

Can the European Union Draft Constitution be Considered a Constitution by the People and for the People?

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A. Introduction

European States have spent centuries fighting each other. Religious, ethnic, and linguistic differences prevented any attempt to bring the European states together when efforts were made in the middle of the nineteenth century.¹ Following the catastrophe of the First World War, there was growing support for the idea of a unified Europe. In 1929, Aristide Briand, the French Prime Minister, made a speech to the League of Nations proposing a federation of European nations based on economic, social and political solidarity. This proposal gained considerable support until the Great Depression and World War II started, at which time all momentum for this proposal was lost. However, as a result of the atrocities and the great destruction experienced during World War II, European leaders were looking for new ways of ending wars in Europe once and for all. Pursuant to a proposal made by Jean Monnet and Robert Schuman, in 1951, six European countries formed the European Coal and Steel Community (ECSC) and transferred national powers over the critical coal and steel industries to a European High Authority composed of bureaucrats rather than politicians. Only a few years later, a similar model for the transfer of bits and pieces of national sovereignty related to the European economies was implemented via the 1957 *Treaty Establishing the European Economic Community (EEC)*.² The purpose of the ECC was to remove trade barriers between the six countries and to form a common market for trade in goods and services and the free movement of workers, service providers, corporations, and capital. In this way, the Member States sought economic efficiencies and a widening of the co-operation initiated in the framework of the ECSC. Collaboration of the Member States under the EEC-Treaty was implemented via four key institutions, the European Council, the European Parliament, the European Commission, and the Court of Justice. In spite of significant progress in the EEC, the Member States were

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¹ M. Ortega, *A Constitution for an Enlarged Europe*, 32 Georgia Journal of International and Comparative Law 393-241, at 405 (2004).

² Signed in Rome on 25 March 1957.

ambiguous about the transfer of additional competencies to the supra-national institutions. At the same time, they did want to expand their collaboration to cover issues such as immigration, justice and home affairs, as well as foreign and defense policy.³ To accomplish this goal, the Member States signed the *Treaty on European Union* (the Maastricht Treaty) in 1992, which established the European Union (EU) and added intergovernmental pillars to the existing supra-national EEC.⁴ In parallel, the member base of the EU rapidly evolved from six to fifteen Member States by 2001 and was bound to grow even more after the collapse of the iron curtain. To bring about some important reforms and to prepare the Union for consecutive enlargements, the European Council adopted the *Treaty of Amsterdam* in 1997⁵ and the *Treaty of Nice* in 2001.⁶ Both of these treaties brought about numerous amendments to the *Treaty on European Union* and the *Treaty of Rome*. As a result, the constitutional order of the Union was now composed of no less than eight treaties, and dozens of protocols, creating three Communities, one European Union, and three different pillars with different decision-making structures. Even without thousands of regulations, directives, decisions, judgments, and other legal acts adopted by the institutions, the entire structure had become complicated, intransparent, and cumbersome. Therefore, a European Convention set out to consolidate all the existing European Treaties into one single text. In August 2003, a draft Treaty Establishing a Constitution for Europe was published.⁷ The purpose of drawing up a Constitution was not only to clarify the European legal framework but to allow for better economic and trade relations between ever more Member States. Of equal importance was the goal to promote European identification and better associate Europeans citizens with the process of European integration. In June 2004, after agreement on a final text by an intergovernmental conference of Member State representatives, the Constitution was signed and submitted to the Member States for ratification according to their domestic constitutional requirements.⁸ Initial reception in the Member States was not exactly warm, but one parliament after the other duly ratified the text. Unfortunately, as is well known, the French and then the Dutch rejected the Constitution for Europe in national referenda in 2005.⁹ Since the Constitution cannot take effect unless it is ratified by all twenty five Member States, its future is very much uncertain at this point in time. This paper will examine whether the lack of democratic legitimacy was one of the reasons behind the rejection of the Draft Constitution for Europe (EU Constitution) by the Dutch and French.

³ G. Burca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61(2) *Washington and Lee Review* 555-584, at 556 (2004).

⁴ This Treaty was signed on 7 February 1992 in Maastricht and entered into force on 1 November 1993.

