EUROPEAN UNION IN SEARCH OF ITS "PEOPLE": IDENTITY AND LEGITIMACY GENERATIVE FUNCTIONS OF THE CONSTITUTIONAL PROCESS IN THE LIGHT OF THE FRENCH AND DUTCH "NO"-LIMITS AND PROSPECTS

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ABSTRACT

The profound shift in conceptions of legitimacy of the European Union informs the recent constitution-making process and the main argument of this study. After a brief discussion of different conceptions of legitimacy within context of a sui-generis polity like the EU, the article focuses on the recent constitutionalisation process in order to highlight its demos/identity-generative potential. Attempts at an innovative approach to Treaty reform in the EU are examined in order to ascertain whether they serve the need to facilitate the emergence of a European public sphere and a European collective political identity. The peculiarities of the current constitutionalisation process are discussed with a view to demonstrate that the European Constitution is an endeavor aimed at the creation of its "pouvoir constituant". The unfavorable referenda results in two of the leading, original and traditionally pro-EU members of the Union, France and the Netherlands, demonstrated the limits of the polity and political identity building potential of written texts, albeit constitutions. It is asserted that the results suggest restraint but there is no ground for despair for the future prospects or viability of the European polity and transnational democratic governance.

Keywords: European Union, Legitimacy of the EU, Constitutionalisation in the EU, European Constitution, European Political Identity.

ÖZET

Son anayasalaşma sürecinin ardında yatan temel neden olan Avrupa Birliğinin meşruiyet arayışına yaklaşımlar alanında yaşanan önemli değişim bu çalışmanın konusunu oluşturuyor. AB gibi kendine özgü bir yapı bağlamında meşruiyet kavramına farklı yaklaşımların kısaca ele alınmasının ardından, çalışmada son anayasalaşma sürecini siyasi kimlik yaratma potansiyeli üzerinde duruluyor. Çalışmada, AB'de kurucu antlaşma reformu sürecine yenilikçi yaklaşım girişimleri bir Avrupa kamusal alanı ve Avrupa siyasi kimliğinin ortaya çıkışını kolaylaştırma amacına hizmet edip etmedikleri bakımından değerlendirildiği gibi, mevcut anayasalaşma sürecinin özellikleri, Avrupa Anayasasının kendi kurucu iktidarını yaratma amacına yönelik bir çaba olduğunu gösterme hedefiyle tartışılıyor. Fransa ve Hollanda gibi Birliğin önde gelen, orijinal ve geleneksel olarak bütünleşme taraftarı iki üye ülkesinde anayasanın onayı için yapılan referandumların olumsuz sonucu, anayasa niteliğini taşısa bile yazılı hukuk metinleri aracılığıyla siyasi yapı ve siyasi kimlik inşası çabalarının sınırlarını ortaya koydu. Sonuçlar temkinli bir yaklaşımı zorunlu kılsa da, burada ileri sürüldüğü üzere, Avrupa Birliğinin ya da ulusötesi demokratik yönetişim denemelerinin geleceği bakımından umutsuzluğa kapılmayı da gerektirmemelidir.

Anahtar Kelimeler: *Avrupa Birliği, AB'nin Meşruiyeti, AB'de Anayasalaşma, Avrupa Anayasası, Avrupa Siyasi Kimliği.*

INTRODUCTION

Starting from the mid-90s, the field of European Studies, in particular in the legal realm, has been preoccupied with the exploration and theorization of the legitimacy problems of the integration process. Initially, or more precisely up until the Maastricht Treaty, the legitimacy of the integration process was predominantly held to be legal and indirect. The EC was regarded as a "community of law", whose founding documents were international treaties prepared and ratified by Member States according to the rules and principles of international law and national constitutional requirements. The European integration functioned in a limited, mainly economic and technocratic domain; where decisions were usually taken by unanimity. So, it was not held to require express and direct democratic legitimacy from the peoples of Europe in benefit of which it was operating. The legitimacy deriving from the Member States was deemed to be sufficient for the viability of the European unification.

The substantive and comprehensive developments brought about by the Maastricht Treaty regarding the increase in the competencies of the European integration, together with the re-introduction of the qualified majority voting procedure and the establishment of the political pillars, brought the Union and its technocratic and elitist nature into both scholarly and public attention and debate.[1] Coupled with the ratification

debacles in France and Denmark, this phenomenon marked the end of the so-called "permissive consensus"[2] and heralded the end of such simplistic approaches to the legitimacy problems of the Union. The recent referenda results in France and the Netherlands for the ratification of the "Treaty Establishing a Constitution for Europe"[3] provided further indications regarding the legitimacy and democracy predicaments of the EU. The disaffection and disinterest displayed by the European peoples, not only towards the Constitutional Treaty, but also towards the integration process in general,[4] highlighted the need for a search of different avenues and mechanisms to close the gap between the EU and its citizens, which paradoxically was one of the main justifications behind the recent constitutionalisation attempts.[5]

Maybe we are at a stage where Europe Union is an accepted reality for the daily politics of the Member States and a daily source of identification for their peoples, although this claim is highly debatable in the aftermath of the constitutional referenda. Even in the case of popular legitimacy, however, the normative or theoretical question would not be whether the EU is accepted by the European peoples or not, but whether it deserves to be so on the basis of its being a democratic and ethical polity of justice and solidarity. After all, a regime does not have to enjoy democratic or normative legitimacy in order to gain popular support from its subjects as the history bears witness. So, apart from public support how can we evaluate the EU's legitimacy?

The profound shift in the conceptions of the legitimacy European Union from legal and indirect to social, popular, democratic and normative, from output-oriented to input-oriented,[6] from intergovernmental to supranational/federalist, from economically-oriented to political outlooks informs the recent constitution-making process and the main argument of this study.

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[1] J.H.H. Weiler, "Transformation of Europe", **Yale Law Journal**, Vol. 100, 1991, pp. 2403-2483.
[2] Leon N. Lindberg, and Stuart A. Scheingold, **Europe's Would-be Polity. Patterns of Change in the European Community,** Englewood Cliffs, New Jersey, Prentice-Hall, 1970.
[3] "Treaty Establishing a Constitution for Europe", **Journal of the European Union,** OJ C 310/1-474, 16.12.2004: <http://europa.eu.int/constitution/index_en.htm>.
[4] For Eurobarometers in general see: <http://www.europa.eu.int/comm/public_opinion/index_en.htm>.
[5] For the Laeken Declaration see: <http://europe.eu.int/futurum/documents/offtext/doc151201_en.htm>. For an analysis of the Laeken Declaration regarding its approach to EU's democratic legitimacy problems see Christopher Lord, "Democracy and the Future of Europe. Five Questions Raised by the Laeken Declaration", **ESRC "One Europe or Several?" Programme Briefing Note,** 1/02, February 2002.
[6] Fritz Scharpf, **Governing in Europe-Effective and Democratic?,** Oxford-New York, Oxford University Press, 1999.

This article is structured in the following manner. The first two sections have a theoretical and conceptual outlook, whereas the last section is mainly empirical. After a brief discussion of different conceptions of legitimacy within context of a *sui-generis* polity like the EU, this article will focus on the recent constitutionalisation process in order to highlight its *demos*/identity-generative potential. Attempts at an innovative approach to Treaty reform in the EU will be examined in order to ascertain whether they serve the need to facilitate the emergence of a European public sphere and a European collective political identity. The peculiarities of the current constitutionalisation process will be discussed with a view to demonstrate that the European Constitution is an endeavor aimed at the creation of its *"pouvoir constituant"*. Yet, is there such historical determinism in the "constitution creates its *demos*" assertion?[7]

In order to answer this question, in the last section we will undertake an empirical approach to the constitutionalisation process in the light of the recent ratification referenda results and the results of the public opinion surveys regarding the overall support for the integration process. The unfavorable referenda results in two of the leading, original and traditionally pro-EU members of the Union, France and the Netherlands, demonstrated the limits of the polity and political identity building potential of written texts, albeit constitutions. The results suggest restraint, but there is no ground for despair for the future prospects or viability of the European polity and transnational democratic governance. In order to substantiate this argument the reasons behind the no vote will be discussed.

