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Does the process really matter?

Some reflections on the " legitimating effect"

of the European Convention

by
Paul Magnette

Institute for European Studies
Université libre de Bruxelles
39, av. F. D. Roosevelt
B – 1050 Brussels
Pmagnet@ulb.ac.be

Abstract

The European Convention, set up by the Heads of state and governments during the Laeken Summit of December 2001, was presented by its initiators as a means of strengthening the legitimacy of the EU. Is this a rhetorical argument of politicians, which could be explained by the intense electoral cycle of 2002-2004? Or is there something, in the process of the Convention, that could change the nature of the EU constitution?

This paper argues that the Convention is not likely to transform the nature of the EU. The arguments put forward by its members, and the partial compromises reached at this stage, show that the *conventionnels* are willing to rationalize the *acquis*, rather than launch a new phase of integration; this Convention will not be remembered as a European Philadelphia.

I then turn to the process of the Convention in order to assess its potential effect in terms of legitimation of the EU. I argue that the EU's alleged "democratic deficit" is merely a problem of standards: though the EU can be seen as a fully accountable and legitimate polity in Madisonian terms (Moravcsik), it is still seen as an unsatisfying arrangement when interpreted in more demanding "republican" terms (Habermas). This is the reason why the Convention might be useful: if it managed to reduce cognitive and normative dissonance, it could help soften conflicts of interpretation of the nature of the EU among leaders. Moreover, by clarifying the role of the EU, it could reduce public expectations and the frustrations they engender.

I conclude that the Convention is an exercise of reappraisal and confirmation of the EU's founding pact, but that even this rather modest role is important in terms of legitimacy because of the nature of the EU constitutional process: since the existing treaties are the result of a long piecemeal and instrumental process of bargaining among member states, the EU lacks clear and accepted normative foundations. Even if it only clarifies and confirms the status quo, the Convention, and the public debates to which the ratification of the treaty might give rise after the IGC, might help root the EU's founding pact in the public's conscience.

Since the ratification of the Maastricht treaty at the beginning of the 1990s, the problem of the EU's "democratic legitimacy" has been one of the most discussed aspects of European integration, both in academia and in the real world. The Laeken Declaration, giving birth to the Convention on the Future of the Union, bears witness to this widespread public preoccupation when it presents the question of democratic legitimacy as "the first challenge facing Europe." The creation of the Convention itself, conceived as a broad and open body, is supposed to be an element of answer to this challenge; the questions its members are asked to discuss cover a broad range of subjects, but all of them are said to be related to the EU's democratic ambition; the plenary sessions of the Convention confirm that its members pay tribute – or at least pretend to pay tribute – to this objective: most of their interventions are based on the argument that the reform they support is connected to democratic intentions.

Despite (or because) of the consensus on the importance of the question, the mission of the Convention is a very difficult one. Giving an answer to the question of what a "democratic Union" could be indeed supposes an agreement on the meaning of democracy and on the nature of the EU. Ten years of discussions on these two controversial questions have shown that conflicts of interpretations among European leaders and public opinion remain very deep. In order to reach its purpose, the Convention will have to reduce this dissonance, and to forge a common understanding, not only among leaders but also among the general public, of these basic constitutional principles.

In the first section of this paper, I briefly recall the *conflict of interpretations* over the EU's democratic legitimacy and argue that the EU is more than a simple "modus vivendi" but its basic rules are more controversial than those of a "constitutional consensus" defined in Rawls's terms. I will then, in the second part, focus on the *process* of the Convention and argue that its deliberative nature might be a (modest) contribution to the democratic legitimation of the European Union. In the last section, I examine the *likely outcome* of the Convention, in terms of policies and institutions, and underline the aspect of the present conflicts of interpretation that it will probably not be able to solve. I nevertheless conclude that the EU can live with these ambiguities, and that its legitimacy will be strengthened if the Convention manages to forge a consensus on some formal core issues.

I. The conflict of standards

One of the reasons why the debate on the EU's democratic legitimacy remains so lively is that the diagnosis of the different actors and scholars, and the suggestions they made, are based on different assumptions, which are rarely made clear.[2] In this continuous controversy, scholars classically distinguish five different vectors of legitimation.[3]

Indirect legitimacy

According to this notion, the legitimacy of the European Union can at best be indirect or derivative. It depends on the legitimacy of its component states, its respect for their sovereignty, and its ability to serve their purposes. Supported by the German Constitutional Court in its famous decision on the Maastricht treaty, this argument is the *leitmotiv* of those who, within and outside the Convention, defend an intergovernmental vision of the Union. In the academic literature, this rationalist assumption is also associated with principal-agent models, according to which any autonomy of Union institutions is not evidence of their independent legitimacy, but of where it suits states to confer limited discretion on a supranational agent, according to a contract that is contingent, calculated and controlled.

According to this argument, the EU would be a democratic polity if its competences were defined in strict terms and if national parliaments were given the opportunity to control the action of their governments acting in the Council and the growth of EU competences.

