

## II. Europe's Constitution

### *1. The Initial Leadership Proposition: A Constitution for Europe*

Between 2005 and 2007, the first ever European Constitution (formally called Treaty Establishing a Constitution for Europe or, less formal, Constitutional Treaty) had been buried in order to be resurrected through the traditional channel of ordinary treaty-revision. The democratic aspiration of the European Constitution was curtailed when the repair work was handed back to the experience and camaraderie of intergovernmental backdoor bargaining. Two steps forward with the signing of the Constitutional Treaty in 2004, three steps backward with its rejection in referenda in France and in the Netherlands 2005, two steps forward again with the help of the Reform Treaty signed in Lisbon in 2007 and again three steps backward with its rejection in a referendum in Ireland in 2008 – thus was the path of the roller coaster in the European constitution-building process during the first decade of the twenty-first century. For the time being, the EU would continue to operate on the basis of the widely despised Treaty of Nice of 2000.

Despite the final result of this process: On October 29, 2004, European Constitutional history was rewritten. For the first time in the history of the European continent, a “European Constitution” was signed by the representatives of 28 countries.<sup>1</sup>

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1 The Treaty Establishing a Constitution for Europe was signed by Austria: Chancellor Dr. Wolfgang Schäussel, Christian Democratic Austrian People's Party (ÖVP), Federal Minister for International and European Affairs Dr. Ursula Plassnik, Christian Democratic Austrian People's Party (ÖVP); Belgium: Prime Minister Guy Verhofstadt, Flemish Liberals and Democrats (VLM), Foreign Minister Karel de Gucht, Reformist Movement (MR); Cyprus: (Greek Republic): President Tassos Papadopoulos, Democratic Party (DIKO), Foreign Minister George Iacovou, Independent; Czech Republic: Prime Minister Stanislav Gross, Social Democrats (CSSD), Foreign Minister Cyril Svoboda, Christian-Democratic Union – Czech People's Party (KDU-CSL); Denmark: Prime Minister Anders Fogh Rasmussen, Liberal Party (VENSTRE), Foreign Minister Per Stig Møller, Conservative Peoples Party (DKF); Estonia: Prime Minister Juhan Parts, Res Publica – Union for the Republic, Foreign Minister Kristiina Ojuland, Estonian Reform Party; Finland: Prime Minister Matti Vanhanen, Centre Party (KESK), Foreign Minister Erkki Tuomioja, Social Democratic Party of Finland (SDP); France: President Jacques Chirac, Union for a Popular Movement (UMP), Prime Minister Jean-Pierre Raffarin, Union for a Popular Movement (UMP), Foreign Minister Michel Barnier, Union for a Popular Movement (UMP); Germany: Chancellor Gerhard Schröder, Social Democrats (SPD), Foreign Minister: Joseph Fischer, Green Party; Greece: Prime Minister Kostas Karamanlis, New Democracy (ND), Foreign Minister Petros G. Molyviatis, New Democracy (ND); Hungary: Prime Minister Ferenc Gyurcsány, Socialist Party (MSZP), Foreign Minister László Kovács, Socialist Party (MSZP); Ireland: Prime Minister Bertie Ahern, Fianna Fáil – The Republican Party, Foreign Minister Dermot Ahern, Fianna Fáil – The Republican Party; Italy: Prime Minister Silvio Berlusconi, Forza Italia (FI), Foreign Minister Franco Frattini, Forza Italia (FI); Latvia: President Vaira Vike-Freiberga, Independent, Prime Minister Indulis Emsis, Green Party, Foreign Minister Artis Pabriks, Conservative People's Party; Lithuania: President Valdas Adamkus, Independent, Prime Minister Algirdas Mykolas Brazauskas, Social Democrats, Foreign Minister Antanas Valionis, Labour, Social Liberals – New Union; Luxembourg: Prime Minister Jean-Claude Juncker, Christian Social People's Party (CSV), Foreign Minister Jean Asselborn, Social Democrats

The ceremony took place in the same room – the “Sala Degli Orazi e Curiazi” at the Rome City Hall Campidoglio on Capitoline Hill – as the signing of the Treaties of Rome (formally the Treaty Establishing the European Economic Community and the Treaty Establishing the European Atomic Energy Community) on March 25, 1957. The ceremony was much more crowded than the founding act of the European Economic Communities almost five decades earlier. But the signing ceremony of the Treaty Establishing a Constitution for Europe was not any less important. In fact, it was meant to symbolize the Second Founding of an integrated Europe. This, at least, was the initial ambition of the political leaders that came together on the solemn occasion. Three years later, the next generation of political leaders (or the same ones, after having gone through a reflection period that is ironically described as a period of abstention from thinking) in the European Union has had to realize that the political elite had failed in its initial ambition. They tried to rescue the substance by giving up on the symbolism.<sup>2</sup> This was less than what was planned in 2004. In the meantime, this was also below the expectation of many citizens of the EU. European integration was to continue as a process of incremental progress. This was not the only insight into the outcome of the constitution-building process of the first decade of the twenty-first century. Already the experience with the formulation of the Treaty Establishing a Constitution for Europe, and the subsequent decision-making process in the European Council, should have eliminated any hope of overcoming this realist approach any time soon.

Only after a bitter power struggle and psychological waves of mistrust, coupled with a lacking “esprit européenne” over much of 2002 and 2003, have the leaders of all EU member states and current candidate countries been ready to sign the Treaty

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(LSAP); Malta: Prime Minister Lawrence Gonzi Nationalist Party (PN), Foreign Minister Michael Frendo, Nationalist Party (PN); The Netherlands: Prime Minister Jan Peter Balkenende, Christian Democratic Appeal (CDA), Foreign Minister Bernard R. Bot, Christian Democratic Appeal (CDA); Poland: Prime Minister Marek Belka, Independent, Foreign Minister Włodzimierz Cimoszewicz, Socialist Party (SLD); Portugal: Prime Minister Pedro Miguel de Santana Lopes, Social Democratic Party, Foreign Minister António Victor Martins Monteiro, Independent; Slovakia: Prime Minister Mikuláš Dzurinda, Slovakian Christian Democratic Union (SDKÚ), Foreign Minister Eduard Kukan, Slovakian Christian Democratic Union (SDKÚ); Slovenia: Prime Minister Anton Rop, Liberal Democrats (LDS), Foreign Minister Ivo Vajgl, Liberal Democrats (LDS); Spain: Prime Minister José Luis Rodríguez Zapatero, Socialist Party (PSOE), Foreign Minister Miguel Angel Moratinos Cuyaubé, Socialist Party (PSOE); Sweden: Prime Minister Göran Persson, Social Democrats, Foreign Minister Laila Freivalds, Social Democrats; United Kingdom Prime Minister Tony Blair, Labour Party, Secretary of State for Foreign and Commonwealth Affairs Jack Straw, Labour Party. The Final Act of the Treaty Establishing a Constitution for Europe was also signed in their capacity as candidate states for accession to the European Union by Bulgaria: Prime Minister Simeon Saxe-Coburg, National Movement Simeon II. (NDSV), Foreign Minister Solomon Passy, National Movement Simeon II. (NDSV); Romania: President Ion Iliescu, Social Democrats (PSD), Foreign Minister Mircea Geoana, Social Democrats (PSD); Turkey: Prime Minister Tayyip Erdogan, Justice and Development Party (AKP), Foreign Minister Abdullah Gül, Justice and Development Party (AKP). Present at the signatory ceremony were also representatives of Croatia. For the text see European Union, Treaty Establishing a Constitution for Europe, Luxembourg: Office for Official Publications of the European Communities, 2005.

2 On the meaning of political symbolism for European integration see Theiler, Tobias, *Political Symbolism and European Integration*, Manchester: Manchester University Press, 2005.

Establishing a Constitution for Europe. The optimists among them were convinced to move the European Union from early constitutionalism to a full European Constitution. Although the formal name Treaty Establishing a Constitution for Europe did not leave any doubt that this was another inter-state treaty arrangement, the colloquial use of the term European Constitution made it clear to skeptics and supporters of the project alike: This event did not have any precedent in European history. A European Constitution was truly news in the long history of old Europe. Even those who signed the Treaty Establishing a Constitution for Europe with reluctance had to admit this. Some of them, however, immediately began to back down. They began to reinterpret the European Constitution and tried to undermine this exceptional European project over the course of their respective national ratification processes.<sup>3</sup>

Constitutions are the product of a rearranged equilibrium of political power and social orientations in a society. They do not require the existence of firm identity of the body politic they are supposed to frame. The history of decolonization during the twentieth century gives ample proof of this experience. Constitutions time and again were meant to help in the formation of nation states. They did not have to be preceded by a solid nation state identity in order to make constitutional statehood possible. Often, constitutional orders were aspirations of a new beginning after the most daunting process of destruction of a nation (e.g., Afghanistan and Lebanon). Under other circumstances, a new constitutional order could prove the readiness of a population to mark a new beginning after deep societal cleavages and scars (e.g., South Africa and Russia).

The skeptics of constitution-building in Europe have perceived the potential of a European Constitution merely through the lenses of the historical experiences of Europe's long-standing nation states. They had developed constitutional orders – and had often changed them over time – in response to the historical evolution of national identities, significant developments in the national power equation and the redefinition of political or social goals. In the case of national histories, constitutions were evolving testimonies to the tenacity of the nation state they were meant to guide. In light of this pattern in Europe's national histories, it was easy to draw the wrong conclusion for the future of Europe as a whole. The “ingredients” needed for constitution-building and the tenacity of constitutional authority in many EU member states – skeptics argued – do not sufficiently exist on the European level. The experiences with failed constitutions in states with multiple identities (e.g., Yugoslavia and Soviet Union) were invoked as an alarm signal for the European Union. The example of Switzerland as a nation state with multiple identities and languages did not seem to be transferable because of different geographic dimensions and the enormous regional socio-economic asymmetries inside the European Union as a whole. And yet, the European Union has eventually reached the status of a constitutional entity. The EU is not a nation, and it is not a state. It

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3 See Duff, Andrew, *The Struggle for Europe's Constitution*, London: Federal Trust, 2005.

contains multiple identities, multilevel structures of governance and enormous regional socio-economic asymmetries. It has become a political entity with a cumulative constitution. This is unknown to the history of national constitution-making.

The most promising sign of political leadership during the first decade of the twenty-first century stood at the very beginning of this most recent series of constitution-building efforts: The highly forward-looking work of the Convention on the Future of Europe, soon labeled the Constitutional Convention of Europe, was an extraordinary construction. This unique forum was installed by a decision of the European Council meeting on December 15, 2001. Meeting in Laeken one year after the highly unsuccessful European Council in Nice that had left bitter memories across the EU, the Heads of State and Government were under enormous public pressure not to lose further authority as leaders of Europe. The Declaration they presented to the public at the end of their meeting echoed this sense of cautious self-criticism.

Five decades after the beginning of European integration, the Laeken Declaration admitted, the EU “stands at a crossroads, a defining moment in its existence”. While the European Union was preparing for the biggest ever enlargement through the admittance of former communist countries in Central and Eastern Europe, the EU itself was facing the challenge of a democratic deficit – a term often to be heard across the EU during the following years. While the institutions and actions of the European Union “must be brought closer to the citizens”, the EU must respond to the challenges and opportunities of globalization, playing a “stabilizing role worldwide and to point the way ahead for many countries and peoples”.<sup>4</sup>

The Laeken Declaration made explicit reference to new global threats manifested in the terrorist attacks in New York and Washington on September 11, 2001 (“9/11”). Invoking the Magna Carta, the Bill of Rights, the French Revolution, and the fall of the Berlin Wall, the Laeken Declaration defined Europe as “the continent of liberty, solidarity and above all diversity, meaning respect for other’s languages, cultures and traditions”. The Declaration used to proud language: “The European Union’s one boundary is democracy and human rights.” At the same time, it recognized that the actions and goals of the European Union were not always properly understood or appreciated by the EU’s own citizens: “Citizens are calling for a clear, open, effective, democratically controlled Community approach, developing a Europe which points the way ahead for the world.” What was expected from their leaders was left unspecified. The Laeken Declaration defined four fundamental mandates for the institutional reform process ahead:

- A better division and definition of competencies in the European Union, an issue especially dear to representatives of federal EU member states and those trying to prevent further transfer of competencies to the EU level.

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4 European Union, European Council, *The Laeken Declaration on the Future of the European Union*, [http://ec.europa.eu/justice\\_home/unit/charte/en/declarations-laeken.html](http://ec.europa.eu/justice_home/unit/charte/en/declarations-laeken.html).

- The need to simplify the Union's legislative instruments, an issue usually more contentious among political players than of interest to the broader public.
- A stronger involvement of national parliaments in the EU policy-making processes, an issue meant to enhance national legitimacy for the European process. The future structure of the EU's rotating presidency and the various Council formations as well as the mechanisms for the EU's foreign policy were included in the mandate.
- A simplification of the Treaty structure of the European Union in order to enhance transparency.

At the European Council meeting in Laeken on December 15, 2001, the possibility of the creation of a European Constitution was only a vague option ahead at the Convention that was to begin its work. The establishment of the Convention on the Future of Europe was an innovative rupture with the past method of treaty revisions through secretive intergovernmental conferences. Under the Presidency of former liberal French President Valéry Giscard d'Estaing, the Convention on the Future of Europe began its deliberations on March 1, 2002, in Brussels. The former Heads of Government of Italy, Giuliano Amato, a Social Democrat, and Belgium, Jean-Luc Dehaene, a Christian Democrat, had been appointed Giscard's deputies.

The Convention on the Future of Europe was composed of 15 representatives of the Heads of State and Government of EU member states (one from each state), 30 members of national parliaments (two from each state), 16 members of the European Parliament and two representatives of the European Commission. 13 accession countries were fully involved in the deliberations of the Convention on the Future of Europe, represented in the same way as the 15 current EU member states (one government representative and two representatives of each national parliament). The Praesidium of the Convention was composed of the Chairman and his two deputies and nine members drawn from the Convention: the representatives of all governments holding the Council Presidency during the work of the Convention – Spain, Denmark and Greece – two representatives of national parliaments, two representatives of the European Parliament and two representatives of the European Commission.<sup>5</sup> Three representatives from the Economic and Social Committee of the European Union and six representatives from the Committee of the Regions and the European Ombudsman were invited to attend as observers. The Presidents of the European Court of Justice and of the European Court of Auditors were invited to address the Convention. The work of

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5 The other members of the Praesidium of the Convention were: Alfonso Dastis, Henning Christophersen, Georges Papandreu representing the governments holding the Council Presidency during the Convention, John Bruton and Gisela Stuart representing the national parliaments, Klaus Hänsch and Inigo Mendez de Vigo representing the European Parliament, Michel Barnier and Antonio Vitorino representing the European Commission; Alojz Peterle, representing the candidate countries, attended the meetings of the Praesidium as an invitee; the Council's Secretariat was headed by Sir John Kerr, a distinguished British career diplomat.

the Convention's Presidium was supported by a Secretariat with experts from the Commission, the European Parliament and the Council General Secretariat.