It is argued that the European collective identity must be explored not only through democratic legitimacy enhancing exercises but also through the investigation of what Europe is for; i.e. an investigation of its overall objectives in the 21st century. Since the European Union lacks in the department of *demos* or a "we-feeling", input-oriented legitimacy approaches of identity-building through law on their own are doomed to fail as demonstrated by the recent referenda results. Yet, the approaches focusing merely on strengthening the output-oriented legitimacy of the Union are not sufficient on their own either. A balanced approach with an emphasis on creating a Europe which would facilitate the emergence of a European identity is required, which can only be achieved first by by activating the citizenship or the "we-feeling" by new and meaningful objectives and then, by delivering what is being promised. The formal constitution can only be considered as an achievement when and if it can muster both these missions in an efficient and appropriate manner.

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[7] Jo Erik Murkens, "The Integrative Function of a European Constitution", **German Law Journal**, Vol. 3, No. 2, 2002. For an in-depth analysis of the relationship between democracy, sovereignty and the constituent power see, Andreas Kalyvas, "Popular Sovereignty, Democracy and Constituent Power", **Constellations**, Vol. 12, No. 2, 2005, pp. 223-244.

Theoretical Question: Legitimacy Theories of the European Integration[8]

Legitimacy is the premise that transforms power into effectiveness[9] and it requires the realization of democratic and normative ideals within a suitable context of coherence and stability.

An often cited definition of legitimacy is provided by Phillippe C. Schmitter as "[...] a shared expectation among actors in an arrangement of asymmetric power, such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to the pre-established norms. Put simply, legitimacy converts power into authority [...] and thereby simultaneously establishes an obligation to obey and a right to rule."[10]

Where does the legitimacy of the European Union emanate from under this definition? In order to provide an answer to this question we need to identify different forms of legitimacy for the European integration that can inform the basis of legitimate rule at transnational level. First, however, two caveats are in order.

First, in modern liberal democracies the legitimacy of a political system is premised on its being a democratic polity; its being based on the rule of law and respect for human rights constitute the minimum requirements. The polity we are dealing with under this definition, however, is a nation-state; the European Union is not a state and does not purport to turning into one.[11] The difficulty stems from the fact that the legitimacy conceptions for polities have mainly been elaborated in the territorial and temporal realm of the nation-states. The conflation of nation-state with democratically legitimate governance and its subject, i.e. the "people" or the "*demos*", contributed to the problems of conceptualization of democratic legitimacy at the level of supranational governance. The Union is at a standard setting stage for its emerging polity regarding the classical conceptions of democracy, legitimacy, sovereignty, people, etc. As a *sui generis* polity, with no *demos* in the conventional meaning of the term, and based on a dual[12] and somewhat indirect legitimacy,[13] the traditional theories of legitimacy

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[8] See for instance, Christopher Lord and Paul Magnette, "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU", **Journal of Common Market Studies**, Vol. 42, No. 1, March 2004, pp. 183-202; Andreas Follesdal, "Legitimacy Theories of the European Union", **ARENA Working Paper** WP 04/15; Erik Oddvar Eriksen and John Erik Fossum, "Europe in Search of Legitimacy: Strategies of Legitimation Assessed", **International Political Science Review**, Vol. 25, No. 4, 2004, pp. 435-459.

[9] Kalypso Nicolaidis, "EU-topia or the Power of the Superpower-less", in Tod Lindberg, **Beyond Paradise and Power:Europe, America and the Future of a Troubled Partnership**, London-New York, Routledge, 2004.

[10] Philippe C. Schmitter, "What is There to Legitimize in the European Union ...and how Might This be Accomplished?", **Jean Monnet Working Paper**, No. 6/01, 2001, p.1.

[11] For an interesting debate on the final destination of the European integration see G. Federico Mancini, "Europe: The Case for Statehood", **European Law Journal**, Vol. 4, No. 1, March 1998, pp. 29-42 and J.H.H. Weiler, "The Case Against the Case for Statehood", **European Law Journal**, Vol. 4, No. 1, March 1998, pp. 43-62.

[12] The Union's legitimacy in that sense stems from the Member States via the Council of Ministers, and from their citizens via the European Parliament.

developed within context of nation states are generally inadequate as far as the European integration is concerned.

Against this backdrop, the main contention of this paper focuses on the assumption that the European Union's legitimacy is based, to a certain extent, on a different conceptual and theoretical framework, a much more diverse and composite basis, compared to that of the nation states.[14] While ascertaining the legitimacy premises of the European Union, however, we have, as yet, no other conceptual tool apart from the widely used legitimacy conceptions developed for the nation-states. As the legitimacy theories analyzed below show, there are various intersections between the legitimacy premises of nation states and the European Union, as well as divergences.

Second, the legitimacy of the Union does not rest on one single principle, but on a complex network or layers of legitimation principles which are complementary, but also competitive, and require a careful and difficult balancing act as is the case with many pluralistic polities.[15] The Union is a system of multilevel governance and displays a dual nature in its structure and functioning.[16] It is a polity based on the coming together of the Member States and their peoples. Although the sources of its legitimacy are diverse, there has to be some inherent, all encompassing legitimacy of the overall project for its proper functioning, and its being a polity with normative and popular grounds of approval.

Several theories have been put forward or adapted to the peculiarities of the European Union in order to grasp and explicate the somewhat shaky, but undoubtedly distinct foundations of its legitimacy. In that context, we can mention a few of the legitimacy foundations of the Union such as, input-oriented, output-oriented, formal, social, popular, democratic, normative, technocratic, legal, procedural etc. On the basis of those different legitimacy conceptions we can ascertain the possible legitimacy premises of the European Union as follows:

1. *Legal and indirect legitimacy* deriving from the founding treaties, and the democratic input stemming from their national ratification, as well as the role of the

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[13] According to this approach, the Union's legitimacy derives from the Founding Treaties and their ratification by the Member States according to their constitutional procedures.

[14] What is being referred to here is social or democratic legitimacy, and not formal or legal legitimacy, which are undoubtedly enjoyed by the European Union.

[15] For an analysis of the overlapping, competing, composite and complementary characteristics of the Union's legitimacy see Lord and Magnette, **op.cit.**, **supra** note 8.

[16] Gary Marks *et al.*, "European integration from the 1980s: State-centric v. Multi-level governance", **Journal of Common Market Studies**, Vol. 34, 1996, pp. 341-378; Gary Marks, Fritz W. Scharpf, Philippe C. Scmitter and Wolfgang Streeck, **Governance in the European Union**, London-Thousand Oaks-New Delhi, Sage Publications, 1996; Tanja A. Börzel and Thomas Risse, "Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System", in Christian Joerges, Yves Meny and J.H.H. Weiler (eds.), **What Kind of Constitution for What Kind of Polity?-Responses to Joschka Fischer**, Badia Fiesolana, San Domenico, European University Institute, 2000, pp. 45-60; Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.), **European Governance, Deliberation and the Quest for Democracy**, Oslo, ARENA, October 2003.

Member States as democratic polities in decision-making and implementation of the secondary legislation.

2. *Performance legitimacy* (of a problem solving agency), deriving from its capacity and structure to provide solutions to the problems of a transnational nature in a functional manner for the Member States and their peoples.

3. *Democratic legitimacy* deriving from the democratic nature of the processes and procedures in regard to their representativeness and accessibility for participation; their accountability, transparency, inclusiveness and fairness, which are mainly reflected in the structure and functioning of the European Parliament (direct democratic input), as well as the indirect democratic legitimation by the Member States.

4. *Normative legitimacy* deriving from the ethical and fair processes and values of a polity, premised on the evaluation of their being what they really ought to be; closely related to the democratic characteristics of its governance, and mainly reflected in the articles of the founding treaties on the common/shared values of the EU.

5. *Social legitimacy* deriving from the levels of belongingness, allegiance[17] and support procured from the subjects of the polity; in direct relationship with all aforementioned conceptions of legitimacy, since such loyalty and acceptance of a political and legal system necessitates both a functioning and achieving, and a just and democratic polity, in ideal circumstances.

The first two of those legitimacy premises display an output-oriented legitimacy approach, whereas the third and fourth mainly deal with the input-oriented manifestations of legitimacy. The last foundation; i.e. social legitimacy, on the other hand, is associated and premised on all the other conceptions. For popular support, a system would have to be democratic and just, and also deliver the goods in an efficient manner. This classification of the legitimacy postulates of the European Union prompts us to further investigate the main divergences between those different conceptions in respect to the politicization and constitutionalisation processes of the European Union: the output-oriented legitimacy and the input-oriented legitimacy; or in other words process-based and outcome-based popular sovereignty.[18]

Output-Oriented Legitimacy Approaches to the European Union

According to the proponents of the view of the EU as a problem solving agency[19] or a regulatory state,[20] there is no democratic deficit or a legitimacy gap as far as the

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[17] For the relationship between allegiance and legitimacy in the European Union context see Kees van Kersbergen, "Political Allegiance and European Integration", **European Journal of Political Research,** Vol. 37, 2000, pp. 1-17.

