European Constitutional Avoidance?

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I. INTRODUCTION

The European Council, during its Lisbon meeting, on October 19, 2007, reached agreement on a Draft Reform Treaty, the so-called Lisbon Treaty.[1] This will, if ratified, replace the defunct Treaty establishing a Constitution for the European Union (TEC) that large majorities of the French and the Dutch citizens rejected in popular referenda in May-June 2005.

The Lisbon Treaty was forged by the 2007 Intergovernmental Conference (IGC) and represents a modified version of the TEC. It has scrapped the terms in the TEC like 'constitution' and other 'state-like' symbols, such as the characterization of Community legal acts as laws and framework laws; flag and national anthem. By removing the term constitution and state-type language and symbols, the European Council (which forged the detailed mandate for the IGC) sought to reassure Europe's peoples that the EU was not a state; neither did it have the vocation to become one. The symbolic and substantive changes wrought can be construed as efforts to prevent the outcome from having to be put to the people in popular referenda. Popular referenda could yield unpredictable outcomes; they could easily get side-tracked; and citizens could use them to pass verdicts on their national leaders rather than on the treaty. The European Council's aim was to have the Treaty ratified before the European Parliament elections in June 2009 (European Council 2007a: 2). The intention was thus to try to minimize direct popular input.

The European Council's reading of the factors that led to the rejection of the TEC, and its approach to treaty reform in the Lisbon Treaty sit well with Andrew Moravcsik's argument to the effect that the main lesson from the Laeken process (2001-5) was that 'The effort to generate participation and legitimacy by introducing more populist and deliberative democratic forms was doomed to failure because *it runs counter to our consensual social scientific understanding of how advanced democracies actually work*' (2006: 221 – italics in original).[2] Moravcsik finds the empirical premises underlying the strategy for legitimating the European constitutional project to be dubious, namely that increased opportunities to participate produce more participation, and this produces more informed deliberation and decision making, which again lead to greater identity, trust and political legitimacy (2006: 222; see also 2004: 359-61; 2005a: 374 and 2007: 25). The faulty process can thus be traced back to flawed theory, notably the theory of deliberative democracy.

Is then the theory (of deliberative democracy) flawed? In the next section I first briefly present Moravcsik's argument in order to clarify the link to deliberative democracy. Is the theory flawed, or was the flaw rather in how the theory was applied by the EU? In the subsequent section I discuss deliberative democracy in relation to the EU's approach to constitution making. I structure this discussion along the steps that Moravcsik has outlined, but now also held up against my

[1] European Council 2007b. The documents are available at: http://europa.eu/reform_treaty/index_en.htm

[2] Andrew Moravcsik has offered some of the most well-known and cited contributions on EU treaty-making (1991, 1993, 1998), and some of the most scathing critiques of the EU's Laeken constitutional project (2005a; 2005b; 2006).

version of deliberative democratic theory. This helps clarify the relationship between deliberative democracy as I understand it, EU constitution making, and Moravcsik's version of both. The final part holds the conclusion, with main lessons included.

II. INSULATION, DELEGATION AND DELIBERATIVE DEMOCRACY

Moravcsik's reconstruction of the empirical premises underlying the European Constitutional Project (Figure 1) posits a causal sequence from institutional opportunities to participate, and through to heightened political legitimacy. The theory behind these empirical premises is thus presented as a causal theory.

More Institutional Opportunities to Participate	⇒	Greater Political Participation	⇒	More Informed Deliberation and Decision-Making	⇒	Greater Common Identity Institutional Trust, Political Legitimacy

Figure 1: Empirical Premises Underlying the European Constitutional Project

Source: Moravcsik 2006: 222

Moravcsik argues that the EU's presumptions were dubious 'as general propositions about modern democratic politics…' (2006: 222). What does this mean? It could mean that the European Union drew on a mistaken understanding of how deliberation and participation work in modern democracies. This could mean that there was nothing wrong with the theory as such. The issue would then be to improve the Union's application of deliberative (and participatory) democratic theory to practical constitution making. Or, it could mean that the *theory* of deliberative (and participatory) democracy has no real purchase on explaining and accounting for how modern political systems work.

Moravcsik's argument is that deliberative democracy is largely irrelevant for enhancing the EU's democratic legitimacy. This rests on a general critique of deliberative democracy, which operates with an ideal-type rather than a realistic conception of democracy (2005a: 369; 2006: 238-9). Deliberative democrats use a standard of democratic legitimacy when critiquing the EU that no political entity would be able to adhere to. Hence, the debate on the EU's democratic deficit is founded on faulty assumptions, which can be traced back to the theory itself.

Moravcsik argues that when held up against real-life cases of democracy, the EU is not democratically deficient. This has bearings also on the Laeken constitution making experience. The EU framed the TEC as a constitution, but this generated faulty democratic expectations.[3] One important reason for this is because the EU is foremost engaged in low-salience issues; matters that in modern democracies are delegated to bodies relatively insulated from popular participation. To increase participation in such a setting offers few assurances of enhanced trust, support and legitimacy. All democracies delegate to expert bodies and are thus insulated from public participation; the EU is however exceptionally preoccupied with low salience issues that fail to engage citizens and voters. Hence, any effort to equip the EU with a democratic constitution is not only the wrong project but is also bound to fail.

