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Adversary or ‘Depoliticized’ Institution?

Democratizing the Constitutional
Convention

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Abstract

This paper is about a counterfactual empirical assumption: If the Laeken convention had been elected, we would have had a more democratic as well as a more legitimate process of European constitution making. Electing conventionneers and re-opening the convention is probably a successful way to gain a real constitutional moment and to lead the EU out of its current legitimacy-trap. An elected convention would probably be more democratic, because such an institution would be more public as well as more accountable to the people, without significant expectable deliberative losses. Effective involvement of citizens at an early stage can also be expected to be a cure for the failures connected to the late politicization during Dutch and French referenda.

Keywords

Accountability - Constitution for Europe - Deliberative Democracy - Democracy - Election - European Convention - Legitimacy - Publicity - Referendum

Introduction¹

By many analysts, the Laeken convention has been praised for its special democratic and deliberative functioning - at least compared to conventional international negotiations.² Of course, measured 'isolated' and by abstract democratic standards its performance is good and compared to intergovernmental negotiations it is even better (Risse and Kleine 2007). But to be sure, it failed to gain sufficient popular acceptance. In this paper it will be shown, that the Convention's democratic performance could have been significantly better than it actually was, if the convention would have been *moderately more competitive*. And this politicization could have been reached if at least half of the conventioners would have been elected.³

But why is the improvable democratic performance of the possible future convention of any interest at all, when the EU heads of governments have just paved the way for down-grading the European constitutional project with their Berlin declaration? The answer in section 1 is: Because it seems to be the only plausible solution to break the current constitutional deadlock, to lead the EU out of a legitimacy-trap.

The distinction of politicized and depoliticized institutional forms is central in contested explanations of the ratification failure (Moravcsik 2006; Zürn 2006).⁴ Solving this conflict should therefore also be central for future recommendations as well: Both, Moravcsik and Zürn rightly argue that there was politicization at the ratification stage and it was precisely there, where the Constitutional Treaty was rejected. Then Moravcsik's conclusion is to downgrade the whole constitutional matter to piece-meal reforms, which could be dealt with in purely depoliticized institutional forms (Moravcsik 2006). Contrary to this, Zürn (2006) insists on more politicization to be the cure for the existing politicization. The argument developed here, as already indicated, is closer to Zürn's position: a moderate politicization along the complete constitutional process (through initial election of the conventioners) is not only appropriate for normative reasons, we can also expect it to moderate the defective politicization Moravcsik is suspicious of.

Defending the democratic superiority of an elected convention is a demanding aim. The argument rests first of all on a normative conception of democracy, but it is a

¹ I am grateful to Erik O. Eriksen, John Erik Fossum, Steffen Ganghof, Christoph Humbrich, Leo Maier and Hans-Jörg Trenz for many valuable comments. Previous versions of the paper have been presented at ARENA (Oslo) and InIIS (Bremen).

² Much has already been published on the Convention on the Future of Europe, on its invention (Closa 2003: 184ff), its procedural and deliberative quality in drafting a constitutional treaty (Dinan 2004; Fossum and Menéndez 2005; Göler 2006; Magette 2003; Magette and Nicolaïdis 2004; Maurer 2003), its representative value (Closa 2003: 188ff; Lombardo 2003; Pollack 2004; Schönlau 2004) and not least on the quality of its output (e.g. Fossum and Menéndez 2004; Joerges 2006).

³ The *prima facie* curious position defended here is, the EU political system *should* be more *depoliticized* than the nation states' polities, but the European polity *is* also *too* depoliticized, which has negative consequences for its democratic performance, so that more politicization might foster the democratic quality.

⁴ Despite some conceptual vagueness the distinction of 'depoliticized' and competitive or adversary institutions lays at the core of debate on institutional devices for democracy. In normative political theory, clear cases of depoliticized institutions are presented e.g. by Rawls (1971, 1993), Fishkin (1995) and Pettit (2004). With respect to the EU a depoliticized mode is most famously favoured by Majone (1999) and Moravcsik (2006). Adversary institutions are favoured by political theorists like Cohen and Rogers (1995), Fraenkel (1964) as well as Young (1997). And a politicized EU is favoured e.g. by Føllesdal and Hix (2006), Schmitter (2000) and Zürn (2006).

common place today, that it is contested, which normative conception of democracy is desirable. And even if we solve this problem, critics might argue, that even the best democratic theory should not be applied at European level.⁵ In section 2 these questions are addressed and a proposal will be outlined to overcome the unsatisfactory state of normative pluralism.

It is one matter to argue that we should apply deliberative democratic principles as reciprocity, publicity and accountability in the European decision making system, it is quite another matter to support the point, firstly that especially deliberative democratic ideals are fostered by a more competitive style of European political institutions and secondly that Moravcsik's thorough challenges can be answered. This question is discussed in the two following sections: After pointing at a controversy among deliberative theorists about the desirability of competitive vs. depoliticized institutions, it is discussed, if a more competitive convention would foster the democratic quality of the EU and if we should expect a more democratic convention to increase social acceptance at the polls.

The EU Constitutionalization Process in a Legitimacy-Trap?

Here constitutionalization means processes fostering collectively binding rules with respect to certain kinds of substantial and procedural norms, such as basic rights and the juridical organisation of a political system and its different branches. It should be clear, that (with respect to these material issues) the EU has become more and more constitutionalized in the previous decades (see e.g. Rittberger and Schimmelfennig 2006). But it seems this process of constitutionalization was stopped by the double-no in the ratification process. Of course, with the beginning of the German presidency the Constitutional Treaty is back on the political agenda. But the political actors seem somewhat paralyzed by a tricky situation⁶: First, it seems with the effort to develop a Constitutional Treaty a Pandora's box has been opened: If the stopped act of conscious constitutionalization had brought so many legitimacy advantages (as some argue), the status quo would have been very unsatisfactory (see, for example, Habermas 2001: 118f.).⁷ If the latter is true or not, is not important. The impression simply turned up through the constitutional debate (ironically transported mostly by defenders of the treaty).⁸ This makes a first option, political inactivity, probably weakening EU legitimacy. Even worse, this perceived symbolic defect cannot be cured by a second option - negotiated piece-meal reforms. A core expectation associated with the Constitutional Treaty is that it should address some fundamental questions (Weiler's 'hard choices') of the European political order.⁹ By doing this,

⁵ The variance of normative conceptions for the EU polity is well explored. See Kohler-Koch and Rittberger (2007) for an overview.

⁶ On the impressive post-veto debate about the future of the Constitutional Treaty, see Brunkhorst 2006; Faber and Wessels 2006; Fossum 2006; Maurer 2006; Moravcsik 2006; and Zürn 2006.

⁷ This is not (mainly) because of the substantial quality of the rejected constitutional treaty, but because of the expected integrative force of a democratic constitutional moment, which is even more important at European level where other (additional) integrative mechanisms are much weaker than at nation state level.

⁸ In 2004 the general support for a European Constitution in France was at 85% (Eurobarometer 2004: 29ff), the support for the Constitutional Treaty is two years later only at 56% (Eurobarometer 2006). Of course, the questions are slightly different, but the more the questions are seen as different ones, the more suspect is the Laeken process.

⁹ For Weiler (2002) the EU has five fundamental constitutional issues to settle. I would not subscribe to his list, but the idea to focus on hard choices seems plausible to me. These constitutional issues concern

wide public attention should have been reached and, as a consequence of public debate, a *deliberate dissent* hopefully occurs.¹⁰ And wide public reception of these public debates should sufficiently inform the finalizing step of popular ratification. All this, we cannot produce by piece-meal reforms.

