

THE EUROPEAN CONSTITUTION AND THE IMPERATIVES OF TRANSNATIONAL DEMOCRACY

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Democracy is traditionally associated with the sovereign nation-state, wherein a constitutionally guaranteed separation of powers ensures the rule of law, and decision-making is rooted in the sovereign will of the citizens (“the people”). Whenever competences are delegated to a supranational authority, or transferred to an intergovernmental entity or a transnational framework of decision-making, the loss of democratic control on the part of the polity of the nation-state has to be counterbalanced by complex procedures of checks and balances at the international level. The “erosion of democracy through delegation” (from the state to a supranational entity) has been the structural problem of the European Communities and the European Union ever since their foundation. This paper analyses to what extent the Constitution for Europe, drafted by an Intergovernmental Conference (on the basis of the proposal by the Convention on the Future of Europe) and adopted by the Heads of State and Government in the Treaty and Final Act on 29 October 2004 in Rome, gives redress to the democracy and legitimation deficit of the European project.

I. THE CONCEPT AND DIMENSIONS OF TRANSNATIONAL DEMOCRACY WITHIN THE EUROPEAN UNION

Democracy as a system of decision-making among people—insofar as they understand themselves as citizens as distinct from a status of mere privacy—has been developed and practiced at the local community level and within the wider realm of the state as a sovereign entity. In spite of the intergovernmental structures that have evolved, particularly during the twentieth century, and mainly around the United Nations (UN), the nation-state has remained the locus of democracy. Decision-making rules for the interaction between states as sovereign entities have almost exclusively been developed outside the paradigm of democracy; the global interplay of state power has mostly been determined by the politics of “national interest” and has only gradually been adapted to the norms of international law. What has become known as the “international rule of law” is not necessarily based on or identical with democracy between states¹ and, by definition, does not require that states practice democracy within their respective constitutional systems.

Thus, whenever competences of the state are transferred to a transnational framework, or delegated to a supranational authority, a “democratic deficit” will almost inevitably result so long as the respective intergovernmental mechanisms, transnational structures or supranational entities have not themselves been democratically organised. The “erosion of democracy through delegation” has not only been an inherent structural problem within the nation-state,² but has become a major issue in an era when an increasing number of political

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¹ On the meaning of democracy in the international system, see Hans Köchler, *Democracy and the International Rule of Law: Propositions for an Alternative World Order. Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations* (Vienna/New York: Springer-Verlag, 1995).

² See Hans Köchler, ed., *The Crisis of Representative Democracy* (Frankfurt/Bern/New York: Peter Lang, 1987).

competences are being transferred to transnational frameworks (whether on the regional or global levels).

Traditional international organisations such as the UN have long been criticised for the “democratic vacuum” in which their decisions, affecting the global community in the most serious matters of war and peace, are made.³ In the European transnational realm, this fact has been described particularly in regard to the decision-making rules of the European Communities⁴ and the more elaborate mechanisms and supranational structures provided for by the Treaty on European Union.⁵ In the course of the deepening of transnational cooperation within the framework of the European institutions, a consensus has evolved—particularly in the last decade—as to the need for “democratising” Europe, *i.e.* making the transnational structures provided for by the various intergovernmental treaties as democratic as possible.⁶

The crucial question to be answered by those who undertake to explore the universal validity of the democratic concept is this: whether the European Constitution has indeed brought about a paradigm change in the application of democracy beyond the realm of the nation-state, or, should these expectations be too high, to what extent and in what specific areas the project of the Constitution gives redress to the democratic deficit at the European level. The Laeken Declaration of 2001 set the parameters within which the subsequent *Convention on the Future of Europe* worked out a highly complex constitutional framework of norms in the attempt to reconcile the goals of democracy and efficiency in the cooperation among an increasing number of member states.

Through the ambitious project of the European Constitution, the European institutions created by and following the Treaty of Rome establishing the European Economic Community (EEC), and the European Union (EU) (as originally established by the Treaty of Maastricht⁷ and amended by the Treaties of Amsterdam⁸ and Nice⁹), are now being merged into a unified constitutional framework. Following the Intergovernmental Conference, the signing of the Treaty and Final Act establishing a Constitution for Europe by the 25 member states of the EU on 29 October 2004 at the Campidoglio in Rome has opened a new chapter of the practice of democratic rules between sovereign states and beyond the paradigm of the nation-state. This is, at least, the grand expectation that will have to be tested in the years after the eventual entry into force of the Constitution.

³ See Hans Köchler, ed., *The United Nations and International Democracy* (Vienna: Jamahir Society for Culture and Philosophy, 1995), and Hans Köchler, *The United Nations and International Democracy: The Quest for UN Reform*, Studies in International Relations, XXII (Vienna: International Progress Organization, 1997).

⁴ *Treaty establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140, this treaty expires by its own terms on 23 July 2002; *Treaty establishing the European Atomic Energy Community*, 25 March 1957, 298 U.N.T.S. 259; *Treaty establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 3; *Treaty Establishing a Single Council and a Single Commission of the European Communities*, 8 April 1965, 1967 J.O. 152/1.

⁵ For details, see Hans Köchler, “Decision-making Procedures of the European Institutions and Democratic Legitimacy: How Can Democratic Citizenship Be Exercised at Transnational Level?” in *Concepts of democratic citizenship* (Strasbourg: Council of Europe Publishing, 2000) at 147-165.

⁶ See Svein S. Andersen & Kjell A. Eliassen, eds., *The European Union: How Democratic Is It?* (London/Thousand Oaks, California/New Delhi: SAGE Publications, 1996), Winfried Kluth, “Die demokratische Legitimation der Europäischen Union: Eine Analyse der These vom Demokratiedefizit der Europäischen Union aus gemeineuropäischer Verfassungsperspektive” (*The Democratic Legitimation of the European Union: An Analysis of the Thesis of the Democracy Deficit of the European Union from the Perspective of the Common European Condition*) (in German) in *Schriften zum Europäischen Recht (Writings on European Law)* (in German), vol. 21 (Berlin: Duncker & Humblot, 1995), Gerda Falkner & Michael Nentwich, *European Union: Democratic Perspectives after 1996* (Vienna: Service Fachverlag, 1995) and Stratos V. Konstadinidis, ed., *A People's Europe: Tuning a concept into content*. (USA/Singapore/Sydney: Ashgate/Dartmouth, 1999).

