

# We, the Peoples? Constitutionalizing the European Union\*

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## Abstract

This article reviews arguments in favour of a formal, written constitution for Europe, and concludes with a better suggestion – a Basic European Law. The article also criticizes the wholehearted embrace of ‘popular constitution-making’. It does so by drawing on comparative evidence from constitution-making processes in various historical time periods and world regions. It poses three essential questions to organize the debate. First, *why* a European constitution? Second, *what kind* of European constitution? Third, *how* a European constitution?

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‘Law is defined as a rule of action;  
but how can that be a rule, which is little known and less fixed?’  
Madison (1792)

## Introduction

The momentum for a formal, written constitution for the European Union has been growing. As early as the spring of 2001, over 60 per cent of the public favoured such a document.<sup>1</sup> The following October, *The Economist* cleverly

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<sup>1</sup> *Eurobarometer*, No. 60, p. 88 (Autumn 2003). By the spring of 2004, 63 per cent of citizens within the EU-15 still supported such a document (see *Eurobarometer*, No. 61, Section 2.6, p. 12).

provided readers with a sample constitutional text, complete with a preamble.<sup>2</sup> In May 2002, German Chancellor Gerhard Schröder introduced *his* plan for a federal constitutional model. Some months later, French Prime Minister Lionel Jospin presented his anti-federal ideal.<sup>3</sup> In November of that same year, German Federal President Johannes Rau pleaded for a written European constitution.<sup>4</sup> And in the 'Benelux Memorandum on the Future of Europe', the Belgian EU Presidency noted, 'the governments of the Benelux countries believe that a constitution should be developed for the European project'.<sup>5</sup> The project and a draft constitution, complete with a preamble quoting Thucydides, was ready in 2003. In spite of a breakdown of the EU's constitutional convention later that year, on 18 June 2004, leaders of the newly enlarged EU-25 finally approved a final constitutional text.

Certainly, one crucial factor driving the formalization of a European constitution has been the assumption that 'the process of adopting a constitution – the debate it would generate, the alliances it would form, the opposition it would create – would all, it is said, be healthy for the democratic and civil ethos and praxis of the polity' (Weiler, 2000, p. 2). Yet, the June 2004 elections to the European Parliament, with voter apathy at 55 per cent, suggest that neither the 'democratic and civil ethos', nor the 'praxis' of the polity, is in good health. Indeed, this unhealthy trend has been worsening, in spite of the EU constitution-making process: since the first European parliamentary elections in 1979, an increasing number of Europeans have either voted for the eurosceptic political parties, or have simply abstained from voting altogether.<sup>6</sup>

In the light of these twin empirical trends – the momentum, on the one hand, to draft and approve a written constitution, and the lack of momentum, on the other hand, to foster supporting institutions such as a European party system – this article reviews arguments in favour of a formal, written constitution for Europe. It concludes with a better suggestion – that of a Basic European Law. The article also criticizes the wholehearted embrace within Europe of 'popular constitution-making'.<sup>7</sup> It does so by drawing on comparative evidence from constitution-making processes in various historical time

<sup>2</sup> *The Economist*, 26 October 2000. The preamble reads: 'We among the states of Europe, seeking to encourage peaceful, open and constructive relations between our peoples, and seeking to advance our common interests in the world, ordain and establish this Constitution for our European Union. This constitution shall prevail over other European and national law, including treaties of the Union, should conflict arise'.

<sup>3</sup> See 'L'avenir de l'Europe', l'intégralité de l'intervention de Lionel Jospin', *Le Monde*, 28 May 2001.

<sup>4</sup> Speech delivered at the Minda de Gunzburg Center for European Studies, Harvard University, 15 November 2001 (see also Johannes Rau, 'Plädoyer für eine europäische Verfassung'. Speech delivered to the European Parliament, Strasbourg, 4 May 2001.

<sup>5</sup> 'Benelux Memorandum on the Future of Europe'. Press Release by the Belgian EU Presidency, 21 June 2001, available at <<http://www.eu2001.be>>.

<sup>6</sup> *Collaboration EP – Eos Gallup Europe*, reported by the BBC News, UK edition, 14 June 2004.

<sup>7</sup> By a Basic European Law I have in mind something like the German *Grundgesetz*, which is discussed below.

periods and world regions.<sup>8</sup> The article poses three essential questions to organize the discussion. First, *why* a European constitution? Second, *what* kind of European constitution? Third, *how* a European constitution?<sup>9</sup> This article focuses on the ‘why’ and the ‘how’ of a European constitution, and then revisits the ‘what kind’ in the concluding section. ‘What kind’ is essentially a second-order question, since it concerns the specific institutional and procedural details of the supranational polity. While such details are essential to the practice of an eventual European constitution, they alone do not justify, or provide reasons for, a new constitutional text. Paradoxically, ‘what kind’ of constitution has already received much more discussion than the other two, first-order questions.<sup>10</sup> This article concludes that the political debate in Europe, by separating the three questions and focusing first on ‘what kind’ of constitution, is an example of classic Rikerian heresthetics – a ‘redefinition of the political situation so that formerly unsympathetic competitors wish to stand with the erstwhile disadvantaged’.<sup>11</sup> A debate on Europe’s specific constitutional design presupposes an answer to the ‘why’ and ‘how’. With much less attention given to these two prior questions, the debate has remained rather circular. The consequences of this circularity may be critical, with many citizens across Europe now having to ask *themselves* ‘why’ in national referendums to be held on the draft Constitution.

