

shocking example of Yugoslavia disintegrating into isolated islands of ethnic hatred and violence. The “Europeanization” of the Central and Eastern European countries was perceived as the best scenario for the region since the post-communist political reconstruction of democratic institutions and economic reforms could be backed by the “grand design” of the European Union.¹⁵ The strong involvement of “patron power” guaranteeing the peaceful nature of post-communist transformations and the enforcement of democratization by internationally recognised standards had been favoured because of its ability to curb the growing threats of political authoritarianism, nationalist factions and other disturbing consequences of the post-1989 political changes.¹⁶

5. THE COPENHAGEN CRITERIA AND BEYOND: THE UNION’S *ETHNOS*-ORIENTED STRATEGIES IN CENTRAL EUROPE

Central European states formally started the process of the EU integration after the Copenhagen summit of 1993 which set up conditions for the accession states. In June 1993 in Copenhagen, the European Council specified the following criteria which individual states had to meet: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criterion); the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union (economic criterion); and the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (criterion concerning adoption of the Community *acquis*). These accession conditions are very general and vague but their meaning could largely be extracted from the existing institutional frameworks and practices in the EU and its member states. However, these frameworks and practices were changing as a result of the transformation of the EU itself during the 1990s.¹⁷ For the accession states, the Union became a fluid goal which was yet to be achieved. While the Union was progressing in its political debates during the 1990s and proposed fundamental constitutional changes, the accession talks were driven by clear reference to the status quo of the 1993 Copenhagen criteria. The enlargement process required compliance and stabilisation whereas the Union’s stability was non-existent.

Furthermore, these conditions even expand the EU frameworks and practices as in the case of ethnic and national minority rights. Although the EU regulations dominated the list of conditions, the conditionality policy was not necessarily limited to the Union’s own standards. The Union could demand extra conditions only

¹⁵ A. Agh, *The Politics of Central Europe* (London: Sage, 1998), pp. 43–44.

¹⁶ See, for instance, C. Offe, “Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe”, 58 *Social Research*, 4 (1991), p. 889.

¹⁷ See, for instance, C. Jenkins (ed.), *The Unification of Europe: An Analysis of EU Enlargement*. (London: Centre for Reform, 2000).

because the European integration was such a high political priority for all accession states. This asymmetrical patron relation between the EU and the accession states and the Union's superiority was typical of the enlargement process, often described as the "learning process."¹⁸ The conditions were even expanded after 1997 when the Commission introduced annual reports and elaborate monitoring of economic and political institutions and their transformation in the accession countries. The process of approximation of laws, which was not originally perceived as a legal condition for accession, eventually became a central activity of the legislative bodies and governments in all accession countries. The harmonisation of the EU and national legal systems of the accession countries seriously affected the quality of democratic deliberation in those countries because national parliaments favoured a smooth integrative process and mechanically, without an adequate political debate, enacted most of the proposals harmonising national laws with the EU legal framework. This practice was possible due to the fact that the Copenhagen principle of conditionality set up standards for those aiming at becoming the Union's members and assumed that meeting these standards would automatically open the Union's gates. The accession states even raced to be first to knock on those gates!¹⁹

With regard to the identity argument, European integration has nevertheless always proceeded as a neutralising force in the ethnically and politically diverse regions of Europe and its positive effect therefore should not be underestimated. The Copenhagen special minority rights criteria were part of this force. The *neutralisation function* was emphasised, for instance, in post-1989 tensions between Hungary and Slovakia regarding the policy of ethnic and national minority rights in both states. Hungary's attempts to veto Slovakia's accession to CSCE following the split of Czechoslovakia in 1992 and abstention at the admittance of Slovakia to the Council of Europe in 1993 worsened diplomatic relations between the two countries. In order to reduce the growing tension, the European Union launched its first Joint Action of the EU Common Foreign and Security Policy—"the Balladur Plan" based on the idea of preventive diplomacy.²⁰ The Balladur Plan drafted by the French government pursued the idea of a stability pact cemented by bilateral agreements on ethnic and national minority problems arising between neighbouring countries and threatening their peaceful coexistence and political stability. Supported by the Recommendation 1201 of the parliamentary Assembly of the Council of Europe on minority rights, this plan led to the successful

¹⁸ See M. Maresceau, "Pre-accession", in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press, 2003), p 22.

