

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.

of democratic legitimacy at the national level while having no real effect on the quality of European politics and its legitimacy. Other voices acknowledge the real achievements of the European integration, but want to keep it at the level of purposive legitimacy by common interests instead of symbolic legitimacy by a common people.⁵⁸ The main message of these pro-European, yet anti-federal, warnings is that it would be dangerous to instigate political identity where a political community does not exist. Instead, these voices propose that liberal democracy should rather be cultivated at the national level with the European constitution-making merely confirming the existing level of integration and thus reducing the potentially growing deficit of democratic legitimacy.⁵⁹

Any sort of the European constitution-making, which would be based on the post-Maastricht European sovereignty claims and the notion of the supremacy of European law,⁶⁰ cannot pass the Hobbesian test of political order. According to Thomas Hobbes, it is the threat of anarchy and violence what makes the establishment of political order necessary. One can ask in a similar manner: “Why does Europe need a sovereign constitution when its political order is not threatened by anarchy and violence?” It may be distrusted by many European inhabitants, yet has been largely beneficial to most of them. Despite politically disruptive effects of government by committees, there is no imminent threat to its stability and the main driving force behind current changes therefore has been political ambitions to stretch further the existing levels of integration and build a federal Europe. Economic challenges and achievements of the common European market and currency were to be cemented by political ambitions to constitute a federal European polity. Federalism has been taken as a rich political tradition and practice which should be exploited by the EU policy-makers and constitution-makers in order to construct the Union as a federal polity.⁶¹

If the enlargement policy was driven by the logic of *conditionality* set up at the Copenhagen summit, the progressive political integration was typical of the logic of the “constitutional *finality*” of a European Federation.⁶² For instance, the German foreign minister’s finality principle included a stronger bicameral European Parliament representing both the citizens and the nation states and basic human

⁵⁸ H. Lübke, *Abschied vom Superstaat: Vereinigte Staaten von Europa wird es nicht geben* (Berlin: Siedler Verlag 1994).

⁵⁹ D. Grimm, *op. cit.* n. 55. pp. 282–302.

⁶⁰ N. MacCormick, “The Maastricht-Urteil: Sovereignty Now”, 1 *European Law Journal*, 3 (1995), pp. 259–266.

⁶¹ R. Koslowski, “A Constructivist approach to understanding the European Union as a federal polity”, 6 *Journal of European Public Policy*, Vol. 4, Special Issue (1999), pp. 561–578, esp. at 568–570.

⁶² For this view, see especially the Germany Foreign Minister J. Fischer, “From Confederacy to Federation: Thoughts on the Finality of European Integration”, speech delivered on 12 May 200 at the Humboldt Universität, Berlin.

and civil rights enforceable at the European level. According to these federalist views, enlargement is taken as one of the reasons why political integration should speed up its progress. It has been argued that European institutions should get more decision-making powers in order to avoid possible political chaos and instability. Nevertheless, the enlargement process has eventually proved to run according to a very different logic which was incommensurable with the finality argument.⁶³ The Hobbesian finality argument could not be accommodated in the constitution-making process seeking to reconcile both visions of tightening and widening the European Union.

Nevertheless, the argument of fear as the most important cause of individual and collective violence which needs to be eliminated by a political sovereign, first made in Hobbes's *Leviathan*, had a formative effect in the pro-European discourse in former communist countries exposed to threats of nationalism and "new tribalism."⁶⁴ Although the Union could hardly be perceived as a sovereign power, it was nevertheless portrayed as a safe haven curbing all nationalist animosities and protecting the member countries from regress to an earlier state of ethnically defined politics and traditionalism. Europe was expected to act as *quasi-Leviathan* that promotes the virtue of civil unity and protects national politics from the risks of secessionist movements and nationalist separatism. Expectations of the Union's constraining power in the field of ethnic politics, including minority rights and political self-determinations, were indeed very high in the ethnically divided region of Central and Eastern Europe. The Copenhagen conditionality policy could therefore successfully use the Hobbesian model of political stabilization.

Although the Hobbesian model had a positive external effect on the accession states, its internal effect would be much more negative and harmful. The Convention's constitution-making therefore eventually involved many elements different from Euro-federalist aspirations and their Hobbesian logic of state building as power providing security for its subject citizens. It resembled the social contract a lot more in the sense of an alliance of the involved parties that have mutual responsibilities and rights. The dominating logic was that of John Locke's "horizontal" version of the social contract and not its "vertical" version formulated by Hobbes.⁶⁵ After the struggle between federalists and anti-federalists, the Convention presented a draft of the social contract between the peoples of Europe politically organised in their democratic nation states. At the same time, it drafted some institutional

⁶³ Compare, A. Wiener, "Finality vs. enlargement: constitutive practices and opposing rationales in the reconstruction of Europe", in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2003), pp. 160–165.