Federal legitimacy

A second classic view is that the Union can only be democratic if it follows the traditional devices of federalism. Constantly defended by the Commission, by the majority of the EP since its direct election in 1979, as well as by Germany and the Benelux countries, and recently advocated by Jürgen Habermas (2001), this argument is based on an orthodox Madisonian reasoning. A polity that is territorially segmented, yet focused on the management of problems that cut across those sub-units, will require representative structures that can aggregate and deliberate on preferences both nationally and transnationally. The need for dual legitimation might also be justified by the classic argument for mixed government. If it is unlikely that rational citizens will consent for long to systems of rule that expose them to risks of arbitrary domination, a legitimate Union

[2]Craig 1999

cannot afford to concentrate power, whether in a club of governments or in a parliamentary majority, but must, instead, institutionalize checks and balances between the carriers of those two legitimacy claims.

Practically, the advocates of this federal vision support the authority of the Commission and the powers of the European Parliament as counterweights to the international nature of the Council. They tend to see the Commission as a federal government, that should be personalized to help citizens perceive the issues of EU politics.

Technocratic Legitimacy

According to this perspective, the EU is legitimated as an "independent fourth branch of government."[4] This position implies the following: first, a normative belief that the superior ability of a system to meet citizen needs is grounds for political obligation to it; second, epistemological confidence in a rationality or science of government (positivism); and, third the identification of specific public needs that can only be met by independent European institutions.

Though this argument is rarely voiced as such in the political arena, and never presented as a comprehensive doctrine of legitimacy, it underlies the status of the European Central Bank and of other agencies, including the Commission in some of its tasks.

Procedural Legitimacy

Though it can be seen as a vector in itself, procedural legitimacy is often presented in the EU literature as a means of filling a gap in technocratic legitimacy. In response to criticisms that independent technocratic agencies are means of escaping democratic controls, some authors have defended a procedural conception, according to which the legitimacy of an action rests in its observance of certain formal procedures: transparency, motivation, balance of interests, evaluation, participation of stakeholders and so on.[5] Moreover, from this formal point of view, what gives the Union legal legitimacy is not just its attentiveness to due process, but also its capacity to generate an original normative order that confers new rights and entitlements on citizens, enforceable even against states themselves.

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[3] This section is based on (Lord and Magnette 2000).
[4] Majone, 1996
[5] Majone, 2001

Corporate legitimacy

Another way of securing the legitimacy of a policy is by negotiating it directly with those whose compliance it needs. Such an approach may confer legitimacy where it is generally accepted that those exposed to the concentrated effects of public policy should have special rights of consultation in the decision-making process. Although the corporatist ideas that lay, for example, behind the creation of the Economic and Social Committee (ECOSOC) have little purchase on contemporary economy and society, the Commission has sought new ways of identifying those affected by its policies and including them in their design (Magnette 2003).

By way of summary, it is useful to show how each vector of legitimacy implies its own distinct account of what is needed to make the EU legitimate on the input and output sides of governance.[6] In the case of indirect legitimacy, authorisation by Member States and the delivery of state preferences are the sources of input and output legitimacy respectively. In that of federal legitimacy, elections provide input legitimacy and the delivery of voter preferences secures output legitimacy. In the case of technocratic legitimacy expertise and delivery of efficiency are the key inputs and outputs. In that of procedural legitimacy, due process is a source of input legitimacy, whilst output legitimacy is constituted by the delivery of rights. Under corporate legitimacy consultation and compliance of organized actors are indicators of input and output legitimacy respectively.

Input and output legitimacy under the five vectors

Vectors of legitimation	**Input**	**Output**
Indirect	Authorisation	State preference
Federal	Elections	Voters' preference
Technocratic	Expertise	Efficiency
Procedural	Due process	Rights and remedies
Corporate	Consultation	Compliance

[6] Scharpf 1998

These should not be understood as full-fledged doctrines but as ideal-type elements of necessarily composite conceptions of legitimacy. Some actors defend one and only one of these elements – as do the rare purest advocates of national sovereignty or of European federalism – but most actors and scholars refer, explicitly or not, to several of these elements of legitimation. Majone, for example, typically combines technocratic and procedural vectors.

The purpose of this typology is simply to recall that the problem of the Convention is to find a *combination of these vectors that could be acceptable to a quasi-unanimity of its members, and to the largest segments of public opinions*. As scholars, we can argue that the EU is objectively an efficient international organisation, and that as such it is democratic because it is controlled by its member states and because the non-majoritarian institutions they have set up are submitted to strict mechanisms of accountability.[7] However, if this rational argument is not accepted by political leaders and public opinion, because their vision is based on other cognitive and normative frameworks, the EU's democratic legitimacy will remain weak. The contribution the Convention might give to the legitimation of the EU depends on its capacity to reduce the scope and depth of these conflicts of interpretation, by finding a combination of the vectors which is largely acceptable. Theoretically, at least three types of combination can be envisaged.

i) First, the members of the Convention could reach an *ambivalent agreement*, i.e. an agreement on some basic rules based on misunderstanding. The policy preferences of the actors are indeed derived from their fundamental principles and from their beliefs about ends-means relations. In some cases, this can lead to an agreement "based on preference differences and belief differences that cancel each other";[8] the decision to reject bicameralism in the French *Assemblée constituante* can be understood in these terms.[9] In the EU, the definition of the principle of subsidiarity in the Maastricht treaty offers an example of this mechanism: some member states thought this principle would limit the growth of EU powers, while others hoped it could be used to launch new policies. Because they disagreed on the "finality" of the Union and on the likely effect of the principle of subsidiarity, they could agree on the principle itself.

