Revus
Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava

12 | 2010
Sodno ustvarjanje prava

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OpenEdition Journals

Electronic version
URL: http://journals.openedition.org/revus/131
DOI: 10.4000/revus.131
ISSN: 1855-7112

Publisher
Klub Revus

Printed version
Date of publication: 10 June 2010
Number of pages: 35-56
ISSN: 1581-7652

Electronic reference
Armin von Bogdandy, « Founding Principles of EU Law », *Revus* [Online], 12 | 2010, Online since 01 June 2012, connection on 30 April 2019. URL : http://journals.openedition.org/revus/131 ; DOI : 10.4000/revus.131

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Founding Principles of EU Law

A Theoretical and Doctrinal Sketch

The article provides the groundwork for the constitutional law approach to EU legal scholarship. It stresses the special role of the basic principles of the EU legal order, explaining their dimensions, foundations and their functions. First of all, legal principles play a special role in ordering the legal material into a meaningful whole, a function the author entitles doctrinal constructivism. Furthermore, they can supply arguments for the creative application of the law and can at the same time help to maintain and further legal infrastructure. The author also explains their legal and integrative aspects and their constitutional characteristics and illustrates their significance for establishing unity of EU law in light of heterogeneous primary law. The article has previously been published in German (*Europarecht* 2009/6, 749-768) and English (*European Law Journal* 16 (2010), 95-111). The author would like to thank Maja Smrkolj and Christian Wohlfahrt for their support in finalizing the article; and Jürgen Bast, Jochen von Bernstorff, Iris Canor, Pedro Cruz Villalón, Philipp Dann, and Michelle Everson for their valuable comments.

Keywords: European Union, constitutional law, basic principles, constitutional theory, functions of legal scholarship

1 INTRODUCTION

The study of principles is a well established way of legal scholarship striving for autonomy and searching for a disciplinary proprium behind the multifariousness of norms and judgments.[1] Hence, there is no dearth of exquisite commentaries, monographs and handbooks on principles of EU law.[2] This article seeks to further

1 Seminal Immanuel Kant, *Kritik der reinen Vernunft*, Riga, Hartknoch, 2nd edn, 1787, Edition B, 355 *et seq*, esp 358.

2 See, within the extensive literature, the still prominent perspective of *common or general* principles: Ulf Bernitz and Joakim Nergelius (eds), *General Principles of European Community Law*, Den Haag, London and Boston, Kluwer Law International, 2000; Xavier Groussot, *General Principles of Community Law*, Groningen, Europa Law Publishing, 2006; Takis Tridimas, *The General Principles of EU Law*, Oxford, Oxford University Press, 2006; Ricardo Gosalbo Bono, 'The Development of General Principles of Law at National and Community

the understanding of the European legal discourse on such principles, illuminating its dimensions, foundations and functions (see section 2). Further, it analyses the diffuse use of the term 'principle' in EU law. With reference to a political act, the codification of Article 6(1) EU by the Amsterdam Treaty, it then defines as *founding principles* those norms of primary law which, in view of the need to legitimise the exercise of any public authority, determine the general legitimatory foundations of the EU (see section 3). Finally, the viability of a comprehensive doctrine of principles for EU law *and* Community law is debated (see section 4).

2 THEORETICAL ISSUES REGARDING THE EU'S FOUNDING PRINCIPLES

2.1 A Founding Principles and Constitutional Scholarship

This article understands European *primary* law as *constitutional* law. Applying the category of *constitutional law* to European primary law certainly needs to be justified, not least because of the failure of the Treaty establishing a Constitution for Europe. As a scholarly concept, however, it does not require the blessing of politics, and the European Council cannot authoritatively decide whether the Treaties on which the EU rests are of a 'constitutional character'.[3] In addition, what the European Council makes out to be a 'constitutional concept' is hardly relevant from the perspective of legal research. According to the Council's conclusions the constitutional concept of the constitutional Treaty 'consisted in repealing all existing Treaties and replacing them by a single text called

Level', in Rainer Schulze and Ulrike Seif (eds), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft*, Tübingen, Mohr Siebeck, 2003, 99–142; from the perspective of *constitutional* principles, see Bengt Beutler, in Hans von der Groeben and Jürgen Schwarze (eds), *Kommentar zum EU-/EG-Vertrag*, Baden-Baden, Nomos, 2003, Art 6 EU; Christian Calliess, in Christian Callies and Matthias Ruffert (eds), *EUV/EGV*, München, Beck, 2007, Art 6 EU; Meinhard Hilf and Frank Schorkopf, Art 6 EU as well as Ingolf Pernice and Franz Mayer, Nach Art 6 EU, both in Christoph Grabitz and Meinhard Hilf (eds), *Das Recht der EU*, München, Beck, looseleaf, last update May 2008; Stelio Mangiameli (ed), *L'ordinamento Europeo: I principi dell'Unione*, Milano, Giuffrè, 2006; Joël Molinier (ed), *Les principes fondateurs de l'Union européenne*, Paris, Presses Universitaires de France, 2005; Hartmut Bauer and Christian Calliess (eds), *SIPE 4: Constitutional Principles in Europe*, Athens, Sakkoulas, 2008.

3 'The TEU and the Treaty on the Functioning of the Union will not have a constitutional character', European Council, 21/22 June 2007, Presidency Conclusions (11177/1/07 REV 1), Annex I: IGC Mandate, para 3, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/94932.pdf (accessed 29 January 2009). On the differences between the Treaty establishing a Constitution for Europe of 2004 and the Lisbon Treaty, see Grainne de Burca, 'General Report', in Heribert Franz Köck *et al* (eds), *Preparing the European Union for the Future, FIDE XXIII Congress Linz 2008*, Baden-Baden, Nomos, 2008, 385–406, 391 *et seq*.

"Constitution"'.[4] In this view, neither Germany (Basic Law or *Grundgesetz*) nor Austria would have a constitution.[5] Furthermore, no relevant actor challenges the jurisprudence of the ECJ[6] that conceived the EC Treaty as a 'constitutional charter'.[7]

Approaches in legal scholarship like the constitutional law approach must be assessed on the basis of scholarly arguments. Certainly, the constitutional law approach demands supportive elements in its object of investigation. These are not in short supply. The primary law justifies the exercise of public power, it legitimises acts of the EU, it creates a citizenship, it grants fundamental rights, and it regulates the relationship between legal orders, between public power and the economy, and between law and politics. Numerous common elements of EU primary law and national constitutions emerge in a functional comparison. Yet, not only the functions but also the 'semantics' support a constitutional law approach: the Treaty of Amsterdam provided in Article 6(1) EU (now Article 2 EU-Lisbon) the key concepts of constitutional discourse: freedom, democracy, rule of law, protection of fundamental rights. Correspondingly, the constitutional *semantics* of the ECJ have just taken a big step with the terms 'constitutional principle' and 'constitutional guarantee'.[8]

The constitutional interpretation is an *academic postulate* which is to be judged by its analytical, constructive, and normative merits. Thus the task of a doctrine of European founding principles is also to prove the usefulness of the constitutionalist approach. The thesis is that primary law's constitutional character[9] manifests itself especially clearly in the founding principles. Their academic development as *constitutional* principles generates insight since this perspective leads to the relevant questions, knowledge and discourses. The conception of primary law as constitutional law defines it as the framework for political struggle, thematises foundations, aims at self-assurance, mediates between societal and legal discourses.[10]

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4 *Ibid*, para 1; according to the German government this would include the symbols and the denomination 'European law', *Denkschrift der Bundesregierung zum Vertrag von Lissabon vom 13 Dezember 2007* [Memoir of the Federal Government concerning the Treaty of Lisbon of 13 December 2007], cited after *Bundesrat Drucksache* 928/07, 133, 134.

