THE CONSTITUTIONAL TREATY IN THE CONTEXT OF EUROPEAN INTEGRATION: AN ASSESSMENT

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ABSTRACT

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163 pages

This thesis takes up the mantle of studying the Constitutional Treaty in the context of European Integration. This work examines how constitutionalization affected the process of European integration in relation to the democratic legitimacy of the European Union. Albert O. Hirschman's Exit, Voice and Loyalty paradigm is used to assess and define the process of constitutionalization in the context of the supranational and intergovernmental tendencies of the European construct which birthed the democratic deficit in its foundational period. Special focus is allotted to the role of the European elites in drafting the Constitutional Treaty which was the culmination of their attempts to compensate for the foundational lack of democratic legitimacy. In order to make this assessment this thesis delineates the history of European integration. Furthermore, this work examines the European constitutional drive and evaluates the implications of the failed ratification process in correlation to the aforementioned issues. In conclusion this thesis maintains that the future feasibility of the constitutional project is directly related to the degree of democratic legitimacy achieved by the whole of the European Union.

Keywords: Constitutional Treaty, European Integration, Democratic Legitimacy, Intergovernmentalism, Supranationalism

ÖZ

AVRUPA ENTEGRASYON SÜRECİNİN ÇERÇEVESİNDE
AVRUPA BİRLİĞİ ANAYASASI

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163 sayfa

Bu tez Avrupa entegrasyon süreci çerçevesinde Avrupa Anayasası'nı değerlendirmektedir. Bu kapsamda anayasalaşmanın Avrupa Birliği'nin demokratik meşruiyetine olan etkisi incelenmektedir. Avrupa Birliği'nin anayasallaşma süreci içerisinde gelişen demokratik meşruiyet sorununu uluslarüstü ve hükümetlerarası eğilimleri kapsamında değerlendirebilmek için Albert O. Hirschman' nın 'Çıkış, Ses, ve Sadakat' (Exit, Voice and Loyalty) paradigmasına başvurulmuştur. Avrupa siyasi elitlerinin, bu demokratik meşruiyet sorununu Avrupa Anayasası çerçevesinde gidermeye çalışmaları neticesinde, Anayasa'nın onaylama süreci başarısızlıkla sonuçlanmıştır. Sonuç olarak bu tez Avrupa Birliği Anayasası'nın geleceğinin demokratik meşruiyet sorununun giderilmesi ile doğru orantılı olduğunu savunmaktadır.

Anahtar Kelimeler: Avrupa Anayasası, Avrupa Entegrasyonu, Demokratik Meşruiyet, Uluslarüstü, Hükümetlerarası

To My Parents

Without whom I am just a blade of grass against an unrelenting storm

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CHAPTER 1

INTRODUCTION

The European Union (EU) can be viewed as a multifaceted quasi-legal union of states with supranational tendencies. Although this may sound complicated it is in fact a valid description of what has become one of the most ambitious social and political projects of the 21st century.

The EU, due to its unique position as a first in such wide scale international integration, has always had to reinvent itself. The evolutionary metamorphosis of the EU has led it from essentially being a tactical agreement between states aimed at creating an amicable status quo during its genesis as the European Coal and Steel Community to the union of states on the brink of constitutional amalgamation today. The European construct has undergone some major transformations in the pursuit of European integration.

These watersheds of metamorphoses that have led to the Constitutional Treaty are important in that they created the conditions for the advent of, and the ambiguous demise of, the very same document. This thesis strives to understand the European Constitutional settlement in the context of European integration by studying the effects of constitutionalism on the process of European integration in terms of the Exit, Voice and Loyalty paradigm[1] and the deficit of democracy inherent in the European construct.

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[1] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States, Cambridge: Harvard University Press, 1970.

The Exit, Voice, and Loyalty paradigm revolves around the theories of Albert O. Hirschman who applied these concepts to the working conditions of organizations. The basic premise is that Exit represents abandonment of an organization by a member in the face of discontent with the performance of the said organization. Voice is expressed as a tool of reform that allows the member who is discontent to express his / her discontent thus, allowing for corrective procedures to reform the organization and negate the necessity of Exit. Voice and Exit are inversely related. The extensive use of one, such as Voice, will cause a decrease in the use of Exit. If Exit options are more available then Voice is less likely to be exercised. The third concept refers to Loyalty as a tool that keeps a member within an organization regardless of the availability of Exit. This paradigm is a basic tool that is pivotal in understanding the events that led to the Constitutional Treaty and the deficit of democracy inherent in the EU.

This thesis is comprised of four main chapters. Chapter two addresses the need to fortify the reader with a solid understanding of the history and principles of the European constitutional and integrative processes. It is known that the much discussed *Les Verts* case[2] brought the constitutional undercurrent of European integration to the surface. The European Court of Justice (ECJ) reading that the European Economic Community Treaty (EEC) together with its amendments under the Single European Act (SEA) was to be viewed as "the basic constitutional charter" of the European Community (EC). This event cemented the constitutionalization of the Treaties. With this reading of the ECJ the Community had moved from the governing principles of international law to an interstate governmental structure functioning under a constitutional charter governed by constitutional principles[3]. This event was the culmination of a series of changes the EU underwent in its foundational period. The tug of war between the

[2] Case 294/83, Parti ecologiste 'Les Verts' v. European Parliament, 1986 E.C.R 1339, 1365 (here forth Les Verts).

[3] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2407

supranational and intergovernmentalist elements of this period caused the constitutionalization of the founding Treaties by the ECJ.

The first part of Chapter two deals with the polarization of the Community between a supranational legal order and intergovernmental decision making – legislative institutions. While this polarization created the democracy deficit, the erosion of the enumeration of competences in the European construct caused the democratic deficit to become institutionalized. The second section builds a correlation between the historical events of the integrative process and the theoretical base presented in the first section. These basic building blocks are a prerequisite to understanding the complex issues dealt with in terms of the definition of the EU today. It is with this in mind that section three covers the historical significance of the Treaty Establishing a Constitution for Europe and the role integration has played in its development.

Chapter three begins with defining the term "constitution" and elaborates its significance to the European setting. The second section of Chapter three looks at the democratic deficit in greater detail. This section heavily relies on the material presented in chapters one and two. While it makes a historical connection to the foundational period it also examines the role of the European Parliament (EP) as a tool used to increase the legitimacy of the Union as a whole by the European elite. The last section of chapter three examines the Constitutional Treaty in terms of the changes and innovations it presents to the EU in reference to the democratic deficit and its institutional structure.

However, these sections are just tools; the real challenge makes itself apparent when trying to understand the reasons behind the constitutional failure of 2005. The rejection of the Constitution via referendum raises questions as to the reason behind the no vetoes and what they mean for the *finalite politique* of the EU. Chapter four in its entirety is dedicated to the European Constitutional debacle. Sections one and two examine the failure of the Constitutional Treaty in reference

to two reports consecutively issued by independent organizations directly before and right after the Constitutional failure. These reports provide a view of firstly the expected results of the ratification process and secondly they provide a view of the initial shock caused by the rejection of the Constitutional Treaty in France and the Netherlands. After presenting empirical evidence section three attempts to explain the ramifications of the Constitutional failure in regards to what it means to the Constitutional drive as a project of the European elite. The formal, material, and normative deliberative - democratic connotations of constitutions reviewed in chapter three are used explicitly to evaluate implications the Constitutional failure. Also, the issue of the lack of a constitutional culture in Europe is raised.

Chapter five presents a unique look at the possible solutions to the Constitutional debacle. Recent propositions are examined in order to get a comprehensive inside track picture of the viable possibilities for salvaging the Constitutional Treaty. The second section of Chapter 5 makes an assessment based on the Exit, Voice, and Loyalty paradigm whilst touching on the effects of the foundational rift between the formal and social legitimacy of the EU in terms of the democratic deficit.

In conclusion this thesis aims to have provided a unique look at the Constitutional Treaty in the context of European integration whilst using the Exit, Voice, and Loyalty paradigm to explain the lack of social legitimacy in the EU in terms of the democratic deficit and the importance of citizen Voice in pre-confederal arrangements between nations.

CHAPTER 2

INTEGRATION AND CONSTITUTIONALISM

When dealing with any concept that is even remotely related with the European Union and its earlier manifestations the term 'integration' will come up more often than not. Many scholars have defined and redefined the term throughout the history of the EU. This chapter will attempt to present an interpretation of what the European integration process means in relation to the constitutional sentiment that has taken root in the ever closer Europe of today. While latter chapters deal with the final climax (or anti-climax) the Union has reached as of 2006, this chapter will raise a few issues that will aid the reader in understanding why by definition, or real life example the concepts of a constitution and European integration might be the only chance at reaching a European '*finalite politique*' or that these concepts might not be reconcilable in the European context.

When assessing the accomplishments of the new European system after WWII one must look at them as a whole. Each event must be taken as an integral part of the historical progression of a new system founded on a *tabula rasa*. This blank slate offered by the travesties of WWII presented an opportunity to incorporate the struggling nations of Europe into the global fold. Our focus will mainly revolve around what integration is and how it has affected European development in terms of constitutionalization and constitutionalism in the European context. In this line of thought the EU must be seen as a historical project. The first part of this chapter deals with the constitutional solidification of the EU in its foundational period. It also defines the basis for which the balance between supranationalism vs. intergovernmentalism has been a factor in defining the

European project as a unique governance system different from classical intra-state associations like federalism or confederalism. This project which had the opportunity of bringing order to chaos did so based on the premise that nations that are brought to an interdependent state of existence will refrain from hostility and embrace peace and stability. This premise allowed the nations of Europe to attempt a unique system of governance. The second part of this chapter strives to understand the flow of integration defined in terms of this foundational shift towards a constitutional order and the intergovernmentalist reactions that have developed as a reaction to this change. An attempt at framing these reactions in terms of integration in the sense of deepening and integration in terms of widening is also made to better portray the pressures that led to a constitutional settlement. In this sense deepening refers to integration in the fields of policy making and establishment of institutions while widening refers to the addition of new members to the Union. The deepening / widening paradigm can also be used as a way of identifying the pressures that spurred the integrative process of the European Union in its fundamental stage and throughout its development. These two concepts coupled with the theoretical base presented in part one are pivotal to understanding the way European integration works and the place constitutionalism occupies in its evolution. By portraying the balance between these two concepts under the scope of the constitutional evolution of the EU this chapter aims to define the reasoning behind the Constitutional Treaty and the reasons for its existence. The third section of this chapter deals with the actual events leading up to the signing of the Constitutional Treaty and their relevance to the material presented in parts one and two. Part three also foreshadows material covered in chapter three.

The following chapter strives to define the term ‘constitution’, recap the significant events leading up to the drafting of the European Constitution, look at the issue of the deficit of democracy, and cover the changes and innovations introduced by the text in its final form.

2.1 Intergovernmentalism vs. Constitutionalism

The history of constitutionalism in the context of the European integration can be regarded as a tug of war between supranationalism and intergovernmentalism. When speaking of supranationalism in the context of European Union the term refers to the federal or post-federal (constitutional) structure seen in legal integration during the earlier foundational period of the Community. The intergovernmentalist feature refers to the political – decisional – procedural aspects of this foundational period and is more de-integrative (intergovernmental). It is the tension between the definitions of these terms during this foundational period that sets the stage to understanding the unique problems the EU faces today.

The concepts of Exit and Voice and Loyalty that Hirschman[4] developed in the 1970's were later introduced to the European agenda by Joseph Weiler. Weiler used Exit and Voice to define the inherent difference between legal integration and political intergovernmentalism. To recap the original paradigm; Exit refers to abandonment of an organization by a member in the face of unsatisfactory performance and Voice refers to the exercising of corrective measures within an organization in order to satiate the ills that forced the member to resort to Exit. Thus, the relationship between Voice and Exit is inversely related. When more Voice is available there is less of an inclination to resort to Exit and if Voice is not available, then Exit becomes the only viable route. However, if Exit is made unavailable to the members of an organization, then enhanced use of Voice is the only viable option. This results in an intense exercise of Voice within the organization by its members. This last prospect is the one most resorted to by Weiler in trying to understand the foundational period of the Community and the effects of legal constitutionalization during this time juxtaposed to intergovernmental decision making. In the case of the European Community, as

[4] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States, Cambridge: Harvard University Press, 1970.

Weiler points out, the option of formal Exit is not an option at all. Firstly, the fact that the Treaty of Rome does not include a withdrawal clause makes it legally not viable for a Member State to unilaterally withdraw. However, withdrawal, although not an implicit provision under the Treaties, is covered by the Charter of the United Nations[5] which the Member States of the EU are also party to. The Treaty of Rome states that Member States are only bound to follow EU law as long as they are "compatible with existing international arrangements" (Treaty of Rome, Article 37.5)[6]. Thus, an ECJ ruling that validated a request to withdraw would make withdrawal possible. Secondly, the fact that the economic and political ramifications of withdrawal from the Member State side actually negate the option of Exit is a much more likely explanation to the functional non-existence of formal exit from the Union. With this in mind, it is the option of Selective Exit that becomes a possibility open to the Member State[7]. Selective Exit can be achieved by avoiding the obligations of the mandates of the Treaty. In the context of the founding period the use of selective Exit was exercised by the Member States, as will be covered in latter sections. However, for now, what is important is the move made by the political and legal proponents of the Union (the Community hence in order to use the jargon as it applies to the period), the institutions of the Community to close the option of selective Exit in order to keep the Member States from selectively participating in the *acquis communautaire*. This was accomplished in two steps. Firstly, by way of the process of constitutionalization brought to the Community legal structure spearheaded by the ECJ and secondly, by way of the legal and judicial guarantees provided by this system.

The constitutionalization of the Community legal structure during the foundational period of the EU between 1963 and the early 1970's was mainly

[5] The Charter of the United Nations, http://www.un.org/aboutun/charter/.

[6] Treaty of Rome, http://eur-lex.europa.eu/en/treaties/dat/12002E/html/12002E.htm.

[7] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2414.

accomplished by the ECJ. The readings it provided on landmark cases at this time allowed the constitutionalization process to proliferate through the introduction of four basic principles; the doctrine of direct effect, the doctrine of supremacy, the doctrine of implied powers and the doctrine of human rights. These principles allowed for the harmonious union of Member State law and Community Law under a federal constitutional state framework. The doctrine of direct effect is directly associated with the Van Gend en Loos[8] case which as of 1963 introduced the principle that Community legal norms that need no further clarification and do not require legislative action by Member States or the Community must be regarded as the law of the land. The ruling reads:

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international laws for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which not only comprise the Member States but also their nationals.[9]

This ruling effectively gave the Community legal structure direct effect and created enforceable laws prescribed by this legal structure which functioned between Member States and individuals and between individuals within the Community. In comparison to the international law in which the individual citizen of a state may not benefit from rights prescribed by an international treaty if the individual state chooses not to internalize the obligations of the treaty to which it is a party to. In the Community context this ruling effectively bypasses this and directly prescribes rights to the individual regardless of state internalization. In the Community the ruling of the ECJ allowed the citizens of the Member States, through the rights allocated to them by direct effect, to bind the Member States to the legal infrastructure of the Community.

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[8] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R 1, 1970 C.M.L.R.1 (here forth Van Gend).

[9] A.G. Harryvan and J.der Harst, *Documents on European Union*, US: St Martin's Press, 1997, p.144.

The next principal introduced by the ECJ which lead to the constitutionalization of the Community legal structure was the principal of supremacy. The single most important case in terms of the supremacy of Community law which is the 1964 Costa[10] case ruled that due to the fact that Community law under the principal of direct effect is applicable as the law of the land in Member States, the law of the Community is to be regarded as pre-eminent. In comparison to law in the international sphere this ruling as to the primacy of Community law is closer to that of a federal constitutional order.

The doctrine of implied powers effectively helps the Community complete the mandates of the Treaty efficiently. The prior principles of direct effect and supremacy would not be effective if the Community did not have the instruments to implement them. During the foundational period EC internal policies required the Community to negotiate and conclude international treaties with third parties. Thus, the ECJ in another reading on the ERTA[11] case established the principles of implied powers. This meant that the internal competences of the Community were to be taken as explicitly implying that the Community had external treaty power. This also meant that any treaty undertaken by the Community mechanism would be binding to the Community and its Member States. In tune with its constitutional readings, this principle sent the message that on Community policies the ends justified the means, granted that the Community had a legitimate aim. Powers as a necessity to reach these aims would be regarded as in favor of the Community. The ramification of this reading was that in comparison to international intergovernmental relations the Community would not conform to the principal of international laws on the interpretation of treaties in that any binding treaty should not encroach on national sovereignty in its implementation.

[10] Case 6/64, Costa vs. ENEL (Ente Nazionale Elettria Imprea Gia Della Edison Volta), 1964 E.C.R 585, (here forth Costa).

[11] Case 22/70, Commission of the European Communities v. Council of the European Communities, 1971 E.C.R 263 (here forth ERTA).

In the Community this was effectively sidestepped by the ECJ allowing for directly binding and supreme laws as mandated by the Community machinery[12].

The fact that the Treaty of Rome did not include a bill of rights allowed another constitutional 'gap' filling reading by the ECJ. As there were no formal grounds for judicial review on the issue of the violation of human rights the ECJ took the mantle of applying judicial review in terms of human rights to Community measures. Thus, the power exercised by the Community in its direct, implied and supreme forms was subject to judicial review in terms of human rights by the ECJ[13]. This has significance in that the self image of the ECJ as a constitutional court of the Communities which, as seen in federal systems, is charged with protecting the rights of a "constitutional polity", offered up the question of the democracy deficit as a viable issue. If a constitutional legal order exists above the scope of the peripheral Member States, then would a united European constituency need to have direct representation and benefit from transparent legitimate governance? The fact that the ECJ has taken the individual as a direct concern of Community law goes to show that the ECJ is not an agent of the Member States like the Council of Ministers. It does suggest though that the ECJ justices who having been educated in the context of national law naturally have shaped the Community constitutional legal structure into an order that takes the individual as its unmediated unit of normative concern[14]. As the question of the democracy deficit will be looked into in chapter three, what remains in this section is a look at judicial review and its effects on the Exit / Voice paradigm as it applies to the Community in its foundational stages.

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[12] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2417.

[13] Examples of ECJ human rights readings: Case 29/69 Stauder (1969) E.C.R 419; Case 11/70, Internationale (1970) E.C.R 1125; Case 4/73, Nold (1974) E.C.R 491; Case 5/88, Wachauf (1989) E.C.R 2609; Case C-260/89, ERT (1991) E.C.R I-2925; Case C-168/91, Konstantinidis (1993) E.C.R I-1191.

[14] Daniel Halberstam, *The Bride of Messina or European Democracy and the Limits of Liberal Intergovernmentalism*, in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-20.html.

The basis of judicial review as set forth by the principles described above assumes that the founding Treaties are the higher law of the land. Thus, neither the Member States nor the Community machinery may violate the Treaty mandates by legislative or administrational action. Thus, judicial review encompasses two strata. The measures of the Community via the Council of Ministers, the Commission, and the European Parliament (EP) reviewable in terms of conformity with the Treaties and the acts of the Member States reviewable in terms of conformity to Community law and policies. This two fold judicial review makes the closure of Exit an issue in terms of the latter strata. In articles 169 and 170 of the EEC Treaty[15] state:

> If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice (Article 169 – now Article 226).
>
> A Member State which considers that another Member State as failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice (Article 170 – now Article 227)[16].

This means that there exists a two fold failure by the Member State to fulfill an obligation; firstly, inaction to implement a Community measure and secondly, a failure due to the enactment of a national measure that is in conflict with the Community obligations. As inferred in Article 169 the arena for adjudication of this matter is the ECJ. In this respect the EU and its former evolutionary embodiments constitute a different model than that of an international organization. While there is no formal enforcement apart from a declaration and a fine issued by the ECJ (which received the power to issue fines for non-

[15] Treaty of Rome, http://eur-lex.europa.eu/en/treaties/dat/12002E/html/12002E.htm.

[16] A.G. Harryvan and J.der Harst, *Documents on European Union*, US: St Martin's Press, 1997, p.117.

compliance with previous Court rulings via The Treaty of European Union[17]) and Commission deadline set for the Member State to rectify the failure, the real power of these provisions comes from the national courts of the Member states themselves.

When a question arises from the interpretation of Community law by the national courts of Member States the domestic court asks the ECJ for an interpretation. Thus, a system for dynamic judicial review is created between the ECJ and the national courts. In this sense, an interpretation of a Community law that brings obligations to a Member State cannot be violated by the Member State based on the principal of the rule of law in modern systems of governance; they cannot reject a ruling by their own courts[18]. As mentioned the role of the citizen as an object of the ECJ allows the individual to also control the Member State as far as its obligations to Community policies. In the Community experience the Member States have acquiesced to this legal constitutional order. This aspect again sets the EU apart from other international dealings due to the removal of the principles of reciprocity and countermeasures[19] as seen in international law. Thus, the distinction between Community law and the principles governing international law is that the Community legal system strays away from the main international relations premise; that the nation state is unquestionably sovereign. This is why the legal structure of the Community during its foundational period was formed into a system resembling a federal constitutional legal order rather than an intergovernmental arrangement under international law.

[17] Robert A Jones, *The Politics and Economics of the European Union*, UK: Edward Elgar Publishing ltd, 1996, p.93.

[18] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2419.

[19] Reciprocity: mutual or cooperative interchange of favors of privileges, especially the exchange of rights or privileges of trade between nations. Countermeasures: reactions of one or more States to an internationally wrongful act.

Now that the legal constitutionalization of the Community mechanism has been covered it will be appropriate to return to the significance of the Exit / Voice paradigm as it refers to the EU and its former manifestations. The closure of Exit as experienced by the Member States as an effect of the rulings of the ECJ the use of Voice within the Community became of primary importance to the Member State. As it was mentioned, the loss of Exit options causes the use of enhanced Voice. In keeping with this approach, it can be said that as a result of this aforementioned closure of Exit the Member States focused completely on the decision making process of the Community. Community decision making functioned under:

- Political impetus for a policy
- The technical elaboration of policies and norms
- The formal proposal of a policy
- The adoption of the proposal
- The execution of the adopted proposal

Originally the decision making process of the Community was highly supranational; the Commission was king and had the sole power of proposal making. The Council of Ministers received these proposals only after the Commission prepared them for formal adoption. Adoption took place supranationally; majority voting in the Council by the representatives of the Member States took the decision. Thus, it was sent back to the executive arm, the Commission, for execution. The European Parliament, which will become important to this work as an example of incremental strengthening of democracy and thus, legitimacy in the EU in latter chapters, was only in a consultative role during this foundational period[20]. In this period, however, the Member States took dominance on decision making as a reaction to the closure of Exit mentioned earlier. The 'Empty Chair' crisis, which will be covered in the next section, blocked the entry into force of majority voting in the Community sphere. As a

[20] John McCormick, *Understanding the European Union a Concise Introduction*, NY: Palgrave Macmillan, 2005, p. 94.

result the Luxembourg Accord would allow Member States veto rights on issues that were of prime importance to their national interests. At this single historical point, as will be seen in context in the following section the supranational decision making trend of the Community was effectively halted.

The Council of Ministers who functioned in the realm of the Member States took the role of introducing policies to the Community. The Commission as part of its original mandate still had exclusive power of proposal. However, at this point it became more like a secretariat to the Council. The technical elaboration of proposals also was cornered by the Member States. The Commission started to meet regularly with COREPER: The Committee of Permanent Representatives, This body is formed from alternates to the state representatives (Ambassadors) who deal with the day to day affairs of the Council and provide the ground work for Council decisions[21]. This became part of the proposal formulation process. This changed coupled with the loss of majority voting and the Member State veto the Member States gained control over both the proposal and adoption of policies. At this point even the execution of policies was not beyond the scope of Member State influence via regulatory committees in the execution stage of decision making. This signaled the deconstruction of the original decision making process as foreseen by the founding Treaties. The increased use of Voice applies to this process of change; in the absence of Exit the Member States invoked an intergovernmentalist check on the supranational proliferation of the earlier stages of the Community integration[22].

To understand the relevance of Exit and Voice in the foundational period Weiler presents three overlapping interpretations of the change described in the latter section. He suggests a view of these events as; self contained and unidirectionally reactive, in the form of a transnational instrumentalist move, and finally as

[21] Robert A Jones, *The Politics and Economics of the European Union*, UK: Edward Elgar Publishing ltd, 1996, p.79.

[22] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2424.

bidirectional movement. The first view states that Charles De Gaulle[23], the intergovernmental protagonist (or antagonist depending on which side of the argument one resides), influenced the political realm negatively and the ECJ in the realm of law chose to implement direct effect and extended it to encompass the supremacy of Community law. The second view holds that the ECJ took initiative when French action under De Gaulle deadlocked the decision making process whilst the other Member States were showing a greater inclination to lean away from the Community decision making process as setup by the Treaty and showing signs of dissent. The ECJ action in essence worked to as an amalgam to the Community on the verge of dissolution. This view also points to a federal (constitutional) reaction to a confederal (intergovernmental) political development. A moment must be taken to open the impetus behind the national courts acceptance of the ECJ actions at this time, for without the consultation procedure the ECJ would not have been able to effectively close Exit to the Member States. Mainly the national court or all courts for that matter are the protectors of law and have an obligation to adhere to them. The constitutional readings of the ECJ came from its jurists who were the senior justices of the Member States and thus, added to the legitimacy of the legal reasoning of the ECJ. To take a functionalist approach a reference to legal spillover may be made in describing the way in which the constitutional rulings became accepted in more and more Member States due to this legitimacy. Also, the fact that any national court could confer with the ECJ meant that these courts would become legally empowered asking for ECJ interpretation. This would equate the lower courts with the highest court of the land in the Member States giving them attributes as such[24]. Thus, it is quite reasonable to assume lower national courts would be quite enthusiastic about implementing the referral procedure provisioned in the Treaty of Rome.

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[23] Charles De Gaulle, French President 1959 – 1969, Maintained that the Qualified Majority voting present in the Treaty of Rome had been negotiated during the IV Republic when France was politically weak, and that France was "taking our destiny back into our hands". Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.46.

[24] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2426.

The third view maintains that the legal integrative development of the period actually influenced the disintegrative political developments. In this sense it can be assumed that the more inflexible the direct effect of law becomes the more opposition it garners from the Member States. As mentioned, this effectively causes the need to exercise Voice as the highest possible level in reaction to the closure of Exit. As a result, this caused the polarization of the legal and political orders of the Community. The legal order took on a federal constitutional structure while the political order took a confederal intergovernmental structure that accumulated all decision making power.

At this point in the foundational period the shift towards a constitutional legal structure was facilitated by the legitimacy of the ECJ – national supreme court axis. A constitutional turn in this respect might have required a constitutional Convention as the one embarked upon nearly forty years into the EU's future; however, during the foundational period the Member States were influenced by other circumstances in order to accept this constitutional shift. The fact that the supranational decision making process was abandoned via the "Empty Chair" crisis and that the decision making procedures shifted to more intergovernmental bodies such as COREPER and the Council allowed the Member States to control the Voice of the Community. Member States who fully controlled the decision process, the effective Voice of the Community, were not threatened by the constitutional shift apparent in the legal order[25].

Weiler points out that this development was not a zero – sum game in which either the Member States or the Community came out on top. The overall effect of creating a legal – political equilibrium benefited both sides. The structure as a whole allowed the Community to exist as a unit and discouraged dissent due to the existence of the legally binding attributes of the constitutional legal order and

[25] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2429.

the veto power gained by the Member States allowed them to control the direction in which the Community was headed.

As we have seen the constitutionalization of the Community in the foundational period allowed for the development of a constitutional legal order and an intergovernmental political order. While the ramifications of this split and other significant constitutional changes will be covered in the following section as a supplement to the historical background provided to European integration this section will conclude with a general look at the deficit of democracy as given rise by the constitutionalization of the Community legal order and the intergovernmental reaction that developed as a reaction.

The Member States have been taken as a unitary construct up until this point. As the Member States they have a singular aim; they aim to protect their sovereignty. This is hardly the case. The Member State is not a homogenous singular entity they have citizens and these citizens have a right to have a say in government. Alas this is where the democracy deficit occurs in the EU. The executive arm of the Community the Commission which is also the prime legislator is completely removed from accountability to any single Member State citizen. The Commission is charged with the protection of the integrationist ideals of the Community. It has been referred to as the guardian of the Treaties; this means that the Commission works to supervise the day to day running of Community policies and to investigate breaches of Community rules[26]. The fact that it carries out its business having only been appointed by their national governments does detract form its legitimacy as a whole. However, it should be noted that the national governments do not want the Commission to be directly elected due to the fear that under the Treaty of European Union (TEU) the Commissioner's independence from national governments is covered by Article 157 which

[26] Robert A Jones, *The Politics and Economics of the European Union*, UK: Edward Elgar Publishing ltd, 1996, p.68.

requires independence "without a doubt"[27]; this might be too independent for the Member States. The national governments to one side it must be noted that true accountability lies with national parliaments; the forums of direct democratic accountability. The Commission has no ties to these organs however. The Council of Ministers can be argued to have a connection to the national parliaments via their connection to the executive branches of their governments, but this still remains outside the scope of the Community[28]. This means that the national parliaments would have no way of checking or second guessing Community measures that are backed by the constitutional legal order that provides direct effect to its laws. Thus, the national parliaments can only hope to control their respective ministers within the Council. Only in this way can they employ a degree of direct accountability to their constituencies. When viewed in this way the executive branches of the Member States function outside the control of their parliaments within the sphere of the EU. The existence of the European Parliament adds a democratic check to this equation but due to the sidelined character of this institution in the foundational period as mentioned means that its far less effective that its is now in applying any sort of democratic influence. The heightened use of Voice at this point also had the effect of empowering the executive branches of national governments who had the benefit of functioning outside the reach of their national parliaments. The foundational period is important in that it sets the stage for the equilibrium between the constitutional supranational legal order of the Community and the intergovernmentalist Member States of the Community. While political supranationalism was greatly diminished legal supranationalism flourished due to the intergovernmental checks conceded to the Member States. This again was provided for by the use of Voice by the Member States in the absence of Exit caused by the legal consolidation of the Member States obligations to the Community[29].