During its initial meeting, the Convention on the Future of Europe elected the remaining members of its Presidium and organized its work for the next fifteen months. The Convention came together on 28 occasions, discussing publicly in Brussels a politically loaded agenda.<sup>6</sup> The Convention's President structured the debate, allowing for an open exchange of general ideas at the beginning, while structuring the debate more carefully the closer the Praesidium and its secretariat came to preparing the final text on the Convention's work. The most courageous and far-sighted decision was taken by the Convention early on, namely the decision that the Convention would present a comprehensive text to the EU governments. This was the breakthrough for the concept of a European Constitution. What had been a taboo across Europe until then became thereafter a common reference across the EU's media, policy circles, and academia. The efforts of the Convention to frame a coherent text acceptable to all its members were supported by eleven Working Groups with members of the Convention dealing with the most crucial issues on the Convention's agenda:

- Subsidiarity.
- The Role of the European Charter of Basic Rights.
- The Legal personality of the European Union.
- The Role of national parliaments.
- Complementary competencies.
- Economic governance.
- External actions.
- Defense.
- The Simplification of European Treaties.
- European Space of Freedom, Security and Justice.
- Social Europe.<sup>7</sup>

Three specialized Discussion Circles dealt with the future status of the European Court of Justice, the possible future budgetary procedures, and the issue of possible own resources for the European Union.<sup>8</sup>

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6 For all deliberations of the "Convention on the Future of Europe", see: European Union, The European Convention, <http://european-convention.eu.int/sessplen.asp?lang=EN>; on the Convention also Shaw, Jo, *The "Convention on the Future of Europe": Working Towards an EU Constitution*, London: Federal Trust for Education&Research, 2003; Michalski, Anna, and Matthias Heise (eds.), *European Convention on the Future of Europe: An Analysis of the Official Positions of EU Member States, Future Member States, Applicant and Candidate Countries*, The Hague: Netherlands Institute of International Relations, 2003.

7 For all deliberations in these Working Groups see: European Union, The European Convention, [http://european-convention.eu.int/doc\\_wg.asp?lang=EN](http://european-convention.eu.int/doc_wg.asp?lang=EN).

8 See: European Union, The European Convention, [http://european-convention.eu.int/doc\\_CIRCLE.asp?lang=EN](http://european-convention.eu.int/doc_CIRCLE.asp?lang=EN).

The Convention on the Future of Europe was a highly political body and was meant to be one. Unknown in former institutional reform processes, its deliberations took place in a very consensual atmosphere, intended to make full use of the possible impact of its work. It was soon labeled the Constitutional Convention of Europe. In light of the final result of the reform process, this was a premature assessment. But the members of the Convention deserve to be recognized as the Founding Brethren (and Sisters) of a new era in European integration. On July 10, 2003, the Constitutional Convention concluded its work. Without a formal vote, the Convention unanimously agreed to the final text prepared by its secretariat and presented by its President. This was a unique act in the history of European integration. Though politicians and government officials could split over issues the size of a hair without ever coming to any reasonable agreement, the Convention for the Future of Europe unanimously adopted a text with enormous implications for generations of Europeans to come. It was not only proof of their ability to generate a common denominator; it was a sign of leadership and authority, so often a rare commodity in European politics over past decade(s).

On July 18, 2003, Valéry Giscard d'Estaing presented the Draft Constitutional Treaty to the European Council and the European public.<sup>9</sup> It was now in their hands to decide about the fate of the first ever European Constitution. The Draft Constitutional Treaty was an extraordinary piece of work. It went far beyond the original expectations of the work of the Convention on the Future of Europe. The Convention had made full use of its mandate without overstretching it to a point at which its members would engage in so much controversy that splitting votes was inevitable. Of course, the Draft Constitutional Treaty did not satisfy everyone in the EU. In fact, practically everybody would have been able to identify with one or the other point of disagreement and contention. This was probably the best possible criterion for measuring the success of the Convention's work; while nobody could euphorically claim complete victory, everybody was able to point to one or the other endearing aspects of achievement.

The future of Europe was not be changed dramatically only because of the very text of a constitution. But the framework for future deliberations, policy decisions and – most importantly – expectations and standards of accountability was to be dramatically changed, enlarged and deepened with this text. The press coverage of the presentation of the Draft Constitutional Treaty already indicated that the text would soon only be known and referred to as the European Constitution. Two bottlenecks remained: The text would have to gain the blessing of the European Council and it would have to be ratified by each nation across the European Union.

The European Council handed the Draft Constitutional Treaty over to an Intergovernmental Conference. This procedural decision was an enormous success for a

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9 European Union, *Draft Treaty Establishing a Constitution for Europe: adopted by consensus by the European Convention on 13 June and 10 July 2003; submitted to the President of the European Council in Rome, July 8, 2003*, Luxembourg: Office for Official Publications of European Communities, 2003.

Constitutional Convention that hardly anyone had believed to be possible two years before. Hope was aired that this might be the last Intergovernmental Conference dealing with EU institution-making. In the future, more public and political Conventions were to be the only instrument to amend EU treaties. Bureaucratic and non-transparent Intergovernmental Conferences would be declared outlived. This hope was premature. Yet, a constitutional debate in Europe had begun. The Draft Constitutional Treaty was recognized as the basis for further deliberations in European constitution-building. During the 1980's and 1990's, Intergovernmental Conferences had become notorious for being unable to achieve more than bureaucratic fine-tuning in EU institution-making. The failure of the Intergovernmental Conference preceding the Treaty of Nice was on everybody's mind when yet another IGC with representatives from member state governments was summoned in autumn 2003. The eventual failure of this IGC to come to terms with the most daunting controversies still in the European air was therefore no real surprise. It was, however, an unpleasant surprise that subsequently the Heads of State and Government also failed to achieve the necessary compromise when they convened for their regular European Council meeting in Brussels on December 11 and 12, 2003. They could not yet agree on the Constitutional Treaty.

Spain and Poland were tainted as the “bad boys;” such, at least was the superficial and highly prejudicial impression conveyed by many in the EU media. Spain and Poland were unwilling to accept demands by France and Germany concerning the future decision-making mechanisms in the Council. As the Italian EU Presidency was unable to overcome the deadlock, the European Council meeting ended early and without result. When the Treaty of Nice was negotiated in 2000, France had insisted on parity with Germany in the institutions of an enlarged EU. While both countries finally had agreed upon this principle, they also accepted an equal proportion of voting rights in the Council for Spain and Poland. Spain and Poland, together representing 80 million people, were granted 54 votes while Germany with 82 million citizens received 29 votes. It was so confusing and contradictory that only three years later, the Nice decision was considered invalid by its very inventors; suddenly, France and Germany insisted on a new share of voting rights in the Council, hoping to reduce the bargaining position of Spain and Poland while maintaining and even strengthening their own. It was no surprise that Spain and Poland said “no” to this “Big Power diplomacy.” The idea to install a double majority for decision-making in the European Council – meaning that decisions could only be taken if a majority of both EU member states and EU citizens would agree – was not convincing to the representatives of Spain and Poland.

The controversy was not simply a matter of the arithmetic of the weighing of votes. The constitutional deadlock of December 2003 was rather the honest expression of antagonisms that had escalated since 2000. Instead of advancing the European Union, France and Germany had increasingly antagonized some of their EU partners – old and

new – with a behavior that others were describing as counter-productive to the spirit of the European Union. Since the notorious Nice Summit, France and Germany had developed from pro-active engines of EU integration into veto powers, at least so it appeared to many of their EU partners. France and Germany were perceived as veto powers against the future new EU member states (i.e., on matters of EU budgeting), against provisions of EU law launched by themselves (i.e., on the issue of the EU Stability and Growth Pact), against the United States (i.e., on the war in Iraq), and ultimately leading to suspicious among themselves (i.e., on voting rights in EU institutions). At the same time, France and Germany were confronted with enormous and growing difficulties to launch necessary structural reforms in their labor markets and welfare state mechanisms, health and pension policies in particular. They were not able to reinvigorate productivity and growth at home. Germany and France had turned from the central economic engines of Europe into the economically “sick men” of Europe.

By the end of 2003, many of their EU partners saw the Franco-German position on voting rights in the Council as yet another expression of their ambition to lead the EU and impose their will if necessary against the interests of other member states. This had become visible for them during the Iraq crisis of 2002/2003 when Spain, under conservative Prime Minister José Maria Aznar, and Poland, under Socialist Prime Minister Leszek Miller, were siding with the US administration of President George W. Bush, while France, under Gaullist President Jacques Chirac, and Germany, under Social Democratic Chancellor Gerhard Schröder, were opposing the American position. Their “bilateral unilateralism” was no more helpful than the one for which they criticized the US administration. The escalation of this internal Cold War in the West left deep wounds and scars all across the EU. One of its collateral victims – at least for a time being – was the European Constitution. An old law of European politics was confirmed: Whenever transatlantic relations are in bad shape, European integration will not work well.

By June 2004, transatlantic relations were not yet really repaired. More than ever, the growing frustration about the unaccomplished mission in Iraq overshadowed all efforts of damage control in order to rebuild the Atlantic alliance around the logic of a new transatlantic partnership.<sup>10</sup> In fact, the most severe wounds seemed to have healed in Europe. The terrorist attacks in Madrid on March 11, 2004 (“3/11”) had shocked Europe and strengthened the sense of European solidarity with the US in an unprecedented way. The EU invoked the solidarity clause that was only to be used in reference to the Constitution itself. In the midst of the horror of the terrorist attack, the ruling conservative People’s Party under Prime Minister Aznar lost the Spanish parliamentary elections. They were blamed for not being honest about the origin of the

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10 On this matter see Asmus, Ronald D., and Kenneth M. Pollack, “The New Transatlantic Project,” *Policy Review*, 115 (2002): 3-18.

terrorist act and trying to cover up what was seen as a consequence of their pro-American policy on Iraq. The new Socialist majority under Prime Minister José Luis Rodríguez Zapatero immediately announced an attitude of compromise on the European Constitution. Poland followed suit while its Premier Leszek Miller stepped down the morning after Poland formally acceded to the European Union on May 1, 2004, being replaced by a caretaker government under Marek Belka. Germany and France had also indicated their readiness to compromise. A result was imminent when the European Council convened again on June 17 and 18, 2004, in Brussels. It was called upon to repair the damage to Europe's future that had been inflicted six months earlier, and it did.

In the meantime, the principle of “double majority” as the basis for strengthening EU legitimacy had been widely discussed in the EU. Twofold legitimacy meant to recognize both the role of the states and the role of citizens in a Union of States and Citizens alike. According to international law, a Union of States would have to recognize equality among them. This would leave aside the sharp difference in the distribution of people among EU countries while all of them would be subject to binding EU law. According to democratic theory, a Union of Citizens would have to recognize equality among them. In the context of the European Union, this would marginalize the citizens of Malta, Luxembourg or Estonia in light of the much bigger populations in other EU countries.

A balance between the concept of a Union of States and the concept of a Union of Citizens was necessary, should the European Union maintain and broaden its popular, as well as its political and academic, legitimacy. Both principles – those referring to the Union of States and those referring to the Union of Citizens – had to be balanced in all EU institutions. As far as the European Parliament is concerned, degressive proportionality in the distribution of parliamentary mandates provides for this balance. In the case of the European Commission, the number of commissioners is decoupled from the number of member states. And as far as voting rights in the Council are concerned, a qualified majority in Council decisions is defined by a combined majority of member states and a majority of EU citizens.

After months of uncertainty, the European Council agreed on compromises on all pending issues during its session on June 17 and 18, 2004, in Brussels. The principle of “double majority” found agreement, with 55 percent of states representing 65 percent of the union citizens necessary to pass legislation under the principle of qualified majority voting. For an interim period (until 2009), the EU would keep 25 commissioners, but the overall number would be reduced to 18 once the EU consisted of more than 27 member states. Finally, the Treaty Establishing a Constitution for Europe was accepted by the European Council and prepared for the signing ceremony on October 29, 2004, in Rome.

All key propositions of the Draft Constitutional Treaty were accepted in the Treaty Establishing a Constitution for Europe:

- The future legal basis of the European Union was to be one single treaty (Treaty Establishing a Constitution for Europe, colloquially labeled Constitutional Treaty or European Constitution). The confusion with four different legal and protoconstitutional provisions was to come to an end. The so-called Pillar Structure, introduced by the Treaty of Maastricht in order to distinguish between the supranational and the intergovernmental dimensions of the European Union on the one hand and the European Community on the other hand, was to be terminated.
- The preamble of the Constitutional Treaty did not make explicit reference to God but was to recognize the Christian heritage of Europe;<sup>11</sup> the Constitutional Treaty was to introduce the mechanism of a permanently structured dialogue between the EU organs on the one hand and Christian churches and other religious communities in Europe on the other hand (Constitutional Treaty, Part I, Article I-52).<sup>12</sup>
- The Constitutional Treaty was to give legal status to the symbols of the European Union the flag, anthem, motto of “Unity in Diversity”, currency, and Europe Day on May 9th, (Constitutional Treaty, Part I, Article I-8).<sup>13</sup>
- The European Union was to gain legal personality (Constitutional Treaty, Part I, Title I, Article I-7).<sup>14</sup> The EU was to consist of one European Union, overcoming the past differentiation between European Union and European Community. Legal personality would allow the European Union to enter into treaty relations with other political entities in the world, including the United Nations. This could be relevant, for instance, for peace-keeping operations under a UN mandate.
- The Charter of Fundamental Rights of the European Union was to be included in the Treaty and thus made judiciable (Constitutional Treaty, Part I, Article I-9; Part II).<sup>15</sup>
- The order of competencies of the European Union was to be considerably simplified (Constitutional Treaty, Part I, Title III, Article I-11 to Article I-18).<sup>16</sup> The Constitution distinguished between exclusive competencies of the European Union, shared competencies of the European Union and its member states, and supporting, complementary and coordinating competencies of the EU.
- The European Parliament was understood to be the co-decision body in

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11 European Union, *Treaty Establishing a Constitution for Europe*, op.cit.: 9.

12 Ibid.: 42

13 Ibid.: 19.

14 Ibid.: 19.

15 Ibid.: 19; 46-60.

16 Ibid.: 20-22.

practically all future EU legislation (Constitutional Treaty, Part I, Title IV, Article I-20).<sup>17</sup> The President of the European Commission was to be nominated by the European Council in light of the outcome of the elections to the European Parliament whose majority would have to approve him. The European Parliament was to be given the mandate to express a binding vote of non-confidence against the Commission President and each EU Commissioner (Constitutional Treaty, Part I, Title IV, Article I-27).<sup>18</sup>

- The European Council was to be chaired by a permanent President, in office for two and a half years, renewable once, and appointed by the European Council (Constitutional Treaty, Part I, Title IV, Article I-22).<sup>19</sup> Council formations were to be simplified and made more transparent. The Council was to meet in public when discussing and deciding on a legislative act (Constitutional Treaty, Part I, Title IV, Article I-24).<sup>20</sup> Council decisions on the basis of a qualified majority were supposed to be taken when at least 55 percent of the EU member states comprising at least 65 percent of the population of the EU are in favor of a decision (Constitutional Treaty, Part I, Title IV, Article I-25).<sup>21</sup>
- The European Commission was eventually (by 2014) to be reduced to 15 members or two thirds of the number of EU member states selected on the basis of a system of equal rotation among all member states (Constitutional Treaty, Part I, Title IV, Article I-26).<sup>22</sup> This provision implied that not every EU member state would be any more able to send a Commissioner to Brussels, thus strengthening the political over the national principle.
- Foreign and Security Policy of the European Union was to become more personalized with the introduction of a Union Minister for Foreign Affairs, who at the same time was to be one of the Vice-Presidents of the European Commission and thus also accountable to the European Parliament (Constitutional Treaty, Part I, Title IV, Article I-28).<sup>23</sup>
- The legislative procedures of the European Union were to be streamlined (Constitutional Treaty, Part I, Title V, Article I-33 to Article I-39).<sup>24</sup> They were to be reduced to six: two legislative acts (European laws and European framework laws) and four non-legislative acts (European regulations, European decisions, European recommendations, delegated European regulations). With almost no exception, future legislation in the European Union was to take place on the basis of co-decision between the Council and the European Parliament.

