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# **The Draft Constitutional Treaty**

Between Problem-Solving Treaty  
and Rights-Based Constitution

By  
**John Erik Fossum**  
**Agustín José Menéndez**

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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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Between Problem-Solving Treaty and Rights-Based Constitution

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# **The Draft Constitutional Treaty:** Between Problem-Solving Treaty and Rights-Based Constitution

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We became convinced that, if any such body was to come into being, we should have to call it into existence ourselves. We were young, we were inexperienced, we were penniless, and we hadn't the slightest idea how to begin.

**John MacDonald MacCormick**, *The Flag in the Wind*, p.21

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# Introduction

The purpose of this paper is to establish which conception of a legitimate European Union the Draft Treaty establishing a Constitution for Europe (hereafter, 'the Draft')<sup>1</sup> speaks to. We consider this paper as a further contribution to a collective research project on the European Union, which undertakes a broad-based empirical and normative analysis of the process of European integration (the CIDEL research project).<sup>2</sup> Our specific aim is to undertake an empirical and normative analysis of the Laeken reform process, which complements a previous essay where we dealt with the constitution-making procedure followed in Laeken, and compared it both to previous Treaty amendment procedures and to a normative standard of democratic constitution-making.<sup>3</sup> In this paper, we focus on the impact that the substantive provisions contained in the Draft Treaty could have on the ordinary democratic decision-making procedures once the text enters into force. That is, we try to determine, by means of looking at certain concrete components of the substantive contents of the Draft how law-making will be structured in the Union (if it is organized according to the Draft), and based on this try to infer what type of entity the Draft propounds, as well as which mode of legitimacy it endorses.

In more concrete terms, we consider a range of markers, six in all (out of which four have here been applied to the Draft).<sup>4</sup> We see these as key indicators for discerning the structure of democratic procedures, both in terms of how deliberation and decision-making proceed, as well as with regard to the substantive contents that laws are expected to uphold and develop. These indicators or markers are also useful for shedding light on the nature of the entity and its democratic legitimacy. The specific 'markers' which we will be considering are:

- the distribution of competences;
- the law-making process;
- fundamental rights;
- the underlying conception of cultural community;

Two caveats are in order. First, any assessment of this kind is complicated by the fact that the European Union is both a contested entity and an 'entity in motion'.<sup>5</sup> In response to this, we apply the three-fold characterization of the European Union shared by CIDEL researchers (problem-solving, value-based or rights-based) to the text, to see which one fits best. Each such conception yields an explicit set of principles, institutional-constitutional configurations, policy instruments, modes of allegiance, and conceptions of how a legitimate EU is forged. Thus, we tackle the problem of plural characterizations of the Union by means of presenting and evaluating the draft in relation to the three legitimation strategies listed above.<sup>6</sup> It seems to us that even if the three conceptions can be neatly distinguished for analytical purposes, any appropriate description of what the European Union is and what it should be necessarily requires combining elements from the three conceptions. The key question is how they should be com-

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1. Approved 18 June, 2004; formally signed 29 October, 2004; and currently awaiting ratification in all the Member States.

2. For further information on the project contact the authors or consult: <http://www.arena.uio.no/CIDEL>

3. 'The Constitution's Gift', forthcoming in *European Law Journal*, 2005.

4. Our dealing with four only is simply due to time and space constraints.

5. E.O. Eriksen and J.E. Fossum (eds) *Democracy in the European Union: Integration through Deliberation?*, London: Routledge, 2000.

6. On the strategies, see J.E. Fossum 'Constitution-making in the European Union' in Eriksen and Fossum, eds, supra, fn 5, PAGES; E.O. Eriksen and J.E. Fossum, 'Europe in Search of Legitimacy: Strategies of Legitimation Assessed', 25 (2004) *International Political Science Review*, pp. 435—59.

bined.<sup>7</sup> This approach permits us to establish not only what kind of polity the Union is, but also how it has become what it is, and to speculate (not to predict) how it might get transformed in the future.<sup>8</sup> Second, the very labeling of the Draft as ‘Treaty establishing a Constitution for Europe’ reflects the Union’s ambiguous and contested character. These traits invariably rub off on the process and on the outcome: Is the Draft actually a constitution; is it a treaty; or is it some kind of a mixture? In this article we take as a guiding assumption that to characterize the Draft as a constitution is at least within the range of current conceptual and normative possibilities. Whether it is the most adequate one in both descriptive and normative terms, taking into account the constitution-making process and the substance of the Draft, must be established in light of the fact that there are different conceptions of the European Union qua political community. This amounts to saying that the type of political community we find the Union to be has clear and obvious implications for which constitution it should have.

This article is structured in three parts. First, we spell out the three basic conceptions of legitimacy and apply these to the Union. From this application we derive more specific expectations on what concerns the substantive contents of the European constitutional edifice that each such application espouses. That is, we ask ourselves what a legitimate European constitution will look like from the vantage-points of the problem-solving, the value-based and the rights-based conceptions of the European Union. Second, we analyze the actual contents of the Draft, with specific attention to the issues listed above. Third, we discuss what our findings yield in terms of designating the Union’s status in polity terms. The last part holds the conclusion.

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7. Indeed, claiming that the three conceptions are unnecessary because the Union as an empirical reality is a mix of the three is a rather harmless criticism. What we claim is that the sharp distinction of three theoretical models provides analytical clarity, and that the key question is how the relationship between the problem-solving, value basis and rights foundations of the Union are related. This dramatically depending on which conception is considered to be prevalent. In that regard, we favour their combination under the general framework of the third conception of the Union as a rights-based polity.
  8. We reject any deterministic interpretation of our claims. In our view, political agency can potentially transform the Union in any conceivable direction, from its transformation into a federal polity to its dissolution. Having said that, one can speculate about the likely shape of the Union in view of the previous dynamics of the process of integration, which lead to paths of least resistance, stemming from the institutional inertias and from the growth of civil and political structures.

# I. Three Conceptions of a Legitimate European Polity: Which Substantive Notion of the Constitution Is Associated With Each?

## A) The problem-solving conception

This strategy conceives of the EU as a functional organization that is set up to address pragmatic problems which the member states cannot resolve when acting independently. The Union is mandated to act only within a delimited range of fields.<sup>9</sup> A critical determinant for establishing which fields is the EU's ability to offload and compensate for the declining problem-solving ability of the nation-state in a globalizing context.

This conception sees the Union's legitimacy as based on two components. In performance terms, it claims legitimacy due to its ability to produce substantive outcomes, i.e. output legitimacy.<sup>10</sup> This pertains in particular to its ability to handle cross-border issues (such as for instance environmental, migration and cross-border crime). Thus, the problem-solving strategy is based on a consequentialist notion of legitimacy. In democratic terms, the Union's legitimacy is derived from the democratic character of the Member States, as they retain core decision-making power within the Union's institutional structure.<sup>11</sup> Delegation of competencies to the Union entails self-binding, and this comes with a powerful set of controls in the hands of the Member States, so as to safeguard that the Member States remain the foundation of the EU's democratic legitimacy. The member states authorize EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and one of them to exercise veto-power, either individually or aggregatively.<sup>12</sup>

A problem-solving conception of the Union is associated with an instrumental, functional approach to the Union's legal order. The problem-solving conception envisions EU law to be of a Treaty-based character, which corresponds to intergovernmental principles. However, for the Union to serve as an effective problem-solver, its legal order has to be grounded on a set of legal norms of material constitu-

9. This *description* is shared by intergovernmentalists, neo-functionalists and regulatory scholars (A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', 31 (1993) *Journal of Common Market Studies*, pp. 473—524; *id.*, *The Choice for Europe. Social purpose and state power from Messina to Maastricht*, London: UCL Press, 1998; E.B. Haas, *The Uniting of Europe*, Stanford, CA: Stanford University Press, 1958; P.C. Schmitter, 'Neo-neo-functionalism: Déjà vu all over again?', in A. Wiener and T. Diez (eds) *European Integration Theory*, Oxford: Oxford University Press, 2003; G. Majone, *Regulating Europe*, London: Routledge, 1996), albeit they differ in their analysis of the *causal mechanisms* behind integration and the *normative* basis of the process. Thus, intergovernmentalists would claim that Member States are the main agents of integration, and that the Union is justified when serving the interests of its Member States. Regulatory variants would stress that the legitimacy of EU institutions and legal norms would be based on *performance* – output legitimacy (F.W. Scharpf, *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press, 1999; Majone, *Regulating Europe*; *id.* 'Europe's "Democratic Deficit": The Question of Standards', 4 (1998) *European Law Journal*, pp. 5—28).

10. Hellen Wallace, 'Deepening and Widening: Problems of Legitimacy for the EC', in Soledad García (ed.) *European Identity and the Search for Legitimacy*, London: Pinter, 1993, p. 100; Fritz Scharpf, *Governing Europe*, Oxford: Oxford University Press, 1999.

11. The strategy presumes that it is possible to distinguish between input and output legitimation, and further that the mode of legitimation that the EU itself can draw on is that of output legitimation (Scharpf, *Governing in Europe*). In input democratic terms, the EU can not claim to be legitimate.

12. QMV as an instance of collective veto, because it is not simple majority.

tional nature, which ensure a modicum of autonomy to its legal order. This entails that the Union has a material constitution, which regulates the production of legal norms and sorts out conflicts between norms within specifically delineated realms of action. This material constitution is, however, enshrined in an international treaty, as there is no need for a formal, procedurally approved constitution. To put it differently, the proponents of this conception of the EU are not overly concerned with the direct democratic legitimacy of the constitution-making process; their main concern is with the material norms which frame the EU legal order and ensure the power position of Member States. Their concern is to get the correct set of decision-making norms in place; not how they are deliberated and decided upon. This leads problem-solving conceptions into depicting the Laeken constitution-making process as another instance of Treaty amendment as we know it, and to be deeply disinterested in the question as to whether this entails a moment of constitutional significance or not.

First, the legal order of a problem-solving Union will be established on the basis of a flexible and open allocation of competencies to the Union, within the confined set of issues designated as relevant to Union action.<sup>13</sup> Thus, the Union has enumerated powers, but their determination is left, as much as possible, to the Member States, and is not subject to procedural or substantive requirements besides the requirement of agreement among Member States. This allows Member States to increase or decrease the realm of Union action in relation to the set of problems to be solved, or to be sorted out, at the Union level.<sup>14</sup>

Second, the problem-solving conception of the European Union presupposes an efficient and expedient law- and decision-making process at the Union level. This requires the constitution to assign decision-making roles both to the Member States and to the Union institutions. The reason for assigning decision-making roles to the latter is a) to increase the specialised or technical knowledge basis of the decision (knowledge-enhancing), and/or b) to facilitate decision-making by means of finding and proposing solutions likely to be accepted by Member States (efficiency-enhancing). The Union has delegated powers (as we have just seen), but the ultimate decision-making power rests with the Member States. This is ensured in different ways, depending on the scope and intensity of the common action. In some areas, Member States retain national veto power, and the role of European institutions is confined to making proposals. In other areas, Member States' veto power can only be exercised jointly, and is matched by an equal veto power granted to Union institutions. Finally, the institutions of the Union have exclusive decision-making power in a very limited number of fields.<sup>15</sup> Which of these is the right operationalisation depends on the will of the Member States, and on the need for rendering their commitment to Union action credible.

Third, the material constitution of a problem-solving Union would include those fundamental rights whose protection at the European level is considered as instrumental to the Union's problem-solving ability, on efficiency or expediency grounds. The protection of economic freedoms empowers persons, especially legal persons, to become decentralised guardians of European Union law.<sup>16</sup> Moreover, the protection of certain rights may also be considered necessary to ensure the social legitimacy of the institutional structure or of the substantive norms that are essential to problem-solving. A good example in that regard could be data protection norms, which facilitate the free flow of data across borders by means of reassuring citizens that their fundamental rights are protected at the same time. The enshrinement and protection of political, citizenship rights, is not a functional necessity, and these remain entrenched and exercised at the national level.