5 On the more than 100 Austrian federal constitutional laws, see Ewald Wiederin, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Österreich', in Armin von Bogdandy *et al* (eds), *Handbuch Ius Publicum Europaeum,* Heidelberg, C. F. Müller, 2007), vol I, § 7, paras 44 *et seq*.

6 ECJ, Case 294/83, *Les Verts/Parlament*, Slg. 1986, ECR 1339, para 23; Opinion 1/91, *Agreement relating to the creation of the European Economic Area I* [1991] ECR I-6079, para 21.

7 For a similar view, see Michael Dougan, 'The Treaty of Lisbon 2007', (2008) 45 *Common Market Law Review* 617–703, 698.

8 ECJ, Cases C-402/05 P and C-415/05 P, *Kadi v Council* [2008] ECR I-0000, paras 285, 290.

9 Opinion 1/91, *op cit* n 6 *supra*, para 21.

10 Philipp Dann, 'Überlegungen zu einer Methodik des europäischen Verfassungsrechts', in Y. Becker *et al* (eds), *Die Europäische Verfassung – Verfassungen in Europa*, Baden-Baden, Nomos, 2005, 161–186 at 167.

At the same time, this approach pursues a strategic academic objective. The development of European constitutional law into a sub-discipline demands a specific *focus*,[11] just as the development of European law[12] and then European Community law[13] into sub-disciplines did previously. The treatment of primary law as constitutional law should bring about a new quality of understanding and exposition and promote the overcoming of understandings like 'law of integration' or 'single market law'.[14] A doctrine of principles not only observes, it is also part of the process of constitutionalisation. This leads to the next point.

2.2 Three Functions of a Legal Doctrine of Principles

Legal doctrines of principles are, in general, part of discourses internal to law, ie operations of the legal system. Such scholarship differs from approaches analysing the legal material from a social science perspective which for instance trace the factual constraints or motives affecting the law. A principles-oriented scholarship does not claim to prove causalities.[15] It does not deal with empirical *causes*, but with argumentative *reasons*; *causes* and *reasons* relate to different cognitive interests and structures of argumentation.

Rather, there are correlations with legal philosophy which nowadays often argues based on principles.[16] The relationship between the principles discourse in legal philosophy and in legal doctrine is as blurred as it is complicated. The difference cannot lie in the principles as such: they always include democracy, the rule of law, fundamental rights, etc. One difference is that a philosophical discourse on principles can proceed deductively, whereas a legal discourse on principles has to be linked to the positive legal material made up of legal provisions and judicial decisions; it is hermeneutical and refers to the law in force. A procedural difference lies in the fact that a juridical conception of principles

11 A separate journal has existed since 2005, the *European Constitutional Law Review*. Compare further the approach in international law: Stephan Kadelbach and Thomas Kleinlein, 'International Law a Constitution for Mankind? An Attempt at a Re-appraisal with the Analysis of Constitutional Principles', (2007) 50 *German Yearbook of International Law* 303–347.

12 Hermann Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl', (1951–1952) 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1–45 at 23 *et seq*.

13 Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr, 1972), 4 *et seq*.

14 Francis G. Snyder, 'General Course on Constitutional Law of the European Union', in Academy of European Law (ed), *Collected Courses of the Academy of European Law*, Oxford, Oxford University Press, 1998, vol VI, 41–155 at 47 *et seq*; Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, Harlow, Longman, 2002.

15 Broader the sociological term whereby principles encompass empiric, causal and normative axioms, Stephen D. Krasner, 'Structural Causes and Regime Consequences', (1982) 36 *International Organization* 185–205, at 186.

16 Framing the discourse, see J, Rawls, *A Theory of Justice*, Oxford, Clarendon Press, revised edn 1999, first edn 1972, 52; Ronald Dworkin, *Taking Rights Seriously*, London, Durckworth, 1977, 22 *et seq*; J. Habermas, *Between Facts and Norms*, Cambridge, Polity Press, reprint 2008, 132, 168 *et seq* and 197.

must eventually assert itself in judicial proceedings. Moreover: important as it is that the principles constructed by legal scholarship reflect their possible philosophical bases, it is as essential that, in pluralistic societies, the legal principles keep their distance to philosophical and ideological discourses in order to remain potential projection screens for similar, but factually divergent constructs. Philosophical considerations are inappropriate in court judgments.

2.2.1 Doctrinal Constructivism and its Limits

The first doctrinal thrust of constitutional scholarship aims at identifying the principles inherent in the positive legal material, thus to organise the latter and to further the coherence of the constitutional material on this basis.[17] Coherence is 'weaker than the analytic truth secured by logical deduction but stronger than mere freedom from contradiction'.[18] The criterion of coherence demands a modeling which is sometimes described, with somewhat essentialistic enthusiasm, as a 'grand structural plan'.[19] The ECJ makes use of this approach in important decisions when it refers to the 'spirit'[20] or the 'nature'[21] of the Treaties. The Supreme Court of Canada has formulated this understanding in an exemplary fashion:

The constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution … . Those principles must inform our overall appreciation of the constitutional rights and obligations … .[22]

Certainly, the assumption of a 'grand structural plan' is as problematic from an epistemological and argumentative viewpoint as are statements on the 'spirit' or 'nature' of a legal order. Nevertheless, the truth is that an idea of the whole is indispensable,[23] and this article aims to convey such an idea via a synopsis

17 Dann, *op cit* n 10 *supra*, 183 *et seq*.

18 Habermas, *op cit* n 16 *supra*, 211.

19 Gunnar Folke Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung*, Baden-Baden, Nomos, 2000, 28 at 39; concerning 'guiding visions', see Uve Volkmann, 'Verfassungsrecht zwischen normativem Anspruch und politischer Wirklichkeit', (2008) 67 *Veröffentlichungen der Vereinigung der Deutscher Staatsrechtslehrer*, 57–128 at 67 *et seq*.

20 Case 26/62, *Van Gend en Loos* [1963] ECR 1 at 13; Case 294/83, *Les Verts v Parliament* [1986] ECR 1339, para 25.

21 Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357, para 35.

22 Reference re Secession of Quebec, [1998] 2 SCR 217 (Can), to question 1; akin *Entscheidungen des Bundesverfassungsgerichts* 34, 269 at 287 (*Soraya*).