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[27] John McCormick, *Understanding the European Union A Concise Introduction*, NY: Palgrave Macmillan, 2005, p.82.

[28] Ibid, p.83.

[29] Joseph H. H. Weiler, "Transformation of Europe", Yale Law Journal, Vol. 100, 1991, p.2431.

A return will be made to the Exit / Voice paradigm in the next section when the historical progression of integration of the Community will be covered in the context of constitutionalism.

2.2 What is European Integration?

The EU is made up of three components; the institutions of the EU, the Member States, and the actors that interact between these two realms. The European institutions have always been one of the proliferators of the integration process. The expansion of Community competences which will be covered later in this section gave the Community machinery the power to replace, change or complement national laws whilst facilitating interaction among European actors. This aspect of the institutions also contributed to the expansion of policy networks that created today's European authority. The Member State being the prime actor of all international transactions relinquished some of its autonomy by internalizing new and previously environmental inputs by being absorbed into the EU's supranational authority whilst in turn deferring issues such as conflict resolution, competition, and mediation to the Community wide authority. This change over was the main force behind the success of earlier functionalist 'small steps' integration. The actors that benefit from this greater union of states have shown a tendency to further interact horizontally throughout the union; cross border firms, citizens, and networks of experts and lobbyists have all converged on a uniform base of formal and informal behavior and values over the span of the European integration process[30]. The relationship between the supranational legal order of the Community juxtaposed to political intergovernmentalism in a state of equilibrium, as covered in the previous section, in relation to the constitutional integration of the Community may help to explain the way integration has moved forward in one way or the other as a result of the pressures of deepening and

[30] Stefano Bartolini, Restructuring Europe, New York: Oxford University Press, 2005, xii.

widening which have slowed integration to a crawl or accelerated it quickly from time to time.

The Marshall plan which was proposed by US General George Marshall aimed to alleviate the effects of the bad harvest of 1946, which had caused the price of food to go up and the severe winter of 1947 that caused a fuel shortage. Also, the continental countries faced an acute shortage of foreign reserves. The plan foresaw US and Canadian aid on the basis that European countries would dismantle barriers of trade amongst themselves.[31] The Marshall plan requested an organization be formed to deal with the distribution of the aid, thus, the Organization for European Economic Co-operation (OEEC) was formed. However, it did not do anything to appease the ill sentiment that lingered among the beleaguered nations of post WWII Europe, the growth of the OEEC into a supranational body was opposed mainly by Britain, France and Norway and thus, it firmly stayed in the sphere of intergovernmentalism[32]. This era of turmoil which, was essentially a time when Europe was filled with doubt and trepidation as to what would happen to Europe in the future. The lack of a long term solution to the immediate issues was a question that needed an answer. While plans of action were developed over time one visionary had a multi level solution; Jean Monnet. Monnet was a French economist and diplomat often referred to as the 'Father of Europe' who had previously executed the Monnet plan for the modernization of the French economy[33]. Monnet diplomatically allowed Robert Schuman to present his plan to satiate the ills of Europe. The Schuman Plan as it was known, covered four troubled areas; the control of the raw materials of war, coal and steel, through mutual responsibility allotted to the survivors of the war, a

[31] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.13.

[32] John McCormick, *Understanding the European Union A Concise Introduction*, NY: Palgrave Macmillan, 2005, p. 57.

[33] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.15.

further institutional foundation to expand economic cooperation between France and Germany, an overall effect of the plan designed to propel economic activity, and a conflict aversion system that worked by encouraging continued interaction and discouraging isolationism[34]. This plan which was the cornerstone on which the EU of today was built could be argued as the fist instance of integration between European nations. As further integration of these post war states seemed inevitable the ECSC (The European Coal and Steel Community) was formed by way of the Treaty of Paris 1951[35], binding German, Italy, France and the Benelux states. The advent of this treaty can be likened to deepening. In this case however, widening also took place; the customs union of the Benelux countries was expanded to encompass the estranged combatants of the bygone war. Monnet's belief that economic means could produce political ends seemed very plausible at this point and it would continue to be the first agenda of the fledgling community. The EEC (European Economic Community) was born of the ECSC. The impetus behind this new page of further deepening was the issues France was enduring under the newly formed community. France did not receive the benefits of this project directly due to her largely agricultural economy; coal and steel were not part of France's exports. Germany however, was very happy with the ECSC; Germany had a high capacity of manufacturing. The Treaties of Rome established the EEC and EURATOM[36]; the EEC provided for the free movement of goods, labor, and capital under the banner of the common market. It eliminated barriers to trade between Member States, which is an example of negative integration. Negative integration implies the removal of barriers, while positive integration refers to the introduction of common policies and building of common institutions[37]. This gave France the coveted Common Agricultural Policy (CAP),

[34] Jorge Juan Fernandez Garcia, Jess E. Clayton, and Christopher Hobley, The Student's Guide to European Integration, Cambridge, UK: Polity Press, 2004, p. 14.

[35] The ECSC expired along with the Treaty of Paris on July 23rd 2002.

[36] EURATOM, This Treaty was conceptualized to further the proliferation of Atomic Energy in Europe. http//:www.ena.lu/cfm.

[37] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.3.

which was a positive integration tool due to its aspirations to install a uniform policy on agriculture throughout the community. The success of these developments brought forth further deepening in the form of a competition policy and a common external tariff. EEC did not go opposed however, another non-aligned movement organized under the guidance of the UK; the European Free Trade Association was formed. This event essentially made European widening a little more difficult to implement due to the geographical proximity of EFTA.

The integration process was plagued by more problems between 1965 and 1966. What became known as the 'empty seat' crisis completely gridlocked the integration process. The issue was an intergovernmentalism vs. supranationalism stand off, which was sparked by the European Assembly's and Commission's need for more legitimacy and power along side their bids to gain an independent budget than that which was provided for by the Member States[38]. As mentioned before this issue also greatly revolved around the loss of the supranational aspect of community decision making and resulted in the introduction of the Veto. The Treaty of Rome had provisioned the finalization of the coordination of the Common Agricultural Policy (CAP) by national governments, which France supported. It also had provisioned switching to unanimity voting in lieu of qualified majority voting on some policy areas by 1966[39]. Another issue was the incorporation, upon a proposition from the Commission president Hallstein, of the budgetary aspirations of the European Assembly (EA now EP) and the Commission. This was a plan to transfer revenues from the Member States to the EEC. For France this was an issue of great importance; the Commissions supranational push was strongly resisted by France who chose to refuse to participate in Community events indefinitely. The Luxembourg compromise

[38] Atila Eralp, Lecture notes, 04/15/2003.

[39] A.G. Harryvan and J.der Harst, *Documents on European Union*, US: St Martin's Press, 1997, p.13.

reconciled the Community but by conceding to France the unanimity vote[40]. This event is significant because it demonstrated that the speed at which deepening occurs may have unexpected results. In this case it was overwhelming for France who wanted to make sure that when a member state felt that its national interest was at stake a resolution could only be taken unanimously[41], but the trend France set in this instance became the hallmark for all Member States that wanted to defend themselves against policy changes within the Community. This new trend had ramifications throughout the 1970's. At this time the first enlargement which encompassed the UK (which had been rejected by De Gaulle as an American mole previously[42]), Ireland, and Denmark took place. This enlarged Community would now fall away from American favor due to the economic competition it posed[43]. The Bretton Woods system which had required the United States to buy and sell unlimited amounts of gold at the official price of 38 dollars per ounce lead to a deficit due to over spending in Vietnam and President Lyndon Johnson's War on Poverty. To cover this deficit the US Treasury was printing bills which ultimately led to the reserves of gold in the US not being able to match the amount of dollars in circulation. When confidence in the dollar dropped this aggravated the problem causing the first US trade deficit of the twentieth century. The Bretton Woods system collapsed when the Nixon administration abrogated the US obligation to buy gold for dollars[44]. This eventuality led to Member States to isolate themselves

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[40] David M. Wood and Birol A. Yeşilada, *The Emerging European Union,* New York: Longman, 1996, p. 23.

[41] Zoltan Horvath, *Handbook on the European Union,* Hungary: Reference Press, 2002, p.22.

[42] In his speech on January 14th 1963 about the rejection of Britain President De Gaulle states that the arrangement for the integration of the original six members could not be strictly followed with more additions he goes on to say that "this community, growing in that way, would be confronted with all of the problems of its economic relations with a crowd of other nations, and first of all with the United States…(leading to) a colossal Atlantic Community dependent on the US and under American leadership which would soon swallow up the European Community. A.G. Harryvan and J.der Harst, *Documents on European Union*, US: St Martin's Press, 1997, p.135.

[43] Zoltan Horvath, *Handbook on the European Union,* Hungary: Reference Press, 2002, p.37.

[44] David M. Wood and Birol A. Yeşilada, *The Emerging European Union,* New York: Longman, 1996, p. 58.

from the community due to trouble in their individual domestic economies due to further damage incurred during the oil crisis.

The first enlargement accelerated the integrative drive of the Community however, this momentum was short lived. The inability of the Community to display a common external posture became apparent during the oil crisis. Whilst during this period the UK had a rough time adjusting to the Community, which as mentioned had reached a stagnant period. The UK had to accept the Community as is and thus, the budgetary and agricultural policies did little to validate the UK's stake. The UK's reason for taking the Community route was based on the sentiment that increased trade and economic growth would be worth an increase in the price of food and high budgetary contributions. However, the UK's budgetary contributions would cause the Thatcher government to demand "Britain's money back"[45]. Rebates starting in 1980 did normalize the relationship but did not keep the UK from heel dragging on Community issue during this period. The negative issues the Community faced during this period cause more attention to be given to fixing institutional problems and relaunching the Community. The constitutional change that occurred during this period however, revolved within the sphere of the Communities competences. This era was when the principal of the division of competences between the Community and the Member States was defined.

The demarcation of competences between the general polity and its parts is based on the principal of enumeration. The framework of how this occurs is strict in some systems and flexible in others[46]. In the flexible case the enumeration of competences causes a shift of power to the center at the expense of the periphery. The Treaty of Rome does not specify the material limits of Community

[45] Robert A Jones, *The Politics and Economics of the European Union*, UK: Edward Elgar Publishing ltd, 1996, p.19.

[46] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2432.

jurisdiction[47]. The community experience shows that the importance of "an ever closer union among the peoples of Europe" implies a transfer of power from the Member State to the Community. Some power is reserved for the Member State encapsulated in an international Treaty which draws legitimacy from the fact that it was ratified via parliamentary will[48]. This jurisdictional control was covered in the Van Gend case in which the ECJ read:

> (The Community constitutes) a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit in limited fields[49].

There are three categories that can explain the change in the competence structure of the Community during the developmental stage of integration 1973 to the mid 1980's. The extension, absorption, and expansion of competences as defined by Weiler help in explaining this constitutional change. Extension refers to a change in autonomous Community jurisdiction. Absorption refers to when Community legislative institutions infringe upon Member State jurisdiction that fall outside Community competences (in this case according to the principal of supremacy the Community prevails). Expansion refers to when original Community legislation infringes on Member State jurisdiction.

Along side the near total control of the Community policy making and legislation process by the Member States the change in Community jurisdiction was viewed as an extension of the will of the Member States based on the unanimity clause under Article 235. Article 235 stipulated:

> If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in

[47] Articles 2 and 3 of the EEC Treaty define the mandate of the Community, which imply competence but the language is very open-textured.

[48] EEC Treaty Article 236.

[49] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R 1, 1970 C.M.L.R.1.

> cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions[50].

Thus, the control of any given legislative act from the proposal to adoption and through to implementation made the Member States un-fearful of the constitutional guarantees of jurisdictional change. The Member States had an added incentive in allowing this occurrence due to the fact that the existence of Community competences as deferred from the Member States effectively circumvented their national parliaments allowing them much more freedom to take decisions without extensive parliamentary deliberation[51]. In this way the classical tug of war between the center and the periphery revolving around the seat of power was essentially nonexistent in the Community at this time; the post-foundational development period. While this explains the demeanor of the Member States on Article 235, the provisions for consultation included in the article in regards to its use by the Commission and the EP might have been a problem. This, however, was not the case; this process was a way for the Commission to expand its fields of activity along with the Community itself. Also, the effects of the Luxembourg Accord allowed for any viscosity adding measure to the Community Machinery to go relatively unopposed. Both the Commission and the Parliament still had the option of consultation which was also a helpful factor.

The deconstruction of the strict enumeration of the judicial limits of the Community was facilitated by the debilitating events of the 1960's. This was possible due the extensive use of Voice by the Member States as a reaction to the closure of Exit. Had this not come to pass this lax take on the expansion of Community competences might not have been possible. However, although there were not direct objections to this process there were two issues that were poised to

[50] Treaty of Rome, http://eur-lex.europa.eu/en/treaties/dat/12002E/html/12002E.htm.

[51] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2449.

turn into long term problems at this time; the issue of constitutionality and the effects of this process on the democratic character of the Community.

The use of Article 235 (article 308 after Maastricht) from 1973 through to the Single European Act opened up practically any realm of state activity to the Community. This was true as long as the Member States were in unanimity. From the legal perspective Article 235 looks like a typical procedural device that allows for unchecked jurisdictional expansion. While in actuality it is not the legal interpretation of the article allows for its virtually limitless scope. There are two checks that protect the Community and the Member States in that the article cannot violate the mandates of the Treaty, and that the Member States are protected by the unanimity clause. When evaluating the implications of Article 235 the Community legal structure should be viewed as no different from any other legal polity. The constitutional revolution of the 1960's is based on the trust developed between the ECJ and the national courts of the Member States. The judicial – constitutional contract developed by the ECJ specified that the Community legal order would function "in limited fields"[52]. The ECJ was not in effect repealing its own principal when the jurisdictional changed mentioned occurred during the 1970's. The basis of the trust that was developed as mentioned above laid in the implicit invitation of the ECJ of the national courts to the Community legal structure. The acceptance of this legal structure by the national courts was based on the premise that the Community legal order would be limited and that this would be guaranteed by the enumeration of jurisdiction. As mentioned the political proponents in the Community sphere accepted this jurisdictional change on the basis that it was in their common interest. This change in effect actually debased the primary corner stone of the constitutional structure existent in the Community. This corner stone was the mutual understanding of the ECJ and the peripheral national courts of the material limits of Community jurisdiction. The erosion of enumeration in regards to jurisdiction

[52] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2451.

meant that the new legal order and its constitutional legal contract were extended to all areas of Community and Member State activity. This was not part of the mutual understanding between the national courts and the ECJ. Another threat to the constitutional structure of the Community comes from the assumption that the peripheries in this case the Member States are protected by the unanimity clause of article 235. The aim of this clause was to hinder the abusive expansion in terms of the jurisdiction of Community competences. Weiler argues that this assumption is flawed; he states that this conceptualization equates the Member State with the government of that Member State. The aim of the constitutional guarantee makes this combination of government and state inherently wrong. As will be covered in chapter three a constitution aims to protect the state in accordance with its democratic principles against the whims of temporary governments. Even if voter turnout is high this does not mean that these governments represent the whole of a nation's population in the first place. In fact even if there were one hundred percent voter turnout that would not mean that constitutional guarantees protecting the individual against the majority are necessarily in place[53]. Thus, the understanding that political power would have a vested interest in the expansion of competence in the center is not far fetched. In this sense the enumeration and division of competences and power aims to keep power from pooling in one body or within one stratum in any given governmental structure. This problem is aggravated in the European case by the aforementioned issue of reduced public accountability as seen in the Commission and the Council of Ministers. It can be surmised that a constitutional guarantee of the enumeration of powers is an indispensable part of any constitutional order.

The effects of this jurisdictional change also affected the issue of the democracy deficit. While article 236 (now Article 309) provisions the parliamentary consent of the Member States the expansive use of Article 235 however, evades the democratic process. The jurisdictional change that the Community under went in

[53] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2452.

the 1970's further aggravated the democratic deficit in terms of accountability. However, as Weiler points out most governments in the context of the European Union have a majority in their national parliaments, in this sense the lack of parliamentary ratification is not the only threat against the democratic foundation of the Community. The target of jurisdictional expansion is focused on social areas such as consumer protection, environmental protection and education. These areas are the target of interests groups that represent different social interests within the national parliamentary policy making process. These groups are effectively shut out of the lobbying sphere on the community level due to the lack of transparency of the Community decision making process. Another level of lobbying elites was more functional in this realm while social interests that relied on the national parliamentary lobbying structure were effectively sidelined. In this way the interplay between social and political forces was lost in the expansion of Community competences. With the advent of the SEA this issue would become a true problem for the Community.

The new enlarged Community was bound for troubled waters. This era can be noted especially for the UK's reluctance to converge on budgetary issues and the fact that the new Member States had very different economies from the original founder states. After this point a consolidated Europe on the monetary front via the European Monetary System (EMS) would help proliferate further deepening within the community. At the start of the 1980's the Community saw greater activity in the context of integration; the advent of the Single European Act (SEA). The SEA was devised to address the issues brought forth by the Cockfield Report. The report proposed a more efficient implementation of the Single Market Program (SMP) and it reintroduced the QMV system on internal markets issues and cooperation between the European Parliament and the Council[54]. The SEA essentially tried to reevaluate the capacity for trade within the Community and work to broaden the scope of economic and social policy; it was successful in

[54] Jorge Juan Fernandez Garcia, Jess E. Clayton, and Christopher Hobley, *The Student's Guide to European Integration,* Cambridge, UK: Polity Press, 2004, p. 21.

creating a more efficient Europe in terms of the free movement of labor, goods and capital[55]. In terms of deepening and widening this event was a watershed in that it, through its fortification of the European Regional Policy, paved the way for further enlargement. The Community received a new title as the European Community, here forth the EC. With the accession of three new members; Greece in 1981 and the Iberian enlargement[56] in 1986 showed that the EC was a good export; it afforded political stability and economic benefits to troubled neighboring states. Greece whose economy had endured a period of civil strife (1946 – 1949) and a military coup (1967 – 1974) was viewed as a less than desirable addition to the EC. However, the political benefits outweighed the economic implication in the Greek case. Spain and Portugal were also economically weak. Their accession would have to wait three more years due to opposition from Italy and France in consideration to the threat posed by these Mediterranean states' agricultural prowess. In this case, widening again acted as a spring board for further deepening; economic social cohesion provided for by the SEA helped balance the inconsistencies incurred by implementing the SMP. The Agricultural issues were handled by allotting Greece, Italy and France compensation for loss of income due to the Iberian economic influx[57].

The 1992 program to establish a single market and the SEA were aimed at re-evaluating how the Community works. The Cockfield report was presented by Jacques Delores the president of the Commission in 1985, it had been drawn up by Lord Cockfield the commissioner for the internal market[58]. This report recapped and in doing so revitalized the impetus for the common market as

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[55] David M. Wood and Birol A. Yeşilada, *The Emerging European Union,* New York: Longman, 1996, p. 25.

[56] The accession of Spain and Portugal.

[57] Jorge Juan Fernandez Garcia, Jess E. Clayton, and Christopher Hobley, *The Student's Guide to European Integration,* Cambridge, UK: Polity Press, 2004, p. 22.

[58] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, pp.114 - 115.

provisioned by the Treaty of Rome. This period was a time of the proliferation of the Commission; it reclaimed the role allotted to it by the Treaty. This new role of the Commission contrasted with the Commission's role during the foundational and developmental stages of European constitutionalization covered earlier. The Commission at this point began to set the Community agenda and acted as the power source in the legislative process. The widening scope of legislation and policy making that was introduced by the SEA was a first step in legitimizing the Community as a whole. While the changes were hardly revolutionary they were of great importance.

The foundational period had allowed for a balance between institutionalism and constitutionalism in this way a solid base to the Community polity was formed. However, this base was founded on the principal premise of unanimous agreement on policy making and governance. While policy management did not stagger throughout the foundational and developmental periods the Community did become incapable of responding to new challenges with clear policy direction. These challenges had come in the form of increased oil prices, rising unemployment and declining world export shares. The single market program hoped to solve the fragmentation of the European markets in order to catch up to the Japanese and American economies[59].

While enhanced Voice had allowed the erosion of jurisdictional limits in the Community it was this same control exerted by the intergovernmentalist Member States that kept the Community's fundamental goals from reaching finality as a result of the foundational period. These goals were the freedom of access and movement in four areas; people, capital, goods, and services[60]. The reasons for this attempt at rejuvenating the Community were numerous firstly the Community

[59] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.112.

[60] John McCormick, *Understanding the European Union A Concise Introduction*, NY: Palgrave Macmillan, 2005, p. 159.

had changed structurally. The number of Member States had doubled. These new members effectively entered a decision – policy making system created in the foundational period. This system had not been designed or augmented to work in a widened Community. The pressures of widening were exerted twice; the accession of the UK, Ireland, and Denmark then compounded by the addition of Greece, Spain, and Portugal. The new load of the accessions in effect caused the Community to lose homogeneity in policy perception and cultural orientation[61]. Thus, Community decision making became lethargic and the turn to a majority voting settlement became a true prospect for the 1980's onwards as seen in the SEA. Another structural reason was to be seen in the different rules the Member States applied to the free movement of the factors of production, this caused incapability at the Community level to regulate these movements. The ECJ as a reaction to this problem made it increasingly difficult for Member States to install protectionist measures against each other at this juncture. This was accomplished by rulings of the court establishing that once a regulatory system for the free movement of the factors of production was in place at the Community level this would negate any previous legislation that would hinder the new Community provisions[62]. This stance of the court coupled with the unanimity clause caused the issue of the elimination of barriers a very difficult issue for the Member States. Due to the unanimity clause any decision taken would require a unanimous decision to repeal, this fact made the Member States very cautious on taking decisions on this matter[63].

The Cockfield report took the fundamental aim of the Community to reach an internal market and used it as a vessel to implement grander Community plans hidden within a technocratic list of legislation in the form of a veritable Trojan horse. As Weiler concurs, by presenting a way to reach a common market the

[61] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2457.

[62] Examples: Case 148/78, Pubblico Ministero v. Ratti, 1979 E.C.R. 1629, Case 5/77, Tedeschi v. Denkavit Commerciale, 1977 E.C.R. 1555.

[63] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2457.

report had facilitated further convergence on economic and social values by its projected deadline of 1992. This was the first stake at actually reaching an "ever closer union among the peoples of Europe" since the Communities inception. In this way the acceptance of the majority voting procedure, albeit with reservations on the decisions on the fiscal policy, the free movement of people, and the rights and interests of employees[64], in the Council allowed for a new turn towards cohesive Community action. While the Member States saw the Report as a technical project aimed at the completion of the non-controversial foundational Community goals provisioned in the treaty of Rome, the report actually aimed at reaching higher political integration hence the earlier reference to neo-functionalist spillover.

In essence the Cockfield report allowed the existence of article 100(a) of the SEA[65]. Firstly this article derogated from the unanimity principal found in Article 100 in the Treaty of Rome[66]. However, the Member States also included a provision that allowed for national safeguards. This was an attempt made at holding on to the influence gained in the foundational period. As seen in the foundational period the system allowed for Member State Voice to be administered in the form of a veto against the introduction of new norms to the Community. While Article 100(a) took the singular veto out of the equation, the provision within Article 100(a) (4) allowed the Member States to deviate from a decision taken under majority voting. This way the possibility to exercise Member State Voice could exist along side the majority voting system. Added support came from the fact that the Luxembourg Accord remained intact calming France and the UK who were worried that the SEA was granting too much power to the

[64] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.115.

[65] The Single European Act text: http://www.unizar.es/euroconstitucion/library/historic%20documents/SEA/Single%20European%20Act.pdf

[66] Treaty of Rome, http://eur-lex.europa.eu/en/treaties/dat/12002E/html/12002E.htm.

Community[67]. In retrospect it can be surmised that the Member States saw the SEA as a modest step forward and felt that the equilibrium between the constitutional supranational legal order and intergovernmentalist decision making was still intact as it was during the foundational period.

However, it can be argued that the equilibrium had been upset. After the SEA Article 100(a) became the Community norm for decision making on the subject of the internal market. The Connection between Article 100(a) and Article 8a (which sets the time frame of the completion of the internal market by 1992) is that it effectively means that Article 100(a) is the Community norm of decision making unless specified otherwise. In the fact that Article 100(a) was provisioned to be used to accomplish the single market through its use in all measures taken to reach that end Article 100(a) transcends its bounds. In this way it would effectively influence areas outside the narrow scope of the technical standards that were required to for the elimination of barriers to the free movement of the factors of production. Thus, the implications of Article 100(a) aside the greater accomplishment of the SEA was that it changed the rules of procedure in the Council of Ministers[68]. Majority voting in the Council of Ministers functions with the Luxembourg Accord and greatly limits the use of the veto due to the scope of Article 100(a), and thus, cannot be used as a legal objection in areas Article 100(a) covers. The use of the unanimity clause in this case can only be invoked if at least half of the Member States are convinced in consensus of a direct threat to an objecting Member State's national interests. The shift from the veto to the vote allows consensus without necessarily having to resort to a vote to break a deadlock; consensus is reach more often through negotiation between the Council Members intermediated by the Commission.

[67] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2458.

[68] Ibid, p.2461.

The evolution of the Community as covered shows that there was a tangible reaction to structural changes such as the enlargements that lead to a shift to majority voting in the Community. The legal constitutionalization of the foundational period which had polarized the legal and political elements to a state of equilibrium on matters of policy and decision making was changed yet again. The adoption of the majority vote without this equilibrium meant that the Member States now would accept norms partially or fully against their will. This would occur under direct effect from their national legal systems as legitimized by the ECJ – national court constitutional contract. The erosion of the enumeration of powers (competences) expanded the scope of the issues that were subject to majority voting within the Community decision making – policy making framework. The existence of article 235 still offered the option of unanimity but only in circumstances that the community did not have a working provision. In this way the Member States were more compliant with Community measures, this occurred at the expense of the Voice the Member States had during the foundational period. The shift to majority voting brought with it a new system in which the Member States did not have as much control over the decision and policy making. This according the rule of the Exit – Voice paradigm would cause for the use of Exit in the face of the loss of Voice. However, in the Community context the third element of Hirschman's theory can help explain the situation. Hirschman uses the concept of Loyalty to explain the reason why the Community would not go into disarray and fall to pieces. The fact that the prolonged use of Voice through out the foundational and developmental stages of the European Community allowed the Member States to develop loyalty to the system in that they would take the next big step to further integration as will be seen in Maastricht.

Thus, in the 1990's, three major treaties were brought to the fore and implemented. Maastricht in 1992, Amsterdam in 1997, and Nice in 2001. The Maastricht Treaty (also known as the Treaty on European Union) raised many issues designed to streamline and deem the EC (now EU) more flexible in its

institutional structure. The founding treaties, at this point were up for revision, and with Maastricht came many new concepts:

- The introduction of the Pillar System.
- The concept of EU citizenship.
- The facilitation of the Single Market through the implementation of a single currency.
- The transfer of more power to the European Parliament.
- The introduction of the Co-decision process along with QMV to the legislative machinery of the EU.
- The deepening of the EU in terms of the introduction of a Social and Monetary Policy (SMP).[69]

Maastricht brought many new areas of competence within the scope of the EU and the objections came firstly from the UK and Denmark. Due to their reservations about delegating power to any supranational central authority the UK objected to the Social charter and opted out of the single currency, Denmark with a 50.7 no vote on the treaty via referendum[70]. A time of slim confidence in the ideals of integration followed. A series of referenda throughout the Community barely ratifying the treaty ensued along side this issue. The economic downturn of the period did not help either. The European Council provisions on accountability, transparency and flexibility however, greased the spokes of the European integration machine albeit with the minimalist renditions of the actual general European document being applied by the UK and Denmark. This was a stark reminder of how things could get sour if the EU had remained ridged.

[69] Jorge Juan Fernandez Garcia, Jess E. Clayton, and Christopher Hobley, *The Student's Guide to European Integration,* Cambridge, UK: Polity Press, 2004, p. 23.