¹⁹ This race was inspired by an enlargement strategy *Agenda 2000* published by the European Commission on 15 July 1997. The document was published together with individual reports on the applicant countries and outlined detailed assessments of each state.

²⁰ For further details, see L. Valki, "Hungary: Understanding Western Messages", in J. Zielonka and A. Pravda, eds., *Democratic Consolidation in Eastern Europe, Volume 2: International and Transnational Factors* (Oxford: Oxford University Press, 2001), pp. 304–6.

Hungarian-Slovak “Treaty of the Republic of Hungary and the Slovak Republic on Good Neighbourliness and Friendly Cooperation”.²¹ Although one must not overestimate the role of the treaty in sensitive diplomatic relations between Hungary and Slovakia and its impact on the Mečiar government in Slovakia (1994–8) or the Antall and Orbán governments (1990–4; 1998–2002) in Hungary, this diplomatic effort certainly reduced the risk of both countries escalating their nationalist policies which would lead to international crisis and possibly violent conflict.

The Union’s policy of active involvement is even more striking in its treatment of the Mečiar government in Slovakia between 1994 and 1998. After the split of Czechoslovakia, Slovak foreign policy was focusing on its European integration and the government pledged to fulfil the requirements formulated at the 1993 Copenhagen and the 1994 Essen EU summits. However, the nationalist, populist and authoritarian Mečiar government which came to power in 1994 gradually steered the country toward international isolation which resulted in the elimination of Slovakia from the list of first round candidates of the NATO membership in Madrid in 1997 and EU refusal to continue the integration process with Slovakia. The government’s foreign policy used the self-perception of the Slovak nation as having a unique strategic position on the map of Europe and being constantly threatened by its neighbours and international “big powers” and consequently strengthened its cooperation with Russia.²² The collapse of Slovakia’s European integration policy in 1997 and severe criticism of governmental policies by the Union’s representatives subsequently affected the victory of political opposition in the 1998 parliamentary elections and helped to restore liberal democratic politics in the country.²³ The combination of diplomatic pressure and local liberal democratic aspirations thus worked as a mechanism of curbing the worst scenario of violent outbreak of nationalist populism and collapse of liberal democratic politics. The Union’s executive power supported the principles of parliamentary democracy and constitutionalism in Slovakia by reporting and expressing concerns over the power abuses of government and its attempts to undermine the role of parliament.²⁴ The EU thus played a fundamental role in the consolidation of democracy in Slovakia in the second half of the 1990s.

Another example of the Union’s active policy of containment of ethnic divisions and nationalism was the role of the EU Enlargement Commissioner Gunther

²¹ Signed in Paris on 19 March 1995.

²² See I. Samson, “Slovakia: Misreading the Western Message” in J. Zielonka and A. Pravda, *Democratic Consolidation in Eastern Europe Volume 2: International and Transnational Factors* (Oxford: Oxford University Press, 2001), pp. 376–80.

²³ See, for example, EU Commission, “Commission Opinion on Slovakia’s Application for Membership of the European Union”, *Bulletin of the European Union*, suppl. 9 (1997).

²⁴ See G. Pridham, “The European Union’s Democratic Conditionality and Domestic Politics in Slovakia: the Mečiar and Dzurinda Governments Compared”, 54 *Europe-Asia Studies* (2002), pp. 203–227.

