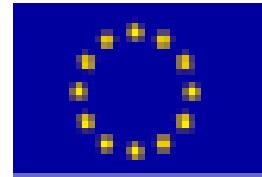**AUSTRIAN ACADEMY OF SCIENCES**

ICE – RESEARCH UNIT FOR INSTITUTIONAL CHANGE

AND EUROPEAN INTEGRATION

From the Convention to the IGC:
Mapping Cross-National Views
towards an EU-30

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*The Peoples of Europe and
the European Constitutional Treaty:
On Legitimacy and Participation*

STRATEGY PAPER
BY

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The Peoples of Europe and the European Constitutional Treaty:
On Legitimacy and Participation

People's dignity requires that they be free and able to participate in the formation and
stewardship of the rules and institutions that govern them.
World Development Report 2002 United Nations

1. Introduction

European integration has led to dramatic shifts of political power. National competences have
been transferred to the European level and the distribution of power within the member states
underwent changes due to the role national executives play at the supranational level. This
affected the traditional modes of representation by significantly changing the role of and the
balance between national parliaments, governments, and the judiciary. It also made
accountability of politicians difficult. The complexity of European politics, the fusion of the
national and supranational level has resulted in an increasing dominance of the executive,
thereby disregarding the democratic quality of the European Union (EU). Democracy is a
form of rule that entails certain monarchic elements which are necessary at some point to take
a decision. But these elements have been strengthened disproportionately by the European
integration process: Whereas on the national level sophisticated formal systems of checks and
balances have been developed they remain remarkably weak on the European level.

The loss of competences directly elected representatives suffered from due to European
integration has been aggravated by the very loose relationship between the European polity
and its citizens. The complex multi-level-system of the EU makes it difficult for European
citizens to scrutinize, let alone decisively influence, European policy making. On the other
hand, European citizens do not seem very interested in the existing possibilities of
participation as turnouts for European elections clearly show. Scholarly opinions differ on the
question whether the lack of a European identity causes the political disinterest of European
citizens or if, on the contrary, a European identity can only emerge if people have the chance
of political participation. However, the mutual dependence of political participation and
political identity remains largely undisputed.

While the EU's democratic deficit has been the subject of quite broad a range of scholarly
work in political science (Føllesdal and Koslowski 1998; Beetham and Lord 1998), another
influential point of view on European integration has maintained that the EU is rather
legitimized by its efficient policy making, i.e. by output, than by input into the decision-
making processes. However, the latest Intergovernmental Conference (IGC) in Nice, which
was supposed to streamline the decision-making process and prepare the Union for

enlargement, also brought about serious doubts on the efficiency of EU politics. The very modest success of Nice did not only show that the negotiation of national interests by the governments of the Member States is probably no longer the most fruitful way of enhancing integration, but it also made clear that legitimacy and efficiency of a polity cannot be evaluated independently from each other but are deeply interconnected. In this vein, Nice can also be regarded as the pinnacle of a gradual process characterised by decreasing rates of approval for the European integration project.

Setting up a Convention was meant as a means to deal with both the problem of legitimacy and the problem of efficiency. Its composition can be regarded as a major contribution towards increasing the transparency and representativeness of the EU, allowing at the same time for new political solutions by including a broader range of opinions and interests. Its outcome should be a European Constitutional Treaty that enables a 'shift of loyalty' from the national levels towards the EU since a reasonable system of balance of power will increase the legitimacy of the Union. However, what is equally important with regard to the legitimacy of the EU is the question how this Constitutional Treaty enters into force. So far, the European citizens hardly had any say about the various treaty reforms from the Single European Act to the Treaty of Nice.

The paper at hand deals with the question of how to ensure legitimacy for the result of this constitutional process. Is a European-wide referendum a feasible way? Or are single national referenda better suited to the task? What are the pros and cons?