[7] Moravcsik 2002
[8] Elster 1998
[9] Elster 1994

This kind of ambiguous creativity however faces two limits. First, an agreement of this kind is possible on some key elements of a constitutional treaty, but not on the whole text: in some instances, dissonance reduction will clarify the nature of the disagreement and make ambivalent solutions impossible. Secondly, this is always a precarious compromise: the continuous controversy on the extent of the EU's tasks after Maastricht, and the legal/political debate on the nature of the principle of subsidiarity revealed the weakness of the agreement and called for further negotiation.

ii) More often than not, bargaining on the rules of the game will lead to a *modus vivendi* between member states. In Rawls's theory of political constructivism, this is the first step of the process leading to the formation of a well-ordered democratic society.[10] A *modus vivendi* can be forged when the parties realize that there is no other viable solution, though their fundamental principles remain irreconcilable. To illustrate this case, Rawls gives the example of the agreement between Catholics and Protestants on the principle of tolerance in the sixteenth century: the two opposite camps agreed on this principle, not because they shared moral conceptions of the nature of the individual and of the society, but because they knew that they could not defeat the other party. As soon as the relative strength of one camp would give it a strategic advantage, it would reject the principle. As the agreement did not include a shared perception of the principles on which it was based, it was not stable.

Again, the initial pact between the member states can be seen as a *modus vivendi*. The logic of bargaining produced an aggregation of preferences that was supported by the member states as long as it was coherent with their interest, but challenged when they thought it limited their gains – the crisis of 1965 could be understood in these terms. Given its weakness – its subordination to the circumstances and to the relative strength of the actors – this kind of agreement cannot stabilize a well-ordered society by its own.

iii) Rawls argues that this *modus vivendi* can be the basis of a deeper, larger and more precise agreement – his famous "*overlapping consensus.*" Rawls distinguishes two degrees in this process. First, under certain conditions, a *modus vivendi* can be gradually

[10] Rawls 1993: IV, §3

transformed into a "constitutional consensus"[11]: this occurs when the parties agree on some democratic procedures to solve their conflicts, but do not necessarily agree on a shared conception of the citizen and the society. Three conditions are required to reach this kind of consensus, according to Rawls: a) a clear definition of the basic rights and freedoms, which places them beyond political conflict; b) the acceptance of a form of public reason, coherent with common sense, and necessary to apply these principles; c) the rise of cooperative virtues in politics – such as the sense of moderation and equity, and the spirit of compromise – which are themselves encouraged by the existence of the institutions and their practice. In a second stage, an overlapping consensus can be built on this basis:[12] acting in this framework, the parties tend to modify their comprehensive doctrines under the effect of a practice channelled by the constitutional consensus. The political practice, based on this proceduralized discussion, will gradually strengthen the consensus. It will become deeper (encapsulating a political conception of justice), larger (defining basic laws guaranteeing these principles), and more precise (narrowing the range of liberal conceptions defended by the citizens). All this should, through political cooperation, strengthen the sense of trust on which the society is based.

Given the absence of strong mechanisms of interpersonal and international solidarity in the EU, it cannot be seen as a society based on a Rawlsian "overlapping consensus." It is not even sure that its basic treaties can be described as a "constitutional consensus." Some could argue that the European Union had already reached this procedural consensus before the creation of the Convention. The adoption of the Charter of Fundamental Rights in December 2000 responds to Rawls's first condition; in a sense, the long practice of cooperation has produced key elements of a common language, and of cooperative behavior. One could also say, however, that the creation of this body by the Heads of State and Government bears witness to the fact that they acknowledged the limits of the existing consensus. Their discourse on the method of the Convention is based on the argument that intergovernmental bargaining is, by its very nature, unable to go beyond a *modus vivendi* – or an imperfect constitutional contract; the *raison*

[11] Rawls 1993, IV, § 6
[12] IV, § 7

d'être of the Convention, as stated by its creators, is specifically to reach a deeper, larger and more precise agreement.

II. The process : (moderate) Kantian optimism

To what extent should a constitution strengthen the consensus, and how far should it preserve the conflicts which are the basis of democratic politics? This question cannot be given a straightforward answer in constitutional theory.[13] Rawls argues that an overlapping consensus is necessary. But Habermas finds this kind of agreement too weak and too fragile: if the members only agree on the rules, but continue to disagree on the foundations of these rules, the constitution lacks a common understanding and remains subject to permanent divisions. However, the two authors agree on at least one core principle: the consensus must be built through public deliberation, not through secret bargaining.