## 1. Why a European Constitution?

Why might a formal, written constitution be necessary for, or even beneficial to, the European Union? Two reasons have been suggested. First, it is thought that a formal constitution might solve the ‘democratic deficit’ from which the EU is said to be suffering.<sup>12</sup> Many have argued that this is the main reason to set the EU up with a formal constitution (see, e.g. Rousseau, 2000, p. 62). Second, we have been told that a written constitution might further clarify jurisdictions and competencies, which is necessary for the EU’s successful enlargement, as the addition of new democracies in 2004 pushed the EU towards an increasingly uneasy Union.<sup>13</sup> A third reason is offered here: a

<sup>8</sup> The question regarding whether a ‘people’ is only constituted by the act of constitution-making will not be dealt with here (see Ackerman, 1998).

<sup>9</sup> A fourth possible question, that of ‘when’, is not taken up here.

<sup>10</sup> See, e.g., the ongoing debates on a ‘federal’ versus ‘non-federal’ constitution for Europe in Joerges *et al.* (2000).

<sup>11</sup> Riker (1986, p. 34). I thank Robert Keohane for raising this point.

<sup>12</sup> The term ‘democratic deficit’ is already problematic, as is discussed below, because it presents a tautology: it assumes the EU should be democratic, equates legitimacy with democracy, and then inevitably concludes that the EU is neither.

<sup>13</sup> See Weiler (2000) and Garton Ash (2001). Garton Ash’s scepticism, however, concerning the constitutional document was that, like all previous EU treaties, it ‘will be a snapshot of the balance *between* the contending parties on the night of the final agreement’.

formal, written constitution might simply improve policy outcomes. All three reasons are briefly examined below, and the argument put forward that the third reason is in fact the *only* good reason for a constitution for Europe now.

### *Improving Legitimacy*

The existing literature on the democratic deficit in the EU contains numerous suggestions that 'a constitution could help "politicize" the EU and thus enhance its legitimacy' (Guérot, 2001, p. 13). There are two problems with this assertion. First, multiple conceptions of legitimacy exist, from Rousseau to Weber to Habermas. With respect to the EU debate, it is never quite clear which conception is being invoked. Moreover, 'legitimacy' and 'democratic legitimacy' are assumed to be one and the same in existing literature on the EU.<sup>14</sup> The assumption is conceptually but also analytically problematic, since we are not dealing with a nation-state, to which much of the literature on 'democratic legitimacy' has been applied (Sartori, 1987, pp. 192–3). Debates over the EU's democratic deficit are even leading to a proliferation of new conceptions of legitimacy.<sup>15</sup> These divergent conceptions provide different yardsticks against which we are asked to size up the EU.<sup>16</sup> Depending on the conception of legitimacy we decide to employ, we can either find different faults, or no fault, with the EU.

The first essential question should therefore be whether or not the authority of the EU is perceived as legitimate. According to Weber, legitimacy is an essential characteristic of all systems of authority, since 'every such system attempts to establish and to cultivate the belief in its legitimacy' (Weber, 1978, p. 212). If we accept Weber's assertion, a first step to understanding the nature of authority in the EU lies in identifying the basis of its legitimacy, remembering that various systems of social and institutional organization may be legitimate, even if they are not democratic. For Weber's distinction between the different types of authority that are associated with different types of legitimacy is independent from any discussion of the democratic nature of this authority (Weber, 1947, p. 328). If we thus accept that the EU may not be democratic, but also accept that it can nevertheless be legitimate, and then examine the various bases for its legitimacy, we may be able to analyse better

<sup>14</sup> For examples of the assumption that legitimacy refers to democratic legitimacy, see Schmitter (2000); Majone (2000); and Moravcsik (2000). See also see Banchoff and Smith (1999) for a more nuanced, but also problematic, discussion. Many theorists, including Max Weber, discuss legitimate authority independent of regime type (democracy or non-democracy). This seems much more applicable than democratic legitimacy, for now, to discussions concerning the EU.

<sup>15</sup> Thus, Weiler distinguishes, for example, between formal (legal) legitimacy and social (empirical) legitimacy (Weiler, 1999, p. 81).

<sup>16</sup> Weiler (1999, p. 81) makes a similar, but distinct, point, noting that democracy and legitimacy are often used interchangeably.

the EU's need for a constitution. Here let me therefore offer a conceptualization of legitimacy that is minimal, and draws on Weber. Linz offers such a conceptualization, in which legitimacy is both relative and focused on policy outputs: '[a] legitimate government is one considered to be the least evil of the forms of government ... [it] is based on the belief that for that particular country at that particular historical juncture no other type of regime could assure a more successful pursuit of collective goals' (Linz, 1978, p. 18).<sup>17</sup> This is similar to Fritz Scharpf's conception of 'output-oriented' legitimacy, in which authority is seen as legitimate because its political choices 'effectively promote the common welfare of the constituency in question' (Scharpf, 1999). The advantage of a focus on output-oriented legitimacy in the EU lies in the fact that 'the output perspective allows for the consideration of a much wider variety of legitimizing mechanisms' than does an input-oriented legitimacy (p. 11). It is, in this important sense, a more generous yardstick – and the one with which the citizens of Europe seem most practically concerned.

Given this minimal, output-oriented conceptualization of legitimacy, what we seem to have in the EU is first and foremost a *legitimacy deficit*. So the question becomes, how do we legitimize the EU?<sup>18</sup> And this question leads to the third problem with assertions that a formal constitution will solve the EU's legitimacy deficit. There is simply no comparative historical evidence that this is indeed how one builds legitimacy – through a written constitution.<sup>19</sup> Numerous non-democratic polities, including the USSR, Pinochet's Chile, and the Third Reich, functioned under the guise of a 'constitution'. Obviously, none was made democratic by the presence of a constitution. But interestingly, the presence of formal, written constitutions did not make these polities any more legitimate than those dictatorships that had no formal, written constitutions. On the other hand, the UK, Israel and New Zealand – three complex, multinational democracies – managed to survive with at least a good dose of democracy *and* legitimacy, in spite of having no formal, written constitutions.<sup>20</sup> Most recently, Poland managed the transition from state socialism to democracy with only the *Mala Konstytucja*, or 'Little Constitution', which was designed as a provisional document to clarify Poland's political structures until a final constitution could be produced. It was only in 1997 that Poland drafted and enacted the final constitution. The current President of Poland, Aleksander Kwaśniewski, noted that, in the long run, the 'Little

<sup>17</sup> Here, Linz is discussing democratic legitimacy.