Verheugen during the negotiations with the Czech Republic regarding the controversial issue of the Beneš Decrees that legalized the expulsion of Sudeten Germans from Czechoslovakia after World War II. In the final stage of negotiations, the Austrian government, the government of the German state of Bavaria, and the Hungarian Prime Minister Orbán repeatedly called for the repeal of the decrees. In the heated atmosphere of the 2002 parliamentary elections in the Czech Republic, Germany and Hungary, Verheugen managed to assure the Czech government that the decrees would not be a bar to accession while suggesting that a symbolic moral gesture recognizing the injustices of the expulsion would be helpful. Apart from its symbolic role in the modern political history of a collective guilt, the EU Commission was reluctant to open the issue because it was closely linked with property restitution, family law issues (the decrees provided a basis for divorce), and compensation.²⁵ Furthermore, similar decrees had been issued in other countries such as Poland and Denmark and the specific character of the Czechoslovak decrees would therefore necessarily have broader international legal consequences.²⁶ The carefully crafted strategy of keeping the legal *status quo* and promoting the culture of moral “collective repentance”, which started with Havel’s apology in 1990 and was incorporated into the 1997 Czech-German Joint Declaration of Parliaments, was the only possible option in the critical situation in which the Czech government and parliament made it clear that any EU annulment demands would effectively put an end to accession talks.²⁷

The last and probably most persuasive example of the Union’s promotion of civil society oriented politics and the protection of minority rights is the protection of minority rights of the Roma populations living in the region. Roma living in Central and Eastern Europe are one of the most vulnerable minority groups subject to individual and institutional racism and discrimination. The EU set up national action plans for the candidate states with sizeable Roma communities and provided funding for their implementation. These programmes were intended to address

²⁵ For instance, a Christian Democratic Union member of Bundestag (German Parliament) and President of the Association of Expelled Germans (Bund der Vertriebenen) Erika Steinbach, who is famous for radical ethno-nationalist views, said that the British and American reluctance to support German restitution demands meant acceptance of the genocide of 15 million Germans after 1945 and accused the European Commission of ignoring the laws depriving Germans of their rights in four future member states of the EU (the Czech Republic, Poland, Slovakia and Slovenia). Quoted from an analysis of the Czech diplomat Jiří Šitler, “Že by mi vrátili tu mou almaru?” (Would they return my cupboard?), published in *Lidové noviny*, Orientace, 3 January 2004.

²⁶ For further details, see “Constitution Watch”, 11 *East European Constitutional Review*, No. 1–2, Winter/Spring 2002, pp. 14–15; “Constitutional Watch”, 11/12 *East European Constitutional Review*, No. 4, No. 1, Fall 2002, Winter 2003, p. 19.

²⁷ See, for instance, *The Declaration of the Assembly of Deputies of Parliament of the Czech Republic*, of 24 April 2002.

discrimination issues as well as to promote Roma cultural and ethnic identity.²⁸ It is also noteworthy that similar policies of promoting the national and ethnic integration and diversity were encouraged by the European Commission in the Baltic States with large Russian-speaking minorities.²⁹

6. TIMING THE FUTURE IN PROCESS: “IMAGINED EUROPE”

Focusing on the symbolic power of constitution-making and the role of European integration, the effect of “imagined Europe” was essential in building the collective identity of Central European political societies. Europe’s symbolic value was given by its temporal orientation. It was always a future oriented political goal for politicians and populations of post-communist countries which helped to contain political myths of the national past threatening to reinvent nationalist politics based on historical and ethnic claims of “blood and soil.”

The collectivist communitarian temptation to perceive political communities as transcendental entities entrenched in their traditions is part of political romanticism which led to the worst disasters in modern Europe. Similarly like romantics, communitarians believe that history and human traditions are sources of true collective nature of a nation and its present identity has therefore to be derived from its past. According to this view, collective identity should be the “gravitational field” of a constitution because it reflects communal values superior to liberal individualism.³⁰ However, this politics of “historical future”³¹ turns out to be politically very dangerous because it draws on the system of historical pre-political identity and transforms particular traditions and national myths into political symbols. Communitarian critics of liberalism are legitimately concerned about the similarity between their position and fascist ideology.³² Politics of primordial attachments³³ is constituted by beliefs in the shared customs, blood-ties, language and tradition of a political community, which are normatively binding for its members. Nationalist sentiments are presented as “natural” and historically “inevitable”. This

²⁸ For many valuable details and analysis, see *Monitoring the EU Accession Process: Minority Protection, Volume I: An Assessment of Selected Policies in Candidate States* (Budapest: Open Society Institute, 2002).