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17 Ibid.: 25.

18 Ibid.: 29.

19 Ibid.: 26.

20 Ibid.: 26-27.

21 Ibid.: 27.

22 Ibid.: 28.

23 Ibid.: 29-30.

24 Ibid.: 32-35.

The new executive instruments of “delegated European regulations” and “implementing acts” were intended to strengthen the executive position of the European Commission.

- The participatory dimension of European democracy was to be strengthened by introducing the right of one million citizens to initiate a proposal for a legal act of the European Union (Constitutional Treaty, Part I, Title VI, Article I-47).<sup>25</sup> In case of such a citizen’s initiative, the European Commission was supposed to prepare the necessary steps for such a legal act.
- The budgetary procedures of the European Union were to be tightened and simplified, although this complex issue had remained one of the least successful in the dealings of the Convention (Constitutional Treaty, Part I, Title VII, Article I-53 to Article I-56).<sup>26</sup> The European Parliament was practically to be granted the right of co-decision in long-term budgetary planning. Both the Draft Constitutional Treaty and the Treaty Establishing a Constitution for Europe did fall short of introducing a European tax, thus leaving the EU in a situation of “representation without taxation.”
- The role of national parliaments in future EU legislation was to be strengthened (Protocol on the Role of National Parliaments in the European Union).<sup>27</sup> Based on the principle of subsidiarity national parliaments were to be enabled to resort to an early warning mechanism in order to judge whether or not their constitutional rights are curtailed by a planned act of EU legislation.
- The European Constitution offered a structured path of exit, provided a country intended to withdraw from the European Union of its free choice (Constitutional Treaty, Part I, Title IX, Article I-60).<sup>28</sup> The mechanism was intended to alleviate the fear in some EU member states that the future path of EU integration might overly curtail their national freedoms.
- Future procedures of constitutional revisions and amendments were explicitly outlined in the European Constitution in order to facilitate additions or changes to the Constitution in a European Union with a growing numbers of actors and confronted with increasingly complex topics that would require a reassessment of the original provisions of the Constitutional Treaty (Part IV, Article IV-443 to Article IV-445).<sup>29</sup>

The signatories of the European Constitution completely underestimated the pitfalls of the ratification marathon that was to follow their signing of the Constitution. In some cases, the ratification pitfalls were considered the last resort to prevent the Constitution from ever coming into force without being directly blamed for its failure. In other cases,

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25 Ibid.: 41.

26 Ibid.: 42-44.

27 Ibid.: 211-213.

28 Ibid.: 46.

29 Ibid.: 196-198.

the arrogance of national governments or the cheap Brussels-bashing that has been a sign of parochialism in many political circles across the EU had to backfire. While the majority of EU member states representing the majority of EU citizens ratified the European Constitution, the majorities of citizens asked in a referendum in France and subsequently in the Netherlands said “no” to the proposition of their respective leadership.<sup>30</sup>

## 2. Resurrection, Second Death and the Paradoxical Results of a Confusing Reform Decade

For two years, the European Constitution rested in a state of political coma. It goes to the credit of the sophisticated work done in the Constitutional Convention between 2002 and 2003 that most of the essential elements of the Treaty Establishing a Constitution for Europe were rescued for the reconstitution work in 2007.<sup>31</sup> After a self-declared reflection period among EU leaders, the experienced and subtle work by the German and Portuguese diplomacy during the EU Presidencies of these two countries in 2007 transferred the political essence of the Constitutional Treaty into the Treaty of Lisbon. This was no longer a readable, slim or attractive text. But it helped to revitalize the constitutional agenda of the first decade of the twenty-first century. The 2007 Treaty of Lisbon was to become a compromise between the 2000 Treaty of Nice and the 2004 European Constitution.

On the occasion of the fiftieth anniversary of the signing of the Treaties of Rome on March 25, 2007, the constitution-building process through cumulative treaty revisions was resurrected. The reflection period of the EU ended with the Berlin Declaration, a somber document signed on March 25, 2007, by the European Council, the European

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30 The Treaty Establishing a Constitution for Europe was ratified by the following countries: Lithuania (November 11, 2004), Hungary (December 20, 2004); Slovenia (February 1, 2005), Italy (April 6, 2005), Greece (April 19, 2005), Bulgaria (May 11, 2005, as part of the EU Accession Treaty), Slovakia (May 11, 2005), Romania (May 17, 2005 as part of the EU Accession Treaty), Spain (May 18, 2005), Austria (May 25, 2005), Germany (May 27, 2005), Latvia (June 2, 2005), Cyprus (June 30, 2005), Malta (July 6, 2005), Luxembourg (July 10, 2005), Belgium (February 8, 2006), Estonia (May 9, 2006), Finland (December 5, 2006). The European Parliament ratified the Treaty Establishing a Constitution for Europe on January 12, 2005.

31 On the Treaty Establishing a Constitution for Europe see also Mény, Yves, “Making Sense of the EU: The Achievements of the Convention,” *Journal of Democracy*, 14 (2003): 57-70; Brimmer, Esther (ed.), *The European Constitutional Treaty: A Guide for Americans*, Washington D.C.: Center for Transatlantic Relations, 2004; Odvar Eriksen, Erik, et.al. (eds.), *Developing a Constitution for Europe*, London: Routledge, 2004; Höreth, Marcus, Cordula Janowski, and Ludger Kühnhardt (eds.), *Die Europäische Verfassung - Analyse und Bewertung ihrer Strukturentscheidungen*, Baden-Baden: Nomos, 2005; Wessels, Wolfgang, “The Constitutional Treaty – Three Readings from a Fusion Perspective,” *Journal of Common Market Studies* 43 (2005): 287-306; Jopp, Mathias, and Saskia Matl (eds.), *Der Vertrag über eine Verfassung für Europa*, Baden-Baden: Nomos, 2005; Church, Clive H., and David Phinnemore, *Understanding the European Constitution: An Introduction to the EU Constitutional Treaty*, London: Routledge, 2006.

Parliament and the European Commission. Through the Berlin Declaration they tried to redefine their leadership task in a joint manner, speaking on behalf of the citizens of European Union as a means to move their own obligation forward: “We, the citizens of the European Union, have united for the better. In the European Union, we are turning our common ideals into reality: for us, the individual is paramount. His dignity is inviolable.”<sup>32</sup> This sounded quite noble, but the struggle over the wording and its interpretation among the leaders of the EU was rather undignified. Euroskeptics and those trying to rescue the political substance of the European Constitution were united in avoiding the term Constitution. For many citizens, the announcement of the purpose of European integration was a helpless signal contradicted for several years by the difficult daily path toward European integration. Others were frustrated or even considered it a threat to hear what Europe’s political leadership had to say about their unity “for the better.” As for its substance, the Berlin Declaration was a masterpiece in diplomacy: It declared the European Constitution dead in order to resurrect it. The Berlin Declaration concluded that “we are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009.”<sup>33</sup> These were empty words for most European citizens, but nuances of self-imposed commitment subsequently hung over the leaders of all EU member states as an obligation to act.

It belongs to the paradoxical realities of the European Union that some of the intentions of the Treaty Establishing a Constitution for Europe – colloquially called the European Constitution – had already been implemented without the ratification of the treaty. In 2004, for example, the President of the European Commission was appointed only after he received the vote of the majority in the European Parliament, representing its strongest political party after the elections of 2004. Since 2004, the EU’s Diplomatic Service (European External Action Service) has been built up, and so has the European Defense Agency which, however, does not belong to the treaty. The European Union was working and had enlarged in early 2007 to include Bulgaria and Romania, thus becoming a Union of twenty-seven states. Yet, a sense of crisis and stalemate had accompanied the past two years. Since the negative referenda on the Treaty Establishing a Constitution for Europe in France and in the Netherlands in May and June 2005, the reflection period had tamed the usual self-serving rhetoric of many European politicians; they were eager to regain control over the crisis. The reflection period was a wise mechanism in order to postpone final decisions and help healing old wounds. By 2007, new wounds broke out as new governments represented those countries in the EU with new special interests, concerns, or dimensions of Euro-skepticism.

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32 European Union, *Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome*, Berlin, March 25, 2007, [http://www.eu2007.de/de/News/download\\_docs/Maerz/0324-RAA/English.pdf](http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf).

33 Ibid.

When the European Council met on June 12-13, 2007, Poland was instantly criticized for being obstructionist, along with the Czech Republic. Ironically, the Polish population was as pro-European as any citizenry in the EU could be at that point in time. Its conservative-nationalist government was fighting against all other EU member states in preventing the introduction of the principle of “double majority” into the new treaty, a decision that had already been included into the Treaty of Nice and also into the Treaty Establishing a Constitution for Europe. During a night-long negotiation, Prime Minister Jarosław Kaczyński called his twin-brother, Poland’s President Lech Kaczyński, several times to discuss the Polish position. The surreal scenery ended with a compromise, elegantly brokered by German Chancellor Angela Merkel, then head of the European Council. Poland accepted the principle of “double majority” for the voting mechanism in the European Council as had already been outlined in the Treaty Establishing a Constitution for Europe. The government of the Kaczyński twins represented a new majority in Polish politics different from the pro-European one that had signed the European Constitution in 2004. To accommodate national political changes, which put into question the former majority’s signature under an international treaty, was a negative experience for many in the EU. To reach a compromise with Poland’s consent was, in the end, a victory for European solidarity and for the continuity of a Europe with one voice and one speed. But the mandate for an EU reform treaty was only a small step. In fact, it was a patchwork and not a contribution to a new level of real reform. The fierce debate in the European Council over the principle of “double majority” for future Council decisions was telling. The mathematical definition of the weighed votes of equal countries with unequal populations echoed the misinterpretation of the EU as a zero-sum operation. In reality, however, the EU could only be successful as long as its decisions turned out to be win-win-constellations for all. The right step into this direction was the comprehensive introduction of a regular legislative relationship between the Council of the European Union and the European Parliament under the framework of co-decision-making. The “double majority” dispute was a dispute of mutual suspicion, reciprocal fear and parochial notions of Europe among its national governments.

By virtue of the EU’s calendar, Germany was holding the rotating EU Presidency during the first half of 2007. The German government under Angela Merkel gained much praise across the EU for its steady commitment to revitalize the reform process and to broker a realistic compromise acceptable to all EU governments. The price for this compromise was high: it was the loss of much of the transparency which the Treaty Establishing a Constitution for Europe had promised. The price was also that the EU was giving up on the idea of a single treaty, of the nomination of its first Foreign Minister and of the explicit reference to its symbols – all this happened without any public debate or transparency. Afterwards, nobody could be held accountable and everybody shied away from looking too deep into the circumstances and driving forces

that had triggered these revisions behind closed doors. With a certain generalization it is fair to say that the state in which Europe's political leadership found itself at the time of the European Council of June 2007 was the real problem behind the failure of achieving a European Constitution. The obvious confusion and lack of forward-orientation among many of the EU's political leaders echoed the resentments and dissonances among the citizens in several EU member states. Since the full introduction of monetary union, the transfer of sovereignty to the EU level has met more reservation than ever before among the original 15 member states. With the accession of twelve new member states, mostly post-communist transformation societies, European interests could no longer be defined as "business as usual." Under the conditions of globalization, all the twenty-seven member states of the EU and the EU's institutions were exposed to an agenda increasingly defined outside Europe yet impacting the Union's citizens directly. Returning the Constitution of Europe to a legitimate place had to become the main task in order to turn the Constitution of Europe into a consensual text and cornerstone for future progress. Political leaders were hiding behind disconcerted citizens while citizens were ignored by disconcerted leaders.

The structural conflict behind the constitutional crisis was perfect material for a thorough reflection on democratic theory: While normally, international commitments of any government can be expected to be binding for the country whose representatives have signed an international commitment, the legacy of the 2004 Treaty Establishing a Constitution for Europe did run counter to this experience of predictability and reliability. The rift between elites and the people that became evident with the results of the referenda in France and in the Netherlands reflected two serious deficits and flaws that had not been properly addressed or resolved before the ratification procedure of the European Constitution was begun:

(a) The EU leaders argued that time had not been ripe for a pan-European referendum representing one single European public sphere. Instead, they embarked on a long and daunting journey of national ratifications under which the negative result in one single nation would hold all other partners hostage.

(b) The EU leaders argued that contingent exercises of national vetoing powers were no longer acceptable if the notion of European solidarity was to maintain its value and meaning. Yet, in order to maintain any meaningful European solidarity and constitution-building consensus, national vetoing pressure and intimidations had to be accepted by all.