[18] See in general Simone Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy", **Constellations,** Vol. 11, No. 2, 2004, pp. 153-173.

[19] Scharpf, **op.cit., supra** note 6 and Fritz W. Scharpf, "Problem-Solving Effectiveness and Democratic Accountability in the EU", **Max Planck Institute for Comparative Public Law and International Law Working Papers,** No. 03/1, 2003.

European integration is concerned. Initially, or more precisely up until the Maastricht Treaty, the legitimacy of the integration process was predominantly held to be legal and indirect. The EC was regarded as a "community of law"; the founding documents were international treaties prepared and ratified by Member States according to the rules and principles of international law and national constitutional requirements. Moreover, the secondary legislation enacted by the competent organs of the Communities were in conformity with these higher and primary sources of law, and were subject to judicial review by the European Court of Justice. The Member States were the "masters of the treaties", and since those nation-states constituted democratically governed systems in their own right, they provided the so-called "indirect democratic legitimacy"[21] to the integration process. The direct involvement and participation of the European peoples in the legitimation of the integration process were not deemed to be essential, despite the introduction of the direct elections for the European Parliament, and a relative and incremental increase in the powers of this EU institution. The European integration was mainly a "government for the people", but not necessarily a "government of the people" or "government by the people."[22]

Europe's output-oriented or performance legitimacy is regarded here as crucial and sufficient for the popular support and social legitimacy it would have to secure from the peoples of Europe. Europe is mainly an economic and technocratic intergovernmental agent,[23] established by nation-states in order to provide solutions to the problems of a transnational nature intensified by globalization, and its indirect legitimacy is sufficient to sustain its viability. It has no public sphere, no political culture, no common language that could or should mobilize the citizens around the idea of Europe or create a feeling of political attachment. There is no awareness of belonging together amongst the peoples of Europe that can support majority decisions and solidarity efforts, at least for the time being.[24] As Grimm puts it, "the European public power is not one that derives from the people but one mediated through the member states."[25] Consequently, there is no basis or normative justification for forging a European collective political identity or a *demos* beyond the interest-based market citizen and the distinct peoples of the Member States.[26] Europe is not a polity in its own right, and it cannot, and should not for that matter, have a "Constitution". Europe is "government for the people" and nothing beyond.

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[20] Giandomenico Majone, **Regulating Europe,** London-New York, Routledge, 1996.

[21] Andrew Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", **Journal of Common Market Studies,** Vol. 40, No. 4, pp. 603-624.

[22] For this famous conception of democracy as "government of, by and for the people" by Abraham Lincoln in his Gettysburg Address see: <http://www.loc.gov/exhibits/gadd/4403/html>.

[23] Mark A. Pollack, **The Engines of European Integration,** Oxford-New York, Oxford University Press, 2003.

[24] For the famous Maastricht judgment of the German Constitutional Court see: Brunner v. European Union Treaty (Bundserfassungsgericht) [1994] 1 C.M.L.R. 57; Dieter Grimm, "Does Europe Need a Constitution?", **European Law Journal,** Vol. 1, No. 3, November 1995, pp. 282-302.

[25] Grimm, **op.cit., supra** note 24, p. 291.

[26] Ulrich Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination", **European law Journal,** Vol. 9, No. 1, February 2003, pp. 14-44.

According to this approach, the EU should either remain below the threshold of visibility, or it must search for conflict minimizing solutions between the national and supranational levels of interest; and it should rely on the ability of national governments to employ their own, indirect legitimacy resources.[27] In that vein, Andrew Moravcsik argues that the more visible the EU becomes the more there is a danger of increase in peoples disaffection with the functioning of the integration process.[28]

Even the supporters of this view agree, however, that the input-oriented legitimacy or "government of the people" and "government by the people" aspects of the European Union could and should be improved to a certain extent.[29] Consequently, some of these scholars support the recent constitutionalisation process in its capacity to reform the institutions and procedures of the Union and increase both the democratic qualities and also, more importantly for them, the efficient functioning of the problem-solving agency.[30] This, however, should not culminate in turning the founding treaties into a "Constitution", or the European Union into a fully-fledged federal polity.

Input-Oriented Legitimacy Approaches to the European Union

On the other side of the debate we are faced with scholars attempting to base EU's legitimacy on some democratic and normative ground other than such utilitarian conceptions. For the proponents of this view, in order to gain the support and allegiance of the European peoples, the EU should not only deliver the goods but also be an ethical, democratic community coming together on the basis of some common or shared values. Whether they support republican/communitarian,[31] supranationalist,[32] pluralist[33]

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[27] Scharpf, **op.cit., supra** note 6, p. 23.

[28] See Moravcsik, **op.cit., supra** note 21; Peter A. Kraus, "A union of peoples? Diversity and the predicaments of a multinational polity", in Lynn Dobson and Andreas Follesdal (eds.), **Political Theory and the European Constitution**, Oxford-New York, Routledge ECPR, 2004, p. 49.

[29] For an argument in this line see for instance, Scharpf, **op.cit., supra** note 6.

[30] For instance, according to Cindy Skach, legitimacy is not necessarily democratic legitimacy; whether or not, and how to prepare a Constitution would not necessarily improve either legitimacy or democracy. Consequently, output legitimacy is what Europe needs. The contents of the Constitutional Treaty, however, improve output legitimacy only to a certain extent. See Cindy Skach, "We, the Peoples? Constitutionalizing the European Union", **Journal of Common Market Studies**, Vol. 43, No. 1, 2005, p. 84.

[31] Richard Bellamy and Dario Castiglione, "Democracy, Sovereignty and the Constitution of the European Union: The Republican Alternative to Liberalism", in Zenon Bankowski and Andrew Scott (eds.), **The European Union and its Order**, Oxford, Blackwell, 2000, pp. 170-190; Richard Bellamy and Dario Castiglione, "Legitimizing the Euro-'Polity' and its 'Regime'", **European Journal of Political Theory**, Vol. 2, No. 1, 2003, pp. 7-34. In opposition to scholars like Bellamy and Castiglione, however, the republican/communitarian view point generally regards democracy and *demos* as concepts limited to nation-states, and therefore not suitable for the European Union. See for instance, Grimm, **op.cit., supra** note 24; Anthony D. Smith, "National identity and the idea of European unity", **International Affairs**, Vol. 68, No. 1, 1992, pp. 55-76.

[32] J.H.H. Weiler, "In defence of the status quo: Europe's constitutional *Sonderweg*", in J.H.H. Weiler and Marlene Wind (eds.), **European Constitutionalism Beyond the State**, Cambridge-New York, Cambridge University Press, 2003, pp. 7-23; J.H.H. Weiler, "To be a European

or cosmopolitan/universalist[34] versions of this view, many legal scholars as well as political scientists underline that the basic tenets of a liberal democracy such as the political participation, representativeness, accountability, transparency, a functioning public sphere, fair procedures and processes are also the prerequisites of a legitimate order of rule of law. The input of democratic process is as significant as the output in democratic polities. Not only such inputs would result in better, more efficient outputs, but also the system would be better embraced by its citizens for being ethical and just as well. As will be discussed below, for most of the supporters of this view, the existence or forging of a collective political identity, whether culminating in a single "*demos*"[35] or a multiple "*demoi*"[36] for the functioning and legitimacy of such a democratic polity is seen as a precondition, or sometimes an outcome, in order to render the system normatively just and efficient, thereby turning the current constitutionalisation process into an identity and polity-constructing experiment.[37] Others, however, are in favor of preserving the "*status quo*" of gradual politicization and constitutionalisation, and the *sui generis*, supranational characteristics of the European integration, without ever culminating in a single *demos*, or ending in a strong federal polity.[38] Scholars such as Nicolaidis, on the other hand, uphold the hybrid approach of a multiple *demoi* and a so-called "federal-vision" type of strong polity.[39]

Citizen-*Eros* and Civilization", **Journal of European Public Policy**, Vol. 4, No. 4, December 1997, pp. 495-519.

[33] Antje Wiener, "Editorial: Evolving Norms of Constitutionalism", **European Law Journal**, Vol. 9, No. 1, February 2003, pp. 1-13; Jo Shaw, "Process, Responsibility and Inclusion in the EU Constitutionalism", **European Law Journal**, Vol. 9, No. 1, February 2003, pp. 45-68; Theodora Kostakopoulou, "Why a "Community of Europeans" Could be a Community of Exclusion: A Reply to Howe", **Journal of Common Market Studies**, Vol. 35, No. 2, June 1997, pp. 301-308.

