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# The New Constitution as European 'Demoi-cracy'?

KALYPSO NICOLAÏDIS

*How should we assess the project for a Constitution presented by the Convention on the Future of Europe? This paper argues that in order to succeed, an EU Constitution would need to present a positive vision of what democracy in Europe is about. While the draft Constitution fails in finding the right language in this regard, it does nevertheless contain an all too implicit manifesto: that ours is a European 'demoi-cracy' founded on the recognition of the persistent plurality of its component peoples but not reducible to a set of complex bargains between sovereign states. The paper analyses the main feature of the project against this benchmark and argues that it is closer to the spirit of demoi-cracy when dealing with the vertical relationship between the Union and its member-states than when dealing with the horizontal relationship among the member-states themselves.*

More Europe, less Europe. Supranational Europe, intergovernmental Europe. Super-power Europe, impotent Europe. European Superstate, Union of European States. European democracy, national democracies. For or against. Debates over European integration have always fallen prey to the tyranny of dichotomies. As good Cartesians, we all tend to think that way. But as good Hegelians we imagine and design grand synthesis and workable compromises: the European Union as a Federation of Nation-States, A Union of States and Peoples, A Community of Nations. At home our politicians tend to be Cartesians. Abroad they take on the Hegelian mantle. Fine: while domestic politics needs scapegoats and slogans, Europe needs grand bargains to accommodate its wide spectrum of political families, national sensitivities and historical trajectories. Today, as the European Union is close to becoming synonymous with Europe, we need to forge anew the bargains that have sustained its history since 1957. Can we avoid the tyranny of our Cartesian dichotomies and

invent a genuine ‘third way’ for Europe? And in doing so, can we escape a European version of the French *consensus mou*? What should a Europe for all, an EU that most of us can like, if not love, look like?

The answers delivered by the Convention on the Future of Europe in June elicited more generalised indifference than either enthusiasm or hostility. One can understand the inflated expectations. For the first time in the history of the EU, delegates from the whole continent but other than diplomats, have engaged for more than a year in a public debate about the foundations of the European Union, its goals and its methods. The reach of their so-called dialogue with civil society may have been wanting, but they have conducted this debate in a highly open and transparent fashion, with the full paraphernalia of webcast and e-forum. Their mission fell somewhere between pragmatic simplification and radical refoundation: to give the Union a form of government adapted to its new size and ambitions and to do so while reinventing it as a democratic polity.

In the end, while the plot and the set may look impressive, the play itself is not revolutionary. For the most part, the draft European Constitution codifies under one umbrella the plethora of treaties and amendments adopted by European Union members over the last 45 years. Nevertheless, the draft Constitutional Treaty has a major flaw which cannot help but antagonise eurosceptics: it is indeed a ‘Constitution’, which, as the most recent of this breed, tries hard to resemble traditional national constitutions, in a prose that seems to borrow from the worse in each EU language. As a result, its content is easy to misrepresent by all sides.

In spite of this, the new blueprint is on the right track. Both eurosceptics and euro-enthusiasts have much they can be pleased about. And after all, if the EU is to reinvent itself as a democratically legitimate polity it must bring both of these constituencies on board. But first, eurosceptics should stop equating more European democracy with ‘more Europe,’ and self-styled euro-enthusiasts on the continent should stop equating retention of national veto power and other concessions made to Britain with ‘less Europe’. Nevertheless, while the final verdict must await the end of the IGC, the French school teacher has an apt expression for this stage of the game: *peut mieux faire*. This constitution must do better in conveying what European democracy is all about. I believe this is how.

### **From Monnet to Pericles**

Indeed, it is the original, if necessary, sin of the EU not to have been built on a democratic foundation at a moment when the citizens of Europe, or

at least those who cared, would have said 'Yes!'. There was a chance to do just that the last time delegates from around Europe met at The Hague in 1948 in the hope of founding a United States of Europe. Nothing came out of their debates but the echo of arguments that are still with us today.