Fourth, from the material constitution of a problem-solving Union we would be able to discern an economic constitution with a clear distinction between questions of redistribution, which would be the competence of nation-states (and regions), and questions of regulation, which would concern the alloca-

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13. In other words, there would be explicit limits on the problem-solving entity's ability to deal with for instance security and defence matters, as these are considered core state tasks.

14. Such rhetoric is evident in the calls to repatriate competencies that were already transferred to the European Union.

15. The material constitution should determine, in a rather flexible way, the requisite majority of Member States that is needed to adopt a piece of legislation or to take a decision. However, in line with the above, majoritarian decision-making would be explicitly mandated (through national veto) and justified with reference to expediency. Extensions in the range of issues handled by the Union thus reflect the Member States' increased commitment to the common organisation.

16. J. Coppel. and A. O'Neill, 'The European Court of Justice: taking rights seriously?', 29 (1992) *Common Market Law Review*, pp. 669—92.

tion of the costs and benefits of maintaining the Union's institutions and the common action norms among the Member States.<sup>17</sup> That is, questions of distributive justice would be dealt with at the European level from a purely technical, regulatory, standpoint to ensure at the same time the efficiency of national systems, without pre-determining their core political choices.

Fifth, the material constitution of a problem-solving Union could be expected to be rather circumscribed on cultural issues. It will affirm the respect for national and regional identities and provide safeguards for their retention. Consistent with the characterization of the EU as a functional organization, the only necessary cement of the Union, so to say, is its problem-solving ability. There is no need for forging and renewing a 'we-feeling' among European citizens, as the Union is confined to deal with pragmatic issues.

Sixth, the procedural rights guaranteed to physical and legal persons in the process of application of Union law should be those necessary to ensure the ongoing commitment on the part of Member States to a common organization and legal system. The protection of procedural guarantees turns (natural or legal) persons into decentralised monitoring agents for national compliance with Union law.<sup>18</sup> This might also require granting individual rights limited rights to contest compliance of Union legislation with basic Treaty principles.

## **B) The Value-based conception**

The value-based community notion conceives of the EU as an emulator of the nation-state.<sup>19</sup> This conceptualization portrays the Union as a political community based on a set of ethical values, shared by European citizens on the basis of pre-political factors, typically embedded in a common culture.<sup>20</sup> As such, the EU is an entity to which Europeans should demonstrate their allegiance. It presupposes that they will shift their ultimate loyalty to the EU when the nation-building process has been completed. A common identity, this strategy posits, not only helps to stabilize the Union's goals and visions, but is also necessary for securing trust.<sup>21</sup>

The EU's legitimacy basis, from this perspective, emanates from the community of values that the EU draws upon. These common values underpin and render possible democratic decision-making at the European level. They are the preconditions for European democracy. Thus, value-based conceptions tend to underpin a democratic conception of legitimacy, but one that is grounded on that community's particular set of common ethical values. This entails substantive limits on the agenda and on what are seen as acceptable outcomes of democratic decision-making. This strategy is based on a contextual mode of rationality and depicts the EU as an emerging value community.

The value-based conception requires the Union to have a constitution that symbolizes and reflects the existence of a European community of values. Thus, the constitution is a 'rooted' constitution, i.e., a body of fundamental norms with deep roots in the pre-political community of values. To put it differently, the constitution is the legal embodiment of the community of values. As such, it is best seen as an evolutionary constitution, which is distilled from such socio-cultural roots over a considerable period of time.<sup>22</sup> The constitution-making process critically contributes to the clarification of the Union's value basis. It is better understood as a collective process of self-interpretation, through which it becomes clear

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17. This also reflects a distinction between commutative and distributive justice concerns.

18. Chris Harding, 'Who goes to Court in Europe?' 17 (1992) *European Law Review*, pp. 105-95.

19. This is, in our view, compatible with a republican interpretation of the Union's value basis.

20. According to communitarians, being a citizen is not a mere act of will, but something which is rendered possible by the pre-politically sharing of 'something' (i.e. a 'culture'); turning individuals into next of kin predisposed to make sacrifices for others. (J. Benda, *Discours à la nation européenne*, Paris: Gallimard, 1993; cf. J.H.H. Weiler, *Un'Europa Cristiana*, Milano: Rizzoli, 2003)

21. Trust is an essential condition for deep and binding cooperation and for the settlement of conflicts by neutral procedures (R. Schmalz-Bruns, 'On the political theory of the Euro-polity', forthcoming in E.O. Eriksen, ed., *Making the European Polity: Reflexive integration in the EU*, London: Routledge, 2005). A critical source of trust is a common cultural substrate, which can help foster allegiance and respect for laws. Cf. C. Taylor, *Human Agency and Language*, Cambridge: Cambridge University Press, 1985; *Sources of the Self: The Making of the Modern Identity*, Cambridge, MA: Harvard University Press, 1989; D. Grimm, 'Does Europe Need a Constitution?', 1 (1995) *European Law Journal*, pp. 282—302; D. Miller, *On Nationality*, Oxford: Oxford University Press, 1995; M.J. Sandel, *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 1982).

who are Europeans and also who they want to be. Consequently, constitution-making has to reach back in time, and establish that there is a set of common traditions and memories that can be seen as constitutive of Europe. These must then be revitalized and brought to the fore to support the constitution-making process. It has to reach into people's hearts and passions, and reinforce their sense of selves as patriots, willing to embrace collective obligations essential to each other's well-being.<sup>23</sup> Thus, the contents of the constitution have to extend beyond institutional design.

First, the constitution of the value-community espouses the principle that the distribution of competencies should follow core community traits. With this is meant that all competencies which are central to the forging and maintenance of the Union as a nation-state should be located at the central level. In other words, because the Union as value-community can only be sustained through a system of defense, a system of redistribution of economic resources, and a system of cultural maintenance, these competencies should be allocated at the Union level. Nations and regions could have auxiliary competences on what concerns the regulatory and administrative implementation of such policies. On other issues, competencies can be shared among all relevant levels of government.

Second, it expects the Constitution to delineate law and decision-making procedures in which active citizens can be socialized into Union common values. This requires combining citizen participation at the European, national and regional levels. Citizens' involvement at all levels of government is needed in order to ensure the sustenance of an active community of values, and to ensure that citizens internalize such values. This entails majoritarian decision-making procedures, in which representative Union institutions have the final say. But this is to be combined with multiple veto points, which ensure sub-communities and protect the central institutions from being overloaded.

Third, the value-community's Constitution will contain a catalogue of fundamental rights placing equal emphasis on fundamental rights and on fundamental duties, as both, and especially the latter, are reflective of the common value basis that bonds citizens together. The constitution will also draw a clear line between rights of citizens and of non-citizens. Similarly, it will delineate law and decision-making procedures that ensure citizens' active political participation, so as to sustain the Community's value basis and sense of self. Given the Union's sheer size, this requires procedures for active participation at all key levels: European, national and regional. But given that these are also in some sense distinct communities; there will also be a multitude of potential veto points, so as to ensure communal allegiance, as well as to protect against trans-communal transgressions.

Fourth, the Constitution will frame a socio-economic order which is reflective of citizens' mutual obligations, of what they owe to each other as members of a value-based community. Consequently, there should be a strong element of redistribution at the European level, which will reflect Europeans' allegiance to the Union. This ensures the necessary we-feeling – required for sustaining the community – and that also has to be forged and renewed on a continuous basis, for this to constitute a value-community.

Fifth, it expects the Constitution to contribute to the fostering of a strong European identity. The Constitution itself should be turned into a symbol of the political community, and for such a purpose, it should make explicit reference to the common symbols and to the Union's foundation as a community of fate. The Constitution will contain provisions to ensure the ongoing socialisation of persons into 'Europeans'; there would be a set of clearly delineated criteria for who are Europeans, and who are not; and these criteria would reflect cultural aspects and a common identity. The onus would be on positively identifying Europe, and distinguishing Europeans from others, rather than on what Europeans have in common with others.

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22. F.A. Hayek, *The Constitution of Liberty*, Chicago: University of Chicago Press, 1960; B. Leoni, *Freedom and the Law*, expanded 3rd edition, Indianapolis: Liberty Fund, 1991; see also H. Brunkhorst, 'A polity without a state? European constitutionalism between evolution and revolution', in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds) *Developing a Constitution for Europe*, London: Routledge, 2004; C. Möllers, 'Verfassung – Verfassungsgebung – Konstitutionalisierung', in A. von Bogdandy (ed.) *Europäisches Verfassungsrecht*, Berlin: Springer, 2003.

23. If there is no common pre-political identity, it has to be created. Constitution making in this perspective is not only a forward looking creative act where the main task is to establish a set of institutions that shape the ensuing community. Constitution making is as much a backward looking *creative* act, in the sense that certain aspects of the past are made explicit and attributed normative value. History is interpreted in the light of amplifying those traits that speak to a common sense of origin and a common sense of destiny.

Sixth, the value-based Constitution is unlikely to constitutionalise procedural rights, even less to grant the same constitutional status as the one given to political rights. This is so to the extent that political procedures, not courts, should play a central role in the definition of common action norms in line with the founding values of the community. Thus, the value-based conception is extremely skeptical of entrenching procedural guarantees which entail the judicial review of legislation, be it European or national, as this entails empowering courts to the detriment of political processes. Such rights are seen as having the potential to undermine the Union's value-basis.

### **C) The rights-based conception**

The rights-based notion conceives of the European Union as a political community based on the citizens' mutual acknowledgment of their rights and duties. The Union is considered as the supranational level of government in Europe, and as one of the regional subsets of a larger cosmopolitan order.<sup>24</sup> The Union, in its internal make-up, is federally structured.<sup>25</sup>

In a globalizing world, the nation-states suffer particularly pronounced democratic deficits, in that their citizens are affected by decisions taken outside the borders, and beyond national control. This underpins the case for supranational government. But to re-establish democracy, the new level of government must itself meet with the requisite standards of democratic legitimacy. From the vantage-point of this model, such standards refer to the rights of citizens to participate in the deliberation and decision-making processes through which common action norms are established. Applied to the EU, laws adopted and decisions taken at the European level deeply affect citizens. This presupposes that the Union's democratic legitimacy be based on the democratic credentials of its decision-making procedures and on its protection of fundamental rights. The rights-based strategy is founded on the notion that the Union's democratic legitimacy is based on citizens who see themselves, not only as the addressees, but also, as the authors, of the law.<sup>26</sup> Further, the rights-based notion also presupposes a public sphere steeped in and upheld by the essential conditions of freedom, inclusion, equality, participation, and open agenda. Its support resides in a constitutional patriotism,<sup>27</sup> where a set of legally entrenched fundamental rights and democratic procedures, are embedded within a particular socio-cultural context, so as to make for political affect and identification. This strategy rests on the moral value of deliberation; it propounds a rights-based, procedural notion of legitimation.