And another well-proven solution to foster European political integration is not available, since the double-no is from the citizenries of two founding members: Leaving them out of the 'constitutionalizing' Europe is anything but a realistic option. Then, there seem no plausible other ways to neutralize popular veto as to gain popular approval to a modified but similar demanding treaty in second tries. And there cannot be another referendum in the closer future without having a substantially revised draft.

Against the backdrop of this tricky situation, there *might* be theoretically two kinds of remaining options to get the European Constitution back on the track. One is to come along with a substantially revised and 'better' treaty (developed from above), the other is to democratize the constitutional process itself. Of course, both options can be and normally are somewhat mixed, but this paper is restricted to only discussing the second option. And to be sure, in the current situation even a substantially improved treaty developed purely in the centre of the political system would more or less automatically induce public suspicion and probably popular rejection at the polls. So the main point is: If there is an option to regain a more *democratic* 'constitutional moment' (Ackerman 1991), this might be at least a central part of the solution for the current European constitutionalization problem.¹¹ But this leads us to the thorny question of an appropriate normative conceptualization of European democracy.

Principles of (Deliberative) Democracy and their Applicability in Europe

To explain political acceptance and even legitimacy by the democratic quality is a common strand in political thought. Here I will take this position for granted. But one condition which is especially important is that we have to know, what is meant by 'democratic quality'. Unfortunately the relevant normative principles as well as the question of appropriate institutional settings are not only contested, they seem to be even more contested with respect to the case of the EU compared to normative conceptions of democratic nation states. With respect to the nation state at least the assertion, that it should be a democratic state is normally undisputed. With respect to the EU this is not the case (see Moravcsik 2002; for an overview about normative conceptions, see Kohler-Koch and Rittberger 2007). Both contestations are unfavourable for the purpose of this paper: What is a normative standard good for if it is not widely shared? And what is even the best normative conception of democracy worth, if we are unsure about its applicability?

inter alia rules for routine decision making processes (and here: the distribution of political competences along the political levels), rules to change these rules, and certain material issues, as enlargement and market modifying 'positive' coordination at European level.

¹⁰ If the hard choices (as the social policy and finality questions) are really hard, then a deliberative dissent (we know the reasons, why we disagree) is all we can hope for.

¹¹ This also implies that - at least in principle - all substantial finality-options might be on the table, even if they are not discussed here. For a general treatment of these options, see Eriksen and Fossum (2007).

Focusing only on authors arguing in favour of a European democracy at least (and very roughly) four conceptions can be differentiated. On the institutional level, the core political settings can be more or less participatory, starting with direct inclusion of 'ordinary' citizens (Abromeit 2002), of civil society organizations (Kooiman 2002), representative institutions (Benz 1998; Lord 2004, 2007) and ending up at indirectly authorized independent agencies (Majone 1998, 1999). For sake of simplicity, the distinction can be restricted to 'participatory' and 'representative' design.

In another dimension, the core democratic aim, we can also differentiate several options by searching for answers to the question: *Which kinds of citizens' preferences deserve normative respect?* The answer is of course contested among democratic theorists. A first group of contemporary theorists argues for empirical preferences (e.g. Shapiro 2003, with respect to the EU, see Abromeit 2002), a second group expects respect for 'enlightened' individual preferences (e.g. Dahl 1989; Offe 1997) and deliberative democrats normally argue for collectively enlightened, 'aundered' 'preferences' merged via deliberations to generalizable or fair results (e.g. Gutmann and Thompson 1996; Habermas 1992, with respect to the EU, see e.g. Eriksen and Fossum 2000, 2007; Neyer 2003).¹²

All these conceptions are or can be interpreted as normative ones, and all are contested. How can we overcome the state of normative insecurity? The remainder of this section is dedicated to this problem and proceeds in three steps. Firstly, a proposal for three fundamental democratic principles is presented as an adequate answer to the problem of normative pluralism within democratic theory. These principles are 'deliberative' with respect to the normative vision of will-formation but consciously indecisive with respect to the question of an appropriate institutional design. Secondly, the advantages of the three principles (compared to rival conceptions of democracy) should at least be illustrated and thirdly, it will be shown, why (these) democratic principles are applicable at EU level.

Procedural Principles of (Deliberative) Democracy – a Proposal

So we either have to *choose* among the different normative conceptions or we have to search for a kind of overlapping *consensus* among them. A mixed variant is presented in the following three principles, which remains indecisive with respect to the institutional question (along the representative-participatory-axis) but which is decisive with respect to the question of appropriate will formation.

To start with a *normative term of democracy*: A political order or system is democratic, if its essential decisions are generated in public and any mechanism exists, which links or binds these decisions in an reciprocal way effectively to their members.

A few explications are in place here. A political order is defined as an association making and implementing collectively binding decisions for their members who have no realistic individual exit-option. At least among normative theorists it is contested if all political decisions should be made democratically. But it should be unproblematic to expect at least the most important decisions (e.g. on Rawls' 'constitutional essentials') having to meet democratic standards. And to meet democratic standards

¹² For a much more complex scheme, see Schmalz-Bruns (2002). For the purpose here, this picture is more than sufficiently complex.

means realizing (as far as possible) the principles of reciprocity, publicity, and accountability.¹³

Political Equality as Reciprocity. There is no democracy without citizens being treated as (political) equals. But what precisely should be treated equally? Empirical preferences, individually enlightened preferences or morally justified preferences? Screening the literature (see above), we find at least these three egalitarian normative conceptions of democratic preference formation.

Here I can not justify the principle of reciprocity at any length. But there seem to be general reasons for the superiority of this principle compared to its alternatives, mainly due to the expectation that only this kind of generalizable backing of political decisions can equally secure political equality as well as certain basic liberties. And it might be, that theorists in favour of one of the other normative visions of will formation with respect to a democratic nation state might none the less support reciprocity at European level, due to its expected rather careful dealing with under-developed societal prerequisites for a strictly competitive democracy.

Reciprocity demands at its core 'other-regarding' behaviour or moral justification in political decision making. Gutmann and Thompson, for example, state: 'When citizens make moral claims in a deliberative democracy, they appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated. The moral reasoning is in this way mutually acceptable' (Gutmann and Thompson 1996: 55).

For them, this would be the case if in moral questions citizens give priority to considerations backed by collectively shared fundamental substantive standards over considerations not backed by those standards. If there is a moral disagreement, where several fundamental standards are at stake, the citizens should try to morally reconcile or accommodate these different norms as far as possible. Conflicts, where empirical questions are at stake, should be resolved by relying on consistently uncontested methods of investigation. The idea behind this principle of reciprocity is to approximate a justificatory ideal, where the actors rely on the 'force of sufficiently justifiable arguments'.

The idea of reciprocity (as the idea of justice) is internally linked to political equality (see e.g. Dworkin 1978; Gosepath 2004), but it is not decisive with respect to the questions of the appropriateness of more representative or more participatory institutional settings. What is necessary is that everybody's (justified) claims and positions are taken into fair consideration. If effected citizens should present and defend their claims themselves or not, is not a matter of principle but a matter of pragmatism. It is an open empirical question, if more representative or more participatory settings will foster deliberative political equality – and the answer might change from one context to another.¹⁴

Publicity. When can political actions, policies or polities be regarded as public? David Luban (1996) has differentiated six possible meanings of the publicity principle. For

¹³ For a more comprehensive defence of these normative principles and a discussion of alternative normative conceptions deliberative democracy, see Hüller (2005: chapter 3).