⁵ This Treaty was signed on 2 October 1997 in Amsterdam and entered into force on 1 May 1998.

⁶ This Treaty was signed on 26 February 2001 in Nice and entered into force on 1 February 2003.

⁷ Draft establishing a Constitution for Europe, OJ 2003 C169/1 (18 August 2003).

⁸ Treaty Establishing a Constitution for Europe, OJ 2004 C 310/1 (16 December 2004).

⁹ The French rejected the Constitution on 29 May 2005 and the Dutch rejected it on 1 June 2005.

I. Characteristics of a Legitimate Constitution

For a constitution to be ‘democratically legitimate,’ there must be a specially close connection between the idea of a constitution and legitimacy of the procedure through which it is elaborated, and the democratic inclusion of norms of the population within the fundamental laws.¹⁰ Modern day constitutions require that two conditions be met before a constitution can be considered ‘democratically legitimate.’ These conditions, characterized as the ‘output’ and ‘input’ legitimacy tests, must be satisfied. The ‘output’ legitimacy test requires that members of the polity identify with the constitution, and the ‘input’ legitimacy test requires that members of the polity be involved in the formation of the Constitution. This paper will first consider what is required to meet these two tests. This will be followed by an analysis which focuses on whether the EU Constitution satisfies these tests. Finally, the paper provides some recommendations on how the EU can repair its legitimacy deficit.

II. Conditions Associated with a Democratically Legitimate Constitution

In the 1790s, a constitution, such as the US Constitution, derived its legitimacy from a social contract. This contract was based on the idea that ‘the people’ agreed to be bound by higher law.¹¹ In modern times, a similar concept is used, although two conditions must be satisfied before a constitution is considered to be legitimate. The first test focuses on ‘output legitimacy.’ This test considers the extent to which citizens see their interests and desires mirrored in the outcomes of political processes.¹² More simply put, this test determines whether citizens identify with the constitution. The second test focuses on ‘input legitimacy’, which addresses the question of direct legitimization of political power through the democratic participation of the citizens or their elected representatives in transparent-making and constitution making procedures.¹³ To determine whether the EU Constitution satisfies the ‘output’ and ‘input’ legitimacy tests, each test will be considered separately.

1. Output Legitimacy

Although the object of a constitution is to set out a special set of legal norms intended to create and regulate the creation and exercise of political power, its

¹⁰ J. Fossum and A. Menendez, *Democratic Constitution-Making Reflections on the European Experiment*, Arena Working Paper Series 1-36, at 7 (2005).

¹¹ M. Brewer, *The European Union and Legitimacy Time for a European Constitution*, 34(3) *Cornell International Law Journal*, 578-584, at 579 (2004).

¹² J. Lenaerts and A. Desomer, *New Models of Constitution Making in Europe: The Quest for Legitimacy*, 39(6) *Common Market Law Review* 1217-1253, at 1224 (2002).

¹³ *Id.*, at 1225.

extralegal effect is to integrate members of a polity.¹⁴ A constitution can only have an integrative effect if the following elements are satisfied: society's fundamental values and aspirations are embedded in the constitution; society perceives that the constitution reflects those values; and society identifies with those values. Since integration is a social process, a constitution cannot control this process, it can only promote it.¹⁵ Therefore, a legal constitution's legal effectiveness is no guarantee of its integrative power.¹⁶ The U.S Constitution serves as a good illustration of one of the earliest constitutions which has had an integrative effect.

In 1776, after a successful revolution against Great Britain, the US declared its independence and in 1787 the US Constitution came into force. This constitution symbolized the founding of a new polity and the unification of all Americans irrespective of their origins. This unity is embodied in the preamble of the Constitution which begins with the words, "We the People of the United States, in Order to form a more perfect Union..." To date, the US Constitution still remains in the minds of people as a document which symbolises the values of the American people. A more modern example of a constitution which has promoted the integration of its citizens is the South African Constitution.