[34] Jürgen Habermas, **The Inclusion of the Other**, Cambridge, Massachusetts, MIT Press, 1998; Jürgen Habermas, **The Postnational Constellation: Political Essays (Translated, Edited and with an Introduction by Max Pensky)**, Cambridge, Polity, 2001; Kalypso Nicolaidis, "We, the Peoples of Europe...", **Foreign Affairs**, Vol. 83, No. 6, November-December 2004, pp. 97-110; Kalypso Nicolaidis and Robert Howse, "This is my EUtopia...': Narrative as Power", **Journal of Common Market Studies**, Vol. 40, No. 4, 2002, pp. 767-792; Kalypso Nicolaidis and Justine Lacroix, Order and Justice Beyond the Nation State: Europe's Competing Paradigms", in Rosemary Foot, John Gaddis and Andrew Hurrell (eds.), **Order and Justice in International Relations**, Oxford-New York, Oxford University Press, 2003, pp. 125-154; Justine Lacroix, "For a European Constitutional Patriotism", **Political Studies**, Vol. 50, 2002, pp. 944-958.

[35] See Habermas, **op.cit., supra** note 34.

[36] See Weiler, **op.cit., supra** note 32.

[37] Jürgen Habermas is the most prominent of those scholars who is in favor of the constitution-making as an identity-generative exercise.

[38] Weiler, **op.cit., supra** note 32; Paul Craig, "Constitutions, Constitutionalism, and the European Union", **European Law Journal**, Vol. 7, No. 2, 2001, pp. 125-150; Dario Castiglione, "From the Charter to the Constitution of Europe? Notes on the Constitutionalisation Process in the EU", **Queen's Papers on Europeanisation**, No. 5/2002, pp. 1-14; Carlos Costa, "Improving EU Constitutional Politics? A Preliminary Assessment of the Convention", **Constitutionalism Web-Papers**, ConWEB No.1/2003, at <http://les1.man.ac.uk/conweb/>.

[39] Robert Howse and Kalypso Nicolaidis (eds.), **The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union**, Oxford-New York, Oxford University Press, 2001.

Arguably, all those conceptions of legitimacy for the Union are inter-linked; law/legality provides normative legitimacy to a polity, whereas the democratic legitimacy together with the values the system upholds strengthen social legitimacy. Neither a benevolent dictatorship, nor a well functioning elitist project of output legitimacy or of problem solving capacity are sufficient on their own in order to render the system acceptable and its law to be observed by its citizens. Moreover, there is an inherent danger in purely utilitarian and out-put oriented approaches linking the Union's legitimacy solely to its capability to deliver the goods[40] since such expediency and efficiency cannot be expected invariably from any polity, let alone from the fragile EU system.

Conversely, purely democratic legitimacy premises would also prove to be inadequate for increasing the social and overall legitimacy of the European Union. Instead of classical majoritarian or parliamentary democracy avenue, which has been developed for and within the boundaries and setting of nation-states, the European Union should take the route of diversifying its legitimacy on various tenets which would reflect its primary characteristic as a multilevel, *sui generis* "polity in the making". In so doing, it would have to put a stronger emphasis, compared to nation-states, on its capacity to produce satisfactory results for economic welfare, democratic governance and peaceful and secure existence of its citizens, since it is much more of a contested polity compared to the nation-states.[41]

Input-oriented and out-put oriented, or in other words democratic/normative and functional/performance legitimacy for the European Union are highly interdependent.[42] Performance and process are inter-linked to the extent that legitimacy derives from the inputs as well as from the outputs. The Union would have to strike a balance between democracy and efficiency while reshaping its polity structure, as it can only secure the allegiances of European peoples if it is deemed to be useful and successful by its citizens, while accomplishments would only be regarded as satisfactory when the process is legitimate and democratic.[43] This, of course, is not to suggest that these different approaches to legitimacy would necessarily have to be contradictory, and that democratic process cannot be efficient, or efficiency would require deviation from democracy, but to point out to the potential tension among the means and ends, especially in a unique polity like the European Union.

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[40] For a similar argument see J.H.H. Weiler, "The Commission as Euro-Skeptic: A Task Oriented Commission for a Project-Based Union, A Comment on the First Version of the White Paper", **Jean Monnet Working Paper**, No. 6/01, 2001, pp. 1-8.

[41] For an analysis of the EU as a "contested polity" see Zenon Bankowski and Emilios Christodoulidis, "The European Union as an essentially contested project", **European Law Journal**, Vol. 4, No. 4, December 1998, pp. 341-354.

[42] For a similar view see, Paul Craig, 'Democracy and Rulemaking within the EC: An Empirical and Normative Assessment, **Harvard Jean Monnet Working Paper**, No. 2/97, 1997.

[43] Erik Oddvar Eriksen, "Technocratic or Democratic Governance", in **Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, Jean Monnet Working Paper**, No. 6/01, 2001; Scharpf, **op.cit., supra** note 19.

There can never be a meaningful discussion of means in a polity, without taking into account the ends, and *vice versa*. In that context, both the process and the outcome should serve to realize the shared aims and objectives of the integration process; those shared aims and objectives which would form the normative underpinnings of the flexible, open-ended, multi-level and multi-dimensional European collective political identity. At the beginning of the 21st century, the quest for such normative values must focus on the shared aims and objectives, and on the common future of the European peoples, rather than the futile attempts of seaching for a common past or distinctive "European" values of an exclusionary nature.

Policy or governance areas necessitate giving priority to different legitimation principles at different times and under differing conditions, which makes striking the balance, especially between democracy and efficiency, a paramount task. Although this is the case for nation states too, since the European Union is a novel and open-ended type of polity with no preordained finality, equipped with limited powers and limited political, legal, financial and material instruments and resources, such balancing act becomes even more complex and sensitive. Such task can best be achieved by deliberative and communicative principles and practices, and cannot be set beforehand in a comprehensive manner. The polity should be open to re-balancing and reformulating its standards of legitimacy constantly. In that context "trust and trustworthiness" are prerequisites for the perceived normative legitimacy of the Union which would also affect compliance and long term support for the EU.[44]

It has to be pointed out in this context that lasting communities of integration can only rely on "a matter of mutual sympathy and loyalties; of "we-feeling", trust, and mutual consideration; of partial identification in terms of self-images and interests; of mutually successful predictions of behavior, and of cooperative action in accordance with it –in short, a matter of perpetual dynamic process of mutual attention, communication, perception of needs, and responsiveness in the process of decision-making" as Deutsch argues.[45]

The constitutional project was aimed at strengthening all five types of legitimacy premises of the EU in different degrees. The main purpose of the process, however, was seen by the proponents of the idea of the "European Constitution" as to reinforce the mutual trust and solidarity of the European citizens and their attachment to the EU by way of the symbolic force and the democratic mechanisms of a "Constitution" prepared and enacted by a democratic, inclusive and transparent process. Here we will only deal with the identity and polity generative function of such constitution-making. In that framework, the function of a "Constitution" for strengthening the "we-feeling", mutual trust and solidarity, and consequently the legitimacy of a polity like the European Union is the issue that needs to be investigated.

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[44] Follesdal, **op.cit., supra** note 8, p. 3.
[45] Karl Deutsch *et al*, **Political Community and the North Atlantic Area: International Organisation in Light of Historical Experience**, Princeton, Princeton University Press, 1957, p. 36.

The Relationship Between the "Constituent Power" and the "Constitution": Constitution or Demos-Which Comes First?

As widely argued within context of the European Union, for the time being there is no European *"demos"*; a concrete and devoted "people of Europe" whose allegiances lie with the Union,[46] despite the possibility of the emergence of a value-(or purpose) driven civic European *demos/demoi* in the future, with multi-level loyalties and identities.[47] The *"demos"* is the "political community", the "collective identity", the "people", the "popular will" behind the system of "democracy". It is the "we-feeling" arising from pre-existing commonalities of history, language, religion, culture or ethnicity, or from the belief in a shared destiny on the basis of common values. This "we-feeling", or the feeling of a common past and future enables and legitimizes the majoritarian and representative premises of democracy. The members of a "political community" accept the sacrifice of being in the minority, and the legitimacy of the majority rule, on the basis of the deep understanding entrenched in the sense of belonging to the same group with a shared destiny, which strives for the common good. Since such a conception of *"demos"* is only existent in the realm of the nation states at this moment in time, according to many, the European Union could not, and should not for that matter, aspire to more democracy or to more political integration, i.e., a European Federal State.[48]

The lack of a political community is, however, different from the lack of popular support or allegiance in social terms from a conceptual, and especially normative perspective, although they are usually very closely connected. Whether they identify with the Union or not; whether they regard themselves as belonging together within the boundaries of a political community, the European citizens have demonstrated a reasonable degree of support for the integration process in general up until the recent times.