23 For more detail, see Friedrich Müller and Ralph Christensen, *Juristische Methodik: Bd II Europarecht*, Berlin, Duncker & Humblot, 2007, paras 349 *et seq*.

of founding principles. The respective role of legal scholarship can be labeled *doctrinal constructivism*.[24]

Given the scepticism towards doctrine in the Anglo-Saxon world, this approach shall be briefly sketched. Initially, ie in the late 19th and early 20th century, the agenda of *doctrinal constructivism* aimed primarily at structuring the law using autonomous concepts, following the legal-conceptual (*begriffsjuristisch*) stream of Friedrich Savigny's historical school of law. The positive legal material is being transcended, not by way of political, historical, or philosophical reflection, but through structure-giving concepts such as *state*, *sovereignty*, or *individual rights in public law*, which are conceived of as *specifically legal* and, thus, autonomous, which as a consequence fall under the exclusive competence of legal scholarship. The highest scientific goal of the doctrinal construction is to reconstruct and represent both public and private law as complexes of systematically coordinated concepts. At the heart of these efforts lies the creation of an autonomous area of discourse and argumentation, a sort of middle level between natural law, which is primarily within the competence of philosophy and theology, and the concrete provisions of positive law, which are in the direct grasp of politics and the courts.[25] In the course of the formation of substantive constitutional law and of the post-positivistic development of the original programme, constitutional principles have increasingly assumed the role of these autonomous concepts.[26]

For the programme of a holistic legal scholarship, ie a 'system' or an 'overarching conception', founding principles in European law are of particular importance, since a legal-conceptual approach has hardly developed beyond an organising exegesis of the ECJ, not least due to the sometimes tumultuous development of primary law. Nevertheless, the founding principles did not play this role from the beginning. At the beginning of the integration, the Treaties' objectives were at the centre of efforts to develop an 'overarching conception'.[27] In the course of the multiplication of these objectives this approach, however,

24 For more detail, see Armin von Bogdandy, 'Wissenschaft vom Verfassungsrecht: Vergleich', in *ibid et al* (eds), *Handbuch Ius Publicum Europaeum*, Heidelberg, C. F. Müller, 2008, vol II, § 39.

25 Julius H. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, Freiburg, Haufe, 1848, reprint 1990, 29, thus justifies the uselessness of jurisprudence as a science.

26 From the perspective of classic positivism, this is of course a story of decline, for a concise account, see Niklas Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main, Suhrkamp, 1993, 521 *et seq*. Further concretion is achieved through so-called 'legal artefacts', typical subjective rights or property, for instance; for more detail, see Ute Mager, *Einrichtungsgarantien*, Tübingen, Mohr Siebeck, 2003, in particular 21 *et seq* and 98 *et seq*. They are quite independent from positive law; however they can hardly be found in the law of the EU. This demonstrates the operational weakness of the doctrine of EU law.

27 Carl F. Ophüls, 'Die Europäischen Gemeinschaftsverträge als Planverfassungen', in Joseph H. Kaiser (ed), *Planung I* (Nomos, 1965), 229 at 233; Ipsen, *op cit* n 13 *supra*, 128 *et seq*.

lost its persuasiveness, which is confirmed by the abolition of the specific goals of Articles 2 *et seq* EC by the Lisbon Treaty (Article 3 TEU-Lisbon). A principle-oriented approach seems a useful alternative.

The doctrinal constructivist endeavour appears to be particularly pressing with regard to European primary law. Its qualification as 'constitutional chaos' is probably its best-known description.[28] Of course the Treaty of Lisbon achieves a certain degree of systematisation, but it does not render futile academic efforts. Moreover, this principle-oriented scholarship does not only deal with primary law. The process of constitutionalisation requires that the constitution 'permeate' all legal relationships.[29] A respective constitutional arrangement of the secondary law material demands a doctrinal constructivism for which, as the national examples show, constitutional principles and in particular single fundamental rights are indispensable. Numerous secondary law instruments downright call for this as they are to be interpreted in the light of founding principles, especially single fundamental rights, according to their recitals. Accordingly, the ECJ uses the conformity with primary law as a method of interpretation.[30] The Charter of Fundamental Rights confirms this constitutionalisation, conveying a constitutional dimension to numerous interests.

All this requires a sustainable concept of doctrinal constructivism. A doctrinal construct can only propose *one* and not *the* system of positive law. In the past, a *system* was often crypto-idealistically believed to be inherent in the law and was sometimes *dogmatically* advanced as the single truth. This academic programme has been characterised as undemocratic or elitist;[31] this criticism needs to be accommodated. In the light of this criticism, contemporary endeavours should be directed towards the more humble goal of proposing means to arrange the legal material and develop the law. Hardly any legal scholar still maintains today that doctrinal constructs reflect a pre-stabilised logical unity of the primary law or the *one* philosophy of integration of the Treaties. In particular, a constitutional doctrine must furthermore be aware of the danger of over-determining the political process. An awareness of the limits of the aca-

28 Deidre Curtin, 'The Constitutional Structure of the Union', (1993) 30 *Common Market Law Review* 17–69 at 67; the term was coined by Jürgen Habermas, *Die neue Unübersichtlichkeit*, Frankfurt am Main, Suhrkamp, 1985.

29 For an early account, see G.F.W. Hegel, *Rechtsphilosophie*, Frankfurt am Main, Suhrkamp, 1821, ed Moldenhauer and Michel from 1970, § 274.

30 Case C-314/89, *Rau* [1991] ECR I-1647, para 17; Case C-98/91, *Herbrink* [1994] ECR I-223, para 9; Cases C-465/00, C-138/01 and C-139/01, *ORF* [2003] ECR I-4989, para 68; Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras 61 *et seq*, 104 *et seq*.

31 Seminal Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Aalen, Scientia Verlag, 2nd reprint of the 2nd edn of 1929, 1981), 23; *ibid*, *Der soziologische und der juristische Staatsbegriff*, Aalen, Scientia Verlag, 2nd reprint of the 2nd edn of 1928, 1981); Michelle Everson, 'Is it just me, or is there an Elephant in the Room?', (2007) 13 *European Law Journal* 136–145; Jo Murkens, 'The Future of Staatsrecht', (2007) 70 The Modern Law Review 731–758.

demic claim to truth is especially necessary for constructions based on principles, due to the openness of the stock of principles in general, to the semantic openness of single principles, to the openness of which principle prevails in cases of conflict.[32] Similarly reduced are the expectations as to what a system can concretely accomplish in the operation of the law. A doctrine of principles as the result of doctrinal construction can moreover not be identical with legal practice. This is no insufficiency but rather proof of the critical content of a doctrinal construction. The project of a critical legal scholarship can also be pursued with doctrinal instruments.

2.2.2 The Role of Legal Doctrine for Legal Practice

In the above-quoted statement by the Supreme Court of Canada, principles not only generate insight through order but also supply arguments for a creative application of the law. This practical orientation is also a feature of *doctrines* of principles, legal scholarship being a primarily practical (social) science according to the prevailing opinion. Principles have diverse functions in the application of the law.

Frequently, principles increase the number of arguments which can be employed to debate the legality of a certain act. In this respect, they can be described as *legal principles* which transcend *structural principles*. By enlarging the argumentative budget of the legal profession, principles strengthen its autonomy vis-à-vis the legislative political institutions. This happens mostly via a principle-oriented interpretation of a relevant norm, be it of primary or secondary law.[33] By employing principles, the onus of demonstration is often placed on the person arguing against the principle.[34] Sometimes, however, the ECJ makes things too easy: by simply characterising a provision as a principle it sometimes attempts to justify its wide interpretation and the narrow interpretation of a contradictory norm.[35] This is not convincing methodically, therefore, further

32 Concerning discourses of application, see Klaus Günther, *Der Sinn für Angemessenheit*, Frankfurt am Main, Suhrkamp, 1988, 300.