⁷ *Treaty on European Union*, 7 February 1992, 31 I.L.M. 253.

⁸ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, 37 I.L.M. 56.

⁹ *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 26 February 2001, 2001 O.J. (C 80).

One of the basic aims underlying the Constitution appears to be the unification of the various normative systems underlying the European treaties and the creation of a common point of reference in international affairs, providing legal personality to the EU as such¹⁰—a status that until then had been enjoyed by the European Commission. Furthermore, according to Art. IV-438(1) of the Constitution, the EU is declared as “successor to the EU established by the Treaty on European Union and to the European Community”.¹¹

As successor to the multidimensional organisations and supranational arrangements of the previous treaties, the Union to be established by the “Constitution for Europe”¹² inevitably represents different levels and forms of cooperation between the member states, which in turn relate to distinct decision-making procedures with different notions of democracy. The “mixed” character of the EU can nonetheless be analysed at three different levels of international cooperation: (1) *intergovernmental* as practiced by the Council of Ministers (which is the traditional form of cooperation between states as sovereign entities on the basis of equality);¹³ (2) *transnational* as represented by the European Parliament—an institution which, through the decisions of its directly elected representatives, expresses positions that increasingly transcend political considerations exclusively related to the nation-state and, thus, contributes to the emergence of genuine transnational views within the European political space; and (3) *supranational* as regards the functioning of the European Commission the members of which “shall neither seek nor take instructions from any government or other institution, body, office or entity” (Art. I-26[7]), thus acting outside and above the framework of the nation-state, being only committed to the *bonum commune* of the Union.¹⁴

A Hybrid Form of Democracy for a Hybrid Form of International Organisation?

As regards the rules of decision-making within the normative framework of the Union, one may ask whether a hybrid form of democracy is required for this hybrid structure of international organisation envisaged by the Constitution for Europe. The complex web of institutions and related sets of decision-making rules that form the EU are neither exclusively intergovernmental nor fully transnational or supranational. Furthermore, the unique form of international cooperation that is to be enacted by the EU on the basis of the Constitution implies that democratic rules determine the decision-making not only between sovereign governments (which is the traditional feature of intergovernmental organisation), but also within the transnational political space of the Union (without direct reference to the national interests of member states).¹⁵ One of the major challenges facing the nascent EU will be how the Constitution will resolve the possible inconsistencies between the intergovernmental, transnational and supranational levels, and how it will be able to deal with the systemic

¹⁰ Art. I-7, *infra* note 12.

¹¹ The Treaty of Maastricht has changed the name of what was previously the EEC to the “European Community”.

¹² All references to the Constitution in this text relate to the revised text presented by the Conference of Representatives of the Governments of the Member States, Brussels, 29 October 2004, CIG 87/2/04 REV 2, and signed by the Heads of State and Government of the European Union on 29 October 2004 in Rome.

¹³ This is also the level of cooperation of traditional international organisations such as the UN.

¹⁴ For the distinction of the three levels of cooperation, see also Richard Bellamy, “Which Constitution for What Kind of Europe? Three Models of European Constitutionalism” (Paper for the CIDEL Workshop “Constitution-making and Democratic Legitimacy in the EU,” London, 12-13 November 2003), online: Constitutional Online Papers No. 03/03 <http://www.fedtrust.co.uk/uploads/constitution/03_03.pdf>.

¹⁵ Analysts have described this form of “hybrid democracy,” as we like to call it, with reference to Robert Dahl’s notion of “polyarchy” and his analysis of the implications of organisational pluralism for a political system; see Oliver Gerstenberg & Charles Sabel, “Directly Deliberative Polyarchy: An Institutional Ideal for Europe?” in Christian Joerges & Renaud Dehousse, eds., *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002) at 289, online: European Union Governance Papers <<http://www2.law.columbia.edu/sabel/EUGOVpapers.htm>>.

contradiction resulting from the fact that the EU aspires to be a union of states as well as of peoples.¹⁶

First and foremost, however, the future of the democratic project at the European level¹⁷ will be determined by whether a genuine European polity will emerge that is more than the sum total of the polities of the member states. Can democracy within the Union be realised in the absence of a supranational, pan-European polity? So far, during all the years of existence of the European Community and, later, the “pre-constitutional” EU (created by the Treaty of Maastricht and amended by the Treaty of Amsterdam), no socio-culturally homogenous political community—*δῆμος* (demos)—has emerged. Instead, a multitude of *δῆμοι* (demoi) has simultaneously existed in each of the member states. Will the quasi-polity of the EU eventually develop towards a pan-European political identity? Will the coming into force of the European Constitution eventually trigger a mutually reinforcing process in the course of which the “European citizen” will emerge? Is there indeed a cohesive European polity in the making? Or will the Constitution open up a genuine “third way” for Europe in the form of what has been called a European “demoi-cracy,”¹⁸ suggesting that the problem of a European polity can be solved on the basis of “unity in diversity” and beyond the dichotomy of nation-state and supranational entity (or federal state)? The problem of democratic citizenship in Europe¹⁹ is intrinsically linked to these questions.

Against this background, the basic question will be whether a form of “post-national” democracy will be able to provide legitimacy to Europe’s new constitutional system. Does the adaptation of the concept of democracy to the political-normative system of the EU indeed require the hybrid form of democracy as suggested earlier? Will a “redefinition of the democratic principle on the basis of the multinational and multicultural character of the ‘European people’”²⁰ be the solution to the democratic legitimacy problem that the EU faced prior to the adoption of the Constitution for Europe—or may still face in a unified constitutional framework? These are questions that have to be addressed if one intends to explore the prospects of transnational democracy in Europe.

II. THE PRACTICE OF DEMOCRACY IN THE MULTIDIMENSIONAL FRAMEWORK OF THE UNION’S INSTITUTIONS

As regards the imperatives of transnational democracy, the Constitution for Europe will have to be scrutinised in all those areas where genuine democracy has remained a *desideratum* during all the years of existence of the European Communities and the supranational entity proclaimed by the Treaty on European Union. This leads to a long list of questions; they relate, *inter alia*, to:

- the evolving European polity and democratic citizenship (democracy versus “demoi-cracy”?)
- the mechanisms of representative democracy in the framework of the European Constitution;

¹⁶ This systemic contradiction is also to be found in the UN. The Preamble of the UN Charter proclaims the establishment of the organisation in the name of “We the Peoples of the United Nations” while the organisation itself is one of sovereign states without any form of popular representation.