²⁹ See, for instance European Commission, *2001 Regular Report on Estonia’s Progress Toward Accession*, Brussels, 2001, p. 24.

³⁰ G. Walker, “The Idea of Nonliberal Constitutionalism”, in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights (NOMOS XXXIX)* (New York: New York University Press, 1997), p. 169.

³¹ H. Joas, *The Creativity of Action* (Chicago: University of Chicago Press, 1997), p. 250.

³² G. Walker, “The Idea of Nonliberal Constitutionalism”, in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights (NOMOS XXXIX)* (New York: New York University Press 1997), pp. 169–70 and pp. 177–8.

³³ See C. Geertz, “The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States”, in C. Geertz (ed.), *Old Societies and New States* (London: Free Press, 1963).

legitimation by “natural history” facilitates the normative force of these sentiments, makes people attached to their ethnically marked political community, and delineates the limits of community membership.³⁴

As a result of such politics, constitutions would become mere symbolic expressions of mythical history of a nation and a powerful technique of constructing its modern political myths. Instead of rational decision-making, constitutions would become a source of the nationalist magic which had turned out to be so disastrous in the modern history of Europe. In a comment, reiterating Max Weber’s distinction of charismatic and legal rational domination, Ernst Cassirer mentioned that “[T]he modern politician has had to combine in himself two entirely different and even incompatible functions. He has to act, at the same time, as both a *homo magus* and a *homo faber*.”³⁵ Drawing on this comment, one can say that communitarian politics of the reinvention of historical ethnic roots would result in the ethnic re-enchantment of modern political world and the leadership of *homo magus*.

In comparison to this politics of historical future, politics recalling a common post-1945 European identity has been driven by the opposite temporal logic which might be called the “future in process.” Unlike the historical future, the future in process is not primarily legitimated by past experiences and therefore must be modelled in a more abstract way. The primary political goal of the future in process is to unify the heterogeneous groups and individuals who share a common political life. From the very beginning, the process of European integration was a project of building a supranational community which would need to emerge in order to minimise particular nationalisms and maximise the integrative power of political culture of civil rights and parliamentary democracy. The supranational ideal of the Union’s citizenry is to prevent the nationalist abuses of the state power in the future and defuse nationality as the principal reference of democratic politics. This ideal has always been present in the European politics as an aspiration and purpose of unification. It has a dual nature of its origin and *telos*.³⁶ It therefore permeates both the symbolic and purposive rationality of European politics. The concept of a European citizenry operates as a point of reference of the “ever closer union” and opens possibilities of future decision-making at the European level.

The primary effect of such a complex concept of the European identity on the nations of post-communist countries was “negative”: it protected them from falling into the abyss of history-oriented nationalism and ethnically based political identity. Nationalisms, which falsely call for the awakening of nations to self-consciousness

³⁴ M. Nash, *The Cauldron of Ethnicity* (Chicago: University of Chicago Press, 1989).

³⁵ E. Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946), p. 282.

³⁶ Z. Bankowski and E. Christodoulidis, “The European Union as an Essentially Contested Project”, 4 *European Law Journal*, 4 (1998), p. 347.

and “invent nations where they do not exist”,³⁷ certainly played a significant role in the post-1989 Central and Eastern Europe but they never transformed into politics of state and tribal violence like in the Balkans in the 1990s. Due to this external “European identity” influence, re-awakened nationalisms could influence only some political decisions and legislation but, with the exception of Slovakia between 1994–8, they never fully determined the course of national politics in the accession countries.