In the early 1990s, the South Africans started to draft a constitution for a new South Africa. A new constitution was needed to replace the existing one because of the country's history, which had long been characterized by sharp divisions between the different races. The purpose of the new constitution was to unite the 'people' of South Africa and to try to remove the tension which had existed for decades between the difference races. The elites who were drafting this constitution realized early on that wide popular consultation and participation was necessary in order to understand what South Africans wanted their new constitution to stand for.¹⁷ To ensure widespread participation, the drafters engaged in effective dialogue with up to 40 million South Africans via online technology and the radio; hundreds of workshops were held throughout the country.¹⁸ The independent media were actively involved in keeping the debate on constitutional issues in the public eye. After this consultation process, provisions such as clause 27 of Chapter 2 concerning the Bill of Rights were inserted into the constitution. This section states that "everyone has the right to have access to health care services...sufficient food and water, and social security."¹⁹ The reason why such provisions were inserted into the constitution was because they mirrored the desires of the majority of South Africans.²⁰ More significant-

¹⁴ D. Grimm, *Integration by Constitution*, 3(2) International Journal of Constitutional Law 193-208, at 193 (2005).

¹⁵ *Id.*, at 195.

¹⁶ *Id.*, at 199.

¹⁷ S. Chambers, *Democracy, Popular Sovereignty, and Constitutional Legitimacy* 11(2) Constellations 153-173, at 162 (2004).

¹⁸ *Id.*, at 164.

¹⁹ Constitution of the Republic of South Africa, Chapter 2, available at <http://www.polity.org.za/html/govdocs/constitution/saconst02.html?rebookmark=1#27> (22 March 2005).

²⁰ C. Murray, *A Constitutional Beginning: Making South African's Final Constitution*, 23(3)

ly, the drafters recognized that the lives of many South Africans had been dramatically affected during the period of apartheid and wanted the constitution to signify a new start for all South Africans, regardless of their skin colour. To signify this new beginning for the South African people, a preamble was inserted into the constitution. It states:

We..., through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

From the wording of the preambles of the South African and US constitutions, it is clear that the drafters of these constitutions intentionally inserted text which they believed their citizens could identify with. In addition, they hoped that what would follow would be more integration among the people of both these countries. Engineers of the EU Constitution hope to achieve the same result among EU Citizens despite having the challenge of having to convince 450 million people of 25 different nationalities (most of whom already have a national constitution) to identify with the EU Constitution.

The architects of the EU Constitution came up with three mechanisms which they thought would promote the integrative effect among EU Citizens. The first mechanism appeals to people's individual rights, group rights or shared values²¹ and is aimed at protecting people's personal autonomy.²² Title II of the EU Constitution contains a catalog of individual rights; additional rights are included in Title I. For example, Article I-10(2) states "Citizens of the Union shall have the right to move and reside freely within the territory of the Member States....shall have the right to vote and stand as candidates in the European Parliament election."²³ Appealing to such rights is known as 'constitutional patriotism.'²⁴ One of the problem's with this approach is that individual rights will be protected in a society that is fuelled by individual choices, but not in one which is anti-individualist.²⁵ The limitation of this mechanism is evident in the EU Constitution. For example, there is no guarantee that citizens of Italy or

University of Arkansas at Little Rock Law Review 809-838, at 818 (2001).

²¹ R. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25(2) Australian Journal of Legal Philosophy 185-204, at 189 (2000).

²² *Id.*, at 190

²³ Title II of EU Constitution http://www.unizar.es/euroconstitucion/library/constitution_29.10.04/part_I_EN.pdf.

²⁴ E. Fossum, *The European Charter – Between Deep Diversity and Constitutional Patriotism*, Cidel Publications 1-33, at 3 (2005).

²⁵ *Supra* note 21, at 191.

Greece value individual rights as much as citizens of the United Kingdom because the cultures of these countries value individual rights to different degrees.