¹⁷ Whenever we speak of “Europe” or “European” in this text, the meaning relates to the political and constitutional framework of the EU.

¹⁸ Kalypso Nicolaïdis, *The New Constitution as European Demoi-cracy?*, The Federal Trust for Education and Research, Online Paper 38/03, December 2003, online: <www.fedtrust.co.uk/eu_constitution> .

¹⁹ On the notion of democratic citizenship, see Hans Köchler, “Decision-making Procedures of the European Institutions and Democratic Legitimacy. How Can Democratic Citizenship Be Exercised at Transnational Level?” in *Concepts of democratic citizenship* (Strasbourg: Council of Europe Publishing, 2000) at 147-165.

²⁰ Xenophon Contiades, *The Democratic Principle as an Organisational Basis of the European Union*, at 5, online: Inter-Disciplinary Net <<http://www.inter-disciplinary.net/AUD/contiades%20paper.pdf>> .

- the elements of direct (participatory) democracy and their “marginal” positioning in the overall context of decision-making;
- the separation of powers between the institutions of the Union in view of the requirements of the (international) rule of law;
- the organisation of legislative power and the European Parliament’s status as “imperfect legislature” (in view of the Parliament’s dependence upon the Commission for the initiation of legislative acts according to Art. I-26[2]);
- the unique form of “legislative power sharing” between the nominal legislative body (the European Parliament) and the body of representatives of the executive branches of the member states (the Council of Ministers);
- the “internal” system of checks and balances between the Council of Ministers and the European Parliament as organs of legislative power (in the cases where both jointly exercise the legislative function);
- the checks and balances between the legislative and executive functions;
- the “hybrid” form of legislative power resulting from the Council of Ministers jointly exercising legislative functions with the Parliament (as one of the rather complex and complicated features of the Union’s breed of “hybrid democracy”) and the eventual fusing of the function of legislative power with what is traditionally defined as executive power;
- the members of the European Commission exercising executive power while at the same time enjoying one of the classical privileges of legislative power, namely that of complete freedom from instructions (Art. I-26[7]), as another expression of the Union’s hybrid model of democracy;
- the refining of special majority rules (“qualified majority” in the form of “double majority”) for decisions of the European Council and the Council of Ministers (not of the Parliament) as a matter of democratic fairness in view of the Union’s supranational character (as distinct from the intergovernmental nature of the UN) (Art. I-25).

Apart from its mention of the “principle of participatory democracy”,²¹ a symbolic gesture which is commented on below, the European Constitution is exclusively oriented towards the principle of representative democracy. Article I-46 stipulates that the very “functioning of the Union shall be founded on representative democracy”. It is a rather unique feature of the Union’s form of hybrid democracy that, unlike at the national level, the notion of “democratic representation” is not only related to the citizens, but to collective entities, namely states. This European “innovation” of the doctrine of representation implies that the decisions of the two entities assembling the executive branches of the member states (the European Council of the Heads of State or Government; the Council of Ministers²²) fall under the category of “democratic representation”. According to Para. 2 of Art. I-46 which deals with the “principle of representative democracy”, “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments ...”, whereby both are “democratically accountable” either to their national parliaments or their citizens. Thus, democratic representation, in itself an indirect form of citizens’ participation,²³ is extended to an additional level of decision by proxy: member states, perceived as subjects, are being represented by their designated governmental functionaries at the Union level while the latter are supposed to represent their citizens’ interests in making decisions in the European institutions.

²¹ Art. I-47, *supra* note 12.

²² In the pre-constitutional framework: “Council of the European Union.”

²³ On the notion and democratic validity of representation, see the author’s analysis: “Die Repräsentationslehre: Zum Problem des Idealismus in der politischen Theorie” (*The Doctrine of Representation: The Problem of Idealism in Political Theory*) (in German) in Hans Köchler, *Philosophie—Recht—Politik: Abhandlungen zur politischen Philosophie und zur Rechtsphilosophie (Philosophy—Law—Politics: Papers on Political Philosophy and the Philosophy of Law)* (in German) (Vienna/New York: Springer-Verlag, 1985) at 27-45.

In addition to the affirmation of representative democracy as the cornerstone of political legitimacy at the level of the Union, Para. 3 of Art. I-46 states that every citizen “shall have the right to participate in the democratic life of the Union” and that decisions shall be taken “as openly and as closely as possible to the citizen”.²⁴ The operative meaning of political participation, however, is explained nowhere in the Constitution.

Because of the Constitution’s exclusive orientation towards representative democracy and the application of the notion of “representation” to both the European Parliament and the Council of Ministers, the quality of democratic decision-making will have to be examined not only in regard to whether the European Parliament is a genuine legislature or not, but also in view of the acting “in tandem” of the Parliament and the Council as agents of democratic representation. Thus, the imperatives of transnational democracy will have to be evaluated as to the consistency and viability of the decision-making procedures of both traditional legislative power (the Parliament) and traditional executive power (the Council of Ministers), jointly acting as the legislative branch of the EU.

According to the ordinary legislative procedure of the Union, legislative acts (for the adoption of “European laws” and “framework laws”) are carried out “jointly by the European Parliament and the Council” on the basis of proposals from the European Commission.²⁵ As set out in Art. III-396, the Commission, acting in a way similar to the functioning of the executive branch at the national level, submits a legislative proposal to the Parliament and the Council. The Parliament adopts a position on the proposal (“first reading”) following which this position is forwarded to the Council of Ministers which may adopt or reject it, eventually requiring a second reading and, should that not lead to the adoption of the law, a conciliation procedure, before a final third reading.²⁶ Thus, the role of the Council of Ministers is similar to that of the second chamber in a national legislature.

Apart from the ordinary legislative procedure, the Constitution provides for “special legislative procedures”. This introduces a kind of parallel legislative structure and, in certain cases, establishes *de facto* sovereign legislative power for the Council. This is a striking departure from the principle of linking an act of legislation, either directly or indirectly, to the will of the nominal legislative body, the European Parliament, and, thus, poses a special problem of democratic legitimacy. According to Art. I-34(2), in specific cases listed by the Constitution, laws may be adopted by the European Parliament with the participation of the Council (“European laws of the European Parliament”) or by the Council with the participation of the European Parliament (“European laws of the Council”). However, the balance of power, regarding these parallel mechanisms, is clearly tilted towards the Council of Ministers.²⁷ Not only are most, and particularly the more substantial, matters²⁸ to be decided under the special legislative procedure established for “European laws of the Council”, the “European laws of the European Parliament” always require the consent of the Council while the latter may, in certain cases, adopt laws after merely “consulting” the Parliament.