The economic, political and societal aspects of the integration have not started at the same time and did not occur at the same speed. This creates tensions with regard to the support for the integration on the part of the European citizens since they have no real awareness on the powers and boundaries of the European endeavor, and they have no real consciousness of belonging together and solidarity as yet.[49]

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[46] For discussions on the issue of a European *'demos'* see, in general, Grimm, **op.cit.**, **supra** note 24; Joseph H. H. Weiler, Ulrich R. Haltern and Franz C. Mayer, "European Democracy and Its Critique", **West European Politics**, Vol. 18, No. 3, 1995, pp. 4-39; J.H.H. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", **European Law Journal**, Vol. 1, No. 3, 1995, pp. 219-258; Lars Erik Cederman, "Nationalism and Bounded Integration: What it would take to construct a European Demos", **European Journal of International Relations,** Vol. 7, No. 2, 2001, pp. 139-174.

[47] For different versions of a collective European political identity and their divergent consequences see Weiler, **op.cit., supra** note 32 and 46, and Jürgen Habermas, "Why Europe Needs a Constitution?", **New Left Review**, Vol. 11, September-October 2001, pp. 5-26.

[48] See, for instance, the Maastricht Judgment of the German Constitutional Court **supra** note 24.

[49] Fabrice Larat, "Present-ing the Past: Political Narratives on European History and the Justification of EU Integration", **German Law Journal, Special Issue-Confronting Memories**, Vol. 6, No. 2, 2005, p. 289.

The problems of identification, participation and involvement in European politics and affairs on the part of the European peoples emanate from the foundations of the integration process. The European integration has been designed as a technocratic and elitist project -on the basis of the Community method[50] and incrementalism[51]- where the support and participation of the masses were deemed to be ancillary.[52] It was presumed that such support would automatically follow once the benefits and achievements of the European integration started to affect the everyday lives of the European peoples.[53] As argued previously, the days of "permissive consensus" and "indirect legitimacy" for the European Union, however, are certainly over, especially in the aftermath of the Maastricht Treaty.[54] As long as the European Union fails to make known its *raison d'être* and its achievements to the masses; or falls short of ensuring their active participation and sense of belonging to the integration process, such support might never materialize. Thus, the Convention on the Future of Europe and its product, the Constitutional Treaty were aimed at bringing the European Union closer to its citizens.[55]

The paradox the European Union faces today, in particular in the aftermath of the French and Dutch referenda, however, appears to be a diametrical/conflicting relationship between deeper integration, more visibility and formal legitimacy in the shape of a formal constitution, and increase in social legitimacy and popular support.

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[50] On the institutional structure of the European Union and the "Community method" see, Helen Wallace and William Wallace (eds.), **Policy Making in the European Union**, 4th Edition, Oxford, Oxford University Press, 2000, pp. 3-37.

[51] Weiler, **op.cit., supra** note 2, pp. 2447-2448.

[52] For the historical background of the European Union being an elitist movement and its implications for today see, Kevin Featherstone, "Jean Monnet and the 'Democratic Deficit' in the European Union", **Journal of Common Market Studies**, Vol. 32, No. 3, 1994, pp. 149-170; Richard S. Katz, "Models of Democracy. Elite Attitudes and the Democratic Deficit in the European Union", **European Union Politics**, Vol. 2, No. 1, 2001, pp. 53-79; Iain McLean, "Two Analytical Narratives about the History of the EU", **European Union Politics**, Vol. 4, No. 4, 2003, pp. 499-50; Christian Joerges, "Introduction to the Special Issue: Confronting Memories: European "Bitter Experiences" and the Constitutionalisation Process: Constructing Europe in the Shadow of its Pasts", **German Law Journal, Special Issue-Confronting Memories**, Vol. 6, No. 2, 2005, pp. 245-254; Bo Strath, "Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community", **German Law Journal, Special Issue-Confronting Memories**, Vol. 6, No. 2, 2005, pp. 255-271.

[53] For the method employed by the founding fathers of the European integration, i.e. neo-functionalism and its basic attributes, strengths and shortcomings see, for instance, Ben Rosamond, **Theories of European Integration**, London, Palgrave, 2000, especially pp. 50-97. For an analysis on the significance of the "neo-functionalist legacy" in today's constitutionalisation efforts see Andrew Moravcsik, "The European Constitutional Compromise and the neofunctionalist legacy", **Journal of European Public Policy**, Vol. 12, No. 2, April 2005, p. 349-386.

[54] Mark Franklin, Michael Marsh and Lauren McLaren, "Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht", **Journal of Common Market Studies**, Vol. 32, No. 4, 1994, pp. 459-461; Weiler, **op.cit., supra** note 2.

[55] See the Laeken Declaration, **supra** note 5.

This prompts us to question both the functionalist/utilitarian and identity-building approaches to strengthening legitimacy within context of the European Union. For some, the main legitimacy problem of the Union arises from its lacking visibility in the eyes of its citizens.[56] The insufficient information and awareness of the European citizens regarding the integration process are at the root of the legitimacy/communication deficit and certain public relations exercises like a "Charter of Fundamental Rights" or a "European Constitution" would be sufficient to bridge the gap. In addition to that, some institutional reforms and novel approaches to governance like "Open Method of Coordination" or involvement of civil society would provide the long sought after remedies.[57]

For others, the Union has to have a firm basis for its democratic governance, a strong political identity premised upon belonging to, and identification with, a polity and its fundamental values reflected in the exercise of making of a constitution, and also in its ethical and normative contents. In the following section we will analyze the constitutionalisation process of the European Union as a community generative method in order to reveal its pitfalls and benefits to substantiate our main argument regarding the composite legitimation requirements of the integration process; both in terms of input-oriented and output-oriented legitimacy.

A Brief Analysis of the Constitutionalisation Process as a Community/Identity Generative Method: Preconditions and Alternative Means of Creating a European Public Sphere and a European Collective Political Identity

In this section, the community/identity generative role of law and constitutions will be analyzed. In that context, the peculiarities of the current constitutionalisation process will be discussed with a view to demonstrate that the European Constitution is an endeavor aimed at the creation of its *"pouvoir constituant."*[58]

Since legitimacy reflects the belief that a system is just because it embodies the common normative values of a polity, and such embodiment usually takes shape in a democratic constitution in today's world, constitution-making is regarded by many as a remedy for the Union's legitimacy problems. Constitutions define collective identities and are made by them. They are both legal texts in the minimalist sense, but also identity builders in the perfectionist sense.[59] Legitimacy derives from belongingness and solidarity, and solidarity and belongingness are strengthened by being members of a just and legitimate political order.

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[56] Cederman, **op.cit., supra** note 46, p. 154.

[57] The White Paper on Governance epitomizes this view: European Commission, **European Governance: A White Paper**, COM(2001) 428, Brussels, 25.7.2001.

[58] See in general J.H.H. Weiler, **The Constitution of Europe "Do the New Clothes Have an Emperor?"**, Cambridge, Cambridge University Press, 1999; Armin von Bogdandy, "The European Constitution and European Identity: Text and Subtext of the Treaty establishing a Constitution for Europe", in Weiler and Eisgruber, (eds.), **Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper**, No. 5/04, 2004.

[59] Antonio-Carlos Pereira Menaut, "Three Critiques of the European Constitution", **Federal Trust Online Paper**, No. 23/04, November 2004.

Can there be a supreme constitution without the constitutive act of "we the people"? Who is the constituent power and why should a constitution be observed by the citizens as higher law? The answer given to these questions in liberal democracies is that, in a democratic polity all legitimate power emanates from the people. Since "people" are the constituent power and the only legitimate source of law, they should observe their self-legislation. The relation between the people (or *demos*) and the constitution is always a two-way process; they constitute each other. In Weiler's words "In many instances constitutional doctrine presupposes the existence of which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps towards a thicker social and political notion of constitutional demos. Thus, the empirical legitimacy of the constitution may lag behind its formal authority [...]"[60] Thus, a constitution both assumes and promotes a political identity.[61] The issue to be discussed here is whether the recent constitutionalisation process of the European Union and its outcome are apt to create a European *demos/demoi* or European collective political identity.