The second mechanism requires a constitution to identify with its citizens through a set of shared values. The drafters of the US Constitution used this mechanism. The EU Constitution also attempts to use this mechanism through Article I-2 which states, "The Union is founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of people belonging to minorities."²⁶ A significant problem with this mechanism is that these shared values are universal values and not specific to Europeans.²⁷ This problem is summed up by Eric Fossum:

The challenge facing the EU is reconciling three sets of concerns: the first is a commitment to a set of universal values, the second is a question for a particular identity, and the third is the protection and promotion of *national* differences and distinctness.²⁸

The third mechanism is the full devolution of sovereignty, which emphasizes that respect for the sovereignty of its Member States must remain. For example, Article 3(5) states, "The Union shall respect the equality of Member States as well as their national identities...[and] and their respective State functions."²⁹ This mechanism embraces tolerance for a range of identities and political communities, but also emphasizes the need for a union among these distinct identities. There is no doubt that such a mechanism is unique and novel as it allows Europeans to have a European *and* national identity. However, the challenge is making Europeans realize that they can have two identities and simultaneously aspire to become one community. As Weiler points out, "it is more difficult to attain an ever closer union if the components of that union preserve their distinct identities, retain their otherness *vis-à-vis* each other, and do not become one flesh, politically speaking."³⁰

Despite the existence of these mechanisms in the text of the Constitution, one of the problems with the EU Constitution is finding this text in the Constitution. In comparison to the US Constitution which has 27 Articles, and the South African Constitution which has 243 Articles, the EU Constitution has 465 Articles, five protocols and three declarations. The length of the constitution and its often complicated wording makes it difficult for EU citizens to grasp the values embedded in this new constitution. Furthermore, unlike the preambles to the US or the South African Constitutions which state "we the people" to signify the unification of polity, the preamble of the EU Constitution states, "His majesty the King of Belgians...." followed by a list of heads of state. This preamble is the same preamble that was used to establish the European Coal

²⁶ Title 1 of EU Constitution available online at http://www.unizar.es/euroconstitucion/library/constitution_29.10.04/part_I_EN.pdf (8 June 2005).

²⁷ *Supra* note 24, at 3.

²⁸ *Supra* note 24, at 33.

²⁹ *See supra* note 26.

³⁰ J. Weiler, *On the power of the Word: Europe's Constitutional Iconography*, 3 International Journal of Constitutional Law 173-190, at 188 (2005).

and Coal Community in 1951 and has been the preamble for all treaties since then.³¹ Hence, it would not be unreasonable to believe that at first glance a reader would reach the conclusion that this document is actually a Treaty but clothed with the title “Constitution” and decorated with constitutional terminology. Despite such flaws in the EU Constitution, its failure to have an integrative effect may not be linked to any specific provision of the treaty, nor to its material content, but instead may have something to do with the fact that the EU has never had a constitutional moment unlike the United States or South Africa.

2. Input Legitimacy

Most constitutions which have managed to have an integrative effect have had a “constitutional moment.”³² A constitutional moment represents a moment in history when there has been a general desire to change a pre-existing social order. For example, when the United States successfully revolted against Great Britain, a constitution reflecting the founding of a new polity based on liberty, self government, and the unification of all Americans was created. To date, very few amendments have been made to this constitution. South Africa also had its constitutional moment in 1996 when its constitution came into effect. As Nelson Mandela stated, “[the constitution] represented the rebirth of South Africa [...] cleansed of a horrible past.”³³

Unlike the US and South Africa, the EU never had a constitutional moment. The reason for this is because the EU has been expanding slowly since 1992, but none of the stages involving the integration of new member states or the adoption of minor reform treaties can be labeled as a “constitutional moment.” Even though the 1992 *Maastricht Treaty* did bring about more public awareness among the Europeans, it seems this had more of a detrimental effect on the Constitution as the number of EU Citizens who see the Union as “a good thing” has been steadily declining.³⁴ Hence, the document drawn up in 2003 cannot be characterized as a striking symbol of the historical realization of European unity as it was not a new beginning or a radical historical break or the foundation of a new European project.³⁵ It seems unfortunate that this is the case considering the fact that only sixty years ago some of the same states who waged war against one another are now united as part of the European Union. However, the failure of the EU Constitution to gain momentum may be indicative of the fact that the ‘input’ legitimacy test has not been satisfied.

‘Input’ legitimacy, also known as democratic legitimacy, refers to the manner in which citizens are involved in public deliberation, law making and collective-decision making, such that the constitution can be said to have been

³¹ *Id.*, at 175.

³² B. Ackerman, *The Rise of World Constitutionalism*, 83 *Virginia Law Review* 771-798, at 775 (1997).