When Austria had tried to relaunch the ratification process for the Treaty Establishing a Constitution for Europe under its EU Presidency in early 2006, it was given a cold shoulder by those governments that were either afraid of the treaty being rejected by their own people or by those trying to monopolize the seemingly new trend of popular Euroskepticism. The European Council on June, 15-16, 2005, unanimously decided that the future of the Treaty Establishing a Constitution for Europe was to be

resuscitated under the German EU Presidency during the first half of 2007. This led to the Berlin Declaration with its vague commitment and to the European Council on June 21-22, 2007. Here, the European Heads of State and Government officially decided to drop the concept of a comprehensive European Constitution under the framework of a single treaty. Instead, they agreed to negotiate two new EU treaties through amendments included in one text: a Reform Treaty was to amend the Treaty on the European Union (Treaty of Maastricht) and the Treaty on the European Economic Community (Treaties of Rome) was to change into the Treaty on the Functioning of the European Union. The result of this decision and the subsequent negotiation process was the Treaty of Lisbon, signed on December 13, 2007, euphorically called “Reform Treaty” by its signatories.<sup>34</sup>

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34 The Treaty of Lisbon was signed by Austria: Federal Chancellor Alfred Gusenbauer, Social Democratic Party of Austria (SPÖ), Federal Minister for European and International Affairs Ursula Plassnik, Christian Democratic Austrian People’s Party (ÖVP); Belgium: Prime Minister Guy Verhofstadt, Flemish Liberals and Democrats (VLM), Minister for Foreign Affairs Karel de Gucht, Reformist Movement (MR); Bulgaria: Prime Minister Sergei Stanishev, Bulgarian Socialist Party (BSP), Deputy Prime Minister and Minister for Foreign Affairs Ivaylo Kalfin, Bulgarian Socialist Party (BSP); Cyprus (Greek Republic): President Tassos Papadopoulos, Democratic Party (DIKO), Minister for Foreign Affairs Erato Kozakou-Marcoullis, Independent; Czech Republic: Prime Minister Mirek Topolánek, Civic Democratic Party (ODS), Minister for Foreign Affairs Karel Schwarzenberg, Independent; Denmark: Prime Minister Anders Fogh Rasmussen, Liberal Party (VENSTRE), Minister for Foreign Affairs Per Stig Møller, Conservative People’s Party (DKF); Estonia: Prime Minister Andrus Ansip, Estonian Reform Party, Minister for Foreign Affairs Urmas Paet, Estonian Reform Party; Finland: Prime Minister Matti Vanhanen, Centre Party (KESK), Minister for Foreign Affairs Ilkka Kanerva, National Coalition Party (KOK); France: President Nicolas Sarkozy, Union for a Popular Movement (UMP), Prime Minister François Fillon, Union for a Popular Movement (UMP), Minister for Foreign and European Affairs Bernard Kouchner, Independent; Germany: Federal Chancellor Angela Merkel, Christian Democratic Union (CDU), Minister for Foreign Affairs Frank-Walter Steinmeier, Social Democratic Party of Germany (SPD); Greece: Prime Minister Kostas Karamanlis, New Democracy (ND), Minister for Foreign Affairs Theodora Bakoyannis, New Democracy (ND); Hungary: Prime Minister Ferenc Gyurcsány, Socialist Party (MSZP), Minister for Foreign Affairs Kinga Góncz, Socialist Party (MSZP); Ireland: Prime Minister Bertie Ahern, Fianna Fáil – The Republican Party, Minister for Foreign Affairs Dermot Ahern, Fianna Fáil – The Republican Party; Italy: Prime Minister Romano Prodi, Democratic Party (PD), Deputy Prime Minister and Minister for Foreign Affairs Massimo D’Alema, Democratic Party (PD); Latvia: President Valdis Zatlers, Independent, Prime Minister Aigars Kalvītis, People’s Party, Minister for Foreign Affairs Maris Riekstiņš, People’s Party; Lithuania: President Valdas Adamkus, Independent, Prime Minister Gediminas Kirkilas, Social Democratic Party of Lithuania (LSP), Minister for Foreign Affairs Petras Vaitiekūnas, Independent; Luxembourg: Prime Minister Jean-Claude Juncker, Christian Social People’s Party (CSV), Minister for Foreign Affairs Jean Asselborn, Luxembourg Socialist Workers’ Party (LSAP); Malta: Prime Minister Lawrence Gonzi, Nationalist Party (PN), Minister for Foreign Affairs Michael Frendo, Nationalist Party (NP); Netherlands: Prime Minister Jan-Peter Balkenende, Christian Democratic Appeal (CDA), Minister for Foreign Affairs Maxime Verhagen, Christian Democratic Appeal (CDA); Poland: Prime Minister Donald Tusk, Civic Platform (PO), Minister for Foreign Affairs Radosław Sikorski, Civic Platform (PO); Portugal: Prime Minister José Sócrates, Socialist Party (PS), Minister for Foreign Affairs Luís Amado, Socialist Party (PS); Romania: President Traian Băsescu, Independent, Prime Minister Călin Popescu-Tăriceanu, National Liberal Party (PNL), Minister for Foreign Affairs Adrian-Mihai Cioroianu, National Liberal Party (PNL); Slovenia: Prime Minister Janez Janša, Slovenian Democratic Party (SDS), Minister for Foreign Affairs Dimitrij Rupel, Slovenian Democratic Party (SDS); Slovakia: Prime Minister Robert Fico, Direction – Social Democracy (Smer-SD), Minister for Foreign Affairs Ján Kubiš, Independent; Spain: Prime Minister José Luis Zapatero, Spanish Socialist Workers’ Party (PSOE), Minister for Foreign Affairs Miguel Angel Moratinos, Spanish

It was a sign of administrative professionalism that the Portuguese government presented a first comprehensive draft on the new treaty text to the EU Foreign Ministers when they formally opened the Intergovernmental Conference on July 23, 2007. At the European Council meeting on October 18-19, 2007, the treaty found political agreement, as usual after intensive negotiations and last minute bartering.<sup>35</sup> To minimize unpredictable public reactions, this time the EU member states agreed that the ratification of the Treaty of Lisbon should be handled like any other international treaty. With the exception of Ireland, ratification through a parliamentary majority would be the appropriate and sufficient way in all EU member states. It was astonishing to see how the political leaders across the EU underestimated the potentially explosive nature of this one referendum. The referenda in France and in the Netherlands in 2005 should have taught them a lesson of people's dissent and frustration. Yet, they closed their eyes, hoping for a gentle approval by one of the economically most successful populations of any EU member state. Hungary was the first to begin the ratification marathon on December 17, 2007, when its National Assembly ratified the Treaty of Lisbon. 325 of 386 members of the Hungarian parliament voted with "yes." Seventeen other national parliaments followed as well as the European Parliament.<sup>36</sup> But then came what had to come: The victory of the "No" vote in the Irish referendum on June 12, 2008. 46.6 percent of the Irish expressed support for the Treaty of Lisbon, 53.4 percent rejected it. The voter's turn out was high with 53.1 percent. The result was powerful: 862,415 of 491 million EU citizens stopped the speedy implementation of the provisions of the Treaty of Lisbon prior to the next election to the European Parliament in June 2009.

The reaction of the political elites in most EU member states and EU institutions was as predictable as their initial ignorance about the possible explosiveness of the situation. They reacted with shock and awe, frustration and the stubborn hope to go ahead anyway with the ratification of the Treaty of Lisbon, if necessary even by temporarily excluding Ireland from its membership in the EU. More than being an informed vote on the content and the objectives of the Treaty of Lisbon, the Irish vote

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Socialist Workers' Party (PSOE); Sweden: Prime Minister Fredrik Reinfeldt, Moderate Party, Minister for EU Affairs Cecilia Malmström, Liberal People's Party (FP); United Kingdom: Prime Minister Gordon Brown, Labour Party, Secretary of State for Foreign and Commonwealth Affairs David Miliband, Labour Party.

35 European Union, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community," *Official Journal of the European Union*, C 306/Vol.50, Luxembourg: Office for Official Publications of the European Communities, 2007, <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

36 Until the Irish referendum, the Treaty of Lisbon was ratified by the following countries: Hungary (December 17, 2007); Malta (January 29, 2008); Slovenia (January 29, 2008); Romania (February 4, 2008); France (February 14, 2008); Bulgaria (March 21, 2008); Poland (April 10, 2008); Slovakia (April 10, 2008); Portugal (April 23, 2008); Denmark (April 24, 2008); Austria (April 24, 2008); Latvia (May 8, 2008); Lithuania (May 8, 2008); Germany (May 23, 2008); Luxembourg (May 29, 2008); Estonia (June 11, 2008); Finland (June 11, 2008); Greece (June 11, 2008). The European Parliament ratified the Treaty of Lisbon on February 20, 2008.

dramatically underlined the widely spread degree of mistrust between EU citizens and EU institutions. The result could have happened in practically every other EU member state if people would have been asked to vote on the Treaty of Lisbon in June 2008. The intuitive reflex of political leaders across the EU was to try to go ahead: Business as usual cannot work, however, in recognition of the complete experience with the double crises of ratification in only three years. The overriding objective has to be redefined: To achieve a new contract between EU institutions and EU citizens on the basis of a Europe of results, a Europe that acts convincingly and with visible success for its citizens. In the end, this path will require more and deeper integration. It will also require a better sense of how to achieve EU reforms without holding the EU majority hostage by a minority that can be manipulated with populist methods. The sequencing of credible action, attractive political choices and essentially required constitutional improvements has to be redefined if the European Union is to get out of its crisis of adaptation with lessons truly learned. Most of the concrete propositions and objectives of the Treaty of Lisbon may then return to the EU agenda but it will only make sense if the citizens are freed from the widely spread feeling that they have to be afraid of such success because their joined political leaders are pushing for it. No future constitutional reform of the EU institutions can hope for public recognition that will not find the support of a majority of EU citizens across all 27 member states. In this sense, a European public sphere is evolving out of the ashes of the double ratification crisis. European constitutionalism is advancing without a European constitution or even against the chance of its early realization.

The Treaty of Lisbon consists of 175 pages of text, 86 pages of accompanying protocols, 25 pages of annexes that renumber the articles in former treaties, and a 26 page Final Act that includes 65 separate declarations. To read and decipher the Treaty of Lisbon is no easy task. Depending upon the perspective, the Reform Treaty includes continuity, improvement and backlash at the same time. The perspective depends on whether one takes the Treaty of Nice or the Treaty Establishing a Constitution for Europe as the starting point for the judgment.

Several provisions of the Constitutional Treaty were deleted or revoked with the Treaty of Lisbon. In particular, the following elements require mentioning:

- The idea of a single constitutional text was relinquished and replaced by the idea of two treaties as the future basis of the EU's primary law.<sup>37</sup>
- The European symbols (flag, anthem, Europe Day, currency) were deleted from the text; hence, they will not gain legal and constitutional status although they will, of course, continue to be used across the EU. In a non-binding declaration added to the Treaty of Lisbon, sixteen EU member states have explicitly

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37 Ibid.: 10. Article 1, 2(b) of the Treaty of Lisbon reads as follows: "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community."

declared their allegiance to the symbols as their recognition helps “to express the sense of community of the people in the European Union.”<sup>38</sup>

- Highly controversial was the deletion of the commitment to “a free and undistorted” market policy in the pursuit of the EU’s internal market (Treaty of Lisbon, Article 2).<sup>39</sup>
- The wording of the Charter of Fundamental Rights of the European Union was deleted from the text although reference was made to the Charter which therefore was to gain legal status (Treaty of Lisbon, Article 6)<sup>40</sup>; in a Protocol to the Treaty of Lisbon, Great Britain and Poland were granted the right not to apply the Charter of Fundamental Rights of the European Union in their countries.<sup>41</sup>
- The term Foreign Minister was cancelled and replaced by the introduction of a High Representative of the Union for Foreign Affairs and Security Policy with the same function, including his dual hat mandate, which makes the holder of this office at the same time Vice-President of the European Commission (Treaty of Lisbon, Article 9 E).<sup>42</sup>
- Any reference to the terms “European law” and “European framework law” was deleted in the legislative acts of the European Union.

There was, obviously, a price to pay for a text that should include many of the initial reforms of the Treaty Establishing a Constitution for Europe while avoiding any new public debate. The backdoor arrangements among the EU governments took place without public protocol. Nobody could properly explain why these curtailments of the originally agreed text had happened or what the benefit of the new wording might be. To the credit of the Treaty of Lisbon, several of its essential improvements over the Treaty of Nice made by the Treaty Establishing a Constitution for Europe were upheld. These included:

- Across the text of both treaties, the term European Community was replaced by European Union (Treaty of Lisbon, A. Horizontal Amendments).<sup>43</sup> Therefore, the Treaty Establishing the European Community (Treaties of Rome) was renamed Treaty on the Functioning of the European Union, while the Treaty on European Union (formerly Treaty of Maastricht with amendments made in the

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38 Ibid.: 267.

39 Ibid.: 11. The text reads now: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

40 Ibid.: 13. Article 6 reads: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

41 Ibid.: 156.

42 Ibid.: 21.

43 Ibid.: 42.

Treaty of Amsterdam and in the Treaty of Nice) maintained its name.

- The three pillar structure, in place since the Treaty of Maastricht, was relinquished. The term “Common Market” was replaced by the term “Internal Market” (Treaty of Lisbon, A. Horizontal Amendments).<sup>44</sup> EU competencies in the fields of foreign and security policy on the one hand, in the field of justice and home affairs on the other hand were enhanced.
- The preamble of the Treaty on European Union made reference to the cultural, religious and humanist inheritance of Europe (Treaty of Lisbon, Article 1).<sup>45</sup> An “open, transparent and regular dialogue” between the European Union on the one hand, and the churches and religious communities on the other hand, was introduced, recognizing the special role of religion in the public life in Europe (Treaty of Lisbon, Specific Amendments, Provisions Having General Application, Article 16).<sup>46</sup>
- The European Union was granted legal personality (Treaty of Lisbon, Article 46A).<sup>47</sup> This should help the EU to get into contractual relations with international organizations, for example with the United Nations on matters of peace keeping. In a rather clumsy way, the important primacy of EU law over national law was confirmed (Treaty of Lisbon, Final Act of the Intergovernmental Conference, Declaration No.17).<sup>48</sup>
- The order of competencies of the European Union was clarified and simplified considerably, although any transfer of competencies remains governed by the principles of conferral, subsidiarity and proportionality (Treaty of Lisbon, Article 3b).<sup>49</sup> The Treaty of Lisbon distinguishes between exclusive competencies of the European Union, shared competencies of the European Union and its member states, and supporting, complementary and coordinating competencies of the EU (Treaty of Lisbon, B. Specific Amendments, Categories and Areas of Competence).<sup>50</sup>

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44 Ibid.: 42.

45 Ibid.:10. The new text reads: “Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.”

46 Ibid.: 51.

47 Ibid.: 38.

48 Ibid.: 256.

49 Ibid.: 12.

50 Ibid.: 46-48. The exclusive competencies of the EU include: customs union, the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the Euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy; the conclusion of international agreement when its conclusion is provided for in a legislative act of the EU. The shared competencies of the EU and its member states include: internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters; research, technological development and space; development cooperation and humanitarian aid. The supportive competencies of the EU include: protection and improvement of human health;

- Although the provisions on the legislative acts of the European Union did not introduce the terms “European law” and “European framework law,” a hierarchy of norms was established which distinguishes between legislative acts, delegated acts and implementing acts. The co-decision procedure between the European Parliament and the Council was renamed “ordinary legislative procedure” (Treaty of Lisbon, B. Specific Amendments, Legal Acts of the Union).<sup>51</sup> It was extended to agriculture, fisheries, structural funds, justice and home affairs, thus covering most legislative acts of the EU.
- The European Parliament was reduced to 750 members plus its President and recognized as the regular co-decision body in practically all EU legislation (Treaty of Lisbon, Article 9A).<sup>52</sup> The future President of the European Commission was to be nominated by the European Council in light of the outcome of the elections to the European Parliament whose majority will have to approve him (Treaty of Lisbon, Article 9D).<sup>53</sup>
- The European Council was made a comprehensive EU institution, to be chaired by a permanent President, in office for two and a half years, renewable once, and appointed by the European Council (Treaty of Lisbon, Article 9B).<sup>54</sup> The Council formations were simplified and made more transparent. The Council meetings were to be public when discussing and deciding on a legislative act (Treaty of Lisbon, Article 9C).<sup>55</sup> Qualified majority voting was introduced as the general rule in the Council. Qualified majority voting is defined as a majority of 55 percent of states, representing 65 percent of the population while a minimum of four states is needed to constitute a blocking minority. This provision was to come into force in 2014 and could be blocked until 2017 (Treaty of Lisbon, Article 9C).<sup>56</sup> Only the most sensitive issues were to remain subject to unanimity: taxes, social security, citizens’ rights, the seats of institutions, languages, and common foreign, security and defense policies. Enhanced cooperation was to be strengthened (Treaty of Lisbon, Article 10).<sup>57</sup>
- The European Commission was reduced to a number “corresponding to two thirds of the number of member states” as of 2014 (Treaty of Lisbon, Article 9D).<sup>58</sup> This provision (most likely beginning with 20 commissioners for 30

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industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation.