When adopting a European law on the basis of the special legislative procedure, the Council acts after either obtaining the consent of or “consulting” the European Parliament.

²⁴ This was one of the basic demands of the Laeken Declaration of the European Council of 15 December 2001. The Declaration identified bringing the Union “closer to its citizens” as one of the basic challenges the Union faces within its borders.

²⁵ Art. I-34[1], *supra* note 12.

²⁶ According to Art. I-34[1] of the Constitution, *supra* note 12, under the ordinary legislative procedure, both institutions are bound to reach an agreement: “If the two institutions cannot reach agreement on an act, it shall not be adopted”.

²⁷ On the power constellation as it has evolved (in the pre-constitutional framework) within the Council of the European Union (in the new Constitution: Council of Ministers), see the empirical study by Torsten J. Selck & Michael Kaeding, “Divergent Interests and Different Success Rates: France, Germany, Italy, and the United Kingdom in EU Legislative Negotiations” (2004) 2 *French Politics* 81.

²⁸ See, for instance, the provisions on decisions on budgetary matters.

In certain cases, unanimous action by the Council is required, in other cases the Council acts by a qualified majority the democratic implications of which will be analysed below. The matters to be decided on the basis of this procedure are spread over the entire Constitution and relate to the most essential competences such as the Union's budget.

In marked distinction from the legislative competences of the Council of Ministers, the legislative authority of the European Parliament, insofar as it acts under the special legislative procedure, is exclusively tied to the consent of the Council. Apart from the aspect of relative authority (the adoption of a law being conditional upon the Council's consent), only three cases to be decided through a "European law of the European Parliament" can be found in the constitution, relating to relatively unimportant issues: Art. III-330(2) subjects regulations on the duties of Parliament Members to this special procedure; Art. III-333 deals with provisions governing the exercise of the right of inquiry; and Art. III-335 provides for rules governing the duties of the European Ombudsman. In decisions on all three cases, the Parliament acts "after obtaining the consent of the Council".

In view of the unequal balance of power between the European Parliament and the Council of Ministers in the exercise of the legislative function described above, the question as to the status of the Parliament as a genuine legislative body is to be posed. Under the ordinary legislative procedure, the Parliament has to act jointly with the Council,²⁹ which is nothing unusual in procedural terms since national parliaments are in most cases bound to obtaining the consent of a second chamber for a law coming into force. It is, however, unusual in material terms of the separation of powers between the legislative and the executive branches since, in the case of the Union, the group of representatives of the member states' executive branches (the Council of Ministers)³⁰ acts as second chamber. As regards the *tópos* of the "democratic deficit" at the Union level, another aspect must not be overlooked—unlike national parliaments, the European Parliament, under the ordinary legislative procedure, cannot initiate any laws by itself. According to Art. I-26(2), "Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Constitution provides otherwise ..." As we have documented above, the cases calling for a special legislative procedure whereby the Parliament acts on its own initiative are small in number and only symbolic in importance.

Apart from those procedural arrangements limiting the Parliament's competence, some of the vital issues of the Union such as the common foreign and security policy,³¹ as well as issues of defence ("solidarity clause"), are exclusively handled by the representatives of the executive branches of the member states, the European Council³² and the Council of Ministers, in the form of "European decisions" as "non-legislative acts".³³ This also applies to eventual joint preventive action against a terrorist threat on the basis of the solidarity clause.³⁴ The European Parliament's role is that of a mere observer. It shall either be regularly "consulted", as in the case of the foreign and security policy³⁵ or "informed", as in the case of implementation of the solidarity clause.³⁶

²⁹ Where "the two institutions cannot reach agreement on an act, it shall not be adopted", states Art. I-34[1], *supra* note 12.

³⁰ Art. I-23(2) of the Constitution, *supra* note 12, states: "The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote".

³¹ Arts. I-40 and I-41, *supra* note 12.

³² Art. I-21(1) of the Constitution, *supra* note 12, expressly states that the European Council, consisting of the heads of state or government of the member states plus its President and the President of the European Commission, "shall not exercise legislative functions".

³³ According to the provisions of Art. I-35, *supra* note 12.

³⁴ Art. I-43[1][a], *supra* note 12.

³⁵ Arts. I-40[8] and I-41[8], *supra* note 12.

³⁶ Art. III-329[2], *supra* note 12.

The rather weak position of the Parliament in this constitutional set-up is arguably also due to the EU not being a federal state, but a union of sovereign states “on which the Member States confer competences to attain objectives they have in common”.³⁷ The limited competence of the Parliament within the Union’s “internal” division of powers aside, the EU’s competences are first and foremost limited “externally”: the Constitution states as one of the “fundamental principles” that the “limits of Union competences are governed by the principle of conferral”.³⁸ Although the law adopted by the institutions of the Union “shall have primacy over the law of the Member States”,³⁹ the related supranational structure is not that of a “United States of Europe” and, for that reason, may not be considered equivalent to a sovereign state as a subject of international law—in spite of the Union possessing legal personality.⁴⁰ This is also evidenced in the member states’ right of withdrawal from the Union,⁴¹ an option that would not be available should the Union be modelled according to the paradigm of the nation-state. In addition, unlike what is argued by some critics of the constitutional project,⁴² a “Constitution” established by an intergovernmental treaty does not *eo ipso* create a (federal) state. In view of these facts, the fears voiced by those concerned about the independence and sovereignty of the state members of the Union appear unfounded.⁴³

The essence of the supranational structure of the EU lies in the delegation of specific competences agreed upon among the member states to institutions of the Union. The question as to the democratic legitimacy of laws passed and decisions made within the framework of the Union must not be directed to the Parliament alone. That representative institution of first order must not be compared on a one-to-one basis to national legislatures; the question has to be asked more precisely in regard to the decision-making mechanisms between the Parliament and the Council, and also within the Council itself, taking into consideration that the group of representatives of the governments of the member states at the ministerial level acts either as a second legislative chamber⁴⁴ or as a surrogate legislature,⁴⁵ particularly in all sensitive areas that touch upon the national interests of the member states.