³³ Address by President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the New Constitution (8 May 1996).

³⁴ *Supra* note 14, at 205.

³⁵ *Supra* note 14, at 205.

constructed by all the members of the political community and be subject afterwards to the plebiscitarian endorsement *We the People*.³⁶ The reason the 'input' legitimacy test must be satisfied is because it is indicative of society exercising its right to self determination and thereby demonstrating that it is sovereign and the sole source of authority.³⁷ Turning to the EU Constitution, the basic legal order of the European Union has never originated in a decision made by its citizens.³⁸ Instead, the process of constitution making has involved a combination of inter-governmental negotiations of Treaties and the use of judicial rulings for the purposes of interpreting the Treaties.³⁹ The lack of involvement in the constitution making process by Europeans was exhibited at the IGC conference in June 2004, where only Heads of State and Governments of the EU were given the opportunity to amend the text of the Constitution before it was sent to each Member State for ratification. Professor Grimm has argued that the method used by the constitutional engineers to attain input legitimacy is void because the EU constitution does not attain its legitimacy from the 'European people,' but rather from the Member States.⁴⁰ For example, the EU constitution provides its citizens several rights, but deliberations about what rights EU Citizens should be entitled to have taken place through a series of intergovernmental treaties behind closed doors and no transcription of its deliberations has been published.⁴¹ One of the disadvantages of such a process is the risk that the real will of the people is not included in the eventual decisions of the Heads of State. This implies executive dominance at both the national level and the Union level.⁴² Moreover, if a citizen would like to challenge any section of the constitution through judicial process, there is no opportunity to do this because individuals are denied the right to stand before the European Court of Justice.⁴³ The European Parliament could be considered to be voicing the will of Europe's citizens since the members of Parliament are directly elected by the European peoples.⁴⁴ However, this is another access point which is blocked for citizens to express their will, as the European Parliament has no power to enact new laws on citizenship rights, social security matters or other matters which directly affect Europeans.⁴⁵ Therefore, the only stage at which EU citizens are provided with an opportunity to get involved is the final stage; when the Constitution is sent to Member States for ratification. However, even at this final stage there is no guarantee that every European citizen will be given an opportunity to get

³⁶ E. Eriksen, J. Fossum, M. Kumm & A. Menendez, *The European Constitution: The Rubicon Crossed?* Arena Report 1-244, at 68 (2005).

³⁷ *Supra* note 14, at 207.

³⁸ A. Menendez, *Neither Constitution, Nor Treaty: a Deliberative-Democratic Analysis of the Constitutional Treaty of the European Union*, Arena Working Paper 1-55, at 3 (2005).

³⁹ *Supra* note 10, at 8.

⁴⁰ D. Grimm, *Does Europe Need a Constitution?* 1 *European Law Journal* 282-302, at 290 (1995).

⁴¹ *Supra* note 36, at 75.

⁴² *Supra* note 38, at 24 (2005).

⁴³ *Supra* note 24, at 6.

⁴⁴ Article I-20 of EU Constitution

⁴⁵ *Supra* note 24, at 32.

involved since Member States are given the choice either to ratify the constitution by a vote of their national parliament or to opt for a referendum.⁴⁶ For those countries that have chosen to ratify the EU constitution via their parliament, the argument by EU constitutional engineers is that ‘the people’ have voiced their opinion on the constitution through the national parliament which they have elected and that ‘the people’ trust their national parliament to bind ‘the people’ to the constitution only if they legitimately believe that ‘the people’ want to be bound.⁴⁷ The problem with this argument is that each and every national parliament, when making its decision to ratify the EU Constitution, may not only take the will of the people into consideration, but political strategies and preferences as well. Due to the absence of a uniform scheme to ensure that Europeans participate in the drafting and adoption process of the Constitution, it is difficult, if not impossible, for the Constitution to be given approval by ‘the people’ which poses a threat to its legitimacy.⁴⁸

Although the legal validity of the document remains undiminished, it lacks the symbolic effect which is necessary to classify it as a ‘legitimate’ constitution. Hence, it would be fictitious to believe that at this stage the EU Constitution could begin with the words “We the People...” To elevate the Constitution to the level where it can begin with those words, the architects of this Constitution will have to find alternative methods which would give Europeans the sense of emotional attachment to the document so that it can have an integrative effect among EU citizens.