The European constitution-making process has been based on the “future in process.” This future in process was typical, for instance, of the attempt at formulating an identity basis for the process of European unification in the *Declaration on the European Identity* signed by the then nine member states of the European Community.³⁸ It states that the member states shared “the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual.” In the process of the European integration, the “historical future” has mainly been constructed as a negative element in the whole symbolic structure of the EU, which represented the history of nationalism, ethnic hatred, racism and anti-Semitism. The historical trauma and reflection of modern political disasters such as the Holocaust and the two world wars in the last century can have an educative and unifying effect for Europeans, both “old” and “new” joining the Union in 2004, and eventually lead to the self-identification of a new European citizenry.³⁹ The historical future accepted by European constitution-making was the republican history of cosmopolitan demos which was always confronted by the destructive power of nationalist political myths. The dream of “everyone’s Europe” of the future announced by the President of the European Commission Romano Prodi was described as a gift “we owe to future generations.”⁴⁰ In his address, the cosmopolitan political programme was almost meeting a utopian dream of ultimate inclusion of all people which would leave nobody out. It is this language of the future in process and not the historical future which has had formative power in recent European constitution-making.

The 1992 transformation establishing a single market and the *Single European Act* were driven by the ideology of European ascendancy and people in the member

³⁷ E. Gellner, *Thought and Change* (Chicago: University of Chicago Press, 1964), p. 169. For a similar definition of “the invention of the nation”, see also B. Anderson, *Imagined Communities: Reflections on the origin and spread of nationalism* (London: Verso, 1983); E. Gellner, *Nations and Nationalisms* (Oxford: Blackwell, 1983).

³⁸ Commission of the European Communities, *Declaration on the European Identity*, 1973 Bull. EC 12, Cl. 2501, pp. 118–27.

³⁹ See, for instance, J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press 1999), p. 152.

⁴⁰ R. Prodi, “Shaping the New Europe”, Prodi’s speech in the European Parliament delivered on 15 February 2000. Here quoted from I. Ward, “A Decade of Europe? Some Reflections on an Aspiration”, 30 *Journal of Law and Society*, 3 (2003), p. 236.

states were “successfully called to rally behind and identify with a bold new step toward a higher degree of integration.”⁴¹ The European market’s purposive rationality was to be fortified by the symbolic rationality of political culture, ethos, and ideology. Europe as unity was a slogan of the 1990s and the original EU integration goal of limiting state sovereignty⁴² was progressing through ever closer economic integration with the hope that full political union of federal Europe would follow. Herder’s concepts of primeval cultural bonds and the spiritual, social and political homogeneity of ethnically defined nations as the main characteristic of the sovereign people were dismissed as damaging the endeavour of the European political integration and democracy. Doctrines of political and social homogeneity of the sovereign people were criticised as invoking the metaphysical concept of *Volk* hiding behind the *demos* and contradicting the democratic and multicultural ethos of a common European state “composed of a plurality of nations and yet founded on a *demos*, deriving its legitimacy from consent rather than descent and its chances of survival from civil rather than primordial loyalties.”⁴³

The European polity brought gradually into being by the 1957 Treaty of Rome and subsequent integrative efforts was believed to be in need of its democratisation and Euro-federalists started arguing strongly in favour of the case for common statehood in the 1990s. However, the federalist model reveals an obvious problem: this *demos* may exist as a utopian fantasy and political project, yet it does not exist in the everyday reality of European politics. Advocates of cosmopolitan democracy and citizenship failed in their attempts to reduce the juridical and representative role of the nation state.⁴⁴ Democracy has not been successfully extended from the nation state framework to the Union and its population as a whole. The peoples of Europe and their democratically elected representatives at the national level even regularly criticise the European Union for the lack of democratic legitimacy and accountability. The European sense of belonging, solidarity, and identity is much weaker than the identification of people with their region, country and nation.⁴⁵

⁴¹ See J.H.H. Weiler, *The Constitution of Europe: “Do the new Clothes have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) p. 89.

⁴² The strategy of limiting the nation-state had been present already in the 1950 Schuman Declaration and the 1951 European Coal and Steel Community Treaty. See Schuman Declaration of May 9, 1950 and the preamble to 1951 Treaty of Paris.

⁴³ See G.F. Mancini, “Europe: The Case for Statehood”, 4 *European Law Journal*, 1 (1998), p. 35.

⁴⁴ See D. Held, *Democracy and the Global Order* (Cambridge: Polity Press 1995); D. Archibugi, D. Held and M. Koehler (eds.), *Re-imagining Political Community* (Cambridge: Polity Press, 1998).