<sup>18</sup> To be sure, given this definition, the efficacy and effectiveness of a political system can 'strengthen, reinforce, maintain, or weaken the belief in legitimacy', but the original commitment to legitimacy may also condition the efficacy and effectiveness of the political system (see Linz, 1978, p. 18).

<sup>19</sup> At least not directly. Below I argue that legitimacy can be increased with a formal, written constitution, once the constitution improves policy.

<sup>20</sup> See, e.g., the discussion in Lijphart (1999, esp. pp. 19 and 24, and especially pp. 45–6 on the EU).

Constitution' was sufficient to get Poland through the difficult early 1990s, when redistributive conflicts and presidential domination of politics threatened Poland's democracy.<sup>21</sup>

In sum, this comparative historical evidence casts doubt on the claims that written constitutions actually improve the legitimacy of a polity. Rather, if legitimacy is to be improved through constitutional change, constitutional change must result in measurable outputs, demonstrating to citizens that the critical problems of the polity are being solved adequately.

### *Clarifying Rules*

Some arguments have been made that the main reason for drawing up and enacting a formal constitution for Europe is that a written document might result in more clarified rules. As De Witte puts it, '[t]he main effect of the [constitutional] operation might well just be a greater degree of formalization and clarification of the constitutional principles that characterize the EU system today' (De Witte, 2001, pp. 1, 3–11).

Indeed, the most important question here is: can the EU expand successfully without a written constitution? It has done so far, moving from the 'easy Union' in the early 1970s, to the increasingly 'uneasy Union' of the 1990s. But with the 2004 addition of east European countries, and a possible future addition of Turkey, should we be concerned that existing rules will be diluted by the greater geographic, religious and linguistic space? Again, recall the three countries in our 'no formal, written constitution' set: the UK, New Zealand and Israel. All have managed to date with written sets of rules, but without written constitutions. They are unitary states, however, and have not had to 'come together' in a federal or quasi-federal way in the manner that the EU, or the US, had to.<sup>22</sup> So perhaps there is more validity in an argument for a written constitution grounded in the need to clarify rules, particularly with respect to the ways of tolerating differences within society.<sup>23</sup> For as Garton Ash notes, '[t]he alternative [to a constitution] is a continuation of evolutionary pragmatism, with ever more bits and pieces being added on to the rambling castle' (Garton Ash, 2001).

But, this claim leads to an immediate objection: if the crafting of a formal, written constitution is seen as an opportunity to clarify all rules, and if this involves trying to produce a very detailed, rigid document, pinning down exact concerns and even negotiating immediate political conflicts, then such a constitution may actually work against the goal of setting up a stable, effective

<sup>21</sup> Interview with the author, Warsaw, 17 May 2001.

<sup>22</sup> A discussion of coming-together federalism is found in Stepan (2001, ch. 15).

<sup>23</sup> Here I have in mind the discussion of various toleration regimes, including consociations and nation-states, in Walzer (1997).

system for governing. Attempts within the EU convention to constitutionalize contentious issues such as religion quickly led to deadlock rather than clarification. For if constitutions are to be effective co-ordinating devices, 'they are best written without trying to resolve all immediate political conflicts ... why they ought to be kept simple ...'.<sup>24</sup> Indeed, Brazil's 1988 Constitution aimed at clarifying all rules and negotiating political conflicts. The result is a 193-page document that is tough to implement, and Brazil is still no shining model of democracy.<sup>25</sup> The proof is in the pudding, or as Przeworski puts it, 'constitutions that allow everyone to introduce substantive demands, constitutions that ratify compromises by enshrining substantive commitments ... are often impossible to implement' (1991, p. 35).

Therefore, even if further clarification of the rules beyond the various, existing EU treaties is desirable from some normative point of view, the process of constitutionalization may have opened a Pandora's box of highly politicized rule-making that works, in the end, against the goals of efficacy and efficiency. This will only exacerbate, rather than mitigate, the EU's legitimacy deficit.

### *Improving Policy*

If a written constitution cannot create legitimacy where there is none, and should not attempt to clarify all rules and settle all political differences for a polity, then what purpose can it serve? Here the argument is advanced that a written constitution can at least provide needed direction by urging a polity toward a common goal.

Russell Hardin reminds us that it is 'through constraint that we are enabled in our strategic interactions with others to achieve outcomes that require joint action' (Hardin, 1999, p. 133). With this idea of constraint in mind, 'the point of a constitution is to tie our hands in certain ways in order to discipline them to more productive use'. Indeed, precisely because of the challenges that an increasingly multilingual, multicultural union will present, the most important task in hand would seem to be the hastened establishment of certain conventions of behaviour and actions rather than others.<sup>26</sup> Moreover, there would seem to be some urgency 'to direct them in certain ways rather than

<sup>24</sup> Ordeshook (1992, p. 149). Ordeshook goes on to say that, with respect to these constitutions, '*once written*, their adoption ought to be accompanied by a public debate that commits the citizenry to it' (emphasis added). Although I am not quite sure what Ordeshook has in mind when he says 'public debate', I agree that once written, public debate may be an important part of ensuring constitutional commitment. See the discussion below.

<sup>25</sup> See the official version, Centro Gráfico do Senado Federal (1988).

