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Making Abbé Sieyès and Jürgen Habermas Meet

Constitution-Making in the Supranational Setting

By
Malte Beyer

A previous version of this paper was presented at the 2004 Maastricht Forum on "European Integration: Making the Constitution Work" which was held at EIPA on 19 November 2004

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Table of Contents

Pages

1. Abbé Sieyès and the *pouvoir constituant* xx

2. Sovereignty in the Age of Interdependence xx

3. Voluntarism vs. Universalism xx
Voluntarism vs. universalism in practice: Why deliberation is better than the social contract xx
Excursus: Constitution-making in Canada xx

4. A Deliberative *pouvoir constituant*? xx

5 Institutionalising Deliberation xx

6. Do We Already Have a European Demos? Is it in the making? Do we need one? xx

7. *Le pouvoir constituant doublement mixte* xx

8. A constitutional convention? xx
Accountability xx
A constitutional moment? xx

9. Coherence in a multilevel constitutional world xx

10. What prospects for the future? xx

Bibliography xx

This presentation will proceed by presenting a virtual meeting of two unlikely companions. Both of them have influenced the European constitutional tradition and discourse to a great extent. In some respects they represent extremes. In others they might agree. This paper will try to highlight some of the important points of discussion and try to see how we can conceptualize the Convention process in the light of these. It will try to build some common ground between the concepts of these writers.

The underlying trouble of European constitutional discourse is that it still lacks a common language. Its points of reference are different. Abbé Sieyès and Jürgen Habermas shall for the purpose of this presentation represent two important strands of discussion. It will begin with an exposé of the argument of Abbé Sieyès, still the most important reference point for member states' constitutional doctrine. It will try to separate his ideas of a pouvoir constituant from the nation as the only possible subject of this power. It will then contrast this doctrine as being voluntarist with the Kantian approach of universalism as a foundation of the constitution and describe the developments Habermas has added to that. With an excursus to Canadian constitutional development it will demonstrate why deliberative constitution-making is necessary on normative ground for the situation of the EU. Then it will discuss how the constitution-making group shall be determined. It will argue for the conception of the demos as a function of a deliberative procedure itself. In the light of this it will try to explain the representation of EU citizens in the Convention on the Future of Europe. Some comments on the question of a constitutional moment will follow and it will argue for a visible political process. Eventually, Sieyès and Habermas will meet in the composite constitution proposed by Pernice.

In response to the topic of this conference I would like to add some remarks on the future development of the Convention method.

1. Abbé Sieyès and the *pouvoir constituant*

Abbé Sieyès contribution to continental constitutional thought, the concept of a *pouvoir constituant* is today for some a mere "myth", for others the essential source of all legitimate law. The former would argue with some valid scepticism that the people (who is claimed to be the *pouvoir constituant* under almost all western democratic constitutions) has actually not exerted too much influence in constitution-making processes dominated by political elites. References in the constitutional text are then not much more than an ex post facto blessing to the whole edifice.

For the latter the concept of pouvoir constituant represents an authoritative measure to determine the "right" author of the constitution of the polity. A great number will look for a group using the phrase "We the people" signifying that it has been adopted in the traditional sense of liberal democracy. In the absence of the classical method of electing a constitutional convention and/ or ratifying the constitutional document in a referendum, they will argue that the constitution cannot be attributed to a pouvoir constituant and therefore is no constitution in the strict sense of the term[1]. None of these writers on the other hand claims that the European Parliament – having at least in theory direct legitimacy through the popular vote – could function as a constituent assembly. Not even the Parliament itself claimed that role, neither in the 1984 nor in the 1993 initiatives. The contributions continue to argue that it takes more than just a common assembly for a group of people to become the constitution-making demos of the new polity: A communicative space where the group can debate on issues, intermediate structures of political parties and associations and points of reference for a democratic discourse such as a common history, shared experiences[2].

1. Cf. e.g. T. Schmitz, Le peuple européen et son rôle lors d'un acte constituant dans l'Union européenne, Rev. du droit public 2003, pp. 1709 et seq., at p. 1732.
2. Most prominently from the German scholarship: D. Grimm, Does Europe Need a Constitution? European Law Journal 1 (1995), pp. 282 et seq.; P. Graf Kielmansegg, Läßt sich die Europäische Gemeinschaft demokratisch verfassen?, Europäische Rundschau 22 (1994), pp. 23 et seq.; but cf. also: O. Beaud, Propos sceptiques sur la légitimité d'un référendum européen ou plaidoyer pour plus de réalisme constitutionnel, in : A. Auer/ J.-F. Flauss (Eds.), Le référendum européen, Bruxelles 1997, pp. 125 et seq.

2. Sovereignty in the Age of Interdependence

Sovereignty, the ultimate power of decision or the competence to decide of the state of emergency, is on the defensive in discussions on the EU. Is sovereignty still with the member states, is it shared or do we live in a *fédération* (Bund) where the locus of sovereignty between the two levels of government is unclear[3]. What do we make of the Permanent International Court of Justice's ruling in the Wimbledon case[4] arguing that sovereignty implies also the capacity to limit one's sovereignty by contractual agreement? What is the purpose of relying on sovereignty when the Westphalian order is being dismantled, when nation states chose to gain from interdependence? What is the range of action of popular sovereignty when either the IMF or the EU step in to change the course of national policies?

Let me suggest that in light of these considerations claims for sovereignty need to be replaced by claims for legitimacy. The question on where the ultimate source of power of decision lies may produce more relevant responses when we rephrase it like this: Where is the legitimate source of decision-making?

When we discuss the relevance of Sieyès' conception of popular sovereignty we may rephrase it as a legitimacy question: Who is the legitimate author of law for a particular community?[5]

3. On the concept of fédération cf.: O. Beaud, op. cit., at p. 162 et seq. with further references.
4. France, Italy, Japan and the UK v. Germany [Wimbledon case] PCIJ Reports Sér. A, No. 1 (1923), p. 15, 25.
5. Cf. V. Constantinesco, L'Union europénne: par le droit vers la politique?, in : G. Duprat, L'Union Européenne. Droit, politique, démocratie, pp. 175-189, at p.188.

3. Voluntarism vs. Universalism

The constitutional doctrine that can be associated with Sieyès as a process of "politicization of law" was put into contrast with a process of "juridification of politics" (reflecting constitutional development in Germany and the UK) and then defined the constitution as a coupling of the spheres of politics and law[6]. When we wonder how exactly to couple these two spheres we can contrast Sieyès with Habermas. This demonstrates the different approaches for determining the legitimacy of law.

The theories of Abbé Sieyès and J. Habermas could not be more different. Sieyès offers a voluntaristic-decisionist account of law-making, setting the will of the nation absolute. In particular there is no procedural constraint to the expression of the will of the nation. In the famous words: "Il suffit que la nation veuille"[7]. The fact that there is a representative constitutional assembly does not contradict this. For the supreme will of the nation cannot be impeded by the decisions of this assembly. This shares parts of Rousseaus theory on the social contract which itself shares – notwithstanding all the other conceptual differences – the underlying rational choice situation of the social contract of Thomas Hobbes and John Locke. They all share the assumption that individuals will want to leave the state of nature based on their own choice.