Having said that, the rights-based conception of the Union is entirely compatible with the notion of the Union as also set up to ensure problem-solving. A political community is established not only to ensure the mutual acknowledgment of rights, but clearly also to pursue policies, which include solving all kinds of problems, normative, ethical and prudential. In short, legitimacy bereft of efficiency is hardly any legitimacy at all. The main difference between the first and the third conceptions lies in the latter's claim to the effect that problem-solving should proceed within a constitutional framework for reasons both normative and prudential. The former, problem-solving notion's concern with the legitimacy of the specific solutions provided, then, can only be guaranteed if framed by and decided within a constitutionally established democratic decision-making process. The latter speaks to the stability of the arrangements, which can only be guaranteed within a properly established democratic constitutional order. A similar line of reasoning applies to the question as to whether the rights-based model claims that the mu-

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24. The Union would occupy an intermediate position between the United Nations and nation-states as a regional political community. As such, the European Union should be regarded as a *political community* part of a cosmopolitan order (cf. E.O. Eriksen, *A Cosmopolitan Europe in the Making?* Working Paper 2/04, Madrid: Instituto Universitario de Investigación Ortega y Gasset, 2004).

25. Note that there is no requirement for a federal entity to be a state. Cf. D.J. Elazar, *Exploring Federalism*, Tuscaloosa, University of Alabama Press, 1987.

26. A central tenet of discourse-theory is that only those norms that are approved in free and open debate are valid (J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA: MIT Press, 1996, p. 107).

27. J. Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in A. Gutmann and C. Taylor (eds) *Multiculturalism*, Princeton: Princeton University Press, 1994; id., *The Inclusion of the Other: Studies in Political Theory*, Cambridge, MA: MIT Press, 1998; id., *The Postnational Constellation*, Cambridge, MA: MIT Press, 2001; id., 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles', 29 (2001) *Political Theory*, pp. 766—81.

tual acknowledgment of rights is sufficient to ensure the stability of the European political community. It seems to us that the only appropriate shorthand answer is no, as is also reflected in the very notion of constitutional patriotism: a set of fundamental rights and democratic procedures that are steeped within a particular context. There is thus a need for some ethical identity, some kind of we-feeling that is also supportive of democratic decision-making procedures.<sup>28</sup> The main difference with the second model concerns the extent to which such ethical values are expected to be subject to *normative, critical* reflexive analysis, with the rights-based conception claiming that such ethical values cannot serve as a set of given contextual or pre-political elements and hence be exempted from criticism from a moral standpoint.

The rights-based conception of the Union sees the constitution as reflecting the fundamental legal norms of the European Union, approved by European citizens in a process with reinforced democratic qualities (relative to ordinary law-making).<sup>29</sup>

As a consequence, the constitution must uphold a set of rights that enable participation in opinion- and will- formation processes, and thus make for public autonomy (i.e. political rights), as well as a set of rights that protect the integrity of the individual, her private autonomy. The two sets of autonomy presuppose each other and are mutually dependent on each other. To ensure this, the constitution also has to contain a set of institutions that realize the public and private autonomies of citizens.

This also presupposes a democratic constitution-making process; ‘revolutionary’ in the sense of forging and reflecting the common will of citizens.<sup>30</sup> The rights-based conception presupposes that the constitution is forged through a ‘constitutional moment’<sup>31</sup>, a process with an explicit democratic sanction. Constitution-making permits citizens to see themselves as the addressees and also as the authors of the laws that affect them. Furthermore, the legitimacy of the European constitution is critically dependent on the EU harnessing the normative essence of the modern democratic constitution, which essentially corresponds to the protection of fundamental rights.

First, the rights-based Constitution is expected to lay the ground for an allocation of competences among different levels of government that ensures that each level retains decision-making capacity over those issues that mainly concern its citizens; at the same time that it ensures the political influence and relevance of each level of government, which is a basic pre-condition for ensuring active political participation. The criteria of allocation of competences could be flexible, but their reform should be subject to procedural and substantive limits, i.e., the criteria need to be properly constitutionalised.

Second, the rights-based Constitution is expected to delineate a law and decision-making procedure that is such set up as to ensure that legal norms and concrete decisions can be supported by the common will of European citizens.<sup>32</sup> This entails designing a law-making procedure that assigns a decision-making role to institutions that are representative of the will of European citizens, so as to ensure that decisions are responsive to social demands. This presupposes a procedure that is sensitive to concerns in the various European public spheres, that is, mutual interaction between strong and general publics.<sup>33</sup> This implies a majoritarian decision-making procedure, in which veto power rests exclusively with citizens through their European or national representative institutions.<sup>34</sup>

Third, the rights-based Constitution will include a catalogue of fundamental rights that is reflective of and that amplifies the commitments entrenched in the Member States’ constitutions of the indivisibility of fundamental rights (including civic, political, but also social and economic rights). As such, the catalogue should reflect the rights that European citizens mutually acknowledge each other as citizens, and which constitute the core precondition for European democracy. Those rights should be equally pro-

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28. The question of the relationship between a normatively grounded democratic constitutional order and an ethical we-feeling is indeed a complex one. But the problem as such is relevant to both the nation-state and the European Union context.

29. Ackerman’s dual conception of democracy is related to the need to distinguish between the Constitution and ordinary statutes (*We the People: Foundations*, Cambridge, MA: Harvard University Press, 1991; and *We the People: Transformations*, Cambridge, MA: Harvard University Press, 1998).

30. H. Arendt, *On Revolution*, London: Faber and Faber, 1963; B. Ackerman, ‘Revolution on a Human Scale. (Moments of Change: Transformation in American Constitutionalism)’, June (1999) *Yale Law Journal*.

31. Even though ‘moment’ is the usual term, it actually refers to a process.

32. This requires that law and decision making procedures will block initiatives that are supported by sectional interests, i.e., are not representative of the common interest of Europeans (that is, procedures that avoid false positives) at the same time as to ensure the translation of the common will of European citizens into legal norms (that is, avoiding false negatives). There is also the recurring issue of ensuring adequate minority protection.

tected within the scope of Union law, something which entails that fundamental rights should be the main constitutional yardstick of European legislation, of the action of EU institutions, and also of national legislative and executive organs when applying, or claiming exceptions to Union law.

Fourth, the Constitution should reflect the condition of the Union as a community of rights and duties. This also entails the notion of the Union as a community of risks (including economic ones). The sustenance of the EU entails the allocation of costs and benefits among Member States or regions, as well as among individuals. The pattern of distribution depends on the good to be allocated or the cost to be covered. This also entails that the Union’s market-making dimension should be complemented with a market-correcting one; by social policy and not only by social regulation.

Fifth, the rights-based notion does not depict the Constitution as rooted in a set of pre-political values. The Constitution could lend symbolic support to any given set of identities, notably a European one, but it would then also underline the multiple identities of Europeans, for instance as regional, national and European citizens. The Constitution however, in line with what has been said above, would be such set up as to render cultural identifications reflexive – and as contingent on compliance with fundamental individual rights.

Sixth, this strategy expects the Constitution to provide European citizens with procedural guarantees which ensure the correct implementation and application of Union law. The concrete breadth and scope of such guarantees will be directly related to the breadth and scope of rights to political participation. Thus, the insufficient democratic character of law-making procedures could be partially compensated for by the granting of individual subject rights to contest the constitutionality of Union laws.

**TABLE 1: The legitimation strategies – expectations related to the draft constitution**

	<b>Regulatory problem-solving</b>	<b>Value-founding of community</b>	<b>Rights-entrenching in federal Union</b>
Polity Type	International organization	Nation-State in the Making	Federal Union (harbinger of a cosmopolitan order)
What the Draft is	Member state-based const. treaty	Evolutionary constitution	Democratic (revolutionary) constitution
What is a Constitution for?	Efficiency	Self-Interpretation	Democratic legitimacy
What the constitution-making process should focus on	Institutional Design, Simplification	Symbolic manifestation and evocation of the values of the community	Realising political rights through self-government
Division of powers and competences	Member state-based principle: delegated to the EU	Communal principle: lower levels support community	Federal principle: ‘democratic congruence’

33. *Strong publics* refer to institutionalised deliberations whose discourse encompasses both opinion formation and decision making. In institutional terms, strong publics alludes to parliamentary assemblies and discursive bodies in formally organised institutions imbued with decision-making power, yet constrained by the logic of arguing and impartial justification. Weak or *general publics* refer to public spheres “whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making”. See Nancy Fraser ‘Rethinking the public sphere. A contribution to the critique of actually existing democracy’, in Craig Calhoun, *Habermas and the Public Sphere* (Cambridge: The MIT Press, 1992), pp.109-42; Erik Oddvar Eriksen and John Erik Fossum, ‘Democracy through Strong Publics in the European Union?’, 40 (2002) *Journal of Common Market Studies*, pp. 401-24; and ‘Conceptualising European Public Spheres: General, Segmented and Strong Publics’, Working Paper ARENA 3/04; and Hauke Brunkhorst, ‘Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism’, 31 (2002) *Millennium: Journal of International Studies*, pp. 675-90.

34. National parliaments acting collectively on European issues can supplement and support the EU parliament, when issues overlap across levels. Note also that on issues allocated to governments at lower-levels, the same rules apply but now within these constituencies.

	<b>Regulatory problem-solving</b>	<b>Value-founding of community</b>	<b>Rights-entrenching in federal Union</b>
Fundamental rights: status and range of	Civil and economic rights only	Community protective rights	Political equality rights
The EU's socio-economic order	Limited taxing and redistribution at EU-level	European: full state-type ability	European: full state-type ability
Cultural community and diversity	No cultural identity required	European cultural identity is vital	Rights-induced reflexive political culture

## II. The Substantive Contents of the Draft Constitutional Treaty

### A) Competences

Federal and quasi-federal polities are characterized by the division of competences not only among different institutions, but also among different levels of government. The *international* origins of the European Communities go a long way to explain the circumscribed character of the Treaties on this matter. At the same time as the Communities were assigned specific tasks in the domain of market integration, the Treaties contemplated flexible arrangements through which Member States could transfer new competences to the Union. It was only after the Treaty of Maastricht that Union primary law tackled the issue, by means of affirming the principles of subsidiarity and proportionality as substantive checks on the assignment of powers to the Union.

The Draft Treaty breaks new ground by including a set of general provisions concerning the allocation of competences between the Union and the Member States. This can be considered in three steps, those being a) the (re)affirmation of the principle of enumerated competences; b) a three-fold classification of competences; and c) the reformulation of the flexibility clause.

#### a) *The principle of enumerated Competences*

The Draft reinforces the formulation of the principle of enumerated powers through explicitly stating its logical corollary that is that if competences have not been conferred, they remain with the Member States (Art. I-11.2). Even if this does not imply any substantive change in relation to present Community law, it can be argued that the *explicit affirmation* of the tenor of this principle contributes to reduce (rightly or wrongly) the flexibility which has characterised the allocation of powers in European constitutional law.

#### b) *A Three-fold characterization of competences*

The third Title of the First Part of the Draft Treaty establishes a three-fold classification of the Union's competences:

- exclusive,
- shared and
- supporting, coordinating and complementary competences.

However, ad hoc provisions are devoted to the coordination of economic and employment policies (art. I-12.3 and I-15), to the common foreign and security policy (art. I-12.4 and 16), and even to the conclusion of international agreements, at least under a certain *a contrario* interpretation of Art. I-13.2). These competences do not easily fit into the three-fold classification, to the extent that one can doubt whether the Draft really classifies competences into three types only.

In addition, certain specific competence titles established in the Third Part of the Draft seem to put into question the three-fold distinction. This applies to the competence to facilitate the right of European citizens to move and reside freely (Art. III-125) a competence which goes beyond the competence title established in Art. III-136, and which might be said to go beyond Community competence, according to Article III-133.3.<sup>35</sup> To this it must be added that the enumeration of powers under each competence type

does not seem to be fully coherent, either. Thus, the label supporting competence for “industrial policy” is questionable, given the close relationship that exists with the internal market.<sup>36</sup> Similar considerations can be made regarding the labeling of competences on research as “shared competences”, given the fact that the Union basically funds research, something which is characteristic of the Treaty’s definition of *supporting, coordinating and complementary competences*.