33 Concerning the principle-orientated interpretation of primary law, see Cases C-402/05 P and C-415/05 P, above n 8, para 303; further Case C-50/00 P, *Union de Pequeños Agricultores v Council* [2002] ECR I-6677, para 44; Case C-354/04, *Gestoras Pro Amnistía et al v Council* [2007] ECR I-1579, paras 51 *et seq*; Case C-355/04, *Segi et al v Council* [2007] ECR I-1657, paras 51 *et seq*; concerning the principle-orientated interpretation of secondary law, see Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras 70 *et seq*; Case C-305/05, *Ordre des barreaux francophones et germanophone* [2007] ECR I-5305, para 28.

34 For an instructive case, see Case C-361/01 P, *Kik v HABM* [2003] ECR I-8283, para 82, where the ECJ rejects a principle; on this, see Franz Mayer, 'Europäisches Sprachenverfassungsrecht', (2005) 44 *Der Staat* 367–401 at 394; this article at the same time demonstrates how legal principles can be generated by legal scholarship.

35 Eg the principle of a common market: Case 7/61, *Commission v Italy* [1961] ECR 317 at 329; Case 113/80, *Commission v Ireland* [1981] ECR 1625, para 7.

arguments are necessary.[36] At times, a principle even becomes a legality standard of its own.[37] A doctrine of principles must examine the relevant patterns of argumentation and develop general aspects and new understandings. The wide range of application of principles and their validity in different legal orders for instance allows for the generalisation of innovative local strategies to concretise principles. Yet at the same time, legal scholarship should highlight the costs of such an autonomisation, for example in light of the principle of democracy.

Finally, it should be noted that there is one function that a legal doctrine of principles *cannot* usually fulfil: to delimit right and wrong in a concrete case. This is a result of the general vagueness of principles; the conflict usually arising when different principles are applied to concrete facts is another reason. The solution to a conflict of principles cannot be determined either scientifically or legally, it can only be structured.

2.3.2 Maintenance and Development of a 'Legal Infrastructure'

The constructive and the practical element converge in a function of doctrinal constructivism which can be labeled as 'maintenance of the law as social infrastructure'. First of all, this refers to the creation and safeguarding of legal transparency,[38] which is of particular importance in the EU's fragmented legal order. Furthermore, the 'infrastructure maintenance' function of legal scholarship is not static but demands participation in the development of the law to keep it in line with changing social relationships, interests and beliefs. In this respect, principles can fulfil the function of 'gateways' through which the legal order is attached to the broader public discourse. This attachment is of particular importance for the EU's primary law, given the ponderousness of the procedure of Article 48 EU. For this reason too, doctrinal work should not be restricted to the analysis of the positive law but also aim at its propositive development.

Constitutional principles enable an internal critique of the positive law, the pronouncement of which is a core function of constitutional law scholarship and which aims at the development of the positive law, be it via the jurisprudential or the political process. They promote the transparency of legal argumentation, are gateways for new convictions and interests, can be agents of universal reason against local rationalities. This criticism differs from general political criticism since it is phrased in legal terms, is closely connected to the previous operation of the law and can thus be absorbed by the law more easily. Title I

36 Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, Berlin, Springer, 1995, 175 *et seq*; convincing Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, EC Measures Concerning Meat and Meat Products (Hormones), para 104.

37 For more detail, see Tridimas, *op cit* n 2 *supra*, 29 *et seq*.

38 Schuppert and Bumke, *op cit* n 19 *supra*, 40.

of the EU Treaty in its previous as well as in the Lisbon version calls for such a critique due to its manifesto character.

2.3 Perspectives of Legal and Integration Policy

Principles enable an autonomous legal discourse, strengthen the autonomy of courts vis-à-vis politics and allow for an internal development of the law which circumvents Article 48 EU. Is this acceptable in light of the principle of democracy? The answer to this question has to distinguish between jurisprudence and legal scholarship. For the latter, it needs to be kept in mind that doctrinal constructions are no source of law but are only of propositive nature. Moreover, legal scholarship can invoke academic freedom,[39] and thus far Max Weber's insight that only a conceptualised and thus rationalised legal order can adequately structure social and political processes in complex societies has not been refuted. From this follows a functional legitimisation of this academic approach.[40] Nevertheless, legal scholarship should not be blind to the possible consequences of its constructions. Particular attention needs to be paid to the *problematique* of the development of the law through judicial practice, courts being the most important addressees of doctrinal constructivism.

Regarding the use of principles by courts, it needs to be noted that all contemporary law is *positive law*. Positivity implies the domain of politically responsible bodies:[41] the law is made by the legislator or is—in common law systems or other cases of judicial development of the law—under his responsibility; the legislature can correct a legal situation resulting from judicial development of the law.[42] The judicial development of a body of law which can only be modified by the legislator under qualified requirements is thus critical and a standard topic of constitutional scholarship.[43] However, it is generally recognised that some judicial development of the law flows from and is justified by the assignment given to courts to adjudicate; it is mostly its limits which are being de-

39 Compared to the German Basic Law (*Grundgesetz*), its protection on the European level is not as far-reaching, see Jean-Christophe Galloux, in Laurence Burgorgue-Larsen *et al* (eds), *Traité établissant une Constitution pour l'Europe*, Brussels, Bruylant, 2005, vol II, Art II-73, para 12.

40 Max Weber, *Wirtschaft und Gesellschaft*, Tübingen, Mohr Siebeck, 1972, 825 *et seq*.

41 Ernst-Wolfgang Böckenförde, 'Demokratie als Verfassungsprinzip', in *ibid* (ed), *Staat, Verfassung, Demokratie*, Frankfurt am Main, Suhrkamp, 1991, 289 at 322.

42 Concerning common law, see Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law*, Oxford, Clarendon, 1991, 141 *et seq*.

43 Alexander M. Bickel, *The Least Dangerous Branch*, Indianapolis, Bobbs-Merrill, 1962; for a study of comparative law see Ulrich Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Misstrauen*, Berlin, Duncker & Humblot, 1998; on the ECJ from an internal perspective, see Klaus-Dieter Borchardt, 'Richterrecht durch den Gerichtshof der Europäischen Gemeinschaften', in Albrecht Randelzhofer *et al* (eds), *Gedächtnisschrift für Professor Dr. Eberhard Grabitz*, München, Beck, 1995, 29.

bated.[44] Accordingly, the ECJ outlines its competence to develop the law with respect to the Treaty amendment procedure.[45]

Another argument for the legal conceptualisation of political and social conflicts as conflicts of principles is that this may lead to their channelling and perhaps even rationalisation. Moreover, principles can play a supporting role for democratic discourses.[46] In addition, a judicial decision which employs the balancing of principles is more intelligible for most citizens than a 'legal-technical' reasoning phrased in hermetic language which obscures the valuations of the court. To devise legal controversies as conflicts of principles allows for a politicisation which should be welcomed in light of the principle of democracy, since it promotes the public discourse on judicial decisions.