Starting with a brief overview on scholarly positions regarding legitimacy through direct and representative democratic instruments especially with regard to the EU, we will then describe the Convention's position on the question of constitutional ratification. After that we will analyse the possibility of a single European-wide referendum based on a uniform supranational provision whereas the following chapter will be devoted to national referenda. The conclusion will set out a possible path for the future.

2. Legitimacy and Democracy in the European Union

For decades now, the democratic deficit has developed as the leitmotif for debates about the future of European integration (Lodge 1994). Nowadays, the legitimacy debate is no longer limited to the domain of heated controversies among scholars of European integration, but was also one of the key driving forces behind the decision of the European Council in Laeken to establish a Convention on the Future of Europe.

For some, the logical answer to the lack of democratic legitimacy of the EU was the demand for a stronger European Parliament (EP). Indeed, the EP has emerged as the winner of all Treaty reforms since the Single European Act. At the same time, we are confronted with a constant decrease in the permissive consensus of the citizens. This could either lead to the conclusion that the empowerment of the EP was useless or that the changes made were not sufficient. But equating the democratisation of the Union with the creation of a full-fledged parliament at the supranational level would be rather short-sighted. The fiction of *one* deliberative assembly materialising the will of the 'people' and *one* public which controls, acclaims or rebels, belongs to the early history of democratic theory (Benhabib 1996, p. 74; Peters 1994, p. 56). The plurality of associations such as parties, grass-roots organisations, lobbies, NGOs etc. builds the reality of complex societies. This network of publics also fulfills the task of information and provides a "problem solving capacity (Bohman 1996, 240). Additionally, it allows for reasonable, well-founded and critically assessed insights, solutions and the setting of public objectives that transcend the egoistic, individual horizon of interest (Peters 1994, p. 47).

Furthermore, the demand for a stronger EP seems to be based on a crude differentiation between the legislative and executive branches that gives an all too simple impression of their multi-faceted interaction. In his seminal article, Anthony King (1976) criticised the classical two body image, i.e. the legislative and executive formula, as rather misleading because it neither does justice to the complex relationship between the two, nor does it take into account the development towards the so-called party government and the cartel party (Blondel and Cotta 2000; Katz and Mair 1995). Western European parliaments are today dominated by political parties. Thus we have to conceive the relationship between the executive and the legislative, first, as a *Handlungsverbund* (v. Beyme 1997, p. 54) between the government and its supporting parliamentary groups and, secondly, as a more or less conflict-oriented relationship between this powerful *Handlungsverbund* and the opposition. The EU lacks this important facet of political drama, viz. the public exchange of arguments between government and opposition. Thus, transferring national models of governance to the European level might be of limited use only.

Scholars of European integration (Abromeit 2000; Benz 1998; Schmitter 2000; Weiler 1997) have argued that the EU has developed its own style of democracy making, rendering ineffective old remedies mixed for the national level. This request for leaving the trodden paths of democratic theory by complementing representative democracy with sophisticated means of direct democracy (Erne 1995; Grande 1996) has come under critique which focuses on the inexistence of a European demos and a European public (Grimm 1995; Gouaud 1995; Isensee 1987; Richter 1999). True, the evidence for a transnational identity within the Union is weak and the chance of creating one in the near future seems bleak because of the lack of intermediary structures and agents (transnational parties, media, common language etc.).

However, the missing 'demos' is not a prerequisite for democratic governance in the EU system, but an ideal product of successful integration and institutional design. In this respect, we refer to Habermas' analysis. He argues that "the ethical-political self-understanding of citizens in a democratic community must not be taken as a historical-cultural *a priori* that makes democratic will-formation possible, but rather as the flowing contents of a circulatory process that is generated through the legal institutionalization of citizens' communication. This is precisely how national identities were formed in modern Europe." (Habermas 1995, pp. 306-307). In other terms, the "*demos* is constructed via democratic 'praxis'. [...] Instead of 'no EU democracy without a European *demos*', we have 'no European *demos* without EU democracy'" (Hix 1998, p. 65).