Because of the role played by the Council as an organ of the Union’s legislature, the decision-making rules within that body are of special relevance when it comes to the issue of democratic legitimacy at the level of the Union. A representation of member states on the basis of the principle of “one state, one vote” (as in the case of the UN General Assembly) would definitely not be compatible with democratic equality, which is rooted in the collective will of the citizens forming the state as a sovereign entity. A carefully balanced system of “weighted voting”, taking into consideration the different sizes of the populations of the member states, will be indispensable to democratic legitimacy within the framework of the Constitution for Europe. Only such a procedure will be able, at least to a certain extent, to “neutralise” the potential negative effects of a policy of the national interest that will be

³⁷ Art. I-1, *supra* note 12.

³⁸ Art. I-11[1], *supra* note 12.

³⁹ Art. I-6, *supra* note 12.

⁴⁰ Art. I-7, *supra* note 12. The fact that Art. I-8 (on the symbols of the Union) provides for a flag, an anthem and a motto *etc.* has no real significance as to the question of whether or not the Union is a state. The UN also uses such symbols. The mention of the euro as the “currency of the Union” might have more weight in that regard; however, its implicit classification as a “symbol” of the Union (through the listing under Art. I-8) makes any argument in favour of this being a sign of the state-like character of the Union less convincing.

⁴¹ See Art. I-60 of the Constitution, *supra* note 12, on the voluntary withdrawal from the Union.

⁴² See, for instance, Dieter Grimm, “Ohne Volk keine Verfassung: Eine demokratische EU braucht bessere Institutionen, aber kein Grundgesetz” (*Without the people there is no Constitution: A democratic EU needs better institutions, not a basic law*) (in German) *Die Zeit* (18 March 1999) online: *Die Zeit* <http://www.zeit.de/archiv/1999/12/199912.verfassung_.xml>.

⁴³ For a critique of the Constitution as a project of a European federal state, see Martin Howe QC, *A Constitution for Europe: A Legal Assessment of the Draft Treaty* (Great Bookham/Surrey (UK): Congress for Democracy, 2003).

⁴⁴ In the case of the ordinary legislative procedure (Art. III-396, *supra* note 12).

⁴⁵ In the case of the special legislative procedure (“European law of the Council”).

pursued almost unavoidably by the executive branch of each state. This consideration may be seen as the rationale behind the requirement of a “qualified majority” for the decisions of the Council of Ministers according to Art. I-25.⁴⁶ (For certain administrative and special legislative decisions such as the one referred to in Art. I-54[3] on the Union’s own resources, the Constitution requires unanimity among the Council members.)

The provisions of Art. I-25 on a kind of “double majority” within the Council of Ministers, applying also to the European Council which does not exercise a legislative function, are meant to balance the sovereign equality of the member states against the equality of the citizens. As a general rule, the double majority (“qualified majority”) required for a decision to be adopted by the Council is defined as “at least 55% of the members of the Council, comprising at least fifteen of them⁴⁷ and representing Member States comprising at least 65% of the population of the Union.” This rather complicated weighted voting formula (which is definitely far more complex and more democratic, for that matter, than the one for the Security Council which provides special voting rights for certain member states)⁴⁸ is further modified in cases “when the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs” where the consent of 72% of the member states is required.⁴⁹ Seen in their entirety, those regulations are aimed at reconciling the interests of the nation-state members with the rights of the Union’s citizens, who are the primary source of legitimacy of the decisions adopted by the institutions of the EU—insofar as the Constitution claims to reflect “the will of the citizens and States of Europe to build a common future”.⁵⁰ The juxtaposition of “States” and “citizens” in the proclamation of the establishment of the Union again highlights the hybrid character of the democratic model at the European level referred to earlier.

Because of this state of affairs it is imperative that transnational democracy⁵¹ be defined in the sense of transcending traditional models of state representation insofar as those are based on the fiction of the “sovereign equality” of states. What is at stake at the pan-European and beyond the nation-state level is the sovereign equality (in the sense of equal rights) of the citizens making up those states and the balancing of their sovereign will against the national interests of those very states. The notion of European citizenship according to which each citizen of a member state shall enjoy inalienable rights not only as a citizen of the respective state, but as citizen of the Union,⁵² directly results from this understanding of popular sovereignty as basis of state sovereignty.⁵³

⁴⁶ The need for such “balancing arrangements” is evidenced in the empirical study quoted earlier on the “relative success rates” of major member states, and in particular the United Kingdom, in preserving their interests in the legislative policymaking process of the Union. See Torsten J. Selck & Michael Kaeding, “Divergent Interests and Different Success Rates: France, Germany, Italy, and the United Kingdom in EU Legislative Negotiations”, *supra* note 27.

⁴⁷ This provision is intended to deal with the actual membership status of the Union (as of 2005, the 55% requirement would mean 14 member states).

⁴⁸ On the lack of democratic legitimacy of Security Council resolutions, see the author’s analysis in *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations* (Vienna: International Progress Organization, 1991).

⁴⁹ Art. I-25[2], *supra* note 12.

⁵⁰ Art. I-1[1], *supra* note 12.

⁵¹ The term “transnational” is used here to describe the application of democracy outside the framework of the sovereign nation-state in general (and not merely as a sub-category of the organisation of international relations as set out in Chapter I above).

⁵² Para. 1, Art. I-10, *supra* note 12 states that: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it”. On the notion of democratic citizenship in the wider European context, see the author’s paper “Decision-making Procedures of the European Institutions and Democratic Legitimacy: How Can Democratic Citizenship Be Exercised at Transnational Level?” *supra* note 5.

⁵³ On the status of the citizen as subject of international law, see the author’s treatise, *The Principles of International Law and Human Rights: The Compatibility of Two Normative Systems* (Vienna: International Progress Organization, 1981).

For the sake of bringing the Union closer to the people, the novel feature of representative democracy within the framework of the EU—namely an elaborate system of checks and balances within the Council and between the Council and the Parliament, with the center of gravity shifting in the direction of the Council— would have to be complemented by mechanisms of participatory democracy such as a pan-European referendum on essential matters of the Union, including amendments to the Constitution. As in many states, and some member states of the Union too, the inclusion of this instrument (particularly the compulsory referendum on constitutional matters) in the Constitution has remained a desideratum and will remain so for the foreseeable future. In order to be realistic, however, one should not expect a higher democratic standard for the organisation of decisions within a union of sovereign states than for that within the domestic systems of the majority of its constituent parts, the member states; this is a general maxim of international organisation.