This failure was probably the EU's saving grace, making room for a more pragmatic, workable approach to integration on the war-torn continent. The European Community replaced grand visions of democracy at the European level with the so-called *community method*, which puts the member states in the driving seat through the intense day-to-day diplomacy of the Council of Ministers, while giving the European Commission the task of balancing the power of big states with a vision of the common good. Later, an elected European parliament was added for minimal democratic flavour. And as Jean Monnet predicted, states started to engage in endless creative bargains ('give me money for my farmers and I will give you a market for your products'), thus creating ad hoc solidarities between national constituencies. In the ensuing decades, this logic served us well for the most part. From the European Communities of 1958 to the European Union of today, European administrations, industries, political parties, trade unions and non-governmental organisations, as well as our political leaders, have learned to work together on everything from food or banking safety regulations to the granting of visas and global trade negotiations. They may still often disagree, as our national interests do not always converge, but they have learned to manage their differences more effectively and constructively. The European crisis over Iraq, however serious, was an exception nevertheless.

The *community method* is the open secret behind the EU's continuous balancing act between old and new members, left and right ideologies, big and small states, general and sectorial interests, business and consumers.

Grand rhetoric has it that we have now exhausted the merits of this functionalist approach and so a new phase in the life of the EU is required. The widening of EU powers to include what everyone perceives as the traditional prerogatives of the nineteenth-century regal state (money, police, migration, management of external boundaries and foreign policy) has not been matched, the story goes, with a parallel increase of its accountability to European citizens. And the doubling of the EU's size over a decade through the enlargements of 1995 and 2004 will spell its demise if not matched by a rethink of its institutions. Hence the Convention, hence the draft constitution.

Sceptics have claimed that this whole exercise is much ado about nothing, a misguided attempt to fiddle with a European Union that ain't broke,

a Union as democratic as it should and can be (Moravcsik 2002). Surely, the EU does not exhibit half the flaws its critics attribute to it. Not only is it *not* a super-state but it lacks the attributes of a state *tout court*. What manner of state would it be with its tiny budget and its tiny administration, rules agreed to in Brussels by national representatives, and interpreted, policed or enforced on the ground by agents of the member states? Moreover, the EU is still primarily excluded from the areas of state action most citizens care most about -from the welfare functions of health, social security and education to defence and home security. And when it does act, it usually does so in a more transparent way than domestic counterparts, through all-out consultations with policy networks, forums and civil society groups of all shapes and colours. The numerous forms of democratic safeguards embedded in its decision making procedures and institutional structures (super-majorities and vetoes, involvement of four different institutions, role of the national capitals in drafting laws) guarantee that no interest will be trampled on. It may be imperfect, but the EU level of democracy compares favourably with the level of democracy in its member states.

But those who dismiss calls for a more democratic EU do so from the point of view of social science rather than political philosophy or politics *tout court*, and thus miss an important point. The success of the European adventure in the last five decades was simply not predicated on exploring a new form of democracy beyond the nation-state. In today's EU, the (democratic) whole is less than the sum of the (democratic) parts. All of the EU's laudable features alluded to above somehow do not amount to a form of democracy that most European citizens recognise. This is because, to the extent that the EU is indeed a new kind of democracy-in-the-making, its democratic character cannot be recognised and developed if we hang on to the conventional paradigm of statehood. If there is no need to deny past achievements, to trash Monnet in order to rediscover Pericles, we must ask anew how the two shall meet.

We need to start with the recognition that the debate over Europe and democracy has been perverted by the Cartesian tyranny of dichotomies, all variants of 'more' vs 'less' Europe.<sup>1</sup> Inside the Convention itself, the two main camps were identified from the start as the intergovernmentalists and supranationalists (also referred to as federalists). The former, which include several big countries' government representatives as well as many national parliamentarians, want to address the new challenges by strengthening the council of state representatives, prefer to retain the unanimity rule for policy areas close to the core of traditional

state sovereignty and see the answer to the democratic deficit in a stricter delimitation of powers between the Union and the states. The latter, which include most of the small member states as well as representatives of the European parliament, want to protect the commission as an advocate of weaker parties, strengthen the European Parliament as the locus of democratic control, extend majority voting in the name of effectiveness and continue to expand EU powers if necessary. At least some in this second camp like to call themselves 'friends of the community method'.

At the outset of the convention, its president, Valéry Giscard D'Estaing called on the conventioners to seek to keep the best of both approaches. And at the end of the day, as the final draft was approved by consensus, everyone seemed to converge on a vision of the EU grounded in a double legitimacy of states and citizens, a community of nations.