51 Ibid.: 113. Article 249 A of the Treaty on European Union reads now as follows: “The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive of decision on a proposal from the Commission.”

52 Ibid.: 17.

53 Ibid.: 20.

54 Ibid.: 17.

55 Ibid.: 19.

56 Ibid.: 18.

57 Ibid.: 22.

58 Ibid.: 19.

member states) implies that not every EU member state would any more be able to send a Commissioner to Brussels, thus strengthening the political over the national principle of representation. The stronger European political parties become, the more this trend toward a politicized European Commission would become relevant. Equal rotation between member states and regions would ensure representation of all interests.

- The general provisions for foreign, security and defense policy were outlined in detail, helping to facilitate the identification of the EU's strategic interests and objectives. The existence of the European External Action Service and the European Defense Agency were formalized (Treaty of Lisbon, Article 10-28).<sup>59</sup> The European Union recognizes a “solidarity clause,” thus committing its member states to “act jointly in a spirit of solidarity if a Member State is object of a terrorist attack or victim of a man-made disaster” (Treaty of Lisbon, Article 188R).<sup>60</sup>
- The citizens of the EU were granted the right to initiate legislative processes when one million citizens address the European Council with their signature. In this case, the European Commission must “submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties” (Treaty of Lisbon, Article 8B).<sup>61</sup>
- The budgetary procedures of the European Union were tightened and simplified. The European Parliament was granted full parity for the approval of the whole annual budget. The multi-annual budget of the EU would require agreement by the European Parliament (Treaty of Lisbon, Article 272-277).<sup>62</sup>
- The role of national parliaments in future EU legislation was strengthened (Treaty of Lisbon, Article 8c; Protocol on the Role of National Parliaments in the European Union)<sup>63</sup>. Based on the principle of subsidiarity national parliaments would be able to resort to an early warning mechanism in order to judge whether or not their constitutional rights are curtailed by a planned act of EU legislation.
- The Treaty of Lisbon was to offer a structured path of exit, provided a country intends to withdraw from the European Union of its free choice (Treaty of Lisbon, Article 49A).<sup>64</sup> This mechanism is intended to alleviate the fear in some EU member states that the future path of EU integration might overly curtail their national freedoms.
- Future procedures of constitutional revisions and amendments were explicitly

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59 Ibid.: 23-38.

60 Ibid.: 100.

61 Ibid.: 15.

62 Ibid.: 123-126.

63 Ibid.: 15-16;148-149.

64 Ibid.: 40.

outlined (Treaty of Lisbon, Article 48) in order to facilitate additions or changes to the Reform Treaty. Conventions shall be the norm of future treaty revisions.<sup>65</sup>

In light of these provisions of the Treaty of Lisbon, politicians could claim that the “political substance” of the European Constitution was rescued. They even added several important new political commitments, including the development of a common asylum and immigration policy (Treaty of Lisbon, Article 62-63)<sup>66</sup>, a common policy on climate change (Treaty of Lisbon, Article 174)<sup>67</sup>, and a common energy policy (Treaty of Lisbon, Article 176A)<sup>68</sup>. These were important commitments for the development of a Europe of results. But by resorting again to a secretive, non-transparent Intergovernmental Conference for drafting the Treaty of Lisbon, and by deleting several important aspects from the Constitutional Treaty without substantial public and Europe-wide debate, national politicians lost the momentum for a more transparent Europe that could initiate a stronger sense of ownership through constitutional symbolism. Enhancing transparency, efficiency and democracy – that had been the original mandate formulated in the 2001 Laeken Declaration for the institutional reforms ahead. In 2007, the promise of transparency was again curtailed. In 2008, Europe’s politicians had to pay the bill.

It was not really a paradox that public opinion took a swing in Ireland in the course of the ratification campaign of the Treaty of Lisbon. The only EU member state to ratify the Treaty of Lisbon by a referendum became exposed to all possible interferences and manipulations. Ireland was perceived as voting on behalf of the whole of Europe’s citizenry. Most of those who eventually said “no” to the Treaty of Lisbon on June 12, 2008 insisted to be good and loyal Europeans. They claimed a better Europe. They sent a message of disapproval of the backdoor work of EU leaders and, paradoxically, advanced the development of a European public sphere through their negative vote. For the political leaders across the EU, this was no consolation whatsoever. The greatest paradox: Europe’s political leadership had given up the idea of a Constitution although more than ever the majority of Union citizens were ready for it. 66 percent of EU citizens expressed their support for a European Constitution in the summer of 2007.<sup>69</sup> The gap between cautious and (especially on matters of power symbolism) divided leaders and ambitious (and on many concrete issues likewise divided) citizens triggered an impasse. The European Union was ever more becoming the governance frame around the key issues of public life in Europe while time was not ripe to present a concise, simple and short constitution for an EU-wide referendum on one single day.

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65 Ibid.: 38-41.

66 Ibid.: 60-62.

67 Ibid.: 87.

68 Ibid.: 88.

69 European Union, European Commission, *Eurobarometer 67: Public Opinion in the European Union*, June 2007, [http://ec.europa.eu/public\\_opinion/archives/eb/eb67/eb\\_67\\_first\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb67/eb_67_first_en.pdf).

This is a highly ambivalent situation for those who have hoped for a speedy new political frame around the European Union and for a happy and simple new narrative regarding the rationale of European integration. A decade has obviously not been long enough for the EU to move from incremental and cumulative constitution-building to a proper constitution in name. The European Union has introduced the term European Constitution into the public sphere. But its inner constitution is not prepared to politically implement a European Constitution yet. Nevertheless, the historical momentum has not been lost to complete failure: The European Union is more than ever recognized as a genuine body politic with its inherent constraints, conflicts of interests and slow consensus-building mechanisms. But its political leaders are at the brinks of losing control over a crisis they have triggered in the first place.

For the time being, the European Union has a cumulative constitution based on several treaties and treaty-revisions. The EU will continue to operate on the basis of this cumulative constitution as it has been doing since its beginning, growing and deepening over time. As the first decade of the twenty-first century is coming to a close, it is again time to improve the state Europe finds itself in and to reconnect European integration to the Union citizens its elites claim to serve. The Second Founding of European integration was not as smooth as it could have been. Yet, it is happening and it will continue. The constitutionalization of a united Europe has been brought a step forward. One might counterfactually suppose that the European Constitution could have been rescued in the course of the first decade of the twenty-first century if politicians had waited another year or so before launching a Europe-wide referendum instead of giving themselves a new mandate for a backdoor compromise below the level of a formal constitution. It is, however, not helpful to think too much about incorrect sequencing or bad timing. The wind of change is favoring a revival of Europe. Also, in the future, history will not consider artificial political itineraries or public sentiments its prime determinants. History will only consider the result of politics which has moved to the core of European integration and is defining the European Union more than ever after its initial five decades. In the future, the European Union institutions must be taken more seriously and likewise its citizens must be taken more seriously by its leaders. This will be the only key to close the gap of mistrust that has been spreading across the EU as deeper integration had become more necessary than ever.

### *3. People's Power: The Role of Referenda in European Politics*

The double ratification marathon of the European Constitution and the Reform Treaty has led to a paradoxical result: It derailed the original Constitution and its repair successor but it initiated the first real constitutional debate in the history of the European Union. The double ratification procedure and the subsequent double

ratification crisis became part of the emerging European constitutional discourse. This was rather unintended by the political leadership. In fact, the ratification issue was not at all properly prepared either by the Constitutional Convention or the European Council, neither in 2004 nor in 2007. The Treaty Establishing a Constitution for Europe and subsequently the Reform Treaty had to be ratified in all EU member states and in the European Parliament before coming into force. It would have been a sign of political wisdom to properly organize the ratification marathon. One option was that the governments of all countries would have agreed to ratify the initial Constitutional Treaty during the same day or at least during the same week. Not doing so turned out to be a major setback for the process. In the absence of an EU-wide referendum, the ratification method was uncoordinated. Most countries favored the ratification by their parliaments. Others were constitutionally obliged to hold a public referendum. Some just wanted to write history: When French President Jacques Chirac announced his desire to hold a referendum in France, he took his EU partners by surprise. This surprise turned into the deepest frustration when it became clear that several other countries were also to hold a referendum. The fate of the Treaty Establishing a Constitution of Europe was no longer in the hand of a European organ or of the political elites running the daily business of the EU. The European Constitution fell prey to national decisions that might be more influenced by domestic considerations than by the content, usefulness and importance of the European Constitution. In the end, it became evident that the European Constitution was held hostage by a minority of member states representing a minority of EU citizens. This was a pilot's error, not a people's fault.

While the favorable vote of the European Parliament on January 12, 2005, could be taken for granted (500 deputies endorsed the European Constitution, 137 voted against and 40 abstained), the parliamentary ratification procedure in several countries did not pose particular difficulties, beginning with the parliamentary ratification in Lithuania (November 11, 2004) and Hungary (December 20, 2004). Referenda were soon announced in Spain, France, the Netherlands, Luxembourg, Portugal, Denmark, Poland, Ireland, Great Britain and the Czech Republic.

Referenda on matters relating to European integration were not a new phenomenon in Europe. Until the signing of the Treaty Establishing the Constitution for Europe in 2004, 40 referenda had taken place about a multitude of aspects relevant for the further evolution of European integration. In some cases a referendum concerned the issue of EU accession or the continuation of EU membership. Some referenda dealt with bilateral relations of a country not wanting to become a member of the EU and yet enhancing its mode of cooperation with the EU. One referendum decided about membership of other countries. Various referenda were held on matters of a constitutional deepening of the integration process, mostly required by national constitutions. Referenda on matters of European integration began in the 1970's. They became more noticeable and contested with the "deepening" of the integration process

following the conclusion of the Single European Act in 1986. This was a clear indication of the fact that European integration was increasingly impacting the national political and constitutional system of its member states. It proved that the European system of multilevel governance and pooled sovereignty had reached a new stage of relevance.

A “deepening” of the integration process did indeed take place. The constitutional legitimacy of any new step of European integration can only matter if it will bring about substantial value added and thus substantially “more” political and constitutional integration. The Treaty Establishing a Constitution for Europe was to lay the ground for the further transfer of sovereignty over time. It was therefore not surprising that the need for a referendum was raised in a number of EU member states, while others upheld the authority of their constitutionally elected and authorized parliaments to vote on further matters of sovereignty transfer.

In the past, the results of referenda on European integration had indicated different patterns of voting behavior depending on whether a referendum was binding or non-binding, obligatory or deliberate, and whether it was called upon by a government or an opposition.<sup>70</sup> Until the referenda on the European Constitution became prominent, two cases of past referendum trajectories were noteworthy exceptions from the general rule: The two referenda in Denmark in 1992 and in 1993 on the Treaty of Maastricht and the two referenda in Ireland in 2001 and 2003 on the Treaty of Nice. In both cases, the result of the first referendum did not only affect the country that was practicing its constitutional right of referendum. Its result affected all other EU member states and the EU institutions as well. In fact, they were taken hostage in their pursuit of EU integration. From both the point of view of democratic theory and integration theory it thus seemed plausible that efforts were made by the EU bodies “to repair” the damage caused by the first rejection of the European proposal presented to the people of Denmark and Ireland.

*Table 1: Referenda Held on European Integration<sup>71</sup>*

<i>Country, Date</i>	<i>Subject</i>	<i>Proportion of “Yes” votes</i>
France, April 23, 1972	EEC expansion	68.3 %
Ireland, May 10, 1972	EC accession	83.1 %
Norway, September 24-26, 1972	EC accession	46.5 %
Denmark (Greenland included),	EC accession	63.3 %

<sup>70</sup> See Hug, Simon, *Voices of Europe: Citizens, Referendums and European Integration*, Lanham: Rowman&Littlefield, 2002.

<sup>71</sup> Sources: Hug, Simon, *Voices of Europe*, op.cit.: 27; European Union, European Commission, *The Accession Process*, [www.europa.eu.int/comm/enlargement/negotiations/accession\\_process.htm](http://www.europa.eu.int/comm/enlargement/negotiations/accession_process.htm).

October 2, 1972		
Switzerland, December 3, 1972	Free Trade Treaty with EEC	72.5 %
Great Britain, June 5, 1975	EC membership	67.2 %
Greenland, February 23, 1982	EC membership	45.9 %
Denmark, February 27, 1986	Common market	56.2 %
Ireland, May 26, 1987	Common market	69.9 %
Italy, June 18, 1989	European Constitution process	88.1 %
Denmark, June 3, 1992	Treaty of Maastricht	49.3 %
Ireland, June 18, 1992	Treaty of Maastricht	68.7 %
France September 20, 1992	Treaty of Maastricht	51.1 %
Switzerland, December 6, 1992	EEA accession	49.7 %
Liechtenstein, December 12, 1992	EEA accession	55.8 %
Denmark, May 18, 1993	Treaty of Maastricht	56.8 %
Austria, June 12, 1994	EU accession	66.6 %
Finland, October 16, 1994	EU accession	56.9 %
Sweden, November 13, 1994	EU accession	52.7 %
Åland-Islands, November 20, 1994	EU accession	73.6 %
Norway, November 28, 1994	EU accession	47.8 %
Liechtenstein, April 9, 1995	EEA accession	55.9 %
Switzerland, June 8, 1997	EU accession	25.9 %
Ireland, May 22, 1998	Treaty of Amsterdam	61.7 %
Denmark, May 28, 1998	Treaty of Amsterdam	55.1 %
Switzerland, May 21, 2000	Bilateral treaties with the EU	67.2 %
Denmark, September 28, 2000	Euro accession	46.9 %
Switzerland, March 4, 2001	EU accession	23.2 %
Ireland, June 7, 2001	Treaty of Nice	46.1 %
Ireland, October 19, 2002	Treaty of Nice	62.9 %
Malta, March 8, 2003	EU accession	53.6 %
Slovenia, March 23, 2003	EU accession	89.2 %
Hungary, April 12, 2003	EU accession	83.8 %
Lithuania, May 10-11, 2003	EU accession	91.1 %
Slovakia, May 16-17, 2003	EU accession	92.5 %
Poland, June 7-8, 2003	EU accession	77.4 %
Czech Republic, June 13-14, 2003	EU accession	77.3 %
Estonia, September 14, 2003	EU accession	66.9 %
Sweden, September 14, 2003	Accession to the Euro	41.8 %
Latvia, September 20, 2003	EU accession	67.0 %
Spain, February 20, 2005	European Constitution	76.7 %
France, May 29, 2005	European Constitution	45.3 %

The Netherlands, June 1, 2005	European Constitution	38.4 %
Switzerland, June 5, 2005	Accession to Schengen Agreement	54.6 %
Luxembourg, July 10, 2005	European Constitution	56.5. %
Ireland, June 12, 2008	Treaty of Lisbon	46.6 %

In the case of Denmark, the European Union recognized some of the Danish citizens' concerns and renegotiated Danish conditions for accepting the Treaty of Maastricht. The four "opting out clauses" according to which Denmark was not obliged to accept future community policies if it did not want to do so caused great concern among integration purists. They added to the worry about a multi-speed EU that was losing inner cohesion. This fear was piling up until the Constitutional Convention began to address exactly this danger. The outcome of the Danish referendum crisis finally opened the way for the introduction of full Economic and Monetary Union and hence the euro in twelve EU member states. This was a consolation for all those who had second thoughts about the politics of "opting-out clauses" that could set a dangerous precedent.