⁴⁵ See, for instance, D. Beetham and C. Lord, *Legitimacy and the European Union* (London: Longman, 1998), p. 46.

European federalism may be supported by different local and national elites, yet it still lacks solid democratic consent.⁴⁶

Instead of representatives of the “imagined” European nation, it is representatives of the member states, middle-range European officials and a variety of private advisory bodies agents who sit on different committees exercising administrative and regulative functions. This “comitology”⁴⁷ inevitably suffers from the deficit of legitimacy and strengthens the perception of the Union as driven by the elites and their conceptions of the emerging polity. The committee based form of European governance is neither constitutional, nor unconstitutional. It is beyond the reach of the constitutional discourse because it exceeds its concepts of different branches of government, checks and balances, principles of delegation and separation of power etc.⁴⁸ The expansion of government by committees contradicts the proclaimed ascendancy of a common European citizenry and its ethos of public control and political accountability. It is much closer to the decisionist concept of law and state elaborated by Carl Schmitt in his critique of the liberal democratic rule of law.⁴⁹ The democratization of the Union by constitution-making, which involves the attempt to establish the European demos, has thus to primarily be taken as a process attempting to reduce its decisionist character and make it more adjustable to Kelsen’s concept of constitutionalism based on the concept of *Grundnorm* (basic norm).⁵⁰ The Union’s decision-making agencies are to be provided with normative legitimation by a constitution.

Furthermore, the search of the European people was intensified by the fact that the Union has already been *de facto* building its constitutional order by decisions and practices of its administrative and judicial bodies. The doctrine of the European Court of Justice holds that European law constitutes a new legal order which is neither a sub-ordinate sub-system of the legal systems of member states, nor merely

⁴⁶ See L.K. Hallstrom, “Support for European Federalism: an elite view”, 25 *Journal of European Integration*, (2003), pp. 51–72.

⁴⁷ The term used in R. H. Pedler and G.F. Schaefer (eds.), *Shaping European Law and Policy—The Role of Committees and Comitology in the Political Process* (Maastricht: European Centre for Public Affairs, European Institute of Public Administration, 1996). See also K. Bradley, “The European Parliament and Comitology: On the Road to Nowhere?”, 3 *European Law Journal* (1997), 273; P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (Oxford: Oxford University Press, 1999).

⁴⁸ See J.H.H. Weiler, *The Constitution of Europe*, *op. cit.* n. 41, p. 98.

⁴⁹ C. Schmitt, *Verfassungslehre* (Berlin: Humblot, 1983, orig. 1928).

⁵⁰ This “symbolisation” of the current constitutional dilemmas in the “Kelsen vs. Schmitt” jurisprudential divide has become quite popular in recent debates. See J.H.H. Weiler, “In defence of the status quo: Europe’s constitutional *Sonderweg*”, in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), p. 12.

part of international law.⁵¹ National legal systems of member states consequently contain two distinct “basic norms”, one coming from the national constitutional order and the other from the European law.⁵² For instance, the response of the German Federal Constitutional Court to this doctrine denied that the Court of Justice could have the so-called *Kompetenz–Kompetenz* to determine the final scope of European law in relation to national law and sovereign state.⁵³ One of the main reasons stated by the German Constitutional Court was exactly that the Union did not have a *demos* and its legislation could not therefore claim supremacy. This famous “no *demos* thesis” and resistance to the European Court of Justice limiting national judicial and constitutional authority only revealed competing and conflicting visions of both jurisdictional and political authority of the European institutions in relation to the member states. National constitutional courts therefore do not necessarily support the emerging transnational European legal order, but often defend national democratic constitutionalism against “illicit encroachment from Brussels.”⁵⁴

Challenged or supported by systems of justice of member states, it is obvious that European constitutionalism had been practiced long before the Convention started its constitution-making job. The existence of a “constitution in practice”⁵⁵ reflects the fact that practical constitution-making and formation of a political community have been existing for long time and alongside conceptual, theoretical and normative debates of the Convention and inter-governmental conferences. It consists of daily practices and decisions of the EU institutions which are shaped into the form of the *acquis communautaire*. The efforts to invent the European people thus did not have only the symbolic function of giving priority to *demos*

⁵¹ See N. MacCormick, “Sovereignty, Democracy and Subsidiarity”, in R. Bellamy, V. Bufacchi and D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe* (London: Lothian Foundation Press, 1995), p 100.