But has the convention then succeeded in designing a third way for Europe? Has it achieved a grand synthesis rather than a messy compromise? Many would say 'no', feeling that no such settlement can deal with the legitimate fears and aspirations of all sides, and that bargains and give-and-take is what the exercise is all about, not the design of a new polity embraced by all.

The irony, however, is that the EU as we have it today provides all the ingredients for such a third way. The draft Constitution falters when ignoring it. It is at its best when it recognises and builds on what we have: our European democracy.

### **A European Demos?**

The argument defended here requires a detour in democratic theory since at the root of the conflict between intergovernmentalists and supranationalists lies a more fundamental fault-line on the actual and desirable relationship between the EU and democracy. As general wisdom has it, democracy requires a *demos*, a group of individuals who have enough in common to want to and to be able to decide collectively about their own affairs. In the representative mode of democracy, this translates into the ability to consent or dissent by majority with the way they are governed. A European democracy would mean being able to 'kick the rascals out' (of Brussels). In other words, if Europeans in their majority expressed themselves in a certain way, the minority would consider their decision final and legitimate. So we have to ask: Is there a European demos to express such consent? Can there be a European demos? Should we want a European demos?

Ever since a famous ruling by the German Supreme Court in 1994 one response has been given legal pedigree: the so-called *no-demos* thesis. Accordingly, democracy requires a demos; there is no European demos but only separate national demoi. Ergo, democracy at the European level is a fruitless pursuit. Those functions of the state that require democratic control (from policing to immigration) should never belong to the EU.

To be sure, for those who call themselves ‘civic nationalists’ in Britain or national sovereignists in France, the nation does not need to be ethnic in nature, but it must provide the basis for a sense of common belonging – be it in a common language, culture, history or political habits (Lacroix 2002). This is a precondition for what representative democracy is all about, accepting to be in a minority one day, expecting to be part of a majority another. National sovereignty must be defended not as a reactionary reflex but as the ultimate guarantee of democracy itself. Europe, therefore, is the realm of agreements between states and, to the extent that our leaders need to be accountable to their voters for what they do in Brussels, the realm of indirect democracy. It is only reluctantly that sovereignists accept that some modicum of direct democracy needs to be injected at the European level through the European parliament and that European affairs need to be more transparent, understandable and accountable to the citizens of the member states. But they oppose the creation of a direct link between these citizens and European institutions (such as a universally elected president of the commission). This approach underpins the defence of intergovernmentalism as the most legitimate way of running European affairs.

On the other side of the fence, as the mainstream story would have it, there are of course those who believe in a *European demos*. Supra-nationalists see the European Union as entailing a progressive transfer of loyalty from the states to the Union. Common policies and programmes create *de facto* solidarities between citizens of different states, and encourage the mobility of students, workers, professionals or firms. Such progressive ‘Europeanisation’ in turn is both the source and the consequence of the development of a European public space where domestic politics converge to create a common European political culture and ‘language’, and in the end, a European ‘civic nation’. They believe in the emergence of a European identity coexisting with national or other local identities. If, as Anderson argued, collective identities are constructed as much as passed on across the ages, why not an imagined European identity? Newly constructed identities can be layered on top of older, equally constructed, national ones, through the crafting of new common symbols and histories

in school curricula and the media, and the projection back into the past of a 'common destiny'. (For a discussion on how this game is played through school curricula see Soysal 2003)

There are of course shades of grey. While some believe in an existing European demos, others reconcile themselves to the fact that we have 'a demos in the making', premised on an incipient European identity. But, at least, all supra-nationalists think that the emergence of a European demos is both possible and desirable in the foreseeable future. This in turn implies that democracy in the EU can and must be perfected above all along traditional lines of majoritarian representative democracy: two legislative chambers, one of which directly elected, and a commission 'prime minister' emanating from the latter.

Should we agree that the constitutional challenge is to arrive at a compromise between these two visions of democracy? Not if we recognise that this version of the great compromise misses the crucial point: these two visions of democracy in Europe are but two sides of the same coin. This is because sovereignist and supranationalist thinking are both state-centric. Symbols dear to supranationalists such as a common flag, passport, celebration day or hymn for Europe, as well as textbooks telling a 'European' history, all constitute attempts to recreate the mystique and power of the nation-state at the European level. In both visions, the political community is predicated on the existence of a single demos, which in turn depends on a common identity between its members. Both camps believe that politics must be communities of identity, both echo Gellner's definition of nationalism as requiring that the political and national units be congruent.