But the most problematic feature of the classification of competences in the Draft Treaty is that Art. I-12.6 affirms that the Draft respects the division which stems from the present Treaties, as reflected in part III of the Constitutional Treaty. This entails that the general classification reflects, more than frames, the present division of powers. Thus, instead of requiring a reinterpretation of the present implicit division of competences in their light, the general provisions of the Draft are to be interpreted by reference to Part III. It is difficult to escape such a conclusion, given the fact that Part III has, at least formally speaking, the same constitutional status as the other two Parts of the Treaties.<sup>37</sup>

### c) *Flexible Transfer of Competences*

Article I-18 introduces a new flexibility clause, which grounds Union competence on the need to attain one of the objectives set out in the Constitution “within the framework of the policies of Part III”<sup>38</sup>. What is different from present law is that the Draft introduces additional procedural and substantive hurdles. On the procedural side, legislation adopted or concrete decisions undertaken under the new flexibility clause are subject to a decision-making procedure which requires both the unanimous consent of Member States and the consent of the European Parliament. On the substantive side, the Draft explicitly formulates that legislation adopted on the basis of I-18 cannot lead to the harmonisation of Member States’ laws or regulations when the Constitution excludes such harmonisation. Both procedural and substantive limits are intended to render impossible the use of the flexibility provision as an alternative to formal Treaty amendment.<sup>39</sup>

## B) Law-making

Law- and decision- making processes are the institutional and procedural arrangements that regulate the production of common action norms, and the transformation of political initiatives into legal and political action. The primary law of the Union is rather complicated on this matter. As a start, Union law has a confusing system of sources of law, which mainly results from the lack of a *nomen iuris* which refers to regulatory instruments, to legal norms which implement general and abstract norms within the framework defined by the former. Moreover, there is a considerable number of different law and decision-making procedures, both within and outside what is generally referred to as the Community method. Under the general heading of ‘Community method’, the Union has relied on a wide range of different processes, through which the Community general will is to be ascertained. Such methods have moved from the ‘classical’ one in which the Commission initiates and the Council decides, to the more complex co-decision procedure introduced in the Treaty of Maastricht, and whose breadth and scope was increased both in Amsterdam and Nice. Moreover, the legislative procedures of the second and third pillar are basically intergovernmental, as no role of European institutions as such is contemplated. However, the strict distinction between the pillars introduced in Maastricht has progressively eroded, in that issues

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35. Cf. F. Mayer, ‘Competences-Reloaded? The Vertical Division of Powers in the EU after the New European Constitution’, in J.H.H. Weiler and C. Eisgruber, eds, *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04, New York: New York University, p. 17.

36. Dimitris N. Triantafyllou, *Le projet constitutionnel de la Convention européenne*, Bruxelles : Bruylant, 2003, p. 42

37. *Ibid.*, p. 48.

38. Something which duly reflects the assumption by the Union of competences beyond market-making. As a matter of fact, this will render discourses on Union policy less centered on “market-making”, but it will not enlarge the scope of the flexibility clause; indeed, when action was undertaken under Article TEC 308, with Member States agreeing unanimously, the “common market” connection was also arguable.

39. Given the considerable risk of over-constitutionalisation from the lack of differentiation of Parts I and II versus Parts III in terms of constitutional status, the opportunity for constitutional tightening of the flexibility clause might be put into question. But our point here is a more limited one, namely, that this points to a constitutionalisation of the division of powers.

have been moved from pillars two and three to one, and some issues must be addressed by several pillars at the same time.

All this results in an unclear compromise between two different strategies of democratic legitimacy; namely (1) derivative executive legitimacy, stemming from the key role assigned to national governments in the Council; and (2) direct representative legitimacy, resulting from the co-legislative powers granted to the European Parliament in some procedures. As a result, the *existing* Union law and decision-making system holds traits of the first, problem-solving, and the third, rights-based, model. This combination makes the Union into quite a distinct polity and one that is clearly different from the second, nation-state model cherished by value-based conceptions of the Union.

The implications of the Draft on law-making procedures will be considered in more detail in five steps: a) sources of law, b) increased transparency; c) direct democratic legitimacy inputs of general publics; d) direct democratic legitimacy through new powers granted to the European Parliament; and e) the emergence of derivative representative legitimacy, by means of the granting of a legislative role to national parliaments.

#### **a) Sources of Law**

The Draft Treaty introduces a new system of sources of Union law, at the same time that it constitutionalises the language in which the different sources of Union law are named.<sup>40</sup>

First, the Draft Treaty aims at a systematic regulation of the whole set of legislative acts into categories which correspond to those entrenched in national constitutional systems (see Article I-33).<sup>41</sup> Thus, there is a clear three-fold distinction between statutes (European laws and framework laws), statutory instruments or decrees (regulations) and administrative acts (European decisions). This presupposes a clearer division of labour between the legislature, the executive and the administration, which could avoid a good deal of the difficulties stemming from the absence of a specific category referring to statutory instruments or decrees in the system of sources of law contemplated in TEC 249.<sup>42</sup>

Second, the Draft Treaty translates into constitutional language the system of sources of law of Union law. The Draft Treaty speaks of laws and framework laws, and not of regulations and directives, the old terminology enshrined in the Treaties.<sup>43</sup> This renders the material legal character of Union norms more obvious, but might at the same time result in obscuring some differences which deserve being maintained.

#### **b) Transparency of the law-making procedure**

Democratic law-making is not just a matter of taking decisions and determining what the common action norms are, but also of providing the underlying reasons for such norms. This grounds the case for a gen-

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40. In doing this, it follows the Conclusions of the Working Group on Simplification, CONV 424/02, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00424en2.pdf>.

41. Article I-33.1: "In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions"; and then I-33.2: "A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States"; I-33.3: "A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result"; I-33.4: "A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as regards the result to be achieved, on all Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result"; I-33.5: "A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them".

42. The original design of the Community legal order presupposed a strict executive federalism, i.e., that regulatory and implementing measures will be adopted by national administrations. However, it was quickly realised that the effective realisation of Union policies required the allocation of further normative powers, on what concern statutory instruments and legislation of detail, to Community institutions. This was crystal clear on what concerned the Common Agricultural Policy, for example, which could only be turned into reality if Union institutions, and especially the Commission, undertook a heavy task of regulatory production. This resulted in a blurring of the kind of act which was contained in a Regulation or a Directive, as the same *nomen iuris* was applied to both general and regulatory legal norms. Union law was plagued by the absence of a specific category referring to statutory instruments or decrees in the system of sources of law (as contemplated in TEC 249), which became extremely problematic with the development of customary, non-Treaty based implementing norms through the mechanism of delegation of powers.

eral obligation to obey the law even for those who did not agree with the decision through which the legal norm in question is enacted. This is why transparency of the deliberations leading to the enactment of a law is essential in order to ensure the democratic character of law-making processes.

The Draft Treaty affirms the principle of the transparency of Council deliberations with regard to the examining and adoption of legislative proposals (Article I-50.2). This confirms and reinforces the decision taken in the European Council of Seville of 2002,<sup>44</sup> by which the Council was already expected to become more transparent. This decision was welcomed by national parliaments, whose supervision of national executives will be rendered easier. In that regard, it increases the strength of the *derivative democratic legitimacy of Union law*. Moreover, this decision will contribute to foster decision-making tied to reasons, and also to ease the circulation of arguments between strong and general publics. In that sense, it might result in increasing the *direct democratic legitimacy of Union law*.

**c) Increased direct democratic legitimacy: general publics**

The Draft Treaty contains an explicit acknowledgment of the central role to be played by general publics in democratic law- and decision-making. Title VI of the first Part of the Draft Treaty is actually entitled “The Democratic Life of the Union”, while Article I-47 affirms “participatory democracy” as one of the central principles to guide Union law- and decision-making.

However, this is not accompanied by a thorough reconsideration of the political rights acknowledged to European citizens. One novelty is the right to exert legislative initiative through the collection of signatures. As we will see, however, this formally results in a mere invitation to the Commission to present a legislative initiative, and not in an autonomous power of any kind. Moreover, some of the remaining provisions whose literal tenor is new merely consolidate the practice of consultation of stakeholders which is usually considered as part of the Union governance structures. Thus, articles I-47 and I-50 require the Commission to consult ‘civil society’ when launching legislative initiatives, but it can be doubted whether this really corresponds to the fostering of the input of general publics.

**d) Increased direct democratic legitimacy: strong publics**

The Draft Treaty confirms the double-sided character of the democratic legitimacy of Union law. At the same time that it aims at increasing derivative democratic legitimacy by means of assigning a direct role to national parliaments, it expands the breadth and scope of the powers assigned to the European Parliament. This results in strengthening the representative democratic legitimacy pillar of Union law, both through European and national representative institutions.<sup>45</sup>

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43. The legal system of the Communities was originally characterised by the delegation of autonomous law-making power to Community institutions, an exercise that resulted in two main types of general legal norms, i.e. regulations and directives. Both regulations and directives were regarded as directly and immediately effective in national legal orders, once approved through the relevant Community law-making process. In that regard, they were materially equivalent to national *statutes* (‘lois, leggi, leyes’). However, the democratic legitimacy of Union law was purely derivative, as regulations and directives were approved through a procedure where citizens exerted only a very indirect influence. Neither European nor national parliaments were given much of a say, as the final legislative word was entrusted to the Council of Ministers, where national executives were represented. True, directives were to be implemented by national law-making procedures, but within the (increasingly detailed) framework of the directive, whose legal effectiveness was further enhanced by the affirmation, under given conditions, of their direct effect by the European Court of Justice. To the extent that national governments were elected by democratic parliaments, and each national representative was granted a veto power, Union law enjoyed derivative democratic legitimacy, of a similar kind to that acknowledged in classical international law.

This necessarily resulted in an unclear hierarchical relationship between national statutes and their European material equivalent, i.e., regulations and directives. The primacy of Community over national law, affirmed by the European Court of Justice, and accepted by many national courts, has been accepted as a matter of practice, but remains on shaky grounds. It is indeed problematic that national norms, especially constitutional norms, with a high procedural democratic legitimacy, are to be left aside when in conflict with European norms of dubious democratic legitimacy.

The move from individual to collective veto powers with the introduction of qualified majority voting in the Council has come hand in hand with the infusion of some degree of procedural democratic legitimacy to Union law-making process. Thus, there is a direct correlation between the move towards QMV in the Council and the assignment of veto power to the European Parliament. This results in a different, more complex and nuanced, combination of derivative and direct democratic legitimacy.

44. See President Conclusions of the Seville European Council, June 2002, Annex 2, points 10-11, ‘Opening Council meetings to the public when the Council is acting in accordance with the procedure for co-decision with the European Parliament’, available at [http://www.europarl.eu.int/summits/pdf/sev2\\_en.pdf](http://www.europarl.eu.int/summits/pdf/sev2_en.pdf).

The Draft Treaty turns co-decision into the standard Union law-making procedure (cf. Articles I-34 III-396).<sup>46</sup> What was introduced as an exception to the rule in the Treaty of Maastricht is now formally the rule.