B. Suggested Reform to the EU Constitution

People expect a constitution to unify their society as a polity, thereby transcending the differences of opinion and conflict of opinion that exist in society.⁴⁹ This integrative effect expected of a constitution can be promoted by a constitution but not controlled by it, because integration is a social process. The European Union, in comparison to nation-states, is particularly disadvantaged because it is dealing with already existing national communities with a historical lineage of self-identification as political communities.⁵⁰ Although the engineers of the EU Constitution have the additional challenge of having to draft a constitution which attempts to integrate close to 450 million people of 25 different nationalities, they must first decide whether to focus on a value based constitution which harbours the idea of a common European identity, or on a rights based constitution which focuses on common civil or political rights so

⁴⁶ *Supra* note 12, at 1226.

⁴⁷ *Supra* note 12, at 1226

⁴⁸ C. Skach, *We, the Peoples? Constitutional zing the European Union?* 43(1) JCSM 149-170, at 159 (2005).

⁴⁹ *Supra* note 14, at 194 (2005).

⁵⁰ N. Walker, *Europe’s Constitutional Momentum and the Search for Polity Legitimacy*, 3 International Journal of Constitutional Law 211-238, at 217 (2005).

that EU citizens can consider themselves co-authors of the law. If the engineers decide to focus on a value based constitution, inserting text which focuses on the spiritual and moral heritage of Europe or European traditions could lay the foundation for the development of a deeper sense of community or unity among Europeans. The advantage of having a constitution which focuses on values is it creates a greater likelihood for the sense of ‘we-ness’ to come about as a result of Europeans knowing that they have a common destiny. In addition, creating such a sense among Europeans increases the likelihood that they will become common patriots in the future who are willing to look out for one another’s well being.⁵¹ If this increased cooperation among Europeans occurs, it also makes it easier for Heads of Member States to cooperate with one another on issues concerning the wellbeing of the European people because they have reason to believe that their citizens will support their decisions. Knowing that Europeans desire similar things or have common goals also makes it easier for the EU to address these issues. Furthermore, such a system increases the likelihood of the ‘input’ legitimacy test being satisfied. The drawback of having a value based constitution is that it diminishes the notion of democracy which prides itself on individuals being able to make individual choices rather than collective choices. Hence, minority groups are disadvantaged by having such a system.⁵² On the other hand if a rights based constitution is implemented, then different considerations will apply.

A rights-based decision making strategy is focused on EU Citizens considering themselves not only subjects of the law, but also authors of the law. For such a system to work, it requires that there be public deliberation in an arena which values the notions of freedom, participation, equality and inclusion so that the eventual outcome is a common set of basic individual rights for all Europeans. The advantage of such a system is that it creates room for Europeans to be patriotic about their constitution because they can consider themselves constitutional co-actors and co-authors. In comparison to the value based constitution, the advantage of this type of constitution is that it upholds the notion of democracy by considering the opinions of all citizens, including minority groups. Furthermore, due to the fact that this type of system requires public deliberation, it also increases the chances of the constitution satisfying the ‘output’ legitimacy test. The disadvantage of this type of constitution is that at this point in time all Member States have a different political structure and the sheer diversity of each state’s population makes it difficult for 450 million Europeans to come to a common consensus on the rights they would like to see entrenched in the Constitution.

Irrespective of which option the drafters of the constitution choose, similar to the US or South African Constitution, the emphasis should be on having a short and concise set of Articles in the constitution. The first amendment that should be made is the preamble to the EU Constitution should begin with the

⁵¹ E. Eriksen & J. Fossum, *Europe in Search of Legitimacy: Strategies of Legitimation Assessed*, 25(4) International Political Science Review 435-459, at 442 (2004).