There is however, a third way for Europe. Sovereignists need to accept that the EU is indeed a community of peoples and not only of states, peoples who ought to take an unmediated part in European politics. And supranationalists need to accept that democracy in Europe does not require that this community become a single demos, whose will is expressed through traditional state-like institutions.

### **European Demoi-cracy – The Third Way**

After half a century of existence, the European Union has established itself as a new kind of political community, one that rests on the persistent plurality of its component peoples, its *demos*. It is more than a particularly strong version of a confederation of sovereign states, in that its peoples are connected politically directly and not only through the bargains of their

leaders. And yet, to the extent that these peoples are organised into states, these states should continue to be at the core of the European construct. In short, the EU is and should continue to be a *demoi-cracy* in the making, subject to the rule of its peoples, for its peoples, with its peoples.

Our European demoi-cracy is neither simply a *union of democracies* nor a *union as democracy*.<sup>2</sup> Our European demoi-cracy is instead one of the most innovative political machines ever invented to create and manage not only economic but also democratic interdependence.

Such a third way is based on the premise that the nation-state is too important a category in Europe to be hijacked by the EU itself. It is precisely in defence of traditional notions of democracy within the confines of the nation-state that we need to 'do something else' and 'be something else' at the EU level. If the EU is not a state today we should not want it to become one. Instead it must be understood as a Union of States and Peoples.

This is why such a third way comes under the broad aegis of post-national thinking –implying political loyalty beyond the state – but a brand that Habermas himself does not necessarily embrace. Post-national principles of community create an alternative to, not a replica of, the nation-state where citizenship needs to be conceptually severed from nationality.<sup>3</sup> Yet I believe that the dominant brand of post-national thinking often becomes simply a version of supranationalism. (Habermas & Derrida, 2003) The idea of European demoi-cracy is thus a radical version of post-national thinking, which takes to their ultimate logic the implications of pluralism and the rejection of identity politics in the EU context. In this sense, a demoi-cracy partakes both of liberal and cosmopolitan visions. Not liberal as is often understood on the continent as free trade plus human rights. But liberal as the emphasis on the necessary constraints imposed by the presence of others in our midst. Not cosmopolitan as the claim of the irrelevance of national boundaries. But cosmopolitan as the emphasis on the responsibilities and opportunities created by the existence of others beyond these boundaries (Balibar 2001).

This is the all too implicit manifesto contained in the draft constitution or at least in an indulgent reading of it. If today's EU is an incipient 'European demoi-cracy', it is a very imperfect one. The current draft is meant to improve at the margins the EU's blueprint for day-to-day action and to sketch an EU-topia for EU citizens. But it fails on the latter because it is presented and perceived negatively, simply as a compromise avoiding sovereignists and supranationalist extremes. A genuine EU-topia cannot simply be something 'in between'. (Nicolaidis & Howse 2002) Instead, it

must present a credible vision of democracy in the EU by boldly following and expanding the spirit of demoi-cracy.

More specifically, a constitution celebrating the EU as demoi-cracy requires three consecutive moves away from mainstream constitutional thinking. First *from common identity to the sharing of identities*; secondly *from a community of identity to a community of projects*; and finally *from multi-level governance to multi-centred governance*.

The first move in some ways was already contained in the founding fathers' intuition that has now found its way into the preamble: the call for an ever closer union between the peoples of Europe. Sovereignists need to recognise that what matters here is the 's' in the peoples of Europe. Supranationalists need to accept that nowhere does the constitution call for the emergence of a homogeneous community where the solemnity of law is grounded on the will of a single demos. Instead it makes respect for the national identities of its member states, as reflected in their fundamental political and constitutional structures, one of its foremost principles (Article 5). Our European demoi-cracy is predicated on the mutual recognition, confrontation and ever more demanding sharing of our respective and separate identities – not on their merger. The EU is a community of others. In political terms, a demoi-cracy is not predicated on a common identity, European public space and political life. Instead, it requires informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each other's forums. In time, a multinational politics should emerge from the confrontation, mutual accommodation and mutual inclusion of our respective political cultures. As the Constitution recognises, trans-European political parties have a key role to play in this regard. So do the media.