Habermas on the other hand follows the universalistic Kantian tradition[8]. He follows Kant in arguing for a fundamental difference between a contract under civil law and the social contract. Whereas the former is concluded "to some determined end", the social contract is "an end in itself"[9]. The social contract is only an idea and the state of nature is to be left following an idea of reason not the individual will. For the acceptance of freedom of every individual requires the presence of what he calls public law. Public law therefore is a logical necessity of the acceptance of freedom. Habermas develops on that and argues that Hobbes' social contract cannot explain how private individuals, living in the state of nature and thinking in the perspective of the first-person singular, would be able to compare their situation with the one after the conclusion of the social contract for this has two requirements. First the individuals would need to "take the perspective of the other" in order to understand the meaning of the principle of reciprocity and thus the perspective of the second persons. Secondly they would need to assume a "social perspective of the first-person plural" in order to determine whether the situation of reciprocity of coercion is in the interest of all[10].

He also concurs with Kant on the justification of norms and gives it a communicative procedural turn. According to Kant just norms are defined by the fact that all possibly affected persons reasonably *could* have agreed to it. Habermas locates this reason in the communicative action of citizens as participants in rational discourses[11]. The focus shifts from the source or author of the law towards a procedure that permits to test legitimacy of a particular norm at any time.

This procedure allows for a circular conception of law and politics that does see the law not just as a *product* of the supreme will of some group of people, but as a constitutive element of the political proc-

6. Cf. C. Möllers, The politics of law and the law of politics, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez (Eds.), Developing a Constitution for Europe, pp. 129 et seq.
7. E. Sieyès, Qu'est-ce que le Tiers Etat?, 1789, ch. 5.
8. For his critique of the social contract cf.: Habermas, Between Facts and Norms, pp. 89 et seq.; cf. on this also: M. La Torre, The Law Beneath Rights' Feet, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez (Eds.), The Chartering of Europe, pp. 71 et seq.
9. I. Kant, Über den Gemeinspruch, Kap. II.
10. J. Habermas, Between Facts and Norms, p. 93 et seq.
11. J. Habermas, Between Facts and Norms, p.107.

ess. Law and politics are mutually constitutive. The structural coupling of law and politics thus allows an escape from the dilemma pronounced by Hegel[12] in an early critique of the French Revolution. He asserted that the conception of Sieyès of a pouvoir constituant completely unbound by any law (except the law of nature) cannot explain how an "atomistic crowd" would be capable of producing a constitutional text without already disposing of a minimum form of constitution. While he denounced this as a logical circle, the circular conception of law and politics of J. Habermas[13] argues in favour of just that. This circular conception has got the advantage that neither the idea of popular sovereignty nor the idea of human rights have to take precedence over the other but are mutually constitutive.

Voluntarism vs. universalism in practice: Why deliberation is better than the social contract

Roland Bieber may be considered as one of the first persons arguing for discursive structures for the EU constitutional process. In 1995 he wrote about the shortcomings of the two-level method of article 48 TEU requiring an IGC and national ratification for treaty changes. Neither an IGC nor the national ratification procedures would produce what is necessary for constitution-making. Constitution-making, he wrote, requires discourse over different concepts. The IGC in this context lacks legitimacy (he likens it to the Conference elaborating the UN convention on the law of the seas). The national ratification procedures in the respective parliaments could not be considered as a European discourse either as there is no conversation between the member states' parliaments[14]. Therefore he favoured a Union assembly composed by members of national parliaments and the European Parliament.

When these ideas were put into practice by creating a Body to elaborate a Charter of Fundamental Rights, this sparked a whole range of contributions on the subject of deliberative procedures[15]. They are based on the arguing – bargaining dichotomy developed by J. Elster[16]. Many of them put the Convention process in the context of EU constitutional development through IGCs and compare the two mechanisms.

Several reasons are brought forward to support the preference of the deliberative procedure over a situation of bargaining. First there are arguments related to the efficiency of the deliberative procedure. It is better designed to get all the participants in the decision-making process informed, it can reduce complexity in a choice situation and in can produce better outcomes than just the lowest common denominator. Second as to legitimacy, it aims at a rationally motivated mutual understanding (Verständigung) instead of a result (Ergebnis). This provides for an improved acceptance of norms being a result of this process.

Thirdly, the inherent feature of discursive procedures which is that participants in a discourses setting will only be successful if they present reasons which can be regarded as good reasons not only for themselves, but also for others[17]. This forces the participants to include the other in their own thinking. This inclusion of the other appears to be an important element in building the political community the constitution is designed to establish. Instead of relying on accidentally overlapping preferences, the discursive procedure aims at shaping the preferences of participants in a way to allow for a gradual development of a joint stock of beliefs and values. It promotes the transformation of identities and allegiances

12. Grundlinien der Philosophie des Rechts, §273, 1821.
13. J. Habermas, Between Facts and Norms, p. 145; cf. also: O. Gerstenberg, Bürgerrechte und deliberative Demokratie, at p. 22; M. La Torre, The Law Beneath Rights' Feet, op.cit., at p. 86.
14. R. Bieber, Steigerungsform der Europäischen Union: Eine Europäische Verfassung, in: J. Ipsen (Ed.), Verfassungsrecht im Wandel, pp. 291 et seq., at p. 297.
15. Cf. e.g.: Papers presented at CIDEL conference « Deliberative constitutional politics in the EU" 19 -22 June 2003, esp. by D. Göler, Between deliberation and bargaining: The influence of the institutional setting of the convention on the mode of interaction; P. Magnette, Deliberation or bargaining? Coping with constitutional conflicts in the Convention on the Future of Europe, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez (Eds.), Developing a Constitution for Europe, pp. 207 et seq.; J. Schönlau, New Values for Europe? Deliberation, Compromise, and Coercion in Drafting the Preamble to the EU Charter of Fundamental Rights, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez, The Chartering of Europe, pp. 112 et seq.
16. J. Elster, Argumenter et négocier dans deux assemblées constituantes, Rev. Française de Science Politique 44 (1994), pp. 187 et seq. ; J. Elster, Forces and Mechanisms in the Constitution-Making Process, Duke University Law Journal 45 (1995), pp. 364 et seq.
17. J. Cohen, Deliberation and Deliberative Democracy, in: A. Hamlin/ P. Pettit (Eds.), The Good Polity, pp. 17 et seq., at p. 24.

which is necessary for the development of a new political community. Deliberation can thus produce not only the "glue of the integration process"[18] but also the glue of the new political community.

Deliberative procedures aim at overcoming the dichotomy between liberal and republican thinking[19]. They are neither built upon individualized actors that are mere "dependent variables in power processes" operating "blindly" towards simple aggregations of the individual wills rather than at consciously formed decisions, nor do they need a citizenry that shares a "culturally established background consensus". Rather it "reckons with the higher-level intersubjectivity of processes of reaching understanding" in a "decentered society"[20]. It seeks a conscious and rational formation of wills within communicative processes that do not rely on an embodiment of popular sovereignty in a people but can still be considered as rational results of conscious will-formation.