⁵² *Id.*, at 444.

words “We the People of Europe...” rather than *His Majesty the King of the Belgians....*

In addition to a change in the focus of the constitution, there also appears to be the need for a constitutional moment to jump start this integration process. Although the formation of the European Union in 1992 seemed like the perfect opportunity to label it as a ‘constitutional moment,’ this opportunity was not seized. Hence, the starting point for the constitutional engineers is to look for another constitutional moment which can act as a catalyst to help EU citizens forge a sense of political identity. Such a moment is obviously dependent on the emergence of conditions which will allow these dual citizens to be persuaded that the EU Constitution is worth pursuing.⁵³ To gain constitutional momentum, the engineers of this constitution should emphasize to EU citizens that the new branch of constitutional tradition which they have set out to achieve has never been attempted by any other continent before. Placing emphasis on this new historical moment could provide a symbolic reference point and also mobilize the European polity.⁵⁴ While the constitutional engineers are searching for the constitutional moment, they should also work on trimming down the Constitution so that it has the features of ‘a constitution.’ To establish these features, the length of the current constitution should be trimmed down and it should be re-phrased so that it sounds less like the text of a treaty. After the engineers have amended the text and gained some constitutional momentum, significant effort should be made to make EU citizens aware of the text of the EU Constitution. This is crucial in light of a report published by the European Commission in 2005 on the results of an opinion poll taken in November 2004. According to the poll, only 11% of Union citizens felt they understood the content of the Constitution, 56% said they knew little on the subject and 33% declared they had never heard of it.⁵⁵ Besides giving evidence for a widespread deficiency in knowledge among EU citizens on the Constitution, the report also states, “there is a clear correlation between the level of knowledge and support for the text.”⁵⁶ This is a significant finding which the engineers of the Constitution should capitalize on. One way of making EU citizens more aware is to make it mandatory for each Member State to hold information campaigns. This would provide an opportunity for EU citizens to gather information on the content of the constitution. While these information campaigns are taking place, synchronized televised public debates should also be held between top ranking government officials or constitutional lawyers who are for and against the Constitution in each Member State. Such debates would provide the public with an opportunity to gain a deeper appreciation on the effects of the proposed Constitution and consequently could allow each voter to make a more informed choice. Furthermore, if the quality of these debates is of a high standard then this could in itself

⁵³ *Supra* note 50, at 222.

⁵⁴ *Supra* note 50, at 235.

⁵⁵ *The Future Constitutional Treaty First Results*, European Commission 1-30, at 26, available at http://europa.eu.int/comm/public_opinion/archives/ebs/ebs214_en_first.pdf (19 February 2006).

⁵⁶ *Id.*, at 26.

add to the legitimacy of the Constitution. After providing Europeans the opportunity to express their opinions on the Constitution, a Europe-wide referendum should take place with a provision allowing the Constitution to be implemented if 75% of the total votes are for the proposed constitution. The reason for such a procedure is, as Menendez and Fossum correctly point out, that a deliberately designed constitution making process will help to contract a range of views and foster common understandings with the hope that the parties will be brought closer together.⁵⁷

Menendez states “[t]here is no explicit democratic basis of the material constitution of the European Union, which has been basically constructed and affirmed by the courts.” Although this statement appears to be pessimistic and slightly discouraging, the engineers of the Constitution should bear in mind that they have set out to achieve a historical mission which no other continent has attempted to do. These engineers should be motivated by the fact that the opinion poll taken in November 2004 indicates that almost one European in two said that they are in favour of the Draft Constitution with only 16% opposing it.⁵⁸ To ensure that this feeling among the Europeans continues to gain momentum, engineers of the Constitution should concentrate their efforts on trying to increase awareness among Europeans. However, the engineers of the Constitution should bear in mind that this may require much more time and patience than they perhaps anticipated initially. If the engineers are able to engage in effective dialogue with the public, then by the time a referendum is held, EU citizens can consider themselves as authors of the Constitution and not only as objects of the laws. The engineers of this constitution should not be disheartened by the recent rejection of the Constitution by the Dutch and French. Instead, they should bear in mind that democratic constitution making is a process which requires several steps to be taken before a collective constitutional will is ascertained. This process also involves several steps of filtration in order to draw the conclusion that the constitution is a democratically legitimate constitution which satisfies both the ‘output’ and ‘input’ legitimacy tests.

C. References

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⁵⁷ *Supra* note 10, at 15.

⁵⁸ *Supra* note 55, at 26.

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