Mutual identification makes it possible to reconcile diversity with integration. We do not need to develop a 'common' identity if we become utterly comfortable borrowing each others'. We do not need to invent a common European history if we learn to borrow each other's past and identify, for instance, with the victims of the crimes our nation may have committed. The constitutional clause on citizenship (Article 8) borrowed from the Maastricht treaty stating that we can benefit from each other's consulate services outside the EU provides an apt metaphor: Abroad, I can be a bit British and a bit Italian – more than European per se. I have nothing to gain by spinning the rainbow white.

But where then is the glue that binds us together? This brings us to our second move away from mainstream constitutional thinking. The reading of the draft constitution makes it amply clear that this political community

does not rest on a shared identity, as is usually assumed with nation-states, but on shared projects and objectives. As stated in its very first article, member states confer competences on the EU 'to attain objectives they have in common', not as the expression as some state-like collective essence. These objectives are then defined extensively – from the promotion of peace, social justice or children's rights, to working for sustainable development, full employment or solidarity with future generations (Article 3). The Union is also defined by its values: respect for human dignity, liberty, democracy, the rule of law and human rights (Article 2). But here what matters crucially is not the proclamation of these values (they are after all universal, if not universally applied), but the *praxis* associated with common values. The list of values is restrictive and short (is that all we believe in?) because it is actually 'judiciable'. A member state can ultimately be kicked out for acting against them.

In short, the sense of belonging and commitment to the European Union ought to be based on the *doing* more than the *being*, on shared projects and ambitions, both internal and external.<sup>4</sup> A community of project is not necessarily less demanding than a community of identity.<sup>5</sup> But it is voluntary and differentiated rather than essentialist and holistic. It is worth reminding ourselves that the goal of the single market is still the most popular shared project in Europe. In short, the *Europeanisation* of national citizens through the instrumental benefits and opportunities that the Union creates does not necessary require or lead to their *Europeanness*. Shared material or idealistic goals provide the ties that bind.

The third move away from mainstream constitutional thinking consists in translating the ethos of mutual recognition of identities and shared projects into legal and institutional terms. A demoi-cracy should not be based on a vertical understanding of governance, with supranational constitutional norms trumping national ones and supranational institutions standing *above* national ones. Instead, our demoi-cracy ought to be premised on the horizontal sharing and transfer of sovereignty. It involves a dialogue rather than a hierarchy between different legal or political authorities such as constitutional courts (captured by Miguel Maduro's contrapunctual metaphor (Maduro 2001)), national and European parliaments, national and European executives. It is about multi-centered not only multi-level governance, with decision made not *by* Brussels but *in* Brussels as well as elsewhere around Europe. When it comes to rules, procedures and institutions, a European demoi-cracy is neither national nor supranational but transnational<sup>6</sup> (Nicolaidis & Howse 2001).

## Constitutionalism and Demoi-cracy: Moving beyond the Contradiction

Some may argue that the very idea of drawing up a constitution is anathema to this spirit of non-hierarchical governance. Until now, and in the spirit of demoi-cracy, the EU has been founded on what Joseph Weiler has described as constitutional tolerance, whereby national constitutions and the courts protecting them have coexisted without the need for an overarching umbrella (Weiler 2001). For lack of a formal supranational constitution trumping national ones, Europeans have chosen to constantly and willingly renew their commitment to their common rules while conducting an on-going dialogue on the implications of such a commitment. A formal constitution seems to deny this unique and precious spirit for integration. But it is too late in the day to argue this point. Indeed, it is precisely in order to dispel such misgivings that this constitution – albeit brought about by a constitutional treaty – must be different from any other of its state-bound predecessors. Does it succeed?

To simplify, the constitution is closer to the spirit of demoi-cracy when dealing with the vertical relationship between the Union and its member-states than when dealing with the horizontal relationship among the member-states themselves. To be sure, it often falls short on the first count too. Illustrations are in order.