Having said that, a systematic reading of the Draft allows us to distinguish a number of exceptions to this rule, which correspond to three alternative law-making procedures, characterised as follows:

- i) The European Parliament has no say on the legislative procedure, and it is merely to be consulted. The power to enact new laws is assigned to the Council, which is to decide unanimously. This is the case of legislation on:
  - citizenship rights (art. III-126: right to vote and stand as candidate in elections to the European Parliament and in municipal elections; art. III-125.2: measures concerning passports, identity cards, residence permits or any other such document, measures concerning security or social protection; measures to secure diplomatic and consular protection of citizens of the Union in third countries: III-127.1);<sup>47</sup>
  - some key norms defining the single market, such as a) the regime of the free movement of persons (III-172.2), b) rights and interests of employed persons (III-172.2), c) social security and protection of workers, protection of workers when their employment contract is terminated, representation and collective defence of the interests of workers and employers, including co-determination, conditions of employment for third-country nationals legally residing in Union territory (III-210.3 c, d, f and g, and III-210.1);<sup>48</sup>
  - norms concerning the harmonization of tax measures (III-171);<sup>49</sup> and constraints to the free movement of capital to third countries (III-157.3)
  - linguistic regime of uniform intellectual property rights protection and centralized Union-wide authorization (III-176)
  - family law norms with cross-border implications (Article III-269.3)<sup>50</sup>
  - environmental policy; Article III-234.2 leaves in the hands of the Council (1) measures of a primarily fiscal nature; (2) measures affecting town and country planning, quantitative management of water resources, or affecting, directly or indirectly, the availability of such resources, land use; (3) measures significantly affecting the choice of each Member State between different energy sources and the general structure of its energy supply;<sup>51</sup>
  - police cooperation; the Council needs only consulting Parliament on (a) Operational cooperation between police authorities (Article III-275.3), (2) the operation of police forces in the territory of another MS in liaison and in agreement with the authorities of that State (Article III-277).

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45. It is usually assumed that successive Treaty amendments have resulted in a progressive democratisation of the Union law-making procedures. This perception is based on the slowly but steadily strengthening of the European Parliament. From being a merely advisory institution, almost on a par with the Social and Economic Committee in the founding Treaties, the Parliament have become a central institution in the law-making process, equipped with the right to veto any piece of legislation which has to be approved through the co-decision procedure, now used to approve a majority of secondary Community norms. The first step was taken in the 1970 and 1975 Treaty amendments, which granted the Parliament limited but far from negligible powers in the budgetary process. The Single European Act turned the Parliament into a decisive institution in the law-making process, by introducing the co-operation legislative procedure. The Maastricht Treaty increased the salience of the Parliament's role by granting it veto power in the new co-decision procedure that has been further strengthened by the Treaties of Amsterdam and Nice.

46. It must also be stated that the Draft Treaty requires the consent of the European Parliament before an international treaty is ratified by the Union in terms rather similar to the national constitutions requiring the consent of national parliaments (Article III-227.7; it is especially noticeable the reference to "agreements covering fields to which the legislative procedure applies", which translates the terms used in present Article TEC 300 into proper constitutional language).

47. Moreover, Article III-13 subjects the extension of the rights of European citizenship to (1) unanimous consent among Council members; (2) approval by the European Parliament; (3) ratification by each Member State in accordance with national constitutional provisions. This amounts to specifying a rather ad hoc procedure of constitutional reform.

48. The Article subjects Community legislation to the further requirement of respecting the basic principles of national security systems and financial equilibrium. However, the Council can decide by unanimity to subject the approval of some of these norms to the ordinary legislative procedure (III-104.3).

49. Although the Council could unanimously decide to subject some family law norms with cross-border implications to the ordinary legislative procedure (III-269.3).

ii) The European Parliament has no say on the legislative procedure, and it is not even required that it be consulted:

This is the case of legal norms dealing with:

- common foreign and security policy (Article III-300)
- common security and defence policy (Article III-309.2).
- common commercial policy negotiations, as Article III-315.3 keeps on limiting the power to establish a mandate to the Council, as well as the ratification of agreements)
- the domains where the Union operates through the so-called open method of coordination, that is, social policy, employment, but also economic policy coordination through the Broad Economic Policy Guidelines.
- monetary policy, where powers are monopolized by the European System of Central Banks, with the European Central Bank at its head.

iii) The budgetary procedure, which is subject to a specific procedure of great complexity, in which the allocation of powers extends to national parliaments. There are three main budgetary legislative acts:

- The Decision on own resources, now named as Own Resources Law, which is required to enumerate the sources of Union revenue and to cap the total amount at its disposal (in actual practice, this is done by reference to a percentage of the total wealth of the Union) (art. I-54). This amounts to the full constitutionalisation of the own resources decision, the approval of which follows at present a procedure which is formally considered an amendment of the Treaties, even if in an abridged and simplified form. In the Draft Constitution, the Own Resources Law would be approved if there is unanimous agreement in the Council of Ministers, and if the Law is ratified by all Member States in accordance with their national constitutional provisions. This clearly compromises the characterization of the Union's resources as its own resources, and leads, with all probability, to the granting of a veto right to each and every national parliament (a tall decision in a European Union with a membership of twenty five plus);
- The Financial Perspectives, which originated customarily out of the mismatch between the spirit of the Treaty reforms of 1970 and 1975 which granted budgetary powers to the European Parliament and the literal tenor of the said Treaties which limited the effective power of the European Parliament on the matter. Such practical arrangements are now fully given constitutional resilience, and redefined as "Multiannual Financial Frameworks". They are expected to "determine the amounts of the annual ceilings for commitment appropriations by category of expenditure" (Art. I-55.1 and III-402), thus framing to a considerable extent the shape of the decisions contained in the annual budget. The Constitution renders clear that the first financial framework law should be approved by the Council acting unanimously, jointly with the European Parliament acting by a majority of its component members. Successive financial framework laws would have to be jointly approved by the Council and the Parliament, but the Council could act by qualified majority;
- Finally, the annual budget (I-56) determines the revenue and expenditure of the Union for the fiscal year.<sup>52</sup>

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50. Cf. also Article III-157.3, concerning the enactment of measures which constitute a step back in Union law as regards liberalization of the movement of capital to or from third countries. The Draft put forward by the Convention included two rather modest inroads into the principle of unanimous decision-making on tax issues. Article III-62.2 opened the way to qualified majority voting on tax measures related to administrative cooperation or combating tax fraud and tax evasion, while Article III-63 did the same for "measures on company taxation relating to administrative cooperation or combating tax fraud and tax evasion". In both cases, it was necessary that the Council agreed unanimously that such measures were necessary for the internal market and to avoid distortion of competition beforehand. Both norms have been deleted in the IGC Draft, apparently under heavy pressure from some national delegations (which would probably include the United Kingdom, Ireland and Latvia). But one wonders whether such norms were not a rather modest specification of Article 96 TEC, basically reproduced in Article III-66 of the Draft Constitution in its Convention version, and III-174 in its IGC version.

51. It is also possible in this subject matter to move to the ordinary law-making procedure.

**e) Derivative legitimacy in representative terms**

The Draft Treaty also confers a specific role to national parliaments in a majority of Union law-making processes. In doing so, the Draft contributes to the derivative democratic legitimacy of Union law, but in an innovative way. Arguably, the provisions of the Draft on this matter ensure that Union law obtains further democratic legitimacy stemming from the *custodian role* assigned to national parliaments. Only indirectly could this be said to result in the increase of the powers assigned to Member States.

Until now, national parliaments could play only an indirect role in European legislative processes; more precisely, they could exert the powers acknowledged by their national constitution to control their national executives, also on what concerned their participation in Council meetings. In most cases, parliaments exert a controlling role over the national executive when acting as national representative in the European Council. Indeed, and following the German example, all national parliaments have ended up establishing committees specialized on following European decision- and law-making processes. This limits, even if not fully avoids, the risks of executive empowerment.<sup>53</sup>

The Draft Treaty goes beyond that. More specifically, the Protocols ‘on the Role of National Parliaments in the European Union’ (hereafter Parliaments’ Protocol) and ‘on the application of the Principles of Subsidiarity and Proportionality’ (hereafter, Subsidiarity Protocol) give national parliaments the power

- to let their voice be heard individually on the question whether each and every of the European legislative proposals complies with the principle of subsidiarity; moreover, all the institutions which participate in the process of European law-making “shall take account of the reasoned opinions” of national parliaments (Subsidiarity Protocol, point 5)
- to request the review of the legislative proposal to the Commission, such a power being granted collectively (at least of one third of national parliamentary chambers must join forces to exert this power<sup>54</sup>); such a review might lead to maintaining, amending or withdrawing the proposal; the Commission can decide what to do, but should always “give reasons” grounding its decision;
- to challenge before the European Court of Justice European legislative acts on account of the infringement of the principle of subsidiarity; however, the literal tenor of the Subsidiarity Protocol leaves it to the constitutional order of each Member State to determine the specific terms according to which national governments should act on behalf of national Parliaments (“notified by [national governments] in accordance with their legal order on behalf of their national Parliament or chamber of it”).

The direct powers granted to national parliaments are, however, limited in scope. It is also important to notice that they result in the establishment of direct, constitutionally mandated, relationships between Union institutions, i.e. the Commission and the European Parliament, and national parliaments. Indeed, the Parliaments’ protocol imposes upon the Commission the obligation to transmit directly the annual legislative program, all Commission consultation documents, all legislative proposals, and any other documents which it transmits to the European Parliament and the European Council to national parliaments (see points 1 and 2 of the Parliaments’ Protocol).

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52. Given the extremely limited amount of resources in the hands of the Union at present (the current Own Resources Decision caps Union revenue at 1.27 per cent of the Gross National Income of the Union), and given the sheer number of national parliaments that would have to accept the increase of such a ceiling, any policy measure which will require an increase in Union revenue (it does not take much ingenuity to realize that redistributive measures at the European scale will fall under such a heading) will be dramatically constrained by the number of actors with veto power. This entails that the powers of the European Parliament over European budgetary norms are probably weakened, not strengthened by the Draft Constitution.

53. The strengthening of such a *supervisory* role of national parliaments would clearly contribute to avoid the undermining of democracy at the national, but also at the European level.

54. Both protocols define the “third” by reference to a vote system. In such a system, each chamber of a bicameral Parliamentary system has a vote (the Bundestag and the Bundesrat have one vote each) while single-chambered Parliaments in unicameral Parliamentary systems have two votes (the Finnish Parliament, thus, has two votes). This assigns the same number of votes to each Member State, but might lead to rather peculiar results.

### C) Fundamental Rights

Fundamental rights constitute one of the essential components of democratic constitutions. They do not only express the basic preconditions of a well-functioning democratic government, but also establish mandates to legislatures to respect the basic ethical choices taken by the political community at its constitutive stage. They are closely related to the basic substantive principles affirmed by the constitution as defining of the identity of the political community.

Once again, the international origins of the European Communities go a long way to explain the succinctness of the original Treaties on this matter. While there was an explicit reference to the economic freedoms which underpinned the common market objectives, the Treaties did not contain a catalogue of fundamental rights, but two meager articles which enshrined the principles of non-discrimination on the basis of nationality, and a circumscribed principle of non-discrimination on a sexual basis. This did not prevent the Court from proclaiming that the principle of protection of fundamental rights was one of the basic principles of Community law, *even if unwritten*. This opened the way for a jurisprudential elaboration of a catalogue of fundamental rights. This was finally consolidated by a representative Convention which produced the Charter of Fundamental Rights of the European Union. The Charter was solemnly proclaimed by the Union institutions in December 2000, but was not formally incorporated into primary Union law. This has not prevented the Commission and the Parliament from considering themselves bound by the Charter, or the invocation of the charter by the Court of First Instance, the Advocates General of the Court of Justice, several national constitutional courts and, last but obviously not least, the European Court of Human Rights.

The first part of the Draft further elaborates on the values (Art. I-2)<sup>55</sup> and objectives (Art. I-3) of the European Union,<sup>56</sup> paramount among which are the fundamental rights enshrined in Part II of the Constitution.