[70] David M. Wood and Birol A. Yeşilada, *The Emerging European Union,* New York: Longman, 1996, p.81.

As the integrative process of Europe marched forth, widening resurfaced on the European agenda; Austria, Finland, and Sweden became full members in 1995. This enlargement was rather smooth in comparison to the other examples due to the fact that the European Economic Area (EEA) established in 1993 had unified the treaties the EU had with the European Free Trade Association (EFTA)[71]. From this instance we can assume that economically homogeneous nations stand a better chance at acceding because of the similarities in infrastructure in order to assimilate into the EU norm in terms of deepening and widening. The Amsterdam and Nice Treaties were widely debated due to their minimal maintenance of the Community infrastructure in comparison to the other more ambitious treaty amendments. In 1997, Amsterdam brought forth a more flexible look at European integration, introduced QMV to more policy areas, fortified, and provided supranational legitimacy to policies on immigration, asylum and judicial cooperation. Amsterdam can also be noted as the point of incorporation of the Schengen Accords to the infrastructure of the EU. The Schengen agreement which had been agreed upon in 1984 firstly between France and Germany had been kept separate from the EU until this time[72]. Although Amsterdam made an effort in further deepening in EU it did not fortify the EU for widening. In this sense Amsterdam[73] was seen as a failure; as a follow up the Nice Treaty (2001) was introduced in order to better equip the Community for the pending enlargement of the Union by 10 prospective nations by 2007.

The latter half of the nineties until Nice saw the economic convergence of the Community. The EMS which had run its course by 1993 was laboring through market speculation created due to over-dependence to the Deutche Mark which in

[71] David M. Wood and Birol A. Yeşilada, *The Emerging European Union,* New York: Longman, 1996, pp. 193-197.

[72] Robert A. Jones, *The Politics and Economics of the European Union*, UK: Edward Elgar Publishing ltd, 1996, p. 233.

[73] Zoltan Horvath, *Handbook on the European Union,* Hungary: Reference Press, 2002, pp. 48-50.

acting like a crutch to the monetary system had caused high interest rates[74]. The economic down turn of the period had however, been foreseen and the much praised SEA had provisions that were meant to alleviate these problems. A fixed exchange rate, a European Central Bank, and the shift to a single currency system were all part of the SEA answer. By 1998 convergence on economic issues had been hammered out, with the exception of the UK, Denmark and Sweden[75]. The European Monetary Union has many details of which there too many to reiterate here but in keeping with the deepening - widening interpretation of European integration it would suffice to say that the EMU provided for deepening on two fronts. Firstly the infrastructure implemented to undertake the switch to a common currency, secondly the fact that by providing for opt outs the common market had been achieved.

Along side the Laeken Declaration (2001) the Convention on the Future of Europe (2002) was convened with the foresight instilled by the declaration of 2001. The aim of the Convention was to work at deepening the inherent competences of the EU in order to accommodate the May 1st 2004 fifth enlargement. This was also the setting for the birth of a constitutional text for Europe. Later in this chapter we will look at the formulation of the Treaty Establishing a Constitution for Europe. An Intergovernmental Conference held in October of 2003 further worked on hammering out the draft constitution whilst preparing for the pending enlargement via the Treaty of Accession[76] the draft was adopted on June 18th 2004, months after the enlargement of May 1st 2004. This fifth enlargement, which was to encompass the most amount of nations ever to accede to the EU, included Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. By 2005 the Accession Treaty of Luxembourg had been

[74] Jorge Juan Fernandez Garcia, Jess E. Clayton, and Christopher Hobley, *The Student's Guide to European Integration,* Cambridge, UK: Polity Press, 2004, p. 24.

[75] Greece had not qualified for EMU in the third stage initially but it was accepted into the fold next to the other eleven members by January 2001.

[76] 2003, Athens.

signed signaling the second part of the fifth enlargement which is scheduled to take place on January 1st 2007[77] and will see Bulgaria and Romania in club Europa.

In this section we have covered the effects of the foundational and developmental stages of the constitutionalization of the EU. The polarization of the Community machinery between the constitutional legal order and the intergovernmentalist decision - policy making system was greatly changed by the expansion of competences that occurred throughout the developmental stage. While the shift back to a majority voting system became inevitable due to the debilitating unanimity clause which hindered the Community from reaching its fundamental goals as provisioned in the Treaty of Rome, the aim of reaching single market was met although the Community had to deal with allowing for opt-outs. This issue that culminated in the creation of the pillar system effectively was a compromise that hindered the Community machinery from gaining new powers. The Member States due to their apparent loss of Voice via the expansion of Community powers were now bound by loyalty to the European ideal. This pushed the Member States to settle the pillar system merging the EEC, EURATOM, and the ECSC in the first pillar, Common Foreign and Security Policy (CFSP) in the second and justice and home affairs in the third. This was the point the European Union emerged. The double Danish referendum and their ultimate non-convergence in the areas of the single currency, common defense arrangements, European citizenship, and cooperation in justice and home affairs together with the narrow French ratification showed that, as it was decided upon in the Edinburgh European Council meeting, the EU could and should be flexible in the obligations it issued to its Member States in the name of further integration. While the issue of the democracy deficit has been covered in this section as a result of the constitutional change in the foundational period due to the rise of the intergovernmentalist Voice

[77] In July 2007 the Caribbean island states of Bonaire, Saba, and Sint Eustatius will join the Netherlands as the Kingdom Islands. This will be the first enlargement that will occur outside of the scope of the EU.

of the Member States, questions about the legitimacy of the EU in the eyes of its 'citizens' is an important issue in understanding the relevance of the Constitutional Treaty. This democratic deficit is the prime ill of the integrative evolution of the Union as foreshadowed in the Danish rejection and narrow French ratification of the Treaty on European Union. As it will become apparent in the latter sections of this work the importance of bridging the gap between the democratic legitimacy of the Union and its integrative evolution is of prime importance.

2.3 The Advent of the Constitutional Treaty

When the word constitution is uttered in any given platform it garners a certain degree of respect; it is in fact akin to ideals set forth by religious doctrine, or sets of codes to be followed like Hammurabi's laws. But alas constitutions do not fall from the sky nor are they the whims of despots with an eccentric sense of justice. Constitutions are forged, in many cases by the same beleaguered technocrats mentioned in the opening introduction of this thesis. Each constitution is the end result of a sequence of steps taken to create a systematic framework of sovereignty. However, before any steps can be taken the ideal and a need to implement a constitution must form. The idea of a 'constitutional moment' in the general constitutional sense and specifically in the context of the EU will be covered in the next chapter.

This perspective brings with it, in the context of this work, the question of where and how the constitutional ideal in Europe started. Was it that one morning on the 18th of June, 2004 the leaders of Europe came together and declared that Europe shall have a constitution? No, as with all modern European occurrences there was much deliberation, but before the haggling there was already the basis of what could have been called a constitution. As discussed in the previous section this unwritten constitution had been the talk of academic circles and the technocrats of

the European Union for over fifty years.[78] When examining the *acquis communautaire* as a whole, one can infer that it has the frame work of a composite constitution. This is, in part based on the European Union's legal principles set forth by the European Court of Justice's rulings and the legal principles derived from them, and in part based on the tapestry of treaties that make up the body of the Union's infrastructure. As the European Court of Justice stated in its ruling on the Les Verts case in 1986; "…the EC (European Community) Treaty can be characterized as the EC's constitutional charter"[79]. Although the European Court of Justice refrained from the constitutional reference after Maastricht and did not muddy the water in reference to the pillar system, this perspective does denote the constitutionalization of the treaties; in terms of the principles of supremacy of law and direct effect, the development of the concepts of competence, and the charter of fundamental rights. In reality the constitutional ideal has been part of the European Union as an intangible shadow waiting at the fringes of the flow of integration. The treaty texts, formal institutional documents, and informal institutional documents (i.e. the charter of fundamental rights) have always been cross referenced and argued over in the constitution building context. Moreover the bulk of the interaction and tension surrounding the process has been over the interpretation of these fundamental parts of the European Union by the very actors that have a direct interest in these elements. The European Court of Justice, the national courts and finally the institutions of the European Union that deal with issues that fall outside the scope of law; all play a role in the final outcome of what a constitution means for Europe.

Before a further elaboration of what a constitution means for Europe can be attempted, a firm understanding of the chronology of events that have made the

[78] Jo Shaw, "Legal and Political Sources of the European Constitution", *Northern Ireland Legal Quarterly,* Vol. 55, 2004, http://www.law.ed.ac.uk/staff/joshaw_88.aspx, p.2.

[79] Ibid, p.3.

actual text of the Constitutional Treaty should be covered. As with all historical watersheds each event leading up to it deserves honorable mention if any sense is to be made of the larger picture. To recap the basics; the historical journey of the EU begins with the Treaty of Paris (1951); which declared the formation of the European Coal and Steel Community. This spark is further developed upon and with the Treaty of Rome (1957) the European Economic Community is forged, further integration brings with it the grander vision of the SEA (1986), followed by the all encompassing Maastricht Treaty (1992) in which issues such as the European Monetary Union and EU citizenship are finally tackled. The next step in European evolution was the Treaty of Amsterdam (1997) which brought with it further political union. This section deals with how the document known as the Treaty Establishing a Constitution in Europe came to be.

This process began with the Treaty of Nice in 2000, more precisely when the decision to append a "Declaration on the Future of the European Union" to the Nice Treaty was decided on by the heads of state and officials of the government at the intergovernmental conference at Nice also in 2000.[80] Why were people so preoccupied with the future of Europe that they needed a separate declaration? Was Europe's future in any immediate danger? Yes, and no, the Treaty on European Union born of Maastricht in 1992 had already geared up for an enlargement, which would come in the form of Austria, Sweden and Finland in 1995. Also, there was an impending accession of 10 more states due in the near future. The 25 or more states that would comprise the Union in the future would clearly raise questions such as the efficiency of institutional coordination, the effectiveness of external relations and the question of internal rights and freedoms. Attempts were made to treat these apparent aches during the Treaties of Amsterdam and Nice; but results were lacking.[81] In Amsterdam the goal of

[80] Jo Shaw, "*Europe's Constitutional Future*", *Public Law Journal*, 2005. http://www.arena.uio.no/cidel/WorkshopLondon/Shaw.pdf, p.2.

[81] Lynn Dobson and Andreas Follesdal, *Political Theory and the European Constitution,* New York: Routledge, 2005, p.1.

reaching a political union to accompany the economic and monetary union promoted by the SEA and Maastricht was not achieved. Leaders had trouble agreeing on anything more than modest changes to the structure of EU institutions in preparation for enlargement. Policies on asylum, visas, external border controls, immigration, employment, social policy, health protection, consumer protection, and the environment were developed, cooperation between national police forces together with Europol was strengthened and issue of cohesive EU foreign policy was improved. The next big step in Amsterdam was the date set to finalize the single currency by January 1999 and also the eastern enlargement was agreed upon[82]. It should be also noted that Amsterdam gave the European Parliament a considerable power increase, the role of the European Parliament as the premiere forum for the direct democratic accountability of the EU will be covered the next chapter. The appended Treaty of Nice, however, as stated, boldly took a step forward to confront these long time ailments. The intergovernmental conference held in Nice 2000 aimed to make institutional changes in order to better prepare the EU for its eastern enlargement. Another aim of Nice was to make the EU more democratic and transparent this was also seen as a welcome product of the major institutional change Nice was attempting. However, while the aim of Nice was preparing for the enlargement and thus, tackling institutional change allowing for deepening and widening to work as impetus for a closer Europe. The prolonged and difficult negotiations of Nice turned into an intergovernmentalist free for all in which the measures for qualified majority voting (QMV)[83] seemed to reflect a move by the Member States to regain their lost Voice within the confines of the post constitutionalization stage of the Union. The change in voting weights will be covered in the following chapter under the changes and innovations of the constitutional treaty section. Nice ended with a size increase in the EP and the Commission and also redistributed the voting weights in the Council. However,

[82] John McCormick, *Understanding the European Union a Concise Introduction*, NY: Palgrave Macmillan, 2005, p. 74.

[83] Lynn Dobson and Andreas Follesdal, *Political Theory and the European Constitution,* New York: Routledge, 2005, p.50.

the 2001 Irish rejection of the Treaty on the terms that it striped too much power from the Member States and the fact Irish citizens were concerned about Irish neutrality on joint security issues was received with shock, soon another referendum was made with the guarantee that Ireland's neutrality respected on the issue of CFSP, this time the vote came in favorably at a sixty three percent majority in favor[84]. In this way, Nice was widely regarded as a failure in terms addressing the *finalite politique* of the EU.

The reprisal of the term constitution in the European context had come at an opportune time but was met with a great deal of skepticism; a speech made by Joschka Fisher in May 2000[85], the German Foreign minister of the time, had had a constitutional overtone flowing freely from a federalist undercurrent months before agreement on Nice was finally meted out. This single speech was a watershed in terms of the acceptability of the term constitution in regards to the European Union. However, the idea that a constitution would solve all of the EU's problems was not viewed as a long term solution but more as a reactionary short sighted drape over the disappointment served up by the IGC at the end of 2000. Superficially the French presidency took the initial blame for the widely accepted failure of the IGC, but in hindsight there were more problems at the table than any single presidency could have dealt with. The loose ends that needed tying in the wake of Amsterdam, the first disappointment in a series, were still problematic at Nice, and the fact that the infrastructure of the EU still needed work, were the major obstacles that bogged Nice down. As a result the political limitations that aggravated the inability of the IGC procedure to amend the Treaties ultimately left much to be addressed in regards to the pending enlargement of the Union. Something needed to be done and the European Council took up the challenge. The European Council became aware of the need to stage a forum on the future of

[84] John McCormick, *Understanding the European Union A Concise Introduction*, NY: Palgrave Macmillan, 2005, p. 76.

[85] Joschka Fisher, "From Confederation to Federation – Thoughts on the finality of European integration", speech at Humboldt University Berlin, May 12, 2000, http://www.policybrief.org/PPNdelors/Report/Joschka%20Fischer.pdf.

the European Union, this debate needed to be as detailed as possible due to the threat posed by the negative implications circulating at the end of the IGC in Nice that stood poised to harm the process of integration in Europe. This issue would be addressed under the Swedish and Belgian presidencies throughout 2001. In preparation the European Council noted a series of questions that the debate would be formulated around. The reoccurring problems were:

- How to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
- The status of the Charter of Fundamental Rights of the European Union; as proclaimed in Nice December 2000;
- The simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
- The role of national parliaments in the European architecture.[86]

Although the pending enlargement and the strain it would put on the European infrastructure was the main concern of the European Council; the questions posed also encompassed chronic issues such as legitimacy[87] in terms of the relative interaction of the Union with its citizens. By posing these questions the European Council aimed to focus on ensuring the quality of the functions undertaken by the European Union, as an ultra-national body, under the collective will of the sum of its parts, whilst not becoming an enigma in the eyes of its citizens; the citizens of its Member States. Interaction between governance and citizenship needed to become highly efficient and responsive. These issues, however, were not the main issues of concern during this time period. It must be noted that they only contributed to the need for restructuring the EU along side major issues such as economic reform and the ground work being undertaken for the Euro.

[86] Jo Shaw, "Europe's Constitutional Future", *Public Law Journal*, 2005. http://www.arena.uio.no/cidel/WorkshopLondon/Shaw.pdf, p.4.

[87] Legitimacy had been an issue that plagued the EU since Maastricht, 1992.

In December 2001 the Laeken European Council stated;

> The Declaration on the Future of European Union, annexed to the Presidency Conclusions of the said Council, states that the Union stands at 'a defining moment in its existence', establishes a substantive reform agenda, and sets up a procedure to undertake the changes.[88]

These main points were outlined:

- More Europe is needed in the essential aspects of Continental Law, and less in the detailed, state and regional realms;
- The minimum core of the Union is defined as the single market and the common currency;
- The existing texts need to be shortened and clarified;
- The distribution of powers needs to be clarified;
- Powers need to be devolved, even to regions;
- More democracy and transparency are needed; along with less bureaucracy and elitism.

With these aims the Laeken declaration No. 23 as appended to the Treaty of Nice shows that the European elites made a valid attempt to address the legitimacy gap that had developed between the Union and the citizens it influences in its Member States. This gap had been started, as mentioned earlier, in the foundational stages between the closure of Exit and the enhanced use of Voice by the Member States ultimately separating the executive branches of the Member States active in the Council from their accountability to their national parliaments. Thus, the declaration understood that many European citizens did not want a European super-State, albeit with the exception that the Union needs certain greater competence to be able to facilitate policies no single nation can under take. The

[88] Declaration on the future of the European Union, http://european-convention.eu.int/pdf/LKNEN.pdf

Union aimed at by the declaration was one of limited powers in reference to areas states and regions can manage and more powerful in respect to greater continental policies[89]. The declaration did have a strong element of leadership in that Fischer's speech signaled the constitutional project however; this was nonetheless more appreciated in European elite circles. The democratic impulse was extremely weak in that the signaling of the constitution did not inspire the latent support of the European citizen. In this sense there was a rift between the citizen and the European elites working for a European constitution. However, the European citizen was involved in the Convention process through their national parliaments. This meant that the Laeken signaling of the European Constitution did benefit from a strong leadership and was supported by the direct representatives of the citizens, however, the lowest common denominator; the citizen was not very supportive[90].

The Laeken diagnosis set out to meet the ailment of the lack of legitimacy in the EU head on by, in effect, constitutionalising the structure of the EU in a unitary constitutional text. The wording present in the declaration alludes to the lack of democratic transparency; hence the declaration having more in common with a constitution making process than a treaty making process, this assumption will become clear in the following chapter. The declaration sparked what came to be known as the "Convention on the Future of Europe" whose primary aim was to facilitate a multifaceted forum with the intention of gathering a varied collection of views on the future of Europe to be evaluated at a later date by an IGC set to be held in December 2003.

To follow the evolution of the constitutional process accurately a degree of detail is required when examining the Convention on the Future of Europe and the IGC

[89] Antonio-Carlos Pereira Menaut, "*Three Crituques of the European Constitution*", *The Federal Trust*, online paper 2004. http://www.fedtrust.co.uk/eu_constitution, p.4.

[90] Augustin Jose Menendez, "*Neither Constitution Nor Treaty a deliberative-democratic analysis of the Constitutional Treaty of the European Union*", Arena working paper, 2005, http://www.arena.uio.no/publications/papers/wp05_08.pdf, p.9.

that followed it. Firstly the Convention, as mentioned above the main aim behind the Convention was to establish a forum in which debates about possible future constitutional and institutional structures of the EU would be discussed. Parliaments and governments would set out to review the EU structure at hand and attempt a full scale revision of the Treaties that comprise it. This revision would be made in time for the IGC which would then evaluate the outcome of the Convention. The Declaration was modeled on the Charter for Fundamental Rights[91], but only as a political declaration. The Convention was chaired by none other than Valery Giscard d'Estaing, former president of France, assisted by two vice presidents; former Belgian Prime Minister Jean Luc Dehaene and former Italian Prime Minister Giuliano Amato. The Convention would start the process on February 28th 2002, and reach finality on July 10th 2003. The Convention comprised:

- The governmental representatives of all Member States, acceding states and candidate states – twenty-eight in all, each with an alternate.
- The representatives from the national parliaments of all Member States, acceding states and candidate states – fifty-six in all, each with an alternate.
- Sixteen MEP's elected by the European Parliament on a party-proportional basis, each with an alternate, and two representatives from the European Commission, Michel Barnier and Antonio Vitorino.
- Observers including the European Ombudsman, and representatives from the Economic and Social Committee and the Committee of Regions.
- Secretarial services were headed by Secretary-General, Sir John Kerr, former head of the UK Foreign Office, assisted by an extremely able and

[91] Nice, December 7th 2000, http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Charter%20of%20fundemental%20rights%20of%20the%20European%20Union.pdf

> industrious secretariat drawn from the civil service of the Council, the Parliament, and the Commission.[92]

The end composition allowed for 205 persons to be in any given session with an additional 13 observers who were entitled to speak along side a host of press aides and Convention staff members. This aspect of the Convention was conducive to allowing for extensive debates on a whole range of topics due to the diversity of the participants. All documents produced by the Convention were available online from its onset adding to the transparency of the process. The difficulty inherent in the process of the Convention revolved around what indeed it would and should present to the IGC upon its completion. Was the aim of the Convention to present conflicting views of different negotiating political parties and groups as had been the case with the reflection group convened before the IGC that bore the Treaty of Amsterdam? Would preparing drafts on the issues mentioned in the Declaration be enough to address the simplification of the Treaties and the further legitimization of the Union? In reality both questions were addressed in some way by the Convention due to the fact that in essence the Declaration was a clean slate on which to address a myriad of issues concerning the Convention and what it should mean to European integration. The Declaration had passing reference to a constitution. The section entitled "Towards a Constitution for European Citizens", the European Council asked:

> …whether this simplification and reorganizing might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?[93]

[92] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.9.

[93] Declaration on the future of the European Union, http://european-convention.eu.int/pdf/LKNEN.pdf, p. 6.

The Declaration was validation of the beliefs of the pro-constitutionalist in the European governance, legitimacy, integration debate. Valery Giscard d'Estaing also contributed to the constitutional atmosphere in his speech at the opening session of the Convention:

> The Laeken Declaration leaves the Convention free to choose between submitting options or making a single recommendation. It would be contrary to the logic of our approach to choose now. However, the re is no doubt that, in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present. If we were to reach consensus on this point, we would thus, open the way towards a Constitution for Europe. In order to avoid any disagreement over semantics, let us all agree now to call it: a 'constitutional treaty for Europe'.[94]

If this except from the speech is examined it seems Valery Giscard d'Estaing felt that the Convention had the power and authority to mete out a constitutional draft, although an effort is made to implore those present to 'do the right thing' for Europe. His belief in the need for a constitutional validation for the European integration process shines through. Those in his audience with a federalist agenda were ready to participate; those who were reluctant were none the less taken by the 'collective opportunity' sales pitch thus, sparking the constitutional Convention process.

The Convention can be summed up as comprising three stages; the listening stage, the analysis stage, and the writing stage[95]. The listening stage involved a series of consultations across Europe. The analysis stage comprised the efforts of twelve working groups that focused on issues such as subsidiarity, the Charter of Fundamental Rights, the legal personality of the EU, what needed to be

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[94] V. Giscard d'Estaing, "*Introductory Speech to the Convention on the Future of Europe*", SN 1565/02, Brussels, February 28, 2002, http://european-convention.eu.int/docs/speeches/1.pdf, p.11.

[95] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.10.

accomplished in order to simplify the existing treaties of the European Union, the role of national parliaments, the issues regarding collective defense and how Europe should coordinate itself when dealing with external affairs. The analysis stage roughly lasted for one year from 2002 to 2003. Last but not least was the final stage of actually drafting the final product of the Convention; the writing stage. Firstly produced a preliminary draft that was presented in 2002, then proceeded with fortifying the constitutional articles of the draft throughout 2003, this stage was overseen by the Praesidium which comprised a President, a vice-President, two European parliamentarians, two national parliamentarians, two commissioners, two nation government representatives, and the representative for the interests and concerns for ascending states.[96] The final document was deigned to be a constitutional draft and not a revised treaty. After the first draft was presented amendments were raised by the members and their alternates, the Praesidium then redrafted the document in light of the requested amendments on several occasions. By the end of the process the draft constitution had the majority consensus of the Convention behind it. President Giscard presented parts I and II to the European Council at Thessalonica[97] on the 20th of June 2003; after the finishing touches were completed on the 10th of July the 18th signaled the delivery of parts III and IV of the draft constitution to the offices of the President-In-Office of the European Council Prime Minister Berlusconi.[98]

Was the Convention a perfect example of transparent European political interaction? It seemed so, with all of representatives from the Member States, the press, the candidate states, and the technocrats of the Union. There was even an online site for all of the documents produced as a result of the debates. Also, the

[96] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.10.

[97] Lynn Dobson and Andreas Follesdal, *Political Theory and the European Constitution,* New York: Routledge, 2005, p.2.

[98] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.11.

Convention allowed some headway to be made on certain taboos like granting of a legal identity to the EU and the merger of the EC and EU Treaties[99]. In reality the Convention did have its flaws. As the end of the Convention process neared the deliberating turned into bargaining, plenary debates were altogether marginalized by deals hammered out behind closed doors, a common occurrence historically at European Council meetings between influential parties, and the issue of institutional reform remained clearly out of the public debate platform which had been set up. There were also members of the Convention that pointed to an outcome dominated by a Franco-German agenda.[100] The fact that Nice had completed the institutional changes necessary for the enlargement and that the enlargement had been agreed upon presented the opportunity to create a full scale drive for a constitution. The emergence of further enlargement and the advent of the constitutional process were not unrelated; an effort was made to synchronize these two events was apparent. At Nice the IGC was deigned to be held in 2004, however, the date was brought forward to 2003 so as to allow for the constitution to be completed before the accessions of the eastern ten. The 2003 Convention was formed with the goal of limiting the influence of the newcomers; the representatives were there on the Convention floor but not present in the twelve person presidium. Europe's foremost federalists such as Joschka Fischer and Guy Verhofstadt, Belgium's prime minister had been pushing the hardest to get the Convention's constitutional text adopted swiftly and without alteration. Jack Straw, Britain's foreign secretary commented that a constitution was needed "in order to make enlargement work better"[101]. Another concern in the realm of the European elites was that leading European nation's hegemony was at risk due to the enlargement and it diluting effects to the power base. This is closely related to

[99] Bruno de Witte, "Treaty Revision in the European Union: Constitutional Change Through International Law", Netherlands Yearbook of International Law, Vol. 35, 2004, p.69.

[100] Jo Shaw, "*Europe's Constitutional Future*", *Public Law Journal*, 2005. http://www.arena.uio.no/cidel/WorkshopLondon/Shaw.pdf, p.7.

[101] Cited in "Claims that a new constitution is designed to cope with European Union expansion are false," The Economist, Oct. 9, 2003.

the Member State Voice and the impetus of the Member States to use it within the EU legislative apparatus in order to effectively control the EU without having to resort to Exit. The enhanced cooperation concept was the one possibility the leading states, of which foremost Germany and France, had to create a "hard core" of Europe thus, distinguishing themselves from the enlarged EU whole. These core European states would integrate closer in the fields of tax harmonization and justice and home affairs. The idea of enhanced cooperation amongst certain Community members had not been formally accepted before the Treaty of Amsterdam. The legal framework to facilitate closer integration was institutionalized in Nice. Thus, the pending enlargement and the fast track integration concept developed in parallel. This move for hegemonic preservation comes from the threat posed by the accession of the ten new members; this is evident in the constitutional text which solidifies the Copenhagen criteria:

- Proof of respect for democratic principles, the rule of law, human rights, and protection of minorities;

- (To have) functioning market economies that are able to cope with the competitive pressures and market forces of the EU;

- The ability to take on all the obligations of membership, including incorporating into their national legal system all laws agreed by the EU[102].

These criteria may force some of the new members to follow integration at a lagging pace while the leading European states further deepen their integration by creating a core of Europe[103].

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[102] Copenhagen criteria: Copenhagen European Council in 1993, http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf

[103] Ran Hirschl, *Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution,* in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual

The next step that had been preordained by the Laeken Declaration was set to begin as of October 2003, which was as little as three months after the Convention reached finality. The assembly at the IGC discussed the feasibility of accepting the draft constitution as is, but the Member States still had qualms about some of the articles. The question of how the constitution would meld with the inherent EU structure was decided upon; the draft constitution would be set on the table to be ratified as a constitutional treaty. However, the Italian Presidency successful in getting the text adopted. There was heavy opposition to the draft from the Polish and Spanish governments who voiced discontent with the new qualified majority system introduced in the document. The new system heavily downplayed the importance of medium and small sized states within the EU framework. On the other hand the above mentioned Franco-German block stood stalwart behind the new qualified majority proposition and refused to hear pleas that wanted the original qualified majority system left over from Nice to continue serving the Union. The new voting system in the Council was based on double majority; EU laws can be passed if it won the support of at least fifty five percent of EU countries whose combined populations exceed at least sixty five percent of the total EU population. A blocking minority must come from at least four states. The system under Nice was based on weighted votes which effectively gave nations such as Germany, Britain, France, and Italy 29 votes and gave countries with half the populations of the larger states 27 votes. France was pivotal in hindering the double majority vote at this time due to the boost it would give Germany based on its population. However, under the constitution the double majority was back giving the four states with the largest populations; Germany, Britain, France and Italy the necessary girth (in any combination of three) to reach the thirty five percent minimum needed to block any meaningful legislation or decision in the Council, provided they could convince one other state to join them. This girth is even more apparent when it is taken into consideration that these ‘big four’ would

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Perspective, Jean Monnet Working Paper 5/04,
http://www.jeanmonnetprogram.org/papers/04/040501-05.html., p.25.

not need the support of an additional state to effectively stop a Council of Ministers initiative. As mentioned above the Poles and Spaniards were not happy with this settlement however, the Franco – Germany block did not renegotiate the double majority settlement[104].

After an abortive summit in Brussels the Italian Presidency relinquished the office of the presidency to the Irish delegation. The Irish Presidency took a methodological approach to overcoming the impasse reached during the first attempt at reaching agreement. A reconvened IGC spearheaded by the Irish Presidency received the green light from the European Council which had received positive feedback about the possible success of a fresh start to the IGC. The Irish Presidency took up the motto "Nothing is agreed until everything is agreed"[105]; meaning that all disputed points would have to reach some sort of agreement or all headway made in one direction would be overruled. The Presidency worked with all extensions of the components of the impasse such as ministries and offices of high officials, presenting documents to further facilitate consensus. By taking this avenue of attempting concord at the highest levels of the problem the Irish Presidency succeed in bring the Treaty Establishing a Constitution for Europe to the table at the meeting of the European Council on the 17th and 18th of June 2004 held in Brussels. This single text was signed in Rome on the 29th of October, 2004. The ratification of the document would be decided by individual national referenda or parliamentary vote held by the Member States themselves.

As this chapter outlines the EU has evolved into a new form of polity; it has become an international organization of which there is no other example. The

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[104] Ran Hirschl, *Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution,* in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-05.html., p.29.

[105] Presidency Note, "*Report on the Intergovernmental Conference*", CIG 70/04, March 24, 2004, para. 6. found at: Http://europa.eu.int/constituiton/futurum/other/oth240304_en.pdf

policies, institutions and achievements of this machine have taken it from strength to strength. The fortification of this European machinery has greatly benefited from the obliteration of most customs barriers, quotas, and tariffs. In this way the EU has become a regional and international power in terms of environmental policy, competition, agricultural and industrial standardization. The EU has also become a super power of trade, while on the other hand the ECJ has established the supremacy of EU law, the harmonization of domestic constitutions with the Treaty of Rome, and has bestowed the European citizen with certain inalienable rights[106]. The role of the ECJ in the evolution of the EU has also made it the prime facilitator of the Constitutional ideal on the table today, the reaction of the Member States to the constitutionalization of the Community by ECJ led to a series of evolutionary changes. These evolutionary changes were all achieved sometimes with tact on the part of the Community technocrat and sometimes with conviction by the heads of state that would have been expected to resist such attempts at diluting the sovereignty of the nation state. The expansion of Community competences and the Member States acquiescence to this change allowed the Community to take on a more supranational federal character. Thus, it is not difficult to understand the dissipation of federalophobia ten years after Maastricht when Joschka Fisher, Jacques Chirac, and Valery Giscard d'Estaing all backed a constitutional settlement for the EU. Was it a new definition of an old concept that reaped this fervor? Perhaps, it was that the idea of a constitution that had shed its forward momentum as part of the rush to closer integration. Euro skeptics might be happy to see this as a way to bridle the flow of integration in Europe[107]. Nonetheless the EU that emerged at the end of this process was well on its way to reach a constitutional settlement.

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[106] Andrew Moravcsik, "The European Constitutional Compromise and the Neofunctionalist Legacy", *Journal of European Public Policy,* 2005, p.349.

[107] J.H.H Weiler, Iain Begg, and John Peterson, *Integration in an Expanding European Union Reassessing the Fundamentals,* Gateshead, GB: Athenaeum Press Ltd., 2005, p.17.

As it stands today the EU is a power to be reckoned with; it has the economic girth and the combined political influence of the sum of its parts. The one aspect the EU does fall short on is that it has not been able to integrate an army; which is the only thing distinguishing this silent superpower from the United States. On the political flank; in legislative terms the EU has upped the stakes in the European Parliament to a point where the EP has equal powers to that of the Council. The Commission by itself has exceptional autonomy in dealing with international secretariats, while the Council of Ministers has become a hub for activity for the highest government officials always driving legislation to the next step[108]. As the foundational periods effect coupled with the change in the jurisdiction of the Community throughout the developmental stages has left the expanding and developing network of European institutions, which have undoubtedly gained some semblance of supranational authority, with a need of legitimizing their claim to authority in some way. The gap that exists between the speed at which political integration has accelerated since Maastricht (which gained momentum via the constitutional changes that occurred before it) and the relative lag that the legitimacy of the European integrative ideal has incurred due to this process has been on the agenda of the European political elites. The political integrative drive that began whole scale in 1992 was also the setting for an attempt to legitimize the EU; all of the events leading up to the Constitutional Treaty show signs of trying to address the issue the 'lag' of legitimacy.

While this work plans to address the issue of legitimacy in the ensuing chapter, it is important to note the relationship between periodic integrative enlargements and the popularity of the constitutional ideal at this point. The turn towards a constitution may be based on several issues; first and foremost of these is the fact the EU requires an over haul the same trinity of parliament - council - commission

[108] Andrew Moravcsik, "The European Constitutional Compromise and the Neofunctionalist Legacy", *Journal of European Public Policy,* 2005, p.350.

which still exist today as it did over fifty years ago[109], these institutions have reached an event horizon in terms of integration in that they require an overhaul to be better suited to deal with the legislative and decision making pressures of an enlarged Union. Also, due to this expansion in the European population, now directly influenced by the decisions of the EU gives added impetus to these institutions to legitimize their positions in order to touch base with their direct or indirect constituencies. Thus, the legislative system and the policies endorsed by it have always needed a slight brush up before the widening of the Union took place as it has occurred in the past. However, it must be noted that the new accessions came in just before deliberation on the constitutional issue came to a close, and a draft was presented, this happened in spite of the European political elite hopes to have the Constitutional Treaty in place before enlargement. One misconception of this time was that most believed the EU pre-fifth enlargement and the EU of the post-fifth enlargement were the same; this however, is not true. This enlargement made the constitutional drive a legitimate stake at taking the EU to the next level of political networking. While the enlargement was seen as a natural process; a typical act of the EU, the constitution required special handling. The Council had meted out the enlargement without much fanfare, while the constitution received "the works" in the form of a European Convention, an IGC, and referenda. Why was the enlargement not as important? If the constitutional program's short comings, the veto's it received from France and the Netherlands, were taken into account as a part of the strain put on the EU due to its large chunk fifth enlargement; would not the Council have reconsidered further deliberating the accession of ten new members? Certain pressures spawn certain ends, the association between the drive of integration and the advent of the Constitutional Treaty are not separate concepts; they are an ends – means paradigm.

In this chapter, the historical progression of the European constitutional ideal was examined with special focus on the effects of the constitutionalization process on

[109] J.H.H Weiler, Iain Begg, and John Peterson, *Integration in an Expanding European Union Reassessing the Fundamentals,* Gateshead, GB: Athenaeum Press Ltd., 2005, p.1.

the integrative evolution of the EU. The tight rope between intergovernmental and the supranational aspects of the EU have been examined in the context of the Exit – Voice paradigm. The interplay between these ideals has facilitated the flow of the integrative process based on the premise that the Member States are still the masters of the Treaties; it has also been established that only with the prolonged use of enhanced Voice by the Member States allowed them to relinquish, to a degree their intergovernmentalist checks. The ramifications of this line of evolution has come to bear on the European project; the democracy deficit born of the foundational era and which proliferated through the developmental stage of the Community caused the pressures of deepening and widening to be addressed with heightened vigor throughout the 1990's. As covered in section 2.2 there was a need to further integrate the political aspects of the EU along side the economic factors. The hindrance to this political end came from the enhanced use of Voice mentioned throughout this chapter. As stipulated in section 2.3 the advent of the Constitutional Treaty was effectively forged as a project of the European political elites under the shadow of hegemonic preservation coveted by the Member States. In the following chapters first section the definition of the term "constitution" itself will be the focus of this thesis in terms of what it means for the EU. Later an effort will be made to examine the implications of what the issue of the democracy deficit means in the European context and the Constitutional Treaty. By making this journey it will become clearer to discern if the Union has actually forged a gap between the European citizen and the ideals of integration conceptualized by the political elite of Europe, and if so what the failure of the ratification process means in the context of European integration.

CHAPTER 3

CONSTITUTIONAL ASPIRATIONS

The focus of this section will mainly revolve around what a constitution means for Europe, the issue of the democracy deficit, and the changes and innovations presented in the actual bulk of the proposed Constitution. The aim of this chapter is to build on the ramifications caused by the changes that the Community went through during its foundational and developmental stages by way of defining the problem and examining how well the Constitutional Treaty deals with it. These ramifications can be expressed when referring to the inherent democracy deficit that has caused the legitimacy and transparency of the EU to be called into question. In the following chapter this work will take a look at what derailed the Constitutional drive. For now though it is safe to say we concern ourselves with the laurels of the Constitution; what changes and new concepts it will be introducing into the European Union and if these changes are adequate to address the issues presented in the first two sections of this chapter.

3.1 An Overview of the Concept

Firstly, what is a constitution? The simplistic understanding of a constitution refers to the law that establishes and regulates the main organs of government, their constitution and their government[110]. However, the more complex definition of a constitution can be examined through seven criteria. Firstly the Constitution must constitute the main organs of the government and their powers by defining

[110] Joseph Raz, *"On the Authority and Interpretation of Constitutions: Some Preliminaries"*, in L. Alexander ed., Constitutionalism, Cambridge: Cambridge University Press, 1998, pp.152-153.

them. The constitution also must present the substantive and procedural norms of the government. In a federal state the constitution must identify the powers of the federal state and the peripheral governments. These prerequisites cover the simplistic definition of what a constitution is. Secondly, a constitution aims at stability; it aims to create a stable foundation for the political and legal institutions of the state. While amendments are possible it should be noted that this does not change the aim of stability inherent in any constitutional order. Thirdly, constitutions are recorded in written form in one or a small number of documents. Fourth, constitutions aspire to be the higher law; ordinary law that appears in conflict must be voided due to this principal of supremacy. Fifth, constitutions must be open to judicial procedures that test the compatibility of laws and other acts in accordance with the provisions of the constitution; this allows for the supremacy of constitutional law to be applied if necessary. The sixth factor is that the constitutions are entrenched; they can only be amended by special procedures which are distinct from procedures that govern ordinary legislation. This means that those laws or issues that have become constitutional are not subject to the whims of a political party that has the majority in the national legislature. While special procedures can amend a constitution normal legislative acts cannot. Finally constitutions express a common ideology; such as democracy, federalism, civil and political rights which in turn 'express the common beliefs of the population about the way their society should be governed'[111]. This list presents a basic idea about the expectations of a constitutional document and what it means for the state in terms of adopting such a document. This is not to say the list accurately describes all constitutions, on the contrary constitutions may include some of these aspects to greater or lesser degree. Some are very detailed while others subscribe to the bare minimum. The existence of a written constitution however, will conform to the above mention criteria[112].

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[111] Joseph Raz, *"On the Authority and Interpretation of Constitutions: Some Preliminaries"*, in L. Alexander ed., Constitutionalism, Cambridge: Cambridge University Press, 1998, pp.153-154.

[112] Paul Craig, *"Constitutions and Constitutionalism"*, European law Journal, Vol. 7, No. 2, 2001, p.127.

A moment must be taken to differentiate between the interpretations of two related terms; constitutionalism and constitutionalization. Constitutionalism refers to the ideological base of the concept; it questions the legitimacy, the interpretation and the authority of a constitution. It also refers to rationale behind a constitution; the constitutional rules adopted to reach a state of constitutional conscription. In this sense the ethos (starting point) and telos (end or goal) of the constitutional rules define the constitutional system itself. Another meaning associated with the term is the reference to if a system adheres to the prerequisites listed above; constitutionalization expresses the movement towards attaining those prerequisites. The third meaning comes from the judicial connotation; the constitution establishes the institutions and gives them authority it also assigns ultimate power to the people by way of elections. Power in any form is only lawful if it conforms to the constitution and a judgment of nonconformity can be only rendered by a specialist constitutional court. A fourth meaning weighs the legal systems constitutionality; does it satisfy the preconditions for good governance, is the government accountable, and advocate human rights? By covering these questions the term constitutionalism expresses the terms and conditions for a constitutional culture. Finally, the term constitutionalization applies to the constitutional norms that apply between state and citizen and also between citizens as in the example of the constitutionalization of the EU legal system as it turned from functioning under a system of international law into a system of constitutional law[113].

The forms a constitution can take are also of importance. These are the formal, material, and normative conceptions of a constitution. These generalizations on the criteria listed above in regards to the conceptions of what a constitution is, will help define the nature in which the European constitutional example is quite

[113] Paul Craig, *"Constitutions and Constitutionalism"*, European law Journal, Vol. 7, No. 2, 2001, p.128.

different from the traditional understanding of a constitutional process. The formal constitution can be defined as the set of legal norms contained in a document (or compilation of documents). These legal norms define the constitution in social practice. As written law became the tool of liberal revolutions in continental Europe the concept of law became associated with systematic bodies of legislation as seen in the *Code Civil*[114]. Through this system the association of a constitution with one single document came about in Europe and in the United States. This single document must, as mentioned earlier be written as a physical object, it also and more importantly must have a direct association to the political community that required a constitution. Finally, a constitution should presuppose that not only the authors label it as a constitution but that the document aspires to identify the wide spread social practice of a given society and thus, in this way is by default the constitution of that society[115].

The material conception of constitutions refers to the norms of social interaction that are regarded as basic norms according to social practice. Thus, the social practices of the legal actors of a community are considered to be the basic norms of the legal order of a given community. Opposed to the formal constitution definition which takes the cumulative social practice of a community that labels something as the constitution, the material conception takes the social actors and what they regard as the basic norms of the society as the basis for a constitution. The distinction between the formal and material constitution can be used to undermine or vindicate democratic constitutions. Opponents of a democratic constitution would use the material conception as a means to subvert constitutional authority by stating that the constitution is not reflective of the societal norms of the social actors of the community. While the formal constitution is the main restraint against excessive state power, the material

[114] R.C. Van Caenegem, "*European Law in the Past and the Future*", Cambridge: Cambridge University Press, 2001, p.1.

[115] Augustin Jose Menendez, "*Three Conceptions of the European Constitution*", 2003, http://www.arena.uio.no/publications/wp03_12.pdf., p.3.

conception can be used to criticize it as such. The material conception premises that the social actors view the material constitution as a representation of government as an authoritarian necessity. In this sense authoritarian elements are free of the Voice of the social actor and are validated by the material conception of the constitution which lets them function under the premise that they represent the social norms of the said social actors. As a reaction to undemocratic regimes this difference between these conceptions can also be used to denounce the functional constitution as a disguise for the lack of democracy[116].

The normative conception of constitutions relies on norms that present certain properties which are normatively relevant. As seen in Article 16 of the Declaration of the Rights of Men and Citizens, 1789:

> A society in which the observance of law is not assured [guaranteed], nor the separation of powers defined, has no constitution at all[117].

As can be discerned from this article a constitution cannot just reference social practice; they must aspire to an ideal. No matter what the citizens of a community say if rights are not guaranteed and powers are not enumerated there can be no constitution. The normative constitutions aspire to heights above the realities of majority action in terms of societal practice. In order to better understand the European example the deliberative-democratic normative conception of constitutions should be used. The deliberative-democratic conception defines constitutional norms in terms of the highest standards of democratic legitimacy. These standards are met via deliberation and decision making processes that have benefited from citizen Voice. Thus, the exercise of the citizens Voice assures them as to their role in authoring constitutional norms. The principal of democratic political legitimacy requires the participation of all those who are

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[116] Augustin Jose Menendez, "*Three Conceptions of the European Constitution*", 2003, http://www.arena.uio.no/publications/wp03_12.pdf., pp.6-7.

[117] Declaration of the Rights of Men and Citizens, 1789. http://yale.edu/lawweb/avalon/rightsof.htm.

affected by constitutional norms to be involved in the deliberation and decision making that create the aforementioned norms[118]. In this way a democratic constitution looks out for the autonomy of all citizens whilst creating a common political will.

How do these conceptions apply to the EU? Does the EU have a material constitution? Yes, the legal system devised on the ECJ – national courts axis created the material constitutionalization of the Community in the foundational period. While the Treaties were international agreements, the constitutionalization of these documents by the process the ECJ spearheaded allowed for a material constitution in the structural sense. Does the EU have a formal constitution? Yes the Treaty Establishing a Constitution for European answers this question in full. The issue of the "treaty" aspect of the said document will be covered shortly. The question of whether or not the EU has a normative constitution is however, more complex. While the formal constitution exists the normative deliberative – decision making aspect is questionable. Due to the fact that the democratic conception of a constitution presupposes a written document the European case is lacking in that the European citizen does not see him / her self as the author of the formal constitution spoken of in chapter two[119].

The belief that holds that a cohesive European people do not exist and thus, there is no base for the democratic will of such a people in order to legitimize a constitutional settlement will be referred to as the "no demos" thesis. The constitutionalization process of the EU exists however, whilst meeting the constitutional criteria mentioned previously it does not make up for the lack of an act or inclination of the people (demos) to gain a constitution and establish their

[118] Jurgen Habernmas, Between Facts and Norms, Cambridge: MIT Press, 1996, pp.10.

[119] Augustin Jose Menendez, "*Three Conceptions of the European Constitution*", 2003, http://www.arena.uio.no/publications/wp03_12.pdf., pp.14-23.

political capacity[120]. The European example has been under the control of the Member States as the masters of the Treaties. Their leaders together with other European technocrats (also form the said Member States) create an elite European order that functions in the realm of the EU. Thus, European public power is mediated through these European elites via the ultimate power of the states not the people. This is the basis for the issue of the democratic deficit of the European project. However, before the democratic deficit is examined in the next section other issues concerning the constitutional concept need attention.

One of the main questions hovering around the Constitutional debate bullpen is the issue of whether or not the document that has the terms "Treaty" and "Constitution" side by side is, in reality, either or. The distinction isn't clear, let's try to lift the veil. As a Constitution the proposal is a basic set of guidelines determining the rules that dictate the major characteristics of the Union, as well as the obligations of members to this body. It also defines the institutions of the Union, how they function, their powers, how they exercise these powers and last but not least the limits to the powers bestowed upon these institutions. As a treaty it is a legal and binding document among the nation states that are party to it. International law dictates the guarantees presented to the participants in their ploy to create a 'European Union', and in creating such an entity defer power to it. Also, the treaty denotes that it is a continuation of the bodies known as the EC and the EU. The important issue here is the official line of the Union on which way to go; the treaty form would still bring with it reforms or new competences, and for arguments sake we could assume that the ratification process also was successfully completed. This would mean that the sovereign powers from which the Constitutional Treaty would be deriving its power would be the Member States. In the "real" Constitutional definition though this would hardly be the case; the existence of a collective will must be taken into account, as mentioned

[120] Paul Craig, *"Constitutions and Constitutionalism"*, European law Journal, Vol. 7, No. 2, 2001, p.136.

above, along with the acceptance of this will there must also be an acquiescence to this power in that amendments via majority to constitute a polity. This effectively also instills a basic loyalty and commitment to the greater ideal[121]. Another point discerned from the literal existence of the constitutional choice is that if the demos of Europe were to accept and ratify the Constitution, it would also symbolize the deferral of power to a higher authority from the ground up? This event though cannot be expected to occur from the word go because of the fact that the national communities of Europe would only be able to voice an inclination to be a part of a constitutional settlement, the actual forging of a constitutional demos would occur after the fact.

Now let us examine the democracy deficit as the prime candidate to explain the situation of the Constitutional Treaty visa-vie the normative deliberative – decision making aspect of constitutions and the legitimacy of the European order.

3.2 The Democracy Deficit: Questioning Legitimacy

The issue of the democracy deficit revolves around the institutional structure of the EU as it has been defined through its foundational and developmental stages. In this institutional structure there is but one forum for the direct representation of the peoples of Europe; the European Parliament. The EP is the primary nexus of legitimacy and democracy in the institutional structure of the EU. Thus, in the sense that the democracy deficit and the legitimacy issue are an ends means paradigm; the lack of democratic decision making within the union has caused an attempt to address the lack of legitimacy in the Union as a whole. The Commission regardless of its rise to power after the 'empty chair' crisis remains the Union's body of international civil servants. The Council which represents the executive branches of the national governments assumes a legislative role within the Unions structure. These executive branches of government are not meant to

[121] J.H.H Weiler, Iain Begg, and John Peterson, *Integration in an Expanding European Union Reassessing the Fundamentals,* Gateshead, GB: Athenaeum Press Ltd., 2005, p.19-22.

have legislative authority. Legislative powers must be provided to them by their national parliaments. As can be seen the Council functions outside the reach of these institutions thus, circumventing their accountability firstly to their parliaments and secondly to their constituents. Within the institutional structure of the Union the Council, a group of ministers, on proposal of the Commission, a non-elected group of civil servants, has the ability to pass legislation or must pass legislation that is enforceable and binding even if it is in conflict with legislation adopted by the national parliaments of the Member States[122]. All the while this process occurs outside the scope of parliamentary scrutiny or approval. The increase in erosion of enumerated powers as discussed in chapter two makes this issue all the more aggravated.

Historically the EP was inherently weak leading up to and beyond the SEA. However, the gradual rise to prominence of the EP can be seen as a sign that the democratic accountability of the aforementioned institutions has become a priority of the European project. In the Treaty of Rome the Parliament was given its consultative mandate under the *consultation procedure*. In this way the Parliament was allowed to give a non-binding opinion to the Council before the adoption of legislation on issues concerning transport policy, citizenship issues, the EC budget, and amendments to the Treaties. If the EP needed something changed then the Council would refer the draft for amendment to the Commission, however, the Commission was under no obligation to respond. The EP received the *co-operation procedure* under the SEA. This gave the Parliament the power to render second reading on laws that the Council was considering. These laws pertained to aspects of the economic and monetary policy. During Maastricht the EP received it largest injection of competence; the *co-decision procedure*. Maastricht can be viewed as the point of proliferation of the EP. Under its new powers the EP had the right of rendering a third reading on bills in selected areas which meant that it was essentially sharing competence with the Council. Maastricht also extend the

[122] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2467.

EP's reach to the CFSP in that the president of the Council was required to consult the EP on the development of initiatives on CFSP. Also, the *assent procedure* was introduced which gave the EP equal powers with the Council on decisions regarding accessions to the EU, the granting of associate status to the Union, and on the EU's international agreements all of which are subject to a parliamentary majority[123]. The Treaty of Amsterdam effectively bolstered the powers of the EP by abolishing the cooperation procedure except for use on issues of economic and monetary union. The use of the co-decision procedure was expanded from fifteen to encompass thirty eight areas including public health, movement of workers, vocational training, the structural funds, transport policy, education, customs cooperation, consumer protection, and the environment. Also, the EP received joint powers over the budget of the EU with the Council. In this arrangement while the EP cannot raise funds for the EU it can reject the budget. Finally the most potent powers of the EP are its ability to debate the Commissions annual program, ask the Commission questions, and finally the ability to disband the Commission. While this has never occurred the 1999 Santer Commission was accused of mismanagement, cronyism and fraud by the EP who was reluctant to approve the accounts of the 1996 budget. While the EP motion to inquiry did expose instances of fraud the Santer Commission resigned before they were disbanded[124]. The Constitutional Treaties innovations to the competences of the EP as will be covered in section 3.3 coupled with the examples of EP prominence listed here will show that an attempt to alleviate the democracy deficit has been made. This effort in effect attempts to bridge the gap between the democratic legitimacy of the Union and its integrative evolution in terms of the creation of a *pouvior constituent* (the power of a polity to define its own destiny). However, the question remaining is has this effort been too little to late?

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[123] John McCormick, *Understanding the European Union A Concise Introduction*, NY: Palgrave Macmillan, 2005, pp. 97-98.

[124] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.39.

Firstly a distinction must be in defining legitimacy. Formal legitimacy which prescribes to legitimacy in the legal sense and social legitimacy that refers to empirical legitimacy as witnessed in the conceptualization of legitimacy in the eyes of the citizen. In the legal sense as long as the requirements of law are observed in the creation of an institutional structure the basis for legal legitimacy exists. A democratic foundation is required to instill this legal legitimacy as the "peoples consent to power structures and processes"[125]. The EU and its former denotations have been legitimized by the existence of the Founding Treaties in the legal sense due to the ratification procedures of the treaty texts by each addition to the whole via accession. However, it should be noted that before Maastricht the EP still had not received any significant powers, although the legitimizing documents of the Community were always signed and ratified by acceding states none of these states requested the competence of the EP be increased. As mentioned the equilibrium between the constitutional legal order and the institutional intergovernmental sphere allowed the EP to remain outside the scope of the decision making process until the factor of Loyalty (in reference to Hirschman's Exit, Voice and Loyalty paradigm) among the Member States allowed for them to ease their absolute control over the decision making process of the Community. This occurred as mentioned during the expansion of the Communities competences, only then did the supranational element of the legal order seep into the realm of the Member State. While the ratification procedure of the Treaties themselves by the national parliaments of the Member States upon accession define the formal legitimacy of the EU the legitimacy deficit still continues to exist. The state of the EP throughout its existence testifies to the inapplicability of the ratification procedure as proof of the popular legitimacy of the institutional structure of the EU.

[125] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2468.

The EU has aspired to create a regional system of sovereignty which prescribes to shared authority, divided judiciary powers, and a complementary structure of lawmaking and enforcing. The merits of the EU aside however, it remains pre-modern due to the lack of consistent parliamentary democracy. European decision making remains highly bureaucratic and lacking in transparency. Thus, in this way the EU mechanism can be likened to an order that intends a to establish a 'good order' from above while preventing public discourses which if allowed would lead to chaos threatening the seats of power of the European elite[126]. Of course this comparison does not allude to some Machiavellian plot but tries to picture the view of Brussels from the eyes of its citizens. In this sense the gap between Union sovereignty and popular sovereignty or legal formal legitimacy and social legitimacy is visible.

Social legitimacy denotes a societal acceptance of a system or structure of governance. This acceptance is strengthened by the protection and guarantee afforded to the general political culture on topics such as freedom, justice, and welfare[127]. The Member States enjoy social legitimacy in reference to their democratic structures and liberal constitutionalism within their national spheres to such an extent that such notions are a prerequisite to accession to the EU. However, on the EU level these notions are not infallibly executed. The EU is still quite a bit removed from being consistent with the basic western prerequisites of democratic theory and popular sovereignty. As witnessed in the events covered in chapter one, the Member States are again the main culprits behind the short comings of the EU in their unwillingness to democratize the EU and its institutions. As a result the Member States sit anonymously while Brussels is the silent target as to the comments on the legitimacy and in-transparency of the EU. The EU is an indirect democracy that aspires to the highest moral claims in regards to democratic standards in its Member States but it is these states that

[126] Ludger Kuhnhardt, Constituting Europe, Germany: Baden-Baden, 2003, p.164.

[127] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2469.

perpetuate the democratic short comings of the whole. The EU itself would not qualify to join the EU if the Copenhagen criteria were to be applied[128].

Why have the EU level principles of democratic transparency been left behind in the realm of the Member State in the drive for further integration? The answer is that even if the intent to integrate was forged under the most solemn democratic oath it would still nonetheless create a short term deficit of democracy. The convergence of a group of polities occurs at the expense of losing control over unified policy areas. Integration causes a gap or lag in the sense that the process of integration creates a new sphere of activity above the scope of the individual polities that comprise it. At the point of change over to this new sphere, as we have witnessed in the European example in the supranational – intergovernmental battles of the early Community, the individual polities lose control over policy areas that influence the integrated group thus, they also lose direct accountability to their national parliaments causing the deficit of democracy. To fill this gap the element of social legitimacy is required; this can be accomplished in two ways. First by proving to the citizenry that the new integrated whole was formed in the interest of improved welfare or secondly this can be accomplished by guaranteeing the democratic institutional structure of the new sphere[129].

As mentioned, the double standard between the democratic attributes of the Member States and the democratic short comings of their heightened sphere of integrated activity, the EU, is based on the premise that the EU is as democratic as its individual polities allow it to be. Thus, as it has been seen, the EU mechanism has been working to gain legitimacy by investing in more projects of democratization. The effort to enhance the role of the EP into that of a key actor as an institution that at least has equivocal powers of political initiative and decision making to that of the Council has been a bold step for Brussels. In

[128] Ludger Kuhnhardt, Constituting Europe, Germany: Baden-Baden, 2003, p.164.

[129] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2471.

retrospect the fact that the EP received its democratic wings in the 1979 by the decision to switch to a direct election system based on universal suffrage makes at least the base claim of legitimacy accurate[130]. Although this important prerequisite is in place the EP has not been able to enhance its position into one which generates natural recognition for its role as an important or even singular decision maker in terms of legitimacy. However, the EP is unmatched as a supranational parliament in its role as the forum for popular sovereignty. It is not far fetched to assume that the Brussels already has the democratic deficit under control; the problem, however, is garnering recognition for the constitutional stake as made by the Union from the citizens of Europe.

In the European example the united whole of polities under the institutional structure of Brussels during its foundation caused an increase in relative Voice from the Member States. This is an occurrence that precedes almost all such shifts of power from periphery to center. In the examples presented by the United States, Switzerland, and Germany this can be seen in the confederated forms they assumed before a federal union. What this allows for is the social acceptance of the new supranational polity[131]. If examined from the political standpoint the EU and its earlier manifestations already resemble a confederation. Thus, it is not important to ask whether or not the EU is ready for a federal *finalite politique* but whether or not it has reached a level of societal acceptance in that the peripheries have socially integrated to an adequate degree. Also, it should be noted that the increase in Voice seen in these transitory confederal arrangements can and have hindered the flow of integration as seen in the years leading to Eurosclerosis. Another element is that if not enough Voice is allotted to the constituent polities the convergence of majorities within the system may suffocate the minorities. This would detract most form the social legitimacy of the integrated whole, as an example in the European setting one could view the opt-out clauses together with

[130] Ludger Kuhnhardt, Constituting Europe, Germany: Baden-Baden, 2003, p.165.

[131] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2471.

multi-speed Europe theories as pressure valves designed to keep members from resorting to the use of Exit. The enhanced cooperation system however, as mentioned, relates more to the formation of majorities within the united whole i.e. a hard core Europe. Viewing the EU as a "work in progress" points to a reconstructed and redefined whole constantly adapting to internal and external economic, political and social developments. This open ended view of the European project raises the issue of whether or not the EU should continue to exist as an 'ever closer union of states and their people' as implied by the founding treaties or try to meld this closer union into a single entity[132]?

It would seem that the inherent problems of system change need to be addressed in that the democracy deficit caused by the integrative process should be rectified. The only way this apparent lag between the social acceptance of the Union by the people and the integrative drive to create the Union can be addressed is by the creation of a Europe wide demos that accepts the legitimacy of the whole on social terms in regards to the majority rule of the integrated polities. The EU does not suffer from formal legitimacy; it actually suffers from social illegitimacy. The more power converges in the EP and the less it pools in the Council the more this social illegitimacy subsides. Taking the EP as the prime key to solving the democratic deficit in the EU is necessitated by the argument above. While the EP has been put in a more reinforced position in the EU institutional structure it is still however, incomparable to the national democracies. The EP was debilitated firstly by its formal lack of powers and secondly due to its structural remoteness to the people it claimed to represent[133]. Due to the lack of parliamentary control or influence over the decision making structure of the EU via the Member States in the Council, the over all effect leaves the executive branch of the EU under less scrutiny from both the EP and their national legislatures. However, the

[132] Sanem Baykal, "Unity in Diversity? The Challenge of Diversity for the European Political Identity, Legitimacy and Democratic Governance: Turkey's EU Membership as the Ultimate Test Case", 2005, http://jeanmonnetprogram.org/papers/05/050901.pdf, pp.10-13.

[133] Ian Ward, "Beyond Constitutionalism: The Search for a European Political Imagination", European Law Journal, Vol.7, no.1, March 2001, p.27.

Constitutional Treaty (the next section covers the innovations) and such watersheds as Nice have provided for the legitimization of the EU institutional structure. Thus, the problem of the absence of a Europe wide demos is not tied to an after the fact creation of a demos but is born of the problem that the EU never had a 'demos' to begin with[134]. European integration has transferred certain state functions to the Union; however, this has not been reciprocated in the redrawing of political boundaries which could be made possible only on the condition that a European people exist. According to the no demos theory this has not occurred, and thus, the Union cannot have 'demos-cratic' authority or legitimacy. The empowerment of the EP is no solution because it effectively weakens the Council which is the Voice of the Member States. Further yet the European Electorate is not well informed, for example the "Future European Constitution" Flash Eurobarometer of 2004 remarked "…the citizens of the European Union continue to consider that they are poorly informed about the European Constitution[135], while previously the "Convention of on the Future of Europe Flash Eurobarometer" in 2003 reported that 55% of those polled had not even heard of the Convention, and only 33% could identify the product of the Convention as a Constitutional Treaty and not a lesser text[136]. Those who are informed reluctantly accept the notion that the EU should govern areas in the public social sphere in reference to their 'national' minority in the greater polity. In this sense the Voice of the Member States becomes the Voice of Brussels leaving the people's Voice out of the equation due to the fundamental development of the democracy deficit. Thus, the European electorate perceives the decisions taken by the EP or the Council as equally belonging to the EU Voice. To put it simply; the average

[134] Miguel Poiares Maduro, How Constitutional can the European Union Be? The tension Between Intergovernmentalism and Constitutionalism in the European Union, in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-18.html., p.21.

[135] Flash Eurobarometer, Future Constitution, No. 159/2, TNS Sofres / EOS Gallup Europe, June – July 2004. http://ec.europa.eu/comm/public_opinion/flash/fl159_fut_cons.pdf, p.41.

[136] Flash Eurobarometer, Convention, No. 142, TNS Sofres / EOS Gallup Europe, June – July 2003. http://ec.europa.eu/comm/public_opinion/flash/fl149_convention.pdf, p.62.

citizen as part of the Member State minority within the Union does not see Brussels as socially legitimate[137]. What was the *telos* of European integration? Was it not 'an ever closer union among the peoples of Europe'? The idea that a single demos of Europe could be created is contradictory to the integrative constitutionalization process of the EU as a means to achieve a union of (the different) peoples of Europe[138]. The normative legitimation of this constitutionalism however, requires the demos, which would effectively negate the telos of the Union as expressed in the above mentioned quotation. The paradox stems from the fact that when trying to address legitimacy in the EU via the basic democratic prerequisites the formation of a demos is nonnegotiable. This however, leads to the melding together of the peoples of Europe into a whole; a *pouvior constituent* which in effect destroys the concept of a closer union among peoples. The transformation of the primarily economic community; the EC into a thicker supranational regime; the EU via the process that began in Maastricht in 1991 and continued through the Treaty of Amsterdam lead the expansion of the Unions competences into the political, social, and moral issues that had been previously dealt with at the Member State level. These events effectively politicized the EU and brought forth the issue of legitimacy. While the belief that the democratic deficit can only be sealed via the formation of a European demos it is also negated when referring to the paradox between the telos of the EU and the finality the no demos theory brings to it. It should be noted that the aim of achieving an 'economic and social cohesion and solidarity among the Member States' as put forth by the EC Treaty (Article 2) is still a demos building mandate. The European Constitution was designed to serve a symbolic social integration function so as to achieve a higher level of social cohesiveness in the supranational

[137] Joseph H. H. Weiler, "*Transformation of Europe", Yale Law Journal*, Vol. 100, 1991, p.2472.

[138] Joseph H. H. Weiler, "*The Reformation of European Constitutionalism*", Journal of Common Market Studies, Vol. 35, No. 1, 1997, p.117.

European polity[139]. So why has the need forge a social facet to the economic integration of the Union become so important thirteen years after Maastricht?

Maastricht was the table on which the concerns about the legitimacy first appeared; this can be seen empirically by gauging the reactions to the Treaty on European Union. The governments within the Council surrounded by the EU mechanism had until this point assumed the "permissive consensus" of the European public in regards to further integration. "Permissive consensus" is the terminology used to describe the creation of a European polity by the European elite without requiring the consent of their voters[140]. The popular reception of the Treaty proved that the people were tired of being seen in the light of permissive consent. Referendums in Denmark, France, and Ireland caused deep public debate on the *finalite politique* and institutions of the Communities. The Treaty was rejected in Denmark (51% - 49%) in 1992 only to be accepted one year later on the promise of exemption from the single currency. In France the Treaty split political parties, similar to the events of the constitutional ratification process, and thus, barely passed referendum (51% - 49%). In the UK the Treaty passed grinding to ratification by 1993. These events effectively politicized the integration process. As a result governments realized the public opinion of their citizens had gone from "permissive consensus" to "acute awareness". After this period the falling turnout to EP[141] elections was also indicative of the need to attend to the problem of social illegitimacy. As a side note to the questionability of the "no demos" argument is that the legal constitutionalization of the EU has also been questioned; the Treaty of European Union was also reviewed by the

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[139] Ran Hirschl, *Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution,* in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-05.html., p.4.

[140] Karlheninz Neunreither, Antje Weiner, European Integration After Amsterdam, US: Oxford University Press, 2004, p.95.

[141] Susan Senior Nello, The European Union Economics, Politics and History, UK: Bell & Brian, 2005, p.47.

constitutional courts of Germany and Denmark. While the Treaty text was deemed compatible with the national constitutions in Germany the Court ruled that it would protect fundamental rights and review the actions of European institutions. This also meant that the sole competence to review EU institutions of ECJ was contested at the national level which alluded to the failure of the ECJ – national court contract that made the constitutionalization process possible. Also, the Court read that it the German Parliament's powers could not be transferred without limits and that the Union could not decide whether such transfers were necessary as provisioned by Article 235 (308 and now I-18). Finally on the social legitimacy topic the Court stated that the influence of the Member States' people must continue to be secured, either via national parliaments or by increasing EP influence on the EU level. The Danish issue was similar in that it also raised the transfer of competences issue and consented to it as long as it occurred to a limited extent[142].

Thus, the post Maastricht need to legitimize the Union due to the politization of integration under a *pouvior constituent* or a singular demos was in conflict with the mandate of 'an ever closer union among the peoples of Europe'. Creating one people out of many would contradict one of the most basic European ideals: inventing new ways and contexts which would enable distinct nations and states to thrive, interact and resolve their conflicts. The constitutional drive aspires to create a general European citizenry whose rights are guaranteed under the European Constitution. Is the Constitution also in conflict with the prime directive of the EU? Maybe not, if the conceptualization of the European citizen is taken in view according to the multiple demoi much like the concentric circles approach which groups countries into circles of nations that are similar in integrative willingness and readiness. This approach takes the feeling of belonging to a nation be it Germany or the UK and simultaneously adds a secondary level of association on the European level thus, one is German and European, a Scot and Britain and a

[142] Andreas Follesdal, "*Legitimacy Theories of the European Union*", 2003, http://www.arena.uio.no/publications/wp03_12.pdf., pp.3-4.

European. In this way a strong sense of organic-cultural identification and sense of belongingness to two or more demoi exists[143].

While the attempt to legitimize the EU due to the inherent democratic deficit has met with varying questions as to the meaning of the *finalite politique* of the integration process, the Constitutional Treaty still remains as an all inclusive text. This text sets out to answer the question of legitimacy that was posed to the European elites at the end of the politization process starting at Maastricht. The issue of the nonexistence of a European demos aside there is another problem with the drive to create a European Constitution. This problem arises in part from the democratic deficit, which lead to the gap between the formal and social legitimacy of the Union and in part it is based on the nonexistence of a constitutional moment. The constitutional moment concept portrays constitutional law making as a derivative of a large-scale political mobilization of vast numbers of citizens over a substantial period of time in turn leading to a constitutional transformation that genuinely reflects the demos' will. The concept of the constitutional moment was defined by Bruce Ackerman[144] who is a Professor of constitutional law and development at Yale University. When compared with the European example the apparent lack of a revolution or any type of "constitutional moment" is plain to see[145]. The constitutionalization of the law of the European polity were manufactured by the readings of the ECJ and as the Eurobarometer findings show there was never a 'large-scale political mobilization' of citizens over any period of time. The statistics speak for themselves: Eurobarometer 61 conducted in July 2004. This report asked respondents how much they knew

[143] Joseph H. H. Weiler, "The Reformation of European Constitutionalism", Journal of Common Market Studies, Vol. 35, No. 1, 1997, p.121.

[144] For further reading and a recap of the "constitutional moment" concept see: George Skouras, "*American Constitutionalism and Dualist Democracy*", ExpressO Preprint, Paper 561, 2005, http://law.bepress.com/cgi/viewcontent.cgi?article=2753&context=expresso, p.10-19.

[145] Ran Hirschl, *Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution,* in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-05.html., p.4-5.

about the EU, they were asked to give themselves a score out of 10, 10 the highest amount of knowledge, and 1 being very little. While 6% admitted that they knew nothing at all, about 70% of those polled gave themselves a failing grade of less than 5. The average for the whole of the polled nations was 4.48. Only 7% actually stated they were familiar with the EU. The picture gets starker when the actual questions are reviewed: 55% of the respondents believed that the EU was formed after world war I, 50% were not aware that the EP was directly elected, and one in five had never heard of the Commission or the ECJ[146]. As mentioned the facts speak for themselves. The main problem with the European constitutional project is that it has no "constitutional moment" in the eyes of the citizens that comprise it. The lack of knowledge of the EU and its function points to a detached socially illegitimate structure of sovereignty that works under a democratically deficient decision making process at the mercy of the European elites. Those "elites" have tried to make the EU more legitimate and transparent. However, all those efforts aside, including the innovations that were included in the constitutional text, the European elites had not taken into account that the whole concept of a constitution was not a step the EU, at least socially, was ready to take.

3.3 The Constitutional Treaty: Changes and Innovations

While the legitimacy issue will ultimately lead to the non-ratification of the Constitutional Treaty this does not change the fact that the text itself did a good job of addressing the democratic deficit of the EU. So in that light it will be appropriate to examine the changes and innovations presented by the constitution by assuming that the ratification process has met favorable finality.

[146] Summary of Eurobarometer 61 supplied by: John McCormick, *Understanding the European Union A Concise Introduction*, NY: Palgrave Macmillan, 2005, p. 136.

The EU in its new form will assume the identities of the EU and EC, the EU will work with the Constitution guaranteed by the Treaty. The binding nature of the Treaty will govern the coherence of acts and decisions taken in reference to the Constitution. On the legal front the European Court of Justice will interpret the Constitution of the Union not as a treaty text but as a viable constitution. Considering that as evidence presents, this constitutional avenue aspires to a grassroots change in the perceptions of what European Union is ideologically, it is important to understand the inner workings of what the constitution proposes to do to the European infrastructure. This work will attempt a run through of what the Constitutions is comprised of and what the Constitution will attempt to change as far the institutions of the EU are concerned. Let us start with the form of the Constitutional text itself. The Constitution is comprised of 447 articles four parts, add to this sum are the protocols and annexes (which cover special issues). The protocols I and II deal with the role of National Parliaments and deals with the applicability of the principles of subsidiarity and proportionality[147]. The latter points deal with the retroactive compatibility of laws. Of the overwhelming 447 articles the first sixty articles comprise of the main idea of the Constitutional text, these articles are classified under Part I[148]. Part II deals with The Charter of Rights which weighs in at fifty four articles; this section deals with the limitations of the powers of the institutions of the EU in lieu of its European citizenry[149].

Now let us look at these two parts in selective detail. Part I: This section starts by presenting the definition and the objectives of the Union. Article I-1 covers the establishment of the Union; it states that the Union was established by both: citizens and states, that Member States confer competences to the Union and that

[147] Subsidiarity refers to the limitation of the EU powers to only its areas of competence, while Proportionality references that the EU can act only to the extent need to complete its objectives and not exceed its scope of competence.

[148] For a more in-depth analysis see Part III.

[149] The second part of the Constitution remains outside the scope of this text. For further reading please consult the link to the Draft European Constitution.

it is open to all European States sharing its values. Article I-2 tackles the Values of the Union which are promptly listed as human dignity, freedom, liberty, democracy, equality, rule of law, human rights, and rights of minorities. Article I-3 recaps the Objectives of the Union; these are listed in the text as promotion of peace, its values and well being of its people. It continues to offer its citizens justice, security and the guarantee of no internal frontiers along side an internal market with free competition. These opening articles are interesting in that they fail to explain who qualifies as being "all European States sharing its values", which raises questions as to the boundaries of Europe[150]. Article I-4 issues the four freedoms; the free movement of persons, services, goods, and capital, along side the freedom of establishment and a nondiscrimination clause. Article I-5 denotes the relations between the Union and the Member States; the equality of the Member States before the constitution and that national identities shall be respected, the obligation of Member States to assist the Union in implementing its laws, the pledge of the Member State to fulfill Union obligations, also that in no way shall Member states jeopardize Union objectives. Article I-6 deals with Union law, the primacy of which is stated in the document but disputed in the real political environment of the EU as mentioned German and Danish constitutional court rulings. Article I-7 tackles the issue of the legal personality of the Union which in effect does away with the pillar system. Article I-8 identifies the symbols of the Union; a flag, an anthem, a motto, a currency and a designated day to celebrate Europe. This is again an attempt at identity building and the creation of a "we the people of Europe" feeling which as covered in the previous section is not feasible due to the necessary absence of a Europe wide demos. The next two Articles which are; I-9 and I-10 deal with fundamental rights and EU citizenship. Which promise to adhere to the European Convention on Fundamental Rights without affecting the primacy of EU law and cover the issues of dual citizenship, the rights and duties of EU citizens, and a language clause which guarantees the

[150] Bonde, Jens-Peter. The Constitution: The Reader-Friendly Edition, http://en.euabc.com/upload/rfConstitution_en.pdf, 2005. Referred to as: Bonde, Jens-Peter. The Constitution: The Reader-Friendly Edition here forth.

equal usage of all EU languages and states using any EU language will receive an answer in that language throughout the institutions of the EU[151]. When taking in to account the coverage of Article 1-9 there is a question that needs to be asked; would not the potential to create a multiplicity of sources for fundamental rights of citizen and non-citizens exist and would this not cause loop holes in which parties could argue infringement of rights when left between the choices of the European Charter of Rights and those presented in Part III of the draft[152]?

Until this point all of these articles were involved with general statements on the nature of the EU and direct statements about issues that involve citizen rights and obligations. These are the most accessible parts of the Constitution to your average citizen; issues raised about the complicated nature of the document would have to be taken in reference to the text as a whole. As mentioned earlier these statements are not much different than the pre-constitutional structure of the EU; however, the issue of the interpretation of the document remains important.

Now to further fortify our acquaintance with the changes brought forth by the Constitution this work will provide an overview of various significant changes proposed by the Treaty. The evolution of the integrative process which achieved its constitutionalization during the earlier manifestations of the EU through the convergence of the Member States into a united polity which created a pre-federal base on which to surmount a constitutional document. This organization of Member States which respectively deferring limited sovereignty to a larger network of institutions with federalist and intergovernmentalist tendencies still retained their own unique societies, cultures and political infrastructures. The main aim of this move is to unite the Union as one legal entity, to achieve this it takes the founding treaties and subjects them to a major overhaul by removing and replacing the current set of Treaties that were part of the EC and the EU. The

[151] Bonde, Jens-Peter. The Constitution: The Reader-Friendly Edition

[152] Jo Shaw, "Legal and Political Sources of the European Constitution", Northern Ireland Legal Quarterly, Vol. 55, 2004, http://www.law.ed.ac.uk/staff/joshaw_88.aspx, p.7.

legislative and legal procedures of the EU are also refined and fine tuned. Finally the Constitution aspires to provide more for Europe in terms of a joint foreign policy, security and defense.

The issue of European competences is defined through articles I-11, I-12 in which as mentioned earlier; EU law receives primacy. To expand this issue it should be noted that while the EU retains jurisdiction in some areas as delegated by the Member States; these areas of competence are solely the realm of the EU thus, these areas require the permission of the EU body to be legislated upon by the Member States themselves. In most areas shared competence is still practiced and Member States may legislate to an extent the EU cannot[153]. Article I-15 covers the issue of the coordination of economic activity and employment policies via the EU. The Common Foreign and Security Policy along side the needs of European defense are outlined in Article I- 16. The supporting role of the EU technical machine is also incorporated in places the Member States might require assistance (Article I-17). The flexible EU competence issue is covered by allowing actions to be taken outside of dictated EU ability by the EP and the Council to be able to deal with issues that require Union wide action (Article I-18)[154]. This 'rubber clause' is the updated version of Article 308 of the Treaty of European Union and Article 235 under the Treaty of Rome.

One of the main incentives for the need to have an all encompassing document and the overhaul that it brings to the structure of the EU is ,according to some, largely based on the widening of the Union to 25 members, this should not be overlooked. Although statements have been made on both sides of the court, where some scholars believe that the expansion is simply a numbers game and that the new members were still entering the old EU even if the Draft had been completed before the accession date of May 1st 2004, and that nonetheless both

[153] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.20.

[154] Bonde, Jens-Peter. The Constitution: The Reader-Friendly Edition

pre-post- constitutional systems are based on the political expectations[155] of the Member States and the European political elites. However, as mentioned earlier the rushed Convention and IGC calendar attests to the fact that the Euro elites were cramming to get the Constitutional Treaty adopted before the large scale accession.

How does the Treaty deal with the institutions of the EU? The European Council which seats the cream of the crop of Europe; the heads of state and governments of the Member States, accompanied by the head of the Commission is in charge of managing the agendas of the other EU institutions. Under the Constitution the European Council receives a new president[156] who chairs its meeting and is elected every two and a half years (Article I-21). The Council of Ministers (or Council of the European Union) is the representative body that caters to the Member States governments as an extension of their executive branches. Nine layers cover the breadth of the policy areas; representation of which is on the ministerial level. The Council shares legislative and budgetary powers with the Parliament but takes the lead in economic policies. The old rotating presidency system still exists with the exception of the External Relations Council which is chaired by the European Minister of Foreign Affairs. Along side these adjustments the Constitution requests the Council meet in public to add to its legitimacy and transparency (Article I-24).

The European Parliament whose influence had been steadily growing even before the Constitution was on the agenda; now has even more powers allotted to it. The introduction of an expanded co-decision procedure as mentioned gives the Council and the EP control over legislative and budgetary issues. The Constitution limits the membership of the EP to 750 seats which are proportionally set by the Member States populations. This issue causes a deficit of proportional

[155] Vilenas Vadapalas, "EU Constitutional Treaty in the Context of Enlargement", www.ecln.net/elements/conferences/booklisbon/vadapalas.pdf, 2003, p.113.

[156] Sometimes referred to as the 'Presidency of the European Union'.

representation due the fixed amount of seats allotted to the Members of the European Parliament (MEP's) representing the interests of a dynamic pool of diverse states that are now included in the EP. The reduction in minor party seats reduces the chance of consensus style politics in the EP. Thus, the EP is destined to resemble a majoritarian legislative chamber much like the US House of Representatives rather than the multiparty structure of the continental national parliaments. Majoritarian grouping has occurred in favor of the right-of-center EPP-ED (the European Peoples Party and European Democrats) coalition with the PES (Party of European Socialists) led left-of-center Party Groups forming the opposition, this leaves the ELDR (European Liberal Democrat and Reform Group) as the holder of the balance of power. If the number of MEP's aligned to smaller Party Groups falls this will result in the dissolution of these groups as provisioned by the EP guidelines which means either there will be more independents or growth in the numbers of the primary party and its opposition. What this effectively means is that there will be less cumulative representation of the interests of varied European citizen interests which is not a favorable end to the stake of legitimizing the EP[157]. Also, when the proportional representation system was unveiled the debate was elevated; the Constitution states that no nation can have less than six or greater that ninety six seats which would mean smaller states and minority political groups would be greatly marginalized in terms of representation while trans-community parties would easily control the floor as seen above. Elections to the EP come from the pool of EU citizenry to a term of five years; Article I-20 foresees the implementation of this procedure before the Parliamentary elections of 2009 (now a distant possibility as we will discover in the following chapter).

The watch dog of the founding Treaties, the Commission also receives its share of adjustments under the new Constitutional EU. As the firing pin of the European legislative process the EP and the Council look to it to provide them with

[157] Natalie Mast, "Squeezing the Minor Parties: EU Expansion and the New Rules in the European Parliament", http:/www.europeananalysis.com/research/mast1.pdf, p.5.

initiatives to follow. The Commission is very much in tune with national governments and thus, manages budgets and EU policies after all the Member States are still the masters of the Treaty. Under the Constitution the Commissioners are allotted one per Member State (it was two for the larger ones in the past), 2014 will see a fixed number of Commissioners which are to be 2/3 the number of Member States. Of course the system will incorporate a rotational system to include the diverse EU (Article I-26). Another new introduction to the Commission is the European Foreign Minister who will sit as the vice-president of the Commission and will coordinate international relations functions. The European Court of Justice (ECJ) is the prime institution for the reference of EU law; and thus, its jurisdiction on inter-member disputes, EU – Member State disputes, intra- EU institution disputes, disputes between private individuals, companies, and EU institutions will continue to function. The Constitution allows for greater ease for individuals or businesses to bring cases to the ECJ concerning EU regulatory acts. This decision was in no doubt aided by the court decisions of Germany and Denmark regarding the flexibility provisions of Article I-18. It is possible to make the assumption that the ECJ – national court contract forged in the constitutionalising foundational period of the EU has suffered in the modern setting due to the way the expansion of Union jurisdiction allowed the supranational proponents of the Union to come to the fore thus, institutionalizing the democratic deficit in the EU. Now as a reaction the national courts have taken the mantle of bringing the institutional structure of the back into the realm of direct popular accountability.

Now that we have covered some basic changes the constitution brings to the EU structure lets see if we can uncover what further adjustment it brings to issues such as the EU legislative process, democratic rights and citizen's rights. The constitution aims to reinforce the concept of dual legitimacy in the workings of the Parliament and the Council of Ministers this way legislation which is carried over from the Commission receives the attention of both the citizens of Europe, as defined by the constitution, via the EP and the views of the Member States due to

the involvement of the Council. Parliamentary voting today occurs via majority voting, the Council sets it voting by qualified majority which instills weighted votes according to population; for example France receives 29 while Malta receives 3. The qualified factor comes in when of the possible 321 total votes 232 vote come in supporting the decision. The Constitutive process however, is a bit different; it employs a concept known as double majority voting. This system requires fifty five percent of the Member States to vote in favor of any given decision and must not have less then fifteen states involved. The outcome must represent sixty five percent of the total EU population (Article I-25). As mentioned earlier in chapter two blocking such moves may seem easy if the three largest states banded together to halt a decision, but foreseeing such a probability the provision that at least four states must proceed to block a decision was brought. If however, only ¾ of the total population or three Member States opposed a decision then they would be allowed to postpone the Councils move to action. The QMV field is one area the Constitution has taken to greater prominence in the hopes that instances such as the empty chair crisis do not hinder EU action in the future thus, solidifying a conscience shift to the supranational decision making seen in the first half of the foundational period. This act has much to do with the Loyalty of the Member States in terms of the Exit, Voice, and Loyalty paradigm. The fact that the Member States conceded the veto and the unanimity vote in more and more policy areas over the span of European integration shows that the effects of Eurosclerosis when compared to the prospect of formal Exit led the European elites to embrace the integrative process. The reasons behind the formulation of a constitutional finality of the EU also adhere to this Loyalty to the integrative process. However, the failure of the ratification process might prove that the European elites were too optimistic in their appraisal of the readiness of the confederal EU, which was still suffering from the natural democratic deficit of a pre-federal order, to take the next structural step.

The democratic deficit has always been a thorn in the EU's side. The main issue is centered on terms like; transparency and accountability, transparency in terms of

the legislative arm as we have witnessed above, and the accountability of the law-makers and other decision makers. The whole constitutional system was designed as a blue print for a system of government that could, if exercised properly, create an efficient European democracy, although this would not be "…*constructive rationalism* as though it were possible to cure all human ills according to a perfectly designed blueprint imagined out of nothing"[158]. While questions on how efficient the legislative system proposed by the Constitutional text remains yet to be tried and tested the real issue of what a democracy is and how it applies to the Europe of today remains an issue worth mentioning. The democratic legitimacy or social legitimacy of the EU has been an issue the European elites have been trying to address and in the Constitutional Treaty they seem to have made some headway. However, the paradox of the creation of a European cumulative demos and the prime directive of 'an ever closer union among the peoples of Europe' creates the need to find another way to define the constitutional stake of the EU. As mentioned it was the lack of a "constitutional moment" that makes the European constitutional drive a project of the European elites. How can the lack of a "constitutional moment" be circumvented and an after the fact constitutional loyalty be created? Firstly as mentioned, the multiple demoi approach to the idea of a pan-European citizenry creates a diluted "we feeling" for the citizens of the EU Member States. Secondly, these multiple demoi that associate themselves to a degree with a European unitary whole could, if allowed the time, develop a 'constitutional patriotism'[159]. The mutual bonds that create a loyalty base that spans the common boundaries of the loyalty arch of societies today and in the past; can come from a higher authority. For 13 years the European project has been trying to forge this understanding and although the fight seems to continue today it would not be far fetched to believe that a constitutionally unified Europe is not a figment of fiction. The patriotism mentioned could be mustered if the

[158] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.51.

[159] Constitutional patriotism is a concept associated with the German philosopher Jürgen Habermas. According to the principle of constitutional patriotism, citizenship should rely on a shared sense of values rather than a common history or ethnic origin.

Constitutional process establishes itself, not as a regional super-state but as a "country called Europe"[160]. To create this sort of legitimacy base in addition to the socially legitimizing steps they have taken, the fathers of the Constitution, as we have seen, upped the stakes in terms of the ultimate accolade in direct legislative participation; the principal of *participatory democracy* a provision that creates a mechanism that allows direct legislative impetus from the European citizen. One million European citizens may submit a proposal to the Commission on matters pertaining to legal acts that will help implement the Constitution (Article I-47). One aspect of this new freedom is that the one million citizens have to come from a minimum set number of Member States. The article states that European laws will determine this number but is ambiguous as to the exact number. Nonetheless this article can be shown as an exemplary act of boosting the social legitimacy of the EU.

The subject of transparency has also been surmounted throughout the Constitutional text; one such move opens the channels to civil society – institution dialogue, by which citizens and civil organizations are to be consulted when policies are being developed (Article I-47). An "Early Warning" system has been introduced that allows national parliaments to monitor the Commission, and deem if any given proposal or action is within the scope of the EU or within the competence of the national, regional or local authorities. This is actually related to the concept of subsidiarity; although the debate on the ills of an over-centralized system has been voiced numerous times, this work will try to recap the idea in relation to the Constitution and the way it applies to the EU. One thing that steps out in the EU realm of the issue of subsidiarity is that the Unions institutions and the Member States themselves share competences and have mutual responsibility over Union activity. On the Member State side some competences fall under the authority of constitutionally empowered regions or on some issues the local authorities have authority. This is based on Catholic Moral theory, and when

[160] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, pp.47-49.

adapted to the governmental level allows for governments to only intervene in events that are beyond the capacity of the local authorities. Thus, it envisions every separate body dealing with issues under their own general scope and competence; from the macro system such as the government to the micro system of the family unit. Community law adopted this idea in Maastricht[161] and has made its way to the Constitution in Article I-11. The argument against this concept mainly comes from the federalist school because they regard the subsidiarity principal as a way of procrastinating; European level institutions might shy away from their duties, however, some also point out that subsidiarity does not necessarily have to be seen in this way, it could also be seen as a division of levels of government; European, national, and regional[162].

As far as individual institutional responsibility to the concept of subsidiarity is concerned the Constitution provisions that the Commission, the Council, the EP and the Member States must make sure that any bills not in tune with the principal are not be submitted or proposed. The system by which this is guaranteed is very meticulous indeed. The authority that brings forth such a bill must provide pre-legislative consultation and take into account any regional or local dimensions to the proposed act, and then it must attach a report on the subsidiarity to make the Constitutional appraisal of the act[163]. Another topic questioned under the current EU system is the accountability issue. One aspect of the Constitutions reforms of the Treaties has been some what viewed as icing on the cake. The truth of the matter is there is a spot in the EU hierarchy that has been reserved for a President of the European Commission. This position is sort of the mantle on which the achievement and laurels of the Union can be placed, a symbol of the success of

[161] Also, known as the Treaty on European Union, there was a passing reference to the concept in the SEA.

[162] Jones, Robert A., *The Politics and Economics of the European Union,* UK: Edward Elgar Publishing Limited, 1996, p. 51.

[163] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.64.

the Constitutional project and a figure head for a European identity. The European Council can make the nomination for a President of the Commission who in turn is deemed worthy by the Parliament. The President then creates a list of nominee Commissioners who are given consent by yet again the EP. The legitimacy of all of the institutions will receive a boost due to the sheer political will behind the task of electing such an individual by consensus. However, the Constitution it would seem has been gracious with its presidential appointments; the European Council also has a president (mentioned above), this individual might actually be the cause of much confusion among citizens and those looking to understand the structure of the EU; considering that this position is widely regarded as the replacement for the rotating presidency system[164]. Albeit the presidency of the European Council has fewer powers than the Commission's, nonetheless it is an important post. The merger of these two posts is also a way to clear up any possible confusion, however, the issue of the accountability of executive officers comes firstly from having someone in a role that authenticates the institution they reside over, it seems that the attempt to bestow the title of president of x or y is an attempt made by the EU to shed its image of a cold calculating technocratic 'evil empire' in the eyes of its constituency.

On this note one officer in the ranks of the EU deserves final and special mention; the Union Minister of Foreign Affairs (UMFA). This special minister who sits as the vice-president of the Commission will directly be in charge of European Common Foreign and Security Policy (CFSP), as an extension of this role the minister will be the public face of the Union in international affairs. This post will reside over the Foreign Affairs Council and essentially is a merger of the Council's High Representative for Common Foreign Security Policy and the European Commissioner responsible for External Relations. The office of the UMFA is legitimized by the fact that it is in charge of carrying out the Council of

[164] George Pagoulatos, Spyros Blavoukos, Dimitris Bourantonis, "Continuity *and Change in the post-Constitution EU Presidency: A New Actor in Town?*" 2005, http://aei.pitt.edu/3085/01/EUSA_Presidency_Paper_Final.pdf, p.2-3.

Ministers mandates on foreign policy (Article I-28) who must make such decisions via unanimity vote (Article III-300). This dual hat role of the UMFA creates ambiguity as to the political responsibility of the UMFA which would cause a degree of suspicion from both the Commission and the Council as to the UMFA being a "Trojan Horse" sent from the other institution. Nonetheless the UMFA does supply the EU with a new international face and allows for the preparation of a cohesive international perspective for the Union[165].

There is a link between the process of integration and the constitutional apex we have covered in this chapter. Each of the amendments and new concepts the Constitution is trying to introduce aims to do one thing; putting less distance between the Unions core and its peripheries, these could be the Member States or a private citizen. The fear of the term 'constitution', the ramifications of which will become very apparent in the next chapter, seems to fuel the misconception that constitutions are texts that solemnly swear to ideals such as the separation of powers, declarations of rights, etc. while in real terms they provide no guarantee that anyone will up hold these ideals[166]. However, in the European context the real issue at hand isn't whether the proposed constitution is trying to dupe the demos with a façade of democratic transparency but whether or not the text at hand is a formal or functional constitution, although it ought not to be overlooked that a functional constitution would be preferable to a dysfunctional formal document[167]. In fact the lack of civil understanding of what the European Constitution means for the EU makes the distinction between formal and functional so apparent. The European case aspires to both; the underling informal constitution has existed within the treaties as interpreted by the ECJ, and the Treaty Establishing a

[165] Wolfgang Wessels, A 'Saut constitutionnel' out of an intergovernmental trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security, and Defense Policy, in Weiler and Eisgruber, eds., Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, http://www.jeanmonnetprogram.org/papers/04/040501-17.html., p.20.

[166] This conception leans heavily towards the British school of constitution bashing.

[167] Neil MacCormick, *Who's Afraid of a European Constitution,* UK: Imprint Academic, 2005, p.45.

Constitution for Europe meted out in session after session at the Convention and IGC presents a unique opportunity to embrace a formal constitutional document 50 years in the making, albeit under the federal constitutional – confederal intergovernmental axis between the ECJ and the Member States helmed by the European elites. The task that remains, there is still hope as we will see in the following chapter, is one of taking the opportunity to unify these two constitutional outlines in the frame work of a unique European Union experience; in the form of constitutional legitimacy for a Union that exhibits federalist, confederationist, supranational and intergovernmentalist tendencies.

The major issues as described in this chapter revolve around the conception of the constitutional drive as a project of the European elite. The foundation for this conception is based in the foundational era constitutionalization of the treaties by the ECJ who by doing so necessitated the increase in Voice of the Member States in order to escape the closure of selective Exit and the practical non-existence of formal Exit. This enhanced use of Voice created the lag between the formal legitimacy of the integrative process in regards to the social legitimacy of the European construct as a whole. The expansion of jurisdictional powers that ensued after the threatening and disruptive events that caused Eurosclerosis institutionalized the democratic deficit. The fact that the European construct allowed the executive branches of their respective governments to function without direct accountability to their national parliaments allowed the legitimacy gap to further increase. The intergovernmentalist Member States at this point had reached a point of Loyalty to the integrative process due to the consistent use of enhanced Voice throughout the developmental stage. Thus, when the Treaty on European Union came about they were already aware of the need for more supranational competence in certain EU policies. The ground work had been prepared in that the use of the majority vote allowed quicker integrative action. At this point a distinction should be made: it was this Loyalty to the integrative process and the European construct that bore forth the European elites. These Elites took notice of the lag in popular legitimacy during the ratification problems

of the TEU and the following national court rulings. It was at this time the idea to fortify the legitimacy of the EU was conceived and to do so in the context of a possible constitutional settlement. The creation of an EU wide "citizenship" and the preceding symbols of the European Union a flag, an anthem, a Europe day all were consummated in this Constitutional text as a foundation for a "we" feeling in European the creation of a European demos. However, as expressed the creation of a European Demos creates a paradox in that it negates the 'an ever closer union among the peoples of Europe' statement, the EU should not aspire to create unitary citizen of the EU. Thus, the choices are presented by the motto of the EU under the constitution "united in diversity". By making the statement that "via the EU, Europeans are united in working together for peace and prosperity, and that the many different cultures, traditions, and languages in Europe are a positive asset for the continent[168]" the Euro elites also recognize the need to implement a multiple demoi approach to creating a pan-European identity. This way they will allow for the possibility of a constitutional patriotism to unite the peoples of Europe in the absence of a constitutional moment.

The next chapter will set the technical stage to understanding the failure of the ratification process of the constitutional treaty.

[168] The official site of the symbols of the EU: http://europa.eu/abc/symbols/motto/index_en.htm

CHAPTER 4

THE FAILURE OF THE RATIFICATION PROCESS

The European Constitutional stake passed the political tribulations of firstly being an idea legitimized by the famous speech by the German Foreign Minister Joschka Fisher[169], which was contested at first, and later as the idea gained momentum; snowballed into an acceptable idea for the future *finalite politique* of the EU in the realm of the European elites. It followed the trail leading it from the Laeken Summit to the European Convention that gave it its draft form, held its breath past the failed European Summit of 2003, and finally was signed by the heads of state that had reluctantly warmed to the idea in the IGC in October 2004. Current events tell us this was the easy part; at this point what remained was the Herculean task of garnering the approval of the people of Europe. Also, due to the nature of the Constitution itself, the fact that it is in treaty form requires that it be dealt with via the ratification of the text under the scrutiny of each Member States' constitutional process. This type of popular support can only come through parliamentary vote or popular consent in terms of the will of the people. While some States chose the latter; some, or the ones that truly count, as it will become apparent, opted for the referendum route. In this way they paved the way for the failure of the Constitution at the door step of possible public acceptance. There is one question that needs to be asked; why were the ideals reached during the "deeper wider debate" not enough to convince the public of the joint will for a Constitution for Europe? What upset the citizens of the European Member States

[169] Joschka Fisher, "From Confederation to Federation – Thoughts on the finality of European integration", speech at Humboldt University Berlin, May 12, 2000, http://www.policybrief.org/PPNdelors/Report/Joschka%20Fischer.pdf.

to the point of unquestionable rejection of the Constitutional Treaty? In this chapter we will cover the issue of what went wrong with the Constitutional ideal of the European Union in two parts, firstly we will deal with how the veto's came to be and what the European playing field looked like leading up to that point in the technical sense, secondly in part II starting from section 4.2 we will take a look at the 'why' of the Constitutional failure at the hands of the public referenda process after the fateful 'no' vetoes submitted by France and the Netherlands.

4.1 A Rocky Road

Let us examine where all of the Member States involved in the process stood prior to the dismal events that are the topic of part II: section 4.3. At the onset, the conditions surrounding the ratification process were varied from state to state within the Union. The high stakes at this point revolved around the diversity of the European pallet and the fact that the process was not fortified to handle a veto from anyone. The ever popular 'opt-outs' that saved face on issues such as EMU in the past would not be possible at this point. The double-majority voting system, a hallmark of the Constitution, makes this problem apparent; either all ratify or none do at the end game[170]. Taking a moment to remember the investment made, it is not difficult to surmise what the damage to the integrative process and the European elite driven constitutional project would be. The weight behind the success of the Constitutional project was seen by most as a testament to the growth of the EU into a unified regional power, the fact that they had grossly under estimated the building resentment of the integrative flow made the architects of the Constitutional drive blind to the possibility that an 'ever closer union' might just be too close for comfort. As we cover the ratification process the probability behind the pre- and post- veto situation becomes quite interesting. To handle the before and after evaluation of the ratification process two separate documents will be used, the first a survey conducted by the European Policy

[170] EPIN, 2005, p.2, please see next foot note for full title of work cited.

Institutes Network[171] covering the views of national experts, the second a research paper submitted to the House of Commons Library[172]. Each presents a view of events falling right before and right after the May and June vetoes of France and the Netherlands respectively.

In January 2005 the outlook on the ratification process of the Treaty Establishing a Constitution for Europe seemed quite plausible in that there was still hope. At this point Lithuania, Hungary, and Slovenia had already ratified the Treaty. Austria, Belgium, Cyprus, Estonia, Finland, Germany, Greece, Italy, Latvia, Luxembourg, Malta, Portugal, Slovakia, Spain, and Sweden were regarded as highly likely to ratify the Constitution. France, Ireland, the Netherlands, Denmark, were all in the rather likely to ratify pile. The Czech Republic and Poland were unsure. Finally the UK the classic heel dragger of European integration was regarded as rather unlikely to ratify the Constitution[173]. The three countries that had ratified the text at this point had little fanfare over the issue and the whole affair was handled in a session of parliament with very few abstentions or counter votes. In projecting to the future the EPIN survey presumes that the division between possibly yes or possibly no is drawn at the choice between referendum and parliamentary consent; referendum being a choice for much unwanted suspense and the parliamentary route; a sure thing.

Austria, Cyprus, Germany, Greece, and Italy had very low opposition in their Parliaments while Malta, a case of special mention on this point, had an

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[171] Sebastian Kurpas, Marco Incerti, Justus Schonlau, "What Prospects for the European Constitutional Treaty: Monitoring the Ratification Debates: Results of an EPIN Survey of National Experts", 2005, http://www.epin.org/pdf/WP12-KurpasIncertiSchoenlau.pdf. Here forth referred to as EPIN, 2005. Also, note that table I found in the appendix provides a visual aid to the information presented.

[172] Vaughne Miller, "Future of the European Constitution", International Affairs and Defense Section, House of Commons Library, 2005, http://www.parliament.uk/commons/lib/research/rp2005/rp05-45.pdf. Also, note that table II found in the appendix provides a visual aid to the information presented.

[173] EPIN, 2005, p.3

opposition party which had forty eight percent of the parliamentary seats, which in January 2005 was still undecided on whether to vote for or against the Constitution. On the referenda spectrum according to EPIN only Luxembourg, Portugal, and Spain seem likely to vote in favor. Luxembourg had a history of strong support for the integrative process and the European Constitution which can be noted in Eurobarometer findings[174]. Spain is looked upon as a sure thing due to the major two parties being consolidated on the issue of the Constitution, as a side note Spain was the first to declare referendum and this was interpreted as a method of sending a strong signal for a positive outcome in other Member States. Portugal is the shakiest of the highly likely group at this time; according to EPIN the resignation of the Government in 2004 and the voiced ignorance of the public about EU issues raised certain doubts[175].

The next group in the survey is the rather likely group; it should be interesting to find out how they view the Netherlands and France. The EPIN has the Netherlands pegged as the most promising of the rather likely group; all of the signs point to the fact that it would seem so; starting with the national experts interviewed all voiced a strong commitment to the EU line, and the Eurobarometer findings rated the Netherlands above average in terms of consent[176]. Other striking statistics include the fifty percent consent among the general public and the eighty five percent favorability of the Constitutional plan among members of parliament. Next on the agenda is France; a special note on France is that the efforts of Valery Giscard d' Estaing and Jacques Chirac were both notable in the push for the document itself and the popularization of it. The French scene seemed a bit more timid due to a clash on the Constitution issue

[174] Eurobarometer, Public Opinion in the European Union, TNS Opinions & Social, No.62, December, 2004. http://ec.europa.eu/comm/public_opinion/achives/eb/eb62/eb62first_en.pdf. Here forth referred to as EB, 2004.

[175] EPIN, 2005, p.4.

[176] EB, 2004: The average during this time within the 25 members was 68%; the Netherlands came in at 73%.

between the two major parties; UMP (Union for a Popular Movement**)** and Parti Socialiste; although the disagreement had been handled (according to EPIN, but we will see the effects of party politics in France would affect the outcome of the referendum) it did not contribute to raising public support for the document. The French had two hang ups firstly the role of France within the EU and the accession of Turkey. EPIN projects correctly that the positive outcome of the French referendum, vaguely set at this point "before summer" would be dependent on if the government could maneuver around these two pressing issues[177]. The devotion of the Irish to the Constitution was covered in Chapter two, thus, it is not odd to find that support was actually quite high at this time; the Constitution had the support of the main political parties which covered eighty five percent of the constituency. Denmark according to EPIN; which referred to CATINET[178] who conducted research polls for a Danish radio station placed the favor rating for the Constitution at fifty four percent as of November 1st 2004. However, the Eurobarometer findings of this time also ranked Denmark as the most skeptical of all the Union Members with only forty four percent interest in the Constitution, also at this time positive impetus came from the formerly eurosceptic Socialist Peoples Party with 63.8 percent approval. EPIN points to the fact that the general elections that were scheduled to take place on February of 2005 might have an influence on the outcome of the referendum which was set for the end of 2005 or early 2006[179].

The two nations listed as unsure by EPIN present an interesting case because in real terms the ambiguity of only one of them remains in the aftermath of the veto crisis. The Polish stance was very eurosceptic before the funds started coming their way, as EPIN points out a CBOS poll carried out in November 2004 puts the pro-constitution votes at sixty eight percent. The Polish situation is further

[177] EPIN, 2005, pp.5 - 4.

[178] CATINET A/S – The Nordic Research Institute at http//:www.catinet.dk

[179] EPIN, 2005, p.5.

aggravated by low voter turnout which would make a twenty one percent against statistic[180] very threatening if voter turnout were to fall below fifty percent, contrary to this if voter turnout went above the fifty percent mark this would mean the Constitutional drive might benefit from such a display of public interest. EPIN puts the Czech Republic in an equally precarious situation; where voter turnout could influence the ease of which ratification can be attained. The Eurobarometer finding in the Czech Republic however put the approval rating at five percent lower than the EU average. EPIN predicts at this point that a later date for referendum could benefit from positive influence if other states were to ratify the Constitution before hand. Finally they look at the United Kingdom, who being in the not likely to ratify group by itself paints a bleak outlook from the word go. Hereditarily if the UK's stance on EU integrative action is anything to go by this does not come as a surprise, even British public opinion is very unsupportive of EU aspirations. A MORI[181] poll puts the support for the Constitution, under the heading of 'strongly support' at thirty one percent while the inverse of this caption 'strongly oppose' comes in at fifty percent. The Eurobarometer put the British at second to last place in regards to opposition to the Constitution in 2004; they were nineteen percent below the EU average at this time. The highly mobile political scene in the UK did not help either with the four largest parties at each others throats over the matter. EPIN projects that the British presidency to the EU might hold sway over any possible positive outcome on the Constitutional issue[182].

At this juncture this work would like to move on to the issues that are most disputed in these countries surrounding the EU and the Constitution it presents to the Member States. The continued use of the EPIN survey is beneficial to this study because not only does it provide statistical data to back up its claims it also

[180] CBOS http://www.cbos.pl/opinia/2004/11_2004.pdf

[181] MORI, "The Referendum Battle", September 2004, http://www.mori.com/polls/2004/fpc.shtml. The author has selectively incorporated the 'in favor' and 'oppose' sums into the statistics provided in the following sentence.

[182] EPIN, 2005, p.6.

issues a tally of which debated issue is more prominent within the Member States. Issues that are of prime importance can be listed as; the issue of membership and the possible threat of having to withdraw from the Union due to an absence of an opt-out clause, the issue of where European boundaries must be set, the economic benefits of being a Union Member, the role of Europe in the international arena and the evaluation of the European social model. The membership issue; according to the EPIN survey; eleven Member States use this argument as a pro-ratification reason, and in six states this line is used as an anti-constitution argument. The underling sentiment being that dissatisfaction with the Union itself is keeping public opinion about EU in the cool. The geographical limits of Europe argument; this is in reference to the possible accession of Turkey and other possible enlargements that threaten to dilute the Union, this line is used as an argument against ratification in twelve Member States while surprisingly as a pro-treaty line in Ireland, Cyprus and Greece. The Economic benefits debate takes hold on the positive scale in eleven Member States, while four reason that the 'benefit' economically of being a Member is more of a detriment[183]. The global role of the EU seems to be the only area in which the ideal of an EU as a global power is a grand selling point for the Constitution. The European social model and the coverage of the democracy deficit and the issue of transparency according to EPIN is a major positive trump card in seven states while Sweden and the UK believe that the Constitution has not provided enough in terms of the promises made at the Laeken Declaration, the Convention and the IGC that comprised the Constitution[184]. The text of the constitution also is the target of controversy via the realignment and adjustments it brings to the EU structure. The issue of the inclusion of the Charter of Fundamental Rights; which has been used as a positive campaigning tool in twelve of the fifteen Member States that took up this issue. Belgium maintains that the document is 'too limited'; while in the UK big business fears it will grant too many rights to unions. Next, maybe the most

[183] EPIN, 2005, p.15.

[184] EPIN, 2005, p.16.

ambitious modification of the Constitution; the issue of Common Foreign and Security Policy (CFSP) and the use of more QMV in EU affairs draw positive backing from ten Member States, while others are less inclined to take the QMV issue as a platform. The last two points are the mantle of the EU presidency (President of the Council) and the Union Minister of Foreign Affairs, the first might be feared by the UK skeptical always of any federalist icon, and the second issue, closely tied in with the CFSP is opposed by Ireland and yet again by the UK[185]. So the European scene is set and we have examined the ambiguity of the atmosphere circa January 2005. Now as we move on to part II; 4.2 and 4.3 we shall review the reality of the Constitutional disappointment.

4.2 The Union of Suspended Animation

May 29th 2005 was the date that brought the first crippling blow to the locomotive effect of the drive for a European Constitution started some four years earlier with the Laeken Declaration; the '*non*' vote had hardly ceased reverberating when the second blow a veritable *Coup De Grace*, according to some, came from the Dutch constituency on June 1st 2005. This came as a surprise to some but, it would be prudent to believe it wasn't unexpected. The aspirations of the Constitution were high indeed in fact some viewed the whole ordeal as a bit unnecessary[186]. The reasons for rejecting the Treaty Establishing a Constitution for Europe were chalked up to fears of the loss of the sovereignty of the nation state, issues of identity, issues relating to enlargement and the modifications brought by the Constitutional text, but it was not essentially the ideal of a constitution that received a no vote. French and Dutch proponents of the Constitution have pointed out that Turkey's possible accession, globalization, and just plain resentment for

[185] EPIN, 2005, p.18.

[186] Andrew Moravcsik, whose insight will come in handy in the final chapter, has made statements of this sort throughout his musings on the constitutional process.

national governments were also to blame[187]. Nonetheless the rejection of the Treaty by two founding Members was nothing to shake a stick at; in France the no vote was at fifty five percent, while in the Netherlands a high voter turn out had placed the rejection at sixty two percent.

The European technocratic elite were at a loss, the next step seemed impossible, how would Europe move on? Was the Constitution dead? It would seem so; the House of Commons Report states that the British government announced on June 6th 2005 that they were suspending the European Union Bill which aimed at allowing the Constitution legal authority in the UK and also setting up a referendum to ratify this move, effectively killing the Constitution in the UK. The report however, cannot project past June 13th 2005, which is an added bonus for this piece of research due to the insight it will present on the first shock of the events after the no votes. Before moving on to briefly coving the issues raised in the report a moment should be taken to add that the European Council meeting held on June 16th 2005 did happen to set an open ended final date for the Constitution, in that in extended the final date past November 2006. The atmosphere at the meeting was high strung and the statement made by the EU presidency of Luxembourg was that the ratification process would proceed as planed and that re-negotiation was out of the question. The House of Commons Report states that the Dutch vote was not binding and that the government could have taken the parliamentary route if they hadn't pledged to heed the referendum if the turnout was over thirty percent. This meant that the Dutch would have to wait it out and then revaluate the outcomes of the referenda in the remaining Member States. During this time Latvia voted favorable for the Constitution. The heads of the three main EU institutions Josep Borrell Fontelles of the EP, Jean-Claude Juncker of the Council and Jose Manuel Barroso of the Commission issued a joint statement stating that

[187] Kalypso Nicolaidis, "The Struggle for Europe", *Dissent*, Fall 2005, http://www.sant.ox.ac.uk/esc/knicolaidis/struggleEUrope.pdf, p.13

> …coming as it does from (France) a Member State that has been for the last fifty years one of the essential motors of the building or our common future (the out come deserved) a profound analysis (by French authorities and the EU institutions)[188]

The Dutch in this case also received a heavy handed statement from this group.

The House of Commons Report includes an after referendum map much like the EPIN survey; strikingly there are differences with what it projects and the reality of what the ratification process looks like today[189]. To recap dates of ratification lets start from Austria; as mentioned there was no referendum and the Treaty was accepted on May 25th 2005, in Belgium at the time of the House of Commons Report the regions had yet to ratify the Treaty, however, due to the federal strain in Belgium it is not a surprise to know the Treaty reached ratification on February 8th 2006, Cyprus ratified on June 30th 2005, the Czech Republic as mentioned in the EPIN survey was not a safe bet and in keeping with this projection; it still has yet to ratify the Treaty and the process has been postponed indefinitely, in Denmark at the time of the report the referendum was scheduled for September 27th 2005 however, this was not to be the case; the treaty was postponed indefinitely, Estonia was still up to deliver a verdict at the time of the report on May 5th 2005 but favorably ratification came on May 6th 2006, Finland is also a late comer who is set to ratify the Constitution on December 14th 2006, Germany ratified on May 27th 2005 with eighty one percent in favor[190], Greece ratified on April 19th 2005 with 268 votes in favor in the Parliament, Hungary ratified on December 20th 2004, Ireland was scheduled to ratify in October 2005 however, the process has been postponed indefinitely, Italy ratified on January 25th 2005,

[188] Declaration by Josep Borrell Fontelles, Jean-Claude Juncker and José Manuel Barroso following the results of the referendum in France on the Treaty establishing a Constitution for Europe, 29 05 2005, http://www.eu2005.lu/en/actualites/communiques/2005/05/29ref/index.html

[189] See tables I, II and III in the appendix.

[190] As of December 2006 the bill is still in Constitutional Court and on that account has not been signed by President Horst Koehler. However Merkel has commented that the 2007 German Presidency will most definitely bring the Constitution back on track in Europe.

Latvia ratified on June 2nd 2005, Lithuania ratified on June 2nd 2005, Luxembourg ratified on October 25th 2005, Malta ratified on schedule as projected by the report on July 6th 2005, Poland failed to take any decision on the matter and President Lech Kaczynski has commented that the ratification of the Treaty is highly unlikely, this is odd due to the fact that public opinion in Poland is in the high eighties in support of the Constitution[191], Portugal has postponed, Slovakia ratified on May 11th 2005, Slovenia ratified on February 1st 2005, Spain ratified in May 2005, Sweden postponed indefinitely, and finally the UK also postponed the ratification process indefinitely. So to take a look back at the EPIN report and cross reference it with the facts of the post 'no crisis' European agenda we can see that of the highly likely group of fifteen states only Portugal and Sweden have not yet made a decision on the Constitution, however, in the rather likely group of four states all four seem not to have fit the bill; Ireland and Denmark have postponed ratification while France and the Netherlands have decimated the Constitutional process. The unsure group has stayed unsure, while the UK has not stepped out of character[192]. The comparison of the survey and the report with today's reality paints a stark picture of the turmoil and unpredictability of the ratification process of the Constitutional Treaty, there is much to be said about the two major surprises that so to speak 'stole the show'.

4.3 Interpreting the Failure of the Ratification Process

The two sticks in the spokes of the wheel of integration in Europe; France and the Netherlands rejected the Treaty Establishing a Constitution for Europe through the popular legitimacy of their peoples. The will of their constituencies however, were anything but focused on the Constitutional text and the innovations it brought for Europe. Constituencies in the new realm of Europe after Maastricht are more aware about the changes in their political atmospheres. In France the

[191] "EU constitution: Where member states stand", http://news.bbc.co.uk/2/hi/europe/3954327.stm, 2006.

[192] See table III in the appendix.

ghastly unemployment rate which was above ten percent was by far the main reason for them to chastise their government, while in the Netherlands where the government wasn't all that popular, the EU was worse off because of the fact that the average citizen contributes more to the EU budget than in any other Member State. As a unifying factor they both had an inherent phobia of EU enlargement; mainly due to the influx of cheap labor and the out flux of investment. The 'no crisis' occurred regardless, along side the campaigners for a no vote there were campaigners for a yes vote, in fact it is hard to discern who is at fault; was it the lack of rallying ability on the yes front, perhaps. The European elites were sure of their abilities to get things done; had they not asked Denmark and Ireland to try again when they had rejected previous treaties[193]? Maybe eight years further on from Maastricht and four years since the declaration at Laeken had done more for the maturity of the citizenry of Europe in realizing that they were misinformed and ineffectively represented at the EU level. If the points of the Constitutional debate are taken into consideration more often than not the problematic issues do not tend to be based on the Constitutional reforms presented in the text but issues already existent in the treaties the Constitution strives to unite, such as the Single Market[194]. This fact points to the probability that by reinventing the Treaties of the EU under a new more comprehensive document, they might have just made it a target for the ire of all who mistrust or fear the EU mechanism as a whole. In effect the proponents of the Constitution might have dug themselves and the EU in to a trap. According to Andrew Moravcsik the only way to discern a lesson from this failure is to accept the short comings of trying to create a constitutional text with little legal or substantive justification, he continues to state that all of the innovations brought forth in the text could have been incorporated in to the existing Treaty structure over the five years the draft constitution took to

[193] Kalypso Nicolaidis, "The Struggle for Europe", *Dissent,* Fall 2005, http://www.sant.ox.ac.uk/esc/knicolaidis/struggleEUrope.pdf, p.13.

[194] Ibid, p.13.

implement[195]. This approach to the Constitutional aftermath is something the author of this work also subscribes to, it seems that the whole Constitutional process was a bit over ambitious, even reckless at points, looking into the future a Union leaning more towards the intergovernmentalist interpretation of Europe's integrative journey is highly likely.

When viewing the rise in public awareness since Maastricht the assumption that the citizens of the Member States are not well informed about the workings of the cohesive polity the EU aspires to forge. On the superficial level citizens have a single minded view of Brussels. This view sees it as a technocratic closed box that for some is working for the betterment of the whole and for others it a closed box that represents all that is wrong with top down authoritative governance. The key element here is the closed box analogy. The issue of the gap between the formal legitimacy and the social legitimacy of the EU is important in that it denotes that the European political elite understand the way in which the EU works and also understand its short comings. They have worked to bring the social legitimacy of the EU up to the level of its formal legitimacy since the first signs of civil unease with the growing EU came in 1992. However, the way in which they set about to do so by raising a "we" feeling was wrong in the first place. There is no need for a European demos. This is not only a theoretical statement but an empirical one when viewing the outcome of the ratification process. The people of Europe so deigned to be "united in diversity" under the new constitutional settlement still had not realized the subtle change in wording from the last European slogan 'an ever closer union among the peoples of Europe'. In effect both slogans imply the same thing; that all of the divergent peripheral Member States and their citizens define the EU, not the other way around. The change in wording however, points to the realization of this fact by the European elite. The belief that a constitution could be created on the basis of a *pouvior constituent* born from a unified European demos that came together at the Convention and established a

[195] Andrew Moravcsik, "What Can We Learn from the Collapse of the European Constitutional Project?", "*Politische Vierteljahresschrif",* forthcoming, 47:2, 2006, http://www.princeton.edu/~amoravcs/library/PVS04.pdf, p.219.

constitutional moment was a fallacy. The "how close is close enough" question has been answered; this upset is not the same as the usual ups and downs of the integrative process as covered in chapter two. This is something else, it is maybe as important as the constitutionalization process of the EU in the foundational period that established the European construct as a new order of international entity. This issue has to do with the perception and Voice of the peoples of Europe and their legitimate social stake in defining their version of Europe, which as it has come to pass, is not one that exists under an all encompassing Constitution for Europe.

The next chapter presents an outlook on the possible future awaiting the European constitutional drive and presents an assessment of the events covered in this chapter.

CHAPTER 5

REFLECTIONS ON INTEGRATION AND THE FUTURE OF THE CONSTITUTION

The fact that the constitutional process has been halted has given rise to many narratives declaring the document dead. Although some attempts have been made to find ways out of the dead end turn reached after the unfavorable vetoes, it would be wise to separate wishful thinking from the reality of the state of matters in the EU. From the legal perspective it is discernable that because a unanimous ratification has not been reached as of November 1st 2006 and the process has gone deeper into a 'period of reflection' a final agreement on the constitutional issue may have a long wait ahead of it. With the end of term for many of the European elites that put their efforts behind the constitutional project pending, such as Tony Blair and Jacques Chirac, it will be up to those who take up the mantel of leadership in their stead to continue with this process. Any possibility of a new page however, is severely clouded by the rising anti-constitution sentiment in the bureaucrats of states like Poland and political ambiguity in other more mature EU states such as Germany and Italy[196].

This concluding chapter will try to cover both sides of the argument against and for the continuation of the constitutional project in Europe. As this study explores the possibilities of European emergence into a constitutional state and the unfeasibility of this prospect, it has become possible to discern that there some

[196] Laurent Pech, "*Is the EU Constitution condemned to the dustbin of history?*", Taking the EU Seriously: Persistent but Misguided Constitutional Controversies, forthcoming 2006, http://jurist.law.pitt.edu/forumy/2006/07/future-of-eu-constitution-escaping.php, p.1.

fundamental ills that plague the constitutional process. The ideal of integration or over zealous integration has brought the EU face to face with the constitutional failure discussed in the earlier chapters of this work. As it stands in the aftermath of the failure to ratify the constitution; the aim set by the European elites at closing the gap between the formal legitimacy and the social legitimacy of the EU in an all inclusive constitutional text has met with a severe reaction from the citizens of the Member States of Europe. While the treaty form of the document does contribute to eliminating the social illegitimacy of the EU the constitutional connotation and the prerequisites that are required to meet such a document do not exist in the European context. As mentioned there is also the failed attempt at creating a vast European demos in order to achieve a constitutional moment which was aimed at by the Convention. This does not mean that the changes and innovations the Constitutional Treaty has brought to EU are reforms that should not be implemented; it is the sheath in which these reforms were presented that caused the problem. Akin to when the lumberjack first entered the forest, the trees said "look the handle is one of us" the people of Europe have realized that the constitution does not speak for them and have realized that the proverbial "handle" was a construct of the European elites. The term 'constitution' struck a heavier connotation with the diverse peoples of Europe than the formal conception of the term carries.

The material implications of the Constitution in that it provides for the norms of the society in which it functions were non-existent in the diversity of Europe. While it did reiterate the basic democratic mandate of the Treaties, the fact that it was called a constitution coupled with the fact that it lacked a constitutional moment as brought forth by a cumulative will of the people over time caused its rejection. This aside, the growing resentment and focus bearing down on the European elite project of bridging the social and formal legitimacy gap caused the European citizen to question the validity of the constitutional stake. In the following sections firstly, a look at what projects are being discussed for the possible rejuvenation of the constitutional project will be covered, secondly, a

look at the role of citizens Voice in the constitutional debacle will be covered in reference to the myriad of issues covered throughout this thesis.

5.1 Future Possibilities

As mentioned in the introductory paragraph the twenty five members of the EU are in a state of suspended animation, instead of declaring the Constitution dead in the water they have opted to ignore the problem and hopefully regroup. However, it has taken a very long time to regroup; which in turn becomes more aggravating due to the absence of a secondary plan of action. One suggestion adheres to the multi-speed Europe ideal; Belgian Prime Minister Guy Verhofstadt believes that those countries within Europe who have ratified the Constitution could exist under its authority while allowing the Member States outside the Constitutional fold to interact via the current Treaty arrangements. This scenario however, is highly unlikely due to the difference in voting provisions under each version of the core Treaty[197]. Also, there exists a safety line created during the drafting of the Constitution which provides that if two years after the signing of the document by four fifths of the Member States there are one or more Member States that have encountered difficulties; the issue will be referred to the European Council (Declaration 30 annexed to the Constitution). This however, does not mean anything when considering that the Treaty on European Union which dictates today's agenda of Europe, states that; no revision of the treaties can take place unless it is agreed first by the governments of all the Member States and then is ratified by those states according to their own constitutions[198]. What can the European Council possibly do about this even if they were to convene?

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[197] Laurent Pech, "*Is the EU Constitution condemned to the dustbin of history?*", Taking the EU Seriously: Persistent but Misguided Constitutional Controversies, forthcomming 2006, http://jurist.law.pitt.edu/forumy/2006/07/future-of-eu-constitution-escaping.php, p.2.

[198] Andrew Duff, "Plan B: How to Rescue the European Constitution", *Studies and Research*, Number.52,http://www.andrewduffmep.org.uk/resources/index/?PHPSESSID=935be888313b358f8e428dae7757a530, p. 2.

So the chess board is set to hear the possible options for salvaging the Constitutional project. To be able to understand first hand what the future may hold for Europe this study has confided in the pamphlet created by European Parliament Member (MEP) Andrew Duff, he is in a unique situation due to his previous involvement in the Convention on the Future of Europe. Due to his technocratic look at the issues facing Europe his summary of the possibilities awaiting Europe are more likely to be unbiased and free from the extravagancies of rhetorical musings. Duff explains that the constitution has met with insurmountable difficulties and that a new direction although widely discussed has not been plotted on a course. The first possibility he discusses is the option that France and the Netherlands coming up with a way to fix the Constitutional debacle. This would entail a revote and would mean decisive government action by the French and the Dutch, however, the 'period of reflection' having endured so far into the game points that firstly, the governments of these nations have no answer to why they failed at claiming the referenda and secondly that any adjustment tailored to their needs would most likely cause waves elsewhere in the Union. The second possibility explored in the pamphlet is the suggestion that new protocols be administered to the existing constitutional manuscript on a state by state basis or to groups of states. Of course any additional protocol would have to be signed by all of the remaining states, causing much confusion and maybe even more resentment among nations that have signed the text. The avenue of declarations tailored to meet the different needs as administered to Ireland and Denmark is also a suggestion. However, in contrast to the political rift in France, the Netherlands, the UK and even the fractious Czechs and Poles; the *for* and *against* argument is drastic enough to question the possibility of this solution[199]. In the French case there was a crisis of the division of the left, who have been known to support the idea of European Union. Due to this split the yes-left could not mobilize its voters and due to the '*non*' campaign of former Socialist Party

[199] Andrew Duff, "Plan B: How to Rescue the European Constitution", *Studies and Research*, Number,52,http://www.andrewduffmep.org.uk/resources/index/?PHPSESSID=935be888313b358f8e428dae7757a530, p.5.

leader Lionel Jospin, whose presidential aspirations required he oppose Chirac's constitution, sealed the fate of the referendum[200].

The next fix proposed is the quick name change; this of course is irrelevant today because the proponents of this suggestion claim that if the Constitution had been, the key word being had been, presented under another name it would have been much more inviting to ratification. This touches base on the topic of the perception of the Constitution in the eyes of the public and the dilemma presented when trying to explain the simultaneous existence of a national and European Constitution. As will be covered in the following section the issue of the relative perception of the constitutional ideal by the European citizen is an import factor in understanding the ramifications of this impasse the Union has reached. The next idea is an older one that has its roots planted in past moments of European apparent deadlock; the multi-speed Europe or the idea of a hardcore of Europe further integrated than the remainder of its parts. Nicolas Sarkozy[201] had proposed an EU directorate, an idea that would please the ever ready federalists of Germany who are always happy to take the very hardcore European ideal seriously. This is an issue on which Andrew Duff provides an excellent insider perception; he sates that the EP rejects any possible creation of groups within the EU. The possibility that the provisions of Nice could allow enhanced cooperation between states thereby bypassing the Constitution should be resisted according to Duff.

The next and highly fashionable proposal on the future of the Treaty Establishing a Constitution for Europe is the 'cherry picking' of the Constitutions provisions essentially deconstructing the document into an easier more manageable portion. This approach however, is disputed in that it downplays the complexity of the document that came out of the Convention and IGC. Getting a consensus on the first document was hard enough let alone allowing the favorite parts of twenty

[200] Kalypso Nicolaidis,"The Struggle for Europe", *Dissent*, Fall 2005, http://www.sant.ox.ac.uk/esc/knicolaidis/struggleEUrope.pdf, pp.13-14.

[201] French Minister and Presidential hopeful for France in 2007.

five states to be revaluated. This would most definitely cause more problems, and the last thing Europe in the shadow of a failed integrative project needs is another one. Also, another suggestion in keeping with this approach is the suggestion that different parts of the Constitutional innovations and amendments be slowly introduced while the bulk of more drastic and disputed issues are handled at a later time. This is based on the premise that Part I and II are separable from Part III; this is incorrect in that Part III completes the provisions set in Part I. Also, the articulation of matters such as QMV and the Council are inherent in this final part of the Constitution. Thus, to ignore or drop Part III destroys the Constitutional package. The final possibility provided for in Andrew Duff's pamphlet is the option to change the unanimity clause in Article 48 of the Treaty of Nice; this way the Constitution could be enforced before the problematic Member States completed their ratification process[202]. Although this seems feasible it is highly unlikely due to the current unpopularity of such radical initiatives. The Treaty of Nice however, cannot help the progression of integration in Europe as it currently stands; enlargement beyond Bulgaria and Romania is impossible without its revision. Before the Turkish accession can even become an issue, this problem will present itself via the probable accession of Croatia, who *does* classify as a member of 'Christian Club Europe'. To summarize Andrew Duff's empathic plea to revitalize the constitutional drive this work presents his closing arguments in full; he states:

> Europe evolves from crisis to crisis. Jean Monnet taught us how a setback to European unity in one field could spawn an advance in another. No doubt the European Union will weather the storm caused by the rejection of the 2004 constitution. If that treaty cannot be successfully renegotiated and brought into force, the EU will have no alternative but to survive without a constitution for some years to come. Yet the Union will be much the poorer without its constitution: less confident, less capable, and less democratic. And these are exceptionally difficult times for the Union, facing, as it does, acute problems abroad as well as loss of support at

[202] Andrew Duff, "Plan B: How to Rescue the European Constitution", *Studies and Research*, Number,52,http://www.andrewduffmep.org.uk/resources/index/?PHPSESSID=935be888313b358f8e428dae7757a530, p.8.

> home. So for those who wish Europe well, it becomes essential to try to rescue the constitution[203]

5.2 Questioning Integration and the Failure of the Constitutional Project

Now that, so to speak, the 'EU machinery' side of the argument has been stated an evaluation of the essence of European integration in relation to the constitutional project is necessary. This failure, as Duff puts it, might lead to greater convergence in other fields of integration between the Member States, but is this view accurate of the reality European *union* is experiencing today? Most influential writers of discourse on European issues would beg to differ. Andrew Moravcsik states that from the legal perspective the need for an overhaul of the Treaty of Rome and the EU infrastructure was unnecessary; he argues that the EU had just completed its most successful decade. The EU was at a point where in, terms of integration; it was a shining star; monetary union, two rounds of enlargements, greater transparency, more foreign policy coordination, movement toward EU policies on Energy, and services deregulation were all testament to this fact[204]. He believes that the Constitutional drive was purely an exercise in public relations. The premise behind this conclusion is that the project behind the constitution was essentially created to address the democracy deficit; the aim was to instill the European citizen with a sense of belonging to a greater polity. However, the idea of a Union closer to the people also brought with it an opportunity to exercise a federalist agenda in keeping with the material constitution the Union was provided with by the ECJ – national courts axis in the foundational period. The original draft of the constitution at the Convention had the phrase 'federal basis' in it, this was of course removed by explicit intervention by Valery Giscard d'Estaing and Tony Blair. The words 'the community way'

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[203] Andrew Duff, "Plan B: How to Rescue the European Constitution", *Studies and Research*, Number,52,http://www.andrewduffmep.org.uk/resources/index/?PHPSESSID=935be888313b358f8e428dae7757a530, p.30.

[204] Andrew Moravcsik, "What Can We Learn from the Collapse of the European Constitutional Project?", "*Politische Vierteljahresschrif",* forthcoming, 47:2, 2006, http://www.princeton.edu/~amoravcs/library/PVS04.pdf, p.220.

were surmounted on the empty space that had been previously filled by a big word. The fact that this big word was no longer in the text meant that it could be ignored. Nonetheless the constitution was at this point a blueprint for a unique federal union, not having to mention the name however, removed the need to discuss this aspect of the Treaty candidly during the 2004 – 2006 ratification period[205].

This draws attention to the question of whether or not the perception of the integration process by individual citizens that share a bond with their national identity, causes the same citizens to connect with the larger structure. The demos of Europe does not exist. Thus, identification with the European whole is allotted to the formation of an after the fact constitutional patriotism by the European political elite that have aspired to bridge the legitimacy gap. The ambition to create a federal *finalite politique* by the these elites can be undoubtedly argued, however, to hint to the possibility that the federalist undertones that were injected into the constitutional text were spliced with democratic garb so as to win over those who were anti-federalist to begin with; like the British is not likely. The fact that the term federation was removed from the text by these elites in the first place support the claim of this work that they were aware of the mounting discontent of the peoples of Europe with Brussels. The fact that public opinion varied widely from the reality of the issues at hand arose from the fact that those contested federal overtones were not taken in context. The context in this case is a federal model for the best interest of Europe; the next step of the confederated union who is waiting for the necessary amount of integration before an attempt at full scale federation can be made. However, as the Constitution does not allude to competence in areas other than monetary policy, external trade, and competition policy while issues such as foreign policy or economic coordination remain firmly

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[205] Kalypso Nicolaidis," Paradise Lost? The new European Constitution in the Shadow of Federalism", forthcoming *The Constitutional Challenge in Europe and America: People, Power, and Politics*, Cambridge University Press, 2006,http://www.sant.ox.ac.uk/esc/knicolaidis/sortedpubs.htm#EUreform, p.1.

in the realm of European intergovernmentalism means that the constitutional stake itself is a confidence building measure in the continued integrative journey of the confederation awaiting federation. As K. Nicolaidis states; certain definitions must be made clearer when referring to supranational power or saying 'community basis' in relation to exercising community competences, the question must be asked if this is any different than alluding to a federal authority[206].

It seems that with all of the rhetorical discourse going on in the realm of EU studies, one issue remains vague; when did the premise of "ever closer union" turn into "united in diversity"? The answer lies in the fact that, as mentioned, those in the seat of power in Brussels realized that the widening rift of the legitimacy gap needed to be addressed through the creation of an EU that is closer to the citizen. Without a "we" feeling the diversity of the EU, especially after the latest enlargement, would have raised questions about the integrative process and where it is headed. The choice to create this EU level demos however, along with being in conflict with the premise of "ever closer union among the peoples of Europe" was also necessary to legitimize the proposed constitution. The "united in diversity" slogan aims at accomplishing this by creating another layer of identity association on top of the deep rooted national identity already present in the citizens of the Member States. This second identity was the aim of the constitutional document. This was why the use of the word federal was stricken; it was obvious that people who were very much associated with their national identities would find it objectable. So when K. Nicolaidis asks the question of if it is truly important to use the term community basis instead of federal basis the author of this work must say yes. It was just this sort of association the European elites were trying to avoid due to their realization that the social legitimacy of the EU had drastically lagged behind its formal legitimacy.

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[206] Kalypso Nicolaidis," Paradise Lost? The new European Constitution in the Shadow of Federalism", forthcoming *The Constitutional Challenge in Europe and America: People, Power, and Politics*, Cambridge: Cambridge University Press, 2006, http://www.sant.ox.ac.uk/esc/knicolaidis/sortedpubs.htm#EUreform, p.4.

The federal not federal debate is in essence a problem of semantics in relation to the meaning it carries in the context of the EU. The forward momentum of the integration process must continue for the European project to bear fruit. Neofunctionalism is the thought engine behind this perception of European integration. Ernest Haas's vision of Europe in his work "The Uniting of Europe" portrayed a system in which when one commitment was made in one area it was a guarantee that this would spillover into other fields; creating bonds and loyalties. This approach was the effort made to theorize the real world experience of Jean Monnet; which revolved around the relationship between high and low areas of politics in which bonds forged in low politics would fuel greater loyalties higher up in the food chain[207]. As witnessed in the Cockfield report[208], which brought about the SEA and greater supranational fluidity to the EC, the vessel of the shift to majority voting and greater political integration was sheathed in what looked like a technocratic low level document that aimed at achieving the prime mandates of the Treaty of Rome. However, it did effectively lead to spillover in that by adopting the SEA the nations of Europe had stepped over the bounds of intergovernmentalist restraint and were well on the way to a closer union. According to this vision however, Europe must always appear to be in a state of 'becoming', whether or not it becomes anything is rather irrelevant.

Understanding the battle between Euroskeptics and Europhiles (choice words by Andrew Moravcsik) is the first step in understanding the evolution of the EU in terms of integration. To the Europhile camp the becoming process is an open ended expression of the catch phrase "ever closer union" (used selectively here without the "...among the peoples of Europe'), in this sense Europe as perceived

[207] Andrew Moravcsik, "The European Constitutional Compromise and the Neofunctionalist Legacy," *Journal of European Public Policy* 12:2 , April 2005, http://www.princeton.edu/~amoravcs/library/haas.pdf, p.350

[208] See chapter two, p. 30

by this group must keep deepening and widening ala bicycle theory[209]. If continued open ended integration is what keeps the EU strong and dynamic; It would be prudent to assume that at one point someone would have to ask when 'closer' is close enough. On the euroskeptic side the integration process and the connectivity of the European bureaucratic networks serves as a warning to the prominence of a "technocratic" superstate which some have likened to Nazi Germany. This fear of over centralization however, can be averted through further democratization and subjecting those who wield sovereignty conceded to them by holding them accountable to direct popular majorities[210]. At this point and in retrospect with the outcome of the constitutional process in view we could proclaim that the centralization via 'integration' in certain fields and the intergovernmentalist subsidiarity clause could be interpreted to mean that the clash of these ideological views has converged in one way under the Treaty Establishing a Constitution for Europe. With this in mind it not difficult to see that the EU has consisted of a federal type legal system and confederal type institutions working under a balance of 'Constitutional tolerance' for over five decades. As K. Nicolaidis puts it quoting Joseph Weiler; indeed the constitutions of the Member States and the courts protecting them have symbiotically coexisted without the need for an uber-legal document looking out for them. Her counter argument is also quite fetching; the constitution she states is a unique opportunity for Europe and Europeans alike to renew their bonds and adopt a common language for what they want to achieve. The constitution provides a voice[211] for Europe which can lead to defining a unified goal. However, if there is an issue referred to as the democracy deficit in the EU, she continues, there is no need to look any further than the citizens who look upon the Union not as a democracy

[209] Bicycle theory likens European Integration to pedaling a bicycle, if the pedaling motion is stopped then the bicycle topples.

[210] Andrew Moravcsik, "The European Constitutional Compromise and the Neofunctionalist Legacy," *Journal of European Public Policy* 12:2 , April 2005, http://www.princeton.edu/~amoravcs/library/haas.pdf, p.350

[211] Disambiguation from the Exit, Voice, and Loyalty paradigm.

but a political tool they can make their own[212]. That is a clear representation of a demos that has a limited understanding of the system in which it resides; and in this sense cannot differentiate between a Union of Democracies in the intergovernmentalist sense and a Union as a Democracy as a more federal line interpretation (K. Nicolaidis uses these term solely on a Federal example for Europe). While her argument is interesting it is flawed; as mentioned there is no 'demos' to speak of in Europe. There are however, citizens of the Member States of the EU. It is these citizens who have come to realize the social illegitimacy of the EU which has come to pass from the existence of the deficit of democracy born forth from the very foundational evolution of the European construct. This realization is a consequence firstly of the politicization of the citizens of Europe; which has upped the salience of regional integration in public debate, and secondly of the influence of populism on the way integration is perceived. European elites have learned that they require the formal consent of their constituencies via referenda to carry out EU reforms; parliamentary votes are not looked upon in favor anymore. This is true even in the most parliament dominated Member States such as the UK and the Netherlands. European integration has altered democratic politics in Member States which has in turn changed the way European integration functions[213]. While the use of the term "European elite" seems like a populist remark it is not so and should be differentiated from its use as tool to point the finger at Brussels. In the European example the foundational period made the advent of an elite European stratum of leaders and technocrats inevitable. The polarization of the constitutional legal system and the intergovernmental legislative system is mainly responsible for the European elite referred to throughout this thesis. It was the interplay between Exit, Voice and

[212] Kalypso Nicolaidis," Paradise Lost? The new European Constitution in the Shadow of Federalism", forthcoming The Constitutional Challenge in Europe and America: People, Power, and Politics, Cambridge University Press, 2006,http://www.sant.ox.ac.uk/esc/knicolaidis/sortedpubs.htm#EUreform, p.6.

[213] Liesbet Hooghe, Gary Marks, "Europe's Blues: Theoretical Soul-Searching after the Rejection of the European Constitution", April 2006,http://www.unc.edu/euce/newsletter/06/newsletter0601.htm, p.247

Loyalty that brought the legitimacy deficit to the fore and institutionalized it. There was no direct accountability to national parliaments and Community legislative action worked outside the scope of the public. The result was that the legislative system of the EU could and would pass legislation that would influence the European public under the principles of direct effect and supremacy indoctrinated by the ECJ. This lead the elite Union level leader and technocrat to realize that the legitimacy of the construct would be called into question. The events starting after Maastricht brought about the politization of the social illegitimacy of the European integration and also sparked the need of the European elite to bridge the gap between the social and formal legitimacy of the EU. The answer as it has come to pass was found in the Constitutional Treaty. So what can be surmised from the no votes which made a considerable statement about the state of the European Union? As Larry Seidentop puts it in a response to the "Europe without Illusions: A Category of Error" article by Andrew Moravcsik;

> Europe is suffering a crisis of legitimacy. Though the phrase is used interchangeably with a "democratic deficit", they are not the same thing. A crisis of legitimacy occurs when there is no widely understood and accepted framework for public decision making. This is the plight of Europe today[214].

There is an underlying logic in the above caption; however, the fact that the main forum for the rejection of the Constitutional Treaty was the directly democratic national referendum does send a clear message about the Voice of the citizen in the European context. This message is that given an opportunity the citizen will participate in a widely accepted framework for public decision making. Beyond the short comings of the ignorance associated with the peoples of Europe this message implies that they are ready and willing to participate in a normative deliberative – democratic process within the scope of the EU; be it with or without

[214] Larry Seidentop, "Europe without illusions", *Prospect Magazine*, Issue 112, July 2005, http://www.prospect-magazine.co.uk/pdfarticle.php?id=6939 ,p.10

a constitutional connotation. Also, it is interesting that the choice of parliamentary ratification of the constitution seems to have been the order of the day in sixteen states. Would the results have been different if those States had subjected their ratification of the Constitutional Treaty to a referendum? The possibility that it would does become feasible if it is considered that of the nine nations that opted for a referendum four including Spain, Luxembourg, Ireland and the UK chose to implement a Parliamentary vote and a referendum; only two of these states ratified. The remaining five Denmark, France, Portugal, Poland, and the Netherlands strictly adhered to the referendum outcome; as it stands. While Parliamentary ratification is a prerequisite to Treaty adoption the fact that of the countries that resorted to a referendum only two Spain and Luxembourg have been successful. While the no votes in France and the Netherlands effectively put the Constitutional Treaty on hold this does not mean that the other nations that have not as of yet ratified the text or held referendums will do so with a positive result. The results of France and the Netherlands are just the beginning to the newest transformation the European construct will experience. This new transformation is based on the fact that the social legitimacy rift exists, and has so for the entirety of the history of European integration. The effect of this rift has been seen in the ignorance of the average European citizen and the "permissive consensuses" assumed by the European elites that make decisions in their stead. Maastricht was indicative of the events covered in this chapter, the codification of the symbols of Europe and European citizenship were aimed at the creation of a socially legitimate system of governance that functioned under a demos of Europe. However, existence of a European demos conflicts paradoxically with the "ever closer union of the peoples of Europe" mandate. The mandate does not foresee a European "melting pot". The change in the wording of this motto in the constitutional text to "united in diversity" is a testament to the acknowledgement of this fact by the European elite. The aim of the European elite who were loyal to the ideal of integration was to get the Constitutional Treaty ratified and then build on the text as a formal constitution that could garner a "constitutional patriotism". This patriotism would effectively come from a multiple demoi approach to

European identity building. There is logic in the creation of a sort of diluted "we" feeling in European citizens that have a functional conception of a European identity existing outside their own national identities. Although this may be a solution for the next attempt at rekindling the constitutional drive this present constitutional debacle still stands.

The reason behind the no votes of the Netherlands, France and those still poised to reject any constitutional settlement like Ireland and the UK is that from the citizens perspective there has been a closure of Exit much like the example seen in the foundational era of the European construct experienced by the Member States. The issue is that direct democratic impetus from the European citizen has been missing from the European equation since the foundational period. As mentioned this rift essentially has made the exercise of citizen Voice in the absence of formal or selective Exit a necessary ill. It stands to reason that the European elites tried to give the EP more powers and implemented the principal of participatory democracy in the constitutional text in an attempt to bridge the rift between the formal and social legitimacy of the EU. However, they could not, the no vetoes and the complete lack of progress in the constitutional drive since that time shows us that a change is needed. The closure of Exit to the European citizen stems from the existence of the deficit of democracy in the EU. Such a long term lack of legitimacy had to hit a pressure valve sooner or later. While Maastricht signaled the possibility of trouble and an attempt was made to counter the effects of the democracy deficit it was ultimately impossible to stop. As it stands the innovations of the Constitutional Treaty are still very effective and maybe the European elites will find another way to empower their constituents with Voice without a need to force a constitutional settlement on the pre-confederal unity of states that has a good thing going in respect to the strength and solidity of foundation in the original Treaties.

CHAPTER 6

CONCLUSION

This thesis strives to understand how constitutionalism affected the process of European integration in terms of the Exit, Voice, and Loyalty paradigm and the democracy deficit. This work aspires to convey to the reader a deeper understanding of the process by which the constitutional evolution of European integration set the stage for its ultimate and ambiguous finality as of June 2005. The ramifications of this foundational fault have been instrumental in the rejection of the Constitutional treaty. To be able to discern what transpired in the minds of the citizens of France and the Netherlands it is important to look at the fundamental issues the European construct has had to deal with over the span of its evolution. These issues developed in the foundational period of the EU under the Treaty of Rome that stipulated the mandate of an "ever closer union among the peoples of Europe".

The essential element in the flow of integration that led to the failure of the Constitutional Treaty was the issue of the lack of social legitimacy in the EU. This lack of legitimacy was born of the democratic deficit that occurred in the constitutionalization of the Treaty by the ECJ which in effect closed the avenues of formal and selective Exit[215] to the Member States from the EEC. The option of formal Exit was inconsequential because of the joint will of the states to become a part of the economically prosperous whole. However, the use of selective Exit; the attempt made by the Member States to keep form implementing the obligations

[215] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States, Cambridge: Harvard University Press, 1970.

presented by the Treaty mandate was a possibility that threatened the viscosity of the European project. At this point the constitutionalization of the Treaty mandates by the ECJ effectively closed the option of Exit to the Member States. This occurred on two fronts. Firstly the ECJ established the principles of direct effect and supremacy that placed Community law over national laws and provisions. Secondly, the ECJ created a constitutional contract with the national courts that effectively made governments who did not adhere to Community mandates accountable to their national legal orders. When the option of Exit was closed the Member States started to exercise and increased use of Voice. The enhanced use of Voice allowed the Member States to control the legislative decision making system of the Community thus, installing an intergovermentalist check to the supranational legal system.

The Member States had functioned under a supranational majority voting oriented system before the advent of the "empty chair" crisis. This crisis allotted the veto to the Member States as a security measure for the protection of their national interests. At this point the supranational majority vote was cast aside and led to increased intergovernmental decision making in the shadow of the veto. This led to what was known as Eurosclerosis. In the face of the sluggish forward momentum of the integrative process the Member States allowed the expansion of Community competences due to the erosion of Community jurisdiction allowed in part by the ECJ. This effectively caused a return to a more supranational majoritarian decision making system. The reason Member States did not object to the expansion of Community competences meant that they had achieved a level of Loyalty to the European integrative process.

The expansion of Community competences also contributed to the democratic deficit of the Community in that it institutionalized the problem. The democratic deficit arose from the fact that the governments of the Member States functioned outside the scrutiny of their national parliaments. This meant that they function without direct accountability to their citizens. The erosion of the limits of

Community competences essentially allowed the decisions taken by Brussels to affect greater policy areas in Member States. The direct effect and supremacy principles established by the ECJ meant these policies were directly influencing the citizens of Europe without the benefit of approval from their national parliaments. This essentially institutionalized the deficit of democracy in the EU. It was this foundational occurrence that caused the Community to evolve through the SEA, Maastricht, Amsterdam and Nice in a state of social illegitimacy.

The institutionalization of democracy deficit within the structure of the EU was made possible on account that the executive branches of the Member State governments find it easier to function within the frame work of the EU away from the scrutiny of their national parliaments. The erosion of the enumeration of powers during the 70's allowed this to become a growing problem within integrative discourse and added to the fact that directly effective and supreme Community policies were applicable in more and more policy areas directly influencing the citizens of the Member States. While the SEA reintroduced the majority vote to the EC the extensive use of Voice by the Member States up until this time had allowed for a Community level Loyalty[216] to form in regards to the integrative ideals of the central polity. This new found Loyalty to the integrative drive formed a new type of European leader and technocrat who had a belief in the integrative mandate of the Treaty of Rome "an ever closer union of the peoples of Europe".

The steady rise to prominence of the EP after the SEA is indicative of the fact that someone was aware of the relative lag of social legitimacy behind the formal legitimacy of the Communities. This eventuality had occurred during the constitutionalization of the Community legal order by the ECJ. The EP's enhanced role in the Community as the only directly elected institutional body of the EU became a central issue in the attempt to realign the gap between the formal

[216] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States, Cambridge: Harvard University Press, 1970.

legitimacy and the social legitimacy of the European construct. After the SEA the EP was endowed with more powers thus, making a valid stake at addressing the democratic deficit. However, in the aftermath of the following Treaty on European Union, which strove to enhance political integration among the Member States, the first ramifications of the social legitimacy gap became apparent. The crisis of the Irish veto and the ruling of the German and Danish courts pointed to a lack in faith in the socially unifying aspects of EU and the forming instability in the ECJ – national court contract that had allowed for the constitutionalization of the European order.

After this point as mentioned the consecutive amending Treaties of Nice and Amsterdam were unsuccessful in finding a reformative solution to the pending eastern enlargement and the mounting pressures of the widely recognized democratic deficit of the EU. While throughout this period the EP gained more power and aided in alleviating the EU's inherent democracy deficit, the social legitimacy gap had grown to resemble a rift as the Eurobarometer findings attested to during this period. The citizens of the EU were highly uninformed about the workings of the central polity that influenced their daily lives. This was when the European Council, the epitome of the European elites, issued a declaration that sparked the constitutional process. At this point the fact that the elites were aware of the social legitimacy gap is important; this is the reason they wanted a constitutional settlement for Europe. They felt that only in this way could they counter the damage done. However, the Convention was far from an ideal constitutional moment; it resulted in an intergovernmental rush for hegemonic preservation between the big European States who squabbled over the majority vote in the face of the impending enlargement. However, the Constitutional Treaty was nonetheless forged by a European elite's constitutional moment made possible by their loyalty to the integrative process. This brings us to the reason why the Constitutional ratification process failed as it did.

The European Union does not have a constitutional culture to speak of. It may have a formal constitution in the tangible written sense and has a material constitution as created under the watchful eye of the ECJ. However, the important question is; does the EU have a normative deliberative - democratic constitution? No, there is no Voice of the European people in the Constitutional Treaty. A constitution cannot be draped over a convergence of polities that are in a pre-confederal state of existence. In this formation the Member States have not yet reached a level of integration on the social level to accept the norms of a Europe wide demos that can aspire to have a constitution. There is no singular set of norms that all the peoples of Europe can be identified with. The Constitution aspires to create those norms. In the context of the EU the elites premise to know what those norms are and believe that the material constitution validates their claim to authority. This is based on the European elites Loyalty to the material constitution forged in the foundational period. The elites and their predecessors were all authors of this normatively deliberative – democratic constitution due to the interplay between the supranational legal order created by the ECJ and the intergovernmental Member State's enhanced use of Voice in the legislative decision making processes. This fact makes the Constitutional Treaty feasible to the formally legitimate EU in that a "we" feeling exists in this top stratum. However, due to the fact that the people of Europe do not associate themselves with the written text as an embodiment of their collective Voice or as being representative of their societal norms; they cannot see and have not seen themselves as the authors of the text presented to them for ratification. Thus, the Constitutional Treaty is not feasible for a socially illegitimate EU.

The question still standing however, after all of the fanfare is what will become of the Treaty Establishing a Constitution for Europe? Will it become a side line in the history of the EU or the next big success of a Union that has survived in a world where its mixed political structure is regarded as some what of an oddity? This oddity that is the European Union of today can still be referred to in text, after text as an entity that is a federation, a confederation, or an international

organization. In this sense there is an almost limitless possibility of rhetorical permutations about the nature of this organization of states. However, when it comes down to the definition the European elites have tried to create for the EU and their efforts to form a constitutional legitimacy; there can be no mistake. There was a subliminal if not conscience aim to validate the legacy of the deficiency in social legitimacy inherent in the EU. There is no doubt as to what this represents; the European Union ideal of an integrative *finalite politique* is still possible. The functionality of the EU in the wake of the constitutional ratification debacle goes to show that in a way the dreams of Monnet for a functional solution to the ills of Europe have come true.

At this stage in its development the EU is a figurehead of intra-government compatibility and stability, a point on which further elaboration is necessary. In the Constitutional text the provisions of a withdrawal procedure is present Article I-60 expresses that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. This statement, which is a first for the EU, means that this union of states has reached a certain maturity. Was not the premise of the European project 'an ever closer union'? This withdrawal option does not seem to be very conducive to bringing states incrementally closer together. In fact it seems to allow for more breathing space. It is important to remember that the issue of the democratic deficit that spawned the social legitimacy rift was born of the attempts of an organization which was trying to consolidate its stake at creating a supranational polity by effectively closing the avenues for Exit. This new provision that was not included in any previous Treaty amendment says much for the integrative ideal. The only option is not bonding together without end or reason, an entity that is not just the sum of its parts, an entity that welcomes it's would be members but is no less in definition at their absence.

The nations of Europe in their quest for a higher form of political existence have been integrating for quite some time, the examples are much apparent in the

earlier chapters of this work. Today however, the EU has plateaued in terms of integration; its vigilant elites have also collectively reached a higher state of maturity in that they realize the follies of the lack of direct public accountability and the lack of transparency. They have shown in their some what reckless drive for a European Constitution that they do care about the state of the European citizen. This work hopes to present a way out from the paradox encountered when trying to consolidate the "ever closer union among the peoples of Europe" mandate with the new motto of the EU proposed in the Constitutional Treaty; "unity in diversity". While these two phrases are complimentary to each other the odd word out is the term "constitutional". Both phrases aspire to a Union wide polity created to provide better comprehensive welfare to its citizens in their diversity. It may be surprising but even the "Iron Lady" Margaret Thatcher spoke of this vision of Europe:

> Europe will be stronger precisely because it has France as France, Spain as Spain, Britain as Britain, each with its own customs, traditions, and identity. It would be a folly to try to fit them into some sort of identikit European personality…our pride lies in being British or Belgian or Dutch or German[217].

The fact that a European elite, one that has even been referred to as a Euroskeptic can make this presumption about the future vision of Europe means that there is hope for the European construct yet. This study suggests that if an attempt to define a Europe wide demos is to be made it must be vested in the multiple demoi approach. This way a second layer of identity can be presented to the citizen of the Member States. This second layer which is representative of a European identity can then be used to create a somewhat diluted "we" feeling. This is a prerequisite to the possibility of a federal change over for the pre-confederal EU that exists today. This is so because a "we" feeling is necessary to implement a constitution; a text that claims to represent and protect the societal norms of those

[217] Margaret Thatcher, Bruges Speech at the College of Europe, on the state and future of European Integration, Sept 20th 1988, http://www.margaretthatcher.org/speeches/displaydocument.aspdocid=107332.

who forged it. This might be possible even if the current deadlock is broken and the Constitutional Treaty is ratified as is. In this way the second level of identity associated with the EU can be used to create an after the fact 'constitutional patriotism'.

The issues discussed throughout this thesis point to a reoccurring sequence of events; constitutionalization of the foundational period legal order effectively closed the route to Exit to the skeptical Member States allowing the European construct to become a cohesive whole. The effects of the process bore forth the democratic deficit causing a rift to develop between the formal and social legitimacy of the EU and it former manifestations. This rift effectively resulted in the closure of selective and formal Exit to the citizens of Europe in that they did not have a direct democratic link to the supranational entity that influenced their lives. In return after a period that allowed for the politicization of the effects of the integrative process and the democratic deficit the people used enhanced Voice, as the Member States did, to regain control of the organization they were discontent with. At the same time those Member States that had searched for selective Exit now incorporated a provision to allow for formal Exit from the organization they so mistrusted during its fledgling years. Things have come full circle; if the European elites who have shown foresight in the drafting of the Constitutional Treaty allow this period of reflection to let them look beyond the inevitable use of Voice by the citizens of the multiplicity of Europe, they may find a way to salvage the positive reforms they buried with the wreckage of the Constitutional Treaty on June 1st 2005.

In retrospect it can be said that intergovernmental problem solving and supranational legal harmonization have become the forte of today's EU; these competences are almost second nature to it. In this way the EU has become more than the sum of its parts, and the formulization of the Constitution was the first attempt at declaring this truth. Any reaction to this eventuality should be viewed as growing pains endured for a better tomorrow. In this sense the author believes

that the constitution is not dead; the actual augmentations and modifications it brought to the EU will survive in one way or the other. The only task remaining is for the Union to touch base with its constituency. The no votes as mentioned in chapter four revolve largely around the "Voice" of discontent; this discontent however, rooted in a fundamental flaw was not very focused or uniform in intent. It was the outcry of a public that had woken up to a process they had been sleeping through. To create a Union wide polity that can inform its misinformed public that it *is* democratic and transparent; this is the new integration; integration of the *citizen* to benevolent governance.

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APPENDIX

Table I: EPIN Survey Ratification Table

RESULTS OF AN EPIN SURVEY OF NATIONAL EXPERTS[218]

No. 12 / January 2005

"Overview of the ratification process in the different member states"

	Process & timing	**Comments**
AT	Parliamentary ratification Early 2005	- Simple majority of Congress & Senate; 2/3 majority if Constitution is changed (likely to be obtained) - Legally binding referendum (Volksabstimmung) can be initiated by the Congress (Nationalrat), if object of referendum changes Austrian Constitution - Ruling conservative ÖVP, Social Democrats (SPÖ) and Greens only in favour of referendum if it takes place in all MS (preferably at the same time) - Freedom Party (government coalition) unconditionally pro referendum
BE	Parliamentary ratification Date still unknown	- Binding popular votes not foreseen in Belgian Constitution - 'Conseil d'Etat' has given negative opinion (29.11.2004) on a possible consultative referendum without changing the Constitution - Parliamentary majority now against referendum, while PM Verhofstadt (VLD) still in favour - Christian Democrats (Dehaene) & Flemish (Spirit) and Wallon Socialists (PS) against referendum - Greens, Liberals (VLD) and extreme-right 'Vlaams Belang' in favour - 7 parliamentary bodies need to ratify (ratification likely): Both chambers of the federal Parliament, Flemish Parliament (Region & Community combined) 2 regional Parliaments (Wallonia, Brussels), 2 community Parliaments (francophone, German-speaking)

[218] Sebastian Kurpas, Marco Incerti, Justus Schonlau, "What Prospects for the European Constitutional Treaty: Monitoring the Ratification Debates: Results of an EPIN Survey of National Experts", 2005, http://www.epin.org/pdf/WP12-KurpasIncertiSchoenlau.pdf

TABLE I CONTINUED		
CY	Parliamentary ratification, Date still unknown	- Binding popular votes not foreseen in Cypriot Constitution - Only new MS that did not hold referendum on EU membership - No significant public debate on a possible referendum on EU Constitution
CZ	Referendum June 2006	- No constitutional obligation for referendum, but strong political consensus of major parliamentary parties in favour - Parliamentary ratification would need 3/5 approval in both houses (unlikely to be obtained) - Binding referendum requires constitutional act, as no general framework regulating nationwide referendum yet - Likely that no minimum turnout and no additional requirement to refer the Treaty to Parliament for ratification will be set (like accession referendum) - Most likely that referendum will be held together with general elections
DE	Parliamentary ratification May 2005 (Bundestag) & June 2005 (Bundesrat)	- Parliamentary ratification by 2/3 majority in both houses (likely to be obtained) - German federal constitution does not foresee referendum - Government proposes to generally change the Constitution (2/3 majority in both chambers needed), but Conservatives (CDU/CSU) reject this - CSU for referendum on Constitution, but against general provision - Strong majority of citizens for referendum on EU-Constitution
DK	Referendum Date still unknown, not before Fall 2005	- In absence of a 5/6th majority in Parliament, Danish Constitution requires a binding referendum when national sovereignty is transferred. - Referendum already announced by PM Rasmussen 1 January 2004 -Referendum will not be combined with referendum on existing Danish 'opt-outs'(euro, defence, JHA matters)
ES	Referendum 20 February 2005	- Non-obligatory, consultative referendum called by Socialist PM Zapatero - Wording: "Do you approve of the Treaty by which a Constitution for Europe is established?" - Government needs to observe strict neutrality in the campaign - Constitutional Court ruled on 13 December 2004 that EU Constitution is in line with the Spanish Constitution
EE	Parliamentary ratification First half of 2005	- Govt & major parties pro parliamentary ratification: simple majority needed (likely to be obtained) - Binding referenda for international treaties expressly excluded - Consultative referenda possible (ad-hoc law needed)
EL	Parliamentary ratification First half of 2005	- Parliamentary ratification by 3/5 majority (likely) - No significant public debate about a referendum despite some late efforts by Socialists and the Coalition of Left and Progress.

TABLE I CONTINUED		
FI	Parliamentary Ratification, Early 2006	- Stable centre-left government pro parliamentary ratification; PM Vahanen ruled out referendum - 2/3 majority needed for parliamentary ratification (likely to be obtained) - Constitution only foresees possibility of a consultative referendum (Conservatives and Greens in favour)
FR	Referendum June 2005	- President has the power to call a referendum - Conseil Constitutionnel stated that ratification of EU-Constitution makes change of French Constitution necessary - Draft law on constitutional changes approved by Ministers on 3 Jan 2005 and Assemblée Nationale on 1 Feb 2005 (Senate later in February) - Both chambers convene as a Congress in March or April 2005; both must approve changes by 3/5 majority
HU	Parliamentary ratification Ratified 20.12.2004	-Parliamentary ratification needed 2/3 majority (unicameral parliament) - Referendum at request of 200,000 registered voters possible - 25% turnout necessary - Alliance of Free Democrats was only parliamentary party to argue in favour of a referendum
IE	Referendum Late 2005 or early 2006	- Obligatory, binding referendum for any transfer of power - Government to publish Constitutional Amendment Bill which must be approved by parliament and then put to the people for referendum - No minimum turnout required for referendum
IT	Parliamentary ratification Early 2005	- Obligatory, binding referendum for any transfer of power - Government to publish Constitutional Amendment Bill which must be approved by parliament and then put to the people for referendum - No minimum turnout required for referendum
LV	Parliamentary ratification, Early 2005	- Government aiming for quick parliamentary ratification - Simple majority needed (likely to be obtained) - If 50% of parliamentarians were in favour, a referendum could be called (not the case)
LT	Parliamentary ratification, Ratified 11.11.2004	-For parliamentary ratification, a simple majority was needed - No significant public debate about a possible referendum
LU	Parliamentary ratification Not before mid-2005	- Consultative referendum will be held - Participation compulsory (as with elections) - Parliamentary ratification would need 2/3 majority
MT	Parliamentary ratification Not before mid-2005	- PM Gonzi excluded referendum on 5 June 2004 - Parliamentary ratification needs simple majority (likely to be obtained)

TABLE I CONTINUED		
NL	Referendum Late May or June 2005	- Non-obligatory, consultative referendum based on a parliamentary initiative - Special committee (members: e.g. from social advisory and elections council) will determine date, allocation of resources, formulation of question - Parliament will still have to ratify by 2/3 majority, but several parties have already indicated they will respect referendum outcome
PL	Referendum Probably autumn 2005	- Referendum likely together with presidential elections - 50% turnout needed in order to be valid - Parliamentary ratification would need 2/3 majority (unlikely)
PT	Referendum Probably April 2005	- Non-obligatory referendum - Parliamentary ratification would require simple majority
SK	Parliamentary ratification, Before summer 2005	- Parliamentary majority of 3/5 needed (likely to be obtained) - President Gasparovic, PM Dzurinda and opposition leaders Fico and Meciar against referendum - Eurosceptic KDH (member of govt coalition) in favour of referendum
SL	Parliamentary ratification Not before mid-2005	- 79 yes votes (4 no votes, 7 abstentions) - Government was against referendum, although Slovenian Constitution would have allowed it to call for one
SE	Parliamentary ratification Not before mid-2005	- Parliamentary ratification needs simple majority (likely to be obtained) - PM Persson and 4 pro-Constitution opposition leaders against referendum - 1/3 of parliamentarians needed to call referendum: Not enough, as only eurosceptics (Green Party and Left Party) in favour - Ratification bill to be presented to Parliament by May 2005
UK	Parliamentary ratification Not before mid-2005	- PM Blair called for referendum in April 2004, only after massive pressure from media and opposition - Referendum likely after UK EU Presidency (Jul-Dec 2005) in spring 2006 - Referendum bill to be debated in Parliament early 2005 - Wording of the bill: “Should the United Kingdom approve the Treaty establishing a Constitution for the European Union?”

Table II: House of Commons Report Ratification Table

HOUSE OF COMMONS LIBRARY[219]

INTERNATIONAL AFFAIRS AND DEFENCE SECTION:

RESEARCH PAPER 05/45, 13 JUNE 2005

"Ratification Table"

Country	Referendum	State of play on ratification	Prospects for Ratification
Austria	No	Lower House voted on 11 May 2005. A two-thirds majority in both Houses is required for ratification. 182 MPs voted in favour, with one - Barbara Rozenkranz - of the far right Freedom Party – against. On 25 May 2005 the Upper House approved the Constitution by 59 to three (from the far-right).	No problems are expected as nearly all political parties support Constitution, in spite of some concerns about Austrian neutrality. However, the extreme-right party leader, Jörg Haider, has threatened a legal challenge over the Government's refusal to put the Constitution to a Referendum.
Belgium	No	Parliamentary committee voted 16 February 2005 by 9 to 8 2005 against referendum. Parliamentary ratification expected May 2005. On 29 April 2005 Senate voted for the Constitution by 54 votes to 9 with 1 abstention. On 19 May 2005 the Lower House approved the Constitution by118 to 18 with one abstention.	

[219] Vaughne Miller, "Future of the European Constitution", International Affairs and Defense Section, House of Commons Library, 2005, http://www.parliament.uk/commons/lib/research/rp2005/rp05-45.pdf

TABLE II CONTINUED			
		The Constitution will then be considered by the parliaments of the three regions (Brussels, Francophone Wallonia, Flemish-speaking Flanders) and of the three language communities (Flemish, French, German).	
Cyprus	No	Parliamentary ratification on 30 June 2005.	Ratification had been considered a formality. However, the largest party, Akel (Communist, 20 seats), is opposed to the Constitution. The other parties in the 56-seat parliament are likely to vote in favour, which means it could still be approved.
Czech Republic	Undecided	A new law was adopted on 9 March making referendums a common instrument of decision-making. Main opposition centre-right Civic democrats (ODS) proposed bill applying only to vote on EU Constitution. Possible date: June 2006, to coincide with regional elections. Parliamentary ratification becoming more popular option.	Czech President, Vaclav Klaus, is against Constitution.
Denmark	Yes	Referendum on 27 September 2005. Draft law must be adopted in early September.	Public support reasonably high. In 179-seat parliament, only right-wing Danish People's Party and left-wing Red-Green Alliance (30 seats) are opposed. Denmark is considering whether to go ahead with a referendum in view of the French and Dutch results.
Estonia	No	Constitution sent to Parliament on 5 May 2005. Parliamentary ratification expected to be completed before summer recess 2005.	Lowest public support for Constitution of all the new Member States.

TABLE II CONTINUED			
Finland	No	The Prime Minister, Matti Vanhanen, ruled out a referendum, in spite of support for one by some government ministers.	Parliamentary ratification expected December 2005.
France	Yes	Constitutional amendments were agreed on 28 February 2005, allowing for referendum to be held on 29 May 2005. In the referendum, 45.1% voted in favour, 54.9% against, with a turnout of 69.7%.	The Constitution cannot be ratified.
Germany	No	According to recent polls, 81% of Germans support a referendum, but the German Constitution currently rules one out. The CSU parliamentarian, Peter Gauweiler, appealed to the Constitutional Court for a referendum, but this was rejected by the Court on 28 April 2005.	*Bundestag* ratification on 12 May 2005 by 569 to 23 with two abstentions. The *Bundesrat* ratified on 27 May 2005 by 66 votes out of 69 with three abstentions.
Greece	No	On 19 April 2005 the Greek Parliament approved the Constitution by 268 to 17. 15 deputies were absent. .	The main government and opposition parties support the Constitution and there is majority public endorsement of it.
Hungary	No	Parliamentary ratification on 20 December 2004 by 304 votes to 9 with 8 abstentions and 64 deputies absent.	The Hungarian population is the most pro-European of the new Member States.
Ireland	Yes	Probably October 2005	Unpredictable. No vote on the Nice Treaty. Government likely to be active in promoting Constitution
Italy	No	The Chamber of Deputies endorsed the Constitution on 25 January 2005 by 436 to 28 with 5 abstentions. On 6 April 2005 the Senate approved it by 217 to 16. 82 deputies were absent.	

TABLE II CONTINUED			
Latvia	No	Parliamentary ratification process started on 13 December 2004. Parliament ratified Constitution on 2 June 2005 by 71 votes to 5 with 6 abstentions.	
Lithuania	No	Ratified by *Seimas* 11 November 2004 by 84 votes to 4 with 3 abstentions.	
Luxembourg	Yes	Parliamentary vote expected mid-July 2005	High public support for Constitution.
Malta	No	Parliamentary vote expected mid-July 2005	In the referendum on EU membership in 2003 Malta was the weakest EU supporter among the accession states.
Netherlands	Yes	In a consultative referendum on 1 June 2005, the Dutch were asked: "Are you for or against the Netherlands agreeing to the Treaty Establishing a Constitution for Europe?" The Constitution was rejected by 54.9% to 45.1% with a turnout of 69.7%.	Following the French rejection opinion polls indicated that public support for the Constitution was diminishing. The Parliament and the Government will respect the result, as the turnout was over 30%.
Poland	Yes	25 September 2005, to coincide with presidential elections.	Poland is one of the most euro-sceptic Member States. Recent opinion polls indicate low public opinion of the Constitution. Turnout must be at least 50% for vote to be valid.
Portugal	Yes	October-December 2005, with local elections. The new Socialist Prime Minister, Jose Socrates, supports constitutional amendments to allow for the two votes. The main Government and Opposition parties have agreed a common text for the amendment. In spite of the French and Dutch results, the	There is strong public and political support for the EU Constitution

TABLE II CONTINUED			
		Portuguese Parliament is to vote on the joint text by 15 June 2005 and the referendum will take place with local elections on 2, 6 or 9 September 2005.	
Slovak Rep	Unlikely	Prime Minister, Mikulas Dzurinda and President Ivan Gasprovic are against referendum. They have the support of the two main opposition party leaders for parliamentary ratification. On 12 May 2005 116 deputies out of 150 voted for the Constitution, with 27 against and four abstentions.	Unpredictable. No vote on the Nice Treaty. Government likely to be active in promoting Constitution.
Slovenia	No	Parliamentary ratification 1 February 2005 by 79 to 4 with 7 abstentions.	
Spain	Yes	Consultative referendum on 20 February 2005. Yes: 77%, No:17%,blank: 6% blank; turnout: 42%. Question: "Do you approve the Treaty by which a Constitution for Europe is established?"[87] Formal ratification by the Chamber of Deputies on 28 April 2005 by 311 votes to 19 with 20 abstentions. The Senate approved the Constitution on 18 May 2005 by 225 votes for to 6 against.	Following the French rejection opinion polls indicated that public support for the Constitution was diminishing. The Parliament and the Government will respect the result, as the turnout was over 30%.
Sweden	No	Tradition of holding referendum only when there are party splits (eg on EMU). Parliamentary ratification expected December 2005. Social Democrat MP, Sören Wibe, has found rarely used paragraph in party statute allowing for 5% of party members to call for a referendum. 7,000 party members would have to sign the current petition to secure a vote.	Parliament is expected to ratify the Constitution without problems. Only Swedish Green Party and the Left Party want a referendum. Public support for it is weakening.

TABLE II CONTINUED			
United Kingdom	Yes	Early indications were for mid-March 2006, following UK Presidency of EU (July-December 2005). Question: “Should the United Kingdom approve the Treaty establishing a Constitution for the European Union?”.	Early indications were for mid-March 2006, following UK Presidency of EU (July-December 2005). Question: “Should the United Kingdom approve the Treaty establishing a Constitution for the European Union?”.

Table III: Current Situation of States that Postponed the Ratification Process[220]

10 May 2006

Projection by EPIN	Country	Status
Highly Likely	Portugal	Referendum **postponed** (no date has been set)
	Sweden	Ratification **postponed** (no date has been set).
Rather Likely	Denmark	Referendum **postponed** (no date has been set)
	France	Referendum **29 May 2005** **negative** (NO: 54,68%; turn out: 69,34%)
	Ireland	Referendum **postponed** (no date has been set). A White paper has been presented to the parliament on 13 October 2005.
	Netherlands	Referendum **1 June 2005** **negative** (NO: 61,6%, turn out: 62,8%)
Unsure	Czech Republic	Referendum **postponed** to end of 2006 - beginning of 2007
	Poland	The Parliament failed on 5 July to vote on the ratification procedure. Ratification **postponed** (no date has been set).
Rather Unlikely	United Kingdom	Parliamentary ratification process **suspended** (suspension announced by UK government on 6 June 2005)

[220] Table presented is original to this work. The information presented can be found in Sebastian Kurpas, Marco Incerti, Justus Schonlau, "*What Prospects for the European Constitutional Treaty: Monitoring the Ratification Debates: Results of an EPIN Survey of National Experts*", 2005, http://www.epin.org/pdf/WP12-KurpasIncertiSchoenlau.pdf and the Europa: Constitution for Europe official site found at http://europa.eu.int/ratification_en.htm