In the Irish case, EU partners and institutions remained firm and rejected the possibility of a new set of opting out clauses. The unaltered Treaty of Nice was presented again to the Irish voters two years after they had rejected it on the ground that it would intervene too much into their national sovereignty. This unusual procedure caused great concern among democracy purists as to whether or not the repetition of a vote on the same issue would sufficiently recognize the maturity of a democratic people or instead ridicule it. Was the EU more about integration for the sake of integration or about democracy for the sake of democracy? This was an impossible alternative that nobody wanted to see repeated.

Observers of and participants in the ratification marathon on the European Constitution could not take consolation in public opinion polls but had to wait until the ratification procedure was completed. Yet, opinion polls were comforting for those fearing another constitutional backlash in one of the countries perceived as being euroskeptical. In November 2003, a Eurobarometer poll had shown 67 percent of EU citizens (in all future twenty-five member states) favorable to a European Constitution.<sup>72</sup> In February 2004, after the failed European Council meeting of December 2003, 62 percent of EU citizens (again in all twenty-five future member states) wished that their

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72 European Union, European Commission, *Flash Eurobarometer 142*, November 10, 2003, [http://ec.europa.eu/public\\_opinion/flash/fl142\\_convention.pdf](http://ec.europa.eu/public_opinion/flash/fl142_convention.pdf).

own governments accepted compromises in order to save the Constitution from failure; the percentage of those favoring a European Constitution had risen to 77 percent.<sup>73</sup>

Some had suggested a Europe-wide referendum to enhance legitimacy of the European Constitution. As unrealistic as this was, the idea reflected academic arguments concerning the practical implementation of legitimacy considerations.<sup>74</sup> The political reality across the European Union was not yet ready for such an ambitious idea. As a consequence, individual EU member states got veto power over the Treaty Establishing a Constitution for Europe, raising delicate questions of democratic legitimacy in a multilevel governance system.

The first referendum on the European Constitution was held on February 20, 2005, in Spain. 76.7 percent of the voters said “yes” to the European Constitution. Only three days later, in an unusual joint session, the French National Assembly and the French Senate changed the country’s constitution to pave the way for a referendum in France. It is ironic that Nicolas Sarkozy, then Chairman of the UMP Party, was among those particularly favoring a referendum. He was joined by President Jacques Chirac who considered Sarkozy his main internal rival in the struggle for the presidential election 2007. Immediately after the way was made free for a referendum in France, domestic disputes completely unrelated to the European Constitution began to dominate the agenda of French public life and politics: Strikes and mass demonstrations of post and bank workers, at airports, among telecommunications workers and academics created an increasingly depressing atmosphere. Their main concern was the future of the French welfare state. Opponents of the European Constitution linked the domestic crisis in France with, as they saw it, “neo-liberal” policies institutionalized by the European Constitution. The support for the European Constitution and for President Chirac dropped – and it was not always clear who of the two became more unpopular. Public debates about the possibly negative effects of globalization began to dominate the debate about the economic policies of the EU. Those supporting the European Constitution with the argument that it would guarantee a more democratic, efficient and transparent EU became a minority. Even the President’s support for the European Constitution became counterproductive, and it was perceived as half-hearted. In the end, the negative result of the referendum on May 29, 2005, was beyond any doubt: While 45 percent of those who had gone to the polls said “yes,” 54.8 percent rejected the European Constitution. Voter turnout was only 69.2 percent. There is a general consensus that the vote was largely a vote of no-confidence in President Chirac and the policy of his government. Prime Minister Raffarin had to resign. There was little

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73 European Union, European Commission, *Flash Eurobarometer 159*, February 17, 2004, [http://ec.europa.eu/public\\_opinion/flash/fl159\\_fut\\_const.pdf](http://ec.europa.eu/public_opinion/flash/fl159_fut_const.pdf).

74 See Esposito, Frédéric, “The European Referendum: A Tool to Legitimate the European Integration Process?,” in: Nagel, Stuart (ed.), *Policymaking and Democracy: A Multinational Anthology*, Lanham: Lexington Books, 2003: 15-37; also Weale, Albert *Democratic Citizenship and the European Union*, Manchester: Manchester University Press, 2005.

consolation in calling the result a victory of fear.<sup>75</sup> The real loser was the Constitutional Treaty.

Only three days later, the majority of voters in the Netherlands also rejected the Constitution: Only 38.4 percent said “yes” in that country. Voter turnout was only 62.8 percent. The shock wave across the EU and beyond was substantial. A Swiss referendum on June 5, 2005, ended with overwhelming support for a bilateral agreement between the EU and Switzerland for the usually euroskeptical country’s accession to the Schengen Agreement on border control (54.6 percent “yes”). This was only a small consolation that technical business of an integrative nature was to continue in Europe. But the momentum to ratify the first ever “European Constitution” was lost. The courageous decision of Luxembourg Prime Minister Jean-Claude Juncker to go ahead with a referendum in the Grand-Duchy ended as a personal triumph for one of the most respected European politicians: 56.5 percent said “yes” in Luxembourg on July 10, 2005. Eventually, also Latvia, Cyprus, Malta, Belgium, Estonia (May 9, 2006) and Finland ratified the Constitutional Treaty. Two-thirds of all EU member states (18 of 27) representing a majority of Union citizens had ratified the European Constitution. It did not help.

Great Britain, Denmark, Ireland, Portugal, Poland, the Czech Republic and Sweden postponed their respective dates for ratification, mostly intended to be held via referendum. The European Council of June 16-17, 2005, still under shock after the French and Dutch referenda, declared a period of reflection while accepting the continuation of the ratification process and postponing the anticipated implementation of the Constitution from November 2006 until the summer of 2007. At first academic reactions described the EU as being trapped by its constitutional ambition.<sup>76</sup> The subsequent positive votes in seven countries did keep the political responsibility alive for finding a formal and substantial solution to the ratification crisis. They served as a barrier against a new tide of Euroskepticism among the public and several governments of EU member states. While some of them had come to power after the signing of the Treaty Establishing a Constitution for Europe, others had capitalized on the ratification crisis by turning more euroskeptical and retreating from their own signature under the original treaty. But the eighteen positive votes could not rescue the Treaty Establishing a Constitution for Europe. France and the Netherlands had held the rest of the EU

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75 See Schild, Joachim “Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum,” *Integration* 28.3 (2005): 187-200. After the failed referenda in France and in the Netherlands, the possible options for European policy makers were immediately evident as suggested by this author: a) declaring the treaty dead; b) presenting it again for a second referendum; c) making additions to the text that could console those who were afraid of losing identity, sovereignty and social stability under the conditions of globalization; d) dividing the Treaty Establishing a Constitution for Europe into two treaties, one dealing with the fundamental institutional provisions, the other one covering the contingent policy issues: see Kühnhardt, Ludger, *Erweiterung und Vertiefung: Die Europäische Union im Neubeginn*, Baden-Baden: Nomos, 2005: 151-164.

76 Diedrichs, Udo, and Wolfgang Wessels, “Die Europäische Union in der Verfassungsfalle: Analysen, Entwicklungen und Optionen,” *Integration* 28.4 (2005): 287-306.

hostage; some rather reluctant countries were happily hiding behind the French and Dutch results, and altogether the political elite in the EU, for once, had become speechless and disoriented. The political elite in the EU had failed; it had failed technically to better anticipate and manage the ratification process, and it had failed politically to convincingly present the value added of the European Constitution to the Union's citizens in two key countries. It was no consolation to put the blame on French President Chirac alone. The fact that so many Union citizens in some of the most pro-European countries simply did not believe that the Treaty Establishing a Constitution for Europe would bring about more democracy, efficiency and transparency should have been a more serious warning signal for politicians across the EU.<sup>77</sup> In fact, it meant the deepest crisis of confidence and hence legitimacy for the European project. The Union citizens wanted to see political results as a consequence of European integration. Many were worried about the effects of globalization. They were under the impression that welfare state reforms in the EU would only mean a reduction in social security for them personally. They did not believe that European integration as presented by the work of the current political leadership would generate value added for their own lives. Often, they almost felt offended that politicians were putting all their energy into institutional reforms while the citizens of several European countries – most notably France and Germany, the former dynamos of integration – were going through a serious economic recession. They were concerned about migration and radical Islam, not about the weighing of votes in obscure EU organs.

The effect of the first ratification shock was twofold: On the one hand, negotiations about institutional reforms of the European Union were returned to backdoor politics under the framework of an Intergovernmental Conference. The Intergovernmental Conference opened in July 2007 was mandated to repair the broken promises and achievements of the European Constitution. On the other hand, the negative outcome of the referenda in France and in the Netherlands initiated, in a paradoxical and counter-intuitive way, the first broad constitutional discourse across the European Union. The second ratification shock followed the same pattern and triggered the same initial reflexes among politicians as the first one three years earlier: After the Irish “no” vote, shock and awe were followed by busy activities to come to the rescue of the Treaty of Lisbon. Blaming the Irish or, even worse, blaming the people of Europe in general could only be counterproductive. Yet, the immediate political reactions in June 2008 were repetitions of their set of reactions in 2005. This was not promising for an early rescue of the Treaty of Lisbon with lasting success. The most convincing initial answer would be to implement those useful and consensual elements of the Treaty of Lisbon that can be implemented through means of secondary EU law. While the day will come

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77 See Niedermayer, Oskar, “Die öffentliche Meinung zum Europäischen Verfassungsvertrag,” in: Jopp, Mathias, and Saskia Matl (eds.), *Der Vertrag über eine Verfassung für Europa*, op.cit.: 435-449.

for a concise, short and readable European Constitution, it will be on the political leadership in Europe to work under the conditions of the Treaty of Nice with a prime focus on issues, substance and results. Eventually, this will be the only way to reconnect with the people of Europe and to revitalize respect for the EU institutions and procedures. To make a debate about more efficient, democratic and transparent institutions of the EU more interesting and relevant for EU citizens requires their trust in the relevance and impact of this work. Europe's citizens would wish to become Europeans if their leadership could orientate them by showing the right and serious path. Political leaders should be measured by their ability to base their important and noble work on tangible political options and to present accountable results to the citizens they represent. This will be the only way out of the valley of mistrust in the multilevel system of European governance. In the end, this is the conclusion of a fascinating but also irritating reform decade. The Union citizens seem to be ahead of their political elites in their quest for a constitutionalized Europe of results. While the first effect is regrettable, the second effect is unprecedented in European constitution-building. In fact, it is encouraging for the ongoing Second Founding of European integration.

#### *4. Cumulative Constitution-Building: From Rome to Nice and Beyond*

Ever since the mid-twentieth century, the cumulative evolution of a European Constitution has been part of the integration process on the continent. From the outset, interstate-treaties were the basis for European integration. But the parameters of their purpose and legitimacy, their authority and connection with public opinion have enormously changed and broadened over five decades of European constitution-building. For five decades, a pre-constitution of Europe evolved as product of gradual and cumulative treaty-based integration, moved forward by political will and experience, by crisis and adaptation, by interpretation and judicial review. The cumulative European Constitution, based on consecutive treaties and treaty revisions remains unfinished business. This genuine European method of constitutionalizing the process of integration may well prevail while the European Union is encountering its future beyond the adaptational crisis of its Second Founding. As a point of reference for measuring the legitimacy of European integration, the state in which Europe finds itself will certainly remain more important than the texts that constitute the political order of Europe.

The trajectory has never been set for a definitive constitutional goal since the European Economic Community was founded.<sup>78</sup> Cumulative, gradual and incremental

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78 On the path toward the EEC see Loth, Wilfried, *Der Weg nach Europa: Geschichte der europäischen Integration 1939-1957*, Göttingen: Vandenhoeck&Ruprecht, 1990.

constitution-building has accompanied European integration since its beginning. On March 25, 1957, the Treaties of Rome were signed, giving existence to the European Economic Community (EEC) and to the European Atomic Community (EURATOM). Unlike the Treaty Establishing a Constitution for Europe in 2004, the Treaties of Rome (officially called Treaty Establishing the European Economic Community and Treaty Establishing the European Atomic Energy Community) were simply an act of interstate-diplomacy. They were ratified by all six national parliaments concerned and took effect on January 1, 1958.

The EEC Treaty affirmed in its preamble the determination of the signatory states to establish “the foundations of an ever closer union.”<sup>79</sup> In reality, a customs union was created. A twelve-year transitional period was agreed upon to abolish tariffs among the six member states of the EEC. As of 1968, all tariffs were in fact abandoned two years earlier than expected. At the same time, the EEC began to establish common tariffs for all products entering the EEC while also framing its notorious Common Agricultural Policy. The European Common Market agreed upon in Rome was in fact exclusively a free circulation of goods. The four principles outlined in the Treaties of Rome – freedom of goods, freedom of persons, freedom of capital, freedom of services – remained limited. A genuine impulse for the Common Market truly worth the name did not come about before the Single European Act of 1986.

The Treaties of Rome established the European Commission as supranational authority with the task of protecting the Treaties of the EEC. The European Parliamentary Assembly remained a representation of delegates from national parliaments without any relevant powers. The Court of Justice was established and grew into a strong supranational force poised to enhance the implementation of community law. The Economic and Social Committee was established and has remained a consultative body to this day. Nevertheless, the Treaties of Rome established a path toward treaty-based integration that was to develop its own constitutionalism. It laid the groundwork for the gradual, incremental evolution of a European pre-constitution to which it also belonged and on which it was based.

The Treaties of Rome were a solid basis nobody really questioned. It had taken more than a decade to implement the original aim of the Treaties of Rome, namely to establish a viable customs union in the European Economic Community. But the first modification – and in fact “deepening” – of the original Treaties of Rome took place only in 1986. In 1985 Jacques Delors had become President of the European Commission, giving this body stronger leadership and bringing to full potential its force to pave the way for the EEC as a whole. Since 1981, French Socialist François Mitterrand had been President of France. Christian Democrat Helmut Kohl had been

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79 *The Rome, Maastricht and Amsterdam Treaties, The Treaty on European Union (Treaty of Maastricht) and the Treaty Establishing the European Communities (Treaty of Rome) Amended by the Treaty of Amsterdam: Comparative Texts*, Genval: Euroconfidentiel 1999: 6.

German Chancellor since 1982. These two leaders formed the most successful Franco-German partnership possible. It was the beginning of an exceptionally long period in integration progress guided by strong pro-European leadership with Delors as Commission President and Mitterrand President of France until 1995, and Kohl staying in office until 1998.