[3] 'The objectionable aspect was its form: an idealistic constitution… The new document was an unnecessary public relations exercise based on the seemingly intuitive, but in fact peculiar, notion that democratization and the European ideal could legitimate the EU.'(Moravcsik 2005b: 3)

How Moravcsik establishes issue salience is instructive. Methodologically speaking, issue salience could be established through examining the normative quality of the principles that the EU subscribes to; principles that it has entrenched in the treaties. Low issue salience would appear through the EU being based on core principles with limited or no normative salience and therefore qualitatively different from those of democratic constitutions. This is not how Moravcsik determines issue salience (the EU then also appeals to the *same principles* as democratic constitutions do). Rather, his approach is to establish issue salience through examining whether citizens consider the issues that the EU is presently handling to be of importance to them. For this approach to work for Laeken, it must be made clear that these issues are of such a character as to render a constitutional project unfeasible. One obvious condition would be that the EU's legal order *would not qualify* as constitutional (not Moravcsik's view). Another is that high salience issues are *unrelated to* the EU constitutional construct (which is what Moravcsik contends). That would work if voters rejected the TEC because they saw it as failing to grapple with the issues that were most salient to them, but otherwise understood the TEC to leave these concerns intact. But if voters rejected the TEC *because* they saw it as a deeply negative influence on matters important to them, as was certainly the case with France and the Netherlands (notably on the social dimension, and the issue of immigration),[4] then the EU cannot be understood as a low salience project. Many of the issues that were activated in the process pertained to peoples' identities, belongings, and sense of community; hence were akin to what Charles Taylor has labeled as 'strong evaluations'.[5] It might also have mattered that the TEC, understood as a constitutional document, was *exceptionally detailed*. Part III contained a whole host of detailed provisions on all kinds of issues with bearing on people's sense of community, including border control, immigration, asylum, police cooperation, justice cooperation, consumer protection (Title III, Chapter IV), provisions on foreign and security policy etc. (Title V, Chapter II). This suggested that the EU was not only giving lip-service to abstract principles but had developed detailed provisions on these issues within a complex and difficult-to-understand polity framework. Moravcsik's way of determining issue salience fails to convince, with obvious bearings on his claim to EU exceptionality.

The main issue that concerns me is what I take to be Moravcsik's critique to the effect that participatory and deliberative democratic *theory* generate flawed social scientific presuppositions; hence cannot account for and explain how advanced democracies work (2006:222, 239). Moravcsik often lumps the two theories together,[6] whereas most theorists would hold these apart,[7]

[4] A post-referendum Eurobarometer poll (Eurobarometer 2005c) showed that the French no voters were very concerned with loss of employment (31%), with worsening economic consequences (26%), with the project being too economically liberal (19%), and not in tune with 'Social Europe' (16%). Dutch voters were concerned with a loss of national sovereignty and the costs of an enlarged Europe. Further, 'a clear majority of Dutch respondents (65%) agree that the rejection of the Constitution will allow for its renegotiation in order to place greater emphasis on the social aspects' (Eurobarometer 2005a). Many Dutch also found the Union to be too remote from the citizens (Eurobarometer 2005b: 8). Moravcsik argues (2006: 228) that third country immigration was an issue unrelated to the EU. Note here that the TEC's Article I-3 sets the EU up as an Area of Freedom, Security and Justice. The Union's legal competence has increased in this field. Consider Council Framework Decision 2002/946/JHA on the penalization of the smuggling of third country nationals into the Schengen area; and the ECJs judgement in C-176/03 (Commission vs. Council), which 'paves the way for the adoption of EC criminal law measures *inter alia* in the field of illegal immigration' (Aus 2007: 5).

[5] Strong evaluations are based on morally significant visions of life and who a person wishes to be (Taylor 1985).

[6] Participatory democracy has its roots in ancient Athenian democracy. This tradition was notably reinvigorated by Jean-Jacques Rousseau's *The Social Contract*. More contemporary proponents are Pateman (1970), and Macpherson (1977). Deliberative democracy has seen a great upsurge in the last decades. See for instance Habermas (1984/87; 1996), Bohman and Rehg (1997), Dryzek (2006), Elster (1992; 1998), Gutmann and Thomsen (1996); as directly applied to the EU, see Eriksen and Fossum (2000). Whereas ancient Athenian democracy equated the two traditions, most modern theorists see them as quite distinct. Some theorists have however sought to

(but note that the 2004 and 2005a articles trace the sequence of steps directly to deliberative democracy).

One major source of the failure of EU constitution making can thus be traced back to flawed presumptions built into the theory of deliberative democracy. This argument raises two theoretical-methodological issues. First, do the empirical premises that Moravcsik outlines reflect an understanding of deliberative democracy that the theory's own proponents would agree with? Would deliberative democrats formulate the same propositions, or are the empirical premises *consistent with* deliberative democratic theory?

Second, *did the EU* during Laeken (2001-5) rely on an approach to constitution making that was consistent with the basic tenets of deliberative democracy? If it did not, then the failure of the TEC cannot be attributed to flawed (deliberative democratic) theory. To understand the role of deliberative democratic theory in EU constitution making, we need a clear conception of how deliberative democratic theory sees constitution making: what sparks a process, how does it unfold and what kinds of outcomes does it generate? This must then be translated to EU constitution making, so as to yield a conception of EU constitution making that covers all the relevant stages, from initiative to ratification. This translation must pay adequate heed to the particular and distinctive traits of EU constitution making. The verdict for the practical application of deliberative democratic theory then hinges on how suitable to deliberative democracy the Laeken instance of constitution making was. Only after having discussed how deliberative democrats formulate this in relation to Moravcsik's reconstruction can we proceed to establish *how useful* the EU is as a case on which to draw more general conclusions pertaining to deliberative democracy in the realm of constitution making. What would be the main lessons from Laeken from a deliberative democratic perspective?

On the first question, Moravcsik's reconstruction (figure 1) is set up as a causal sequence, to serve an explanatory function. This reconstruction must be understood as based on deliberative democratic theory. As such, it induces us to think of the theory of deliberative democracy as a causal theory. Deliberative democracy is however a *normative* theory. It establishes or spells out certain standards of democratic government (Habermas 1996; Gutmann and Thompson 1996, 2004). As such, it can be used as a normative-evaluative tool to assess the democratic quality of a given system of government. Further, it can serve as an analytical-reconstructive tool to spell out *whether* a political system or a process of constitution making coheres with deliberative democratic tenets (without necessarily evaluating the normative quality of the system or of the process). Hence, critiquing deliberative democrats for operating with ideal-theoretical standards largely misses the mark. The important issue that marks the entire debate on the EU is: *which standard is the most appropriate?* Here lies much of the scholarly contestation over the EU today.