Excursus: Constitution-making in Canada

Without stretching concepts too far, the Canadian constitutional process of the last 20 years may give some evidence on how the two conceptions of liberalism and republicanism clash. The situation very briefly is one of multiple segmentations and visions of what Canada is. Are not all Canadians equal? Is Canada made up by two nations (French-speaking Québec and English-speaking "Rest of Canada")? What do we do with linguistic minorities living in the other part? Do the so-called First Nations present a nation on equal footing with the aforementioned ones? Isn't Canada rather a federal state made up of ten provinces and there can be only equality among those ten? What about the core-periphery conflict between Ottawa and the Western provinces?[21] I will only focus on one issue: How does reconcile the pan-Canadian ambitions of a Charter of Fundamental Rights that demands constitutional equality for all Canadians with the demands of Québec for recognition as a distinct society and thus permitting a legislation that gives preference to a linguistic group over linguistic equality? We can see the former as an expression of political liberalism, placing individual rights before the political process. The latter approach defends a rather republican vision of society, the preservation of a particular common culture and way of life necessary for a truly democratic process.

These two approaches clashed in the constitutional referenda of 1992. Referenda are regarded by many federalists in Europe, among them J. Habermas[22], to have a catalytic effect for the establishment of a transnational sphere of communication. In the light of the Canadian experience they are thought rather to have undone the beneficial effects of discursive processes aimed at creating mutual understanding. They can produce a divisive dynamic when citizens get the feeling that they go beyond a point of constitutional no return or fall into a trap[23].

J. Tully has analysed the clash of the two visions of society as an effect of what he calls "diversity blindness"[24]. Each side looks at the problem only from its respective point of view. What would be necessary is a "federal ability", that is "the ability to imagine the federation from the other points of view"[25]. We have seen above how this is an inherent feature of discursive procedures. Chambers argues that the five thematic theme conferences held in Canada in 1991 would be the best setting allowing fostering this "federal ability"[26]. These theme conferences which can be likened to Fishkin's deliberative polls[27] were

18. E. O. Eriksen/ J. E. Fossum, Conclusion. Legitimation through deliberation, in: E. O. Eriksen/ J. E. Fossum, Democracy in the European Union, pp. 256 et seq., at p. 257.
19. Habermas, Between Facts and Norms, pp. 295 et seq.
20. Habermas, Between Facts and Norms, pp. 299, 301.
21. Cf. an account of the Canadian situation by S. Chambers, Contract or Conversation? Theoretical lessons from the Canadian Constitutional Crisis, Politics and Society 26 (1998), pp. 143 et seq.
22. Cf. J. Habermas, Why Europe needs a constitution, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez (Eds.), Developing a Constitution for Europe, pp. 19 et seq., at p. 28.
23. S. Chambers, op. cit., at159 et seq.
24. J. Tully, Diversity's Gambit Declined, in: C. Cook (Ed.), Constitutional predicament. Canada after the Referendum of 1992, pp. 149 et seq., at p. 157.
25. J. Tully, op. cit., at p. 184.
26. S. Chambers, op. cit., at p. 158.
27. Cf. on this: J. S. Fishkin, The Voice of the People, esp. pp. 161 et seq.; A. Weale, Democratic Legitimacy and the Constitution of Europe, in: R. Bellamy/ V. Bufacchi/ D. Castiglione (Eds.), Democracy and Constitutional Culture, pp. 81 et seq. at p. 92, favours them for the constitutional process of the EU.

televised debates on issues of Canadian constitutionalism organized at different places in the country between citizens but also representatives of NGOs, different groups of the population (aboriginal groups, the disabled) or academics.

The difference of the European situation is obviously the absence of a linguistic and cultural duality that heightens tensions. As the EU is made up by a greater number of linguistic communities and national cultures it is unlikely that such a pointed clash will happen. Also Europe is not as integrated as a political association to allow drawing quick conclusions from the Canadian example[28]. Maybe not yet, but the lines of conflict between those arguing for a pan-European egalitarianism based on the ideas of German-style federalism and those favouring intergovernmental civic republicanism are apparent. We could witness a this debate most recently on the status and scope of the Charter of Fundamental Rights, on the reference to a religious heritage in the Charter Preamble, but also earlier on the introduction of art. 6 § 3 TEU (respect for national identities) or on the specific provisions maintaining a shared competence of the European Community and the member states when negotiating international agreements covering among other things trade in cultural and audiovisual services (art. 133 § 6 Subpara. 2 TEC)[29]. These examples demonstrate that lines of conflict in the EU can be approached to the ones in Canada.

28. J. Shaw, Process and Constitutional Discourses in the European Union, Journal of Law and Society 27 (2000), pp. 4 et seq., at p. 24.
29. Cf. on this also the recent contribution by J. E. Fossum, Still a Union of deep diversity, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez, Developing a Constitution for Europe, pp. 226 et seq.

4. A Deliberative *pouvoir constituant*?

As is well known, Abbé Sieyès claimed that the pouvoir constituant rests with the "nation". While he defines the "nation" at some point as being the Third Estate, as a body of associates living under a common law and being represented by a common assembly or as the sum of all taxpayers and thus as a collective of persons[30], it can be argued that the concept of "nation" is first and foremost an abstract one. This responded to the need to overcome the usurpation of sovereignty by the *person* of the absolutist monarch. In order to do this, the person of the monarch could not simply be replaced by a people conceived of as one body. An impersonal concept of "nation" is better placed to explaining the uniting of the principles of monarchy and democratic participation in the constitution of 1791 or the provision for an aristocratic electoral system in the 1795 constitution[31].

In the light of this we can see the demand for a direct participation of the people through elections or referenda in the constitution-making process as a demand following from a specific conception of democracy and being the result of a historic struggle[32]. While at the time of Sieyès it could be claimed that the French nation was only legitimately found in the group of those contributing to the state revenues (i.e. the Third Estate) excluding a minority on these grounds from active participation in the political process, this need not necessarily be true in other contexts.

The argument favouring a compelling connection between the idea of the pouvoir constituant and a conception of democracy that sees a "people" as its subject faces the critique that its underlying homogeneous conception of the people is in contradiction with democracy as a form of government based on plurality and diversity. Furthermore such a conception cannot explain constitution-making that establishes the people as a demos only in the moment when it is formally addressed by the constitution. On a more abstract level it could be claimed that the determination of the subject of the pouvoir constituant is a question for the legitimacy.

Many authors have used the concept of a pouvoir constituant in their discussions about the state of the constitution of the EU. Some argue that as Sieyès' teachings have shaped the "democratic European context" and is common to most member states, a constitution on the EU level can only exist "in its own right" if a social contract could be constructed somehow. This social contract could be found in the national democratic ratification procedures within the member states[33].

Others adhere to the famous (infamous for some) "Herren" doctrine of the German Constitutional Court[34], or they either see the pouvoir constituant with the member states' governments or argue that the EU received its alleged constitution by some third party[35]. The last proposition would then conclude that as the treaties are not an act of self-legislation of the citizens of the polity it could not be a constitution.