The Post-Nice debate, the Convention on the Future of Europe and the Intergovernmental Conference of 2003/2004 together with the product of these processes, i.e. the Constitutional Treaty, were conceived and publicized as the panacea to the legitimacy predicaments of the Union. Naturally, apart from its community and legitimacy generative function, the constitution was also deemed to be necessary in order to render the Union more efficient in the aftermath of the big bang enlargement process.[62] However, this was only considered as a secondary objective for the constitutionalisation process. The particular emphasis on public participation in the preparation of the Constitutional Treaty and the relatively lively public debate generated around the idea of a "European Constitution" provided ample ground for the assertions that a European political identity, a European *demos* and a European experiment on transnational governance and deliberative democracy were on the making.

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[60] Weiler **op.cit.**, 2003, **supra** note 32, p. 9. Similarly, according to Jürgen Habermas, "[...] the argument that there is no such thing as a European people, and thus also no force capable of generating a European Constitution, only becomes a fundamental objection through a particular use of the concept of "a people". The prognosis that there cannot be any such thing as a European people remains plausible only if "the people", as a source of solidarity, actually depends on some corresponding community as a pre-political basis of trust, which fellow countrymen and women inherit as the shared fate of their socialization". Habermas, **op.cit.**, 2001, **supra** note 34, p. 100.

[61] Miguel Poiares Maduro, "How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union", in Weiler and Eisgruber, (eds.), **Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper**, No. 5/04, 2004, p. 54.

[62] For the processual, procedural, debate generative and material justifications underlying the recent constitution-making process see J.H.H. Weiler, "Epilogue-Fischer: The Dark Side" in Christian Joerges, Yves Meny and J.H.H. Weiler (eds.), **What Kind of Constitution for What Kind of Polity?-Responses to Joschka Fischer**, Badia Fiesolana, San Domenico, European University Institute, 2000, pp. 241-242.

What is the function of a constitution for a polity like the European Union? If the Union already has a material constitution as claimed by many legal experts[63] does it really need a formal one, and why? The justification for the constitutionalisation process lies in the political and symbolic function of the constitution; in its identity generative potential.

Regarding the function of the constitution for the current European governance Neil Walker ascertains two main purposes: First of all, the European Constitution was to be a symbolic legal text defining the European polity as "polity", and secondly it would be defining the identity and territory, that is the boundaries of the polity through a set of ideals and collective missions.[64]

Accordingly, the function of a constitution for the emerging European polity would be twofold: First it would be an identity building device, and second, it would be a public sphere building instrument in order to sustain the European polity.[65] The capacity to communicate about shared objectives and problems discursively, in a mode of ethical discourse would only be enabled by a functioning European public sphere. There is no doubt that such an instrument, i.e. a distinct public sphere, is non-existent in today's Europe. The debate around the Constitutional Treaty and the referenda for its ratification, irrespective of their current outcome, however, were regarded as mechanisms that would help to pave the way for the emergence of such public sphere and political culture.

This was one important aspect of Habermas's assertion that "Europe needs a Constitution" as a catalyst.[66] According to Habermas, the empirical circumstances necessary to the extension of the process of identity formation beyond national boundaries were the emergence of a European civil society; the construction of a European-wide public sphere; and the shaping of a political culture that can be shared by all European citizens. This process would have to begin with a referendum arousing a Europe-wide debate whereas the making of the constitution would be "representing itself as a unique opportunity of transnational communication with the potential for a self-fulfilling prophecy."[67] The gradual construction of such European public sphere

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[63] Jean Claude Piris, "Does the European Union have a Constitution? Does it need one?", **Harvard Jean Monnet Working Paper**, No. 5/00, 2000; Paul Craig, "Constitutions, Constitutionalism, and the European Union, **European Law Journal**, Vol. 7, No. 2, June 2001, pp. 125-150; Miguel Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Neil Walker (ed.), **Sovereignty in Transition**, Oxford, Hart Publishing, 2003; Weiler, **op.cit.**, 2003, **supra** note 32.

[64] Neil Walker, "Constitutionalising Enlargement, Enlarging Constitutionalism", **European Law Journal**, Vol. 9, No. 3, July 2003, p. 370.

[65] Maduro, **op.cit.**, **supra** note 61, pp. 39-40.

[66] Habermas also argued in favor of a European Constitution for its capacity to forge a collective European identity around and on the basis of the values the Constitution itself endorses, i.e. a European version of "constitutional patriotism".

[67] Habermas, **op.cit.**, **supra** note 47, p.17. It would of course have been more effective and beneficial to hold simultaneous "European" referenda for the ratification of the Constitutional

The way the Constitutional Treaty is prepared and enacted has an undeniable normative significance. In liberal democracies only the "people" can give themselves a constitution and the process should be democratic in the purest sense of the term. In that context, what can be said about the constitution drafting method recently employed by the European Union?[76] Should the dual processes of Convention and IGC be assessed as a relative success or business as usual? Should and could the Convention be ascertained as a "constituent assembly"? Have we experienced a "constitutional moment"[77] or the functioning of mechanisms of the gradual integration as usual?[78] Could a Europe-wide popular referendum have better served to forge a European public discourse, European public space and the emergence of European collective political identity -perhaps even irrespective of the outcome?

The democratic qualities reflected in the representativeness, transparency and inclusiveness of the Convention process are arguably an improvement compared to the bureaucratic, diplomatic, elitist and closed nature of the Intergovernmental Conferences alone, which was the name of the game previously.[79] Even the Convention method itself, together with its outcome, demonstrated the shift in approaches to democracy, legitimacy and politics in the European integration. The recent process carried further the democratization of constitution-making, through it's heightened degree of inclusiveness and transparency.[80] Despite some harsh and legitimate criticism[81] the

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[76] For an interesting critique of the functioning of Convention on the Future of Europe see the Alternative Report included in the Draft Constitution, **"The Europe of Democracies"**. For the analysis of the recent constitution-making process see Lars Hoffmann, "The Convention on the Future of Europe-Thoughts on the Convention Model", **Jean Monnet Working Paper**, No. 11/02, 2002, Shaw, **op.cit., supra** note 33 and Closa, **op.cit., supra** note 38; Paul Craig, "Constitutional Process and Reform in the EU: Nice, Laeken, The Convention and the IGC", **European Public Law**, Vol. 10, No. 4, 2004, pp. 653-674.

[77] For the concept of a "constitutional moment" within context of constitution-making in the US see Bruce Ackerman, **We the People: foundations**, Cambridge Massachusetts, Harvard University Press, 1991; Bruce Ackerman, **We the People: transformations**, Cambridge Massachusetts, Harvard University Press, 1998. For the adaptation of this concept to the European Union see Neil Walker, "The Legacy of Europe's Constitutional Moment", **Constellations**, Vol. 11, No. 3, 2004, pp. 368-392.

[78] See for instance, J.H.H. Weiler, "A Constitution for Europe? Some Hard Choices", **Journal of Common Market Studies**, Vol. 40. No. 4, pp. 563-580; Maduro, **op.cit., supra** note 61.

[79] See in general, Francis Snyder, "Editorial: Enhancing EU Democracy, Constituting the European Union", **European Law Journal**, Vol. 11, No. 2, March 2005, pp. 131-134; John Erik Fossum, "Still a Union of deep diversity? The Convention and the Constitution for Europe", in Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (eds.), **Developing a Constitution for Europe**, London-New York, Routledge, 2004, pp. 226-247; Yves Meny, "The achievements of the Convention", **Journal of Democracy**, Vol. 14, No. 4, October 2003, p. 57-63; Juliane Kokott and Alexandra Rüth, "The European Convention and its Draft Treaty Establishing a Draft Constitution for Europe: Appropriate Answers to the Laeken Questions", **Common Market Law Review**, Vol. 40, 2003, pp. 1315-1345.

[80] John Erik Fossum and Augustin Jose Menendez, The Constitution's Gift? A deliberative democratic analysis of constitution-making in the European Union, **ARENA Working Paper**, No. 13, March 2005; Paul Magnette and Kalypso Nicolaidis, "The European Convention:

Convention process is generally regarded as a right step in the right direction which helped to sow "[...] the seeds of a critical and reflexive approach to constitutionalisation."[82]

Yet, the difficulties faced during the Convention and the ratification debates illustrate the fact that the recent constitutionalisation process still constitutes a limited success in reinforcing the democratic qualities of the integration process and the forging of a collective identity. The justifications for this argument are related to the fact that both the process and the outcome, i.e., the Constitutional Treaty did not generate the expected mobilization and identification with constitutionalisation in particular, and the integration process in general. The results of the recent Eurobarometer surveys and the ratification referenda substantiate this view.