Three further comments are in order. One is that Moravcsik overlooks the efforts by scholars to develop analytical categories that can capture what goes on in-between ideal deliberation and pure bargaining.[8] This is the most fruitful area for theoretically oriented empirical research and where the research can gain the most from the debate between rational choice and deliberative democratic theorists.

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bring them together (see for instance Cohen and Sabel 1997). Such an attempt requires modifications in both versions, hence, also has costs and drawbacks.

[7] See also Fishkin's (2006) reaction to Moravcsik's (2006) article.

[8] For different versions consider Elster (1998); Eriksen (2007); Schimmelfennig (2001).

The other is that *if* deliberative democracy is to be set up as a causal theory, that is, as a theory to explain how processes come about, it is necessary to add a host of supplemental (non-deliberative) conditions pertaining to institutional-structural, and even cultural, factors which ensure deliberation and help ensure that agreements reached communicatively are actually translated into binding action that is subsequently implemented in line with the communicatively reached agreement. This would require a much more comprehensive reconstruction of factors than that listed by Moravcsik; it would also require weighting or privileging of distinctly *different* factors, along the relevant stages of the process. In other words, deliberative democrats would neither support the way the theory is applied by Moravcsik, nor would they see the reconstruction as adequately spelled out to offer any assurance of a consensual outcome.

Finally, Moravcsik's reconstruction does not clarify what deliberation is supposed to *do*: Is it a tool for rational problem-solving, for reaching the best possible technical solutions? Or is it about the handling of intractable value conflicts and moral issues? In the former case, the epistemic dimension of deliberation is the key: Modern democracies insulate expert bodies from pressures precisely because they want to tap into this. The EU being exceptionally endowed with such bodies is by implication exceptionally deliberative. The other aspect of deliberation we may label the transformative, and pertains to how actors through deliberation come to understand each other's viewpoints and stances and from there *may* converge on a common position. These two dimensions of deliberation do not necessarily operate in the same manner or go through the same sequence. Both however operate through issue framing: deliberation plays a central role in clarifying which frames are activated and whether actors subscribe to the same or to different frames (Rein and Schön 1993). The road to agreement goes through convergence on frame or issue definition. Openness and transparency – and participation – also matter to issue framing: they offer procedural safeguards for the public to ascertain that the way the experts handle the issues is consistent with their concerns and interests; lest the legitimacy of these arrangements will suffer.

The second question I raised above is that of properly testing the theory in relation to the process of constitution making. Moravcsik, when illustrating how the steps in the reconstruction work in practice, says a lot about the EU in general, but surprisingly little about how the steps figure in relation to the process dynamics of EU constitution making itself. Here the reader is left to figure out for herself *how* a deliberative constitution making process would unfold.

In the following pages, I will first outline the stages in one deliberative democratic theory of constitution making. This draws on Bruce Ackerman's (1991; 1998) notion of unconventional constitutional moment, suitably modified and adjusted to the complex European setting (see Fossum and Menéndez 2005a; 2005b). This helps me to establish *whether* the Laeken constitutional process was informed by deliberative democratic theory. I organize this assessment along the same steps that Moravcsik outlined. My intention is to relate the steps in Moravcsik's reconstruction to deliberative democratic theory (as I see it), and to the Laeken constitutional process, so as to clarify (a) whether, or the extent to which, Moravcsik's reconstruction departs from core tenets in deliberative democratic theory, and (b) whether the EU's Laeken constitution making process was based on deliberative democratic theory.

III DELIBERATIVE DEMOCRACY AND THE LAEKEN CONSTITUTIONAL EXPERIENCE[9]

[9] The following presentation of Laeken and previous IGCs is based on personal and commissioned (conducted by other researchers) interviews with participants and observers at Laeken and previous IGCs; personal attendance at the Dublin and Amsterdam IGC meetings (as member of the press corps), and at numerous Laeken Convention plenaries, preparatory meetings, EP sessions and NGO meetings; academic conferences on the two Conventions

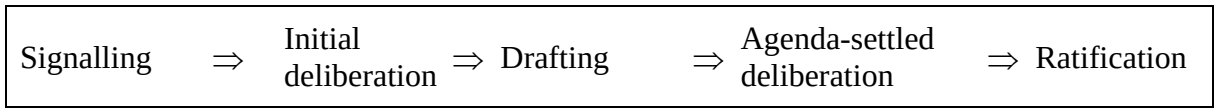

Figure 2: Deliberative-democratic constitution making

Source: Fossum and Menendez 2005a; 2005b.

Figure 2 outlines a deliberative democratic approach to constitutional making, which can be said to consist in five distinct stages: signaling, initial deliberation, drafting, agenda-settled deliberation, and ratification. Such a model or representation of a constitution making process is based on a complex interplay between direct participation and deliberation, both of which *open up and close* during the different stages of the process. In that sense, the deliberative democratic model is set up to take heed of Moravcsik's key recommendation, which is the need to close or insulate the process at certain critical instances. Deliberative democrats would therefore *agree* with Moravcsik that participation is not a panacea, and that the real issue is 'how to design institutions that *politicize and depoliticize* politics functions in a way that generates more accountability, more desirable outcomes, and more long-term support …' (2006: 222).

Moravcsik's own recommendation for institutional design is consistent with deliberative democratic theory; hence, it appears difficult to discard deliberative democratic *theory* as either irrelevant or to reject it for harboring dubious propositions about modern democratic politics.

Moravcsik's argument is that the changes effected at Laeken represented a major transition, a turn to deliberative democracy, if you will. I therefore consider the changes in the process that Laeken represented, with particular emphasis on the character and *magnitude* of deliberation and process opening up to participation and general public deliberation.

a) To what extent was Laeken marked by greater institutional opportunities to participate?
In Ackerman's conception, a constitutional moment is marked by strong social mobilization that produces a commitment to launch a process of constitution making. The constitutional impetus is clearly generated *from below*. In a similar vein Habermas (2001) proposes that a European constitutional process can be *triggered* by a catalytic Europe-wide referendum.