⁶⁴ The term used, for instance, by Michael Walzer. See M. Walzer, "Notes on the New Tribalism", in C. Brown (ed.), *Political Restructuring In Europe: Ethical perspectives* (London: Routledge, 1994), pp. 187–200.

⁶⁵ For the distinction, see for instance H. Arendt, *Zur Zeit* (München, Deutscher Taschenbuch Verlag, 1989), pp. 145–146.

and structural preconditions of the federalist model of the Union, but without the concept of the European people legislating the constitution for itself. The preamble of the draft “treaty establishing a constitution for Europe” read:

[C]onvinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny. Convinced that, thus “united in its diversity”, Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities toward future generations and the Earth, the great venture which makes of it a special area of human hope.⁶⁶

While a common identity is yet to be shaped and has been postponed for future-building, the reference to national identities includes both their positive and negative political consequences in European history. The unifying role of negative historical experience should work as a mechanism of enhancing the unification process. At the same time, the Union selects its “positive past” when it committed itself to respect cultural diversity and protect its cultural heritage in Article 1(3) of the draft treaty.

The heavy weight of regulatory politics, comitology and institutional framework of the European Union thus did not eventually result in the historical “awakening” of political societies of participating states and their integration into a civil European nation. In the current situation, the search of the European demos would resemble far too much the undesired Hobbesian model because it would be a search of the sovereign political power legitimating the federal transformation of political power in Europe. The recognition of sovereignty of member states has been reflected in the description of the draft as a “treaty” which means that it, like any other international treaty, would have to be ratified by national governments. The horizontal version of the contractual act forms a “pact” of the parties which reflects the original agreement, consent, and freedom of political will. The principle of negotiations and multilateral agreements between the member states has remained decisive in the Union’s future constitution-making.

The fact that a constitution for Europe is to be enacted by the member states exercising their treaty making powers in the sense of international legal order is of vital importance. The will and capacity of the citizens of Europe is lacking and the operative constitutional framework therefore cannot be treated as a true constitution. “Europe’s constitutional architecture”⁶⁷ is fundamentally different from models of national constitutions because its authority derives entirely from the member states, and not from the citizens of Europe. For this simple reason, the

⁶⁶ See The European Convention document CONV 820/03, *Draft Treaty establishing a Constitution for Europe*, pp. 4–5.

⁶⁷ See J.H.H. Weiler, “A Constitution for Europe? Some Hard Choices”, 40 *Journal of Common Market Studies* (2002), pp. 567.

kind of constitutional authority and discipline in the Union will be different from any concept of statehood and a sovereign constitutional order. The constitutional language of statehood symbolism, which was typical of the Laeken Declaration of December 2001, has lost its momentum and “the current situation of massive enlargement brings back elements derived from the logic of international law.”⁶⁸

The EU enlargement fundamentally affected the constitution-making process because the Convention realised that it would be very hard to go both deeper and wider in shaping the future of Europe at the same time. The accessing countries have enormously benefited from this limitation of political ambitions because they were: a) treated as equal partners of constitution-making debates; b) not forced to renounce too much of their recently re-established national sovereignty. These countries experienced solidarity with other European nations, the sense of belonging to a common political network and being “one of us”, when they were invited to participate in the Convention and the following Intergovernmental Conference.⁶⁹ They could build on the symbolic image of the enlargement as a process of the reunification of Europe and “the real end of World War II”⁷⁰ and incorporate it into the image of the Convention’s constitution-making. It was also important that the preamble of the Convention’s draft reflected it in its phrase of “reunited Europe.”⁷¹ New and fragile national democracies thus did not have to confront the public dilemma of “selling out to Brussels” at even a larger scale than during the enlargement negotiations and incorporation of EU law into their national legal systems.

The European integration process was thus typical of a mixture of both the Hobbesian and the Lockean model. While the first one was applied by the Union for instance in the Copenhagen criteria, the second one was applied by the Convention in its constitution-making and extended to the accession countries. As mentioned above, the Copenhagen criteria was a fascinating example of the Union’s “double standards” policy setting certain political and constitutional conditions for the accession states which had been part of neither the Union’s legal system, nor national legal systems of the member states. This double standards approach was striking in the field of minority rights protection which was expected from the

⁶⁸ A. Wiener, “Finality vs. enlargement: constitutive practices and opposing rationales in the reconstruction of Europe”, in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2003), pp. 159–160.