<sup>26</sup> Such conventions differ from rules in that conventions emerge as 'co-ordination on a pattern for resolving ... interactions', and the enforcement of conventions is thus internal, rather than external (see Hardin, 1999, p. 117).



others by getting people to commit themselves immediately rather than bumbling through to a result...' (Hardin, 1999).

Taken in this sense, a constitution can react to and guard against negative tendencies and trends within a polity. Is not this one of the fundamental challenges for Europe now? What do European publics most 'fear' about the EU? The lack of democracy *per se*? This does not necessarily seem to be the case. A few years ago, a respectable 40 per cent of Europeans seemed rather satisfied with the way democracy was working in the EU (versus 43 per cent who were not satisfied) (*Eurobarometer*, 54, Fig. 2.6). By 2004, the EU was even trusted more by Europeans than were national governments and parliaments (*Eurobarometer*, 61, p. 3). When there was dissatisfaction with the EU, complaints were linked with citizens' perceptions of a loss of control over the potential transfer of funds to less wealthy Member States; the potential transfer of jobs to countries with lower production costs; the fear of an increase in organized crime; and the fear of increased immigration.<sup>27</sup> In the spring of 2004, for example, EU citizens cited employment, immigration and the fight against crime as the three subjects they most hoped would constitute the 2004 parliamentary election debates (*Eurobarometer*, 61, p. 3).

Citizens' fears of the EU are also directly related to the fact that '[t]he chief transfer of power is from politicians at any level to business and its customers' (Hardin, 1999, p. 244). Certainly, a written constitution for Europe, with constitutionalized mechanisms for fast-track policy-making in the most critical areas, to be guarded by the European Court of Justice, might enable the EU to make important headway in these areas first, and to regain the gradual loss of control over commerce that seems to be at the heart of 'fears' of the EU.<sup>28</sup>

To be sure, both organized, transnational crime and transnational commerce could emerge as important, albeit anti-democratic, mechanisms of social co-ordination in Europe. For example, the newfound freedom of circulation and the establishment of a single market in the EU have facilitated the trafficking of human beings, money laundering and cybercrime. At the same

<sup>27</sup> *Eurobarometer*, No. 54. Another striking statistic emphasizing the fear citizens have of immigration is provided by *Eurobarometer* Opinion Poll 47.1 (Spring 1997), in which one in three of those interviewed declared themselves to be 'quite racist' or 'very racist'.

<sup>28</sup> Moravcsik (2004, pp. 336–63) has argued for similar mechanisms in the US. Alesina (2000) makes an interesting proposal along similar lines for a country that is indeed suffering a democratic deficit: Colombia. Alesina suggests constitutional reform that would give the Colombian President 'fast-track' powers, enabling him to submit non-amendable legislation to the Congress on urgent matters concerning, for example, the economy. The idea is that this fast-track mechanism would avoid any tendency for presidents to invoke emergency powers to pass legislation, since emergency powers often involve the suspension of civil liberties and political rights. Given the tendency of Latin American (and other) presidents to invoke emergency powers during economic crises, the proposal makes a great deal of sense for anyone interested in assuring government efficacy in hard times, while simultaneously protecting democracy.



time, regionalism, while not negative in and of itself, has sometimes led to separatist movements in Spain and Italy. Regional political parties are also emerging to take advantage of Europe's reawakened, centre-periphery cleavages, attracting voters who see an increased threat to sovereignty with the EU-25 enlargement. The danger here is that an increasingly disintegrating regionalism, combined with organized crime and transnational commerce, could become the main social co-ordination mechanisms of Europe's future.

Given the expressed fears of EU citizens with respect to this danger, the EU as a constitutional project is a concrete chance to co-ordinate society against these other, potentially negative and disintegrating mechanisms that are emerging as potential alternatives. It is precisely for this reason that a European Constitution, formal and written, would serve Europe well. Because 'social action is coordinated also by a variety of informal norms or undescribed evolutionary processes that can coincide with more insidious things ... this view of constitutions tells us that they must be designed to compete with other things for the political-economic organization of society' (Ordeshook, 1992, p. 149). To the extent that the EU manages to achieve a constitution that serves as the main mechanism of social co-ordination in Europe, the disintegrating, centrifugal mechanisms of social co-ordination may have a smaller chance of taking root.

If we examine history, this motivation behind constitutional design is apparent. Most new constitutions are deliberate reactions against historical failures. For example, Germany's Basic Law in 1949 created a federal, parliamentary system, with the (now enviable) positive vote of 'no confidence'. The elements of the Basic Law were a direct reaction to the very centralized Weimar Constitution, which lent itself to strong presidential domination. Weimar's constitution, in turn, with its strong president and wide-ranging emergency powers, was a deliberate reaction to the fragmentation of the political system in the wake of the Versailles Treaty. A similar story can be told for the various constitutions in France's democratic history. Thus, part of the purpose of a written constitution is to correct the negative tendencies of a polity, in the hope of setting the polity off on a new, more positive, course. In a similar vein, setting the EU off on a new, more positive course, with improved policy co-ordination and the Constitution as the dominant social co-ordination mechanism, may be just the legitimizing output push the EU, and Europe more generally, need.

If we accept the argument that a written constitution would improve policy co-ordination, would keep potentially disintegrating co-ordination mechanisms at bay, and would direct legislators in the EU towards the most relevant problems at hand, then it follows that the written constitution would also

eventually improve the output-oriented legitimacy of the EU project.<sup>29</sup> That is, a certain *Verfassungspatriotismus*, or ‘constitutional patriotism’, could develop if the constitution helps in the co-ordination and production of efficient policy.<sup>30</sup> And constitutional patriotism, it seems at this stage, is much more relevant and feasible than the development of a European ethos or demos.<sup>31</sup>

In sum, since ‘“there are both conditions that facilitate mutually productive relationships and those that yield mutually destructive relationships”, constitutions establish associations that “facilitate the one and constrain the other by constituting order in human societies” ’ (Ordeshook, 1992, p. 143, quoting Ostrom, 1987, p. 48). And in this simple but powerful way, a piece of paper might benefit the EU in predictable and necessary ways. And therefore, the potential policy improvement and social co-ordination that could result seem to be the most compelling reasons for a formal, written constitution for the EU.