Ironically, many in the UK believe that the British government's success in having the F word deleted from the final draft constitutes a symbolic victory against a superstate drift. As in the past, federalism, as understood in the UK, seemed to pit supranationalists against sovereignists. Yet, federalism does not mean more Europe and less nation-states. Nor does it simply mean decentralised government (as the German like to point out), a view still tainted with hierarchical thinking. Instead, it is a mode of organisation as old as human society that is more compatible with the existence of many demoi than that of a single demos. Federalism should not mean bringing different polities together as one, however decentralised. It means instead retaining what is separate, the demoi, *in spite of* all that is common. We forget this today, because, while the notion was developed in the seventeenth century by Althusius *against* Bodin's vision of the state, the history of federalism is that of its progressive subversion by the state paradigm of centralisation. This constitution should have been bold enough to present the EU as a federal union, not as a federal state, and thus rescue the federal baby from the statehood bath-water (Nicolaidis 2003). Instead, and this is an acceptable second best, it speaks of the 'community way' of doing business.

Throughout the draft constitution the reassertion of this community way serves a vision of European demoi-cracy well. For example, the principle of mutual recognition of laws and regulations is embedded in the unchanged articles on the single market – that is the highly managed form of recognition adopted in the 1980s which gives ample leeway to domestic standards. In the same spirit, the revised articles serving as a basis for cooperation in the so-called areas of justice, security and freedom have put mutual recognition of judgments and penal practices at the centre of cooperation among policemen and judges. Only minimum common standards are called for and only to the extent that they are necessary to ensure the mutual trust which underpins mutual recognition. When it comes to creating safeguards against the potential risks from free movement of peoples as well as goods across European borders, the Union does not resort to a European FBI. A demoi-cracy requires overarching rules or institutions only when the ‘crimes’ cannot be tackled effectively at the national level. It is still unclear whether the proposed European prosecutor much maligned in the UK would overstep this minimalist rule.

Unfortunately, the draft fails to institutionalise the so-called Open Method of Cooperation, adopted in the social, environmental and other fields the 1990s, whereby, in the same spirit of horizontal governance, agreements on common policies are replaced by coordination and mutual learning. Here, the conventioners were not bold enough to admit that such a method (which will continue to be used with or without constitutional blessing) helped break with traditional approaches to vertical governance and ought to be spelled out in black and white for symbolic reasons: is it not in the spirit of demoi-cracy for the different public opinions of Europe to be called upon to help adjudicate on the best ways for their countries to learn from the rest of the Union?

The draft contains little new about EU citizenship, which has always mostly been about the horizontal rights connected with freedom of movement and non-discrimination on grounds of nationality – rights we exercise when we cross borders in the EU. But at least these rights figure most prominently in the constitution. Unfortunately, the conventioners shied away from explicitly expanding the mutual granting of political rights in each other’s polity beyond the Maastricht right to vote in local elections. As Magnette discusses in his work, ancient Greeks called this the principle of *isopolity*, according to which the cities would, on a reciprocal basis, grant equal rights to their respective citizens residing within their walls. (Magnette 2001) At the same time, the constitution strengthens the vertical aspect of rights – *sympolity* for the Greeks – by incorporating the

Charter of Fundamental Rights. In empowering citizens against their state, the charter is part of a universal trend to decouple the notion of rights from that of belonging to a polity. As a matter of fact, non-EU citizens living in the EU are also beneficiaries of these rights. The reach of the charter should not be exaggerated as it often is in Britain. It is meant to guard against abuses of power in the design and implementation of EU law, not to supersede national practices. This is what common rights ought to be about in a demoi-cracy.

Crucially, the convention was meant to tackle the division of powers between the states and the Union and respond to the widespread fears of 'creeping competences' by the European publics. Here again, the constitution does not change the basic facts: the EU is still largely excluded from the areas of state action most citizens care most about and which are the object of intense democratic debates at the national level. From the welfare functions of health, social security and education, to defence and home security, no 'European majority' can tell the majority of citizens in a given state what to do. On the welfare state functions, such as social security, the EU only steps in when the free movement of people is at stake. The veto is rightly retained on taxation and defence which involve the kind of reciprocal sacrifice still connected with a single demos. Most importantly, for the first time in EU history and in one of the convention's boldest moves, the expansion of community powers is made subject to an 'early warning system', a veto over EU laws to be exercised by national parliaments on grounds of subsidiarity – the presumption that governance should take place at the lowest possible level. Contrary to the fears of many supranationalists, such national level democratic control over the expansion of EU powers does not mean 'less' Europe. It is exactly the spirit of demoi-cracy to have directly elected representatives police the boundary of competences in the name of individual national majorities.