According to several Eurobarometer surveys held between 2000-2003, around 6 to 7 out of 10 EU citizens supported the idea of a European Constitution, whereas a quarter lacked an opinion, and direct opposition to a constitution was only around 10 percent.[83] Similarly, following the preparation of the Constitutional Treaty the reaction remained largely positive to the process and signaled a success in regard to the identity building/community generative function of constitutionalisation both in terms of process and outcome.[84]

Yet, according to the public opinion survey conducted in the Union in May-June 2005, despite the increase in visibility of the integration process, the attachment levels did not increase significantly in the Union during this period; in fact compared only with 6 months ago results of this survey showed a decline in certain indicators.[85] People had become more critical of the Union and seemed less enthusiastic about the future of Europe. However, they did not call into question either their membership of the EU or the European integration process itself, and they were optimistic about their personal situation. One year after the enlargement, support for belonging to the EU had fallen by 2 points. But this was compensated by the rise in the perceived benefits of membership (55%, +2 points). And yet the image of the EU was deteriorating (-3 points), reflecting the decline in confidence in the Commission and Parliament (-6 points for the Commission and -5 points for the Parliament). 53% of interviewees felt that their voice went unheard within the EU; so the Union was still distanced from its citizens.

Bargaining in the Shadow of the Rhetoric", **West European Politics**, Vol. 27, No. 3, May 2004, pp. 381-404.
[81] Franz C. Mayer and Jan Palmowski, "European Identities and the EU-The Ties that Bind the Peoples of Europe", **Journal of Common Market Studies**, Vol. 42, No. 3, 2004, pp. 584-585. For a critique of the Convention process see also Hjalte Rasmussen, "The Convention Method", **European Constitutional Law Review**, Vol. 1, No. 1, 2005, pp. 141-147.
[82] Shaw, **op.cit., supra** note 33, p. 45.
[83] See **Standard Eurobarometer** no. 58 of March 2003.
[84] **Standard Eurobarometer** no. 62/Autumn 2004, December 2004.
[85] Eurobarometer 63 First Results, July 2005, **Standard Eurobarometer** 63/Spring 2005: Conducted in May-June 2005.

The Eurobarometer results indicated that a majority of the public favored the idea of a European Constitution (61%), despite the outcome of the French and Dutch referenda. This showed that the Europeans were largely in agreement with the idea of a "European Constitution", but not necessarily with the contents of the text proposed to the Member States for ratification. Both the principle of the Constitution, and the aspiration for a more political European Union were strongly held; approximately six out of ten Europeans said that they were in favor of a move towards greater political union within the EU.

The results showed that in the two countries, which in their recently held referenda voted against the Constitution, the assessment of European Union membership was clearly positive -in France (53%) and above all in The Netherlands (67%). Asked about the benefits of being a member of the EU, 55% of citizens replied positively, up two points from 2004. While 53% of respondents were satisfied with the way democracy works in their country, the percentage of respondents satisfied with the way democracy works in the European Union was lower at 49%. Significantly, this Eurobarometer highlighted people's growing concern about the social dimension and their desire to see the European Union play a bigger role in dealing with certain priority issues such as tackling unemployment, poverty and social exclusion. Moreover, the results showed that the Commission and the Parliament were suffering from lower levels of confidence.

The near fatal blow to the political constitutionalisation came with the French and Dutch referenda on the 29th of May and the 1st of June respectively. The French rejected the Constitutional Treaty by a 55-45% margin, whereas the Dutch did the same by a margin of 62-38%.

What are the reasons behind this public display of disaffection with the constitutional project? Was Moravcsik right to argue that more visibility meant less support for the integration process?[86] Is there really a structural or contingent democratic deficit that needs to be remedied at the Union level, or is the issue of a mere communication gap,[87] a distance that can be bridged between Europe and its citizens by some novel approaches to governance? Is the legitimacy and public support for the Union contingent on its efficient functioning and delivering the goods? Are we witnessing a backlash against the elite-driven top-down approach of the constitutionalisation process?[88] Were the citizens of France and the Netherlands expressing their displeasure with their own governments, their fears for the poorly

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[86] See also Lee Miles, "Editorial: The Paradox of a Popular Europe", **Journal of Common Market Studies**, Vol. 42, Annual Review, 2004, pp. 1-8.

[87] Christopher Meyer, "Political Legitimacy and the Indivisibility of Politics: Exploring the European Union's Communication Deficit", **Journal of Common Market Studies**, Vol. 37, No. 4, December 1999, pp. 617-640.

[88] For an analysis on whether there is a deep divide between elite and public opinions towards the EU see Liesbeth Hooghe, "Europe Divided? Elites v. Public Opinion on European Integration", **European Union Politics**, Vol. 4, No. 3, 2003, pp. 281-304.

performing domestic economies and fears of foreign competition, whereas European issues were peripheral to their concerns, or were they expressing their profound dissatisfaction with the way things are being run in the EU, while revealing a crisis of legitimacy?[89]

In order for the "Constitution" to perform the legitimating and identity generative function, it should have generated the right incentives for people to embark on the European project, and secondly it should have provided an adequate framework for constructing a polity and collective political identity in order to secure the political loyalty required to sustain the viability of the project.[90] Moreover, it should also have to strengthen the problem solving capacity of the Union and its institutional structure, and satisfy the expectations of the European citizens.[91]

The lack of a collective political identity, combined with the lack of a European public sphere and political culture were reflected in the results of the ratification referenda.[92] National politics, leaders, debates and concerns were predominant in both France and the Netherlands compared to "European" issues. The future of Europe and the problems it is faced with, or the Constitutional Treaty and its solutions to those problems were mainly seen through the lens of national politics and interests, and not from a "European" perspective. The European peoples were largely in favor of the European integration and the idea of a European Constitution but they had no opportunity of a proper and meaningful debate on those issues and on their expectations from the Union. The referenda debates were held hostage by national politics and deliberate or haphazard misinformation provided both by the "no" and "yes" campaigns. Since there is no European politics, no Europe-wide political parties, European political culture and direction as such, the political debate surrounding the project of the European Constitution displayed a compartmentalized characteristic, where domestic/national concerns, reactions and expectations determined the outcome of the referenda and informed the public opinion in the Member States in general.[93]

Reaction against the domestic governments; unpopular domestic political leaders and populist politicians; backlash against the elite-driven nature of the integration

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[89] For an argument asserting that the problem is "European" rather than "domestic" see "The Europe that died", **Economist**, 4 June 2005, pp. 11-12.

[90] Maduro, **op.cit., supra** note 61, p. 53.

[91] For a survey on the expectations of the European citizens from the integration process see **Perceptions of the European Union- A Qualitative Study of the Publics Attitudes to and Expectations of the European Union in the 15 Member States and the 9 Candidate Countries- General Report,** June 2001.

[92] For a general analysis on the ratification referenda prior to the start of the process see Carlos Closa, "Ratifying the EU Constitution: Referendums and their Implications", **The Brookings Institution U.S.-Europe Analysis Series,** November 2004, pp. 1-10.

[93] See in general Piotr Nowina-Konopka, "Democratic Deficit: A European Scapegoat for Domestic Trouble", **European Foreign Affairs Review,** Vol. 8, 2003, pp. 1-4; John Gerry Michael Marsh and Richard Sinnott, "Second order" versus "issue voting" effects in EU referendums. Evidence from the Irish Nice Treaty Referendums", **European Union Politics,** Vol. 6, No. 2, 2005, pp. 201-221.

process; the impact of the recent enlargement, fears of further enlargement and loss of control over the direction and size of the integration process -closely related especially to Turkey debate- which fanned the xenophobia-racism; fear of loss of national identity;[94] economic problems encountered in Europe regarding growth and employment, and the fear of the demise of the welfare state; misinformation about and distance from the Union, its institutions and powers as well as the contents of the Constitutional Treaty have all been cited as the underlying reasons behind the rejection of the Constitution in France and the Netherlands.

The public opinion surveys conducted in France[95] and the Netherlands[96] immediately after the referenda illustrate the reasons behind the rejection of the Constitutional Treaty by the citizens; a project which was paradoxically designed to enhance the democratic and social legitimacy of the Union and close the gap between the Union and its citizens. In France, among those who voted "No", 31% mentioned their fear of the Constitution's harmful effect on employment and 26% of them referred to the current status of their country's economy and the labor market. Moreover, some others voted "No" thinking that the Constitution was "too liberal" (19%) or not "social" enough (16%).