¹⁴ It seems to be fair to expect that both extremes, the participatory and the representative ideal, are not attainable as democratic institutions in modern societies. Where the participatory ideal is (and has always been) sociologically naïve, the pure representative ideal underestimate the need for citizens instruction and deliberations, overestimate the good-will of the political elite or both.

our purpose, I will examine only three of them. In a decision making process we could think of publicity in the least demanding sense, meaning that political actions, documents and decisions are published and recognizable at low efforts and costs. If these conditions are met, we can talk of publicity in the sense of *transparency*.¹⁵ Another conception of publicity would take transparency as a necessary part of publicity but not as sufficient. Here an action, policy or polity counts as public only if also everybody knows it and everybody knows that everybody knows it (Luban 1996: 170). Here publicity means *common public knowledge*. This kind of publicity is found in various aspects of Rawls' 'idea of public use of reason' and 'public justification' (Rawls 2001: § 9, §26; 1999) A third variant starts also with the transparency condition but adds as a central condition that the issues have been put to a public debate by the attentive public, which is observed by a wider egalitarian audience. We take this notion to be a *deliberative public*. That is very roughly the function Habermas reserves to the public sphere in 'Between Facts and Norms' (Habermas 1992: chapter VIII).

Where the mere transparency conception demands too little publicity the deliberative conception demands too much. Why is transparency (as defined) not enough? There are so many publications in modern society, but the scarce resource is attention. If actors who are looking for public attention normally do not get any (as in the case of the Laeken convention), then it seems not to be very difficult to hide certain contents from public attention even if they have to be published, by using technical language, hiding contested aspects in long papers etc. So if the publicity principle expects only transparency it could be a strategic option for decision makers to hide contested contents in the public sphere. But why should deliberative democrats desire more publicity? At least three reasons can be offered: First the 'threat' of public perception makes political behaviour more other-regarding, more impartial and serves the principle of reciprocity – at least if the audience put a premium on such behaviour. (Elster 1986: 112f; Mill 1861: chapter 10) Second without common knowledge about what decision makers do or plan to do, it will be impossible for the citizens to authorize the 'right' party as well as to hold representatives accountable in any demanding way (Habermas 1962: 174f; Gutmann and Thompson 1996: 97f). And third, if main political acts, as constitutional moments are not widely recognized, they simply cannot provide any integrative force. Good reasons as good constitutionalization processes can motivate reasoned acceptance only if we know them as such.

But why should we not be more attracted by the discursive conception of publicity and give it the weight of a principle? The 'ordinary' principle of publicity combined with the principle of reciprocity captures all relevant normative expectations, remaining open only on the instrumental question, if public discourses are always necessary to realize both normative principles adequately.

But even publicity as common public knowledge comes at some costs. First of all, nobody has the capacities and resources (and rarely anybody wants) to grasp the content of every of the thousands of political decisions each year. So the principle of publicity as common public knowledge seems only feasible in the fewer cases where the political decision making is concerned with 'constitutional essentials' (Rawls 1993: 227ff). And second, there is a kind of 'epistemic' trade-off: Everything which should be part of common knowledge must be cognitively accessible for an average mind and that leads consequently to restrictions of the use value of many complex and sophisticated theories (Rawls 1993: 223ff).

¹⁵ For a normative conception of 'weak publicity', see Christiano (forthcoming: chapter 2)

Accountability. In democratic theory terms like control, responsiveness, responsibility and accountability all focus on the appropriate relation between the rulers and the ruled or the citizens and their representatives. Neither the term control nor responsiveness can grasp the descriptive or normative relationship required. 'Control' comes with the connotation of someone who supervises the political processes all the way down. But this would make the whole differentiation of citizens and representatives superfluous. If every political act is accompanied and reviewed by the people, they could have done the entire work themselves and would not need to stand aside. As already mentioned, there are severe empirical restrictions to such an ideal (complexity). And there might also be certain cases, policies and polities, where it is not desired, that the people have such a direct access to (see e.g. Pettit 2004).

Mere responsiveness, the mirroring of empirical preferences in political decisions, is also not desirable (at least not always), but for other reasons. Representatives' responsiveness to citizens preferences can only make sense, where stable and consistent individual and collective preferences exists, which are, at the same time, in accordance with the requirements of reciprocity. All political decisions, where representatives have acted without prior consent of the majority, but which met with almost unanimous approval afterwards, would not be acceptable under a criteria of responsiveness. So a standard of responsiveness would leave too little room for deliberative processes of investigation, discovering and invention within the political process as well as to the representatives' task to convince the people of the quality of any adopted policy.

Expressions like responsibility and accountability are not similarly flawed. Not like control they give some room for representatives to act themselves, and not like responsiveness it leaves room to rely on the possibility of 'deliberative uptakes' (Bohman 1996) within political processes.

The principle of accountability requires two things: *Symbolically* everybody, citizens and representatives, who engage in political discussions leading to collectively binding decisions, should put forward only arguments of which they think that they have taken into consideration the legitimate claims of everybody affected by the decision. *Materially* decision makers should be held accountable for their work in an effective way.

These three normative principles are at the core of a *principles-driven approach* to measure the democratic quality of political institutions. The more political decision making processes (from control of the political agenda to the final decision act) meet these standards, the more democratic a certain polity is.¹⁶

Comparative Advantages of these Principles

The assumption related to the outlined list of procedural principles is, that they are sufficient standards to judge the *democratic* quality of any political system - of its most important political decisions and polities. In other words, if we have approximately realized or accommodated all these principles in practice we can expect the political order to be democratic. Undoubtedly there are several other normative conceptions, not only approaching the same end, but possibly similarly qualified. So the comparative advantages of this specific approach can only be of minor relevance

¹⁶ I cannot discuss the relevant theoretical and methodical problems of applying these principles and on how to measure the democratic quality of political institutions here, but see Hüller (2007).

compared to the shared fundamental idea of free and equal persons. But some hints could be given, why the outlined normative framework has its special merits.

A first advantage, which could hardly be overestimated, especially compared to other conceptions of deliberative democracy, is that we don't have to decide the 'participation question' on a principled basis. Participatory conceptions of deliberative democracy are to easily rightly criticized for being either elitist, compromising liberty, or infeasible or a combination of several of these charges. Leaving this question open on the level of principles without compromising political equality is not denying the instrumental value of wide participation, or the need for a certain participatory threshold in every workable democracy. But it also respects the pluralism of comprehensive doctrines, making the enforcement of the idea of political participation the highest concern at least for some reasonable doctrines somewhat tyrannical (see Hüller 2005: chapter 5).

Secondly, the procedural standards are not only open for deliberative processes they are also required in a certain sense, but deliberation is not prescribed. The principles are setting a normative framework, which leaves much room for concrete policy options, which are in accordance with these principles. Normally there is not one justified solution for a political problem, but a wider corridor of possible legitimate solutions, and to leave room to the many appropriate ways of handling these questions is a central part of this solution.

A third advantage might be that these principles are not connected to any fixed institutional forms (parliament, public sphere, supreme courts, etc.) as it is assumed in some (normative) considerations, normally presenting institutional frameworks which are more or less similar to democracy in a nation state. For empirical reasons, neither regular ('second order') elections nor public communications have and for the time being can have the same democratic functions as in the national state. Only using a norm-driven approach makes these questions empirical questions.