Moreover, if we agree that this is the best justification for a European constitution at this time, then the specifics of ‘what kind’ of constitution will flow logically from the polity’s needs and the constitution’s detailed justification (rather than the other way round). Thus the discussion of a federal versus non-federal polity, or a directly-elected versus appointed European president, can take place with reference to the specific, designated goal of the constitution. We have sufficient evidence from individual country cases and large-N analysis to suggest which specific constitutional arrangements, such as the organization of executives, legislatures, territorial jurisdictions and the electorate, are better at achieving specific goals, such as popular representation, government stability or regime stability (see e.g., Tsebilis, 1995, pp. 289–325; Lijphart, 1984; Sartori, 1993; Linz and Valenzuela, 1994). Yet as comparative evidence shows, there are significant trade-offs between these various goals, as one is often achieved at the expense of another. This experience at the level of individual countries has led comparativists away from the broad goal of ‘more democracy’ toward pinpointing the exact elements of the democracy that need refinement, and arguing for constitutional reform

<sup>29</sup> As Weiler (1999, p. 83) notes, legitimacy will result from ‘a visible and tangible demonstration that the total welfare of the citizenry is enhanced as a result of integration’. These visible and tangible demonstrations can come most readily in the form of policy. Thus, while I agree with Weiler on this point, I disagree with his suggestion that no formal, written constitution is necessary to improve the chances that improved policy will result.

<sup>30</sup> Habermas (1996, p. 500) has discussed the ‘constitutional patriotism’ in the Federal Republic of Germany. He has also suggested the possibility for Europe.

<sup>31</sup> Of course, the development of constitutional patriotism can take some time. Even in France, where a strong 59 per cent (versus 39 per cent) are happy with their constitution, this patriotism took time and developed gradually. See the poll conducted from 3 October to 3 November 2000 by l’Institut IPSOS – *France Soir*, available at <http://www.politique-opinion.com/elections/index.htm>.

respectively. To have the ‘what kind of’ discussion on a constitution, therefore, without first agreeing upon the specific goal of the constitution, may lead to the crafting of incompatible mechanisms within the constitution.

## II. How A European Constitution?

Now that we have considered why a formal, written constitution for the EU may be desirable, there are many important questions regarding the way in which a constitution should be drafted and ratified.<sup>32</sup> Let me distinguish two questions in this regard. Both questions concern the role of the public in the constitution-making process. They are: firstly, will the public participate in the actual drafting and debating of the constitution? Secondly, will the public be the ultimate veto power, by plebiscite or referendum or some relevant mechanism, of the constitution?

The first question concerns the extent of popular *inclusion* in the process. And, the second question concerns the extent of public *contestation* of the process. Here, Robert Dahl’s classic conceptualization of two dimensions of polyarchy – inclusion and contestation – is used (Dahl, 1973, p. 7). An extract from these two dimensions is made to create a typology of four ideal types of constitution-making processes (see Figure 1).

Let us now examine these two dimensions. What constitutes popular inclusion? The provision of real mechanisms for citizens of each European country, and in some cases, each region, to voice their own ideas and concerns about elements of the constitution, signifies popular inclusion. In the ideal type, these mechanisms are matched by the drafters’ serious reflection on citizens’ expressed concerns. What constitutes popular contestation? Is it referendums held in each European country, and in some cases, each region, on particular elements of the constitution, such as the decision to have a directly elected president, the term of the parliament, etc., and on the final constitutional document? For example, is the final draft actually put to a referendum to be approved by the populations of all countries of Europe before it is considered ratified? Or is final ratification left to the existing European Parliament, or the European Court of Justice? As of the summer of 2004, the draft Constitution is to be approved in each Member State either by a public referendum or parliamentary ratification. Thus contestation of the EU Constitution will be more popular in some Member States, such as France and the UK, than in others, such as Germany and Greece.

<sup>32</sup> Surprisingly little normative or positive work exists on comparative constitution-making processes. One exception is Elster (1997, pp. 123–42). Elster distinguishes modes of constitution-making which, while opening an interesting discussion, are not necessarily useful analytically because these modes do not constitute a mutually exclusive, jointly exhaustive typology.