Principles such as primacy and direct effect form the key to the constitutionalisation of the Community law.[47] If the discussion on founding and constitutional principles is nevertheless a rather recent phenomenon, this is to be explained by the history of integration. The path to integration has not been constitutional, but rather functional. The objectives were determined by the Treaties with sufficient clarity, allowing the European discourse to unfold in a pragmatic and administrative manner, unburdened by politic-ethical arguments.[48] This orientation decisively influenced the jurisprudential construction. The federal conception failed to gain a larger following in legal scholarship; economic law approaches and administrative law approaches were—at least in Germany—much more successful. The ECJ only slowly developed principles limiting the power of the Community.[49] As late as 1986, Pierre Pescatore ascertained that although the principles of proportionality, good administration, legal certainty, the protection of fundamental rights or defence rights existed, they amounted to '*peu de chose*', '*où on peut mettre tout et son contraire*'.[50] This was to change profoundly. Due to the single market programme and the Maastricht Treaty, the debate about European founding and constitutional

44 On judicial development of the law by the ECJ, see *Entscheidungen des Bundesverfassungsgerichts* 75, 223 at 243.

45 However only in those cases where the denial of a proposed judicial development of the law seemed to suit the court well, Opinion 2/94, *EMRK* [1996] ECR I-1759, para 30 and Case C-50/00 P, *op cit* n 33 *supra*, para 44; Case C-263/02 P, *Commission v Jégo-Quéré* [2004] ECR I-3425, para 36.

46 Larry Siedentop, *Democracy in Europe*, London, Allen Lane, 2000, 100.

47 Seminal Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *American Jorunal of International Law* 1–27.

48 On the different formations of discourses see Habermas, *op cit* n 16 *supra*, 159 *et seq*.

49 Pierre Pescatore, *Le droit de l'intégration*, Leiden, Sijthoff, 1972, 70 *et seq*; Helmut Lecheler, *Der Europäische Gerichtshof und die allgemeinen Rechtsgrundsätze*, Berlin, Duncker & Humblot, 1971.

50 Pierre Pescatore, 'Les principes généraux du droit en tant que source du droit communautaire', in *ibid* (ed), *Études de droit communautaire européen 1962–2007*, Brussels, Bruylant, 2008, 691.

principles unfolded quickly.[51] It resulted in Article 6 of the Amsterdam Treaty of 1997 (Article 2 TEU-Lisbon) which forms the most important positive basis of European founding principles.

Lastly, the role of a doctrine of principles in promoting a common understanding of the EU among its citizens and the formation of a European background consensus on the operation of the European institutions shall be outlined. Certainly, a doctrine of principles developed by legal scholarship cannot directly trigger the creation of an identity for broad parts of the population.[52] Yet it can be understood as a part of a public discourse through which the European citizenry ascertains the foundations of its polity.

In this discourse on the politics of integration, principles can assume an ideological function. A depiction of the EU in the light of principles certainly has such a potential.[53] The Treaty of Lisbon is problematic in this respect as it presents the founding principles of the EU as 'values' and thus as an expression of the ethical convictions of EU citizens (Article 2 TEU-Lisbon). A legal doctrine of principles should be based on a better foundation than sociological assumptions regarding normative dispositions of EU citizens and should indicate the difference between law and ethics in light of the freedom principle.[54] Value discourses can easily acquire a paternalistic dimension.

3 CONSTITUTIONAL PRINCIPLES AND FOUNDING PRINCIPLES

3.1 Principles in European Law

The authors of the Treaties[55] like the term 'principle': it is employed remarkably frequently in most language versions. The English and the French versions

51 Jochen A. Frowein, 'Die Herausbildung europäischer Verfassungsprinzipien', in Arthur Kaufmann *et al* (eds), *Rechtsstaat und Menschenwürde*, Frankfurt am Main, Klostermann, 1988, 149–158; Jörg Gerkrath, *L'emergence d'un droit constitutional pour l'Europe*, Brussels, Editions de l'Universite de Bruxelles, 1997, 183 *et seq*; Joseph H.H. Weiler, 'European Neo-Constitutionalism', (1996) 44 *Political Studies* 517–533.

52 Franis G. Snyder, 'Editorial: Dimensions and Precipitates of EU Constitutional Law', (2002) 8 *European Law Journal* 315–318.

53 Koen Lenaerts, 'In the Union We Trust', (2004) 41 *Common Market Law Review* 317–343.

54 Erhard Denninger, 'Freiheitsordnung – Wertordnung – Pflichtordnung', in *ibid* (ed), *Der gebändigte Leviathan*, Baden-Baden, Nomos, 1990, 143–157 at 149. Illuminating the comparison with the US debate concerning *rights theory* versus *moral conventionalism*, see Paul Brest, 'The Fundamental Rights Controversy', (1981) 90 *Yale Law Journal* 1063–1109.

55 The term 'authors of the Treaties' characterises the Member States as a collective under Art 48 EU. On the term 'founding authority of the Community', see Case T-28/03, *Holcim v Commission* [2005] ECR II-1357, para 34; Case T-172/98, *Salamander et al v Parliament and Council* [2000] ECR II-2487, para 75.

of the previous version of the EU Treaty use it 22 times, those of the EC Treaty 48 times, according to the Treaty of Lisbon even 98 times altogether, and the Charter of Fundamental Rights employs 'principle' 14 times in its English and French versions. The context in which this term is used ranges from the principle of democracy (Article 6 EU-Nice) to the principles of national social security systems (Article 153 (4) TFEU); some principles are even to be laid down by the Council (Article 291 TFEU). In the German version, the word 'principle' appears far less frequently, only three times in the previous version of the EU Treaty and four times in the EC Treaty, mostly in connection with the subsidiarity principle. This atrophy of principles in the German version is due to the fact that instead of the English 'principle' or the French '*principe*', the German word '*Grundsatz*' is used; this also holds true for the German version of the Charter of Fundamental Rights.

The use of the word 'principle' in the Treaty text has attributive character. The Treaty maker thus assigns enhanced significance to the relevant element or even to whole provisions and provides orientation to the reader in a text which is difficult to penetrate. At the same time, a *principle* usually lays down *general* requirements, eg in Article 6(1) EU-Nice or Article 71(2) EC. The notion characterised as *principle* shall make statements on a *whole*, insofar as having a reflexive connotation. Furthermore, the Treaty maker often identifies as *principles* elements of a provision with a rather vague content, as even the principles for single topics such as those of Article 191(2) TFEU or Article 317 TFEU show.

In his influential theory, Alexy distinguishes between principles and rules and characterises the former as being optimisation commands which are subject to balancing.[56] This may be the reason why the Legal Service of the Council identifies the primacy of Community law in the German version as a 'fundamental pillar' in order to render it immune to balancing, whereas the English version uses the term 'cornerstone principle'.[57] However, the categorical differentiation between rules and principles underlying this theory is not altogether convincing and will not be used in this article to characterise principles.[58]

The qualification as principle as such does *not* trigger specific legal consequences. This can be demonstrated especially clearly by comparing Articles 23 and 52(5) of the EU Charter of Fundamental Rights. The equality imperative of Article 23 of the Charter is an enforceable principle of Community

56 For more detail, see Robert Alexy, *Theorie der Grundrechte*, Frankfurt am Main, Suhrkamp, 2006, 75 *et seq*.

57 European Council, Opinion of the Legal Service, Council Doc 11197/07, see further F. Mayer, 'Die Rückkehr der Europäischen Verfassung?', (2007) 67 *Zeitschrift für ausländisches öffetnliches Recht und Völkerrecht* 1141–1217 at 1153; concerning primacy as a principle, see Matthias Niedobitek, 'Der Vorrang des Unionsrechts', in *ibid et al* (eds), *Continuing the European Constitutional Debate*, Berlin, Duncker & Humblot, 2008, 63–104 at 65 *et seq*.