⁶⁹ A concrete example of this participation was, for instance, an informal consultative Prague meeting of 15 states demanding further changes in the draft Treaty and better balance of power in favour of the smaller member states before the opening of the Intergovernmental Conference in October 2003. See the “Prague Memorandum” of 1 September, 2003.

⁷⁰ M. Walker, “Enlargement of the European Union: How New EU Members Will Change the Shape of Europe”, in R.J. Guttman (ed.), *Europe in the New Century: Visions of an Emerging Superpower* (London: Lynne Rienner Publishers, 2001), p. 58.

⁷¹ The European Convention’s document CONV 820/03, *Draft Treaty establishing a Constitution for Europe*, p. 4.

accession states, yet ignored by some member states. Central and East European countries joining the EU were demanded to enter “with a clean slate in respect of their minorities” because “then there will be no need for the European Union itself to modify its “agnosticism” in respect of minority protection *inside* the Union.”⁷² The Union’s external demand to deal with minority rights in the accession states before joining the EU was to help keep the whole constitutional and legal agenda of minority rights protection outside the gates of the Union’s law.

While the Copenhagen criteria were based on the Hobbesian model, the contractual model of the Union’s “Constitution in waiting” draws rather on the vision of a horizontal community of states which goes far beyond the conceptual framework of international law based on principles of state sovereignty, independence, neutrality, autonomy, national power and self-interest. The European Union has been designed as a community of states and peoples sharing political ethos, principles of government, human values and aspirations. Although it builds on the principle of “divided sovereignty” in growing number of policies and economic and administrative interdependence, it is based on the principle of balance between the interests of a member state and the interests of the community. It thus constitutes itself as a political and legal hybrid exceeding the territory of international law, yet without the coherence of a federal state.⁷³ This development leads to the European political and legal practice “beyond the sovereign state”⁷⁴ which, nevertheless, remains unsupported by the sovereign federal Union.

8. CONCLUSION: THE DILEMMATIC EUROPEAN IDENTITY AND CONSTITUTIONAL MARGINALISATION OF *ETHNOS*

The contractual model may be despised by federalists, but it has strong symbolic value especially for the new member states. It strengthens their European identity exactly because of the constitution’s recognition of the diversity and heterogeneity of voices speaking through different national representations in common Europe. The legitimating force of a Constitution drafted as a treaty can be arguably stronger

⁷² B. De Witte, “The Impact of Enlargement on the Constitution of the European Union”, in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press, 2003), p. 239.

⁷³ Despite the proposed principle of the Union’s legal personality in Article 6 of the draft Treaty, it cannot be considered a sovereign state in the sense of international law which would exercise greater power over the member states. The proposed common foreign policy in Article 11(4) shows signs of external sovereignty of the Union toward the outside world and enhances mutual interdependence and closer cooperation between the member states. However, it is an example of divided sovereignty because sovereignty of the member states has not been lost, but rather subjected to a number of decision-making processes combining the power of the European institutions and the member states.

⁷⁴ N. MacCormick, “Beyond the Sovereign State”, *Modern Law Review* 1 (1993), pp. 1–19.

because it shows reciprocal influence and agreement between equal political democratic nations of Europe. Despite its character, it may still be perceived as the historical expression of an abstract beginning of the European polity based on the principles of equality and diversity.

Furthermore, the covenantal nature of the Convention's deliberation and the final draft inspired the civil virtues of equality, respect and agreement. They represented the Union's formative constitutional experience and the concept of constitutionalism which builds on procedural elements, conversation and dialogue, and equal treatment of all parties. This positive experience was possible only after resorting to the plan of strong European nation-building. In this light, the failure of the Brussels summit in December 2003 appears to be a positive formative moment which reveals a central role of negotiations and compromise and makes the constitution-making process a much more European public issue.