The point of departure for the constitutional process from a deliberative democratic theory perspective is not that of generating institutional opportunities to participate. Rather the point of departure is the *social demand* for constitutional change. Once this demand results in a commitment to constitution making/change, the pressure for change brings with it demands for participation and/or consultation. Deliberative democrats thus see the first step of constitution making as distinctly different from how Moravcsik reconstructs it. This difference affects the entire sequence: without a popular backing there is no democratic constitution making process.

From a deliberative democratic standpoint we first need to clarify *whether* Laeken qualified as a constitutional moment; both in terms of signaling a clear intention to forge a democratic constitution for Europe, and also whether such a constitutional moment, if indeed it was, *was preceded by* social mobilization and demands for citizens' participation in the process.

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and on European constitution making in general; primary documents issued by the relevant bodies; and academic and other analyses of these events, only a limited number of which are listed in this article.

The Laeken European Council meeting in December 2001 was the first formal EU event to *open up for considering* the question of a constitution for Europe. Before this the European Council as the EU's supreme body had *not* wanted to discuss the constitutional question; neither had it referred to the legal body as a constitution (the term used was *treaty*, which smacks of international law). This had created an awkward situation wherein the European Court of Justice had repeatedly declared that the Union's *acquis* was equipped with supremacy and direct effect, hence that it was a constitution of some sort; the European Parliament at several occasions had set forth proposals for a *democratic* EU constitution; and the Council and the Commission had simply dodged the issue altogether. Prior to Laeken the constitutional issue and indeed the political status of the EU's legal construct, was to say the least, ambiguous.

This is particularly important given the sheer number of treaty changes that had preceded Laeken since the early 1980s (SEA, Maastricht, Amsterdam and Nice). These were all based in the Intergovernmental Conference method which grew out of the system of intergovernmental 'Summitry' (meetings among heads of state and government). These had *not* been couched as parts of a European constitution making process. The original IGC model can better be seen as compatible with national sovereignty protection: it was intergovernmental and as such set up so as to ensure that the *national demos*, could sustain its integrity throughout the different stages of the process of *treaty-making.* Each Member State was equipped with veto, which enabled it to protect against treaty provisions and legal decisions that could threaten its national constitution.

To start a process of treaty reform, an IGC had to be called. The Member States were formal initiators; however, EC law (cf. Article 236 TEC and later Article 48 TEU) stipulated that the Commission could play the role of initiator, and the Commission and the EP were to be heard. No public mobilization was needed for such a process to take place. An IGC could be established if a simple majority of the European Council decided to do so. The initial phase, the preparatory phase of the IGC, started with the appointment of a preparatory body, normally labeled a 'reflection group'.[10] The drafting phase was based on the work of the expert groups, and was formalized in the European Council, which produced the official text that was submitted for ratification. At such meetings the heads of government and their supportive staffs would meet at various intervals to negotiate the new treaty/treaty changes.

The IGC is (still) formally speaking a specially designed set of meetings of the expert groups and the European Council bent on treaty reform. At the IGC-meeting each Member State is equipped with veto. Thus, every Member State is able to consider proposals for treaty change in relation to its own constitutional provisions. This structure permitted Member States (including their national constitutional courts) not only to examine whether a treaty change would abrogate national constitutional rights and supremacy, but also to prevent the treaty from entering into force, as each state could veto its ratification. For a Treaty amendment to enter into force each Member State had to ratify it in accordance with its national constitutional provisions. This, quite obviously, implied that ratification procedures would vary across states.[11]

Here is one important change with Laeken. As Moravcsik rightly notes, it *framed the process as a European constitution making process* and introduced substantive measures to that end.[12] The

[10] The committees generally consisted of appointed experts, high-ranking staff and politicians.

[11] There were two main models: national referenda (a model constitutionally mandated in Ireland and Denmark, and constitutionally inhibited in Germany) and/or national parliamentary sanction, which in some cases is given by special parliamentary formations.

[12] The most important were: incorporation of the Charter of Fundamental Rights in the Constitution; recognition of the legal personality of the Union; elimination of the pillar structure (at least formally); recognition of the

initiative had emerged a good year before the Laeken European Council took place. Laeken built on the momentum already unleashed by the German Foreign Minister Joschka Fischer's speech in May 2000 where he (speaking as a private citizen) declared the need for a European Constitution. Laeken's decision to establish a Convention to discuss the 50-odd questions it set forth was then naturally considered as the precept for a European constitutional moment (Castiglione 2004; Eriksen *et al*. 2004; Walker 2004).

The political will expressed by some core leaders, and the resolve to set up a Convention to deliberate these issues in public rather than what had been the case before (during Nice, Amsterdam, Maastricht, and SEA), namely to appoint a reflection group (a group of prominent individuals who simply deliberated among themselves and produced a set of recommendations), raised expectations and gave at least some symbolic credence to the notion of constitutional moment, *although the popular mobilization that Ackerman sees as a vital precondition was entirely absent*.

With Laeken mainstream thinking about, and discussion on, the EU, was *reframed* from the EU as a creature of international law, to the EU as relevant for mainstream constitutional terms and evaluative standards. However, when we consider the magnitude of changes that the TEC wrought, we see that this was more a matter of consolidation than a radical departure from the EU's *existing material constitutional arrangement*,[13] which had developed gradually and over several decades.