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30. Cf. E. Sieyès, Qu'est-ce que le Tiers Etat.
31. Cf. R. Carré de Malberg, Contribution à la théorie générale de l'Etat, tome 2ème, at §§330, 331, 333.
32. Cf. e.g. T. Schmitz, Le peuple européen et son rôle lors d'un acte constituant dans l'Union européenne, Rev. du droit public 2003, pp. 1709 et seq., at p. 1732 .
33. D. Thym, European Constitutional Theory and the Post-Nice Process, in: M. Andenas/ John Usher (Eds.), The Treaty of Nice and Beyond, Oxford/ Portland 2003, pp. 147 et seq.; drawing on I. Pernice, Europäisches und nationales Verfassungsrecht, in: Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (60) 2001, pp. 148 et seq., at p. 166.
34. As is meanwhile well known, the German Constitutional Court deciding on the constitutionality of the Treaty of Maastricht pronounced that the member states where "Herren der Verträge" or Masters of the Treaties as in law they are the instance having authority to change them.
35. D. Grimm, Does Europe Need a Constitution?, loc. cit.

If we accept that popular sovereignty did mean universal participation of the population in determining government only at some later point and that it was the result of a democratic struggle and went along with more or less voluntary processes of nation-building, the doctrine of Sieyès boils down to the acceptance of some higher instance unbound by any higher law except the law of nature. It teaches us to separate two powers: One framing the constitution and one (or rather several) governing the polity. The former cannot be bound by any positive law and is only subject to natural law.

Having argued that the subject of Sieyès' pouvoir constituant could be seen as an abstract concept rather than the embodiment of the people, the question for sovereignty being turned into one of legitimacy, liberal voluntarism being contrasted with deliberative universalism: Are we now being able to detach the legitimizing concept of a pouvoir constituant from a radically input-oriented democratic procedure[36]? Why could the informed will of the future nation only be expressed through democratic procedures of voting and electing representatives? Isn't the principle of democratic equality in the sense of "One Man One Vote" rather the result of successful constitution-making and not fully realized in many federal states?

In any plural society, but especially in the segmented society of the EU, a deliberative procedure presents itself as an alternative rooted in the principles of autonomy and self-legislation without requiring an already constituted community. Alleviating differences between the constituent parts, it is better designed to foster a sense of community.

36. Cf. C. Möllers, Verfassunggebende Gewalt – Verfassung – Konstitutionalisierung, in: A. v. Bogdandy (Ed.), Europäisches Verfassungsrecht, pp. 1, at p. 33, believes that this is not possible.

5. Institutionalising Deliberation

Whereas some writers believe that deliberative democracy will function *as* instead of just *within* a network of associations and organizations[37], J. Habermas[38] argues for the institutionalization of discourse in a parliamentary assembly. This would be the adequate response to the necessity to deliberate face-to-face in a large political community. The procedural questions would then need to be regulated in the light of the discourse principle.

The drafters setting up the exact modes of procedure of the two EU Conventions were at least no strangers to Habermas' theories[39], but did probably go well beyond the imagination of J. Habermas himself. Notwithstanding all the criticism that could be brought forward against other features, a few features helped the development of a deliberative setting that are normally not used in parliamentary assemblies: An alphabetic seating order to prevent the formation of fixed blocks, a lengthy period of "listening" designed to construct the lifeworld necessary for true discourse[40], strict equality of access to the assembly due to the absence of fixed formations[41], the absence of voting and equality of access to the working groups.

37. S. Benhabib, Toward a Deliberative Model of Democratic Legitimacy, in: S. Benhabib, Democracy and Difference, pp. 67 et seq., at p. 73.
38. J. Habermas, Between Facts and Norms, p. 170.
39. J. P. Jacqué in an interview with the author.
40. On the concept of the lifeworld : J. Habermas, Theorie des kommunikativen Handelns, Bd. II, pp. 182 et seq. ; J. Habermas, Between Facts and Norms, chapter 1.2.3; on the problems of applying this concept to international relations : T. Risse, Let's Argue! Communicative Action in World Politics, International Organization 54 (2000), pp. 1 et seq.
41. Although later in the exercise, speaking time could be accumulated, but in a strictly mathematical addition of the individual 2-3 minutes.

6. Do We Already Have a European Demos? Is it in the making? Do we need one?

We all have witnessed that debate. It boils down to the question of whether the egg or the chicken was first. I do believe the reality is socially constructed. Nation, people, demos, the individual are not culturally or even organically given, but creatures of man and more and more often woman.

In law the demos is the number of citizens living under a common (democratic) constitution. This demos is a legal concept.

The dilemma we are facing is to reconcile two statements: (1) A demos is only created by the constitution[42]. (2) The constitution has to be made in respect with the principles of individual autonomy and self-legislation, i.e. in some way democratic. They seem logically irreconcilable. The constructive problem has led to the early critique by Hegel who favoured an evolutive constitution[43].

Discussing the constitutional legacy of "1789", Jürgen Habermas[44] suggested a de-substantialized demos. We should look for popular sovereignty in the "subjectless forms of communication that regulate the flow of discursive opinion- and will-formation". Popular sovereignty is "intersubjectively dissolved" and has "withdrawn into democratic procedures". While this concept moves the emphasis from an embodiment in organic terms towards a procedural understanding of what popular sovereignty actually means, it builds upon a given society which is not necessarily linked to a nation state. It does require "democratic institutions of opinion- and will-formation" where the communicative power – emanating from public spheres – takes shape. These democratic institutions are those of the well-established democratic nation-state. This has led to a critique wondering where the normative surplus is in a theory that (allegedly) accommodates itself very well with this existing institutional framework[45]. It has also been criticized that this limits the explanatory value of this theory to the existing nation-state[46]. This follows from his approach that the exact function of the discourse principle is not to generate new norms but to test those existing norms that claim factual acceptance for their validity. Accordingly Habermas reconstructs the formation of states and nations historically[47]. He accepts the founding elite of a nation elaborating the initial constitution as given.

This appears to be conceptually not very satisfying when the question needs to be addressed, who should legitimately participate in the foundational moment. In order to determine normatively who should participate in the establishment of a new polity, we cannot only rely on the empirical findings on how developed the public spheres are. For the development of public spheres is – just as much as the demos – precondition and result of the establishment of a polity.

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42. This would be the position of Sieyès, defining the nation at one point as a "corps d'associés vivant sous une loi commune et représenté par la même législature.", Qu'est-ce que le Tiers Etat, ch. 1er ; J. Habermas, Remarks on Dieter Grimm's 'Does Europe Need a Constitution ?', European Law Journal 1 (1995), pp. 303 et seq., at p. 306.
43. Cf. P. Pasquino, Sieyes et l'invention de la constitution en France, p. 65.
44. J. Habermas, Popular Sovereignty as Procedure, in: J. Habermas, Between Facts and Norms, pp. 463 et seq., at p. 486.
45. R. Schmalz-Bruns, Reflexive Demokratie, pp. 102-120, at p. 115.
46. A. Verhoeven, The European Union in Search of a Democratic and Constitutional Theory, pp. 46 et seq.; but see on this: J. Habermas, Between Facts and Norms, p. 298.
47. J. Habermas, Inklusion – Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie, in: Die Einbeziehung des Anderen, pp. 154 et seq.

The relationship between the two statements above therefore is a circular one[48]. This responds not only to a logical necessity.

Autonomy and self-legislation need not only be expressed in a decision-making procedure that respects these two underlying principles of legitimacy valid at least in the Western world. Autonomy and self-legislation need also be respected when determining the legitimate group within which the individual is to live as a citizen. Each individual needs to accept the other citizens as equal in law not only, but especially when majority rule is to apply. But also when unanimity shall prevail in decision-making, the question arises how many veto players should sit around the table. Special group rights and federal guarantees to sub-entities also need to be accepted by the others.