This second part of the Draft Treaty formally incorporates into the constitution of Union law the Charter of Fundamental Rights of the European Union. It basically reproduces the text approved by the Charter Convention, solemnly proclaimed in December 2000 immediately before the Nice European Council.<sup>57</sup>

The Charter of Rights reflects the basic principle of the indivisibility of fundamental rights. Its Preamble, also reproduced in the Constitution, renders clear that dignity, liberty, equality and solidarity are co-original founding principles of Union law. This is reflected in the protection afforded not only to civic and political, but also to social and economic rights (rights to solidarity in the Charter parlance). The extent to which this results in mandates to the legislature, depends on the construction of the Charter provisions, and, very specifically, on the systematic interpretation of the Charter together with the economic

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55. The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

56. 1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.

3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular children's rights, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.

57. As is well-known, the Charter was not formally incorporated into the Treaties, but did have legal bite, as it is a consolidation of the constitutional traditions common to the Member States, and as such, part and parcel of Union law.

freedoms, now assigned constitutional status (Art. I-4.1), the general clause on the protection of fundamental rights (Art I-9), and the new horizontal provisions of the Charter (especially Art II-111).

#### **D) The conception of cultural community**

A critical issue that divides constitutional scholars is whether a constitution should rest upon a distinctive cultural *value basis*, which presupposes a common sense of identity, or whether the constitution can be steeped in trans-cultural norms and universal principles that can be agreed-upon across cultures. Both law and culture are communal building-blocks. The constitution as the fount for the constitutive norms of any given community evokes those values and principles that are designative of that particular community.

The Draft evokes the values and principles that are designative of the Union as a particular political community. On the one hand, the Draft refers to a set of universal principles on which the Union is founded. Article I-2 sets out the values that the Union is founded on, namely human dignity, freedom, democracy, equality<sup>58</sup>, the rule of law and respect for human rights. Article I-2 further notes that “[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. Central to the Union’s objectives is to ‘promote peace, its values and the well-being of its peoples’ (I-3). The list is very similar to the one already established in Amsterdam, and since then inscribed in the TEC; however, it is slightly dissimilar from the one contained in the Preamble to the Charter, also contained in the Draft. This universalistic impetus fits very well with the definition of terms according to which the Union should relate to the world at large: “In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”(Article I-3.4)

On the other hand, the Union affirms certain principles which identify it vis-à-vis other non-European polities. In Article I-1.3 we find reference to the social market economy, a peculiar term which evokes the image of the welfare state – perhaps the most genuine European *acquis* in the view of Europe’s citizens. Having said that, the Draft’s usage of the term ‘social market economy’ is problematic, as it is used in combination with “competitiveness” and “price stability”, both of which as we have noted are bolstered and – privileged – by numerous specific provisions in the draft.

Moreover, the Union defines the parameters within which European identity is to be forged, while also respecting the peculiar features of national identities. The Union, through the pursuit of its objectives, is instructed to foster unity and community and a sense of European attachment through common European symbols, such as a European flag, a European anthem, a common currency and a Europe-day (I-8). But it is also instructed to “respect [Europe’s] rich cultural and linguistic diversity”, and further in a more active sense it “shall ensure that Europe’s cultural heritage is safeguarded and enhanced.”(I-3.3) Presumably this also includes national identities, as Article I-5 states that: “The Union shall respect ... the national identities of its Member States...”.

This particular mixture of universalistic and ethical values is reflected in the definition of the conditions of accession to the Union. “The Union shall be open to all European states which respect its values and are committed to promoting them together” (Article I-1).

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58. Equality was added in the final draft, after great pressure by numerous members of the Convention.

## III. Assessment

### A) Competences

The Draft Treaty introduces a degree of formalisation of the division of competences which, while not meeting all the requirements of the rights-based conception, clearly goes beyond what could be expected from the problem-solving conception of the Union.

As already noticed, much of the actual bite of the new provisions contained in Part I of the Constitution will depend on how the different parts of the Constitution will relate to each other, and more specifically, whether this will entail a hierarchical ranking between Parts I, II and perhaps IV (deemed constitutional parts proper), and Part III (detailed provisions on policies and the functioning of the Union). But even if Part III is granted equal constitutional status, which entails that the *framing* value of the general competence provisions is relativised, it is quite clear that the new constitutional ordering will curtail the Member States' ability to serve as Masters of the Treaties, and consequently, to direct the process of integration. This becomes clear when contrasting the present Article TEC 308 with Article I-18 of the Draft. Competences can be Europeanised or renationalised within the framework established by the Draft, but only in accordance with specific procedures, and subject to the material limits stemming from a systematic interpretation of the provisions of the Draft.<sup>59</sup>

In itself, this indicates a clear move away from the problem-solving conception. The general trend is for the principles of allocation of competences in Union law to increasingly come to correspond with those required by a rights-based conception of the Union's constitution. First, the Draft entrenches the principle of enumerated powers by means of explicitly stating that if competences have not been conferred on the Union, they remain with the Member States (Art. I-11). This introduces a first element of formalisation of the division of powers among different levels of government, and provides a first element to determine the condition (European, national or regional citizenship) through which citizens will take decisions. This constrains the flexibility of the arrangements cherished by the problem-solving conception, at the same time as it precludes the Union from developing into a nation-state, as the value-based conception requires. This indeed would have necessitated the existence of a residual powers clause. Such a clause would have affirmed the opposite principle, namely that the Union will be assigned all competences not expressly left in the hands of Member States. Second, the Draft reinforces the judicial monitoring of the division of powers between levels of government. Indeed, one of the main implications of the assignment of a direct role to national parliaments in the Union law-making procedure is to increase the number of potential cases in which the Court will be required to check compliance with the principle

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59. As is well-known, Article TEC 308 establishes a last-resort competence basis for Community acts based on the need to attain one of the objectives of the Community "in the course of the operation of the common market". Legislation is then subject to unanimous consent in the Council, with the Parliament being consulted. Article I-18 introduces a new flexibility clause, which grounds Union competence on the necessity to attain one of the objectives set in the Constitution "within the framework of the policies of Part III". What is different from present law is that the Draft introduces additional procedural and substantive hurdles. On the procedural hand, legislation adopted or concrete decisions undertaken under the new flexibility clause are subject to a decision-making procedure which requires both the unanimous consent of Member States and the consent of the European Parliament. On the substantive hand, the Draft explicitly formulates that legislation adopted on the basis of I-18 cannot lead to the harmonisation of Member States' laws or regulations when the Constitution excludes such harmonisation. Both procedural and substantive limits render it almost unfeasible to make use of the flexibility provision as an alternative to Treaty amendment. Given the considerable risk of overconstitutionalisation stemming from the lack of differentiation of Parts I and II and Parts III in terms of constitutional status, the opportunity of the constitutional tightening of the flexibility clause might be put into question. But our point here is a more limited one, namely, that this points to a constitutionalisation of the division of powers.

of subsidiarity. As was indicated in Part II, national parliaments are granted a right both to object to the proposal on subsidiarity and proportionality grounds within a six-week time limit, and, if the proposal is turned into law without changes which render it compliant with proportionality, to request their national governments to contest the Euro-constitutionality of the law before the European Court of Justice. While the *judicialisation* of conflicts on competences is something which might be explained by problem-solving conceptions as required on credibility grounds, it openly contradicts a value-based conception of the Constitution of the Union.

## **B) Law-Making Procedures**

Here we also find some elements which speak to the problem-solving conception, while there are others that imply that this model has been transcended, and further that the Draft moves the Union in a rights-based direction.

The four main elements of the design of law-making procedures in the Draft Treaty which speak to the problem-solving conception of the Union are: (1) the numerous exceptions to the co-decision procedure, which ensure that Member States keep on playing the sole decisive role in a large number of areas; (2) the retention of purely intergovernmental procedures in much of what used to be pillars two and three; (3) the development of institutional structures associated with the Union's intergovernmental dimension, which is more likely after the changes to the Presidency of the European Council

First, there are many weighty exemptions to the co-decision procedure, so many as to qualify the very notion of co-decision as the standard law-making procedure (as this was set out in article I-34). This entails that there is a hard core of subjects in which Member States retain sole legislative power, which harmonizes with the problem-solving conception of the Union.

Second, the Draft retains, and perhaps even strengthens, aspects of the Council-led (former pillars two and three) decision-making method. Such a potential strengthening would derive from the increased use of QMV in the Council, which is indeed elevated to the status of general voting principle (Article I-25), while keeping Union institutions at bay in what remains of the pillar procedures.

Third, the greatly extended tenure of the elected president of the European Council (from the present system of half a year to a possible total of 5 years) could also strengthen the Council. If this *also* means that the Council develops a greatly strengthened institutional support structure,<sup>60</sup> the net effect could be a *weakening* of the Community method, which would indirectly result in weakening the direct democratic legitimacy basis of Union law. This would take the Union closer to the first model set out above. The problem here is that increased use of qualified majority in the Council would exacerbate the problem of retaining national democracy. Some of this would be alleviated by another set of provisions in the Draft, namely the much stricter and more encompassing transparency requirements (Article I-50, III-399), which include provisions for the Council to conduct its deliberations in public when serving in a legislative capacity.

A further point which *might* sustain traits of the problem-solving model refers to the Draft's retention of the existing system of *Commission initiative*.<sup>61</sup> Such a notion is however premised on the assumption that the Commission would serve as an expert body, and would merely deal with pragmatic issues. Given the Union's consistently increased realm of action, such an assumption is increasingly unrealistic. It also contravenes the increasingly democratic terms of Commission – EP interaction.<sup>62</sup> Nevertheless, Commission monopoly on initiative is problematic from a democratic standpoint (ref. models two and three), as it deprives the European strong public *par excellence*, the European Parliament, of such a right. True, this is somehow alleviated by the fact that the Commission is responsible to the European Parliament (Article I-26.8, with reference to Article III-340). But the Commission is merely approved, not designated, by the European Parliament, contrary to what could be expected in a fully-fledged parliamentary system.<sup>63</sup> Since the Commission does not emanate from the Parliament and is not popularly elected, the

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60. This was frequently referred to as a concern among Convention members. See Convention plenary debates.

61. The Parliament can request the Commission to submit a proposal on any topic (III-332) but the Commission decides as to whether it wants to do so. It is only obligated to inform the Parliament of its decision.

62. As the recent Buttiglione imbroglio further testifies to.

institutional mechanism that produces a legislative initiative is *not* explicitly rooted in the European citizenry. In other words, one core component required to ensure the notion of citizens as self-legislating is inadequately developed. This conclusion is not greatly weakened by the right to *popular initiative* (Article I-47.4). As already noticed, what this kind of popular initiative boils down to is an invitation to the Commission to submit a legislative proposal. The Commission remains free to do whatever it finds suitable with such an initiative.<sup>64</sup>

The important point to note here is that the relevant *standard* for assessing inter-institutional relations has become the third model, even if it is far from perfectly reflected in the positive provisions of the Draft.<sup>65</sup>

This is also consistent with the general thrust of the Draft, which can be said to push the Union further in the direction of the third model. This can be argued on the basis of four decisions contained in the Draft Treaty, namely (1) the affirmation of the principle of transparency of institutional law-making, which is extended to the Council of Ministers; (2) the affirmation of co-decision as the standard legislative procedure; (3) improved national executive control; and (4) increased derivative democratic legitimacy through the assignment of a legislative role to national parliaments.

First, transparency: this weakens Member States control of the integration process, and opens up for its politicization. Given that this is likely to bring in non-pragmatic issues or redefine issues (bio-technology not only as an efficient means of producing food but also as a profoundly important ethical issue), the problem-solving system will fall short.

Second, despite the exceptions listed above, it is noteworthy that the Draft presents co-decision as the standard law-making procedure in Union law (cf. Articles I-34, III-396), for two reasons. First, this provision places the notion of Union direct democratic legitimacy at the forefront and as a critical standard. Second, the provision will likely increase the number of legal acts approved by co-decision and will further empower the European Parliament. These provisions in the Draft thus move the Union closer to the third model, although it is also clear that they fall short of the criteria in the third model.