Since the early 1980s, the SEA, Maastricht, Amsterdam and Nice IGCs had moved the legal-political integration forward and as part of this had also contributed to *solidify* the legal-integrationist work of the European Court of Justice; they had not challenged or curtailed, it.[14] These processes represented incremental steps in European constitution making. They all included popular referenda (at different instances in France, Portugal, Denmark and Ireland); hence these acts of consolidation had also received popular support (however partial this was since only some countries chose referenda, but all those that did not use referenda nevertheless subjected them to parliamentary ratification). The direction of change is nevertheless important: These instances were step-wise efforts at solidifying and entrenching the legal-institutional conditions for European democracy and a European constitution. The Treaty of Maastricht established European Union citizenship. The Court had granted citizens a range of protective rights. Further, the role of the EP, even pre-Laeken, was gradually increased. According to one analyst the EP has, since Maastricht, 'managed to establish a link between a general public discourse about European democracy and a specific programme of institutional reform' (Christiansen 2002: 45). The EP has also over time obtained an indirect veto over constitutional change,[15] an unofficial measure which has not been reflected in formal legal changes (and is hence highly vulnerable to change). These developments reveal that the IGC process, whilst still formally intergovernmental, has given rise to and helped

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supremacy of EU law; reduction and simplification of the instruments for law making and decision-making procedures, plus the introduction of a hierarchy of legal acts; delineation (although far from unambiguous) of the distribution of competences; generalization of qualified majority voting in the Council and the designating of co-decision as the standard procedure (albeit subject to important exceptions in Part III); changes to the Council presidency (elected for a once renewable term of 2.5 years); and a popular right of initiative.

[13] With 'material constitution' is meant 'the *norms of social interaction* that are regarded as basic norms according to *social practice*' (Menéndez 2004: 111).

[14] This is precisely Weiler's (1994) point in his famous article on the Court of Justice.

[15] During the Maastricht negotiations the Italian and Belgian parliaments formed an agreement, which stated that they would only ratify the accord if the EP had given its assent. This also applied to Amsterdam (Interview with Commission official, January 1998). On 'indirect veto', see Christiansen (2002: 45). The EP also affects the ratification through the requirement of EP assent to enlargement.

cement, well before Laeken, a European supranational constitutional construct that speaks to a European democratic constituency.

The IGC process framework, then, pre-Laeken, had actually, almost by stealth, served as a vehicle for *European constitution making*. National elites in euro-skeptical countries have gone along with this but at the same time also gone to great lengths to argue that the process should still be understood as one of national constitutional sovereignty protection and by implication that the EU's legal construct *bears no semblance to constitution*.[16] For instance, on January 30, 2002, then Minister for European Affairs in Denmark, Bertel Haarder, when asked what would come out of the Convention's deliberations, said: 'Whether it is called a basic treaty or a constitution or a third name I think we shall be quite relaxed about, for whatever one wants to call it, it is only a treaty that will come out, which only comes into effect when it is in accordance with the member states' constitutions, and which only can come into effect according to the rules that are laid out there [in the national constitutions]'.[17] Recognizing this as having constitutional standing would amount to admitting that they were involved in a European constitution making process, where the Member State's own formal constitutional sovereignty would be at stake. This they adamantly refused to do. The open Convention process, with its explicit focus on European constitution making, helped to expose these tensions and contradictions: now national publics could see that the EU had been up to European constitution making, however much their leaders had pleaded the opposite.

These tensions reveal that core actors diverge over the EU as a polity: with one position not recognizing the EU as a self-standing democratic polity (hence with no need for a democratic constitution), and another which does (and which thus also needs a democratic constitution). The Laeken process demonstrated that what was at stake in the European integration process was not an EU marked by low-salience issues, but an EU that had emerged as a constitutional entity, an entity that might even contend with national constitutional supremacy.

Some of the discussion of the Laeken constitutional process – including the references to the Philadelphia Convention – has left a certain impression that the European Convention was a constituent assembly.[18] That such an association was made is hardly surprising, given the central role of constitutional *convention* in mainstream constitutional thought. Formally speaking, the Laeken Convention was only a preparatory body which was asked to formulate one (or several) proposal. The Convention *took upon itself* to serve as a kind of drafting body. It underlined that its mandate was of constitutional salience but the TEC was more the case of consolidation of the EU's existing material constitution than the adoption of an entire new framework. The Convention leaders, notably Giscard d'Estaing, were concerned with forging a proposal that would be directly accepted by *the formal drafter*, the European Council. This goes to show that the European Convention was not a self-standing body with an explicit democratic authorization to prepare a draft to be put to the EU's citizens. The Convention's composition and its designated role were deeply colored by its being *inserted into* the IGC system rather than replacing it. The Convention sought to broaden its formal role as a consultative body by appealing to its more representative character (with a majority of parliamentarians – national and EP). It thus argued that it was better suited than the European Council to forge a common constitutional proposal.

[16] When I interviewed a Commission official in 1998, the official noted that there was a virtual ban on talking about 'constitution' in Brussels.
[17] Available at: http://www.folketinget.dk/Samling/20012/salen/F4_BEH1_22_4_69.htmAuthor's translation.
[18] The European Convention sought to present itself as such a body. Its chair Giscard d'Estaing made references to the American Philadelphia Convention.

These comments serve to underline first that the Laeken constitution making process, grew out of previous instances and was *not* a qualitative break with these. But the Convention's reframing of the reform process as one of constitutional salience was *consistent with* the constitutional character of the EU's legal system. Hence, the process was not confined to low-salience issues. Second, the Convention claimed to have popular support but this had not been demonstrated by explicit popular consultation.

b) Should we expect greater political participation to result from this?
With regard to the second step, deliberative democrats see greater political participation as *resulting from* a popularly generated first step; hence the initial popular mobilization will produce demands for greater institutional opportunities to participate, rather than the obverse. Deliberative democratic theory does not assume that greater institutional opportunities to participate will *produce* more participation, unless there is a reason to participate.

Let me start by reiterating the conditions that deliberative democratic theory posits for greater participation or citizen involvement. One was an explicit constitutional signal, which Laeken did *not* contain. The Laeken Declaration presented fifty-odd questions that were to be discussed, and where the Convention was asked to formulate proposals for how to address these rather than forge a constitution. The Laeken Declaration was formulated by the European Council.