In the Netherlands, on the other hand, 32% cited "lack of information", whereas 19% mentioned their fear of a loss of national sovereignty, and 13% complained about the cost of Europe for taxpayers as reasons for voting "No".

Yet, in both Member States the large majority was in favor of membership of the EU (88% of the French and 82% of the Dutch respondents), whereas especially in France the idea of a "European Constitution" was still being widely supported.

Did the Constitution and the constitutionalisation process answer the call of the Laeken declaration for the vision of the Union that is able to enjoy legitimacy in the eyes of its citizens? The answer to this question cannot be given in the affirmative in the aftermath of the ratification referenda. The reasons behind the "No" vote demonstrate the paradox of the current state of the EU integration and the overall objective of the Laeken declaration; i.e. bringing the European citizens closer to the Union; a document assumed to bring more democracy to Europe was being rejected by its peoples. Moreover, the assertion that the more visible the EU becomes the more dissent it is faced with held true; a phenomenon which suggests severe difficulties for the "Constitution" in serving as common ground for the EU.

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[94] See in general Lauren M. McLaren, "Opposition to European Integration and fear of loss of national identity: Debunking a basic assumption regarding hostility to the integration project", **European Journal of Political Research**, Vol. 43, 2004, p. 895-911.
[95] **Flash Eurobarometer** 171: The European Constitution: Post-referendum survey in France: Fieldwork conducted in 30&31 May 2005, published in June 2005.
[96] **Flash Eurobarometer** 172: The European Constitution: Post-referendum survey in The Netherlands: Fieldwork conducted in 2/4 June 2005, published in June 2005.

The strengths and weaknesses of the constitution rhetoric as a community generative method have been highlighted during this process.[97] On the one hand, its capacity for both eliminating and reinforcing the expectations/capabilities gap of the Union; on the other hand its potential for eliminating the danger of legitimacy crisis or reinforcing it by imposing on the European peoples yet another integrationist step in the absence of their consent or explicit will, have been established.

On the basis of these empirical observations, should we conclude that the recent and concrete European experiment in deliberative democracy and constitutional construction of political identity has failed completely?

Constructing a community like the Union aspires to, requires strong leadership, sense of direction and the opportunities presented by existing political, social, economic, cultural and legal conditions surrounding the polity in question, which cannot be created solely by constitution-making. Has Europe reached such a stage is the question that needs to be answered right now.

What we have experienced cannot be defined as a "constitutional moment". The inter-state bargaining and incrementalism have influenced and shaped the outcome more than the Convention process. The democratic and inclusive qualities of the Convention process and the debate created around the idea of constitutionalisation, however, have created their own momentum. More than its content, the Constitutional Treaty is significant for its potential and rhetoric.[98] In that context the constitutionalisation process has proved to be valuable in the sense that it has opened the floodgates of public debate on the *raison d'être* and direction of the European integration amongst the citizens of the Union. Such debate was desperately needed and awaited, despite its potential for temporal set-backs as the ones that are being experienced today. What we are faced with is a community/identity/public sphere

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[97] For the critical analysis of the recent constitutional process from legal and political science perspectives see in general, Bermann, **op.cit.**, **supra** note 73; Maduro, **op.cit.**, **supra** note 61; Walker, **op.cit.**, **supra** note 75; Shaw, **op.cit.**, **supra** note 33; Carlos Closa and John Erik Fossum (eds.), **Deliberative Constitutional Politics in the EU**, ARENA CIDEL Report, ARENA Report No. 5/04, ARENA/University of Zaragoza: Oslo, August 2004; Erik Oddvar Eriksen, John Erik Fossum, Mattias Kumm and Agustin Jose Menendez, **The European Constitution: the Rubicon Crossed?**, ARENA Report No. 3/05, Oslo, February 2005; Dario Castiglione, "Reflections on Europe's Constitutional Future", **Constellations**, Vol. 11, No. 3, 2004, pp. 393-411; Agustin Jose Menendez, "Between Laeken and the Deep Blue Sea-An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint", **European Public Law**, Vol. 11, No. 1, 2005, pp. 105-144; John Erik Fossum and Hans-Jörg Trenz, "The EU's fledgling society: From deafening silence to critical voice in European constitution making", **ARENA Working Paper**, No. 19, July 2005.

[98] Erik Oddvar Eriksen, John Erik Fossum and Agustin Menendez (eds.), **Developing a Constitution for Europe**, London, Routledge, 2004; Erik O. Eriksen (ed.), **Making the European Polity. Reflexive integration in the EU**, London, Routledge, 2005; John Erik Fossum and Augustin Jose Menendez, Democratic constitution-making. Reflections on the European experiment, **ARENA Working Paper**, No. 18, May 2005.

[99] Habermas, **op.cit.**, **supra** note 47; Follesdal, **op.cit.**, **supra** note 8.

generative exercise; a process that is set alive by the post-Nice debate, irrespective of the current crisis. If such community generative exercise cannot create a belongingness and solidarity on the basis of shared values geared towards activating common objectives, then of course what we would be left with is the "market citizen" driven by self-interest and nothing more. Yet, the possibility of achieving something more might be worth pursuing this route. The Union has to rise to this challenge or risk the further alienation of its citizens.

In that context, devices such as a European-wide debate or referenda for the ratification of the Constitution are instrumental to raise a European awareness not only because such manifestations of direct democracy would enhance the legitimacy of the Union but also because they would create the preconditions of a meaningful debate on what Europe is and what it is for. Constitution and *finalité* debates, as well as debates on the US's invasion of Iraq and the European attitudes on this issue, and Turkey's accession to the European Union can easily be interpreted as signs of the emergence of a European public sphere and discourse, albeit rather slowly.[99]

Here we are faced with the problems of finding and agreeing upon new common interests, objectives and ideals for the integration process. The underpinning normative argument of this article is that collective efforts for shared goals and interests may also be instrumental in forging collective identities especially if they are successful. There has to be a plausible -albeit minimum, renegotiable and inclusive- agreement and understanding on the definition of common/shared good/output/values of the integration project. Moreover, the citizens must also have a minimum degree of democratic participation in order to identify with the system and its outcomes. The days of "practical achievements calling for real solidarity"[100] are over; functionalist approaches alone are not sufficient. What is required is a delicate balance of input-oriented and output-oriented legitimacy. Neither raising awareness, nor democratic participation would be sufficient on their own; the EU should also make the people care for and identify with the integration process through its values and normative underpinnings, and its aims and objectives. The challenge is to politicize the Union to motivate the citizens for identity building without damaging the delicate balance of the intrinsic attributes of the existing *sui-generis* structure. It is better not to set unrealistic and unattainable goals regarding the finality of the integration process.

CONCLUSION

The recent crisis and the results of the referenda provided the long needed opportunity for the EU to debate on its future and reflect on its prospects and direction in a more open, inclusive and comprehensive manner by bringing the constitutional debate to the fore. Crises worked for the European Union to regroup and reflect deeper, and consequently come up with solutions to its multi-faceted problems up untill now. This is a healthy sign for the future of the integration process and there is no reason why it would not be repeated this time around.

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[100] For the Schuman Declaration see: <http://europe.eu.int/abc/symbols/9-may/decl_en.htm>.

Normative significance of the Constitutional Treaty is in-tact despite the fact that it has suffered a near-fatal blow during the ratification process, at least for the near future. Yet, the initiative and the ideas adopted but not ratified for the time being will almost certainly be filed away for now, but will be taken out of the closet and dusted off in the future. The ideas and provisions on the "identity", "values" and "aims and objectives" of the Union together with the justifications on the normative premises of the Constitution and its preparation process provide the valuable background and foundations for reflection and analysis on legitimacy and political identity of the Union, together with the type of polity it is, or aspires to become.

The European integration is in need of well defined and attainable aims and objectives to mobilize the European peoples around and for the idea of Europe, and hence for the creation of a value and goal driven *sui-generis* collective political identity. This is the way to increase its composite legitimacy on both input-oriented and output-oriented aspects. The challenge for Europe is to build this complementary identity without eroding the diversity of national identities or the essence of the supranational integration process, combined with deciding on what would be the normatively legitimate ground for the forging of such political identity. The combination of the process and deliberation towards the search for those common objectives, together with concrete results in accomplishing them, are capable of creating the synergy for a European collective political identity.