58 András Jakab, 'Prinzipien', [2006] *Rechtstheorie* 49–65.

law.[59] Article 52(5) of the Charter, on the other hand, explicitly distinguishes between enforceable rights and principles. The presumption of a missing overarching conception of the authors of the Treaty is confirmed by the rather fortuitous assignment of attributes such as *guiding* (Article 119(3) TFEU), *existing* (Article 47(2) EC), *basic* (Article 67(5) EC), *uniform* (Article 207(1) TFEU), *fundamental* (Article 340(2) TFEU), *general* (Article 340(2) TFEU) or *essential* (Article 2 of the Protocol on the Financial Consequences of the Expiry of the Treaty Establishing the European Coal and Steel Community and on the Research Fund for Coal and Steel). One has to analyse individually for every single use of the word 'principle' what legal consequences are attached to the norm, especially with regard to legal remedies and judicial review.[60]

The word 'principle' not only denotes a term of positive EU law but also of jurisprudential analysis. As explained in section 2.2, it is indispensable for the fulfilment of the tasks of legal scholarship. Nevertheless it is debated what exactly a 'principle' is; behind the term stand competing concepts of law.[61] This is rightly so since the definition of a jurisprudential term is not about truth but about expediency in view of the scientific objective. This brings us to the founding principles.

3.2 The EU's Founding Principles and their Constitutional Character

This article uses *founding principle* as a term of legal scholarship in order to identify and interpret, in the tradition of constitutionalism, those norms of primary law having a normative founding function for the whole of the EU's legal order; they determine the relevant legitimatory foundations in view of the need to justify the exercise of public authority.[62] In this respect, this understanding links up with the above-mentioned concept of principles in primary law: principles are special legal norms relating to the whole of a legal order. *Founding* principles as a sub-category express an overarching normative frame of reference for all primary law, indeed for the whole of the EU's legal order. This substantive conception of founding principles does not capture all norms

59 Settled case-law; cf Cases 117/76 and 16/77, *Ruckdeschel* [1977] ECR 1753, para 7.

60 For more detail, see Chris Hilson, 'Rights and Principles in EU Law', (2008) 15 Maastricht journal of European and comparative law 193–215 at 215.

61 Seminal Dworkin, *op cit* n 16 *supra*, 24 *et seq*; Alexy, *op cit* n 56 *supra*, 72 *et seq*; on the debate, see Riccardo Guastini, *Distinguendo: Studi di teoria e metateoria del diritto*, Torino, Giappichelli, 1996, 115 *et seq*; Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution*, Hague, Kluwer Law International, 1999, 39 *et seq*; Martti Koskenniemi, 'General Principles', in *ibid* (ed), *Sources of International Law,* Aldershot, Darthmouth, 2000, 359.

62 On the term '*principe fondateur*', see Molinier, *op cit* n 2 *supra*, 24; for a similar view, see Dworkin, *op cit* n 16 *supra*, 22.

or elements of norms labelled *principle* in the Treaties or by the ECJ, but only a few provisions which are also called *founding principles* or *structuring principles* in national constitutions.[63]

It is useful to understand the *founding* principles as *constitutional* principles and to deal with them accordingly.[64] The EU became a political Union in the 1990s. After long debates, in 1997 the authors of the Treaty founded the EU on 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' and thus on the core programme of liberal-democratic constitutionalism. This implies a decision for constitutional semantics which is now to be elaborated by constitutional doctrine.[65] The normative content of the indicative mode 'is founded' in Article 6(1) EU and corresponds to that of the indicative mode 'is' in Article 20(1) of the German Basic Law (*Grundgesetz*).[66]

A comparison with Article F of the EU Treaty in its Maastricht version illustrates the significance of the political decision of 1997. Article F is still formulated entirely from a limiting perspective underlying Article 6(3) EU right until today: Article 6(3) EU commits the EU to general principles of law which have no constitutive but only a *restrictive* function.[67] In 1997 the Treaty maker then laid down the normative core contents on which the EU is *founded* in Article 6(1) EU. In this respect, the constitutional content of the former Article 6(1) EU exceeds by far the constitutional dimension of the Maastricht Treaty. Now not only a restrictive, but also a constitutive European constitutionalism has found its recognition in positive law. The legal approach pursued here with its substantive notion of what a founding principle is spells out the political decision voiced in the Amsterdam Treaty that a European political Union is to be founded on the postulates of liberal-democratic constitutionalism.

Founding principles are thus the principles laid down in Article 6(1) EU-Nice (now Art. 2 TEU) as well as the other principles located in Title I EU regarding the allocation of competences, loyal cooperation and structural compatibility.

63 For more detail, see Horst Dreier, in *ibid* (ed), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2006, vol II, Art 20 (Einführung), paras 5, 8; Franz Reimer, *Verfassungsprinzipien*, Berlin, Duncker & Humblot, 2001, 26 *et seq*.

64 The ECJ too speaks of constitutional principles of the EC Treaty: Cases C-402/05 P and C-415/05 P, *op cit* n 8 *supra*, para 285. Cf on this the reflections in the introduction.

65 Beutler, in von der Groeben and Schwarze (eds), *op cit* n 2 *supra*, para 1; Pedro Cruz Villalón, *La constitución inédita*, Madrid, Editorial Trotta, 2004, 73, 143; Hans-Werner Rengeling and Peter Szczekalla, *Grundrechte in der Europäischen Union*, Köln, Heymanns, 2004, paras 92 *et seq*.

66 Art 6(1) EU is slowly becoming operative; on the principle-orientated interpretation of primary law, see Cases C-402/05 P and C-415/05 P, *op cit* n 8 *supra*, para 303.

67 Molinier, *op cit* n 2 *supra*, 29; cf the principles discussed by Tridimas and Groussot, *op cit* n 2 *supra*.

This approach is confirmed by Title I TEU-Lisbon with regard to the founding principles of the federal relationship between the EU and its Member States. Other principles of primary law do not belong to these overarching founding principles but serve to concretise them and thus derive constitutional content from them.

The tenets laid down in Article 2 TEU-Lisbon, although denoted as 'values', are to be understood as legal norms and principles, as founding principles. Usually, principles are distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms. Since the 'values' of Article 2 TEU-Lisbon have been agreed upon in the procedure of Article 48 EU and produce legal consequences (eg Articles 3(1), 7, 49 TEU-Lisbon), they are legal norms, and since they are overarching and constitutive, they are founding principles.[68] The use of the term 'value' in Article 2 TEU-Lisbon instead of 'principle', the obscure normative function of the second sentence of this article as well as the differences between the diverse formulations of the posited values[69] illustrate the remaining uncertainties concerning the identification of European founding principles.