Deliberative democratic theory posits that the drafting stage would normally consist in a strong public (a public body that deliberates and that can make authoritative decisions based on its deliberations, Fraser 1992), equipped with an explicit popular mandate that drafts a proposal. The drafting would occur by a specifically designated and designed body, and be taken out of the normal political process, so as to shield it from undue influences. This strong public would thus be attributed symbolic status as a constitution making body; it would interact with the general public but also have recourse to secrecy, to forge an agreed-upon constitutional draft.

Some deliberative democrats also believe that the absence of an explicit popular demand for constitutional reform need not foreclose constitutional reform. Such absence can be recompensed through democratic testing during the *subsequent* stages of the process. What is important to recognize is that at Laeken there was no mechanism in place to consult the EU's citizens in their capacity as European citizens on the Convention's draft.

The IGC model (pre-Laeken) departs particularly strongly from how deliberative democratic theory understands the drafting stage. As noted, the European Parliament had no formal role; hence there was no European-wide popular body (strong public) involved that could prioritize and weight issues, where its different factions could point out what they saw as the key issues at stake, and thus mobilize the citizenry along these lines. This absence of a Europe-wide representative body meant that the quite closed IGC approach could be opened up to public participation and deliberation *in two qualitatively different ways*. As a vehicle for the democratic protection of national constitutional orders, the process could be opened up along its different stages (initiative, initial deliberation, drafting, agenda-settled deliberation and ratification) *within each Member State* only. The point of opening it up to public participation would be to permit the public to formulate and adopt the national positions that went into the process, and to evaluate and eventually ratify (or reject) the proposals. This way of opening it up underlines the formal character of the process as intergovernmental: a process set up to serve the notion of a Europe made up of *multiple national demoi*.

But the process could also be opened up to serve a European end – by rendering the conception of a European demos visible in process terms. There are two variants of this. The most explicit case would be where the process is opened up to serve the European dimension, which means that the process is set up to speak to European citizens – in their capacity as European citizens *only* - at all the different stages. This could be through a European body taking the initiative, a European strong public drafting the proposal, and in its most open form, a European popular referendum ratifying the draft. *Or* the process could be opened up so as to speak *both* to the national and to the European dimension, within the framework of a European constitutional construct.

The particular feature of the Laeken process was that it was opened up along *both* main tracks above, but only partially so along either track. The European Parliament, as the key institution speaking to a European constituency was well-represented in the Convention. But the Convention was set up as a preparatory body, not as a constitution making body proper. It *claimed popular European support*. The Convention sought license from and appealed to a European constituency; which had not been directly consulted. Neither were the subsequent stages of the process set up to permit a European constituency to accept or reject the Convention's output. The post-Convention process was tailored to national constituencies (national ratifications which were set to take place not simultaneously across Europe but sequentially over a period of time). The Convention was not in charge of the process; it had no influence on how its results would be put to the people. Nor could the Convention decide on who would be its most relevant constituency.[19]

The European Convention was *interspersed into* the IGC model rather than replacing it. Whereas the Convention set itself up to symbolically play the role of constituent body for the forging of a European constitution; its composition revealed how deeply it was still steeped in the IGC-mould. It contained representatives from Member State governments and parliaments, together with EU institutions, notably the EP. In the Convention government ministers and other government appointed officials sat together with European and national parliamentarians. One important element in this composition gave a strong governmental steer to the Convention process. Government representatives – notably where *foreign ministers* served as government representatives – were part of the Convention's deliberations but would also *re-enter the process as direct participants* at the deciding, European Council, stage. Each government was equipped with veto at the European Council meeting; hence the government representatives in the Convention – and notably the foreign ministers - could exercise credible veto threats in the Convention. The credibility of such veto threats was, if anything, heightened by the fact that each European Council meeting is conducted in secret; there is no official documentation on actors' positions and changes taken during the negotiations; neither the character and scope of deliberations nor the justifications presented are released to the public. The secrecy involved in such meetings exceeds beyond, and is incompatible with, how deliberative democratic theory understands secrecy.[20]

The upshot is that the *national dimension* was very much present in the Convention, both through national government representatives and national parliamentarians. Differences in opinion voiced among the different national components in the Convention, which often occurred (notably in the UK: Peter Hain vs. Andrew Duff) were modified by the body's deliberative ethos (as professed in the opening speech of the Convention's chairman, Valery Giscard d'Estaing), but were

[19] The Convention President, Valerie Giscard d'Estaing was cited to the effect that 'The substance of the text under discussion is a constitution, but one which takes the legal form of a treaty since, in contrast to a national constitution, the powers conferred on the Union derive from the States which conclude the Treaty' (European Convention 2003: 1).

[20] For useful such sources see Chambers (2004) and Gutmann and Thompson (1996).

nevertheless hard to handle because of the differentiated weight that government representatives carried in the Convention.

The Laeken constitutional process represented the clearest visible demonstration thus far that the EU was involved in European constitution making and that this process had gone on for decades already. Many national constituencies nevertheless still understood and discussed the process in distinctly non-constitutional terms. Within the Convention context, most of those initially championing national positions proved able to embrace the complex construction labeled Treaty establishing a Constitution for Europe.[21] But the agreements struck at the European level did not reach deeply into the national arenas, so that the national settings did not echo the agreement on the European legal construct as a constitution of sorts.

c) Would more informed deliberation and decision-making occur here?
The assumption that the Laeken Convention would contain more informed deliberation is based on the rather dubious tenet that IGCs are marked by bargaining and Conventions by deliberation. Previous IGCs had contained lots of discussion, made up as they were of expert working groups, which dealt with the issues in preparatory meetings. We cannot *a priori* discard preparatory meetings as non-deliberative. Even European Council meetings can be deliberative. We cannot draw a direct link between a specific type of procedure, such as a Convention and a specific action mode (communicative instead of strategic action or logic of deliberation instead of bargaining). All procedures will contain elements of both deliberation and bargaining: there was bargaining and strategic action in the Convention,[22] and there is bargaining also in the European Council meetings.