⁵² This structural division in national legal systems invokes the idea of constitutional and legal pluralism. See, for instance, N. Walker, “The Idea of Constitutional Pluralism”, 65 *Modern Law Review* (2002), p. 317.

⁵³ See, for instance, J.H.H. Weiler, U.R. Haltern and F.C. Mayer, “European Democracy and Its Critique”, in J. Hayward (ed.) *The Crisis of Representation in Europe* (London: Frank Cass, 1995), pp. 4–39, at 9–23.

⁵⁴ See J.H.H. Weiler, “In defence of the status quo: Europe’s constitutional *Sonderweg*”, in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2003), pp. 7–23, at 16.

⁵⁵ See J. Shaw, “Process and Constitutional Discourse in the European Union”, 27 *Journal of Law and Society* (2000), No. 1, pp. 4–37, at 18. On the other hand, Dieter Grimm criticizes this thesis of “constitution in practice” as self-contradictory when he says that “. . . [T]he call for a constitution would be void from the outset if European legal scholars’ assumption that the missing constitution already exists were right. In that case one could certainly talk about improving it, but hardly about creating.” See D. Grimm, “Does Europe Need a Constitution?”, 1 *European Law Journal*, No. 3, November 1995, pp. 282–302, at 284.

over ethnos in the “unification dream” decade of the 1990s. The invention of the European demos was also to affect all three spheres of democratic legitimacy of the European institutions and practical rationality of decision-making: authorisation, accountability and representation.

7. SPACE VARIETIES: TWO MODELS OF THE EUROPEAN CONSTITUTION-MAKING

Europe’s search of its people and constitution-making are examples of a historically unique and paradoxical situation in which the “constitutive power” is desperate to constitute its “constituent power” (*pouvoir constituant*). The existing EU institutions decided to create a special agency—the Convention—which was expected to outline a new political structure and institutional framework inspiring the constitution of Europe’s constituent power—the people. Concrete political actions and decisions were to be taken in two separate steps: the first one was to create the Convention while the second one was to create the Constitution. This gradual work of the EU agencies was then expected to transform the Union’s political and legal structural framework and inspire the creation of the European democratic citizenry. While actions and decisions determined the structural transformation in the first part of the plan, the expected transformation was to inspire the creation of a new agency in the second part. This political structuration⁵⁶ would be a common social process if there were not a paradoxical expectation involved in the whole business: a new-born agency was to retrospectively legitimise the transformed political structure which made its creation possible. The constitution-making process would thus have serious political and cultural implications for all European nations involved and it is therefore not surprising to see that the whole nature of the process was questioned and re-designed by its agents.

The whole business of constitution-making and search of the European collective political identity has been undoubtedly risky like any sort of political constructivism. Apart from institutional and procedural aspects of power and obedience, it involves problems of moral commitment and cultural identity. No wonder that endless debates regarding the Draft Constitutional Treaty were regularly addressing the issues of cultural self-understanding of “Europeans” and the Philadelphia Convention was used as a decisive inspiration for the coming European democratic citizenry.⁵⁷ Despite such an overarching moral and cultural discourse, critics have often warned against possible destructive effects which the current process may have on democratic politics at the national level. According to these views, the imposed idea of a non-existing European citizenry may result in the weakening

⁵⁶ For a general sociological account of “structuration”, see A. Giddens, *The Constitution of Society* (Cambridge: Polity Press, 1984).

⁵⁷ See, for instance, a speech delivered by the Convention’s President Valéry Giscard D’Estaing, “The Preparation of the European Constitution”, *Second Annual Henry Kissinger Lecture*, Library of Congress, Washington, 11 February 2003.