The analytical (and normative) distinction between the deliberative and bargaining modes of conflict-resolution has become very fashionable in political science in the last ten years. Very schematically, this distinction can be summarized in these terms:

i) *bargaining* is usually defined, in the widely accepted terms of social choice theory, as a process between a) actors with stable preferences, b) who try to maximize their benefits, c) through exchanges of concessions.

ii) by contrast, the advocates of *deliberation* argue that this process takes place among a) actors who are ready to change their preferences, b) when they are convinced by rational arguments, c) in order to reach "common goods."[14]

This distinction is based on both analytical and normative grounds. From an analytical point of view, the advocates of deliberation assume that the outcome of the process may be explained by its rules and by the non-utilitarian aims of the actors. From a normative point of view, inspired by neo-Kantian perspectives, this praxis is said to be superior to negotiation. In terms of efficiency, it is supposed to produce "integrative" results which go beyond the smallest common denominator. In terms of legitimacy, it pretends to build more solid and better accepted solutions. After having argued, the actors not only agree on a norm but also on its justification.[15] Those who have not won at least have the satisfaction of having been heard, and do know why they have lost. The

[13] Sunstein 2001
[14] Elster 1998; Dryzek 2000
[15] Habermas 1996

foundations of the agreement being clearer, later conflicts on the basic norms are less likely to occur. Moreover, if deliberation takes place in an open forum, ordinary citizens are given the opportunity to understand the *raison d'être* of the norms, and should therefore accept them more easily.[16] For these reasons, constitutional assemblies are often described as privileged sites of deliberation.[17]

It is difficult, when looking at the European Convention, not to notice that its creators and its members are deeply imbued with such an idealized definition of deliberation.

i) the reasons given by those who advocated the *creation* of this preparatory body clearly refer to this opposition. The classic argument – that can be found in the EP's report, in the Commission's positions, in the discourses of the Belgian Presidency and its Benelux partners – is based on the contrast between the inefficiency and lack of legitimacy of the IGC method, illustrated by the Nice Summit, and the promises of a broader and more open Convention – of which the first Convention gave an example;

ii) the *mandate* defined by the Heads of State and Governments in the Laeken Declaration incorporates some basic elements of a "deliberative setting."[18] True, the fact that the Convention will be followed by a classic IGC, and that during its works it will be influenced by the governments from inside – through their representatives – and from outside – through the dialogue between its Chairman and the European Council – confirms that the praxis of bargaining remains crucial.[19] But the deliberative potential of the mandate defined at Laeken should not be neglected. First, the publicity of the debates could force the governments to justify publicly their positions[20] – some of them may have thought that this would actually give them the opportunity to demonstrate that their traditional reluctance is not based on a narrow defence of national interests or

[16] Manin 1998
[17] Elster 1998
[18] Elster 1998
[19] The geographic and political balance of the Presidium also corresponds to a classic intergovernmental logic. The fact that the Secretariat of the Convention is provided by the General Secretariat of the Council is another sign of this classic pattern.
The non-decisional nature of the Convention is neatly affirmed in the Laeken Declaration: the text says that "it will be the task of that Convention to *consider* the key issues arising for the Union's future development and try to *identify the various possible options*"; the final document is said to "provide a *starting point* for discussions in the Intergovernmental Conference, which will take the ultimate decisions" (emphasis added).
[20] Theories of deliberation show that the principle of publicity can have perverse effects, in that the actors may be tempted to use rhetoric to convince the external audience (Elster 1998). But this does not occur in a Convention which is largely ignored by the general public.

on prejudices, but on pragmatic reasoning. Second, as all members states have been given the same number of representatives, it would be very difficult, if not impossible, to vote in such an assembly: in the absence of a system of weighted votes, a majority could represent a very small minority of the European population. The Convention was thus condemned to agree by consensus, rendering the use of vetoes, blocking minorities or winning coalitions very difficult. This, in turn, could preserve the fluidity of the assembly and, without preventing it, limit the resurgence of practices of bargaining. Finally, the fluidity of the body is also encouraged by its mixed composition: in an assembly composed of representatives of the national governments and parliaments – including those of the candidate countries – as well as MEPs and members of the Commission, the classic dividing lines of intergovernmental negotiations could be overcome by new, more flexible and unforeseen coalitions. All this had been, moreover, illustrated by the experience of the Convention that had written the Charter of Fundamental Rights;[21] governments could not say they were unaware of these potential effects of the rules they had defined. And they knew that all Conventions, in the history of modern politics, have always escaped their creators.

iii) the *discourse of the conventionnels* pays tribute to this "deliberative spirit." Just to take one example, in his introductory speech, President Giscard invited the members to "embark on our task without preconceived ideas, and form our vision of the new Europe by listening constantly and closely to all our partners." Taking this further, he added that "the members of the four components of our Convention must not regard themselves simply as spokespersons for those who appointed them" and that even if each member would remain "loyal to his or her brief," he or she also had to "make his or her personal contribution ."[22] This is, he argued, the key of the "Convention spirit." Paraphrasing the ideal-type definition of deliberation, he concluded: "If your contribu-

[21] Braibant 2001; Deloche-Gaudez 2001

[22] Inaugural speech, pp. 8 et 13. He added during a press conference that the term "representative" was a "erreur de rédaction" since "ce ne sont pas des représentants, lorsqu'ils parlent, ils ne disent pas parler au nom de l'une ou l'autre composante," *Agence Europe*, 28 March 2002, p. 6. Jose Maria Aznar, as President of the European Council had on the contrary argued that the members had to follow the views of the organs they represented. In his speech to the Inaugural session, Aznar however insisted on the virtues of deliberation, on behalf of the European Council: transmitting the opinion of the quasi-unanimity of the members of the European Council, he argued that "Nice is the reason why we are here today." Partly rewriting the history, he added that "Immediately thereafter, the Heads of State and Governments convened the Convention that is starting now, in the knowledge that *the new stage calls for new forms of operation and deliberation* in order to continue to create 'more Europe" (emphasis added).