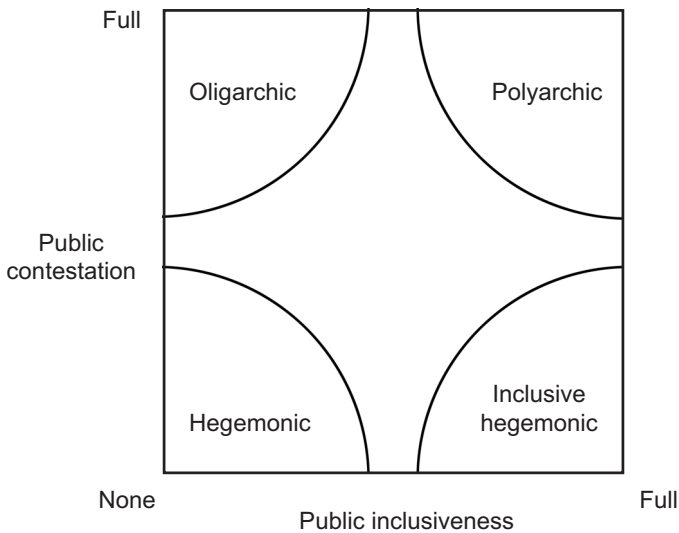


Figure 1: Four Ideal Types of Constitution-making

None of the literature on constitution-making distinguishes a mutually exclusive, jointly exhaustive typology as such. Consequently, and more problematically for our purposes here, the growing literature on the EU constitution has not been able to draw on any positive discussion of types of constitution-making processes in order to analyse the EU better. Therefore, when we read that ‘public debate’ and ‘popular constitution-making’ are necessary to increase the legitimacy of an eventual EU constitution, we are not quite sure what kind of, or how much, participation is being discussed. Moreover, literature using the term ‘participation’ conflates the two crucial elements of participation, inclusion and contestation. Often it appears, then, that the type alluded to in the debates on the EU is the participatory type – that is, the type with a variety of mechanisms for public participation in the actual drafting of the constitution, plus the final, direct ratification of the document by the populations of all European countries. In short, what is often alluded to is the most public participation possible (given the constraints of a large-scale, multinational polity). This is represented here by what can be called polyarchic constitution-making.<sup>33</sup> The constitutionalization of the EU to date, however, has not been a strictly polyarchic process.

Essentially, three basic arguments have been given in the literature for why what can be called a polyarchic model of constitution-making should be the process for the construction of the EU. These are: firstly, a polyarchic

<sup>33</sup> I thank Jens Meierhenrich for this insight.

process would increase the legitimacy of such a constitution because participation would guarantee that the document was ‘owned’ by all; secondly, such a process would create a sense of ‘nation’ amongst the diverse, multilingual nations of Europe; and, thirdly, a polyarchic process would help forge an EU-wide party system and civil society, something currently lacking in Europe, by focusing attention and debate and joining public spheres across Europe.<sup>34</sup> But the knowledge we have of constitution-making in complex, multinational states does not support these assertions. There is simply no comparative evidence that a polyarchic constitution-making process necessarily leads more directly to polyarchy, or that a hegemonic constitution-making process produces hegemony. On the contrary, even a few examples from key countries demonstrate the lack of relationship between polyarchic constitution-making and consolidated democracy. Let me examine some of this evidence.

### *Polyarchic Constitution-making*

Concrete examples of polyarchic constitution-making are quite rare. Brazil comes close to providing one example, since extensive efforts were made for both public inclusion and, to a lesser extent, public contestation, of the constitution-making process.<sup>35</sup> One NGO member participating in the drafting of the Brazilian constitution noted:

We went into a hall with just over 400 people sitting in it and by the time we finished we realized we were sitting in a room with more than 1,600,000 Brazilians. For me that was a point in the process that made the clear statement that this was not just a repeat performance of a legislature writing out a constitutional text – the seventh in Brazil’s history. This part of the text on children and adolescents had really involved people in ways that no one would have imagined possible even a year before. (Swift, 1991, quoted in Klees and Rizzini, 2000)

However, elite groups structured most of the public debates in Brazil, which is inevitable when a large-scale population is unaware, after years of dictatorship, of the various ways of organizing a new democracy.<sup>36</sup> Political parties thus took advantage of this ‘knowledge void’ in society, and began advocating and motivating their preferences for the constitution. These parties, consequently, did not represent any meaningful societal cleavage, but rather were created by opportunist politicians. Brazil saw the rise and demise of the

<sup>34</sup> For example, Schmitter (2000) appears sometimes to make such arguments.

<sup>35</sup> The contestation essentially came later, in 1993, in a plebiscite held to decide whether Brazil should change from a presidential to a parliamentary system. The 1988 Constitution was thus seen as a document that could be, within the first five years, amended by different popular plebiscites.

<sup>36</sup> On some crucial questions up for grabs during the Constituent Assembly, see, e.g., Lamounier and Nohle (eds) (1993). On the various ways of organizing a democracy, see Lijphart (1999).

'Parliamentary Party', and other parties whose existence was tied solely to the constitution-making process. When we examine Brazil's subsequent democratic record, it is not robust. In 2003, only 35 per cent of Brazilians felt that democracy was preferable to any other form of government. After a decade under their new constitution, Brazilians are still less committed to democracy than the citizens of any other Latin American democracy except Guatemala.<sup>37</sup>

In Zimbabwe's recent constitution-making process of 1999–2000, efforts were also made to approach a polyarchic ideal. For example, 'in countrywide meetings, some 100,000 people were canvassed for their views on what the government said should be a 'people-centred' magna carta'.<sup>38</sup> However, there was a sense of opinion overload, and subsequently, no commitment on the part of President Robert Mugabe and his constitutional commission to take any of these views seriously. This led to organized protests by the Zimbabwe Congress of Trade Unions in the country's five main cities. It also led to boycotting by the National Constitutional Assembly – made up of civic organizations, women's groups, youth groups, human rights activists and churches – of the official constitutional review and survey. Thus, polyarchic constitution-making backfired in Zimbabwe, closing what may have been an important democratic opening. Today, in spite of near polyarchic constitution-making processes, neither Brazil nor Zimbabwe provides a strong model of legitimate, democratic government.

### *Inclusive Hegemonic Constitution-making*

South Africa's constitution-making process has been heralded as one of the most 'popular' constitution-making processes in history. Because of this, it has been suggested as a model 'well worth studying' for the EU (Schmitter, 2000, p. 123). The degree of popular participation is summarized nicely by Chief Emeka Anyaoku, Commonwealth Secretary-General, who noted in an address to the South African Constitutional Assembly: 'all the proceedings of the Constitutional Assembly are open to the public. Submissions have been invited – and two million received! Information on the Constitutional Assembly is available on the Internet. And you have solicited the views of ordinary citizens in hundreds of meetings around the country. Whilst proceedings may at times appear cumbersome, they have given real meaning to the phrase, "participatory democracy"'.<sup>39</sup>

<sup>37</sup> See *Latinobarometro 2003*, p. 40. On average 53 per cent of Latin Americans believed democracy was preferable to any other form of government.