Nevertheless, it became obvious that the strong concept of political identity was not useful in the covenantal form of constitution-making. The identity of the European *demos* would be too difficult to formulate by the concepts of nationhood, sovereignty, and democratic state. Weiler speaks even about impossibility when he comments on the process of European state and nation building:

It would be more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state. It would be equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism. The problem with the unity vision is that its very realization entails its negation.⁷⁵

In his polemic with Grimm, Habermas, who has always been a strong proponent of the idea of a common European people, also recognizes troubles with the European identity and statehood and introduces a new project of a "heterogeneous" people which would have to replace old "homogenous" concept of the people in order to provide a legitimation framework for federal Europe:

[O]f course, the argument that there is no such thing as a European people, and thus also no force capable of generating a European constitution, only becomes a fundamental objection through a particular use of the concept of "a people." The prognosis that there cannot be any such thing as a European people remains plausible only if "the people", as a source of solidarity, actually depends on some corresponding community as a pre-political basis of trust, which fellow countrymen and women inherit as the shared fate of their socialization.⁷⁶

⁷⁵ See J.H.H. Weiler, *The Constitution of Europe*, *op. cit.* n. 41, p. 94.

⁷⁶ J. Habermas, *The Postnational Constellation: political essays* (Cambridge: Polity Press, 2001), p. 100.

The European identity lacks a common language, shared tradition and customs, yet it can draw on common culture and both historical negative and positive experiences. However, history cannot glue a political community. Habermas and other Euro-enthusiasts therefore call for a political identity established by European law, politics, the public sphere and civil society institutions. According to this view, a European citizenship is incompatible with the exclusionary nature of nationalist sentiment.⁷⁷ Nevertheless, the main source of this identity will have to be the language of law and the European constitutional guarantees of civil rights because the European public sphere, political parties and civil society do not exist.

Unlike the utopian image of one European people, the European identity is most likely to be constructed as a hybrid mixture of common civil ethos and persisting different national loyalties. It will be the *dilemmatic identity* which will be impossible to consolidate at the symbolic level. European identity and legitimacy will thus remain an open-ended process of the symbolization of the common social, cultural and political space. However, this process will have to exceed the common understanding of democratic legitimacy based on the question of who constitutes the people to which there must exist a mutually agreed and settled answer.⁷⁸ Post-communist experiences of the accession countries show that the identity dilemma had an enormous impact on constitution-making and political processes which could be stabilised externally by the symbolic power of the European Union as a supra-national structure representing the political virtues of civility. The choice between ethnic and civic identity was often reduced to the choice between authoritarian nationalism and democratic liberal politics. Inside the Union, the European civil identity has been a major constitutional tool for responding to the democratic legitimation gap at the Union's level and connecting with democratic politics of the ethnically consolidated Member States. In this context, it has not been a dilemma of clear alternatives but rather of supplementing and expanding one form of political identity over the other.

Despite their persistence, the building of a new European political identity will proceed as further marginalisation of the ethnically established loyalties and traditional communal identities. This marginalisation is part of an internal logic and constitution of the European Union in which *demos* was supposed to substitute *ethnos* and diminish its impact on political decision-making processes. This logic is an answer to modern European history, its nationalism and ethnically incited political violence. Furthermore, unlike civil rights and virtues, local ethnic identities are not sufficiently flexible for contemporary globalized societies of Europe. Local identity of ethnicity is too rigid and "thick" in the sense of its normative binding power. It is far too limited to cultural particularity. Unlike local ethnic

⁷⁷ N.W. Barber, "Citizenship, nationalism and the European Union", 27 *European Law Review* (2002), June, pp. 256–7.

⁷⁸ See, for instance, R. Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989).

identity, purposive rationality of general economic and legal networks produces social flexibility, has power to expand social communication, and transcends local limits. However, these networks can lead to the establishment of merely “thin” identity⁷⁹ based on specified costs and benefits.

European constitution-making is therefore accompanied by multi-dimensional identity which is disentangled from the traditional concepts of solidarity, community, and face to face relations.⁸⁰ Cultural rigidity is replaced by flexibility of social networks and multiplied personal choices. The Union has already extended civil rights enforcement beyond the nation-state and thus effectively put an end to the modern limitation of rights to the boundaries of a state sovereign power. The emergence of a minimum common identity through the network of European constitutional law is well documented in the concept of the European citizenship. The original Maastricht citizenship provisions incorporated in Article 8 of the Maastricht Treaty have been elaborated in Article 8 of the draft of the Constitutional Treaty and declare that “[e]very national of a Member State shall be a citizen of the Union. Citizenship of the union shall be additional to national citizenship; it shall not replace it.” Although national citizenship is not affected, this provision clearly makes citizens of EU member states the subject of rights and entitlements provided at the European level. This trend of directly granting the rights at the European level weakens old communal loyalties, but it does not mean a full decoupling of national and European citizenship. It is still member state nationality which opens the way to the rights guaranteed for European citizens.⁸¹

The primary source of European identity will be the emerging constitutional framework, which may gradually establish a common “thin” constitutional identity based on the principle of universality of rights and its political benefits to European citizens.⁸² The systemic logic of European constitutional law will be enforcing rights and protecting civil liberties of individuals and various groups. The Kantian republican cosmopolitanism will have to be mediated by the established systemic logic of European constitutional law. So far, it cannot be mediated by a common civil ideology and political ethos because the European public sphere does not exist as an effective communicative network and basis of democratic will-formation.