tions genuinely seek to prepare a consensus, and if you take account of the proposals and comments made by the other members of the Convention, then the content of the final consensus can be worked out step by step here within the Convention." This, he added, is the crucial difference between the Convention and a classic IGC, which he defined as "an arena for diplomatic negotiations between Member States in which each party sought legitimately to maximize its gains without regard for the overall picture,"[23] paraphrasing, this time, the classic definition of bargaining.[24] Giscard's rhetoric is not an isolated example. Most members of the Convention, and the members of the European Council themselves, have underlined these "promises" of deliberation in their comments on the Convention method.

The weight of this "deliberative ideal" is important in terms of democratic legitimacy. Whatever may be the result of the Convention, it confirms that, in this phase of European integration dominated by discussions on the institutional framework rather than on the policies of the Union, ideas and ideologies become ever more important.[25] Setting up the Convention was, in itself, a strategy of democratic legitimation, and this is probably one of the reasons why those countries who were not enthusiastic about this idea nevertheless accepted it.[26]

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[23] Speech, p. 13. In the same vein, see his opinion published by *Le Monde* on 23 July 2002: "Il ne s'agit pas de rouvrir, de manière précipitée, d'anciens débats, comme la querelle entre fédéralistes et intergouvernementalistes, ou la rivalité entre la Commission et le Conseil, qui se sont brisés sur les écueils d'Amsterdam et de Nice, mais de faire avancer le groupe pour vérifier s'il peut découvrir, en fin de parcours, une solution globale commune."

[24] In a press conference after the session of 22 March, Giscard said he found it "normal que les grandes sensibilités européennes harmonisent leurs points de vue" while however warning against any "structuration excessive" of the Convention. (*Agence Europe*, 23 March 2002). On 12 July, after many members had presented their argument as their state's position, he recalled 'qu'il ne s'agira pas de s'exprimer d'un point de vue national (…). Nous attendons des conventionnels une expression européenne" (p. 12). In his opinion published by *Le Monde* on 23 July 2002, he said about the representatives of the governments: "Leur situation comporte une certaine ambiguïté: participent-ils en tant que personne aux travaux et aux interrogations de la Convention, ou viennent-ils y exprimer le point de vue des gouvernements qui les ont désignés? Après un premier flottement, il m'a semblé que leur caractère de 'conventionnel' s'affirmait."

[25] Moravcsik & Nicolaïdis 1998

[26] It remains difficult to assert why Britain and Denmark, who had been surprised and annoyed by the first Convention, have accepted this process. One hypothesis is that the Belgian presidency, presenting this initiative as one element of a broader debate, reduced its importance and made it acceptable. But the representatives of these member states were probably not so naïve – and if they were, they will not acknowledge this in interviews. Another hypothesis is that these countries found it difficult to refuse a Convention and thought it more efficient to try and control it – hence their strategy to amend the Laeken Declaration and open new questions, their insistence on the non-decisional nature of this body and their willingness to integrate candidate countries, supposed to be less prone to support further integration. If this hypothesis is right, as I believe it is, it means that these countries acknowledged the need to set up a process inspired by a democratic constitutional tradition.

True, the creation of the Convention does not guarantee, in itself, that an answer will be given to the "democratic challenge facing Europe." On the contrary, if it did not manage to produce a text widely accepted and understood as "more democratic" than the former treaties, it would deepen the EU's democratic deficit.[27] The question is thus: will the process matter? will the Convention be able to produce a "constitutional consensus" that will stabilize the Union? will citizens find it more legitimate because it was written by a deliberative body ?

This kind of questions cannot be given satisfying empirical answers. First, because we will never know what the outcome of the IGC would have been if the Convention had not existed, and it will be very difficult to demonstrate that the final compromise was forged through deliberations rather than through the negotiations between Heads of State and Government taking place in parallel. Moreover, it cannot be excluded that, within an IGC, actors argue and sometimes alter their preferences after having heard arguments. If this could be demonstrated (and it probably could), this would weaken the analytical distinction between bargaining and deliberation. These methodological biases imply that when the Convention has concluded its work, we will be able to compare its outcome to the status quo ante, but not to compare deliberative and bargaining processes. Secondly, it is nearly impossible to assert when and how the actors changed their mind because of the arguments put forward in the deliberative process. Finally, measuring the changes of perceptions in public opinion requires sophisticated methodologies which are subject to many biases.[28]

Examining the work of the Convention, we could argue that, in many aspects, deliberation works. Its members are organized in political groups, components and sometimes national delegations, but they rarely state it. As they try to combine these three forms of membership, they tend to escape constraints: to be a "good liberal" one may have to abandon the "British line"; as an MEP, a Conservative *conventionnel* can have an opinion which is remote from the official line of the Conservative party, and so on. In other terms, "multiple constraints" can strengthen the autonomy of the actors, who can use a constraint as a pretext for escaping another constraint. Moreover, the complexity of the Convention is such that, as a body, it is much more fluid than an

[27] From a formal point of view, as its members were not explicitly elected by the citizens of the member states to write a European constitution, the Convention remains less democratic than a national constitutional assembly.