It is quite apparent that the plenary debates of the Convention were not always conducive to deliberation. The plenary sessions were often more staging events for representatives to perform their pre-prepared speeches, than fora where their views could be discussed in detail. When the chairs permitted, there were real debates through direct exchange of arguments. There was however lots of debate in the many fora and meetings that the Convention spawned and that were intrinsic (often informal) parts of it: its numerous working groups; in-between sessions (notably in the EP's 'Mickey Mouse bar'); in meetings among the sections (national parliamentarians, EP, national government representatives); in preparatory meetings;[23] in the EP – notably its Constitutional Affairs Committee – but also in other of the EP's fora; in national parliaments;[24] in the European political party formations, and in their national counterparts; in mini-conventions at the national and regional levels which mimicked the Convention; and in various civil society organizations that followed the Convention's work. Precisely because of this multitude of opportunities for deliberation, which were available for the more than 16 months that the Convention lasted, was it possible for representatives from so different contexts to reach

[21] Eldholm (2007) in her detailed analysis of the UK and Italian contingents shows how actors over time came to embrace the notion that the Convention was dealing with constitutional issues. The author saw this also when observing the Convention's work and deliberations.
[22] Bargaining occurred especially in the last stage of the Convention's work. At that point members had had time to familiarize themselves with each other's views and had also reached a greater understanding of the process and the issues, which made set the stage for results-oriented bargaining. Actors showed different fidelity to the deliberative ethos. Detailed analyses of actors' behaviour show that whereas some actors were quite consistent in how they addressed different audiences (one among several indicator of deliberative action), other members were clearly acting strategically. Eldholm (2007: 54) documents through analyses of the speeches Gianfranco Fini gave over time and covering both speeches given inside of and outside of the Convention (the latter period includes the time after the Convention) that he acted strategically through adapting his talks to the different audiences he encountered.
[23] I attended several of the breakfast meetings of the European federalists.
[24] National parliamentary delegates reported back to their respective national parliaments and

agreement on what kind of process they were involved in, as well as to end up with a document that most signed on to.

The Convention's task was effectively given to it by previous IGCs: to try to reconcile the tensions between those that championed for a European constitution and those that saw a European constitution as a threat to national sovereignty. This effort at reconciliation could not be performed on a level playing field or in the absence of quite clear bounds; as everyone in the Convention was wholly aware of the fact that national government representatives – notably the ministers (Fischer, de Villepin and Hain) – could veto proposals at the next stage. The UK government's representative Peter Hain expressed this very clearly when he spoke of 'red lines' that could not be crossed. These threats were credible, since everyone knew that what Hain opposed would be opposed by the UK government at the IGC stage.[25] The Convention thus played out and sought to bridge the tension between two democratic-constitutional constituencies: one national with national government representatives as the main champions, the other European, with MEPs as the main champions. In the more transparent proceedings of the Convention, it was clear for all to see that the national positions were not internally unified: national parliamentary representatives at times stood up against their own government representatives. It was this setting that enabled the Convention to craft a hybrid that would be suitable to the EU's distinctive character qua polity, but also to entrench it within a framework of democratic norms by drawing on mainstream constitutional-democratic terms and standards.

Moravcsik talks of 'informed deliberation' (figure 1). Deliberation is not confined to impartial arguing; it is *also* about voicing of dissent, airing of discontentment and exposure to, and criticism of, power. Deliberation …"is about collective solutions, but it is also about *intellectual and cultural innovation* and producing and distributing new ideas and interpretations" (Peters 2005: 105-6). Public deliberation can play a central role in the identification of problems; it can also form a vital aspect in a collective search for new solutions. Through deliberation, issues are framed and reframed.

One of the key achievements of the Laeken Convention was to clarify that the Union was a political construct based on a legal structure of a *material* constitutional kind. As such, the Laeken Convention's deliberations and its output, the TEC, played a key role in *reframing* the debate on the EU. Prior to Laeken, many of the frames used to depict the Union labeled it as a particular type of international organization, or as a kind of functional regime or EU as a Common Market – all of which highlighted the Union as foremost an economic type of organization.[26]

The Laeken Convention gave symbolic credence to the constitutional framing of the Union. This is of relevance to the question of issue salience: once a process is framed as of constitutional salience it brings to bear our normative expectations pertaining to *constitution*. From the American revolution onwards we have been conditioned to think of constitution as "an *exclusive* concept: it is striking that certain forms of order are now no longer labelled as faulty or wrong constitutions; rather, their claim to be constitutions at all is denied."(Möllers 2004: 130) Such a claim has particular resonance in the European setting, which is marked by such a high density of constitutional norms. Constitution making in the European Union is a process that takes place within a setting of already constitutionalised political entities; hence there is naturally a pressure on the EU whenever it raises the constitutional flag also to adhere to the most basic constitutional

[25] Peter Hain was not a foreign minister but it was well known that he was very close to PM Blair.

[26] A Convention member noted in an interview on 22.01.03 that several of the representatives from the new member states, when they first entered the Convention did not think of the EU in constitutional terms.

norms and principles that the Member States subscribe to, lest EU law lose its legitimacy and any veracity of the claim to being 'higher law'.

d) Greater common identity, institutional trust and political legitimacy

The Draft was presented and understood as a compromise by the participants. It was never presented as the fruit of a rational consensus. When we consider it more closely it might more suitably be labeled as a *working agreement* (Fossum 2005), which is an agreement based on rational reasons, but where the actors offer *different* reasons and justifications (Eriksen 2007). This falls well short of the deliberative democratic ideal of rational consensus – a consensus based on rational arguments and referring to the same set of reasons. It forms an intermediary category between an ideal speech, and a pure bargaining, situation (stronger form of agreement than a *modus vivendi*)[27].

There was a deliberative imprint, as positions have been moved and standpoints have changed. As such, the agreement rests on reasonable reasons, not only on compromised interests. Participants portrayed the draft as the best that could be got under the circumstances, but they also underlined that this was a result that had been forged through a lengthy argumentative procedure; hence ultimately lending legitimacy to the result. This designation of the TEC as a working agreement is thus more consistent with participants' accounts than would be the notion of a bare compromise.