Applicable at EU Level?

Three kinds of reasons are presented for the applicability of a normative conception of democracy at EU level: The outlined principles are central elements of the self understanding of the core institutions of the EU (a). The desirability of its application in the EU can also be defended within a more sceptical normative framework – as Rawls' conception of justice, and it can be saved from Moravcsik's challenges (b). And along with many deliberative theorists it can be argued, that at least a deliberative conception of democracy does not suffer from the lack of a supreme common European identity (c).

(a) Some authors are sceptical if the EU is in need of democratic legitimization, independent from processes within the member states (Moravcsik 2002), others are sceptical if democracy beyond the nation state is desirable (Rawls 1999) and/or feasible (Dahl 1989) at all.

These scepticisms are explicitly not shared by the core European political bodies. The Commission, the EP, as well as the IGC have supported the general idea to apply democratic principles even at the supranational level. In various documents, first and foremost in the White Paper on European Governance (Commission 2001) and the

Constitutional Treaty the idea of independent democratic processes at EU level is spelled out.

(b) According to Rawls, demanding democratic principles (derived from his conception of justice) should solely be applied to the domestic case, to more or less closed (national) systems of social cooperation. Of course other scholars have entirely attacked Rawls' distinction between the national cooperative case, where the members face strong normative obligations and the international sphere, where only some very fundamental (natural) duties and treaty compliance should be expected for normative reasons. (Rawls 1999; for criticisms see e.g. Beitz 2000; Buchanan 2000; Gutmann and Thompson 2004: 36ff)

Instead the argument here is, that all relevant conditions presented by Rawls to justify the more demanding principles for the domestic regime, are present in the European Union as well - at least in some important policy fields.

Rawls specified four essential conditions for adopting the stronger normative approach to political legitimacy: the existence of durable social interdependence within an association, ideological pluralism among the members, the missing of realistic exit-option for individuals, and lastly collectively binding decisions. Because all four conditions are more or less perfectly met by the European integration's status quo, the European political order has to comply with the demanding principles designed for the domestic case.

Since the completion of the common market at the latest, European economic integration affects the distribution of goods most fundamental to citizens even from a perspective of Rawls' theory of justice. We have to face certain prohibitions and restrictions for certain kinds of subventions or for national food safety policies, the advantages and disadvantages of European economic integration are nowadays by no means equally distributed. And most of all growing economic integration will show more important impacts in the future, when we consider the possible effects of highly unequal flows of employees across (former) borders on the social insurance systems.¹⁷

Of course, some authors would reject this empirical point - either empirically (Moravcsik 2006) or normatively (Peters 2005). I am unsure if re-nationalization is a plausible option, so I restrict the discussion to the empirical point. Moravcsik's argument is too simple to be sound. His point that European policy making is limited to unimportant and boring issues rests on a theoretical deduction: He derives 'important issues' (for the citizens) from superficial opinion polls (as Eurobarometer data), and because these issues are dealt with (objectively) mostly on the national level, the remaining unimportant questions can legitimately be delegated to technocratic agencies. I would resist this muddling of (subjective) opinion (somewhat dubious for theoretical reasons) with objective reality of EU competences. Either he can do his argumentation the complete 'constructive' way, and by combining the opinions with the *perceived* importance of the EU, or he can do it the complete 'objective' way. Both ways followed, would not confirm Moravcsik's conclusion: the EU is perceived as an important actor, and 'objectively' (and besides the Rawlsian point from above), as Scharpf (1999: section 2.3.3) has shown, we have to face important cross-cutting cleavages on the European level with respect to ideological,

¹⁷ For different considerations supporting this view, see e.g. Habermas 1998; Joerges and Godt 2005; or Scharpf 1999.

economic and institutional conflicts. Therefore the idea to construct European politics as an epiphenomenon or extension of national democratic politics is misleading. Without independent politicization at European level, these cross-cutting cleavages won't be addressed adequately.

(c) Maybe democratic ideals are part of the self understanding of the EU, and maybe it is desirable from a normative point of view. Feasibility problems ('ought implies can!') might have an influence on the direction of the normative prescription. If certain societal prerequisites for a functioning democracy are not attainable for the whole EU, a plausible solution might be a kind of democratic restraint from further integration (e.g. Grimm 2004).

The political order of the EU does not replace the national political order but supplement it. And it is not at all obvious what this implies for the enduring development of the societal prerequisites of democratic integration. It might be true that without certain socialisations and some kind of (national) collective identity a functioning democracy is impossible. But there are rather optimistic (Habermas 2004) as well as rather pessimistic (Peters 2005) views about the possibility that socially integrative processes on the nation state level can be simply transferred to the European level or if they have to be redeveloped in European processes of social integration.

Most of the socializing and integrating institutions (families, schools) can work similarly well even under a stronger supranational integration, some will not. Problems might also come up from the changed interplay of different socialising agencies. But we do not know much about successful social integration in such settings.¹⁸

It is difficult to draw from this on normative conclusions for democratic theory. The precautionary formula to stay with the status quo in the face of possible negative consequences of reform strategies relies on the condition, that it would be possible to conserve at least the essentials of that status quo - and if this is the case or not is unclear. Facing this uncertainty, I would resist from offering more than a common place: The democratic question of the EU has to be put in a comprehensive multi-level perspective. Neither can democratic nation states guarantee for social prerequisites of a democratic EU nor do we have to search for a complete substitute at the supranational level.

Adversary vs. Depoliticized Institutions

The essence of the last section is that the outlined normative principles of deliberative democracy (reciprocity, publicity, and accountability) should be applied to the European Union. But what does this imply with respect to the question of the appropriate institutional design?

The question of the desired (non-)politicization is at the core not only of prescriptive institutional recommendations for the EU polity. Føllesdal and Hix (2006) made the point for politicized institutions, Moravcsik (2006) the one for depoliticized agencies.

¹⁸ It is not clear how much we can learn from multi-cultural national cases as Canada or Switzerland. For such a fruitful comparison with Canada, see Fossum (2006).

This dispute has also a long tradition, which is mirrored in two strands of contemporary conceptions of deliberative democracy. James Bohman (1996), Joshua Cohen and Joel Rogers (1995), John Dryzek (2000) or Michael Walzer (1999) are favouring adversary institutions, John Rawls (1993) or Philip Pettit (2004) relate their hopes more to depoliticized institutions. So even if the normative case for deliberative democratic principles is sound, the question of appropriate institutional settings remains contested.

But what are politicized, adversary or competitive institutions on the one hand, and what are depoliticized arrangements on the other? In accordance with a central theme in the literature, here the difference between competitive institution on the one hand and a depoliticized institution on the other is defined as purely *relational*, namely in two complementary respects (issue-actor relations and the polity's composition): In the first kind of institutions the issues addressed are (subjectively) essential for the main participating actors. And in democratic polities every actor which is affected (or his representative) should participate. Procedures of conflict mediation with all affected stakeholders are a quasi-ideal example for adversary institutions. In the second depoliticized model the main actors are ideally 'untouched' by the issue on the agenda. Judges in courtrooms, citizens' juries, or independent administrative agencies *normally* represent this kind of institutions.