The Constitution for Europe juxtaposes the “principles” of representative and participatory democracy,⁵⁴ while “founding” the very functioning of the Union on representative democracy alone. It assigns participatory democracy mainly to the area of lobbying and public relations in the traditional sense. Article I-47 states that the institutions of the Union shall give the citizens and N.G.Os (“representative associations”) the opportunity to make known their views, and obliges those institutions to maintain an open dialogue “with representative associations and civil society”. Apart from information and consultation, the Constitution provides only for one rudimentary form of citizen’s participation, namely a “citizens’ initiative” for “inviting” the European Commission to submit a legislative proposal in cases where citizens consider “that a legal act of the Union is required for the purpose of implementing the Constitution”.⁵⁵ Such a demand may be submitted to the European Commission if it gets the support of at least one million citizens from a “significant number of Member States”.⁵⁶ Too much excitement has been expressed about this “European referendum”⁵⁷ which, in fact, does not provide for any legislative authority of the citizens in the sense of direct democracy, but merely defines a right to request the Commission to make proposals for certain acts of legislation. In the strict sense of the term, this provision is not one of participatory democracy. It might well be perceived as a kind of placebo⁵⁸ handed out to European citizens’ groups that have desperately lobbied for the insertion of provisions of direct democracy into the European Constitution.⁵⁹

As regards the exercise of “participatory” democracy, it is noteworthy that the Constitution places citizens and “representative associations” on an equal level. However, “civil society” should not be represented by transnational lobbies and economic interest groups. The ambiguity of Art. I-47 of the Constitution in regard to the nature of civil society (namely its constituent elements) makes the need for genuine procedures of direct democracy even more obvious. The importance of such measures is further underlined by the predominant,

⁵⁴ Arts. I-46 and I-47, *supra* note 12.

⁵⁵ Art. I-47[4], *supra* note 12.

⁵⁶ The organisational details are not set out in the Constitution. The minimum number of Member States from which the supporting citizens must come and other administrative procedures of the citizens’ initiative are to be decided through European laws.

⁵⁷ See, for instance, Michael Efler, *A Rollercoaster Ride towards Transnational Democracy: Transnational Democracy in the Making* (Amsterdam: Initiative & Referendum Institute Europe, 2003), online: <<http://www.iri-europe.org/documents/michaelefler.pdf>>.

⁵⁸ See the evaluation of the “People’s Movement” in “A Brief Critique of the Provisions of the Proposed Constitution for Europe”, online: People’s Movement <<http://www.peoplesmovement.org/doc5.html>>. “The provision is ... practically useless but by mirroring the initiation process for a popular referendum, gives the illusion of democracy.”

⁵⁹ For an overall evaluation of the provisions related to what the Constitution calls “participatory democracy”, see Bruno Kaufmann & Theo Schiller, *Initiative for Europe into new democratic territory*. (Working paper on the Options and Limits of Art. 47.4 in the EU Constitution—the European Citizens’ Initiative process for the Initiative & Referendum Institute Europe, October 2004), online: <<http://www.iri-europe.org>>.

though unavoidable, role of national executive power in the shaping of European legislation (according to the mechanisms described earlier). Only the possibility, in principle, of direct citizens' participation in the legislative processes (without the interference of lobbies and interest groups) could provide the democratic leverage that is necessary to make the European project succeed in the long term. Thus, one of the imperatives of transnational democracy in what is so far the strictly representative context of the EU would be the insertion of genuine forms of participatory democracy into the Constitution, such as a pan-European referendum, measures that are complementary to, not in lieu of, the representative models of decision-making.

One important step in that direction could have been a direct-democratic procedure on the "meta-level", namely the presentation of the Constitution for ratification in a pan-European referendum, in addition to the acts of ratification at the level of the member states. This would have provided added legitimacy to the future Constitution and strengthened the rule of law at the Union level (in so far as it could have provided, irrespective of the different domestic regulations, a unified procedure for the coming into force of the Constitution). Under the prevailing circumstances, the Constitution will eventually come into force through the application of "double standards" of democracy. While in certain member states the Constitution will be subjected to a popular referendum, in the majority of the states the ratification will be decided by representative bodies,⁶⁰ something which is indicative not only of the different democratic traditions within the member states, but also of an essential, possibly irreconcilable, difference regarding the requirements of constitutional legitimacy, *i.e.* the relationship between democracy and the rule of law in general.

The additional provisions about the "democratic life of the Union" (Part I, Title VI of the Constitution) will not completely dispel the concerns about a "democratic deficit" in the EU. Art. I-46(4) explicitly acknowledges the role of "political parties at European level" as contributing to forming a European political awareness and "expressing the will of the citizens of the Union".⁶¹ So far, this indispensable element of a "European democratic space" (which would finally allow the European polity to transcend, in the exercise of the representative function at least, the confines of the nation-state) has remained a desideratum. As regards the other provisions listed under Title VI, neither the establishment of the institution of a European Ombudsman⁶² nor the Constitution's recognition of the role of "social partners" and the commitment to "social dialogue"⁶³ will enable the citizens of the Union to participate in the decision-making processes. Virtually all measures dealt with under the heading "democratic life of the Union" (with the exception of the provisions of Art. I-46[1] and [2]) relate merely to information and consultation.

Similarly, in our assessment, the provisions of the *Protocol on the application of the principles of subsidiarity and proportionality* (annexed to the Treaty establishing a Constitution for Europe)⁶⁴ do not constitute a real "democratic corrective" from the part of the national parliaments as organs of representative democracy of the member states. While

⁶⁰ In some countries, a referendum (of consultative nature in most cases) will be held in addition to the parliamentary vote.

⁶¹ On the implications of this issue for the emergence of a European polity and the cohesion of the supranational structures of the Union, see Amie Kreppel, *The European Parliament and Supranational Party System: A Study in Institutional Development* (Cambridge/New York: Cambridge University Press, 2002).