Following a decision of the European Council, representatives of the member state governments came together recurrently as of June 29, 1985, in order to negotiate treaty revisions. The format of these negotiations came to be known as Intergovernmental Conferences. After its work was concluded, the Single European Act was signed in Luxembourg and The Hague on February 17, 1986, and came into effect after ratification in the nine EC parliaments on July 1, 1987. This was the most visible effort to properly and thoroughly implement the original EEC goal of a Common Market as a market without frontiers, based on economic and social cohesion, a strengthened European Monetary system and the beginning of Europe as a social area. The Single European Act legalized the European Council as a periodical meeting of the Heads of State and Government, intended to discuss and decide fundamental matters relevant to the EEC. The competencies of the European Parliament – directly elected for the first time in 1979 for a five-year period – were marginally expanded. Measures to better coordinate monetary policies among the member states were introduced. To achieve the objective of regional cohesion, the instruments of Structural Funds, Regional Funds and Social Funds were introduced. The most important achievement of the Single European Act was agreement on concrete measures to progressively implement a common market over a period of five years, concluding on December 31, 1992. Finally, an area with freedom of goods, persons, capital and services was to realize the original goal of the Treaties of Rome. 35 years after its initiation, European integration could move to another level.

During the 1980's, the deplored phenomena of "Eurosclerosis" had become tangible for everybody not shying away from economic reality. Europe was confronted with enormous difficulties to overcome the impact of the oil crises of the 1970's and their long aftermath as well as the burden from welfare states without maintaining a strong base for growth-led productivity. While the European Community enjoyed peace, the base for its prosperity seemed to shrink. "Reaganomics" in the United States gave a strong impulse to the economic recovery of the US, echoed by "Thatcherism" in Great Britain. The economic rise of Japan and the "little Tigers" in Southeast Asia (Thailand, Indonesia, Singapore, Malaysia, Taiwan) was felt as another challenge, if not threat to Europe. It was time to move ahead, out of the perception of being incapable of developing strong, productive and ultimately also communitarian policies, if the European integration project was to have a future.

The commitment of French President François Mitterrand, German Chancellor Helmut Kohl and EC Commission President Jacques Delors to complete the European

Community's Common Market was carried further by their ambition to reinvigorate the institutional and political sides of the European Community. The Single European Act was to be followed by a Political Union and an Economic and Monetary Union.

On June 26-27, 1989, the EC member states agreed to initiate two Intergovernmental Conferences in order to pave the way for the definitive establishment of a monetary union and to give new impulses for the realization of a political union. After the fall of the Berlin Wall on November 9, 1989, German Chancellor Helmut Kohl was determined to couple imminent German unification with further progress toward political integration in Europe. The two Intergovernmental Conferences began their work on December 14-15, 1990. Treaty revisions were, again, to come about as a product of negotiations among government officials, with representatives of the European Parliament and of the European Commission invited to participate.

German unification accelerated the creation of an Economic and Monetary Union, although monetary union was not a precondition for German unification, and German unification was not the cause for achieving monetary union. However, the second Intergovernmental Conference on Political Union was less successful. Fundamental differences about national interests regarding European integration remained irreconcilable. In the context of these experiences, the scholarly analysis favoring the intergovernmental perspective felt confirmed.<sup>80</sup> As already sensed during the path toward the Single European Act, the Treaty of Maastricht (officially called Treaty on European Union) seemed to strengthen the European nation state through mutually recognized common goals. To some analysts, it did not seem to strengthen the supranational ambition of the European integration project. At the end, this perspective turned out to be wrong, or at least insufficient as monetary union led to the biggest transfer of national sovereignty so far experienced during the integration process.<sup>81</sup>

On December 9-10, 1991, the European Council completed the work of the Intergovernmental Conference in Maastricht and agreed on the basics of what was to be called the Treaty of Maastricht. The Foreign Ministers of the European Community officially signed the treaty on February 2, 1992, after some "post-last minute" compromises were reached. Yet, the Treaty of Maastricht ran into difficulties during the process of ratification. The Danish population rejected the treaty in a referendum on June 3, 1992, with only 49.3 percent of the population voting with "yes." The EC Commission and political leaders in all other Community countries were shocked. They had finally agreed on a path toward Economic and Monetary Union and now it seemed a stillborn concept. They began to embark on creative measures on how to reverse the Danish attitude driven by fear to lose national identity and sovereignty with an increase in integration. The myth of an emerging "European Super-State" made headlines,

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80 See Moravcsik, Andrew, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, op.cit.

81 See Kühnhardt, Ludger *Europäische Union und föderale Idee: Europapolitik in der Umbruchzeit*, Munich: Beck, 1993.

exaggerated often, but useful whenever “Brussels-bashing” helped to gain domestic political support in constituencies driven more by fear than by lasting hope in so far as the integration idea was concerned. As integration became truly serious, time was needed for many Europeans to properly digest its impact.

The Danish government successfully negotiated four “opting-out clauses”: They stated that Denmark was not obliged to participate in fundamental union projects if national interests would think it inappropriate, most notably as far as full monetary union, a Union citizenship, a common justice and home affairs policy, and a common foreign and defense policy were concerned. A second referendum in Denmark, held on May 18, 1993 saw 56.8 percent of Danes voting in favor of the Treaty of Maastricht, revised only for their country. The next stage toward Economic and Monetary Union could begin. The Treaty of Maastricht came into effect on November 1, 1993. Since then, the European Community has been renamed European Union. A new period of European integration has begun and with it the paradigmatic shift from economic primacy to a politicized Union.

The result of the Intergovernmental Conference leading to the Treaty of Maastricht did not satisfy those in the European Community favoring deeper political integration as a necessary complementary measure to prepare for a successful Economic and Monetary Union. The Treaty of Maastricht based the structure of the EU on three pillars, indicating the difference between supranational and intergovernmental elements of the integration process. The first pillar alluded to the Community policies set out in the original treaty and included community policies, economic and monetary policies and the newly established Union citizenship. The second and third pillars outlined the newly emerging yet still intergovernmental policies in the field of foreign relations as well as justice and home affairs. Thus the Treaty of Maastricht began to open the daunting way toward a Common European Foreign and Security Policy. Union Citizenship, introduced by the Treaty of Maastricht, remained a complementary addition granted through the member states of the EU. The Treaty of Maastricht introduced the instrument of Cohesion Funds to EU policies and created the Committee of the Regions as a consultative body.

On March 29, 1996, the European Council initiated a new Intergovernmental Conference. Designed like the first one and often with the same representatives from both national governments and the European Parliament, it drafted the Treaty of Amsterdam, agreed upon by the European Council in Amsterdam on June 17, 1997, and signed by the EU Foreign Ministers on October 2, 1997. The achievements of this next step in European Constitution-building were minimal and the Treaty of Amsterdam was widely criticized as being a failure. It added certain elements to the concept of enforced cooperation in foreign and security policies as well as in justice and home affairs. Both were barely noted by the larger European public except for the creation of the office of a High Representative for the Common Foreign and Security Policy of the EU. Former

NATO Secretary General Javier Solana gave profile to the position that remained constitutionally weak and, in some ways, contradictory to the work of the EU Commissioner in charge of foreign relations.

As in the case of the Treaty of Maastricht, even before its formal ratification, the Treaty of Amsterdam encountered much criticism in all member states for being insufficient as far as the necessary institutional reforms of a lasting functional European Union were concerned. Yet, this time, the ratification procedure went smoothly and on May 1, 1999, the Treaty of Amsterdam went into force and was added to the emerging pre-constitution of Europe.<sup>82</sup>

The Treaty of Amsterdam explicitly opened the way for another new Intergovernmental Conference, realizing the limits of its own work. This Intergovernmental Conference was resumed on February 15, 2000. It was mandated to resolve three critical issues relevant in light of the upcoming and presumably largest enlargement of the EU that had ever taken place: the weighing of votes in the Council, the possibility of expanding qualified majority voting in the Council, and the size and composition of the future European Commission. Its results were presented to the European Council in December 2000 in Nice, leading to the Treaty of Nice agreed upon after the longest ever meeting of the European Council on December 11, 2000. The memory of this Summit meeting of Heads of State and Government casts a lasting shadow over the political leadership of the European Union. More than anything else, their final negotiations were driven by the ambition to raise veto powers rather than by efforts to make the European Union effectively work in anticipation of the upcoming enlargement to a host of post-communist countries of Central Europe. The Nice negotiations and their highly ambivalent result were the culmination of a struggle between two contrasting understandings of European integration: On the one hand, the nation states – and in fact that meant the national governments – wanted to remain masters of the Treaties. Most of them did not want to accept a transfer of sovereignty to the EU level while at the same time the biggest among them did not want to allow for voting mechanisms in the Council that could work to their detriment. France and Germany, locomotives for integration projects in the past, had turned to becoming veto powers scared of their partners and their potential claims and also suspicious among themselves. During the same time, the discourse on a democratic deficit of the integration process took ground.

To prevent the EU, enlarged to twenty-seven or more members, from becoming incapable of deciding, the Commission had proposed to generalize the principle of qualified majority voting in the Council. After long debates, the European Council agreed to expand the mechanism of qualified majority voting in forty cases, most of

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82 For the texts see *The Rome, Maastricht and Amsterdam Treaties, The Treaty on European Union (Treaty of Maastricht) and the Treaty Establishing the European Communities (Treaty of Rome) Amended by the Treaty of Amsterdam: Comparative Texts*, op.cit.

them rather technical. The most controversial issues, such as migration, taxes, and audiovisual cultural cooperation remained unanimous. More intricate were the debates about the future weighing of votes. Germany, after unification the EU country with the largest population, intended to re-weight its vote in the Council. France insisted on continuous parity with Germany, not only in the Council, but also in the European Parliament. Other countries followed with efforts to reposition themselves and against others, for instance the Netherlands and Belgium. A highly complicated result was found. It was more a sign of sophisticated mathematics than an expression of solidarity in a common union. It strengthened veto powers to the utmost while leaving in doubt whether this could ever help bring about more efficient decisions in the enlarged EU. In order to pass a motion in the Council, 71.26 percent of votes were said to be necessary while this figure would go up to 74.7 percent in a European Union of twenty-seven countries.

The size of the future Commission was limited to a maximum of twenty-seven commissioners, up from twenty before. This would imply that all countries would have not more than one Commissioner in the future. Should the EU increase to more than twenty-seven member states, a new decision on the number of Commissioners would have to be taken. The Treaty of Nice was the low point of the efforts of the EU Commission to safeguard the community spirit against the prevailing and seemingly increasing bad habit of a veto culture. It also marked the low point of authority of the political leaders in the EU. And it finally questioned the usefulness of further Intergovernmental Conferences as a means to reform the institutions of the Union. The failure of Nice became the beginning of a more democratic and public discourse about the future of Europe. Increasingly, EU citizens realized that European integration was becoming relevant and impacting their lives as well as the political and economic structures of their countries. The fact that the Nice summit had adopted the Charter of Fundamental Rights of the European Union did not reduce the frustration with its results, but rather confirmed the need to tackle the democratic deficit and to bring European integration back into the public sphere if it were to advance further. Constitution-building had to turn from obscurity into the limelight of public deliberation if it were to continue with success.

The results of the Treaty of Nice hardly satisfied anybody in the European Union. It could not come as a surprise that only 46.1 percent of the Irish population said “yes” to the Treaty of Nice when asked in a referendum on June 7, 2001. Unlike those who thought that the Treaty of Nice did not go far enough in outlining the working principles for an enlarged union, many Irish voters considered the arrangements of the Treaty of Nice already too strong an infringement on Irish sovereignty and autonomous national decision-making. Yet, the Treaty of Nice was not revised and Ireland was not offered any opting-out clauses equivalent to Denmark’s almost a decade earlier. Instead, the Irish government presented the same Treaty of Nice for a second referendum to its

population one year later. On October 19, 2002, 62.9 percent of the Irish voted with “yes.” An ambiguous understanding of democratic decision-making rescued the notorious Treaty of Nice from rejection by the citizens it claimed to serve. On February 1, 2003, it came into effect.<sup>83</sup>

The main dilemma of European integration had become more evident than ever before with the whole operation surrounding the Treaty of Nice: The EU was not suffering from an abstract democratic deficit. All its member states were flourishing democracies, the very reason why the Copenhagen Criteria had been formulated in 1993 as measurement for the possible accession of post-communist and other European countries such as Turkey. The main dilemma was the governance asymmetry between the democratic member states of the EU on the one hand and the semi-developed democratic governance structures on the EU level and in the multidimensional web between the EU and its member states on the other hand. While increasingly political authority had to be transferred to the EU level, the EU level was not sufficiently democratized by the EU’s member states. They were and continue to be afraid of losing sovereignty and political authority to the EU level of European governance. This constellation has turned into a power struggle over the appropriate balance between vertical and horizontal forms of governance in the European Union. Inevitably, the call for a more substantial institutional reform was to be linked to the question about the state in which Europe was finding itself. From this metaphoric debate it was not a long way to raise the matter of a political constitution in order to frame the future operation of the European Union and all its constituent parts.

Constitutions define political power and limit it at the same time. They echo social developments and claims, and they outline the institutional path to deal with the next phase in social and political evolution. For the European Union, a constitution would always mean the continuation of institutional and constitutional integration while the growth of political identity would primarily be shaped through practical experiences and success-based memories. In 2000, the EU was beginning to refocus its trajectory. It would not go unchallenged to move from a community of organs to a community of fate. This had not been easy in all cases of constitutional-based nation-building in Europe. Yet, there was consensus in Europe that constitutionalizing the European Union would not mean the abandonment of traditional nation states. Europe would remain a compromise between a Union of States and a Union of Citizens.

During the first decade of the twenty-first century, the European Union embarked on further cumulative constitution-building as a step in the process of broadening rule of law through the *acquis communautaire*. In doing so, it also broadened the legal base for the political processes across the EU and its horizontal and vertical institutions. The

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83 European Union, *Treaty of Nice Amending the Treaty of European Union, the Treaties Establishing the European Communities and Certain Related Act*, Luxembourg: Office for Official Publications of the European Communities, 2001.

interpretation of the EU's constitution-building might remain the prerogative of academics, lawyers and judges. The ultimate legitimacy test is, however, not different from any democracy participating in the European integration process. Popular support is needed more than ever. No matter the details of any constitutional arrangement, eventually, peoples' power will decide Europe's constitution and the quality of the work of those acting under its umbrella. Some politicians seem to fear the Union citizens while certainly many others are hoping to finally reconcile the Union of States with the interests of the citizens of the Union. The search for a contract between the Union citizens and the Union institutions, and those acting in these institutions, remains a daily necessity. No single European treaty can resolve the queries or skepticism about Europe's political, economic, social or cultural constitution.

With the Second Founding of the European Union, democracy has reached European integration politics in a very direct way. Politics, more than anything else, was to define the future of European democracy in its genuine multilevel governance system. The cumulative constitution-building of European integration is the most visible foundation of the genuinely political character of European integration. Both processes are mutually reinforcing each other. Both, the constitutional and the political dimension of European integration can, so it seems, only advance through adaptational crises that eventually strengthen and deepen European integration. Beyond the most recent experience of a turbulent decade, it remains partly an unresolved promise and unavoidably a continuous challenge for the EU to advance simultaneously democracy, efficiency and transparency and keep all three principles in balance.