Third, when considered in relation to the three models, (and when viewed in isolation from the issue of the division of powers), improved executive accountability at the national level would increase the Union's legitimacy in relation to *all* the three models listed above. But the models differ in terms of to whom such accountability foremost applies. The first model highlights the *parliamentary* dimension, whereas the two latter models see parliaments (as strong publics) and the general public as equally important.

Fourth, the Draft contains transparency provisions that will heighten accountability to parliaments and to general publics. The public nature of the Council's legislative meetings will clearly enhance effective control on the part of national parliaments, as national governments will not be able to hide beneath vague appeals to *consensus* in order to depart from the mandate established by national parliaments. The protocol on National Parliaments compels the Commission to transmit to *each national parliament* the annual legislative program, all Commission consultation documents, all legislative proposals, and any other documents which it transmits to the European Parliament and the European Council (see points 1 and 2 of the Parliaments' Protocol). Presumably, then, each parliament would decide whether to make these public.

Fifth, among the most publicized innovations of the Draft is the conferral of certain powers to national parliaments within the European law-making process. At present, the role of national parliaments in the European law-making process is wholly determined by *national constitutional provisions*. In most cases, parliaments exert a controlling role over the national executive when acting as national representative in the European Council, albeit one that has generally not been seen as adequate to avoid executive

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63. The European Council proposes a candidate for President of the Commission to the Parliament, who is adopted or rejected by the EP. Again consider the recent imbroglio between the Parliament and the newly appointed Commission President Barroso.

64. Thus, this measure falls short of serving as an institutional vehicle to foster self-legislating citizens.

65. A pluralistic definition of the common will is part and parcel of the federal character of a rights-based Union. However, this requires a constitutional framework which articulates in a normative satisfactory manner the different procedures through which the common will is expressed. By means of making a step towards a more complete system of sources of law, the Draft Treaty pushes the European Union forward in this concrete regard, although still not sufficiently.

dominance. The strengthening of such a *supervisory* role of national parliaments will help stall the undermining of democracy at the national, but presumably also at the European level.

Note that a strengthened role of national parliaments *within the Union's law-making process* is not necessarily compatible with the third model. Such strengthening is actually foremost a case of the first model: to alleviate the democratic deficit through executive dominance that this model almost inevitably produces. With regard to the third model, including national parliaments in the Union law-making process leads to confusion in the notion of citizens as self-legislators: why should European citizens defer to national citizens in such matters? Much of this boils down to the division of powers and competences: when there is a system of clearly delineated competences at each level, there is no real need for national parliamentary involvement in Union law-making. But when such lines are hazy and greatly overlap, such as is still the case with the Union, it might be necessary to supplement Union law-making with national inputs. But for such a supplementing at all to be compatible with the third model, it presupposes a way of harmonizing national positions, which has not taken place.<sup>66</sup>

### C) Fundamental Rights

The formal inclusion of the Charter of Fundamental Rights is, indeed, one of the potentially most transcendental decisions in the Draft. It is also the one that most explicitly moves the Union in symbolic and substantive terms beyond the problem-solving conception of the Union and its attendant constitutional architecture.

By making the *Charter of Fundamental Rights in the EU* an explicit part of the primary law of the Union,<sup>67</sup> the Draft greatly raises the symbolic role and visibility of fundamental rights. As we saw in Part II, Community law has long been said to be founded on the principle of protection of fundamental rights, but the Charter signals that they are an intrinsic and outstanding part of the EU constitutional edifice. Indeed, a resolve on the part of the EU to make a Charter could be seen as an important stepping stone towards a rights-based democratic constitution for Europe. The very notion of a Charter of Rights can be said to be laden with constitutional symbolism. But that of course presupposes that the Charter contains the requisite range of rights and also that these operate – and are made to operate – in accordance with the requirements of the third rights-based model.

The Charter is not different from, neither more constrained in its scope than, conventional state-based Charters or Bills of Rights. If it has an outstanding characteristic it is that of enshrining rights of the so-called fourth generation, which deal with social problems which only the most recent constitutions have had the chance to deal with, such as bioethics. Further, the strong onus on solidarity and social rights in the Charter could – if pursued to the full – provide the EU with a more explicit ethical foundation. The reformulation of the substantive values at the foundation of Union law does not lead in itself, quite obviously, to the establishment of different economic and social policies, neither at the European nor at the national level. But it can in fairness be said to open up *political space*. The Charter opens up the way to an increased abstract weighting of fundamental rights<sup>68</sup> in cases of conflict with the basic economic freedoms enshrined in the Treaties (the so-called four economic freedoms, and the principle of free competition laid down in Articles 81 and 82 TEC). This is based on the fact that the Charter grants *fundamental status* to what are usually labelled as civic, political and social rights, while denying such status to the four basic economic freedoms, which are to be seen as *concretizations* of wider and more abstract rights, such as the right to private property. This has the consequence of shifting the scope of what can be said to be constitutionally mandated by Union law. Since the late seventies,<sup>69</sup> the European

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66. The almost unanimous embrace of the principle that the relation between national executives and parliaments should be fully determined by national constitutional provisions confuses formal and effective democratic sovereignty. The effective democratic sovereignty of national parliaments, one could claim, depends on the existence of common norms established at the European level. Such norms can be seen as formally impinging upon national sovereignty, but in substantive terms they render it possible to establish the preconditions for the exercise of national democratic sovereignty. The Draft in this respect falls short of the requirements in models two and three.

67. See I-7: “Fundamental Rights”, which states that “The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution” (CONV 850/03: 8).

68. Robert Alexy, ‘On Balancing and Subsumption. A Structural Comparison’, 16 (2003) *Ratio Juris*, pp. 433–49, especially p. 440.

Court of Justice has tended to argue that, next to the explicit exceptions enumerated in the Treaties, the canon of exceptions to economic freedoms should be determined through a *systematic* interpretation of Community law as a whole.<sup>70</sup> The Charter seems to reinforce such an approach, by means of providing simultaneously normative guidance and certainty (as fundamental rights provisions could be read as a *numerus clausus* of exceptions).<sup>71</sup> This approach can already be seen at work in the opinions of Advocate General and in the judgments of the Court published after the solemn proclamation of the Charter. This is clearly the case with the judgment and the Opinion in *Schmidberger*<sup>72</sup>, and might lead to a similar result in *Omega*<sup>73</sup> and *Grøngaard*.<sup>74</sup> Moreover, the different abstract weighting of fundamental rights versus economic freedoms propitiated by the Charter might lead to a different structuring of the weighing and balancing of them in case of conflict, and more specifically, to the shifting of the burden of argumentation in favour of fundamental rights, and against economic freedom. Advocate General Geelhoed seems to be pointing in this direction in her Opinion in *American Tobacco*.<sup>75 76</sup>

Having said that, there are aspects of its drafting and its perceived role in the EU that affect the salience of the Fundamental Rights provisions of the Treaty to serve as vehicles for the rights-based conception of the Union. First, the Charter does not abrogate the aspect of differentiated citizenship that inheres from the fact that access to EU citizenship is conditioned on national citizenship and subject to national rules of incorporation, but it might narrow it considerably. Second, provisions on citizens' public autonomy<sup>77</sup> in the Charter are rather weak, and in themselves do not allow to claim that the citizen has been placed at the core of the process of European integration. This is further confirmed by provisions on citizens' rights contained in the first part, as already noticed when considering Union law-making processes. Third, rights to solidarity are granted a weaker status and protection than civic rights, and very especially, the right to private property. This has the implication that the former should be considered as setting exceptions to the breadth and scope of economic freedoms, and as such, be more 'valuable' in the protection of fundamental collective goods, over that of serving as fundamental subjective rights. In other words, there is a risk of civic rights becoming instrumentalised. Fourth, the horizontal clauses (and to some extent the onus on interpreting it in line with the explanations provided by the Charter Convention) clearly restrict its scope of application. This is especially so after the actual drafting changes introduced in the Charter as solemnly proclaimed in 2000 by the Laeken Convention, and later endorsed by the IGC.

Moreover, some of the potentialities of the Charter are limited by some of the general provisions in the first part of the Draft. It could be argued that certain provisions curtail the opening of political space envisioned by the very presence of the Charter. Indeed, the Draft grants constitutional status to values that undermine the actual *legal force* of socio-economic fundamental rights and principles. Two main observations are due in this respect: (a) While the Preamble of the Charter<sup>78</sup> enshrined dignity, freedom, equality and solidarity as the grounding principles of Union law, Article 2 of the Draft Constitution offers a longer, more prolix and at the same time narrower definition of such principles ("respect of human dignity, liberty, democracy, equality, the rule of law and respect of human rights, including the rights of persons belonging to minorities"). We already noticed this discrepancy in Part II. It is now proper to

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69. More specifically, since the judgment in *Cassis de Dijon*, Judgment in Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, 1979 [ECR] 649.

70. K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, London: Sweet and Maxwell, 1999, pp. 135ff. They label as the rule of reason the set of exceptions which the Court has referred as "reasonable" national measures in restraint of economic freedoms.

71. A.J. Menéndez, 'Three conceptions of the European constitution', in Eriksen et al., *supra*, fn 9.

72. See Case C-112/00, Opinion of the AG Jacobs delivered on 11 July, 2002, judgment of the court was delivered on 12 June 2003. See 2003 [ECR] I-5659, par. 89: "This appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty. Such cases have perhaps been rare because restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection. It is however conceivable that such cases may become more frequent in the future: many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations"; and par. 95: "In such a case the Court in my view should follow the same two-step approach as the analysis of the traditional grounds of justification such as public policy or public security which are also based on the specific situation in the Member State concerned. It must therefore be established (a) whether in relying on the particular fundamental rights recognised in Austrian law in issue, Austria is, as a matter of Community law, pursuing a legitimate objective in the public interest capable of justifying a restriction on a fundamental Treaty freedom; and (b) if so, whether the restriction in issue is proportionate to the objective pursued".

highlight that in Article I-2 solidarity is relegated to the condition of a second-rank principle, together with pluralism, tolerance, justice, and equality between men and women<sup>79</sup>; (b) Article I-3 tilts the balance in favour of economic freedoms when determining the objectives to be aimed at by the Union. Such a *market bias* was already present in the Convention draft, although not so much in this Article, but in the assignment of constitutional status to Part III. It must be granted that the formula “social market economy” was rather bland and a trifle ambivalent (as it was qualified by the reference to the simultaneous aim of high competitiveness).<sup>80</sup> The IGC Draft has further decaffeinated the Article, by means of requesting the Union to strive at “a highly competitive social market economy”, and by means of inserting a specific reference to the objective of “price stability”. It is difficult not to come to the conclusion that this indicates a further *entrenching* of the present Union’s definition of its socio-economic model, a process that helps further shift the balance in favour of the market dimension, to the detriment of the *political and social* dimensions.

#### D) Cultural community

The Draft speaks to the Union as something more and distinctly different from that of a mere problem-solving entity. It nevertheless does also, as the problem-solving model presupposes, affirm respect for national and regional identities, as well as provide safeguards for their retention.

But the literal tenor of the Draft is not a mere subtle front or veil for something less impressive and less unique, and which will serve as a mere functional vehicle for and appendix to, a Europe of nation-states. It goes much further and explicitly depicts the Union as a community of values. The preamble speaks to the “cultural, religious and humanist inheritance of Europe”, which the Union draws on. This gives a foundation not only for Europe as idea, but also for a European identity. This sense of identity takes credence from and is to be rooted in a set of common symbols (Article I-8). Together these can serve to evoke a sense of Europeanness.