How do we go about this on the micro-level? How do we conceptualise the determination of the (personal) scope of the political community?

Following J. Locke and T. Hobbes, the establishment of the polity can be understood as a contract between every individual. The actual procedure necessary to conclude this contract can then be conceived of as a system of referenda on the (territorial or personal) scope of the new polity[49]. The majority in already constituted sub-groups (e.g. existing nation-states) shall prevail. These referenda would need to include conditional answers allowing for differentiated responses (e.g.: Belgium shall only accede to EU, if Luxembourg does also, but not if Iceland does etc.). It is improbable to see such a system working. On a theoretical level, this conception suffers from the downsides of private preference formation. The procedure does not conceive of the process leading up to the decision and does not organize the preference formation openly and democratically. It suffers from the same conceptual disadvantages as the decision-making procedure discussed above.

I will suggest in the following to understand the European demos as the function of a deliberative procedure.

Arguing for a deliberative conception of the modes of the formation of communities takes up the arguments brought forward in favour of deliberative decision-making. Both the issue of a particular constitutional arrangement and the personal scope of the political community are issues of legitimacy. Questions of legitimacy are best settled by a procedure which can itself claim legitimacy. The discourse theory provides such a procedure. It can determine how the legal recognition of citizens among each other is legitimate. Discourse theory is rooted in a basic human condition which is the use of communication[50].

Giving reasons why some individual or pre-constituted group shall become part of the polity may include the usual sociological, religious and ethnic criteria. Any reason can be introduced into the discourse on the scope of the community.

A simple example is the admission of individuals into a larger community. Some countries call this process “naturalization”. When the conditions of awarding citizenship are discussed we are deliberating on the (personal) scope of the community. In these debates the in-group considers who should be part of it, considering the demand from outside.

In this sense the democratic nation is not only Renans daily plebiscite, which allows for every individual to decide for him- or herself to be part of the demos, but also a deliberation on the inclusion or exclusion of others.

The starting point for the deliberative process need be a theoretical universal approach. Theoretically every individual citizen of the world and every organized group, living within its proper nation-state or not, may participate. Obviously clusters would form on a geographical basis, but not necessarily only on that. The fringes would be a matter of contest and more intensive debate, like we see in the discussion on the accession of Turkey. The demand for constitutional referenda in some member states on the admission of Turkey demonstrates the procedural turn the question on the definition of the geographical scope can take. The question whether the Turkish population shall be part of the political community, develops from an empirical fact-finding mission on the ethno-cultural links between Turkey and the Rest

48. I understand J. Habermas in a recent contribution supporting this circular conception: Ist die Herausbildung einer europäischen Identität nötig, und ist sie möglich?, in: ders., Der gespaltene Westen, pp. 68 et seq., at p. 81.
49. T. Pogge, How to Create Supranational Institutions Democratically, in: A. Føllesdal/ P. Koslowski (Eds.), Democracy and the European Union, pp. 160 et seq.; cf. the similar approach taken by H. Abromeit, Volkssouveränität in komplexen Gesellschaften, in: H. Brunkhorst/ P. Niesen (Eds.), Das Recht der Republik, pp. 17 et seq.
50. J. Habermas, Erläuterungen zur Diskursethik, pp. 194 et seq.

of Europe into one of democratic procedures. Both deepening and widening of the EU are issues that can no longer be settled taking a permissive consensus within member state's populations for granted. They have to be democratized. As we have seen, however, do referenda compare unfavourably to deliberative procedures. They are prone to stabilize divisions rather than fostering rational dialogue. When there is no debate between those wanting to accede the polity and those already inside the club within a forum that includes both sides, and debates are rather lead by members and leaders within one polity how are the arguments brought forward by the outsiders to be properly considered? Is the result of a referendum campaign led by, say, French politicians on the question of Turkish accession without that one single Turk was ever heard up to democratic standards? The constraints of the national forum become evident. Therefore the appropriate forum needs to include both sides: Those who are already members of the political community and those who want to become part of it.

The Convention on the Future of the EU did not debate the geographical scope of the Union, although arguments were raised by its Chairman in the French press. It may be considered a downside and a missed opportunity that the issue was not raised in the plenary for discussion. Still it provides a good example how an inclusive approach may operate. Although accession negotiation were not opened with Turkey during the Convention period, nor was scheduled to be so, there were members coming from this country in the assembly. Even though this was a political decision on pragmatic grounds it makes also sense on the conceptual level.

We may conclude that the presence of a people is not a prerequisite of a constitutional process. We can rely on a procedure that will tell us who is to be involved. In that sense constitution-making conceptually becomes a two-level affair. On the first level the legitimate group for constitution-making will be determined. Deliberation on the constitution begins. The demos of the EU is not more than the function of the deliberative procedure.

7. *Le pouvoir constituant doublement mixte*

The EU is in the favourable position of not having to build the community from scratch. When selecting the participants of the deliberative process it can largely rely on existing structures.

Vlad Constantinesco has argued some years ago that the pouvoir constituant of the EU is necessarily "doublement mixte, mi-national, mi-communautaire et mi-intergouvernemental, mi-parlementaire". Conditions would need to be found to allow for its expression[51].

The Convention looks like a perfect response to this argument with its four component parts. But how can we conceptualize a multiple representation of each European citizen? Could not every individual citizen claim to be represented in any of the four parts?

For a starter, we need to support the views expressed by J. H. H. Weiler on the multiple demoi including the important difference he mentions regarding the motivation for allegiance[52]. European citizens can at the same time be citizen of the member state and European citizens. At least the citizens of the 15 member states at the time of the beginning of the Convention process were already made subject of a common legal order through market freedoms and Union citizenship. For the acceding member states, Bulgaria, Romania and Turkey, the representation was in this sense "simplement mixte", as they were "only" represented by two members of parliament and on representative of the government.

According to this distinction an assembly of members of the European and national parliaments would suffice to represent the two identities of EU citizens[53]. If we are not willing to accept that the presence of representatives of national governments and the European Commission[54] was just the pragmatic result of European negotiations, but are trying to find a conceptual explanation for it, we may wonder why government representatives should be present alongside members of parliaments. I would like to discuss this in the light of the doctrine of the double legitimacy of the Union. According to that frequently used doctrine, the EU is not only a union of states but also a union of citizens[55]. Its legitimacy flows from these two sources. German lawyers can see here a Hegelian line of argument that glorifies "the State" as some distinct entity, distinct from the citizens that live within it. According to their critique, there can be no distinction between the state as an entity and the citizens. They do in fact constitute this state and the state would have no existence without them[56]. The state is just one form of organizing human life. Following this argument the notion of double legitimacy does not make much sense. The state does not represent anything additional. I would like to challenge this view and argue that the state is nothing but the constituted citizenry. (Almost) Every citizen has a national identity and a certain number of shared beliefs and values produced by mechanisms of nation-building. The government acting in external relations as a non-partisan body can represent this national identity of citizens[57].