[28] In Fishkin's experiences, the same sample is questioned before and after the deliberative process to measure this change (Fishkin 1995). Given that, as far as I know, no systematic polls were made before the Convention on these issues, comparison will be difficult : moreover, Eurobarometers are often criticized for not being immune to misinterpretations due to cultural diversity and the small size of the samples.

IGC. Agreements are built on oscillating and composite coalitions between a large number of small factions, and we have known since Madison that this weakens the veto of the larger factions. Publicity is also important in the Convention. Even if the members negotiate outside the Convention, their compromise can only be endorsed by the Convention after it has been publicly debated. Some members have strengthened the role of the plenaries, when they used them to announce and explain a shift in the position of their government – as Peter Hain did when he said "he" (meaning Blair's government) was ready to accept the incorporation of the Charter of Fundamental Rights in the Treaty.

At this stage of the Convention, however, it remains difficult if not impossible to draw definite conclusions. We are condemned to hypothesis and general remarks. I first would like to underline a *paradox of deliberation* which, as far as I know, has not been clearly analyzed by theorists of deliberation. This paradox concerns the relation between the two promises of deliberation. On the one hand, this practice is said to be more efficient than bargaining, because it produces dissonance reduction and mutual understanding, and legitimizes the attitude of those who change their mind, so that its outcome can be superior to the smallest common denominator. In practice, these dynamics are facilitated by the formation, among the actors of deliberation, of a "common language" and shared cognitive and normative frameworks. The European Convention illustrates this phenomenon. After a period of "listening" dominated by vague rhetoric, the *conventionnels* have opted for pragmatic reasoning,[29] and molded their arguments around the legal and technical terms of the eurojargon. This might help them reach a consensus, as conflicts based on misunderstanding and passions are reduced.[30] But this also tends to weaken the "external promise" of deliberation. When debates are cast in technical terms, deprived of passionate rhetoric and remote from the citizen's common sense, they do not draw the attention of the general public and do not help citizens understand the issues at stake. The fact that the Convention has been largely ignored by the European press, and the absence of public debate outside the small circles of "Europeanized" citizens – not to mention the comedy of the "Forum" – are clear illustrations of the limit placed on this "public" deliberation.

[29] A pragmatic constitutional reasoning is based on reasoning on the likely effect of norms. Sartori opposes this deliberative style to the "rationalist" style based on conceptual reasoning and to the empiricist style founded on the lessons of historical experience (Sartori 1965). According to Sartori, the first case is typical of American constitutionalism, while the second is illustrated by the French and the third by the British history.

[30] Perelman and Olbrechts-Tyteca 1969

It should not be forgotten, however, that most constitutional deliberations in history were only debated during the ratification process, after the end of the Convention itself. The French *Assemblée constituante* was a noticeable – if not very encouraging – exception. It cannot be excluded that a larger part of the citizenry will listen to arguments about the Convention's work after the IGC, as was the case with the debates generated by the Maastricht Treaty in France and Denmark, or by the Nice Treaty in Ireland. Advocates of public deliberation warn that "[The] success of public deliberation should be measured reconstructively – that is in light of the historical development of democratic institutions and practices."[31] In the short term, the impact of deliberation on public opinion is probably very limited. In the long term, it may play some role in the formation of a common civic culture. After the Convention, two classic sets of criticisms will lose their appeal. First, the argument of those who criticized the treaties because they had been negotiated in closed and restricted forums of diplomats, will not be valid any more. Secondly, those non-founding members who had long criticized the EU, and its institutions, arguing that they had had to accept the whole package when they became members, despite the fact that they disagreed with some aspects of the treaties, will have to acknowledge that they have now taken part in a broad debate, where everything was on the table. If they support the new treaty, this will amount to a confirmation of their acceptance. Whatever might be the result of the Convention, it will reflect the average vision of the ordinary European ruling class, not just a suboptimal compromise reached at the end of the night by fifteen exhausted ministers. In other words, the composition of the Convention – even if its members were not directly elected to write a "constitution" – gives some legitimacy to its outcome. The text will be read as a compromise between the dominant visions of European representatives at the dawn of the twenty-first century. Its status might be compared to that of the *Federalist Papers*, read by generations of politicians, constitutional judges, lawyers and students, and often used as a reference to interpret the U.S. constitution.[32] Since the interpretation of the founding fathers – "la volonté du constituant" in French – is an important element of the Western legal culture,[33] the records of this deliberation might become, in the long term, a key to interpreting the European constitutional treaty in political and judicial fora; as such, they would be an element of these "conceptual resources" that Rawls presents as a

[31] Bohman 1996: 241
[32] Though, in this case, the argument on the deliberation by some of its actors was more important than the deliberation itself.
[33] Sunstein 2001.

necessary condition of any "overlapping consensus."[34] But this is only one of the three conditions laid down by Rawls to forge a "constitutional consensus" that could evolve towards an "overlapping consensus." Once we turn to the other two conditions, the analysis becomes ever more hypothetical and pessimistic.