My reconstruction of the Laeken process suggests that one of the main reasons for the subsequent failure of Laeken can be seen in the character of the process that preceded Laeken, which Laeken was deeply steeped in. This is not a hard and fast causal claim; it is a working hypothesis that is premised on a host of presuppositions about human behavior.

My reconstruction has permitted me to uncover some of the elements that such a causal analysis should contain. As I have sought to demonstrate in the above, the IGCs preceding Laeken had been part of a long-term *constitutional avoidance strategy* on the part of the Union. The Laeken Convention was the first official European Council appointed body to discuss the question of the Union's constitutional status. It made clear that the EU had been involved in a European constitution making process for decades, which the previous IGCs had not admitted to. If anything, the IGCs, as *Intergovernmental Conferences,* could be referred to as the best means of protecting national sovereignty and hence serve as useful means to avoid the constitutional issue altogether. Laeken addressed the constitutional issue head-on, but its success could not be translated onwards, to the citizens, because its effort at reconciliation was only tested from a select number of national perspectives. No European counterpart was available to correct for national distortions and caprice during ratification, or to rally European support behind the proposal during the ratification.

It should come as no surprise that critical voice, not rational consensus, would emanate from the particular and *partial opening up* that the Laeken process (and the Convention) represented. With the post-Convention period organized to suit national constituencies there was no procedural 'safeguard' to permit citizens to understand themselves as a European constituency. Even Convention members' fidelity to the product varied greatly.

The Laeken constitutional process was different from its fore-runners in its overall greater transparency, its onus on democracy, and its effort to bridge two conflicting positions on the issue

[27] This category depicts a situation wherein actors, after deliberating together, reach a temporary agreement. Two sub-categories of this are (a) quasi-consensus, wherein a losing minority accepts the agreement because it is the result of legitimate procedures, and (b) mini-consensus which refers to the agreement not to discuss those items that the actors know from their interaction that they disagree about. (Eriksen 1993: 44).

of a European constitution. This emerged as a response to demands for more openness and transparency, demands that had been raised during previous IGCs, and which were also clearly spurred by the democratization thrust within the EU, especially in the post-Maastricht period. This opening up at Laeken subsequently helped to raise expectations and generate demands for more democracy and more democratically accountable procedures. This thrust for more democracy does not in itself translate into assurance of reasoned, issue-oriented – problem-solving or even consensus-forming - deliberation. What appears more likely is that when the stakes in the European integration project are made more transparent to people, there will be *more contestation* over the character of the EU. Such contestation is a necessary component of political legitimacy. This is also one of the reasons why representative bodies tend to score lower on popularity: they are designed to speak to and stir up power; to bring issues on the agenda; to mobilize and politicize the citizenry; all with the view of ensuring the political system's overall democratic legitimacy.

IV CONCLUSION

In the above I have discussed Moravcsik's statement to the effect that deliberative and participatory forms of democracy are out of synch with how social science understands the workings of modern democracies. The theoretical implication is that strategic rationality and bargaining trump deliberation and communicative rationality. I showed that Moravcsik's reconstruction of deliberative democracy deviated from how deliberative democrats themselves would depict it; which throws serious doubts on the veracity of the sweeping conclusions that Moravcsik makes. Further, I have shown through the analysis of the EU's process of constitution making that the Laeken constitution making process was not set up in such a manner as to constitute a critical test of deliberative democratic theory.

My analysis of the Laeken constitution making process showed that a process that was nevertheless set up more in line with deliberative democratic theory than had been the case with previous EU treaty making processes, had obvious merits. It brought to light the deep tensions that had plagued previous treaty instances, but which had not been publicly articulated, nor adequately dealt with in previous rounds.

The main theoretical lesson we can draw from this is that whereas humans rely on both strategic and communicative rationality in their interactions, the process of theorizing on communication cannot start from strategic rationality or game theory alone. Theorizing has to take as its point of departure that strategic rationality is parasitic on communicative rationality rather than the reverse. I have tried to show that the Convention played a central role in forging a convergence among the participants on what the process was about - and by implication further clarification of what the EU was about. Such a process of convergence can only come about through an argumentative exchange; an exchange that takes place in accordance with certain basic presumptions inherent in language; that actors' statements contain claims pertaining to truth, justice and authenticity, which again can be tested for their veracity through various means by the actors themselves. This also serves as the standard that permits us to establish *whether, and the extent to which* actors are being strategic. These are the more-or-less-explicit taken-for-granted assumptions that inform communicative interaction.

Reality is still ahead of theory, notably when it comes to such complex processes as European constitution making. What does seem clear at present is that how democratically accountable such processes can be hinges to a large extent on adequate intellectual framing of the processes. This requires more attention to deliberative democratic theory, not less. One lesson from Laeken is that the European constitution making is in democratic terms *double-tracked*. Since the EU is a case of

constitution making within a setting of already constitutionalised states, EU constitution making is an ongoing attempt to harmonize two democratic constituencies, programmed along a national and a European track. To properly design such a process is a major intellectual and political challenge.

My analysis has suggested that rather than continue to confront this challenge, the EU has with the Lisbon Treaty opted for a seemingly easy way out, namely to abandon the constitutional terminology but sustain the material constitutional substance and even much of the institutional underpinnings for a European-level democracy. An important issue that requires further attention is therefore what the democratic implications will be for the Union of dropping the constitutional frame. Will this lower democratic ambitions, as the Union cannot credibly claim to challenge national constitutional authority? Will this ameliorate what I consider as the critical dilemma facing the Union: the Union exercises constitutional authority with reference to Union-entrenched principles and Union-generated law but cannot offer a convincing normative justification for why this authority should be exercised by it? *If* the Lisbon treaty is picked up by citizens as a case of constitutional avoidance, there will be a reaction.

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