There are some arguments indicating that depoliticized institutions are better in realizing reciprocity, as impartial reasoning is an essential task for the sake of reciprocity. If the actors have no personal stakes in certain conflicts, it seems plausible, that the results of their reasoning are on average much more in accordance with the principle of reciprocity than adversary negotiations. And political equality, which is also part of the idea of reciprocity, should be served more easily as well. In ideally structured deliberations good arguments can convince their open-minded audience, even if it is not repeated routinely. And equally good arguments should get equal weight in political processes (Christiano 1996; critically e.g. Sanders 1997).

Despite many criticisms (especially with respect to the realization of political equality) I take this position for granted. But there are several conditions to be met for the appropriate working of depoliticized institutions. First, their representative deliberations are depending on the idea that there is one right solution, which would be more or less reached by impartial deliberations. To imagine that there are many equally justified solutions (with very different regulative outcomes and distributive consequences) would undermine the legitimacy of rule making mainly done by judges or independent agencies. Second, deliberative agencies are intended to accommodate given political claims in an egalitarian or fair way. A precondition for this would be that all relevant claims are already on the table. And it is everything but clear if the same decision making institution appropriate to weight relevant claims in the second place is equally qualified to collect them in the first place.

What are the effects on publicity? As in the case of reciprocity the results should be expected to be mixed. Public attention is a scarce resource, often too scarce for complex (sometimes boring) deliberations within depoliticized settings. Being affected should actors make (on average) more passionate, using rhetoric as well as simplification and all this can more easily attract audiences to listen and to participate and thus have an instrumental value for publicity. But it is simply not part of the repertoire of main actors in depoliticized institutions (see Dryzek 2000 and Walzer 1999 for such criticisms).

The Laeken Convention gives a good example for political processes, which were almost perfectly transparent, but which did not attract wide public attention. Here, actors having clear positions with respect to certain hard choices, presenting more simple and contested statements gain public attention more easily. But pure politicization might also easily overdo. Neither threats nor manipulations are promoting public deliberations. It is a kind of mixed composition (with respect to positions on the hard choices concerned) of *few* affected actors and *many* more or less 'impartial' actors, which force the former to convince majorities and point the latter on relevant issues and claims.

Above accountability has been separated in two parts: symbolic and material accountability. Symbolic accountability depends more or less on the performance with respect to reciprocity. Here I focus on material accountability. Depoliticized institutions are normally embedded in a *horizontal* mode of material accountability. They are not held accountable by the citizens, but by other representative institutions (see e.g. Majone 1999). We should be clear about the fact that with respect to the idea of democracy horizontal accountability is at best a second best substitute. It brings up the following questions: Who guards the guardians and how can the legitimization chain be traced the whole way down to the citizens?

In more adversary settings representatives might also be held accountable by the citizens. But there are several restrictions to *vertical* accountability as well. Due to the number and complexity of political decisions, accountability is (and can be) claimed only very modestly. Because of the gains and losses connected to adversary institutions and their results, these processes are hampered by informational manipulations making appropriate choices difficult for the citizenry.

To sum up, there is and there will be no single institution sufficient to realize the principles of deliberative democracy, not from a theoretical point of view and even less from a practical point of view. Maybe there is also no political system capable of realizing this regulative ideal. But it should have become clear, that for the sake of realizing these principles a mixture of more adversary and more depoliticized institutions is necessary. Normally this is (or could be) done in a political system by a complex division of political labour and by differentiating between 'normal politics' and 'higher lawmaking'. At least the acts of higher lawmaking have to approximate the procedural normative ideal. The Laeken convention and its framework is such an act. So we can now ask if it was such an appropriate mixed institution, serving its democratic functions sufficiently or not.

Attracting Europe: Deliberative-Democratic Gains from More Competitive Institutions – the Example of the Constitutional Convention

There is no definite or general answer to the question of an appropriate mixture of adversary and depoliticized institutions. To a large extent it depends on actual (empirical) conditions. Due to the absence of certain societal prerequisites at European level, the desired mixture might be closer to the depoliticized end of the

continuum compared to most nation states.¹⁹ More confusing, even if this is true, the argument here is that in the case of the Laeken convention the composition was too depoliticized, a moderately more competitive convention would probably have been more democratic and can gain sufficient acceptance (with a substantially different treaty) at the polls.

In this section only the processes of constitution making will be considered, and even more restrictive, the effects of the Convention's character as a forum which was close to a depoliticized institution are assessed.

The starting point is the more or less depoliticized character of the Constitutional Convention. The formal authority to develop the Draft Constitutional Treaty was delegated from the 'real' decision making agency (the IGC) to an independent forum assembling members of different supranational, national and local political bodies. It is this act of delegation which made the Convention rather depoliticized. Compared to the overall issues related to a Constitution, only with respect to a minor part we should expect the participants to have own stakes (related to their institutional belonging) on the agenda. The future distribution of political power might be the most important issue here.²⁰ But even this is at best partly plausible with respect to the Convention's influential presidency. The actor constellation was also pluralistic, but not clearly adversary. Crossing cleavages and affiliations (ideology, national etc.) have narrowed the scope for simple adversary constellations.

There are also several empirical indicators supportive of the assumption of a rather depoliticized Convention, as the Conventioneers' rather unspecific preferences at the beginning, their rather independent mandates, or the Convention's internal desire for consensus.²¹

It might seem puzzling that the complete ratification of the Constitutional Treaty failed despite broad general support for the constitutional project. There are mainly three options: an insufficient democratic quality of its origin (Zürn 2006), an unsatisfactory substantial quality of the Treaty ('Attac'), or the dysfunctional effects of the constitutional rhetoric (Moravcsik 2006). I will only elaborate on the first option here.²²

¹⁹ This has of course fatal methodological consequences for comparisons to the nation state. It would not be enough to prove a difference between national and European institutions with respect to the mixture but the level of comparison should be the realization of normative principles itself.

²⁰ For impressions of the effective presence of these institutional self-interests in the Laeken Convention, see Dinan (2004: 30ff.).

²¹ For more research on such indicators, see Göler (2006).

²² Moravcsik presents at best an undercooked 'empirical theory' of political participation. His *theoretical* point is sound. If there would be strong and durable evidence from empirical research, that we should not expect wide participation in processes of European constitution making, then we should adjust our normative expectations (ought implies can). But it is precisely Moravcsik's empirical evidence which is at best one-sided. Roughly there are four general conditions having an effect on political participation: (1) the political influence of the participants, (2) the relevance of an issue for them, (3) their educational and political skills as well as (4) the existence of certain political virtues. With respect to all four conditions at least a basic threshold has to be met to expect any significant participation. For the time being conditions (3) and (4) remain more or less constant, and we will assume above the threshold level. With respect to conditions (1) and (2) Moravcsik's argumentation has to face a double problem: First, how can he explain the wide participation in France and Netherlands? If the constitutional treaty is of the minor relevance he ascribes to it? And why is there wide participation at the polls in France and Netherlands but not in Spain? The obvious point 'complying' with empirical participation theory would be to argue there are (a) relevant contested issues attached, but not sufficiently resolved due to the neutrality strategy of

The assumption is, that the acceptance (or even legitimacy) of a political decision is correlated to the democratic quality of its generative process. And what I would like to show in the remainder of this paper is that there are feasible options to significantly improve the democratic quality of the constitution making process, namely the option to elect the conventioners and –only very briefly – the option to synchronize obligatory referenda and some plausible hints for increased social acceptance and legitimacy.

Recruitment Mechanisms for the Constitutional Process

About half of the Convention's members were incumbents of national parliaments (more or less proportionally represented), about a quarter of the delegates were sent by national governments and the rest consisted of members of the European Parliament, the Commission (only two) and the three members of the presidency, determined by the IGC. Together they added up to 105 members plus 102 alternates, representing a wide spectrum of political parties and the central organs of national as well as European legislative and executive.