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51. V. Constantinesco, L'Union européenne: par le droit vers la politique?, op.cit., at p.186.
52. J. H.H. Weiler, European Neoconstitutionalism in Search of Foundations for the European Constitutional Order, Political Studies XLIV (1996), pp. 517 et seq., at p. 526.
53. Which was in fact one of the modes of composition discussed and favoured e.g. by the French government.
54. The inclusion of the latter can apparently be attributed to the diplomatic skills of the Commission's representative in the COREPER, cf. F. Deloche-Gaudez, The Convention on the Charter of Fundamental Rights: a Method for the Future?, p. 8.
55. C. Closa builds his argument for explaining the representativeness of the Convention around this duality: C. Closa, The Convention method and the transformation of EU constitutional politics, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez (Eds.), Developing a Constition for Europe, pp. 183 et seq., at p. 189.
56. I. Pernice, Europäisches und nationales Verfassungsrecht, op cit., 162 et seq.
57. cf. also: A. Peters, Elemente einer Theorie der Verfassung Europas, p. 566.

For a German lawyer it is therefore more than just semantics when the duality of citizens and states is maintained in the treaty texts (art. I-1 Constitutional Treaty) and in scientific discourse. It would be favourable e.g. to replace the formula "Reflecting the will of citizens and states…" by something like the following: "Reflecting the will of the citizens, acting in the capacity as citizens of the EU as well as citizens of their state…"

The Commission on the other hand is an institution designed to represent the "general interest of the Community" (art. 213 § 2 TEC)[58].

This multiple representation means multiple points of access to the deliberative forum, but also multiple locks and filters for input into the procedure. Beyond a clear division of competences between member states and the Union as layed down as a basis for conceptualizing the need for four components, the fact that all Convention members are political animals assures multiple representation of in some cases overlapping political needs. Thus different representatives assure an adequate debate on a great number of issues.

58. This is reflected in the different majority requirements in art. 205 § 2 TEC.

8. A constitutional convention?

The distinction between a pouvoir constituant and the pouvoirs constitués argues for a separation of the institutions of the polity and one representative institution elaborating the institutional design. While this is an expression of Sieyès' doctrine of the completely unbound will of the nation, this distinction may make sense also for other reasons.

There is a strand called the "constitutional processualism" critique in a recent contribution by N. Walker[59]. The idea is about a certain relativism towards constitutional documents and specific moments in time when a polity consolidates its constitution into a limited number of written documents. For the EU context this could be regarded for a long while as making a virtue out of necessity: One could argue for the constitutional quality of the EU treaties without being able to identify a "constitutional moment".

The distinction between ordinary politics and constitutional politics is not understood to be the result of different processes, the constitutional process being one of reasoned argumentation among citizens to arrive at a consensus on principles of justice, the former being characterised as a bargain between sectional interest[60]. Such a distinction could be questioned on empirical grounds. My intent is to make a normative statement and ask: Should the constitutional process be different conceptually as to participation, organization etc.? Should it be made visibly distinct?

Deliberative theory does not stress the hierarchy of norms too much. As no legitimate law can be conceived of as pre-political, not even fundamental rights and the political process may not be circumscribed by a constitution anxious of majority rule, the function of the constitution is to lay down the provisions for deliberative procedures. It has to provide for "the demanding communicative presuppositions of political arenas that do not coincide with the institutionalized will-formation of parliamentary bodies, but rather include the political public sphere as well as its cultural context and social basis"[61]. The constitution being thus determined primarily functional, the constitution may include fundamental rights, just that they are not excluded from the political process.

If it does not emphasize the hierarchy of norms, even less discourse theory provides for the arenas elaborating the basic constitutional text which it takes as given. As we have seen, in a segmented polity-in-the-making a deliberative character of the constitutional process is particularly compelling. But does this process need to be separated from the ordinary legislative process? Firstly, it is clear that the network of organizations and associations within which the institutionalized process is to take place; the public sphere-in-the-making will be the same as in the ordinary process. Secondly, on the abstract level institutionalized deliberation at the core of this network in the still to be founded polity can take place between the various national and – as e.g. in the case of the European Parliament or the Court of Justice – partly centralized institutions".

Looking at the legislative mechanism of the EU, however, we see a highly complex machine. On EU level alone there are several institutions and bodies involved. All these institutions and bodies are highly fragmented ones. Various committees of either the Council, the Parliament or the Committee of the Regions and Economic and Social Committee contribute to the legislative procedure. Expert knowl-

59. N. Walker, After the Constitutional Moment, in: I. Pernice/ M. Poiares Maduro (Eds.), A Constitution for the European Union, pp. 23 et seq. at p. 29.
60. This distinction is the basis for the contribution by R. Bellamy and J. Schönlau, The Normality of Constitutional Politics: an Analysis of the Drafting of the EU Charter of Fundamental Rights, ConWEB No. 6/2003, S. 2; referring to B. Ackerman's distinction between normal politics and higher lawmaking, We the People, 1991.
61. J. Habermas, Between Facts and Norms, p. 274 et seq.

edge becomes involved through consultations. The Council is dominated by emissaries from the national capitals. For all the deliberative capacities of the Council and the Parliament of their own, how would a constitutional discourse function under these conditions? There is no definite preference for small assemblies in deliberative thinking[62]. Still, it is preferable for it to happen within one assembly of a reasonable size rather than having a conversation between various institutions just on grounds of efficiency. While the legislative process requires a lot of detailed discussion on the possible effects of certain measures in a large number of different fields and therefore a more complex system of different institutions is inevitable, the number of items on the constitutional agenda is more limited and less technical: Values, purpose of the polity, institutional design, and fundamental rights.

This responds also to the need for the development of mutual trust between the participants in the discourse. A lifeworld needs to be constructed between the participants who for the moment do not live in a common political community.

It follows that one assembly for the debate of constitutional affairs is preferably and should be distinct from the other institutions.

Another reason is visibility of the process. The necessity of visibility in constitutional affairs has been recognized explicitly by the Cologne European Council when it called for the drafting of a Charter of Fundamental rights. It stated that the purpose of this Charter would be to make the relevance of fundamental rights "more visible to the Union's citizens"[63]. No one seriously doubted in 1999 that the EU was bound in its actions by a set of fundamental rights rooted in the general principles of law of the EU and to be found by the Court of Justice by comparative analysis of national rights documents and the European Charter of Human Rights. The purpose was thus not to acknowledge new rights, but rather to raise public awareness for the existing rights on the side of the citizen.

Beyond the issue of visibility it has already been said that the Convention on the Charter of Fundamental rights marks a "political" turn in the predominantly judicial process of constitutionalisation the EU has undergone. The EU has now experienced a body formed by the political will of member states governments on demand from the EP, academia and civil society to shape the constitutional foundations of the Union[64].

It is not difficult to find arguments challenging the success of the Convention process on this count. If only 30 percent of EU citizens respond in the affirmative to the question if they have never heard of the Convention and knowledge on the functioning and competences is rather poor[65].

On the other hand: If almost 900 documents were posted on the Convention's website from organisations ranging from the Orthodox Patriarchate of Moscow to the German members of armed forces of the anti-Hitler coalition, organized citizenry[66] participated to a considerable extent. At this point it may be helpful to judge EU developments on fair terms without demanding more popular involvement than nation states' democracies could deliver.