Due to its analytical nature, the qualification of a norm as founding principle does not mean that other understandings would be excluded. There are formidable analyses of the same principles eg as administrative principles.[70] The constitutional and the administrative approach overlap with regard to supranational public law. One may ask why this study legally qualifies the founding principles as constitutional principles, but does not *designate* them as such. First, this is in line with the judicature: until recently, the ECJ has used the term 'constitutional principle' only for constitutional norms of the Member States.[71] In the *Kadi* decision, the term 'constitutional principle' figures prominently also with regard to Community law,[72] underlining the innovative force of this judgment. More common so far, however, is the denomination as *founding principle*.[73] But most of all, to employ the wide term of 'constitutional principle' for the principles presented here as founding principles would challenge the con-

68 On the difficulty related to the concept of 'values' see section II C.

69 Compare the third recital of the preamble to the EU Treaty and Art 6(1) EU with Art 2 TEU-Lis and the second recital to the preamble to the EU Charter for Fundamental Rights.

70 Giacinto della Cananea, 'Il diritto amministrativo europeo e i suoi principi fondamentali', in *ibid* (ed), *Diritto amministrativo europeo*, Milano, Giuffrè, 2006, 1 at 17 *et seq*.

71 Case C-36/02, *Omega* [2004] ECR I-9609, para 12; Case C-49/07, *MOTOE* [2008] ECR I-0000, para 12. Occasionally, an Advocate General uses this term for the law of the EU, AG Kokott in Cases C-387/02, 391/02 and 403/02, *Berlusconi* [2005] ECR I-3565, no 163.

72 Cases C-402/05 P and C-415/05 P, *op cit* n 8 *supra*, para 285.

73 Cases C-46/93 and C-48/93, *Brasserie du pêcheur* [1996] ECR I-1029, para 27; Case C-255/02, *Hailfax* [2006] ECR I-1609, para 92; Case C-438/05, *International Transport Workers' Federation* [2007] ECR I-10779, para 68; Case C-162/07, *Ampliscientifica* [2008] ECR I-0000, para 25.

stitutional character of other principles of primary law, something which is not the aim of this article.

In EU law, it has to be distinguished between principles, in particular founding principles, and objectives. The EU 'is founded' on principles (Article 6(1) EU-Nice, Article 2 TEU-Lisbon), and principles limit the actions of the Member States and the EU. Objectives, on the other hand, stipulate the intended effects in social reality. The conjunction of objectives and principles as for example in Article 3(1) TEU-Lisbon does not undermine this distinction. The separation of objectives of integration and constitutional principles is also suggested by the shortcomings of the functionalist approach to European integration.[74]

3.3 Principles of Public International Law

International public law scholarship operates with the term 'constitutional principle', too,[75] and the question arises whether general principles of public international law or principles of individual Treaties, in particular the UN Charter, the Human Rights Covenants or the WTO Agreement, must be included in an analysis of the EU's founding principles. Article 3(5) TEU-Lisbon can be understood in this sense. Furthermore international Treaties stand above the derived law according to Article 216(2) TFEU; this also applies to general principles of international law.[76]

However, a closer analysis of the jurisprudence shows that norms of international law, with the exception of the provisions of the European Convention on Human Rights,[77] do not play a decisive role for the exercise of public authority by the EU; consequently, they will not be addressed in this article. This basic decision is already expressed in the *Costa/ENEL* judgment: while the *Van Gend* judgment characterised the Community law as 'a new legal order of international law', ever since *Costa* the ECJ only speaks of a 'new legal order' *tout court*.[78] The prevailing understanding of European constitutionalism does not conceive of it as a sub-category of an overarching international constitutionalism.[79]

74 See section II C.

75 Kadelbach and Kleinlein, *op cit* n 11 *supra*.

76 Case C-162/96, *Racke* [1998] ECR I-3655, paras 45–51.

77 Note the refusal of direct effect concerning the UN Convention on the Law of the Sea in Case C-308/06, *Intertanko* [2008] ECR I-0000, paras 42 *et seq.*

78 See Cases C-402/05 P and C-415/05 P, *op cit* n 8 *supra*, para 316.

79 Jean d'Aspremont and Frédéric Dopagne, 'Two Constitutionalisms in Europe', (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 903–937.

4 UNIFORM FOUNDING PRINCIPLES IN VIEW OF HETEROGENEOUS PRIMARY LAW

4.1 Establishing Unity of Principle

The principles set forth in Title I EU are valid for the whole of EU law, i.e. the EU Treaty and the TFEU. Although this is unquestionable under Article 2 TEU-Lisbon, it was doubted under previous Treaties in particular with reference to the so-called 'pillar structure' of the Treaties (EC-Treaty, Title V and Title VI EU). In fact, Titles V and VI of the EU Treaty-Nice did not correspond in every respect to the so-called community method including supranationality, direct effect and comprehensive European judicial review. The special rules were an expression of important compromises in the context of the Treaty-making process which need to be taken seriously by legal scholarship. According to some scholars, however, the EU did not even exercise public authority. They maintained that 'in reality', the Member States and not the EU's organs operated under Title V and VI EU. Accordingly, a categorical differentiation would have to be made between Community law and the law of the EU. Acts of the Council under Title V and VI EU, for instance a framework decision, would not be acts of the EU, but an international agreement between the Member States.[80] An overarching doctrine of principles would thus be rather nugatory.[81]

There were, however, good reasons for conceiving the EU as one body of public authority and the law of the EU Treaty and that of the Community Treaties as a single legal order, delimiting it from the legal orders of the Member States on the one hand and from international law on the other hand. First of all, the organisational fusion shall be outlined. Since 1994, it was always the Council of the European Union which was named as the legislative organ in the legal acts under Title V and VI EU, never the Member States. Moreover, this unity was explicitly mandated for the founding principle of fundamental rights protection (Article 46(d) EU-Nice)[82] and could furthermore be based on provisions such as Article 1 or Articles 48 *et seq* EU-Nice.[83] Seen in this light, it is only consist-

80 Andreas Haratsch, Christian König and Matthias Pechstein, *Europarecht*, Tübingen, Mohr Siebeck, 2006, paras 79, 83; in the same vein, see also *Entscheidungen des Bundesverfassungsgerichts* 113, 273 at 301.

81 Matthias Pechtsein, in Rudolf Streinz (ed), *EUV/EGV*, München, Beck, 2003, Art 6 EU, para 2 *et seq*.

82 Concerning the uniformity of standards, see Case C-303/05, *Advocaten voor de Wereld* (European Arrest Warrant) [2007] ECR I-3633, para 45.

83 For more detail, see Armin von Bogdandy, 'The Legal Case for Unity', (1999) 36 *Common Market Law Review* 887–910; along similar lines, see Hermann-Josef Blanke, in Calliess and Ruffert (eds), *op cit* n 2 *supra*, Art 3 EU, paras 1, 3; Christoph Stumpf, in Jürgen Schwarze (ed), *EU-Kommentar*, Baden-Baden, Nomos, 2008, Art 3 EU, para 1.

ent that the ECJ expanded the scope of Community law principles to cover legal acts under Titles V and VI EU.[84]

The assumption of legal unity of EU law could also be justified through the principle of coherence which itself is based on the principle of equality. It constitutes the vanishing point for academic system-building—and thus unity-building—and enables a critique inherent to the law of diverging logics of regulation and lines of jurisprudence. It finds its positive foundations in the equality principle (Article 20 of the Charter) and provisions such as Articles 3(1) EU-Nice (13(1) TEU-Lisbon), 225(2) and (3) EC (256(2) and (3) TFEU.