⁶² Art. I-49, *supra* note 12. On the role of the Ombudsman within the new constitutional framework of the Union, see P. Nikiforos Diamandouros, "The European Ombudsman and the European Constitution" (Speech by the European Ombudsman, P. Nikiforos Diamandouros, to the 34th Session of the Asser Colloquium on European Law on "The EU Constitution: The Best Way Forward?" at The Hague, October 2004), online: <<http://www.euro-ombudsman.eu.int/speeches/en/2004-10-15.htm>>.

⁶³ Art. I-48, *supra* note 12.

⁶⁴ *Protocols and Annexes I and II annexed to the Treaty establishing a Constitution for Europe*. Conference of the Representatives of the Governments of the Member States. Brussels, 13 October 2004, Doc. CIG8704 ADD 1 REV 1, Protocol 2.

stating that the member states are bound “to ensure that decisions are taken as closely as possible to the citizens of the Union”, the Protocol only provides for a right of national parliaments to demand a review of “draft European legislative acts” from the Commission or other European bodies and institutions⁶⁵ if those are perceived to breach the principle of subsidiarity. This right may be exercised under the condition that “reasoned opinions” demanding such a review represent at least one third (in certain cases, one fourth) of the votes fictitiously allocated to the national parliaments⁶⁶ of the member states.⁶⁷ Apart from the rather complicated procedures (which appear not to be really compatible with the idea of “closeness” to the citizens), this measure, like many others in the constitutional framework of the Union, is not one of effective checks and balances according to the imperatives of transnational democracy; it only obliges the respective European bodies and institutions to give reasons for the decision they have taken regarding the request for review of a legislative proposal—while they have complete freedom to decide “to maintain, amend or withdraw the draft”.⁶⁸ Similar to the provisions on participatory democracy, those on respect for the principle of subsidiarity essentially relate to the areas of information and consultation, not to actual legislative authority. This is also true for the provisions of the *Protocol on the role of national parliaments in the European Union* (Protocol 1). Thus, no effective remedy to a use of Union authority which is detrimental to the competences of national, regional or local institutions—in cases where a Union objective might be better achieved by measures at national level⁶⁹—seems to be available within the Union’s framework of representative democracy.

III. THE NORMATIVE FOUNDATIONS OF THE CONSTITUTION AND THE PARADIGMATIC IMPORTANCE OF TRANSNATIONAL DEMOCRACY WITHIN THE UNION FOR GLOBAL AFFAIRS

In view of these procedural mechanisms which are meant to ensure the overall acceptance of the Union by its citizens as well as the democratic accountability and transparency of the decisions taken by its institutions, and because of the difficulties—doctrinal as well as organisational—faced by the institutions in conforming to the Union’s democratic ideal, the commitment to a system of values shared by all member states and, first and foremost, supported by the citizens of the Union, is of paramount importance. In spite of the shortcomings and normative inconsistencies described earlier, such a commitment to a “common democratic doctrine” may serve as a guideline for the advancement of democracy within the Union.

At least within the secular civilisation of the West, commitment to universal values has become an indispensable element of cohesion for any political organisation. The Constitution identifies these values as “respect for human dignity, freedom, democracy, equality,

⁶⁵ Art. 3, *supra* note 12.

⁶⁶ It is noteworthy, in regard to the importance of the principle of subsidiarity as well as federalism in the framework of the constitution, that each national parliament is given the same weight. Two votes are fictitiously allocated to each legislature, allowing for the splitting of the votes in the case of bicameral systems (one vote being allocated to each chamber).

⁶⁷ Art. 7, *supra* note 12: “Where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph [each national legislature shall have two votes/H.K.], the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the basis of Article III-264 of the Constitution on the area of freedom, security and justice.”

⁶⁸ Art. 7, Para. 4, *supra* note 12.

⁶⁹ See the provisions of Art. 5 of Protocol 2. Accordingly, Art. I-11(3) of the Constitution provides that “[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States ..., but can rather ... be better achieved at Union level”.

the rule of law, and respect for human rights”, and declares them to be common in any society that is characterised by pluralism, tolerance, and non-discrimination.⁷⁰ At a time when religion *per se*—or more specifically, religious confession—has ceased to be the common denominator of European society, the universal value of democracy, in connection with other liberal values, has become the source of political legitimacy and the rule of law within the constitutional framework of the Union.⁷¹ It is with this fact in mind that the Preamble to the Constitution evokes the “cultural, religious and humanist inheritance of Europe” without reference to a particular religion.

Within the secular political space of the EU, genuine transnational democracy (*i.e.*, democracy transcending the limits of the sovereign state) has gained paramount importance for (a) ensuring the legitimacy of the Union and the acts of its institutions in the eyes of its citizens; (b) enabling efficient co-ordination of policies among the member states along the lines of clearly defined rules of decision-making (including rules of weighted voting); (c) guaranteeing a fundamental openness of the Union vis-à-vis other transnational structures and civilisational realms within our multi-faceted global community.

By avoiding the potentially divisive issue of religion, the Constitution for Europe has made an indirect contribution to the dialogue among civilisations that by now has become a basic requirement of peace not only at the global level,⁷² but, in view of the multicultural realities of our era, within the Union itself.⁷³ A universal and credible commitment to democracy, whether representative or participatory, at the European level negates *eo ipso* the propagation of an exclusive ideology or religion as the basis of the Constitution’s validity. Any such move would be divisive internally as well as externally, jeopardising not only the cohesion of the very Union of sovereign states, but also complicating the Union’s relations with non-member states and other transnational organisations.

The Union’s ideal of democracy, as outlined in the Preamble and Part I of the Constitution, requires an inclusive approach based on the norms of peaceful co-existence. While the constitutional system has to be neutral in matters of religion or *Weltanschauung*, it must be explicit as regards the values of human dignity and the respect for human rights. Those principles have the character of so-called “meta-values” (or meta-norms), values which are the condition for the enjoyment of the basic individual rights and freedoms by every citizen according to his/her specific convictions and value system, including religious confession.⁷⁴

In view of the universality of its principles and of its avoiding the exclusivism of religion in ideological and the nation-state in legal-political terms, it is to be hoped that, in our era of globalisation, the Constitution for Europe will define a proper “transnational space”, thus eventually establishing a new paradigm of peaceful co-existence among states and peoples alike. In spite of the enormous complexity of its provisions and decision-making rules (due to the diverging views and conflicting interests among the member states), the Constitution

⁷⁰ Art. I-2, *supra* note 12.