It has been argued, that the Convention's composition has not perfectly mirrored certain societal features: gender, political orientation towards European integration, regional and ethnic origin (Closa 2003) as well as prospective member states (Dinan 2004). Other authors complained that certain stakeholders (called civil society actors) were not adequately represented (Lombardo 2003), still others were unsatisfied that the Constitutional Convention to a much lesser extent added up to an "arena for experts" than e.g. the Convention on the Charter for Fundamental Rights did (Closa 2003: 195f). Last but not least it might be argued, that the Convention lacks representative or democratic legitimacy because it was not elected by the European citizenry.

So what we are confronted with, are four very different normative ideals of composition, used as reference models to judge the real assembly, which we may call representative sample, assembly of stakeholders, arena of experts, and elected body. But it should be obvious that it is not very comfortable for an assessment to have not only one but at least four (partly) opposing institutional ideals. A second problem can be added: Even if we knew the appropriate ideal, the question would remain to what extent this has to be met.²³

Although the Convention was more than frequently criticized for not mirroring certain social categories, there has been no serious proposal to make the Convention a kind of deliberative poll as sometimes favoured (Dahl 1989: 340; Fishkin 1995). Why not making it such a depoliticized forum? First writing a European Constitution and making judgments on hundreds of complicated questions normal citizens are just not prepared for. Second looking at the duration, making a constitution is time

consensus oriented conventioners, as the social question (France) and the consideration of smaller countries (Netherlands), and (b) in the referenda the citizens had a real influence. The burdens of proof for Moravcsik's alternative explanation are comparatively hard and unredeemed: There is nothing new in the constitution, nobody has recognized its production, but some obscure politicization (better manipulation or deception) leading to broad participation and popular rejection at the polls. This is not very convincing.

²³ With respect to the Convention, Pollack (2004) has suggested to compare it with the representative quality of an IGC. Even if we have to lower the normative expectations compared to certain infeasible ideals, the thinned standards have to meet at least a basic threshold of *normative* plausibility. Therefore we should compare the convention's performance with equally feasible political options.

consuming. So what would be necessary is not a 'deliberation day' (Ackerman 1991 and Fishkin 1995) but a 'deliberation year'. Then, even if the Convention would start with a representative sample of European citizens (a kind of Fishkin's and Dahl's mini-demos), they would not end up with one, but with a collective which would have been 'alienated' from their origins by long and intense deliberations. And not least, this kind of institution would expectably be ineffective, because neither backed by political power nor by relevant stakeholders it remains more than unclear, who should push its results when the draft treaty is on the table – especially at European level without strong public attention.

If not a representative sample of citizens, maybe the Convention should have been a widely inclusive assembly of stakeholders, a more or less adversary institution? But what kind of stakeholders should we want to assemble to draft a constitution, consisting of fundamental rights, a framework for legitimate law-making and so on? If at all we would want this assembly to represent different fundamental but more encompassing ideologies and belief systems and maybe some advocates of so-called common interests. Even if no summing up of any kind and range of stakeholder claims can generate a democratically representative will, maybe we should expect such an assembly to be a second best solution? But this is anything but plausible. Any exclusion of relevant claims and their advocates could be paid with missing attention for these issues and perspectives. So what is needed is a rather inclusive vision of stakeholder participation. Inclusive with respect to the subject of the European constitution means at least hundreds of 'interest groups'. And to be sure, there would be many contested issues on the agenda of a stakeholders' convention. It is the combination of the number of participants and the number and intensity of expectable conflicts, which would, with a high degree of certainty, render this kind of convention ineffective as well.

An arena of experts would have to face a similar problem – only at a later stage of the process. Where it might, under certain conditions, enter into demanding deliberations on the different aspects of a justified constitution, they would surely miss the desired effectiveness in implementing even the best constitution. It would be stopped at latest in the following IGC, due to experts' missing authority to accommodate real political conflicts.

Let us now imagine an elected assembly: In every member state about ten deputies were elected only for becoming members of a constitutional convention (which might be added by other representatives from national and European political bodies). An initial electoral process would render the Convention to a more adversary body – at least in three respects: the recruitment mechanism would bring up public discussions about central (contested) features of a future European Constitution, the assembly would be crowded with more advocates presenting clear but differing/opposing opinions with respect to some main issues, and this should spread to more competitive proceedings.

Prima facie the prospects especially with respect to principles of deliberative democracy might be questioned. But this idea is attractive not only because it relies on some kind of democratic instruction, but also because it would guarantee a decent amount of public attention, which none of the other models can offer. And even positive effects on reciprocity might occur. Now along the three normative principles some expectable consequences of such an initial election are presented.

Assessing the Democratic Quality of an Elected Convention

Reciprocity. With respect to the principle of reciprocity the Laeken Convention was restricted at least in three respects:

(a) The external selection of the Convention's presidency did not only restrict certain deliberative options. The actual misuse of their power should be seen as a reason for deliberative shortcomings (in purely procedural respect): in proceeding with a 'single negotiating text' (the presidency's one) severely cut deliberative processes or the President's simple deceptions did not help to promote a deliberative uptake. (Magnette and Nicolaidis 2004)

(b) The conventioners expected their proceedings to have political influence only if the convention can present a document which is supported by almost every member. Even significant minority oppositions would be expected to undermine IGC approval and ratification. Therefore the two most important substantial conflicts concerning a European Constitution (the finality question, social re-regulation on EU level) have rarely been on the Convention's agenda.²⁴ But this exclusion is not a politically neutral way of dealing with conflicts, but non-decisions favour status-quo interests and are thus themselves partial in their effects. If deep conflicts exist, it can not be an especially deliberative mode of action to set up blinkers and to solve other problems. Instead it is indicated to clarify the nature of the conflict and aiming at a kind of moral accommodation (see Gutmann and Thompson 1996: chapter 2). Ignoring conflicts only means undermining the deliberative quality and (even worse) the acceptance and stability of such results (Karpowitz and Mansbridge 2005).

(c) The Shadow of the IGC-decision. From the very beginning it was clear that the final draft of the Convention would have to pass IGC unanimous approval. This kind of indirect accountability (or control by governmental representatives) was inimical to deliberation at the decisive stage of Convention, because every national government could veto the whole constitution.²⁵

To assess the quality of an elected assembly which has not yet been elected is, of course, somewhat difficult, not to say highly speculative. With respect to the deliberative functioning my assumption chain is the following: The mode of interaction within a convention depends on the question, who participates and who participates depends on who is selected in the national elections, and who is elected depends on the most important citizens' preferences with respect to a European constitution.²⁶ Since there are more or less broad majorities in every EU member state in favour of a European Constitution (see Eurobarometer 2004: 29ff), we should expect an elected convention to mirror this.²⁷

²⁴ See Weiler (2002) for a sophisticated analysis of such 'hard choices'.

²⁵ Not to imagine the expectable effects of the same modus for a future convention, in the EU enlarged in the meantime.

²⁶ This point might be contested. Why should we not expect the same kind of second order elections, where citizens mainly voting on different, domestic issues? Because the supply of alternative candidates is probably quite different from normal voting and the election itself is closer to a referendum, even if the vote is on persons, because the act of political delegation is restricted to one concrete issue.

²⁷ In the EU 25 almost 80% were in favour of a European constitution and only 15% against (see Eurobarometer 2004: 29ff).