Indeed, an EU demoi-cracy cannot rely for its legitimacy on representative democracy in the manner of its member states. Beyond the classical Westminster-type democracy, it may be possible for the EU to promote new forms of *participatory* and *deliberative* democracy – including through the World Wide Web – that are more ambitious and inclusive than those found in the member states themselves, but which do not aggregate the expressions of popular will. In this spirit, the draft constitution devotes separate articles to participatory democracy, and has acquired at the last minute a clause allowing for citizens' initiative: one million is the magic number. But the current draft fails to convey as one

should for a demoi-cracy, that the democratic question in Europe is not just about the role of citizens and civil society in EU governance but also about the role of EU governance in supporting vibrant civil societies and local democracy in member states.

The ultimate implication of seeing the EU as demoi-cracy has to do with the nature and permanence of the bond that unites the peoples of Europe. Perhaps the most significant criterion distinguishing a state from a union is the right of secession for its constituent parts, the 'right of withdrawal' as the draft puts it. The inclusion of such a right testifies to the widely shared intuition in the convention that the separate peoples involved in the EU adventure are together by choice and would continue to make sense as separate demoi. This clause has been contested intensely by some supranationalists who point out that it was not included in the previous treaties and would represent a step back on the road of integration. Yet the right of withdrawal must be defended passionately, not as a concession to national sovereignty, but as a sign that the EU has become mature enough to formalise this ultimate feature of a demoi-cracy. Quite simply, if a majority in a country one day wishes to separate from the whole it must be able to do so.

Most of these characteristics should be music to eurosceptics' ears while not being viewed by euro-enthusiasts as undesirable hurdles on the road to integration. In fact, the spirit of demoi-cracy may have lost out on issues where Britain did not get its way, such as in questioning the way the principle of primacy or supremacy of EU law has finally been included. Nobody can deny the binding character of formal international obligations including and especially EU law. But the draft constitution conveys the wrong impression by not stating clearly that primacy does not allow the European Court of Justice to interfere with the constitutional arrangements of the member states, nor does it render a particular national measure 'null and void', but simply its application in a particular case. And the text does not make it clear that even with such primacy, EU law is usually meant to empower member states or individual citizens, not to take away their capacity to act. Nor does it make it clear that when the EU acts in areas shared competences (Article 11.2) member states do not suddenly lose their power to act beyond the need to respect a particular narrow obligations. But who except experts in EU law would have guessed?! In many cases, the constitution simply lacks the language of demoi-cracy. In the words of Richard Bellamy, the text is sometimes neither good nor bad, they are simply 'ugly' (Bellamy 2003).

In sum, on many of the issues that have to do with the relationship between the Union and the states, the convention gets a pretty good mark – albeit with important lacunae and somewhat worrying centralisation tendencies. Not so, however, when it comes to the horizontal balance among member states. There, the convention, and above all its president, seem to have forgotten that the Union was founded on a rejection of the kind of hegemonic power politics that plagued Europe for much of the previous four centuries. While the commission may need to be streamlined, denying presence (rather than ‘representation’) to the smaller states amounts in their eyes to denying their main access to the EU upper echelons of leadership. Why did the convention refuse to go along the commission’s proposal for an inclusive team approach – an approach that can incorporate principles of rotation without the need to create ‘non voting’ commissioners?

A similar logic is at play with the creation of a post of permanent chair of the European Council. The French and British government has expended a lot of political capital over the perennial institutional question: Who should govern the EU? And paradoxically, they have done so by promoting an innovation that does not seem to chime with the spirit of *demoi-cracy*, namely the creation of a post of permanent president of the European Council. Combined with an indirectly elected president of the commission, the EU system will conspicuously move closer to a national model combining a head of state and a prime minister. (For a comparison of various such narratives of projection see Nicolaidis & Weatherill 2003) The small and medium size countries have opposed this scenario but to no avail. Yet rotation in the leadership of the Union should be defended, not only in the name of equality between member states but as a key institutional symbol of the ideal of *demoi-cracy*. The rotating presidency today conveys to European citizens a sense that EU policy is not ‘made in Brussels’ but is a shared and decentralised enterprise conducted everywhere in Europe from Helsinki to Lisbon. What better symbol of our *demoi-cracy* than the family of European cities? The convention has failed to find a way of combining the need for permanence and sharing of leadership in the Union (Magnette & Nicolaidis 2003)