4.2. Limits of a Unitarian Approach

Coherence is no principle with general primacy; there may be good reasons for divergence.[85] Assuming the legal unity of the EU's legal order does not amount to maintaining that the positive constitutional law or even the jurisprudence relating to it form a harmonious whole. The assumption of a legal order of the EU which included Community law as its main part thus does not deny the fact that a number of legal instruments of Community law could not be applied at all or only with restrictions under Titles V and VI EU. The general assertion is that Community law principles could be applied if this was compatible with the specific rules of the EU Treaty. Although the Treaty of Lisbon offers considerable progress regarding systematisation and reduces this fragmentation,[86] it does not overcome it, as the Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom illustrates.[87]

Even under the premise of a uniform *validity* of the founding principles, the question arises whether this corresponds to a uniform *meaning* in the various areas of EU law. For instance, the dual structure for democratic legitimation through the Council and Parliament only exists under the competences of the

84 For more detail, see Koen Lenaerts and Tim Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law', in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law*, Oxford, Oxford University Press, 2008, 495–531; Thomas Giegerich, 'Verschmelzung der drei Säulen der EU durch europäisches Richterrecht', (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 351–383. However, the ECJ occasionally describes EU and EC law as 'integrated but separate legal orders', see Cases C-402/05 P and C-415/05 P, *op cit* n 8 *supra*, para 202.

85 For more detail, see Filomena Chirico and Pierre Larouche, 'Conceptual Divergence, Functionalism, and the Economics of Convergence', in Prechal and van Roermund (eds), *ibid*, 463–495.

86 Rudolf Streinz *et al*, *Der Vertrag von Lissabon zur Reform der EU*, München, Beck, 2008, 33 *et seq*.

87 For suggestions on how to deal with this situation, see Dougan, *op cit* n 7 *supra*, 665 *et seq*; it is not that exceptional, see Alexander Hanebeck, 'Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber', (2002) 41 *Der Staat* 429–451.

TFEU, and judicial review by the ECJ, paramount for the rule of law principle, is limited or even precluded in important domains.

This gives rise to doubts about the usefulness of an overarching doctrine of principles. It might even nurture the suspicion that a doctrine of principles is not the product of scholarly insight, but rather a policy instrument for more integration and federalism. Yet these doubts and suspicions are unfounded. As the principles set forth in Article 6 EU-Nice (Article 2 TEU-Lisbon) applied to all areas of EU law, an overarching doctrine of principles built thereupon encompassing the entire primary law was a logical consequence. Article 6 EU essentially required its own expansion into a general doctrine of principles.[88] Article 6(1) EU declared that the EU is 'founded' on these principles; this contains an ambitious normative programme. The EU Treaty can therefore even be interpreted as a constitution stipulating criteria for the detection of deficits and guidelines to overcome them.[89]

An overarching doctrine of principles is thus possible. This basic objection being defeated, it might nevertheless appear problematic, in view of the fragmentation within primary law, to determine which provisions may be understood as concretising abstract principles. Theoretically, both the co-decision procedure under Article 294 EC as well as the Council's autonomous decision-making competence under the requirement of unanimity can be understood as realisations of the principle of democracy. This article, however, maintains that the supranational standard case, also called the *Community method*,[90] can justifiably be used for the development of a doctrine of EU principles. The Treaty of Lisbon confirms this thesis with the introduction of an 'ordinary legislative procedure' in Article 289 TFEU.[91] In general it is to be expected that under the Treaty of Lisbon, the founding principles of Article 2 TEU-Lisbon will be concretised in light of the enunciations of the EU Treaty, and that diverging rules in the TFEU will be treated as exceptions. In particular, in its Lisbon version, the EU Treaty contains elements of a manifesto-constitution which is executed by the Treaty on the Functioning of the European Union only inchoately. The

88 A similar concern can be found in Art 23(1) of the German Basic Law which secures the structural integrity.

89 Armin von Bogdandy, 'The Prospect of a European Republic', (2005) 42 *Common Market Law Review* 913–941 at 934 *et seq*.

90 Thus labelled in the Treaty establishing a Constitution for Europe; on this, see Christian Calliess, in *ibid* and Matthias Ruffert (eds), *Verfassung der Europäischen Union*, München, Beck, 2006, Art I-1 VVE, paras 47 *et seq*; on the community method, see Jürgen Bast, 'Einheit und Differenzierung der Europäischen Verfassung', in Becker *et al* (eds), *op cit* n 10 *supra*, 34–60 at 52 *et seq*.

91 In the same vein, see Case C-133/06, *Parliament v Council* [2008] ECR I-0000, para 63; concerning the new differentiation between parliamentary (co-) legislation and bare law-making; pathbreaking Koen Lenaerts, see for instance Sénat et Chambre des représentants de Belgique (eds), *Les finalités de l'Union européenne*, Brussels, Conseil, 2001, 14 at 15.

legal treatment of the resulting tensions should be guided by principles, even more so as specific rules are hardly available. The further constitutionalisation of Europe demands the normative illumination of the new EU Treaty, especially of its Titles I and II, and the development of hermeneutic and legal-political strategies for its implementation.

An understanding in the tradition of European constitutionalism as advocated here will strive to expand the idea underlying the EU Treaty in its Lisbon version of a representative constitution with separation of powers and fundamental rights protection to all areas and protocols. It will however *not* strive to expand the competences of the EU at the expense of the Member States or to override specific rules. An overarching doctrine of principles must not downplay sectoral rules which follow different rationales. To do otherwise would infringe upon an important founding principle: Article 4(2) EU in conjunction with Article 48 EU clearly shows that the essential constitutional dynamics are to remain under the control of the respective national parliaments.[92] An argumentation based on principles uncoupled from the concrete provisions of the Treaties would misunderstand essential elements of the EU's constitutional law: The EU Constitution is a constitution of details; this corresponds to the heterogeneity of its political and social basis.[93] The plethora of details expresses this diversity, but also the Member States' mistrust and desire for control.

5 OUTLOOK

This article has attempted to show that the principles of Article 2 EU (previous Article 6(1) EU-Nice) can be understood as constitutional principles and that a constitutional legal discourse based thereon is viable both from a theoretical and a technical legal point of view. It further confirms understanding and approaching ethical, political or economic conflicts as conflicts of principles, as this can serve to further one's insight and help to solve such conflicts.[94]

92 Opinion 2/94, *op cit* n 45 *supra*, paras 10 *et seq*; Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

93 Jean-Clause Piris, *The Constitution for Europe*, Cambridge, Cambridge University Press, 2006, 59. This certainly does not exclude streamlining and abstractions at many points, see Bruno De Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?', in M. Cremona and *ibid* (eds), *EU Foreign Relations Law*, Oxford, Hart, 2008, 3–15 at 7.

94 In the tradition of critical legal studies, such an approach is suspected of being Ideology, on this, see Günther Frankenberg, 'Der Ernst im Recht', [1978] *Kritische Justiz* 281–307; *ibid*, 'Partisanen der Rechtskritik', in Sonja Buckel *et al* (eds), *Neue Theorien des Rechts*, Stuttgart, Lucius & Lucius, 2006, 97–116; Duncan Kennedy, *Critique of Adjudication*, London, