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Difference as a Potential for
European Constitution Making

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This Working Paper has been written in the context of the 2003-2004 European Forum programme on 'Constitutionalism in Europe', the overall direction and coordination of which was carried out by Professor Bruno de Witte, with Dr. Miriam Aziz as the scientific coordinator.

In order to preserve a clear focus within this broad theme, the scope of the Forum was limited to four distinct but complementary themes, each of which had its own coordinator. Theme 1: 'The Idea and the Dynamics of the European Constitution' was coordinated by Professor Neil Walker; Theme 2: 'The 'East' Side of European Constitutionalism' was coordinated by Professor Wojciech Sadurski; Theme 3: 'The Constitutional Accommodation of Regional and Cultural Diversity' was coordinated by Professor Michael Keating; and Theme 4: 'The Market and Countervailing Social Values in the Constitution of Europe' was coordinated by Professor Martin Rhodes.

Abstract

In the following contribution I propose an analytical approach in which dealing with differences in decision-making is the central factor in explaining the output of European governance. It is the hypothesis that differences can, under certain conditions, be a positive potential for effective governance and problem-solving in the European Union. The prerequisite conditions include actors that take differences seriously, structures of decision-making that are suitable for recognising and organising differences and processes of decision-making in which actors deal with differences in a democratic and communicative way. The analytical approach is applied to European constitution making and the European Convention. First, it is analysed how representative the membership of the Convention has been. It can be assumed that Members of the Convention in order to recognise differences and have an interest in the positive potential of difference must represent differences themselves. Second, it is examined how difference in institutional concepts with regard to a greater involvement of national parliaments in European politics was dealt with. Did arguing influence the protocol on national parliaments in the Convention's draft or have status and power been more important for the solution that was finally agreed upon? Third, it is investigated how difference in interests between big and small states with regard to the position of the President of the European Council influenced the final decision. Although difference was dealt with less democratically and communicatively than in the case of national parliaments the arguments of Members of the Convention against a permanent President were not without consequences for the final article in the Convention's draft. Having shown in the empirical part that differences can be a positive potential for European constitution making, I conclude with the normative proposition that the democratic organisation of difference is the task of a European Constitutional Treaty.

Keywords

Constitution building, European Convention, Governance, Integration theory.

I. Introduction¹

On 18th June 2003, *Le Monde* chose a pair of scales to symbolise the European Convention 2003.² In its issue of that day, the paper published the text of the draft Treaty establishing a Constitution for Europe which the President of the Convention, Valéry Giscard d'Estaing, was to present to the European Council meeting in Thessaloniki on 20th June 2003. One factor looms large in both the media and integration policy: the balance between institutions. Plenary debates of the European Convention repeatedly stressed how important it was to achieve a balance between European institutions. While balance and resemblance are seen as positive, imbalance and difference are considered problems of European integration. Only 'diversity in unity' is accepted.

Balance also plays an eminent role in theories of integration. Intergovernmentalism regards the bargaining power of influential governments, the economic advantages the European Union offers member states, and the willingness of governments to meet their obligations to be the three persistent explanatory factors for European integration.³ Functionalists and neo-functionalists also perceive integration as a linear development. The functionalist approach, well suited to describing and explaining policies connected with the Common Market, is less appropriate in dealing with new areas of European policy, for example in the social and environmental fields.⁴ Not only has 'collective organisation across borders proved more difficult and uneven from sector to sector' than anticipated, but functionalists have underestimated the influence of heads of state and government and the sometimes anti-integration impact of politicisation in the European Union.⁵

The predominance of linear processes and the importance of balance are central assumptions in theories and real politics of European integration. Yet, empirical research shows that European integration has to do with non-linear processes and states of imbalance.⁶ In such non-linear processes and states of imbalance differences play a vital role. This is why I propose an approach⁷ to analysing the evolution of European integration in which difference is in the centre. Difference with a potential

1 This is an amended version of a paper delivered to the European Forum of the European University Institute in Florence on 18th March 2004. Thanks to all who participated and offered comments and criticism, especially to the commentators Maarten Vink and Leonard Besselink and to the anonymous reviewers. Thanks also to Joachim Nettelbeck from the *Wissenschaftskolleg Berlin* who incited me to study the chances of difference for European integration. He drew my attention to the interesting book by A. L. Becker, 1995. *Beyond Translation*, (Ann Arbor: The University of Michigan Press) showing that translating a text from one language into another or learning a foreign language should not only be seen as problems of finding out the equivalence in meaning but as chances to experience a different culture. 'Languages differ in the silences they practice, in the way they make your face look, in the images of context they shape [...] Learning Burmese is learning Burmese ways to reshape Burmese memories into new Burmese contexts [...] Burmese is a web of words and silences that shapes a context, in space, in time, in social relations, in nature, and in emotions and subtle intimations'. *Ibid.*, 12.

2 *Le Monde*, 18th June 2003, p. 1 and Cahier Spécial: 'Projet de la Convention pour une Constitution européenne'.

3 Andrew Moravcsik, 1999. *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*. London: University College London Press.

4 Gerda Zellentin, 1992. 'Der Funktionalismus—eine Strategie gesamteuropäischer Integration?', in: Michael Kreile, (ed.), *Die Integration Europas*. Opladen: Westdeutscher Verlag, p. 69.

5 Philippe C. Schmitter, 2004. 'Neo-Neofunctionalism', in: Antje Wiener and Thomas Dietz, (eds.), *European Integration Theory*. Oxford: Oxford University Press, pp. 55-56.

6 For an approach stressing imbalance and non-linear processes see Alec Stone Sweet and Wayne Sandholtz, 1997. 'European integration and supranational governance', *Journal of European Public Policy*, 4, p. 299.

7 An analytical approach can be defined as a frame of relatively general categories with which to grasp empirical facts. Such analytical approaches include specific theoretical assumptions and are the basis for explaining why certain events or developments have happened. Renate Mayntz and Fritz W. Scharpf, 1995. 'Der Ansatz des akteurzentrierten Institutionalismus', in: Renate Mayntz and Fritz W. Scharpf, (eds.), *Gesellschaftliche Selbstregulierung und politische Steuerung*. Frankfurt and New York: Campus, p. 39. Cp. Thomas Diez and Antje Wiener, 2004. 'Introducing the Mosaic of Integration Theory', in: Antje Wiener and Thomas Diez, (eds.), *European Integration Theory*, op. cit. note 5 supra, p. 17.

to influence the degree of effective governance and problem-solving in the European Union is the decisive category in my analytical approach.⁸ The potential can be positive or negative.

So far, scientists have stressed the negative potential of difference in their research on European integration.⁹ Now, the perspective should be widened with a focus on the positive potential of difference.¹⁰ From such a perspective the process of European constitution making will be analysed in the following paper. It is the hypothesis of this paper that, under certain conditions, differences can offer positive potential for establishing a constitutional treaty that provides a basis for effective governance and problem-solving in the European Union. An important condition is that differences are dealt with in a democratic and communicative way in the process of constitution making. I start with a brief outline of the theoretical assumptions that are related to my analytical approach. I go on to test these assumptions against the empirical findings concerning the role of differences in the European Convention. Finally I show that the empirical findings have normative consequences for a European constitution.

II. Theoretical Assumptions: Difference as a Potential for the Evolution of European Governance

European integration can be understood as a process of co-evolution. The process started with problems of societies that could no longer be solved by the nation state alone. Political elites in six nation states therefore started developing supranational problem-solving approaches and institutions. Transnational activities by national and European elites, burgeoning European law, institutions, slowly emerging European public spheres became elements of a dynamic political system. Equilibrium is rare in such a dynamic system.¹¹ Metastable balance and imbalance are more common. The sequence of balance, metastable balance and imbalance produces non-linear development. Differences are especially numerous and important in states of imbalance. Such states, in which the arrangement of elements and the characteristics of the system change over time, have been frequent in the process of European integration. They allow the system to develop new structures,¹² which influence the direction of further development. This is exactly what happens in the European Union.

Political elites, institutions, treaties, policies, and public spheres co-evolve. The elements of the system are independent and interdependent. Europeanisation is more rapid in some policy areas than others and impetus given in one part of the system can, though not necessarily, prompt change elsewhere. Development is non-linear, shifting direction over time. Europeanisation proceeds at different speeds in different policy areas. Governance in the European Union has to do with the ‘ups, downs and plateaus of the integration process’.¹³ Moreover, implementation of European policies furthers differentiation because

8 For a more detailed outline of the theoretical approach Christine Landfried, 2004. *Das politische Europa*. 2nd ed.. Baden-Baden: Nomos, Chapter 1.

9 Fritz W.Scharpf, 2003. ‘Legitimate Diversity: The New Challenge of European Integration’, in: Tanja A.Börzel and Rachel A. Cichowski, (eds.), *The State of the European Union. Law, Politics, and Society*. Oxford: Oxford University Press, pp. 79-104.

10 Ulrich Beck and Edgar Grande, 2004. *Das kosmopolitische Europa*. Frankfurt: Suhrkamp 2004, put forward the same argument.

11 Helen Wallace, 2003. ‘Designing Institutions for an Enlarging European Union’ in: Bruno de Witte, (ed.), *Ten Reflections on the Constitutional Treaty for Europe*. Florence: Robert Schuman Centre for Advanced Studies and Academy of European Law, p. 90: ‘The illusion of institutional balance’.

12 Carl Böhret and Götz Konzendorf, 1997. *Ko-Evolution von Gesellschaft und funktionalem Staat*. Opladen: Westdeutscher Verlag. On p. 243 they speak of an ‘evolutionary theory of complexity’.

13 James A. Caporaso, 1998. ‘Regional Integration Theory: Understanding our Past and Anticipating our Future’, in: Wayne Sandholtz and Alec Stone Sweet, (eds.), *European Integration and Supranational Governance*. Oxford: Oxford University Press, p. 345.

changes in national policy engendered by European decisions depend on the different political systems with their specific form of interest mediation, administration and problem-solving philosophies.¹⁴

Important for co-evolution is a basic structure common to all elements of the governance system in the European Union. Such a structure is difference.¹⁵ Difference is derived from the Latin term ‘differre’ and can be defined as the state of being distinct in a neutral sense. It is assumed in this understanding that it is important to recognise differences in their own right. Differences per se do not imply differences in values. With regard to different cultures this would mean that ‘we all *recognize* the equal value of different cultures; that we not only let them survive, but acknowledge their *worth*’.¹⁶

A typology of differences in the European Union still has to be developed. Such a typology should be based on the results of empirical research and should be constantly reconsidered with regard to empirical research. In my research on European constitution making I am interested in finding out in which way difference is mobilised and organised at the political and the constitutional level. By concentrating on the role of difference in constitution making one should not understate what a community must find in common to be a community. Therefore my perspective with its focus on difference can only be seen as a little stone ‘in an always incomplete mosaic’¹⁷ of integration theories. I distinguish between types of structural difference and concrete differences. There is structural difference in ideas (ideologies), identities, interests, institutions, problems, knowledge, status, power and structural difference in space and time.¹⁸ These structural differences induce concrete differences in a multitude of fields. Among these fields are history, religion, language, culture, public sphere, civil society, politics, administration, interest mediation, social stratification and the economy.

Differences can be a driving force for successful governance and problem-solving in the European Union. Such differences can be said to have a positive potential. But this is not the case with all differences. Whether their potential is positive or negative depends on their type, where they occur, on their magnitude, and on the specific circumstances in which they occur.

In order to develop a positive potential for European governance, differences do not have to disappear or lead to consensus. Neil Walker’s ‘Idea of Constitutional Pluralism’ is a convincing theoretical approach to difference in the constitutional field. He distinguishes three dimensions: an explanatory claim, assuming that European integration can be explained only within a framework that assumes multiple sites of constitutional discourse and authority; a normative claim, welcoming the implications of constitutional pluralism, ‘contending that the only acceptable ethic of political responsibility for the new Europe is one that is premised upon mutual recognition and respect between national and supranational authorities;’ and, finally, an epistemic claim, stating that ‘the very representation of distinct constitutional sites—EU and member states—as distinct constitutional sites implies an incommensurability of the knowledge and authority (sovereignty) claims emanating from these sites’. In spite of European integration, co-operation, mutual recognition, and the growing relational dimension of constitutional units ‘the constitutional profile associated with each site [...]

14 Adrienne Héritier *et al.*, 2001. *Differential Europe. The European Union Impact on National Policy-Making*. Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers.

15 Diversity should be distinguished from difference. Diversity is variety with regard to certain subjects like the variety of opinion on EU enlargement. We speak of diversity of media and of public spheres. These media and public spheres should not converge with political institutions and this is why there should be a difference between public spheres and politics. In the European Union we find diversity, types of structural difference, and concrete differences that emerge in specific areas.

16 Charles Taylor, 1994. *Multiculturalism. Examining the Politics of Recognition*. Princeton, N.J.: Princeton University Press, p. 64.

17 Thomas Diez and Antje Wiender, 2004. ‘Introducing the Mosaic of Integration Theory’, in: Antje Wiener and Thomas Diez, (eds.), *European Integration Theory*, op. cit. note 5 supra, p. 16.

18 Of course the types of differences are often interconnected.

will develop in accordance with the representative claims peculiar to that site, and with the particular traditions, social pressures and normative dynamics [...]’¹⁹

Differences between constitutional sites will thus continue to exist and there can be no objection as long as each constitutional unit ‘encourages openness’ for communication with other constitutional units.²⁰ Similarly, my point of departure is the idea that the way of dealing with structural difference and concrete differences is important for European integration. As long as differences are dealt with democratically and communicatively, and as long as they are not so great as to be detrimental to a European model of society,²¹ they can exist without prejudicing European integration. On the contrary: it is the hypothesis of my paper that, under certain conditions, differences can be a positive potential for legitimate and effective decisions in European governance.²² The prerequisite conditions include the following.

First: political actors must take an interest in recognising differences and in using the potential of differences for effective governance and problem-solving. It should not be forgotten that some political actors pursue strategies of domination and exploitation and have no interest at all in solving problems.²³ A second condition is that the structures of decision-making and of implementing political decisions are suitable for recognising and organising differences. Third: differences can have a positive potential only if political actors deal with them in a democratic way. A ‘democratic’ way of dealing with differences can be defined as a decision-making and implementation process that generates collectively-binding decisions of the free volition of the people and with reference to the will of the people.²⁴ On the basis of political freedom and political equality being the central values of a democracy, the right of the individual to participate in public affairs becomes crucial.²⁵ For effective participation it is important that citizens have adequate information for developing an ‘enlightened understanding’ of the political issues that have to be decided.²⁶

Fourth: the positive potential of differences can be realised only if political actors deal with differences in a communicative way. Dealing ‘communicatively’ with differences is defined as a decision-making process involving an intensive exchange of arguments and concepts that affects the final decision. This exchange must take place within the political elite and between the political elite and citizens if decisions that are not only collectively binding but also legitimate are to be reached.²⁷

19 All citations from Neil Walker, 2002. ‘The Idea of Constitutional Pluralism’, *Modern Law Review*, 65, pp. 337-338.

20 Ibid., p. 339.

21 Jürgen Habermas, 2001. ‘Warum braucht Europa eine Verfassung? Nur als politisches Gemeinwesen kann der Kontinent seine in Gefahr geratene Kultur und Lebensform verteidigen’, *Die Zeit*, 28th June, p. 7, describes what belongs to this European model of society. Among other things, the common basis of the societies of the European Union is a social market economy. Such a type of economy is now also mentioned in the Convention’s draft of a Constitutional Treaty for Europe in Article I – 3.

22 For the relation between recognising differences and finding an individual identity see, Jacques Derrida, 1992. *Das andere Kap. Die vertagte Demokratie. Zwei Essays zu Europa*. Frankfurt: Suhrkamp, p. 16.

23 Renate Mayntz, 2001. ‘Politikwissenschaft in einer entgrenzten Welt’, in: Christine Landfried, (ed.), *Politik in einer entgrenzten Welt, 21. Wissenschaftlicher Kongreß der Deutschen Vereinigung für Politische Wissenschaft*. Köln: Verlag Wissenschaft und Politik, p. 41.

24 See the definition of a democratic Constitutional State by Jürgen Habermas, ‘Die postnationale Konstellation und die Zukunft der Demokratie’ in, J. Habermas, 1998. *Die postnationale Konstellation: Politische Essays*. Frankfurt: Suhrkamp, p. 100: ‘Der demokratische Verfassungsstaat ist seiner Idee nach eine vom Volk selbst gewollte und durch dessen freie Meinungs- und Willensbildung legitimierte Ordnung, die den Adressaten des Rechts erlaubt, sich zugleich als dessen Autoren zu verstehen’.

25 Erik Oddvar Eriksen, 2003. ‘Deliberative Supranationalism in the EU’, in: Erik Oddvar Eriksen and John Erik Fossum, (eds.), *Democracy in the European Union. Integration through Deliberation?* London and New York: Routledge, p. 51.

26 Robert A. Dahl, 1985. *A Preface to Economic Democracy*. Cambridge: Polity Press, p. 59.

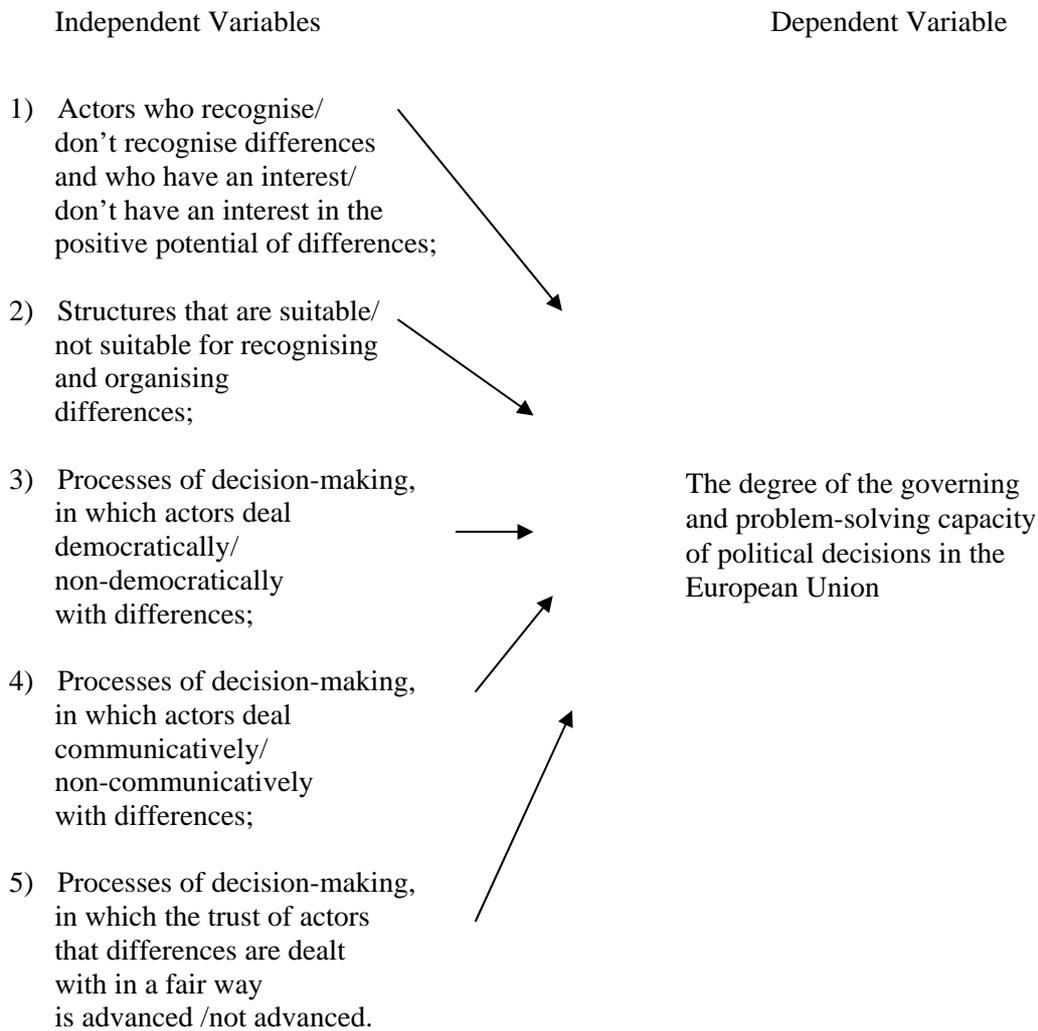
27 Ulrich K. Preuß, 1996. ‘Wo bleibt das Volk? Erwartungen an demokratische Repräsentation’, in: Margarete Fabricius-Brand and Bertram Börner, (eds.), *4. Alternativer Juristinnen- und Juristentag*. Baden-Baden: Nomos, p. 95. Preuß

Any exchange irrelevant to political output and outcome would not fit this definition. Besides arguing there is bargaining as another form of communication in politics.²⁸ As long as arguing and bargaining in dealing with differences influence political decisions and their implementation more than status, power and money we can conclude that differences are dealt with communicatively.²⁹

And finally processes of decision-making and implementation must be such that they further the trust of political actors and of citizens in a fair way of dealing with differences. Only on the basis of such a trust in fair play will it be possible for actors to accept differences (Figure I).

Figure I: Difference and European Governance—An Analytical Approach

a) *First analytical step*

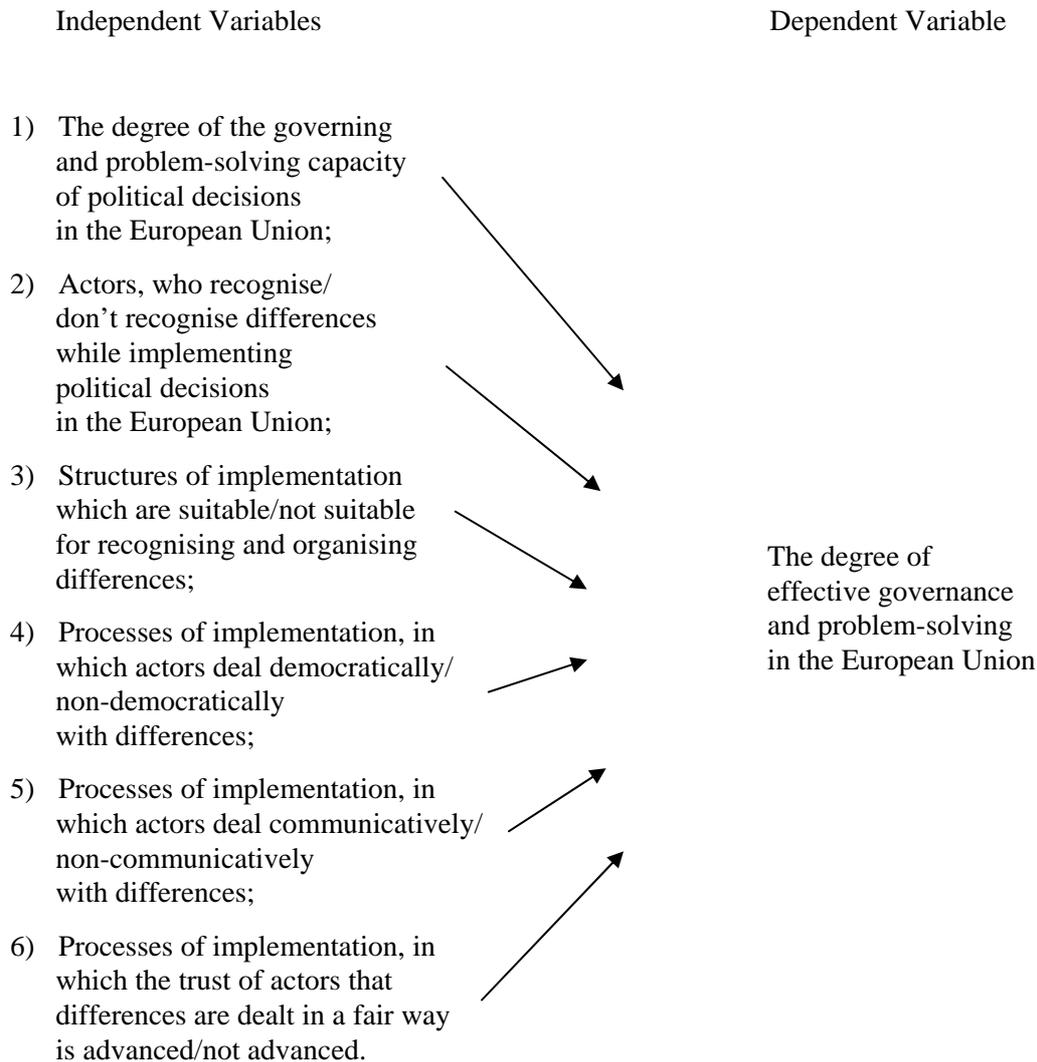


(Contd.) _____

develops a theory of representation in which a continuous communicative process between representatives and represented is crucial for decisions that are binding and legitimate (*'anererkennungswürdig'*).

28 Katharina Holzinger, 2001. 'Verhandeln statt Argumentieren oder Verhandeln durch Argumentieren?', *Politische Vierteljahresschrift*, 42, pp. 414-446.

29 Thomas Risse, 2000. 'Let's Argue!': Communicative Action in World Politics', *International Organization*, 54, pp. 1-39.

b) Second analytical step

In the first step of this analytical approach the governing- and problem-solving capacity of political decisions in the European Union is the dependent variable for which explanations are wanted. It is assumed that the degree of the governing- and problem-solving capacity of political decisions in the European Union depends on actors who recognise differences and are interested in their positive potential, on structures that are suited for recognising and organising differences and on decision-making processes in which actors deal with differences democratically and communicatively.

In the second step of the analysis the degree of the governing- and problem-solving capacity of political decisions becomes one of the independent variables for explaining the effectiveness of European governance and problem-solving. Analogous to the first step it is now analysed to what degree actors in implementing decisions recognise differences and deal with them in a democratic and communicative way and to what degree structures and processes of implementation are suitable for such a way of dealing with differences.

Thus, in the proposed analytical model the ways of dealing with differences in decision-making and in implementing decisions are the central factors in explaining the effectiveness of European

governance and problem-solving.³⁰ It is my hypothesis that a democratic and communicative way of dealing with differences is better suited for a high degree of effective governance and problem-solving in the European Union than a non-democratic and non-communicative way. It could be said that the politics of difference³¹ determine European policy.

It is not assumed that taking differences seriously and dealing with them democratically and communicatively will produce consensus or change preferences. But the deliberative model of democracy argues convincingly that a discursive structure in decision-making gains legitimising power from the assumption that decisions reached in such discourse can be expected to be reasonable. The discursive level of a public debate preparing a decision is thus the decisive variable.³² It might well be that argument about different ideas and bargaining between different interests produces a compromise that does not settle the conflict. Such a compromise will then be the basis for a new round of politics and probably a new decision in the future. But according to my theoretical premises effective decisions are best prepared within democratic and communicative processes that are open to differences and in which differences are not played down. Decisions that emerge from a democratic and communicative dealing with differences seem best suited to solve complex, and especially transnational problems. That a failure to pay adequate attention to differences produces deficient policy is well illustrated by the EU's ineffective reaction to the BSE-crisis.³³

III. Empirical Findings: The Role of Difference in European Constitution Making

My analytical approach 'Difference and European Governance' will now be applied to European constitution making. Therefore, I translate the general variables to variables that are relevant for explaining the role of difference in the European Convention.

It can be assumed that Members of the Convention in order to recognise differences and have an interest in the positive potential of differences must first of all represent differences themselves. In this regard, the interesting question is how representative Convention membership was.

The second condition for exploitation of the positive potential of difference in the Convention are structures that are suitable for recognising and organising differences. Were the standing orders of the Convention favourable for an inclusive approach towards differences? How did the working groups proceed with regard to differences? What about the strategy of the Convention Praesidium to debate conflictual institutional issues only at the end of deliberations? 'We knew that the biggest difference of opinions were on the institutions [...] So we intentionally put the institutions at the end of the agenda, expecting that meanwhile the Convention in its thinking would be far enough to say that we now cannot fail the institutions—and that's exactly what happened' (interview with a Member of the

30 The term 'governance' is not used in the narrow sense of steering capacity and governability of sectors, but includes policy-development and implementation in public-private networks and self-regulating societal systems. And of course 'European governance' includes not only the European level of policy-making, but also the effect of European policy upon national policy-making. See Renate Mayntz, 1998. *New Challenges to Governance Theory*. Florence: European University Institute, Jean Monnet Chair Paper, RSC No. 98/50, Figure 2.

31 Neil Walker op. cit. note 19 supra, p. 328: 'politics of difference [...] is about the growing demand for recognition of distinctive group interests or rights, whether based on national or regional identity, aboriginal or ethnic minority status, gender or cultural difference, the key question is how adequately such claims can be accommodated within available constitutional forms'. In my paper 'politics of difference' is defined as the way (structures and processes) in which political actors deal with specific types of difference in specific areas. Group interests would be one type of difference with which 'politics of difference' has to do.

32 Jürgen Habermas, 1992. *Faktizität und Geltung*. 2nd ed.. Frankfurt: Suhrkamp, p. 369: 'Die deliberative Politik gewinnt ihre legitimierende Kraft aus der diskursiven Struktur einer Meinungs- und Willensbildung, die ihre sozialintegrative Funktion nur dank der Erwartung einer vernünftigen Qualität ihrer Ergebnisse erfüllen kann. Deshalb bildet das diskursive Niveau der öffentlichen Debatten die wichtigste Variable'.

33 Christine Landfried, *Das politische Europa*, op.cit. note 8 supra, pp. 130-153.

Praesidium on 11th February 2004). Did this strategic use of time undermine the necessity to take differences in the Convention seriously?

What was the Convention's understanding of its work? Postnational constitution making can be seen 'as a vector rather than a point'³⁴ and means 'a dialogical and procedural conceptualisation of constitutionalism in the EU'.³⁵ Such a concept problematises 'linear assumptions about progress from a union of states to an integrated polity, and posits a reflexive critique of institutions, legal forms and identity formations beyond statist limits, in which the nation state is one actor, but not a privileged one'.³⁶ Did the Convention see it that way?

The other variables (Figure II no. 3 to 5) that can explain the final output of the Convention's work concern the way in which Members of the Convention dealt with differences. According to my approach one will have to test if decision-making in the Convention has been democratic, communicative and fair with regard to differences.

Democratic participation by citizens is realised primarily through free, equal and periodic parliamentary elections on the basis of universal suffrage.³⁷ The influence of the European Parliament and national parliaments is accordingly an important criterion for democratic constitution making in the Convention. Not only participation through representation but also the degree of democratic participation inside³⁸ the Convention has to be analysed. Did accession state members participate on an equal basis? Did the Praesidium take the arguments of the plenary seriously? Was 'consensus' defined by the Praesidium or did it have a real basis in the interests of the 'conventionnels'? Which groups and interests were excluded?

With regard to the communicative way of dealing with differences in the Convention, it is useful, for example, to examine whether the argumentation of Members of the Convention interrelates and whether convincing arguments in debate result in draft articles being amended or at least reviewed (Figure II). Did arguing influence the Convention's draft Treaty establishing a Constitution for Europe or have status and power been more important for the result of the Convention's work? From the beginning it was clear that the Convention's power was limited and the final decisions would be taken at the Intergovernmental Conference. Whatever opportunity the Convention offered for arguing, it was deliberation 'under the shadow of the veto'.³⁹ (Figure II).

34 Jo Shaw, 2003. 'Process, Responsibility and Inclusion in EU Constitutionalism', *European Law Journal*, 9, p. 47.

35 Ibid., 49.

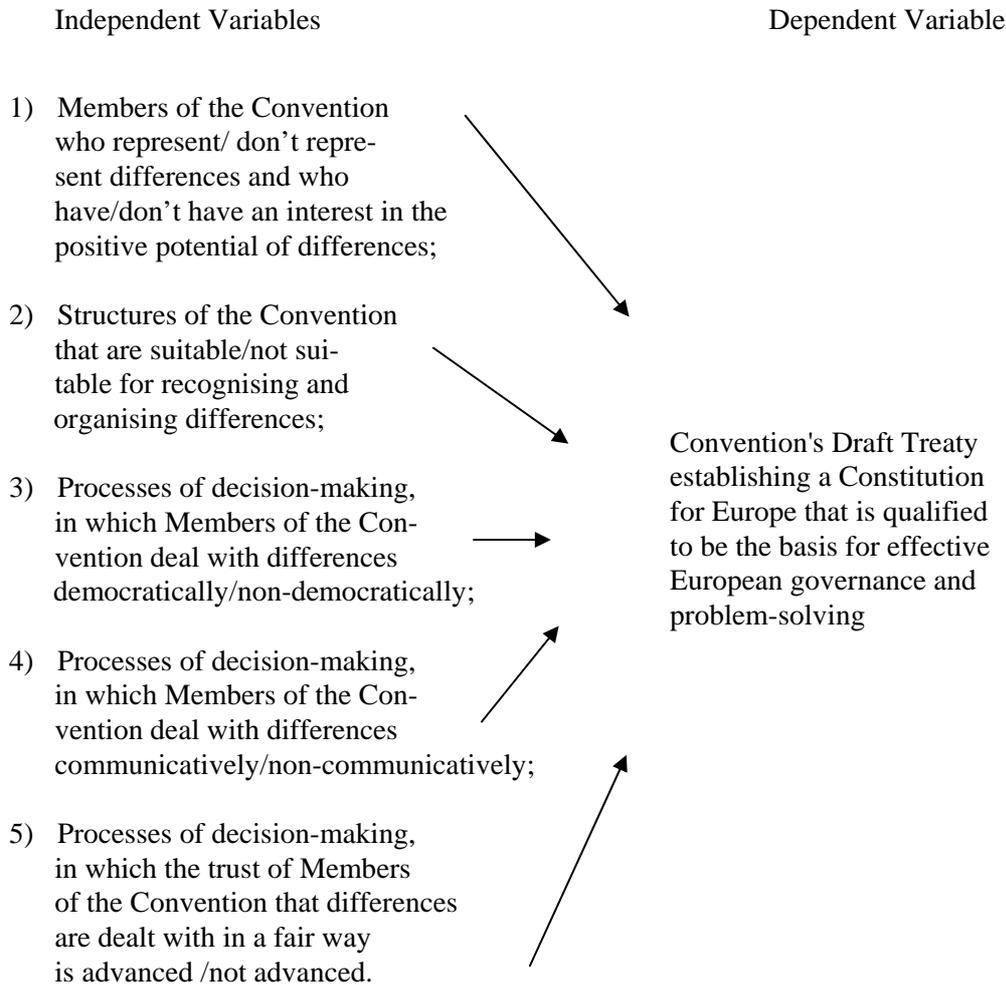
36 Ibid.

37 Robert A. Dahl, 1989. *Democracy and its Critics*. New Haven and London: Yale University Press, pp. 220-221.

38 Participation from 'outside' the Convention would include contributions by civil society. This type of participation is not dealt with by this paper.

39 Paul Magnette, 2004. 'Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe', in: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, (eds.), *Developing a Constitution for Europe*. London: Routledge, p. 218.

Figure II: Difference and European Constitution Making—Application of the Analytical Approach



I now focus on three variables of the Convention's decision-making process explaining the result of the Convention's work: the representativeness of Convention membership, dealing with differences democratically/non-democratically and dealing with differences communicatively/non-communicatively. From the above mentioned types of difference I have chosen difference in institutional concepts and difference in interests.

A. Representativeness of Convention Membership

The Convention has not been a democratically elected constitutional assembly. At Laeken in 2001, member state heads of state and government decided to delegate the task of preparing one or more proposals for achieving greater democracy and efficiency in an enlarged Union to a convention. The Convention started life as a 'preparatory body'.⁴⁰ At the Nice Summit, the Belgian delegation claimed that more effective procedures for institutional reform had to be found. The Belgian move was initially

⁴⁰ John Erik Fossum, 2004. 'Still a Union of Deep Diversity? The Convention and the Constitution for Europe', in: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, (eds.), *Developing a Constitution for Europe*. op cit. note 39 supra, p. 233.

supported only by Germany, Finland and Portugal.⁴¹ The other member states agreed to the Laeken Declaration because they were convinced that intergovernmental bargaining would be the crucial factor of constitution making regardless of the Convention.⁴² The ‘top-down’ setting-up of the Convention is also demonstrated by pre-nomination of the Praesidium.

Nevertheless, membership of the Convention was far more representative than the membership of intergovernmental conferences. It should not be forgotten that it was considered progress when, for the first time in the history of European integration, two members of the European Parliament, Elmar Brok and Elisabeth Guigou, were able to attend meetings of the representatives of governments once a month (!) during the 1996/1997 Intergovernmental Conference that led to the Treaty of Amsterdam. It is a long way from this step to the innovation of the European Convention. In the dynamic system of the European Union it was accomplished within four years.

The European Convention with its 105 members, comprising the Presidency of Giscard d’Estaing, Giuliano Amato and Jean-Luc Dehaene, fifteen representatives of member state governments, thirty representatives of member state parliaments, thirteen representatives of accession state governments, twenty-six representatives of accession state parliaments, sixteen European Parliament representatives and two Commission representatives, was definitely much more representative than intergovernmental conferences. It was an innovation to include accession countries in the decision-making process, although they did not participate on a fully equal footing. The Slovenian parliamentarian Alojz Peterle became a ‘guest’ in the Praesidium, and accession country ‘conventionnels’ were unable to block a consensus reached by member state ‘conventionnels’.⁴³ Only 17 of the 105 Convention members—some 16%—were women. The multicultural character of many member and accession states was not taken into account, either. ‘Here the deficit is even more severe than in relation to the paucity of women, since it amounts to an almost complete silence’.⁴⁴

Table 1: Composition of the European Convention

Presi- dency	European Parliament	European Commission	National parliaments member states	National parliaments accession states	Govern- ments member states	Govern- ments accession states	Total member- ship	Women in %	Represent- atives of accession states in %
3	16	2	30	26	15	13	105	17 = 16 %	39 = 37 %

Members of national parliaments, constituting the biggest group in the Convention (56 of 105 members), are said to have been the ‘least cohesive’ group. They lacked a common culture and the capability to act as a single body.⁴⁵ In my view, more research is needed to evaluate the influence of national parliaments in the Convention. Differences in parliamentary experience may well prove to have been an advantage in the quest for solutions in the Convention. One such solution that suggests difference was a potential is the protocol on the role of national parliaments in the European Union.

41 Paul Mquette, 2004. ‘Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe’, in: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, (eds.), *Developing a Constitution for Europe*, op. cit. note 39 supra at p. 210 for a detailed analysis.

42 Ibid.

43 Jo Shaw, ‘Process, Responsibility, and Inclusion in the EU Constitutionalism’ op.cit. note 34 supra, p. 57.

44 Ibid., p. 59.

45 Carlos Closa, 2004. ‘The Convention Method and the Transformation of EU Constitutional Politics’, in: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, (eds.), *Developing a Constitution for Europe*, op.cit. note 39 supra, p. 189.

The decision-making process in the Convention that produced this solution is a good example for a democratic and communicative handling of difference in institutional concepts.

B. Difference in Institutional Concepts in the Convention

Greater involvement of national parliaments in European politics and greater democracy in the EU are related issues. National parliaments are considered to be closer than European institutions to the citizens. Greater involvement of national parliaments in European politics could therefore strengthen European democracy. The Convention discussed the role of national parliaments communicatively. There was far-reaching discussion of different institutional concepts for the participation of national parliaments. One issue was whether a new institution for national parliaments at the European level was needed.⁴⁶

The first debate in the plenary session on 7th June 2002 showed that a vast majority of Convention members was in favour of national parliaments playing a greater role. The secretariat had prepared a paper describing the role of national parliaments in the architecture of the European Union (CONV 67/02). The plenary debate addressed four questions, including whether it was useful for member states to compare practices of parliamentary control over government and to establish 'best practices'. Procedures in Finland and Sweden were debated. Some members of the Convention proposed that representatives of national parliaments join the government delegation of their country to the Council. There were also proposals to strengthen the effectiveness of COSAC (*Conférence des organes spécialisés dans les affaires communautaires et européennes des parlements de l'Union européenne*). On the whole, a wide range of possibilities was thus discussed (CONV 97/02). In the plenary debate on 7th June 2002 from 9.30 until 12.50, Convention members used a 'blue card' for immediate intervention five times, and, in a total of 70 contributions, the interventions of fellow members were referred to 30 times.

Many members from accession countries contributed to the debate. When, for instance, the Slovenian MP Alojz Peterle pleaded in favour of the Scandinavian model of parliamentary control, Vice-President and chairman of the session, Giuliano Amato, commented: 'Excellent!' Lithuanian MP Vytenis Andriukaitis met with a positive reaction for proposing a multilateral agreement between the European Parliament and national parliaments. It cannot be said, however, that accession country members enjoyed equal status in the debate on national parliaments. With 15 interventions, representatives of accession states were clearly under-represented in the debate in proportion to the composition of the Convention (Table 2).

Table 2: Participation in the Convention Debate on National Parliaments. Plenary Session on 7th June 2002

Total number of contributions	European Parliament	European Commission	National parliaments member states	National parliaments accession states	Governments member states	Governments accession states	Women in %	Representatives of accession states in %
70	17	2	30	13	6	2	16 = 23 %	15 = 21 %

While the Latvian representative Maris Sprindzuks was talking, many members of the Convention did not pay attention. This became so blatant that session chairman Amato called the session to order: 'Please, no private assemblies around the room!' But Maris Sprindzuks indicated by gesture that he did not mind.⁴⁷

46 CONV 68/02 of 31st May 2002, No. 2. iv: 'Would it make sense to create a new organ for a collective representation of national Parliaments? If yes, what should be the composition and competences of such an organ?'

47 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg.

Such modesty was not the rule for representatives of member states or the European Commission.⁴⁸ When Commissioner Michel Barnier exceeded his speaking time, Amato again intervened: ‘I can understand that there are only 2 Commissioners in the Convention. But we can’t turn the Convention into Orwell’s animal farm. We must all be equal’.⁴⁹ And later on in the debate, MEP Alexander Earl of Stockton used his blue card to criticize members of the Convention for exceeding their allotted time in the debate. He explicitly mentioned his ‘good friend Barnier’ who was able ‘to turn three minutes into five’. Stockton proposed: ‘You should, in future, and I would like to formally suggest that when the time limit is reached the microphone is cut off at that moment, without fear of favour.’—‘That’s a good suggestion’, Giuliano Amato answered.⁵⁰

Not many members of the Convention were in favour of a new institution for national parliaments at the European level. However, the few advocates of such an institution insisted that the proposal should not be removed from the agenda without deliberation. Portuguese MP Maria Eduarda Azevedo said: ‘A new chamber for national parliaments is worth a debate without prejudices’.⁵¹ Similarly, Baroness Scotland of Asthal from the British House of Lords argued: ‘We all agree that we must think creatively to develop a new environment within which national parliaments will be able to contribute effectively to the European debate [...] The UK has contributed some ideas to the debate. My Prime Minister’s proposal for a body of national parliamentarians to police subsidiarity, for example. Others have put forward interesting ideas. In particular, I would like to commend Mr. Bruton’s thoughtful contribution to this Convention and that of the Swedish and Finnish parliaments. We are very encouraged by this and feel that we must seize the opportunity to examine a wide range of proposals on their merits and without preconceived prejudices’.⁵²

Another member of the Convention, Dutch MP René van der Linden, admitted that he had not yet made up his mind: ‘Frankly—I’m not sure what my stance will be’. He wanted to wait for the results of the working group.⁵³ The debate was thus a real one in that it was not clear from the beginning what the best solution would be for giving national parliaments a greater role.

President Giscard d’Estaing was disappointed by the debate on national parliaments. Didn’t public opinion expect more than just improving the system? Shouldn’t there be a more dramatic approach? The working group, to his mind, should take a ‘bolder approach with a higher democratic profile’.⁵⁴

Parliamentarian representatives clearly participated most actively. 60 of 70 contributions, 86% of the total, were made by parliamentarians. This does, of course, reflect the overall composition of the Convention (69% of members coming from parliaments) and the subject of the debate on 7th June 2000. The structure of participation in the debate shows a hierarchy: The United Kingdom took first place with 5 contributions, followed by Finland and Italy with 4 and Austria and Denmark with 3. Then there was a broad ‘middle-field’ with countries that made two contributions. Among the 8 countries that intervened only once, 5 were accession states.⁵⁵ Finally, there were three countries that did not intervene at all: Bulgaria, the Czech Republic, and Estonia.

48 Carlos Closa, 2004. ‘The Convention Method and the Transformation of EU Constitutional Politics’, in: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, (eds.), *Developing a Constitution for Europe*, op. cit. note 39 supra, p. 191.

49 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg, protocol, p. 16.

50 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg, protocol, p. 40.

51 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg, protocol, p. 38.

52 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg, protocol, p. 31.

53 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg.

54 European Convention, Plenary session, 7th June 2002, Video No. 12 Archive University of Hamburg, protocol, p. 41.

55 The data relate to contributions from national parliaments and governments .

Table 3: Communication in the Convention Debate on National Parliaments. Plenary Session on 7th June 2002

Total number of contributions	Reference by Convention members to one another Total number	Reference to another Convention member by name	Reference to 'many members' of the Convention	Reference taking up the argument of another member at length
70	30	8	7	15

Evaluation of the debate on national parliaments shows that it was communicative. Nearly half of all participants referred to one another in their contributions—either by naming a fellow member or through statements such as ‘as many members have said’, or really taking up the argument of another member. And of 30 ‘conventionnels’ who referred to others, half took up the argument of another member at length.

The working group on national parliaments was headed by Gisela Stuart from the British Parliament. The group held its first meeting soon after the plenary debate at the end of June. Members of the working group described the experience of their national parliaments with participation in European decision making. Swedish MP Sören Lekberg, for example, pleaded for a strong role for national parliaments in European matters, and explained the Swedish example (Working Group IV, Working document 18 of 3rd September 2002). In this paper Lekberg made reference to the plenary debate and to the arguments of Convention members who believed an active role for national parliaments at the European level would be jeopardize the effectiveness of the Council.

Finally, the working group tabled two recommendations. First, there should be a mechanism giving national parliaments the opportunity to monitor the principal of subsidiarity at an early stage in the legislative process. ‘Most members’ of the working group were in favour of this recommendation. Second, members agreed that COSAC, as a conference of parliamentary committees on European affairs, should be strengthened. Interparliamentary conferences between committees of the European Parliament and of national parliaments on a broad range of subjects should be made possible (CONV 353/02).

In the final plenary debate on national parliaments, too, parliamentary representatives were the most active participants, although less so than in the debate on June 2002: 68% of all contributions came from parliamentarians. Once again, women were overrepresented and accession state members underrepresented in participation in proportion to the composition of the Convention (Table 4). Of the eight countries whose governmental or parliamentary representatives intervened only once in the debate, six were accession states. Of the five countries whose governmental or parliamentary representatives did not participate at all three were accession states. Once again, the United Kingdom was most active with four contributions.

Table 4: Participation in the Convention Debate on Part I of the Draft (Institutions and Protocols). Plenary Session on 5th June 2003

Total number of contributions	European Parliament	European Commission	National parliaments member states	National parliaments accession states	Governments member states	Governments accession states	Women in %	Representatives of accession states in %
71	19	3	20	9	13	7	17 = 24 %	16 = 23 %

In the plenary debate on 5th June 2003, members of the Convention referred to contributions of their colleagues 38 times in a total of 71 interventions. They used blue cards six times for spontaneous intervention. More than half the members taking an active part in the debate referred to other members by name, to ‘many members of the Convention’ or discussed the argument of a fellow member in detail.

Table 5: Communication in the Convention Debate on Part I of the Draft (Institutions and Protocols). Plenary Session on 5th June 2003

Total number of contributions	Reference by Convention members to one another—Total Number	References to another Convention member by name	Reference to ‘many members’ of the Convention	References taking up the argument of another member at length
71	38	14	6	18

The fact that critical comments were made on the procedure for involving national parliaments at the European level until the very last moment also demonstrates the communicative structure of the debate. The Portuguese deputy Maria Eduarda Azevedo stressed that national parliaments had to be effectively involved in the European arena. She pointed to the opportunity to involve national parliaments in shaping the European Union—now. This chance should be taken honestly—there should be no playing to the gallery. In her view, the interparliamentary conferences should exchange opinions on important subjects like the common foreign and security policy and justice and home affairs. She felt that these conferences should not only be mentioned in a protocol, but in the first part of the Constitutional Treaty.⁵⁶

The French parliamentary representative, Hubert Haenel, regretted that there would be no congress of the peoples. With reference to the Portuguese fellow member, he therefore pleaded in favour of at least an interparliamentary conference. *‘Il n’y a plus de congrès. Soit [...] Si on n’a plus de congrès, si la COSAC n’est pas améliorée et ne monte pas en puissance, mettons en place, comme l’a dit Madame Azevedo, une conférence interparlementaire’.*⁵⁷ The British MP David Heathcoat-Amory criticized the solution preferred by the majority of the Convention: ‘Mr. President, a couple of quick points. First, regarding subsidiarity, everyone agrees with subsidiarity but there is an inconsistency. Article I – 9 says that national parliaments shall ensure compliance with the subsidiarity principle, which implies a power; but the protocol only grants national parliaments a request. The matter has to be reviewed, but then the Commission can proceed anyway. So I urge that we bring the various parts of this Constitution into line with each other to ensure consistency. If there is an implied power it has got to be backed up with an actual power’.⁵⁸

President Giscard d’Estaing’s idea of a ‘congress of the peoples’ had no prospect of success. In the plenary session of 5th June 2003 he stressed that he had abandoned it: ‘The article on the Congress disappeared though I thought it to be important’.⁵⁹

In other areas, members of the Convention were less successful in convincing the Presidency and the Praesidium. The hierarchy in the Convention and difference in interests between big and small countries played a role in the decision-making process concerning the President of the European Council. Let us turn therefore to this example and the way difference in interests was dealt with in the Convention.

56 European Convention, Plenary session, 5th June 2003, Video No. 54 Archive University of Hamburg, protocol, p. 9.

57 European Convention, Plenary session, 5th June 2003, Video No. 54 Archive University of Hamburg, protocol, p. 19.

58 European Convention, Plenary session, 5th June 2003, Video No. 54 Archive University of Hamburg, protocol, p. 53.

59 European Convention, Plenary session, 5th June 2003, Video No. 54 Archive University of Hamburg, protocol, p. 5.

C. Difference in Interests in the Convention

There has been a great deal of structural difference in interests in the Convention in institutional matters like the composition of the Commission, qualified majority, and a permanent President of the European Council (Title IV of Part I of the draft). The decisive debate took place on 15th May 2003. Members of the Convention referred to the contributions of fellow members 39 times, and used blue cards 11 times during the morning session from 9.45 to 12.40. 650 amendments were tabled. At the beginning of the debate there was a discussion on procedures inside the Convention. 40 members of the Convention had signed a motion requesting additional meetings because there would not be enough time for adequate discussion of policies. David Heathcoat-Amory from the British Parliament wanted to make sure that the arguments of members of the Convention were taken into account by the Praesidium: ‘Mr. President, when the revised text of Part I is available, I ask that the changes that have been made to it be made clear. There should also be an explanation of the origin of the amendments that have been accepted and the degree of support that they attracted, in order that we can be sure that the changes to the text arise from our discussions and do not come down from above like the tablets from Mount Sinai’.⁶⁰

Not only members in plenary but also members in the Praesidium could remember a text coming ‘down from above like the tablets from Mount Sinai’. On 22nd April 2003, President Giscard d’Estaing presented a first draft on ‘The Union’s Institutions’ to the press that had not been previously discussed. The draft proposed that ‘the European Council shall elect a President by qualified majority for a term of two and a half years, renewable once’. The President ‘shall be assisted by a Vice-President, elected for the same term and by the same procedure’.⁶¹ Such a post of Vice-President had been discussed neither in plenary session nor in the Praesidium.⁶²

‘Conventionnels’ debating institutional reform at a very late stage wanted no further surprises. In the plenary debate on 15th May 2003 they expressed their opposition to a permanent President of the Council.⁶³ But even in the heated debate on institutions, members of the Convention discussed innovative solutions, e.g., a directly elected President of the European Union. Georges Papandreou from the Greek government proposed a directly elected President of the European Union. John Bruton from the Irish parliament supported the proposal:

Here, we are having a debate between institutions, and if you asked most Europeans to identify what the Commission does, to identify what the Council does, to identify what the Parliament does, they would not know. They do not know because they are not consulted in a real way. The most any person can do in a European election is to change one MEP out of seven hundred, by virtue of their vote. They are never asked, in any election, to pronounce on a single, simple European question, where that question is being asked of all Europeans at the same time, on the same day, throughout the continent.

If Mr. Papandreou’s proposal was accepted and we allowed the people to elect the President of Europe, then we would create a European demos. Many people say that we cannot have such a thing until we have a European demos. We will never have a European demos until we have a European election because a European election to select a president will create such a demos. It will create such a political space, it will create such a European debate. We will never have it with the present system, and that is why I support what George Papandreou has proposed.⁶⁴

The structure of participation in the debate on 15th May 2003 on the President of the European Council shows that representatives of parliaments, who made 72% of contributions, participated

60 European Convention, Plenary session, 15th May 2003, Video No. 47 Archive University of Hamburg, protocol, p. 10.

61 The European Convention, Draft Part I of the Constitution, Title IV. The Secretariat, Brussels 22 April 2003. I want to thank Michael Stabenow for giving me a copy of this document.

62 Michael Stabenow, 2003. ‘Giscard’s Überraschungen’, *Frankfurter Allgemeine Zeitung*, 24th April.

63 The draft text for the session on 15th May 2003 was: CONV 691/03.

64 European Convention, Plenary session, 15th May 2003, Video No. 47 Archive University of Hamburg, protocol, p. 26.

disproportionately frequently in relation to the Conventions's composition. Women, who had been over-represented in the two other analysed debates, were under-represented this time. Representatives of accession countries, already under-represented in the debates on 7th June 2002 and 5th June 2003, were even less active in the debate of 15th May 2003. Men and representatives of member states are clearly more equal than women and representatives of accession states when it comes to difference in interests and questions of power (Table 6).

Table 6: Participation in the Convention Debate on the Presidency of the European Council. Plenary Session on 15th May 2003

Total number of Contributions	European Parliament	European Commission	National parliaments member states	National parliaments accession states	Governments member states	Governments accession states	Women in %	Representatives of accession states in %
47	14	1	15	5	9	3	7 = 15 %	8 = 17 %

Table 7: Communication in the Convention Debate on the Presidency of the European Council. Plenary Session on 15th May 2003

Total number of contributions	References by Convention members to one another—Total Number	References to another Convention member by name	References to 'many members' of the Convention	References taking up the argument of another member at length
47	39	14	6	19

The communicative structure is similar to the debates summarised above: the debate has a high 'discursive level'.⁶⁵ Quite often when referring to one another, members of the Convention mentioned fellow members by name. Sometimes 'conventionnels' spoke of 'those who support the proposal' or stated 'I understand the comments made by the various members of the Convention', and so on. In nearly half the interventions in which 'conventionnels' referred to one another, they discussed the argument of one or more fellow members in depth.

In this case the dominance of parliamentary representatives in the debate and the communicative structure of the discussion did not influence the output of the decision-making process to a large extent. Though a majority of Convention members were against a permanent President of the European Council, in the end the Convention decided to propose such a permanent position in the draft text of the Constitutional Treaty.

Whether a general shift from arguing to bargaining occurred towards the end of the Convention's work still needs to be examined.⁶⁶ The influence of the Praesidium and the governments of big member states in the question of the Presidency of the European Council was due to time pressure towards the

65 Jürgen Habermas, *Faktizität und Geltung*, op. cit. note 32 supra, p. 369.

66 Christoph O. Meyer, 2003. 'Konstitutionalisierung ohne Öffentlichkeit? Die Konventsmethode als Testfall deliberativen Regierens', in: Ulrike Liebert *et al.*, (eds.), *Verfassungsexperiment. Europa auf dem Weg zur transnationalen Demokratie?*, Münster: LIT Verlag, p. 246: 'Nach gegenwärtigem Erkenntnisstand war zumindest die Endphase des Konvents weniger von 'arguing' als von 'bargaining' gekennzeichnet [...]'

end of the Convention and the fact that everybody realised that the Intergovernmental Conference would be taking the final decision. Not surprisingly, bargaining was more important in fields where there was a difference in interests than in areas where difference in institutional concepts was at issue.

But even on the subject of the President of the Council, argument in the decision-making process was not without consequences for the results of the Convention's work. The far-reaching criticism expressed by Convention members in plenary debate obliged the Praesidium to review the text. Roughly one week after the plenary debate on institutions, on 24th May 2003, the Praesidium submitted a revised draft of Part I of the Constitutional Treaty to members of the Convention. The draft omitted the articles on institutions. According to the Praesidium, the many amendments and different opinions advanced by members of the Convention required more time for reflection.⁶⁷

The Praesidium took the difference in interests concerning institutions seriously. The first draft of the article⁶⁸ on the President of the European Council discussed by the Convention in plenary session on 15th May 2003 differs in wording from that finally included in the Convention draft. The first draft provides for a European Council option omitted from the final article I - 21 of the draft Constitutional Treaty to decide by consensus on establishing a Presidency consisting of three members of the Council.⁶⁹ And the final draft of Article I – 21 contains a passage not included in the first draft submitted to the plenary Convention by the Praesidium. This passage deals with the competences of the President of the European Council, providing for the President to cooperate with the President of the Commission and with the General Affairs Council in preparing the European Council (Article I – 21). This passage was included neither in the draft submitted to members of the Convention by the Praesidium on 2nd June 2003⁷⁰ nor in the draft of 10th June 2003.⁷¹ It was inserted only at the very last moment of the Convention's work.

On 12th June 2003, one day before passing the first and second parts of the Convention draft, the Praesidium submitted a new version of the article on the President of the European Council to members of the Convention. It now stated: 'The President of the European Council shall ensure its proper preparation and continuity in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council'.⁷² The Praesidium of the Convention added this sentence at the last moment after consultation with components of the Convention and 'in consideration of their review-proposals'.⁷³

It is a solution that can be traced back to a proposal made by the Benelux countries in the plenary debate of 15th May 2003. Jacques Santer from the Luxemburg government, speaking on behalf of the Benelux countries, put forward the idea that meetings of the European Council should be chaired by the President of the Council and prepared and coordinated by the General Affairs Council. And, in the Benelux concept, the President of the General Affairs Council would be the President of the Commission.⁷⁴

Nous voulons que le Conseil européen joue son rôle d'impulsion politique qui est fondamentale dans une Union de 25 membres ou plus. [...] Nous ne souhaitons cependant pas faire du Conseil européen une institution à part. Nous proposons de confier la présidence du conseil des affaires

67 CONV 724/03 of 24th May 2003.

68 CONV 691/03 of 23rd April 2003.

69 CONV 691/03 of 23rd April 2003, article 16 a, paragraph 3.

70 CONV 770/03 of 2nd June 2003.

71 CONV 797/03 of 10th June 2003 article I – 21.

72 CONV 811/03 of 12th June 2003 article I – 21 and CONV 797/1/03 of 12th June 2003 article I – 21.

73 CONV 811/03 of 12th June 2003, p. 1.

74 European Convention, CONTRIB 320, CV 732/03 of 8th May 2003, articles 16 and 18. Compare the contribution of Jacques Santer in the plenary session, 15th May 2003, protocol at 19 and Video No.47 Archive University of Hamburg.

*générales au président de la Commission. Ainsi le besoin de continuité et de cohérence dans l'action de l'union sera le mieux assuré*⁷⁵

Jacques Santer received loud applause and the Benelux proposal was taken up by other members in the debate.⁷⁶

Thus, the plenary debate on the President of the European Council was not without influence on the final outcome of the Convention's work. In the end, the governments of the big member states France, Great Britain, Italy, Spain and Germany were influential enough to direct the decision-making of the Convention towards accepting a President of the European Council elected for a term of two and a half years (Article I – 21 Draft Treaty establishing a Constitution for Europe).⁷⁷ On the question of a permanent President of the Council the Praesidium of the Convention and the big member states had their way.

But even in this case, argument demonstrably played a role until the very end of the Convention's work. And it was no minor change included by the Praesidium because of criticism from Convention members. Moreover, public debate in plenary session made the decision-making process more transparent. It became clear that the decision to have a permanent President of the European Council was taken against the manifest views of a large number of Convention members. And the transparency of the Convention's work proved to be favourable for the media-coverage of European constitution making. The Convention being a 'strong public', in which opinion formation and decision-making took place, was able to foster general publics like the media.⁷⁸ If average media coverage per month from the beginning of the Convention until July 2003 is taken into account, it is not surprising that the media paid so little attention.⁷⁹ But coverage of the Convention was extensive whenever events occurred that were apt to attract media interest. When the Convention started work at the end of February 2002, when the first draft was published on the 28th October 2002, or when the heads of state and government failed to sign the Constitutional Treaty in December 2003, the media reported intensively on developments.⁸⁰

I have so far examined only three of the conditions necessary for developing the positive energy of difference in the European Convention (Figure II). And, of course, examination of the Convention alone is insufficient when investigating the potential of difference for European constitution making. The next step would be to look at the Intergovernmental Conferences. For this level of decision-making a new variable comes into play: dealing with difference in political power.

D. Explanatory Capacity of Politics of Difference for the Results of the Convention's Work

In this paragraph I look at the dependent variable, the output of the Convention's work. Did the decision-making process inside the Convention with regard to politics of difference influence the results of the Convention's work? Is there a correlation between dealing with differences in a democratic and communicative way and a draft Constitutional Treaty that can qualify as a basis for political decisions that possess governing- and problem-solving capacity?

Implementation of the Constitutional Treaty for the European Union cannot yet be assessed. Nobody can know what will happen once this Treaty is put into practice. But we can examine whether the text has the capacity to provide a future basis for perceiving societal problems, for deciding in time on

75 Jacques Santer, European Convention, Plenary session, 15th May 2003, protocol, p. 19.

76 F.e. Anne van Lancker, European Convention, Plenary session, 15th May 2003, protocol, p. 29.

77 Michael Stabenow, 2003. 'Lehrstunde europäischer Realpolitik', *Frankfurter Allgemeine Zeitung*, 9th May.

78 Erik Oddvar Eriksen and John Erik Fossum, 2002. 'Democracy through Strong Publics in the European Union?', *Journal of Common Market Studies*, 40, pp. 405 and 420.

79 Christoph O.Meyer, 2003. op. cit. note 66 supra, p. 248.

80 Christine Landfried, 2004. 'Das Entstehen einer europäischen Öffentlichkeit', in: Claudio Franzius and Ulrich K. Preuß, (eds.), *Europäische Öffentlichkeit (The European Public Sphere)*. Baden-Baden: Nomos, pp. 123-137.

European policies, whether it has the capacity to develop adequate policies, to promote successful implementation of these policies⁸¹ and whether it is a comprehensible, acceptable, and convincing document for citizens of the European Union. And besides analysing the capacity of the Constitutional Treaty for promoting successful governance one will have to look in a long-term perspective if this Constitutional Treaty might contribute to polity legitimization of the European Union. 'By polity legitimization is meant the very acceptance of the entity in question as a legitimate political community'.⁸²

In the context of this article I examine the governing- and problem-solving capacity of the Constitutional Treaty with regard to the influence of national parliaments and a permanent President of the European Council. The question is whether the Convention draft offers an adequate response to the task of European constitutionalism in the protocol on national parliaments and the European Council. The European Union as a supranational political system 'decouples citizenship and nationhood and conceives the constitution as a system for accommodating difference [...] The legislative structure of the modern constitutional state, and the modern idea of democratic citizenship makes solidarity between strangers possible'.⁸³ I want to take this idea of Erik Oddvar Eriksen a little farther. My analytical approach regards a European Constitutional Treaty not only as a system for accommodating difference⁸⁴ but also as a system for the democratic organisation of difference. If difference is accommodated, all the better. If not, it is no tragedy as long as there are democratic procedures for dealing with differences. A Constitutional Treaty capable of organising difference democratically must have structures that are democratic and participatory, and which both respect and organise difference.

Does the draft Treaty offer democratic, participatory, difference-respecting and difference-organising structures with regard to national parliaments and the President of the European Council? Debate on the influence of national parliaments on European politics in the draft Constitutional Treaty engendered a procedure for the participation of national parliaments in applying the principle of subsidiarity. An 'early-warning' system is to inform national parliaments about all Commission legislative proposals at the same time as the European Parliament and the Council of Ministers. Within six weeks of notification of the Commission's proposal, any national parliament may send a 'reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity' (§ 5 of the protocol on the application of the principles of subsidiarity and proportionality). In cases where reasoned opinions from national parliaments represent at least one third 'of all the votes allocated to the Member States's Parliaments and their chambers' (§ 6), the Commission has to review its proposal. After review, however, the Commission is free to maintain, amend or withdraw the proposal. At the end of the procedure, the European Court of Justice might intervene. On behalf of their national parliament each member state can take action before the European Court of Justice on grounds of infringement of the principle of subsidiarity by a legislative act.

From the problem-solving point of view, the 'early-warning-system' for national parliaments in controlling subsidiarity has two shortcomings. National parliaments do not have real participatory power: they can only initiate the review of a proposal by the Commission. And final resort on questions of subsidiarity to the European Court of Justice could intensify the judicialization of

81 Renate Mayntz, 1996. 'Politische Steuerung: Aufstieg, Niedergang und Transformation einer Theorie', in: Klaus von Beyme and Claus Offe, (eds.), *Politische Theorien in der Ära der Transformation*. Opladen: Westdeutscher Verlag, p. 165, has pointed to the fact that in modern, differentiated societies there can be no political steering of 'the society' but only 'in' the society.

82 Neil Walker, 2004. 'Europe's Constitutional Momentum and the Search for Polity Legitimacy', in: J. H. H. Weiler and C. L. Eisgruber, (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*. Jean Monnet Working Paper 5/2004, p. 2.

83 Erik Oddvar Eriksen, 2003. 'Deliberative Supranationalism in the EU', in: Erik Oddvar Eriksen and John Erik Fossum, (eds.), *Democracy in the European Union. Integration through Deliberation?*. London and New York: Routledge, p. 51.

84 James Tully, 1995. *Strange Multiplicity. Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press, p. 184: 'a contemporary constitution can recognise cultural diversity if it is conceived as a form of accommodation of cultural diversity'.

politics.⁸⁵ Yet, compared with the status quo, where national parliaments have little say in European politics and where governments are gaining more and more power, the solution offered by the Convention's draft is an important step forward towards a more democratic European Union.⁸⁶ And as the problem-solving capacity of European decisions grows with the greater democratic accountability of these decisions, the protocol on the role of national parliaments could be a contribution to the problem-solving capacity of the European Union.

The protocol on the role of national parliaments includes another element that could lend greater problem-solving capacity. There is a paragraph on interparliamentary conferences that goes back to proposals made by members of the Convention in plenary debate. COSAC 'shall [...] promote the exchange of information and best practice between Member State's Parliaments and the European Parliament, including their special committees. The Conference may also organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy and of common security and defence policy. Contributions from the Conference shall in no way bind national Parliaments or prejudice their positions'. (Draft Treaty establishing a Constitution for Europe, 13th June 2003, First Protocol No. 10). Such interparliamentary conferences could develop into a difference-respecting structure in European politics if they provide parliamentarians with a forum for the exchange of information and best practices on specific topics.

The protocol on the role of national parliaments is an example for the positive potential of differences in the Convention. For the participation of national parliaments at the European level it can be shown that differences in parliamentary experience and institutional concepts were advantages for the Convention output. Members of the Convention managed to use this potential. They exchanged their experience of parliamentary influence on European politics. Sweden was referred to by many members of the Convention as an example of a country where the parliament can influence politics at the European level. Different ways of ensuring more influence for national parliaments at the European level were debated. Though not many members of the Convention were in favour of a new institution, this idea was discussed, as well. President Giscard d'Estaing was unable to use his status to impose his idea of a Congress of the People. In sum, arguments were an important resource in the debate, and the procedure for participation by national parliaments that emerged from this debate can strengthen European democracy. What Thucydides had considered so long ago to be necessary for effective decision-making still proved valid:

Instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all. Again, in our enterprises we present the singular spectacle of daring and deliberation, each carried to its highest point, and both united in the same persons; although usually decision is the fruit of ignorance, hesitation of reflection. (Thucydides II, 40).⁸⁷

To what extent the positive potential of difference could develop in other areas, too, can be judged only after close analysis of debates and documents for specific parts of the draft.

What about the Convention's draft provisions on the President of the European Council? In my view, the solution can indeed offer a basis for legitimate and effective decisions by the European Council. Although difference was dealt with less democratically and communicatively in the decision-making process than was in deciding about the role of national parliaments, it cannot be said that democratic and communicative processes were of no relevance whatsoever. It has been shown that the review of the first draft provisions on the President of the European Council was provoked by the

85 Christine Landfried, 2003. 'Im Streitfall soll ein Parlamentsparlament entscheiden', *Frankfurter Allgemeine Zeitung*, 10th May, p. 10.

86 Anne-Marie Slaughter, 2004. *A New World Order*. Princeton and Oxford: Princeton University Press, p. 122 argues that more democracy in a supranational organisation like the European Union can be gained by networks of national parliamentarians.

87 I want to thank Johannes Pollak for drawing my attention to this passage of Thucydides.

arguments advanced by members of the Convention against a permanent President. I regard the solution found in Article 21 of part I of the draft Treaty to strengthen its structure for organising difference. The solution of a permanent President has less participatory but more difference-organising qualities than a rotating system. Considering the draft as a whole, this solution offers a reasonable constitutional basis for legitimate and effective decisions in European governance.

Picking out single articles of the Convention draft can be no more than a starting-point in examining how the politics of difference influence European Constitution making. Of course we have to evaluate the draft as a whole. But it does make sense to start by scrutinising single articles of the draft Treaty for their aptness to strengthen democratic, participatory, difference-respecting and difference-organising structures in European governance.

IV. Normative Conclusions: The Democratic Organisation of Difference as a Principle of a European Constitution

What normative conclusions are to be drawn from my analysis? If, under the conditions outlined, differences can be a potential for European constitution making, the types of structural difference in the EU and the many concrete differences would be no obstacle to the adoption of a European constitution. ‘Deep diversity’, as John Erik Fossum calls it and ‘constitutional patriotism’ would be no contradiction.⁸⁸ Multiple demoi could be an adequate basis for a European constitution emerging in the long term from a constitutional treaty. J. H. H. Weiler finds a ‘remarkable expression’ of constitutional tolerance in the political organisation of the European Union. ‘It is a remarkable instance of civic tolerance to accept to be bound by precepts articulated, not by “my people,” but by a community composed of distinct political communities: a people, if you wish, of “others.”’⁸⁹ Why should it not be possible to codify this principle of constitutional tolerance in a formal constitution?⁹⁰

In my view, the democratic organisation of difference and tolerance is the precise task of a European Constitutional Treaty. A Constitutional Treaty that is qualified to serve as the basis for the democratic organisation of difference in European governance is also best suited for a discourse with other constitutional sites. There is an ‘increasing significance of the relational dimension’ between state and post-state constitutional sites within the post-Westphalian configuration.⁹¹ This relational dimension of constitutions has advantages and disadvantages. The ‘increasingly diversified constitutional order’ might encourage a refusal of dialogue and fundamentalism.⁹² But it might also ‘free up debate, encouraging greater resort to the ample tool-kit of state-constitutionalism, more active cross-fertilization of ideas between sites—including state sites themselves as their previous authority is challenged and they are increasingly drawn into the process of metaconstitutional reflection—and a more thoughtful engagement with the ‘problems of translation’ which that invites’.⁹³

However, taking the effects of structural difference and of concrete differences in the European Union seriously does not mean that differentiated integration on the model of enhanced co-operation is

88 John Erik Fossum, 2004. ‘Still a Union of Deep Diversity? The Convention and the Constitution for Europe’, in: Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, (eds.), *Developing a Constitution for Europe*, op. cit. note 39 supra, p. 227.

89 J. H. H. Weiler, 2002. ‘A Constitution for Europe? Some Hard Choices’, *Journal of Common Market Studies*, 40, p. 568.

90 Ibid., p. 569: ‘Is it possible to adopt a formal constitution which would codify the principle of constitutional tolerance? I fear not’.

91 Neil Walker, 2002. *The Idea of Constitutional Pluralism*. Florence: EUI Working Paper Law No. 2002/1, p. 48.

92 Ibid., p. 51.

93 Ibid.

the solution in all cases.⁹⁴ Even more important than effective instruments for differentiated integration is a European Constitutional Treaty that organises difference in a democratic and communicative way for all member states in policy areas for which the EU has exclusive or shared competences. After all, the ‘popular pillar’—or let us say the voice of the citizens—in the European Union is ‘rather meagre’⁹⁵ and should be strengthened by a European Constitutional Treaty.

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94 Fritz W. Scharpf, 2003. ‘Was man von einer europäischen Verfassung erwarten sollte und was nicht’, *Blätter für deutsche und internationale Politik*, 48, p. 59.

95 Yves Mény, 2003. ‘De la démocratie en Europe: Old Concepts and New Challenges’, *Journal of Common Market Studies*, 41, p. 11.