<sup>38</sup> *Daily Mail & Guardian*, Johannesburg, 9 December 1999. Available at «<http://www.mg.co.za/mg/news/99dec1/9dec-zim.html>».

<sup>39</sup> Speech to the International Round Table on Democratic Constitutional Development, 17 July 1995, quoted in Ebrahim (1998, p. 240).

However, if we place South Africa's constitution-making process on our two dimensions, it was actually an inclusive hegemonic type of constitution-making, not a pure polyarchic type. Inclusion was extensive, as is evident from the description of various, profound mechanisms available for the public to voice opinions on many elements of the draft document. But the final contestation of the document was left to the South African Constitutional Court. Widespread inclusion was crucial for the various peoples of South Africa to feel as if they were in fact constructing a democracy that was democracy for all. 'The challenge was to find ways to enter into effective dialogue and consultation with a population of more than 40 million people' (Ebrahim, 1998, p. 241). This inclusion was deemed necessary after the extensive period of exclusion during apartheid. For decades, South Africa was a regime based on terror and repression, and the constitution-making process was a part of coming to terms with this past (Meierhenrich, 2004). South Africa under apartheid therefore suffered a *genuine* democratic deficit and, in this crucial regard, the EU can in no way be said to be at a similar stage of democratic deficit. Thus, the large degree of inclusion in the constitution-making process of South Africa was indeed useful but, for obvious reasons, the model does not seem to be transferable to, or necessary for, the EU.

### *Oligarchic Constitution-making*

Spain is an example of oligarchic constitution-making, since there was no public inclusion in the process, but there was public contestation. The Spanish Constituent Assembly had representatives from all political parties, but had no direct public inclusion by way of town meetings, popular submissions, etc. The final document was passed first by the Spanish Parliament, the *Cortes*, and then put to a public referendum in 1978. In spite of the lack of public inclusion in the process, '65 per cent of those polled felt that the constitution "was an accord among almost all political parties"' (Linz and Stepan, 1996, p. 115). Spain then managed, in the face of huge challenges posed by an unsettled national identity and economic constraints, to consolidate democracy under this constitution.<sup>40</sup>

Russia provides another example of an even more oligarchic constitution-making process. Boris Yeltsin drew up the 1993 Constitution under an opaque veil, since there was no election of a constituent assembly. Indeed, the legislature played no role in drafting or approving the constitution. Even the first draft by Yeltsin's hand-picked constitutional committee was discarded, apparently because it restricted presidential power and gave more power to the

<sup>40</sup> On the other hand, strong acceptance of the Spanish Constitution has still not prevented separatist movements from challenging the document and the sovereignty of the nation.



legislature.<sup>41</sup> Yeltsin's final document was submitted to a plebiscite, and Yeltsin later argued that it had been approved in a 'referendum' by the required majority of votes. In reality, however, there was a very low turnout rate for this national consultation. Official figures claimed that turnout was about 54 per cent, but even if this were true, that meant that the constitution was actually approved, and thus legitimized, by only 31 per cent of the electorate (White *et al.*, 1997). Some observers even doubt whether the 50 per cent requirement had really been met. After one decade under this constitution, Russia may not have reverted to dictatorship, but it also has not managed to consolidate its fragile democracy.

### *Hegemonic Constitution-making*

Finally, let us come to the type of constitution-making with the least public inclusion and contestation. It is with this type, interestingly, that we seem to find some of the most robust democracies in the world.

The making of Germany's post-war Basic Law – the *Grundgesetz* – is perhaps the best example of a hegemonic constitution-making process. In 1948, the reformed and newly elected German state parliaments elected a Parliamentary Council to develop the Basic Law. The work of this council was carefully monitored by the Allied powers, which intervened on several occasions, particularly when they perceived the federal idea to be threatened by those German delegates who favoured a more centralized state. The final document was then ratified by the newly elected and newly established state parliaments, not by the public in a referendum. Interestingly, '[r]atification by the people themselves was proposed in the Parliamentary Council on grounds of democratic legitimacy but rejected for the same reason the document was not entitled a "constitution": that it would give too much symbolic significance to an act meant to be only provisory' (Currie, 1994, p. 10). The Basic Law came into effect on 23 May 1949. There was almost no public inclusion, and no public contestation, of the process. And yet, the hegemonic nature of the German constitution-making process did not seem to prevent the document from being legitimate for the 40 years that it operated before German unification. In fact, German 'constitutional patriotism' did develop, and could take the place of German nationalism. This substitution definitely aided the development of German post-war democracy. Interestingly, this constitutional patriotism developed either in spite of, or perhaps because of, a hegemonic constitution-making process. Moreover, substance mattered: the hegemonic crafting of a powerful constitutional court, for example, with

<sup>41</sup> Galina Starovoytova, Member of this Constitutional Committee in 1993, Interview with the author, Moscow, 26 March 1998.

significant powers of judicial review, aided in the legitimation effect of this constitution as it protected individual rights.<sup>42</sup>

The United States is another good example. As Hardin has said, '[a] constitution, to come into being or to be effective, does not require universal or even widespread agreement. Indeed, one of the appeals of proposing a new constitution in 1787 rather than proposing amendments to the Articles of Confederation was that the former could be done without the destructive "absurdity" of the unanimity required by the latter, especially when unanimity could be blocked by tiny but obstinate Rhode Island' (Hardin, 1989, p. 108).