Due to this more competitive selection style, we should expect advocacies of different positions with respect to certain fundamental questions to gain sufficient electoral support to get (some) seats in the elected convention. We should normally expect these advocacies to have very strong preferences only with respect to certain kinds of issues, but not to other issues which are also on the agenda, and share an overall sympathy for the idea of a European constitution. So, with respect to every single issue we should expect to face a majority of not-heavily-affected conventioners and a minority of stakeholders and with respect to the idea of a European constitution, we should expect to face a strong majority as well.

If the convention proceeds with qualified majority rule (see below), none of the elected groups can simply have its way nor should we expect a fundamental opposition having the influence to completely veto a common result. So we should expect a negotiation and deliberation style of interaction (but not hard-nosed bargaining) and the search for win-win-solutions and reasonable solutions.²⁸

Compared to the Laeken convention, in an elected convention, we should expect not only the citizens' main ideologies and belief systems on a future European constitution to be represented. The popular instruction should endow the conventioners with more autonomy to make a choice for the people and to contest and even overrule conformity strategies of the presidency. More important, elected conventioners would resist holding on to the liberal idea of neutrality or 'conversational constraint'. Deliberative accommodation is the appropriate solution for deep conflicts, not non-decision (Gutmann and Thompson 1996: cp. 2) and the legitimating force of the election should spread to a more autonomous, more experimentalizing convention.

Consensus among all members would not only be unrealistic, due to the more politicized composition, it might also be less necessary for ensuring political impact (compared to an unelected body). Some kind of qualified majority rule might be used to hamper purely destructive actors to undermine the process on the one hand, but to force deliberative processes on the other (because no fraction or simple interest coalition might gain sufficient support within the pluralist convention).

To sum up: At least two of the Laeken Convention's restrictions to deliberations should have been eased by an elected assembly. The role of the IGC will be discussed below.

Publicity. The Convention made strong efforts to act transparently. Most of the meetings were open to the public, and relevant documents have been published in the internet. But as far as they proceeded in public, they hardly attained citizenry's attention. Above we have strictly distinguished between mere transparency and publicity. Screening the Constitutional Treaty's publicity, until today there has not been an approximation to general public attention, neither of the Convention's proceedings nor of their results. Except for certain extraordinary events, there was no strong reception by mass media.

²⁸ For the deliberation enhancing function of consociational settings, see Steiner et al. (2005: 74ff). Due to the initial election, the main preferences of the conventioners are public, so that we do not have to face the usual 'Negotiator's Dilemma' (Scharpf 1997: 116ff). And due to the wide array of issues within a constitution, most of the issues are of periphery interest for most of the conventioners, so that we should expect a kind of moderating and deliberating majority with respect to almost all issues.

But the whole Convention cannot even be characterized as transparent as well. The important presidency meetings, internal discussions among certain subdivisions (deputies from the nation states or among the MEP) did not take place publicly. And later after the entering of national government representatives fostered their habits of bilateral secret meetings. But the main problem for publicity remains another: that the very most part of European citizenry were not at all interested in the process of European constitution making and kept all existing information away from their attention.

It is hard to contest, that with an initial election of the conventioners at least a modest publicity for the conventional process should have been secured, that is to say public attention would have spread from the participatory initiation to the conventions' proceedings, to public reception of key results.

Accountability. In last instance the conventioners have to be accountable to the citizens. If they are not, the whole process can hardly be called democratic. As has been shown, abandoning direct public authorization, by selecting deputies 'from above', did most possible harm to the deliberative quality of the process.

Within the member states there are very different ways to conclude the Convention process. In some countries the ratification will be done by parliament approval, in others by citizens' approval via referendum or plebiscite (or by a combination of both). The second mode will probably raise some public attention to the contents of the Constitutional Treaty, and of course increases the risk of being rejected.

Here I am only interested in the outcome of an electoral initiation. And there should be two positive effects on the referendum mode of ratification. Alone the referendum cannot sufficiently secure accountability. Without having a say at the agenda setting stage, without public attention during the Convention's deliberations, to have a final say of just 'yes' or 'no' to a complex of hundreds of articles at the end is not enough. Combined with initial instruction both can set up a framework of public accountability.

The second point concerns the quality of ex post accountability. The Eurobarometer surveys on European citizens' performance overwhelmingly sing one refrain: most of them do not even know the most basic contents of the Constitutional Treaty. Here the initial election would have provided more general publicity to the conventional process, and it would provide additional information cues for the citizens. Both should have a significant positive effect on citizens' performance in the referendum.²⁹

An Elected Convention – A Feasible Idea?

It should have become clear that from a normative perspective an initial election of the conventioners by the European citizenry makes much sense. Now we can ask, if the model should be eased due to pragmatic or feasibility considerations? There are at least two kinds of important feasibility problems for normative considerations. There are often demanding expectations on the moral quality of actors, on the ideality of circumstances etc. Prima facie, there is no need to weaken the normative expectation

²⁹ Note: citizens are not accused of 'wrong' voting in France and the Netherlands. To be sure French and Dutch competences about the Constitutional Treaty were better compared to Spanish or German. The point is simply: If we do not know if the voting citizens comply to their own preferences we can hardly expect referenda to fulfil an appropriate democratic function.

with respect to this kind of feasibility problems. Elections simply are not that demanding. What remains uncertain is, if sufficiently broad public attention and citizen participation can be expected. A low voter turnout might compromise the instructive force of the institutional means. How much participation should we expect?

We might assume that we have to face two kinds of societal preference constellations across the member states: in some countries core issues of European integration are contested (national autonomy vs. deeper integration; free market vs. European re-regulation) in others this is (more or less) not the case. It seems to be fair to confer the results of the ex post referenda to our expectations concerning an initial election. The first and uncontested Spanish case did have 42% turnout, the attraction in the later and more contested referenda in the Netherlands (62%) and France (70%) was much better. Due to the French and Dutch referenda we should also expect a high general public sensibility for the constitutional issue, what might also justify somewhat higher expectations for future events.

The second kind of problems might be called the 'question of agency'. Who might actively support the initial-election-model?

There are at least four options to manage the French and Dutch 'No'. The first option is to refrain from constitution making. Instead of passing and implementing an entire constitutional treaty singular piecemeal reforms of the most important improvements might be promoted.

The second option would be a repetition strategy (with minor IGC driven revisions of the draft treaty). The third option would (as far as possible) stick with the Constitutional Treaty but modifying the ratification process to an opting-in mode. Only a fourth strategy would admit to untie the Constitutional Treaty to (re-)gain the 'constitutional moment' (Ackerman) by democratizing the conventional process.

It goes without saying that the idea of electing the conventioners might be a core part of this democratizing option. Of course this option is time consuming as well as indeterminate with respect to the future result (as any democratic decision). But it seems to be the only way to (re-)gain an empathic constitutional moment – to steer between two poles, namely the flaw of a constitution, which has already been rejected by parts of the European citizenry,³⁰ and the probability that a top-down approach to save the Constitutional Treaty would generate bureaucracy-bashing popular reflexes.

Decision Making Rules

An initial election is not the sole option to democratize the EU constitution making process. Another possibility, only very briefly attached here, would be a reform of the concluding sequences.