III. The outcome : Tocquevillean fatalism

Rawls concedes that the "constitutional consensus" might be the reality of contemporary democracies, but he still finds this kind of agreement too weak to build a "well-ordered democratic society." An overlapping consensus not only requires "conceptual resources" to understand and interpret the basic principles, it also needs fundamental legislation implementing the basic rights and freedoms – including measures to guarantee the citizen's basic needs – and a loyalty to the basic principles, together with a sense of mutual trust, independent from the comprehensive doctrines of the citizens.

Is the Convention likely to reach an agreement that could be defined as an overlapping consensus? It is certainly too early to answer this question, since the Convention has not reached comprehensive compromises yet. But some elements of the emerging consensus – in the debates of the plenary and the reports of the working groups – tend to show that the *conventionnels* will be content with a modest "constitutional consensus."

First, the debate on the *EU's policies* has confirmed that a quasi-unanimity of the members want to clarify the delineation of competencies between the Union and the member states rather than alter it. If the suggestion to suppress the pillars, and to apply a simplified decision-making procedure based on co-decision and QMV across all policy areas were accepted, this could amount to "more Europe" in some fields – notably the coordination of internal security policies. But, so far, only a very tiny minority of the *conventionnels* suggest strengthening the financial resources of the EU, so that it could develop larger redistributive policies. The working group on "social Europe" produced a consensual report based on the argument that the EU's competence in this field is "adequate." This means that the EU might be used more frequently as a regulatory power, or to coordinate national policies, but it is very unlikely to complement the action of national governments in welfare policies.

[34] The "explanations" of the rights of the Charter, written by the Praesidium in order to explain their meaning (and thereby limit the margins of judicial interpretation) were a crucial element in reaching a consensus. In the new

The consequences of this agreement in terms of democratic legitimacy are ambivalent. On the one hand, those who see the EU as a "regulatory power" which does not interfere with the functions of the national welfare states might be satisfied by this clarification. The EU will not itself pass and implement legislation guaranteeing a "certain level of material and social welfare, formation and education"[35] without which people can not participate as citizens. But it does not prevent member states from passing such legislation, if the impact of European norms of competition on social policies is limited, and if the competition between national regimes is softened through flexible coordination.[36] In a multi-level polity, all the conditions of a "well-ordered society" must not necessarily be dealt with at the highest level.

Two objections, however, can be raised against this argument. First, if the EU does not deliver policies related to the citizen's highest expectations, it will remain an abstract level of power. In the absence of mechanisms of interpersonal and international solidarity, a communitarian critique would argue, the sense of belonging will remain weak and the sense of trust fragile. The "republican" critique of liberal constitutionalism is notably based on the belief that citizens cannot adhere to political principles detached from a thick identity, which itself requires elements of solidarity between social groups.[37] Secondly, in the absence of fiscal and social policies, it remains difficult to politicize European issues.[38] This, in turn, implies that citizens will not be encouraged to participate in EU politics,[39] and that the political principles will remain poorly rooted in their perceptions because they will not be "personally experienced."

The Convention does not seem to be willing to transform the *procedures and institutional balances* of the EU either. The permanent opposition between the partisans of a primarily intergovernmental Union and the advocates of the mixed Community model is likely to lead to an "improved status quo." If the Franco-German "compromise" supporting a dual presidency were accepted, it would strengthen the duality of the Union, and probably deepen the conflict between the two sources of legitimacy embodied by the Council and the Commission. But even if a more integrative compromise could be reached – such as a double-hatted Presidency, invested by the European Council and the EP, and chairing the Council and the Commission – it would not fun-

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Convention, several members have asked for the incoporation of these 'explanations' in the new treaty. This illustrates the impact of deliberation, and its 'rational outcome' to build and strengthen consensus.

[35] Rawls 1993: IV, § 6,3

[36] Scharpf 1998

[37] Habermas 2001

[38] Moravcsik 2002

[39] Magnette 2003

damentally alter the institutional balance. Such a President would still be condemned to form ad hoc and complex coalitions of interests in the Council and the EP. The EU would remain, in other words, a "power-sharing" democracy, characterized by a deep division of the ''society'' and a strong ethos of consensus. [40]

Limited to a regulatory power and a framework of coordination, and remaining a complex institutional system based on variable coalitions, the EU is likely to be perceived as an abstract and remote level of power. This, Tocqueville argued, is the fate of federalism:

> L'Union est un corps immense qui offre au patriotisme un objet vague à embrasser. L'Etat a des formes arrêtées et des bornes circonscrites; il représente un certain nombre de choses connues et chères à ceux qui l'habitent. Il se confond avec l'image même du sol, s'identifie à la propriété, à la famille, aux souvenirs du passé, aux travaux du présent, aux rêves de l'avenir. Le patriotisme, qui le plus souvent n'est qu'une extension de l'égoïsme individuel, est donc resté dans l'Etat et n'a pour ainsi dire point passé à l'Union. Ainsi les intérêts, les habitudes, les sentiments se réunissent pour concentrer la véritable vie politique dans l'Etat, et non dans l'Union .[41]