If the development of a European identity is thus a crucial task of European politics and if the expansion of the EP's co-decision-rights does not suffice to reach this aim, the question for instruments of direct democracy arises. The tradition of 'pure' representative democracy has often been maintained as a result of the strong opposition to the introduction of direct democratic techniques on the part of observers and practitioners alike. Two arguments have been traditionally put forward against greater direct popular participation: First, it is claimed that these procedures have often been abused by authoritarian leaders. Referenda are thus turned into plebiscites and are becoming instruments of élite control. Already in 1835, Alexis de Tocqueville warned against the tyranny of the majority. Secondly, referenda may lead to the manipulation of the electorate by interest groups and parties. Especially small parties may succumb to the charms of referenda in trying to influence the policy process beyond their actual political power.

In recent years both claims have been disproved by various empirical studies (e.g. Gallagher and Uleri 1996; Luthardt and Waschkuhn 2001). Experiences from Western Europe, Latin America, Australia and the United States suggest that referenda do not have these effects. Referenda can have integrative effects (Zürn 1998) and contribute to the creation of a common identity (Zürn 1996, p. 49; Grande 1996, p. 354): At the same time they increase the interest in public affairs (Schmitter 2000, p. 37). This might hold true for by and large homogeneous polities. In the case of the Union, however, referenda can also increase existing cleavages (Höreth 1999, p.266) if the EU is conceived as a single constituency.

The real impact of direct citizen participation also depends on the concrete instrument of direct democracy that is used. Thus, it seems necessary to scrutinize these methods more closely.

2. 1 Instruments of Direct Democracy

We can differentiate between three different means of direct democracy:

- popular initiatives: electors may suggest that a matter may be submitted to a popular vote to force the legislature to discuss it
- referenda: electors can only approve or reject a project which has already been approved by the legislature
- recall: allows a certain number of voters to demand a referendum on whether an elected official should be removed from office (see Cronin 1989).

Referenda can be differentiated by their either binding or consultative nature and by their subject. Issues that are internationally frequently decided upon by referenda are constitutional questions (e.g. the electoral system in Italy and New Zealand), territorial questions and moral questions (e.g. divorce, abortion, temperance).

Referenda typically offer sharply contested visions of alternative political futures. The electorate is subjected to a barrage of conflicting claims about costs and benefits of what will happen if they accept or reject the referendum proposal. In such situations of great uncertainty, people rely on readily available information to make up their minds (Lupia and McCubbins 1998; Mutz et al. 1996; Zaller 1992). One source of relevant information concerns the politicians and parties who are the chief proponents or opponents of a referendum proposal. Voters use knowledge about these highly salient political actors as convenient heuristic devices. They resolve their decision-making problem not only by attempting to assess the merits of rival claims, but also by considering who articulates them (see Clark et al. 2000). Thus, a public sphere of deliberation which provides access to everybody and a comprehensive information about the issues of stake is tremendously important. However, this does not necessarily mean that a referendum is not possible where a public sphere does not exist as it is precisely by political discourses, as triggered by referenda, that a political public sphere is developed.

3. The Convention and the Implementation of the European Constitution

Since one of the Convention's aims has been to create a link between the European project and the European citizens – "bringing Europe closer to the people" according to the declaration of Laeken – the question for the role citizens can play in the ratification of the European Constitutional Treaty is a crucial one. But so far the Convention has shied away from the difficult question of how the Constitutional Treaty should be ratified. Due to the fact that the current Constitutional Treaty will hardly trigger a 'constitutional moment' (Grimm 2003) we have to ask whether a referendum can be such a "foundational act". This idea that