But the Draft cannot be construed as a vehicle for the forging of a European value community on a par with that of a nation-state. As was shown above, the Union is set up as a value community based on a set of provisions that speak to the Union as a community steeped in a set of *universal* values and principles. The preamble tellingly speaks of how the European traditions have given rise to and have helped propound “the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law”. The preamble speaks as much to what Europe has contributed

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73. *Affaire C-36/02, Omega Spielhallen- und Automatenaufstellungsgesellschaft mbH contre Oberbürgermeisterin der Bundesstadt Bonn*, opinion of AG Stix-Hackl, delivered on 18 March, 2004, not yet reported. The case concerned the conflict between the right to provide services (more specifically, the service of playing a game in a ‘laserdrome’ where players obtained points when ‘killing’ human targets) and the right to dignity, as interpreted within the German constitutional tradition. In general, theoretical terms, paragraph 50 of the Opinion is of special interest, as the AG here hints at the question of the higher abstract value of fundamental rights: “Cependant, il vaudrait la peine de se demander si, eu égard aux valeurs protégées par les droits de l’homme et les droits fondamentaux, à l’image de la Communauté en tant que Communauté fondée sur le respect de ces droits et, surtout, à la référence – imposée par l’opinion actuellement prévalente – à la protection des droits de l’homme en tant que condition de la légitimité de toute forme d’organisation de l’État, il ne serait pas possible de reconnaître aux droits fondamentaux et aux droits de l’homme une certaine primauté sur le droit originare «général». Toutefois, les libertés fondamentales peuvent, au moins dans une certaine mesure, parfaitement être considérées sur un plan matériel comme des droits fondamentaux: en tant qu’elles énoncent des interdictions de discrimination par exemple, elles doivent être considérées comme des expressions particulières du principe général d’égalité. Ainsi, un conflit de normes entre les libertés fondamentales consacrées par le traité et les droits fondamentaux et droits de l’homme peut, dans certains cas au moins, également être un conflit opposant des droits fondamentaux.”

74. *Case C-384/02, Anklagemyndigheden v Knud Grøngaard Allan Bang*, Opinion of Advocate General Poiras Maduro, of 25 May 2004, not yet reported.

75. *Case C-491/01, The Queen v. Secretary of State for Health ex parte: American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by: Japan Tobacco Inc. and JT International SA*. Opinion delivered on 10 September, 2002, [ECR] I-11453. Cf. paragraph 106: “In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, the interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded” (our emphasis).

76. A clear example in that regard would be provided if Finland, after having been forced under the principle of free movement of goods to reduce the duties on alcoholic beverages, would increase them again in the name of public health, a national policy objective now sheltered by Article 35 of the Charter.

to the world, Europe's outward projection, and to Europe's responsibilities to the world, as it speaks to the affirmation of Europe's identity. Indeed, this combination of inward assertion and outward projection of moral values is far more reminiscent of a cosmopolitan than of a national sense of community. There is no reference to an explicit *European* value basis, neither in the articles nor in the preamble.<sup>81</sup> The common values that the Union evokes are the ones we generally associate with the spirit of constitutional patriotism.

To get a better sense of its rights-based cosmopolitan vs. value-communal imprint, we should consider first the inward assertion of values espoused by the Union. Here it is natural to start with clarifying the relation between the values espoused by the Union and the notion of constitutional patriotism because this is so central to the rights-based model. Constitutional patriotism as mode of allegiance is such framed as to elicit support and emotional attachment, precisely because the universalistic principles that form its core are *embedded within a particular context*. People's attachments are derived from the manner in which a set of universal principles are interpreted and entrenched within a particular institutional setting. The Draft does not spell out a common European context in a cultural sense. There is no reference to a common language, ethnicity or distinctly European history that these principles are steeped within.

The type of community we can discern from the Draft is thus not monolithic, but is better thought of as a complex, composite community. It could be conceived of as a 'community of communities', as is well expressed in the Union's motto of "united in diversity".

Consistent with this motto the Draft seeks to fuse the universalist value orientation that has marked the EU from its inception with a set of statements and concrete provisions that speak to the need for the Union to "respect its rich cultural and linguistic diversity..." (I-3.3). The question is whether this also entails that the Union is foremost about propounding difference and diversity, in other words, that it is united only in its salutation of difference.

Article 1-5 stated that: "The Union shall respect the equality of Member States before the Constitution and the national identities of its Member States". This article underlined that the Union has a strong nation-state presence, and further that its retention is valuable. However, it is also noteworthy and entirely consistent with the above that it is the institutional over the cultural dimension of national identity that is emphasized.

In one reading this can be construed as the Draft propounding constitutional patriotism at the national level, whilst it actually propounds national diversity at the European level. But it could also be argued that the result might serve as a restriction on the pursuit of diversity and serve as a de facto further vehicle of ensuring the inclusiveness necessary to sustain European co-operation. In sum, the inward assertion of values is consistent with constitutional patriotism but in a 'thin' rights-reflexive trapping. In a sense

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77. Some of the more than 30 constitutional proposals that have been submitted to the Convention contain citizenship provisions that could rectify this. See for instance MEP Jo Leinen's draft proposal entitled Draft Constitution of the European Union, Brussels: European Parliament, October 2002.

78. It goes without saying that the Charter, preamble included, is part and parcel of the Draft Treaty. However, the Convention rejected the suggestion made by some members of the Charter Convention of making use of the preamble to the Charter as preamble to the Draft Constitution and, obviously enough, the Charter is Part II of the Draft Treaty, as there was no agreement, but open opposition, to its inclusion *within* the text of Part I.

79. The IGC substituted "non-discrimination" by "equality between men and women", something which, in our view, has the positive effect of highlighting the importance of sex equality, while constraining the scope of the inequalities which should be fought within the legal order of the Union.

80. See Christian Joerges, *Social Market Economy as Europe's Social Model?*, EUI Working Paper LAW No. 8/2004, Florence: European University Institute.

81. The underlying philosophical orientation of the Charter is that of constitutional patriotism (J.E. Fossum, 'The European Charter – Between Deep Diversity and Constitutional Patriotism', in E.O. Eriksen, J.E. Fossum and A.J. Menéndez, eds., *The Chartering of Europe: The Charter of Fundamental Rights and its Constitutional Implications*, Baden-Baden: Nomos, 2003). The values listed in the preamble of the Charter (which was retained in the Draft, hence leaving the Draft with two preambles, one for the whole Constitution and one for the Charter) refer to a conception of the EU as based on a set of universal principles. Its commitment is to the principles and values of democracy and the rule of law, and not to a set of specific and uniquely European values. But the German language version of the Charter deviates from the rest with its reference to Europe's *religious* rather than *spiritual* heritage (cf. J. Schönlaue, 'New Values for Europe? Deliberation, Compromise, and Coercion in Drafting the Preamble to the EU Charter of Fundamental Rights', in Eriksen et al., *ibid.*, p. 130).

this is the most genuine reflection of how the rights-based democratic spirit of the common constitutional traditions has come to permeate European thinking.

Furthermore, the Union reinforces the rights-based orientation in its outward projection of values. Whereas the nation-state is janus-faced, the Union's two faces are far better combined, although in a contextualised manner. Consider the provisions for membership. Article I-1 states that: "The Union shall be open to all European states which respect its values and are committed to promoting them together". The referral to European states serves as a clear restriction, whereas the values otherwise referred to are universal. This provision is also an explication of Union practice, a practice where the Union has strengthened the onus on basic rights, the rule of law and democracy, over time (Sjursen and Smith 2001).

To sum up, in cultural community terms the draft ended up appealing to the same complex of universality and difference as is found in the most recent treaties. The text of the Draft and its provisions come closest to the third, rights-based, model.

## IV. Conclusions

This paper had three main aims, which correspond to its three main parts. First, we developed three main conceptions of a legitimate European Union and presented the implications that the application of each such would have on the substantive contents of the Union's constitution. This allowed us to establish a set of six constitutional markers, based on the reconstruction and systematisation of the constitutional claims associated with each of the three conceptions of the Union.<sup>82</sup> Second, we offered a description of the substantive contents of the Draft on four out of these six topics.<sup>83</sup> This assumed knowledge of the actual contents of Treaty law, although at some points it was found convenient to render that explicit, especially as our reconstruction also has to be innovative, and as it is pursued from a perspective which is not necessarily part of the mainstream (as on what concerns the analysis of law-making processes in Union law). This allowed us to get a sense of the main innovations that would result from the entry into force of the Draft. Third, we sought to establish to which conception of the Union that the contents of the Draft speak. We did so both in static terms (that is, by considering which conception of the Union is better captured by the present contents of the Draft) and in dynamic terms (trying to determine what is the pattern of evolution).

One caveat is particularly called for here, and which pertains in particular to the second model. The strong evolutionary component embedded in this value-based conception of constitution means that it is particularly hard to establish whether the constitutional draft properly embodies the core tenets of this conception of the legitimacy of the EU. To do so properly we would have needed also to focus on what may be labeled the constitutional support structure, i.e. the strength of European identification and underlying sense of European community. Our analysis did speak to how this document conceives of the Union as community, and how it projects its relations to the citizens, but our analysis of the Draft did not yield much in terms of whether this projection will converge with or diverge from the identifications and communities that make up Europe.

With this necessary proviso, we have reached the following conclusions. First, the Union has clearly transcended beyond the problem-solving conception, and the Draft underlines this in both symbolic and substantive terms. It has become practice to substantiate such a claim on the open constitutional character of the Laeken process, which implies a level of politicisation and procedural democracy that far exceeds the assumptions of the intergovernmental, neo-functional and regulatory conceptions of the Union. But by means of considering the different markers that we established in this paper, we are able to set forth a more grounded and detailed challenge to these conceptions of the Union. The Draft entails a formalisation of the norms which allocate competences among the Union and the Member States, the affirmation of direct legitimacy and parliamentary democratic legitimacy as the pillars of the democratic legitimacy of Union law, the formal incorporation of a catalogue of fundamental rights binding all institutions acting within the scope of Union law, and the constitutionalisation of key elements of European identity. This conclusion does not deny the fact that there are many features of the substantive constitutional order to be established by the Draft that will still reflect the Union's roots in an international organisation. We have also demonstrated that the Union still retains some elements of a problem-solving organisation. The key issue is whether the Draft can be taken in such a direction as to ostracise these.

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82. We are very conscious of the tentative character of the exercise, and also of the need to show the *empirical salience* of such markers (for example, by documenting their use in the Laeken Convention).

83. The limitation is due to the usual time constraints.

Second, and related to this, we have tried to give some sense of the direction of change. Our main finding is that the Draft does not merely simplify or solidify the Union in its present status but is evocative of an entity that is still very much in motion. We have established that the most appropriate direction is from problem-solving to either value-based or rights-based polity. In that regard, we found that the substantive contents of the Draft speak more clearly to the rights-based conception of the Union than to the value-based one. This is reflected in the combined willingness to formalise and further enrich the common institutional structures and foundational values of the Union, while retaining a complex, federal-type political structure, and which is also still quite different from what would be the case in a nation-state building process.

Our finding to the effect that the Draft foremost embraces the rights-based model should not be construed as a statement to the effect that values do not count or that the Union is not overly concerned with values. Rather, as we have tried to show, it underlines the forward-looking and still experimentative character of the Union, as a particularly apt test case of how institutional development can foster a sense of community where the requisite ingredients that communitarians always stress are patently *not* present. The findings on this process that is unfolding in Europe will have deep implications for the world. What is also manifestly clear is that current European developments, in their non-state and hence more fragile nature, also are critically dependent on global developments. Perhaps this fact itself is testimony to the underlying cosmopolitan urge that is so deeply entrenched in this European project.