Coming back to George W. Bush's USA, Tocqueville would probably recognize that he had underestimated the force of the Union. Looking at the EU, we should not proclaim the end of history too fast. In the long term, the perspective of a centralization of power and of a clearer polarization of issues – two elements of a liberal democracy generally considered by political scientists as vectors of civic consciousness[42] – cannot be excluded. The "regulatory" issues are not immune to conflicts. The European party federations already have different visions of how the single market should be regulated, and these divisions do not substantially differ from the classic European left-right cleavage. Questions related to internal security – and freedoms – generate a form of political polarization which also follows the lines of the left-right opposition. Political practice could strengthen these reference points and simplify the "political offer." In parallel, the generalization of codecision in legislative areas could clarify the function of the Commission vis-à-vis the EP and the Council. A German-like evolution remains theoretically possible in the long term. These, however, are fragile prospects. In the foreseeable future, the EU is likely to remain a form of "deliberative polyarchy."[43] As such, it can be seen as a satisfying democratic polity by

[40] consensus (Lijphart 1999)
[41] Tocqueville 1981: 485
[42] Przeworski, Manin and Stokes 1999
[43] Gerstenberg and Sabel 2002

those who share the assumptions of a strictly liberal democracy. But those who support a more ambitious version of democracy – which does not renounce the Millian ideal of civic education – will continue to criticize its lack of ambition .[44]

IV. Some (provisional) conclusions

These two debates – on distributive justice and on civic participation – do not necessarily undermine the EU's democratic legitimacy. The existence of a permanent discussion on the constitutional principles is often seen as an essential element of any liberal democracy .[45] The question, in today's Europe, is this: has the EU reached this balance between consensus and conflict on the foundations which is the substance of democratic legitimacy? And is the Convention likely to contribute to it?

The impact of the Convention should not be overestimated. *Pace* the nostalgic defenders of a United States of Europe, the *conventionnels* are not likely to make a "révolution des pouvoirs," and they do not contemplate a European "New Deal." The Union of states they are trying to redefine will remain very different from Westminster democracies and from European welfare states. Seen from a "republican' point of view – even a moderate republicanism such as that of Habermas – this Union will be unable to build "democratic legitimacy," because it will always lack the comprehensive doctrines, the sense of belonging and pride that are supposed to be the foundations of contemporary democracies. Citizens will not die for the Union. They will not even pay taxes for it.

The contribution of the Convention should not, however, be underestimated. Analyzed through less exacting standards – which are probably more coherent with the preferences of largely depoliticized citizens – the Union might be seen as a democratically legitimate polity. The Convention could help strengthen this argument. First and foremost because of its method. Since it represents, relatively well,[46] the diversity of European opinion, and is composed of many ordinary representatives who had no clear opinion on the Union before becoming members of this assembly, and since all questions were on the table and discussed publicly, it will be more difficult to argue that

[44] Habermas 1996; 2001
[45] Aron 1968, Lefort 1988, Habermas 1996, Sunstein 2001
[46] Given the decentralized mechanism of selection of the members, the parties which are on the left- and right-wing extremes of national arenas are underrepresented in the Convention – there was only one Green representative before Mr Fischer's entry.

its outcome was not really accepted. The ratification of the treaty will probably be the key to the process. The attitude of the minority will be important here: if the most federalist and sovereignist minorities continue to criticize the agreement after a "consensus" – which, in Giscard's terms "does not mean unanimity" – has been reached, this will undermine the text; on the other hand, if they acknowledge that their point of view was defeated by a very large majority, after they had been given the opportunity to make their point, the consensus will be strengthened. The quality of the deliberation, and the satisfaction it provides to its actors, might determine their attitude. The kind of argument used by those who will support the new treaty will be very important too. If they argue that "the treaty is good because it supports our interests, this will not strengthen the foundations of the agreement. If, on the contrary, they explain that the treaty is the best possible compromise between still largely different interests and visions, this might help citizens understand the nature of the agreement. The legitimacy of the Union would be strengthened, not because its capacities would be developed, but because the expectations of the citizens, who would understand the nature of the EU better, would be reduced.

Finally, the impact of forms should not be underestimated either. If the Convention manages to write a simple, clear and understandable text, the consensus might grow.[47] Western minds are forged by formal categories, and the conformity of the Union's basic text to the canons of Western law would make it more acceptable.[48] Giscard is probably right when he says that words matter. If the *conventionnels* were able to find formulas to explain that the Union is less than a state but more than a confederation, this could help dissipate the phantasms of those who still fear, or contemplate, the construction of a European state.

The Convention is not reinventing the European Union. More modestly, its members try to reappraise and rephrase it. In the American history, the Constitution was the outcome of a long debate on the vices and virtues of federalism and sovereignty. In the EU, the Constitution came first, through piecemeal instrumental arrangements and without debate. The EU is now experiencing this debate, *ex post facto*. Even if it only confirms the agreement, this might make it more solid.

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[47] Rawls notes that "constitutional essentials" must not be too detailed and that their principles must be "made visible" in the institutions in order to benefit from a large support (Rawls 1993: VI, §6, 1).
[48] Weiler 1999.

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