can already be found in Altiero Spinelli's draft for a European Constitution in 1964 was acknowledged by Dominique de Villepin. Similary, Valéry Giscard d'Estaing,supported by his Vice-Presidents Giuliano Amato and Jean-Luc Dehaene, argued to hold a referendum at the same time as the European elections in June 2004 . Furthermore, 95 Members of the Convention called for a binding referendum on the European Constitution.[2] Within the EP, the Committee on Constitutional Affairs has already called for a European referendum on 12 October 2000 following the respective national provisions. More recently, the Liberal Party and the Green Party have both declared their support for a European referendum. Andrew Duff, heading a task force of the Liberal Party, emphasized the need for "electoral endorsement" by referendum to complete the process of drafting an European Constitution. A kind of "democratic baptism" (Weale 1995, p. 90 et seq.), "a normative justification" (Beetham/Lord 1998, p.38) or "a direct legitimacy" (Bogdanor 1990, page?) is asked for, or, as Simon Hix puts it: because "the EU does not have a 'government … to throw out' there should be more opportunity for direct democracy" (1999, p. 184). At Member State level the people of Denmark, Ireland, Italy, the Netherlands, Portugal and Spain will probably hold referenda on the Constitution.

Scholars of European integration have suggested different models for a European referendum. Michael Nentwich (1998, p.136) and Joseph Weiler (1997) argued in favour of a simple double majority. Astrid Epiney (1997, p. 310) suggests a double qualified majority, Heidrun Abromeit (2000, p.182) a majority in all participating countries. In the following we deal with two possibilities: a single European referendum based on European law and national referenda based on the respective constitutional provisions.

4. A single European-wide referendum

What are the advantages and disadvantages of a referendum for which the EU Member States would form one single constituency?

Advantages:

- Such a referendum could be an important contribution to a further strengthening of the awareness of being a European citizen and the development of europeanized public spheres. A massive information campaign about the consequences of EU membership and its constitutionalisation would lead to further commitment to and identification with the Union. This would without doubt increase the level of attention of the profound impact of European politics.

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2   Evidence given at http://www.iri-europe.org, controlled 2003-07-01

- A positive referendum would endow the European Constitution with the much called for legitimacy. Based on the assumption that such a referendum would draw huge crowds to the polling booths, it would demonstrate the need for Europe.

Disadvantages:

- Voices have been raised that such a uniform referendum procedure is only appropriately applicable with a homogenous people. However, as we know out of an abundance of scholarly work, neither are national peoples homogenous but their identity has been constructed as part of the nation building process (See e.g. Gellner 1991, Thiesse 2001)
- In a similar vein, it is argued that no European public sphere exists which would allow for the deliberation of the costs and benefits of a referendum decision. As mentioned before, this argument does not correspond with the view represented within this paper.
- A referendum can increase existing tension and cleavages since majority and minority are not bound together by a common identity.
- It must be taken into account that not all EU Member States have experience with direct democracy. Additionally, we find a great disparity between referendum procedures in the Member States: Whereas in Great Britain ad hoc referendum laws can be passed, according to Art. 138 of the Italian constitution a law must be created *ex novo* for each new proposal. In Belgium, provisions for referenda exist only at regional level, while Cyprus, Germany and Malta do have no legal provisions for referenda.
- It is possible that such a referendum will be regarded as a "second-order referendum", i.e. it could be used as another opportunity for citizens to express their opinion about their respective governments, viz. on national issues.
- Participation by the citizens might be rather modest which would only aggravate the 'democratic deficit'.
- In case of a negative outcome, disintegration may be a viable option.

Though a single European referendum with the EU as a single constituency could grant legitimacy to the European Constitution no legal basis for such an undertaking at the European level exist. Introducing such a provision would require the unanimous ratification by all Member States. Apart from the time factor for reaching such a ratification following Art. 48 TEU some Member States, e.g. Germany may encounter severe legal problems in implementing such a provision.

In sum: For the ratification of the present Constitutional Treaty such a referendum does not seem to be a viable option. It runs contrary to the political traditions of some Member States

and would encounter severe legal obstacles. Even if we reject essentialist arguments based on the lack of a European demos or a European public sphere, practical political considerations speak strongly against this solution.