Actually there have been several circumstances been inimical to sufficient deliberative quality. Probably most important was the veto option of every national government at the subsequent IGC – because of their decision making authority and the existing unanimity rule. The veto option was widely used for threats in the Convention's proceedings, especially in the drafting phase. The shift from deliberation in the

³⁰ Since it is one thing to have no European constitution, it is quite another to have a rejected one.

listening phase of the convention to bargaining in the drafting phase has been widely recognized (Magnette and Nicolaïdis 2004).³¹

So the Laeken Convention was somewhat jammed in the IGC prospective delegation and ex post veto power. With an initial election the second connection is moderated as well. Where in the historical convention we have to face a clear principle-agent-structure, this would be undermined in the suggested construction due to the electoral choice. Anyway, to prevent national executives' hard-nosed bargaining at the finalizing state of the Convention additionally a reform of the final decision making act and the ratification mode might be indicated.

The status quo consists of two core elements, the unanimity rule at IGC and relatively voluntary national ratification modes. Desirable with respect to a strengthened European democracy would only be a close-to-unanimity decision rule at IGC. Combined with later majoritarian approval by national ratifications, a dissenting executive's vote at IGC might be overruled. It would at the same time moderate national executives' veto power and thus enhance the deliberative quality of their contributions to the Convention without significantly compromising national autonomy, which is only shifted to the ratification act.

Finally, drawing to the national acts of ratification, we have to face a 'tapeworm' style of very different, partly somewhat arbitrarily applied modes. A synchronisation as well as a standardisation of the national ratification modes might additionally help to foster the perception of the Constitutional Treaty as a European one. And despite any defects, only the French and Dutch referenda generated the public attention which a European constitution deserves. And combined with an electoral initiation and the broader public attention for the Conventional process, we should expect citizens' choices at the referenda to be more informed and even more Europe-regarding compared to the ancient examples.

Social Acceptance and Legitimacy through Democratization: Mechanisms

The puzzle with respect to the French and Dutch 'double-no' is simple: How does it come, that societies which are strongly in favour of a European Constitution (France: 85%, Netherlands: 72%) have rejected the Constitutional Treaty at the polls. Moravcsik has argued the referendum mode at the end of the process has caused a politicization by which the society was manipulated. Maybe he is not completely wrong, but he draws the attention on a kind of (avoidable) epiphenomenon. There are roughly three kinds of reasons why the supporters of a European Constitution did not vote for it in Dutch and French referenda:

- a) Domestic reasons, as an opposition to their national governments (14% in the Netherlands and 18% in France 18%)
- b) Informational insecurity, as a lack of information about the content of the treaty (32% in the Netherlands and only 5% in France, but it was decisive for more than half of the abstaining citizenry in France)

³¹ An indicator is the replacement of national government's delegates in the Convention. Symbolically the replacement policy after the listing phase is a normative disaster impressively mediating representatives' ignorance of and disrespect for an important part of a sufficient democratic process.

c) Troubles with the treaty's content, as the fear of a loss of national sovereignty in the Netherlands (19%) or as the impression of a missing positive integration in France (negative effects on employment 31%, libertarian treaty 19%; not enough social Europe 16%)

In the previous part it has been shown, that we should expect democratization by electing the convention and by synchronizing obligatory referenda. But why should we expect this democratization to be causal for shifting voter behaviour (which we could expect to occur if the negative preferences towards the Constitutional Treaty can be challenged)?

There are at least three mechanisms which are working differently within an elected convention compared to the Laeken Convention:

1. The 'No-taxation-without-representation'-mechanism. Within a constitution hundreds of important issues can be addressed in different ways. The referendum at the end, does not give the peoples a choice about the content with respect to any of these issues, but only a kind of unspecific veto power. Without prior election, the general public mood against 'the political class' (domestic and/or European) can easily be cooked up by political entrepreneurs. As soon as the citizens have elected the convention, we should expect this to have an appeasing impact on the overall mood about representatives' activities and in the last consequence on overall social acceptance. Additionally it would be cognitively very stressing for a voter to use the referendum to judge his national government, if he had sent somebody else to the Convention before.

2. The 'accommodation'-mechanism. There are hard choices to make in any constitutional process. With respect to the EU among these choices are concerned the finality question, the question of positive integration, and the routine decision making procedure. As a consensus about these deeply contested issues is infeasible, there are mainly three pure, but combinable options of problem and conflict solving: the method of avoidance, horse trading and/or case-by-case voting as well as a method of accommodation. The method of avoidance leads to non-decisions, which actually almost always is a partisan decision, and which is an especially partisan solution with respect to the avoidance of working through the questions of positive integration. An initial election is expected to make conventioners more directly legitimized, and thus more regardful to claims they have taken in the electoral campaign. During convention we should expect them to avoid the easy way out of managing deep conflicts (method of avoidance) and stick closer to one of the two other options. And both modes (if applied) would bring up different solutions for the hard choices (compromises and moral accommodations) which are both better suited to gain acceptance from the European citizenry. Why should this be the case? The method of avoidance leads not only to non-decisions, but also to subjective resistance by defenders of other decisions (they simply had no influence on the result) (see Karpowitz and Mansbridge 2005). So the more non-decisions we have with respect to important hard choices, the more reasonable resistance we should expect at the polls.

3. The 'publicity-knowledge-voter-turn-out'-mechanism. The Laeken convention was a process which was more or less hidden in the public sphere, transparent but not recognized by the European citizens. Missing publicity almost automatically leads to low informational thresholds, and as we know from referendum literature, insufficient

information leads to non-voting and conservative voting (status quo bias).³² Both failures have occurred in France and the Netherlands. Above it has been argued, that an initial election of the conventioners should be expected to have a strong positive influence on the public reception of the conventional process and thus also on the level of information. With respect to closing referenda we can expect this connection to have positive effects on the voter turnout as well as on preference-sensitive voting. And the more the voters know about the constitution, the less it is probable that they might vote about anything else (like the performance of their domestic government).

If these three mechanisms work and if there are no or at least less important counter-mechanisms, we can conclude: We can not know the content of a future European Constitution developed by an elected convention, but we should expect it to be more legitimate – in normative as well as empirical respects.

Democratizing the EU through more competitive Institutions

A Conclusion

A proposal for three normative principles of democracy (reciprocity, publicity, accountability) has been developed, which has some advantages compared to rival options, and which can be applied at EU level for normative reasons. In the third section the focus has been shifted to theoretical debates concerning appropriate institutional engineering. The distinction between adversary and depoliticized institutions, here defined in purely relational terms, has been highlighted. Contrary to the majority of either-or defenders, as Føllesdal and Hix or Moravcsik, it has been argued, that only a mixture of both styles can make political systems safe for democracy.

Concerning the outlined normative principles, the depoliticized Laeken Convention did not only suffer from significant deficits, these are also to a large extent avoidable flaws. Especially an initial election of the conventioners is expected to make the Constitutional Convention moderately more adversary in its composition and is also expected to raise its democratic performance significantly.

An additional point was developed: This democratization would set free at least three mechanisms which are supposed to have a positive effect on social acceptance at the polls.

These legitimizing mechanisms should work especially within countries, where we face a strong support for the idea of a European Constitution. Besides France and Netherlands, these are all member states except Sweden and the UK (where the support was around 50% in 2004). It is not beyond the imaginary to bring forward a democratically constitutionalized EU without these two countries, but it is also not impossible to get electoral approval there.

³² In other words: Even the rejected Constitutional Treaty would have got more support in France and the Netherlands if the citizens would have known what it is about. This is an old topic within the referendum literature. For a recent treatment of this issue for the case of Switzerland, see Kirchgässner (2007).

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