The current version of the preamble provides the riddle at the heart of all these debates when it quotes Thucydides: ‘Our Constitution is called a democracy because power is in the hands not of a minority but of the greatest number.’ But how and on which scale should this greatest number be counted in a Union which is closer to the federation of city-

states of Thucydides' times than to the ancient Athens he was referring to? Many convention members, starting with its president, reason that the Union should slowly move towards a 'population principle', be it through more proportional representation or more proportional voting. They should not push this reasoning too far: An EU-wide majority in the European parliament does not easily compete with a plurality of majorities at the national level. The so-called opposition between big and small member states which underpins the debate over the population rule is also one between two versions of democracy: European-level democracy and national-level democracy. It is only in the continued balance between both, in the decades to come, that our European demoi-crazy can flourish.

### Beyond Philadelphia

Some have likened this constitutional moment to Philadelphia, 1787. Others reply that such a comparison is overly ambitious. Yet, the mission of *this* Constitutional Convention may have been the more demanding. Jefferson and Madison did not have to cope with the Internet, nor did their dialogue include their women, the penniless or the natives. Most importantly, the 13 American states were skeletons of states not full-blown patented welfare states as in today's Europe, with their long histories, strong national identities, different languages and obsession with national sovereignty. No longer it fell short of the unachievable standards we now hold it up to.

Indeed, the kind of constitution the EU needs has never been seen before. It is a constitution which should negate the very assumption that usually underpins constitutions, namely the pre-existence of a single constituted demos or even a demos to be constituted by the constitutional moment itself. It is a constitution which should set the foundations for a genuine European demoi-crazy and help us move beyond the traditional dichotomies – variants of *more* or *less* EU – towards a *different* EU, accepted by the greatest number, the mainstream of European citizenry. An intriguing idea aired at the convention and unfortunately forgotten was for each EU country to come up with its own line in the Preamble: 'We the people of Britain...', 'We the people of France...'. Such a dialogue of *demos* to be recited by school children around Europe would have constituted a fitting start.

Obsessed as we are by the mirage of singleness and unity, we tend to overlook the radical nature of the mutual opening and mutual recognition

of identities and citizenship which has, at least partially, characterised the Union for the last decades. In an enlarged EU, in an EU whose ambitions could be that of a global mediator, this spirit of European democracy is more necessary than ever ( Balibar 2003).

Let us be inspired by Frank Thompson's enthusiastic acclaim of the prospect of a union of western Europe just before his death in the resistance in 1944: 'How wonderful it would be to call Europe one's fatherland and think of Krakow, Munich, Rome, Arles, Madrid *as one's own cities* ... Differences between European peoples, though great, are not fundamental. What differences there are serve only to make the peoples mutually attractive'. A half-century of peace later, let us celebrate with him the pleasure that can be drawn from the multiplicity of Europe, its nations, folklores, languages, politics and cities, and from the mutual attraction between its utterly separate peoples.

Whether or not this new Constitutional Treaty ultimately succeeds in giving it a proper manifesto, it is still ours to shape and to dream, our European democracy.

#### NOTES

1. The public rather than academic debate that is.
2. Note that a group of Convention members expressed their collective dissent in the last weeks of proceedings under the banner 'For a Union of Democracies'.
3. See Habermas (1998, 2001); Rochlitz (2002); Weiler (1999); Ferry (1992, 2000); Bellamy & Castiglione (2000); Bellamy (1999); Nicolaidis & Lacoix (2003).
4. It is only unfortunate that the draft constitution we have before us is so timid in providing a vision for its post-imperial role in the world (we have to wait until article 56 to say something about Europe's neighbourhood!).
5. I owe this formulation to Robert Howse.
6. It is worth noting that such a mode of transnational governance is based on a constantly readjusted balance between mutual trust and mutual distrust, reciprocal delegation of powers and reciprocal spying. Since trust is based on mutual knowledge, and distrust increases the incentive to provide it, this dialectic can be self-sustaining.

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