⁷¹ A comparison could be made to the constitutional development that led to the formation of the United States of America where religious pluralism had brought about a pluralistic model of society, based on the acceptance of social and cultural diversity. See, for instance, Sergio Fabbrini, “A European Looks at Dahl’s Democracy” (2001) 42:2 Public Affairs Report, online: <http://www.igs.berkeley.edu/publications/par/summer2001/dahl_demo.html>.

⁷² See Hans Köchler, “The Dialogue of Civilizations and the Future of World Order” (Address on the occasion of the 43rd Foundation Day of Mindanao State University, Marawi City, Autonomous Region of Muslim Mindanao, Philippines, September 2004).

⁷³ On the implications of the multicultural social reality for the modern state in general, see the author’s analysis in “The Concept of the Nation and the Question of Nationalism: The Traditional ‘Nation-state’ versus a Multicultural ‘Community State’” in Michael Dunn & Tiziano Bonazzi, eds., *Citizenship and Rights in Multicultural Societies* (Keele: Keele University Press, 1995) at 44-51.

⁷⁴ On the relationship between a system of meta-norms and the values of first order, see the author’s paper “Cultural-philosophical Aspects of International Cooperation” (Lecture held before the Royal Scientific Society, Amman-Jordan, 1974) (Vienna: International Progress Organization, 1978).

has set the framework for efficient political organisation beyond the confines of the nation-state—a task in which the UN, hostage of the power balance of an earlier era, has inevitably failed.⁷⁵

Whether the Constitution's procedural regulations can finally be reconciled with the basic goal of making the Union more democratic will have to remain an open question at least for the time being. The "normative compromises" over the notion of democracy as the guiding constitutional principle have obviously been dictated by the goals of efficiency and of balancing the national interests among the sovereign member states. The quotation from Thucydides II, 37 that headed the Preamble to the Draft Treaty, highlighting democracy (in distinction to oligarchy) as the basic principle of the Union:⁷⁶

Χρόμεθα γὰρ πολιτεία... καὶ ὄνομα μὲν διὰ τὸ μὴ ἐς ὀλίγους ἀλλ' ἐς πλείονας οἰκεῖν δημοκρατία κέκληται.

has been removed from the text adopted by the Intergovernmental Conference. This omission may be a hint as to the compromises that had to be made in the interest of consensus among the representatives of member states and that do not necessarily reflect the will of the polity of those states. Those involved in European *realpolitik* may simply have shied away from the far-reaching implications of the dictum.

But there are also reasons for a more optimistic assessment. Due to the elaborate regulations ensuring the separation of powers in the Union's set-up of intergovernmental, transnational and supranational mechanisms and institutions—in an entirely novel fashion, when compared to other forms of international organisation—the Constitution for Europe may eventually strengthen the rule of law in the unique normative framework of a union of states that goes well beyond traditional intergovernmental arrangements.

Thus, the Constitution for Europe may set a precedent for the democratisation of international affairs in general and provide a fresh impetus for democratic reform of the UN. What is feasible, in terms of democracy, separation of powers and power-sharing between the centre and its constituent parts in a Union of twenty five states may, in principle, also be achievable for a global organisation; the imperatives of transnational democracy are essentially the same. For instance, the European Constitution's provisions for weighted voting in the Council of Ministers may provide the terms of reference for a reform of the voting procedure in the UN Security Council.⁷⁷ The Constitution, albeit within the regional framework of Europe, may well be seen as providing the paradigmatic organisational framework for a new form of supranational organisation in our post-national era.⁷⁸ In terms of political doctrine, the Constitution's peculiar form of "hybrid democracy" which we have diagnosed in

⁷⁵ On this obvious predicament of the UN, see Hans Köchler, *The United Nations and International Democracy: The Quest for UN Reform*, *supra* note 3. See also Hans Köchler, "The Dialectic of Power and Law: The United Nations and the Future of World Order" (Address to I.P.O. Roundtable on the United Nations and International Power Politics, June 2004).

⁷⁶ "Our constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number." *Draft Treaty establishing a Constitution for Europe. Adopted by consensus by the European Convention on 13 June and 10 July 2003*. The European Convention, Secretariat. Brussels, 18 July 2003. Doc. CONV 850/03, Preamble, p. 3.

⁷⁷ For details, see the author's proposal in *The United Nations and International Democracy: The Quest for UN Reform*, *supra* note 3. See also the European Public Debate on "The European Union and the Reform of the United Nations" organized by the Union of European Federalists in December 2004. International Progress Organization Information Service, News Release, P/RE/18965c-is, "The European Union and the Reform of the United Nations" (3 December 2004).

⁷⁸ See José María Beneyto, "What Is the European Constitution? The Declaration on the Future of the Union and Setting Up of a Common Constitutional Order" (Public Debate on the Future of Europe, European Commission, Secretariat General, Ref. 17, October 2001), online: EU <<http://www.europa.eu.int/futurum>> and Xenophon Contiades, *The Democratic Principle as an Organisational Basis of the European Union*, online: Inter-Disciplinary Net <<http://www.inter-disciplinary.net/AUD/contiades%20paper.pdf>>.

reference to the “organisational pluralism” and multidimensionality of the Union may bring about, to quote a recent essay on EU governance, “a radical re-definition of our democratic and constitutional ideals”.⁷⁹

The Laeken Declaration of 2001⁸⁰ has set a challenging task for a new constitution, namely making the Union “more democratic, more transparent and more efficient” at the same time. Some may consider reconciling democratic transparency with increased efficiency in a complex framework of cooperation among nation-states, united under common principles, but not federated under one central authority, as tantamount to the quadrature of the circle. According to Valéry Giscard d’Estaing’s optimistic assessment as Chairman of the European Convention, that mission has been accomplished in so far as the draft Constitution “strikes the necessary balance between peoples, between States new and old, between institutions and between dream and reality”.⁸¹ For the philosophical observer of international politics, however, only the future will tell whether the project of the Constitution for Europe is a mission impossible.

⁷⁹ Oliver Gerstenberg & Charles Sabel, “Directly Deliberative Polyarchy: An Institutional Ideal for Europe?”, *supra* note 15, at 5.

⁸⁰ *The Future of the European Union—Laeken Declaration*. Adopted by the European Council in Laeken, 15 December 2001.

⁸¹ *Rome Declaration*. V. Giscard d’Estaing, Chairman of the European Convention. Rome, 18 July 2003, Chapter III at 5.