5. National referenda

Art. 48 TEU entrusts the national political systems with the ratification of new treaties. An increasing number of Member States has tabled referenda for this purpose: From 1972 to 2001 29 referenda on European integration took place[3], most recently in Slovenia, Lithuania, Slovakia, Malta, the Czech Republic and Poland. These referenda have decided about a country's individual position towards the EU, for instance whether to join the Union or not. A European-wide referendum taking place in 25 constituencies is qualitatively different since theoretically every country can become the minority in its entirety. Nevertheless, if we imagine a European referendum introducing a double majority – people and states – taking place at the same day as the elections to the EP, what would be the pros and cons?

Advantages:

- No change of Art. 48 TEU is necessary and thus the unanimity principle is safeguarded.
- Most of the Member States have experiences with national referenda.
- The existing disparities of different referendum procedures can easily be overcome by granting the referendum consultative status only. However, in political terms such a referenda series would unfold binding character.
- It might contribute to the emergence of European identity and nurture the growth of a Europeanized public sphere where European issues are discussed in a transnational way.

Disadvantages:

- A single Member State can find itself in the minority position and may have difficulties in accepting it.
- In some Member States no legal provisions for referenda exist.
- The lack of a critical public could easily change the perspective from a European to a national one. It needs to be taken into account that information campaigns on European questions are easily abused for national topics as it is frequently the case for EP elections.

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3   See http://www.iri-europe.org/resources/referendums.asp, controlled 2003-07-01

- Most citizens do not show a resounding interest in European affairs.

The double majority principle overcomes the difficulties the European integration process experienced with the negative Danish and Irish referenda. There would be no possibility for a small population to block the implementation of a new Treaty for the rest of the Member States. A rejection of the Constitution by e.g. the majority of the population of a small Member State would carry no weight. A careful balance, viz. the majority of Member States and the majority of citizens would follow the principle of dual legitimacy in the Union. In the feasibility study of the European Commission "Constitution of the European Union" a rather complicated mechanism for the ratification of this Constitution is foreseen leaving the decision to hold a referendum entirely to the constitutional provisions of the respective Member States. An innovative solution is presented for the case if one or more referenda fail: In case a referendum is negative the state shall leave the EU and re-negotiate its relation to the remaining Member States.

7. Conclusion

The major obstacle for the introduction of a European referendum – based on national constitutional provisions – is the absence of such provisions in Belgium, Luxembourg and Germany where legally binding referenda are not foreseen. Consequently, the lack of experience with referenda would carry the risk of degenerating into mere opinion polls. A supranational provision for the introduction of a single constituency referendum in the EU is highly unlikely.

In a large number of Member States the future Constitutional Treaty will be subjected to referenda following the respective national provisions. The danger of one or more countries blocking the majority of the EU citizens to proceed with further integration is balanced by the newly introduced provision of the right of secession. Therefore, we suggest that after the ratification of two thirds of Member States the Constitutional Treaty automatically enters into force. Thus, a negative referendum in one Member State could not block the implementation of the treaty. The Convention should insert an appropriate provision into the ratification clause.

Although there have been no Europe-wide referenda up to now, we have some experiences with referenda on European issues. Usually, they have not succeeded in significantly raising the awareness for European topics, rather they have been preoccupied with national political topics. This points to the eminent importance of information campaigns before referenda take place. Information campaigns are usually carried by interest groups and parties. In June 2004 elections to EP are scheduled. These elections give the citizens ample opportunity to express

their opinion about the future Constitutional Treaty. Coupling these elections with the fate of this Treaty could increase electoral participation. The European party families are requested to explain their position on the Treaty thus giving the citizens the opportunity to choose between parties being in favour or against a further constitutionalisation of the Union. The information campaigns will have to make clear that the referenda do not deal with European integration in general and the satisfaction of the citizens with its results but with an important and concrete further step in the institutional development of the EU. Important innovations incorporated in the draft constitution correspond to the will of the Europeans as expressed in the Eurobarometer dates. If referenda take place after elaborated and conclusive information campaigns they can, thus, plausibly be expected to lead to the approval of the European citizens.

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