If one does not want to overcharge the citizen in a republican sense with the task of following the current affairs every day one has to find an institutional arrangement for those fundamental debates that require particular attention.

Accountability

Accountability does not quite fit with the classic doctrine of the constituent power. The pouvoir constituant may materialize in a representative assembly, but the members of a constitutional convention are not representatives in the usual sense. They are not subject to re-election and therefore there is no means for disciplining them[67].

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62. J. Elster, Deliberation and Constitution Making, in: J. Elster (Ed.), Deliberative Democracy, pp. 97-102, pp. 107 et seq.
63. European Council, Decision on Drawing Up a Charter of Fundamental Rights of the European Union, Annex IV to the Conclusions of the Cologne Summit; cf. J. Schönlau, New Values for Europe, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez, The Chartering of Europe, p. 112 et seq. at p.115.
64. M. Poiares Maduro, The Double Constitutional Life of the Charter of Fundamental Rights, in: E. O. Eriksen/ J. E. Fossum/ A. J. Menéndez (Eds.), The Chartering of Europe, pp. 199 et seq. at p. 206.
65. Standard Eurobarometer EB 59, Spring 2003, pp. 69, 84.
66. Being aware that many of the organisations were not NGOs, but academic and religious institutions or sub-state entities.

A purist version of traditional constitutional doctrine could argue that the Convention on the future of the EU was not a constitutional convention, because its members were not elected by the people for this task at all. This critique can easily be refuted by looking at current EU treaty provisions conferring those institutions that sent members to the Convention some role in the treaty revision process. Under article 48 TEU national governments are represented in the IGC[68], national parliaments have to ratify any treaty change into national law and the European Parliament and the European Commission are consulted. Under a more hidden provision of treaty change, article 49 TEU providing for modalities of accession to the Union, the Parliament is required to give its assent. As accession does also include treaty modifications, the Parliament plays some role in the revision of the existing treaties. We can conclude from this that no member of the Convention was completely alien to the constitutional processes of the Union. Only a very restrictive view could argue that the members were not chosen for this specific task. Given the fact that the Union is in a constant state of constitutional reform since 1991, this view would need to elaborate in what way the Convention process deviated from this reform process.

Still, accountability in the EU Conventions worked at best in an indirect manner. Observers stressed that the representatives of heads of state or government were not representatives of their respective member state in the strict sense, but rather took a more independent approach[69]. This was also reflected by the position taken by those represented. Luxembourg Prime Minister Jean Claude Juncker did claim after the Convention was over in an interview with a German newsmagazine that it worked like a black box and no one knew quite, what happened inside. Members of national parliaments appear to have been subject only to an ex post control and did not get an imperative negotiating mandate[70]. The Commission's representatives were in some trouble as the institution was divided on many issues at stake and leadership was lacking[71].

A constitutional moment?

Some argue that for segmented societies a pointed moment of decision on the constitutional basics of the polity was harmful, because it induces a feeling within the relevant parties of a trap, of a situation they are likely to be bound to for unlimited and unforeseeable time[72]. This could create a situation in which the segments of the polity become "adversarialised", where the fear to lose out under a new constitutional settlement favours its rejection. A referendum campaign within the individual segments on a new constitutional text could thus thwart the efforts made previously in creating enough commonality to support this text.

Yet a balance has to be struck between the need to make a certain constitutional moment visible and the risks involved in creating a trap-like situation. The more recent history of the EU shows how we have to live with national referenda for the time being. It appears therefore to be important to create specific moments and highlight them purposefully to create public awareness for the constitutionalisation of the EU. Constitutionalisation in this sense is meant not as the incremental process of constitutionalising the existing treaties but to any act that changes the foundation of the EU in direction of one the may legitimately be called a constitution.

67. D. Castiglione, Contracts and Constitutions, in: R. Bellamy/ V. Bufacchi/ D. Castiglione (Eds.), Democracy and Constitutional Culture, pp. 59 et seq., at p. 71.
68. Leaving aside for a moment the self-description of some members of the Convention as "personal representatives" of the prime minister of their country.
69. J. Schönlau, The membership of the Convention: Issues of Representation and legitimacy, Paper for the CIDEL Workshop "Constitution Making and Democratic Legitimacy in the EU", Nov. 12/ 13 2004, p. 6; confirmed by J. Santer in interview.
70. One exception may be the German Bundesrat who voted a resolution on the topics of the Convention.
71. J. Schönlau, op. cit., at p. 7; the failed "Penelope" draft is one of the obvious examples of lack of leadership.
72. S. Chambers, op. cit., at p. 160.

9. Coherence in a Multilevel Constitutional World

The present process of EU constitution-making is also not perfectly one of incremental constitutionalisation. Not only do more frequent IGCs in recent years mark epochs of EU development named after attractive cities in Europe[73]. Referendum campaigns where added to the process in a rather random manner in accordance with national constitutional provisions, not allowing describing an EU-wide coherent pattern in constitutional politics. These referenda brought some sort of confrontation between the "ongoing constitutional conversation" on EU level and the traditional principle of popular sovereignty, be it an asymmetrical one as only some countries' peoples voted. This clash between the perception of a "permissive consensus" allowing for elite development of the EU and popular sovereignty may be considered as being only transitional. In a fully developed EU the national processes would be perfectly integrated into the EU constitutional process. The frictions created by the rejection of revision treaties would subside. It seems not likely that this is to happen very soon nor does it help us in the transitional period. We have to accept that the people, one or the other in accordance to the respective member state traditions, pops in at some point or the other.

The described clash is one of constitutional doctrines. The member states do still rely heavily on the constitutional heritage of the French and American revolutions, at least on the continent and in the Republic of Ireland. The basis of their constitution is a supposed will of the people. While having great sympathy for those views that try to deconstruct the myths of the European nation state and attempt to adapt its constitutional theory to a post-national constellation in Habermas' sense, the force of the traditional doctrine is still strong, especially in the new member states of Central and Eastern Europe. If we conceptualize the constitutional situation of the EU as one of a "multilevel constitution"[74], the national constitutions do form, together with the EU constitution, a composite constitution. The question is, whether diverse conceptions on the source of legitimacy of the constitution may continue to exist within this compound. Would it be acceptable on a theoretic level to root the national constitutions in the classical theories of popular sovereignty *à la Sieyès* and to describe the legitimacy of the supranational constitution of the EU in deliberative and thus non-voluntaristic terms? Would these incoherent parts fit? Could it only be a matter of re-definition of the underlying constitutional principles of the national constitutions in the light of deliberative theory? Do we have to wait for a foundational moment on EU level that compares better to national constitutional traditions?

The difference between the constitution-building effort on the EU level and within the member states is clearly that constitution-making in the member states could build on at least partly consolidated population that could and most of the times did act as a political community. In this sense the tradition of Sieyès could rightly be called as one of "politicization of law". Whereas the law pre-existed, a political process determined to some extent by the population developed. Self-legislation and autonomy could function through elections or referenda because the future citizens shared the common characteristic of being subject to a common authority, the Crown, and were subjects to the same laws[75].