⁷⁹ See D. Beetham and C. Lord, “Legitimacy and the European Union”, in A. Weale and M. Nentwich, *Political Theory and the European Union: Legitimacy, constitutional choice and citizenship* (London: Routledge, 1998), p. 22.

⁸⁰ D. Beetham and C. Lord, *Legitimacy and the European Union* (Longman: London 1998), p. 44.

⁸¹ See, for instance, J.H.H. Weiler *et al.*, *op. cit.* n. 53, p. 21.

⁸² See, for instance, K.O. Apel, “Das Anliegen des anglo-amerikanischen ‘Kommunitarismus’ in der Sicht der Diskursethik. Worin liegen die ‘kommunitarischen’ Bedingungen der Möglichkeit einer post-konventionellen Identität der Vernunftperson?”, in M. Brumlik und H. Brunkhorst (Hg.), *Gemeinschaft und Gerechtigkeit* (Frankfurt: Fischer Vlg. 1993), p. 172.

Inside the Union, the systemic language will necessarily continue to prevail over the language of political morality and the public sphere. It is false to assume that this “thin” sense of European identity could eventually support the establishment of the “thick” European people supporting the idea of the European federal statehood. The European citizenry will hardly transform into a sovereign with both symbolic and real power to support the establishment of supreme political and legislating authority in federal Europe. The system and networks of the EU cannot inspire such identity and its constituted protection of civil rights is far too weak to create political solidarity and the “we-feeling” of a “thick” political community.

The European Union and identity are “essentially contested projects”⁸³ and have to be perceived as open-ended processes which are principally future-oriented and must respect the continent’s pluralistic nature together with a complicated system of hierarchies which exceed the scope of the member states. The European identity can emerge only as a symbolic space of heterogeneity, permanent contestation of existing practices, compromise-oriented negotiations and the conversational model of politics. In this model, the Kantian abstract ideas of cosmopolitanism and universal republicanism must be accompanied by political realism inspired rather by the philosophy of David Hume and based on the recognition of existing political practices, beliefs and customs. Drawing on these two intellectual legacies, it is possible both to keep the vision of a European political community identified with the concepts of civil rights and democratic virtues and respect political and cultural diversity of the continent.

⁸³ See Bankowski and Christodoulidis, *op. cit.* n. 36, p. 341.

9. An Evolutionary Approach to the Constitutionalism of an Enlarged EU: Why will Cognitive and Cultural Boundaries Matter?

Daniela Piana*

“Laws, in their most general signification, are the necessary relations arising from the nature of things. In this sense all beings have their laws . . . We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as for instance if human societies existed it would be right to conform to their laws.”¹

1. INTRODUCTION

Several different perspectives have been put forward in order to reach a better understanding of European constitution making and, at the same time, of constitution making processes that have occurred in the Central and Eastern European countries (CEEC). In this chapter, I will address the impact enlargement has had on the European constitution-making process by analyzing three main issues.² The first relates to questioning the empirical adequacy of models provided by the social sciences to study the interaction between constitutionalisation and the enlargement of the EU. The second is concerned with the capacity of these very models to grasp the essence of the normative validity of constitutional rules. I will argue that the models proposed are inadequate in explaining and shaping (through policy making and the institutional building in the CEECs) the constitutional rules of new Member States. I will propose a mode of analysis which, in my view, transcends the limitations of the above mentioned models, as it is better equipped to detect the

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¹ Charles de Secondat Montesquieu, *De l'esprit des lois* (1748) (Paris: Flammarion, 1979), p. 4.

² For an overall analysis of the impact of the various normative sources on domestic systems see Rein Mullerson *et al* (eds.), *Constitutional Reform and International Law in Central and Eastern Europe* (The Hague: Kluwer Law International, 1998) and, for a more specific view on enlargement, Alfred Kellerman *et al* (eds.), *EU Enlargement. The Constitutional Impact at the EU and at the National Level* (The Hague: Asser Institute, TMC, 2001).