### *5. Interpreting Europe's Constitution*

Public interest in European integration has grown faster than ever before as a consequence of the debate over the frozen European Constitution.<sup>84</sup> Public interest in European integration did not necessarily coincide with support for European integration. In fact, a certain fatigue about European integration has been noticeable across the EU throughout the last two decades. Too much has happened in the wider world and too little time has been given to ordinary citizens to digest the secular changes and transformations in Europe. But the stalemate over the European Constitution has been more than a matter of psychological adaptation. It has been a combination of a transforming political culture and of growing ruptures in the traditional conduct of doing political business in the European Union. It has also been an echo of the changing rationale of European integration: With the growing opening of Europe to a global role

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<sup>84</sup> See for example McGiffen, Steven P., *The European Union: A Critical Guide*, London: Pluto Press, 2005 (2nd ed.). Soon published after the results of the referenda in France and in the Netherlands this is one of many contributions to the debate and to a deepened understanding of meaning, scope and effect of the European Union.

and the unavoidable implications of globalization on Europe's domestic conditions, the constitution of Europe was definitively more than the matter of a formal text. Since the outbreak of the ratification crisis of the Treaty Establishing a Constitution for Europe, the identity of Europe has been debated with more emphasis than ever before. It has become evident that the main reason for the rejection of the European Constitution was not the massive 2004 EU enlargement to Central and Eastern European countries. Exit polls in the referenda in France and in the Netherlands indicated that lack of information about the very content of the constitutional text ranked higher in a list of arguments that favored negative votes. And fear of negative effects of the economic policies of the EU ranked higher than the abstract concern to lose national sovereignty. Finally, at the moment of the referenda in France and in the Netherlands in 2005, concern with the economic situation at home was more important for voters than the abstract hope to achieve a more democratic, efficient and transparent Europe with the help of the European Constitution. The rejection of the European Constitution did not mean that French and Dutch voters had turned against Europe. In fact, the vast majority of "no"-voters in both countries expressed their hope that their negative vote would initiate renegotiations in the EU that would make the EU eventually more social and sensitive to economic concerns. The same pattern became evident in the course of the Irish referendum on the Treaty of Lisbon in 2008.

Since the early 1990's, two fundamental trends had defined the path of the European Union. With the decision to fully implement a monetary union and with the growing focus on the development of a common foreign policy of the EU, the loss of national autonomy in political decision-making became an overall experience. The end of communism and the subsequent eastward enlargement had burdened the EU with an unprecedented financial and potentially social agenda. Migration was discussed no longer as a contribution to give fresh impulses to the productivity, growth and creativity of aging societies. Instead, a widespread perception saw migration as a threat to identity, affluence and social cohesion. Simultaneously, a certain loss of autonomy in decision-making on critical domestic issues and developments was felt in most EU member states, especially the "old" ones. European integration and, in some cases even more contested, globalization impacted domestic political agendas and citizens' life more than ever before. The idea that a European Constitution could provide the EU with instrument's that would enable Europe to stay in the driver's seat of its own destiny was shunned in favor of the worry that a European Constitution would become a threat to the peoples' identity and national political autonomy. Different degrees of controversy and emotions across the EU left a strong mark among weak governments and strengthened the rather euroskeptical part of the citizenry.

Under these circumstances, three strategies were feasible to cope with the situation:

1. Countries – or their governments for that matter – could exit and “opt-out” of further Europeanization.

2. Countries and citizens could give their concerns and interests a stronger European voice and thus influence the decision-making process on the EU level.
3. Countries and people could accept tacit compliance with the trend of furthering the Europeanization through integration and pooled sovereignty.

No matter which choice one might have preferred, the political elites across the European Union are often united in feeling the limiting effect of the EU on their political scope of action. This does not make them good advocates of a European Constitution. Instead of explaining the ongoing trend toward a more interlocking multilevel system of European governance to their citizens, they often pretend to still be in autarkic control of public life while simultaneously they serve anti-Brussels sentiments. The gains and costs of integration are rarely explained in clear and convincing terms to the citizenry.

The political and constitutional conflicts stemming from this constellation are more differentiated than the term Euroskepticism indicates. Often, it seems as if the national political elites are more critical and skeptical about deeper European integration than their own people. The Union citizens desire, and rightly so, a Europe that works. A Europe that delivers is not simply equivalent to a Europe from which citizens immediately benefit in material terms. For instance, all long-term trends of opinion polls indicate that the majority of EU citizens wish for a stronger foreign policy posture of the EU. This attitude echoes a good sense of horizon and realism in the power of one's own state. This insight into the implications of contemporary trends in world affairs goes hand in hand with the skepticism of many Union citizens whether or not their respective political representatives are still capable of managing national affairs with success, and of properly understanding and managing the dynamics of European Union affairs. Confusing leadership leaves confused citizens behind.

As long as Europe exists, political leadership remains crucial. The absence of a coherent European election law is a strong bottleneck to properly and fully implement a genuine political system across the EU. This is not a philosophical matter about the notion of a European "demos." It is a practical matter about the functioning of a political system. Loyalty and trust can only grow across the EU if the organization of decision-making and representation is recognized as one and all member states and societies comply in the same way.

The debate following the outbreak of the ratification crisis of the Treaty Establishing a European Constitution was telling. It showed more than a growing disconnect between Union citizens and EU politicians on all levels. While national politicians tried to bridge the gap by turning to populist, parochial or outright nationalist policy formulas, their colleagues serving in EU institutions could often communicate with the EU's citizenry only in intermediary ways. In many ways, the EU-wide reflection about the root-causes of the ratification crisis of the Treaty Establishing a European Constitution and about

the possible perspectives was equivalent to the first truly EU-wide public constitutional debate. The emergence of a European public sphere has become more obvious than ever in the course of this period of reflection and wound-licking. It was an experience equivalent to the German Paulskirche-Parliament of 1848 as a courageous, yet eventually failed step in developing a democratic political system. For the European Union of the early twenty-first century, the situation is better and worse at the same time. Its actor capacity is already stable and, in many ways, strong. The European Constitution would not have had to initiate European integration and its parliamentarization *per se*. On the other hand, the European Constitution has been written because, in the eyes of many, its time had come in order to prepare the European Union for its role in the age of globalization.

It turned out to be a big deficit that the Convention on the Future of Europe did not properly address the issue of how to organize a comprehensive European ratification scheme for the Treaty Establishing a Constitution for Europe. This clearly was a pilot error on the side of both the Constitutional Convention and, more so, on the side of the European Council. The European Council repeated the same pilot error after signing the Treaty of Lisbon. It was easy to blame the people while their responsible political leaders could have done much better. For all too long, national governments have been reluctant to open a broad public debate on the future of Europe, linked to the meaning and purpose of the European Constitution. Wherever they were asked in referenda, people began to formulate their own opinion, often coupled with different agendas, frustrations and choices. In 2005, the European Constitution was the eventual loser but not because it was too weak or bad. It lost against an unexpected tide of public discourse because the responsible political leaders were not able to lead it properly. The referenda in France and in the Netherlands became tribunals against domestic governments and the defendants were unprepared. Europe was bashed but the respective national political leadership was the target. The European Constitution became a scapegoat. In 2008, the same happened to the Treaty of Lisbon. To many citizens, the current absence of a concrete common European political project contradicts the ambition of an abstract common European constitutional project.

In the end, the constitution-building crisis of the early twenty-first century came as a blessing in disguise. It opened the gate for a broad reflection about the identity and current state of Europe never heard of before. Across the EU – also in countries that had already ratified the Treaty Establishing a Constitution for Europe – the ratification crisis triggered unique and substantial debates about the future of Europe.<sup>85</sup> Most of these

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85 For a good overview see Eschke, Nina, and Thomas Malick (eds.), *The European Constitution and its Ratification Crisis Constitutional Debates in the EU Member States*, ZEI Discussion Paper C 156, Bonn: Center for European Integration Studies, 2006; Niemann, Anna, Sonja Ana Luise Schröder, and Meredith Catherine Tunick (eds.), *Recovering from Constitutional Failure: An Analysis of the EU Reflection Period*, ZEI Discussion Paper C 182, Bonn: Center for European Integration Studies, 2008.

debates were linked to specific national issues. But the EU-wide scope of these discourses and their echo in the media was unprecedented. At long last, the potential for a European public sphere became visible.

This phenomenon was reflected in the trends studied by Eurobarometer opinion polls. The results of the Eurobarometer polls echo the political roller coaster the EU was going through. Yet, it also echoed growing political maturity of the Union citizenry. Eurobarometer published its first findings after the negative referenda in France and in the Netherlands in December 2005. By then, the overall support for European integration had dropped, on average, by four percent across the EU (compared with the data for 2004): Only fifty percent of Union citizens felt that Europe was a good thing. However: The concept of a European Constitution found the support of 63 percent of EU citizens, an increase of two percent compared with 2004 and mid-2005.<sup>86</sup> In December 2006, support for European Union membership had gone up to 53 percent, on average, while only 33 percent of Union citizens thought that the EU was currently going in the right direction. Support for a European Constitution had dropped to an average of 53 percent. It was, however, interesting to note that support for the European Union was highest in Poland (63 percent) and that, on average, 53 percent of Union citizens in the countries that had not yet ratified the European Constitution were in its favor.<sup>87</sup> When the Intergovernmental Conference convened under the Portuguese EU Presidency in mid-2007, the Eurobarometer poll found 57 percent of Union citizens in favor of EU membership – the highest score since 1994. On top of all EU member states stood the Netherlands with 77 percent in favor of EU membership, followed by Ireland, Luxembourg, Spain, Belgium and Poland with 67 percent. As for the idea of a European Constitution, the citizens had risen above their overly cautious and bickering leaders. On average, support for a European Constitution had increased to 66 percent. By then, 68 percent in France and 55 percent in the Netherlands were in support of a European Constitution. In Poland, whose government had the greatest difficulties in accepting a new compromise on the institutional reforms of the EU, 69 percent of the citizens were in favor of a constitution for the European Union.<sup>88</sup>

Time had come for a new contract between the Union citizens and the political elites representing the European institutions. This contract could only be achieved over concrete issues and not over abstract institutional designs. In June 2007, when the European Council decided on the path toward a restructured treaty substituting the European Constitution, 52 percent of Union citizens tended to trust the European Commission, an increase by 4 percent compared with the 2006 poll. According to

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86 See European Union. European Commission, *Eurobarometer 64: Public Opinion in the European Union*, December 2005, [http://ec.europa.eu/public\\_opinion/archives/eb/eb64/eb64\\_first\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb64/eb64_first_en.pdf).

87 See European Union. European Commission. *Eurobarometer 66: Public Opinion in the European Union*, December 2006, [http://ec.europa.eu/public\\_opinion/archives/eb/eb66/eb66\\_highlights\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en.pdf).

88 See European Union, European Commission, *Eurobarometer 67: Public Opinion in the European Union*, June 2007, [http://ec.europa.eu/public\\_opinion/archives/eb/eb67/eb\\_67\\_first\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb67/eb_67_first_en.pdf).

Eurobarometer the European Parliament was trusted by 56 percent of Union citizens, also an increase by 4 percent compared with the 2006 poll. Time had come for Eurobarometer to also measure trust in the dealings of the European Council. Being the most influential European institution, yet its most obscure and intransparent one, the European Council was the source of much of the confusion over the past decade. Now it aimed at also being the source of a successful restitution. Nobody could imagine a future of Europe without the nation states and hence without national governments represented in the European Council. The European Council has a great responsibility to generate common European interests – and to communicate them properly to the respective national citizenry. It was unacceptable that several members of the European Council gave the impression that their signature under the Treaty Establishing a Constitution for Europe was not really to be taken seriously. It was also highly problematic that a strong majority of EU member states and EU citizens were held hostage by negative referenda generated by the votes of less than half of the population in a minority of EU member states.

In the end, the real problem was one of democratic theory. It had become necessary to better reconcile the methods, preconditions and effects of generating political legitimacy between the different layers of the EU's multilevel governance system and the citizens of the European Union. The political leaders across the EU have promised a Europe with results that works. As for the Union citizens, they are clear in the description of their priorities. In 2007, they identified the following issues as their main concern: unemployment (34 percent, down from 49 percent in 2006), crime (24 percent), the overall economic situation (20 percent), health care (18 percent), inflation (18 percent), immigration (15 percent), terrorism (12 percent) pensions (12 percent), education systems (9 percent) and taxes (8 percent). The overall economic situation was perceived more positive than a year earlier. While in 2006, only 46 percent of Union citizens stated that the economic situation was good, the “economic feel good factor” had gone up to 52 percent in June 2007.<sup>89</sup> It was more urgent than ever to give the EU back to its citizens by way of clearly presenting political choices they could connect with or reject. The election to the European Parliament in 2009 was not meant to make the EU enter into a form of artificial harmony and self-sustaining stability. It might, however, become the gateway to a new era of European politics and European integration: The political nature of European integration was more obvious and more acceptable than ever before in the history of European integration. The election to the European Parliament in June 2009 can be understood as the belated substitute for an EU-wide referendum on the European Constitution. This election was a judgment about Europe's constitution, about the constitution the European Union was in.

When asked in 2007 to predict the future fifty years from now, the majority of Union citizens envisaged the EU as playing a leading role in the world – as a key

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89 Ibid.: 11.

diplomatic power (61 percent), with its own army (56 percent) and with its own directly elected President (51 percent). At least 31 percent assumed that the EU at that point in time would have become a secondary economic power, given the enormous transformations elsewhere and notably in China and India.<sup>90</sup> This minority realism also recognized the undeniable continuity of American economic power in the decades ahead.

In order to regain respect and authority, the “chastened leaders” of Europe need concrete policy successes.<sup>91</sup> They need them not for their sake alone but eventually for the sake of their continent. More than anything else it would require for them to exercise transparent deliberations and honest decisions between the several horizontal and vertical, formal and informal levels of EU governance. In the course of the reflection period on European identity and the constitution of Europe the Union citizens had more than ever documented that they wanted to know what was at stake, wanted to get involved in what would eventually impact their personal destiny and the social structures they are living in, and that they wanted to clearly see accountability attached to those representing them. Pragmatic politics and concrete, measurable success – that is the most likely formula to improve Europe’s constitution and to give legitimate meaning to the written constitutional provisions of the European Union.

European integration is about value added, the evolution of common goods and the deepening of mutual solidarity among Union citizens and Union states. At the end of a decade of constitution-building, time has come to reconnect Union citizens and Union institutions both on the EU and on the national level. First and foremost, time has come for the leadership across Europe to define European integration again for its potential and no longer from its limits. Time has come for a Political Union that works instead of mainly being obsessed with fine-tuning its procedural mechanisms and constitutive treaties. In the end, Europe’s constitution will be measured by the contribution of the European Union to a better, free and safe world.

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90 Ibid.: 42.

91 Thus Moravcsik, Andrew, “Chastened Leaders need Concrete Policy Successes,” *Financial Times*, January 27, 2006, <http://search.ft.com/ftArticle?queryText=Moravcsik&y=1&aje=true&x=11&id=060126008460&ct=0>.

# Challenge and Response