A final interesting point concerning Germany is the deliberate elite choice of words: Basic Law (*Grundgesetz*) rather than Constitution (*Verfassung*). This was an intentional choice, because the Basic Law was not meant to be a final document. The final document, it was argued, would be a constitution that would only be drafted once East Germany was unified with West Germany.<sup>43</sup> This has some important implications for the EU, which might have also benefited from presenting the draft Constitution as a Basic European Law now, and waited for the enlargement processes to settle before actually constructing a European constitution.

In light of this comparative discussion, let me outline three fallacies that seem to be at least implicit in the literature that has advocated popular constitution-making for Europe.<sup>44</sup>

### *Fallacy 1: Popular Constitution-making will Solve the Democratic Deficit*

The comparative evidence suggests there is no connection between a polyarchic constitution-making process and democracy, or even between such a process and legitimacy as defined earlier. Rather, several polyarchic processes have resulted in regimes that lack both legitimacy and democracy. Moreover, some of the world's more robust democracies (Germany and the United States) have emerged from hegemonic constitution-making processes.

### *Fallacy 2: Popular Constitution-making will Create a European Demos*

There is some evidence that Europeans have been building multiple, complimentary identities without the help of a written constitution.<sup>45</sup> In the spring of 2000, 45 per cent of Europeans already identified considered themselves to

<sup>42</sup> See the discussion in Ferejohn and Pasquino (2003).

<sup>43</sup> Although the redrafting of an entire constitution did not in fact take place, it was nevertheless the argument put forward at the time. See the discussion in Quint (1997).

<sup>44</sup> This is, of course, a preliminary set of tentative conclusions, awaiting more systematic treatment of cases.

<sup>45</sup> On the development of multiple, complimentary identities in Spain, see Linz and Stepan (1992, pp. 123–39).

be both their own nationality and European; 8 per cent considered themselves both European and their own nationality, putting European first in the self-identification; 4 per cent considered themselves exclusively European; and the last 41 per cent considered themselves to be only their own nationality (*Eurobarometer*, 53, Fig. 6.3). These figures are not overwhelming; but they suggest that multiple, complementary identities are and have been taking root in the EU without a formal, written constitution.

*Fallacy 3: Popular Constitution-making will Create European Parties and Society*

European parties, to the extent that they structure public debates about a constitution, may be strengthened from a popular constitution-making process. But the danger is that such parties will further polarize society by creating artificial, elite-structured cleavages in order to create platforms for themselves. In Europe the latter has so far been the case, as various party debates concerned procedural rules rather than the substance (crime, immigration, etc.) citizens were hoping for. As a result, a potentially destabilizing set of 'anti-system' European parties has developed, and has gained significant representation in the current European Parliament. This suggests that popular constitution-making in Europe may have actually worked *against* the democracy and legitimacy of the EU. Comparative evidence is again important here. In several post-communist countries, for example, similar anti-system political parties sprang up during the early years of democratization. These parties were often based on an 'opposed to reform' versus 'supporting reform' cleavage. As a consequence, a strange political competition stabilized itself around this axis concerning, essentially, the legitimacy of the regime rather than substantive debates over policy.

**Conclusion: What now for the European Peoples?**

To sum up the points made so far. First, we have no evidence, or good arguments, as to why a formal, written constitution would solve the democratic deficit, or even improve legitimacy in the EU. Second, we seem to have no comparative evidence that a formal, written constitution would clarify rules without involving some important opportunity costs in terms of efficiency and efficacy. Third, the best argument for a formal, written constitution seems to be that such a document would serve as a social co-ordination mechanism for Europe, and could compete with other, potentially disintegrating social co-ordination mechanisms. For example, regionalism, transnational commerce and organized crime are in some ways already providing social co-ordination

mechanisms for Europeans, but their effects are becoming more detrimental to democracy than the EU is. Fourth, this formal, written constitution, in order to co-ordinate European societies successfully and efficiently, should remain a basic document, without excessive detail. A Basic European Law, that provides the framework for governance, but that could be motivated as a provisional document to be made into an actual constitution at a later stage, may be the best alternative to the set of existing treaties. Fifth, this European Basic Law, in order to serve its co-ordination function and compete effectively for legitimacy, need not necessarily emerge from a polyarchic constitution-making process. As the discussion of various empirical cases has shown, there seems to be no strong evidence that polyarchic constitution-making processes improve the chances of establishing polyarchy. Similarly, there is no evidence that closed, hegemonic processes produce non-democratic polities.

Looking back at the last year of the convention, therefore, it seems that a 'We, the Peoples', hegemonic constitutionalization of the European Union may have held the most promise, had the members of the Convention not tried to push forward the complex, Brazilian-style document that must now be ratified in individual Member States. A Basic European Law, via a hegemonic process, may have resulted in a document that might have been both more intelligible to the various peoples of Europe, and more acceptable to them, given the vast differences among, and competing claims of, the EU-25. With an enthusiastic ratification by Member States, such a Basic European Law might have had greater chances of improving policy in Europe's most crucial areas in the short term, thereby increasing the legitimacy of both the document, and the European polity, in the long run. By settling, in this sense, for legitimate rather than democratic authority, Europeans may have allowed for the gradual development of both. And in Europe this temporal sequence is essentially what is demanded, for '[t]he complicated form of their political system arising from the partition of government between the states and the Union, and from the separation and subdivisions of the several departments in each, requires a more than common reverence for authority which is to preserve order through the whole'.<sup>46</sup>

<sup>46</sup> Madison (1792). Madison goes on to say that 'liberty and order will never be perfectly safe until a trespass on the constitutional provisions for either shall be felt with the same keenness that resents an invasion of the dearest rights, until every citizen shall be an Argus to espy, and an Aegeon to avenge, the unhallowed deed'.

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