No constitutional process, however, had to create its people[76]. The features of the EU constitutional process therefore need to be distinct. As we have seen do the characteristics of the deliberative procedure

73. The identity-building by making place names like Maastricht, Amsterdam and Nice part of the constitutional heritage of each European citizen is to my knowledge not yet studied.
74. I. Pernice, Multi-Level Constitutionalism and the Treaty of Amsterdam, CMLRev 36 (1999), p. 703 et seq.; I do prefer the German term used by him, Verfassungsverbund, which may be translated as "composite constitution".
75. Leaving behind the feudal period and different *coutumes* in different parts of the countries.

build upon the principles of autonomy and self-legislation, just that they translate them into different procedural requirements.

From that follows that the differences between the two underlying doctrines within the composite constitution are not of such a character as that the different parts would not fit.

Sieyès and Habermas would be able to meet under the "umbrella" of this constitution and try to debate their different approaches.

76. The exception of Germany of 1871 cannot help much, because the procedure of inter-state contracting is criticized for the EU context for not addressing demands for democratic involvement of the population appropriately.

10. What Prospects for the Future?

When we try to "make the Constitution work" we should reflect for a moment on improvements on the Convention method now that the second exercise is over.

Some authors have already examined the Convention elaborating the Charter of Fundamental rights *en vue* of a very soon probable repetition of the Convention exercise[77]. Object of the discussions have changed and the scope enlarged to the widest possible extent. That led to some care by people involved in the process as to the comparability of the two processes[78].

Today we see the Convention model being written into the constitutional treaty. Writing a practice into the treaty text later is not novel to the constitutional development of the Union, the idea of enhanced cooperation or the early-warning mechanism of Art. 7 § 1 Treaty on European Union for alleged breaches of the principles of democracy and the respect of fundamental rights may suffice as examples.

Is it sufficient to build upon the existing? Would it have been wise to draw from the experiences? Readers of J. Elsters works are not surprised by the fact that there is some *amour propre* or self love in the fact that the Convention would not produce a model other than the one they had worked in. We can see the limits of constitution writing here.

Many things were contested throughout the process. Some contestations were part of the game – of a battle for influence. I am not going into detail if the time frames for presenting amendments were adequate or not, as some criticized.

More interesting were the motions as to the seating order. It reflects the character of the assembly most accurately. The demands for a seating along political lines[79] by MEPs at the beginning of the Convention on the Future of the EU showed the hopes of a transformation of the Convention into an Assemblée Nationale for the EU. No Oath of the Tennis Court was sworn, though, none of the estates of the Convention excluded either.

The Convention Praesidium was right not to give way to these demands. For once, the papers produced by the political families during their respective seminars provided evidence that an organisation of the constitutional talks along political affiliations would not help much structuring the discussions. They were either federalist statements supported only by a part of the conservative membership, as in the case of the Christian Democrats or mere restatements of the questions to be addressed as in the Socialist paper. It may be a vision for the future, yet political party do not play an important role in structuring constitutional discourse for the time being. Political parties have not yet developed common constitutional positions across the different national traditions.

Secondly, the reduced number of representatives of national parliaments created a trend towards strengthening a bipartisan Convention rather than a plural one. Especially in member states with two chambers in parliament, the division between the two houses reduced multi-party representation. The European Parliament tried hard, but could only gather very few EU-sceptics or "–realists".

Beyond these doubts as to efficiency, the more important rationale behind the decision was to prevent the formation of sub-groups and static lines of conflict between them. No veto power by any party group or component must be allowed if open discourse of ideas on the basis of strict equality of all the members was to be achieved. Seating a Green foreign minister that belonged to a milieu in the 1970s that

77. Cf. esp. F. Deloche-Gaudez, The Convention on a Charter of Fundamental Rights: a Method for the Future?
78. J. P. Jacqué, La procédure appliqué par la Convention: transparence et efficacité, in: W. Heusel (Hrsg.), Grundrechtecharta und Verfassungsentwicklung in der EU, pp. 93 et seq.
79. Cf. O. Duhamel, Pour l'Europe, p. 21.

shared a critical distance towards the state institutions next to a minister coming from a movement that has traditions to fascist movements may serve as an anecdote.

Voting has been an issue after the first Convention. Some members claimed it could have helped to get a precise idea of the views of the assembly. This would be necessary if the Praesidium, the sole instance in all questions of consensus, was to be held accountable. Clearly the opposition by the Convention President on the ground that there was no strict equality between members and some institutional interest were better represented than others[80] cannot convince completely. Modern parliaments do know the roll call vote. Such a vote would not be done in the interest of counting a majority of heads. It would be up to every member and the general public to determine how to weigh the influence of the different members. Thus the alleged lack of transparency of the Praesidium and the difficulties to follow the conclusions drawn from the debate could be remedied in part.

The Praesidium could then be reduced in number to not more than a handful. Its administrative powers when steering the body (convocation, setting the agenda, organizing consultations with outside experts, representatives from other institutions or the civil society) could be fulfilled easily by a smaller number. Two other functions that the Praesidium fulfilled need to be examined. Firstly, it functioned as a conference of heads of working groups in order to coordinate the work of these[81]. Such a conference may meet with the Chairperson and the Vice-Chairs also in future Conventions. The other function was the examination of draft treaty texts before they would be presented in the plenary. Ideally the Praesidium could have functioned as a filter if the members could legitimately represent one of the component groups[82]. Every component group chose members for the Praesidium, with the two Commissioners being these representatives themselves and the exception of representatives of governments. They were to some degree represented by the three Convention members coming from the three countries holding the Council Presidency during the Convention's time frame. Only the Commissioners and the representatives of the MEPs were successful in giving the necessary input from their components to the Praesidium, the other two groups had no mechanism of forming common positions[83]. Their "representatives" then could neither attribute necessary input nor could they legitimately claim to represent certain institutional interests. One may wonder what sense this function of the Praesidium made other than simply having more views around the table before presenting draft treaty provisions. Without a legitimate mechanism of selection and control, however, the composition can be easily criticized for being arbitrary.

80. Responding to a critic in the assembly, plenary session, 20 January 2003, at 1-086.
81. Cf. oral intervention by the Chairman, V. Giscard d'Estaing, in the plenary on May 23 2002, at 4-073.
82. A hope expressed by a member of the Convention Secretariat in an interview with the author.
83. Cf. C. Einem, Die Quadratur der Sterne, p. 254; B. Fayot, interview with the author; member of the Secretariat, interview with the author; P. Norman, The Accidental Constitution, p. 35.

Conclusion

The EU Conventions have introduced an interesting new format for constitutional development not only compared to IGCs but also to the traditional nation state formats of constitutional assemblies. Going beyond the conceptions found in Habermas' works, assemblies were designed that encouraged deliberative processes resulting in the most innovative treaty reform since Maastricht. Taking a look at the Canadian constitutional reform process of the 1980s and 1990s it could be exemplified why a deliberative approach to constitution-making is more appropriate for the EU as a segmented polity than demands from the federalist corner for a directly elected constitutional assembly or a constitutional referendum.

But it is worthwile also to look at the teachings of Abbé Sieyès for he has influenced the European constitutional tradition to a great extent. Conceptualizing the state of the EU constitution as a composite one we have to make sense of combining the two doctrines represented for reasons of good presentation by the two figures. Both trying to built upon the principles of autonomy and self-rule, I tried to demonstrate that they are not irreconcilable for the construction of the composite constitution.

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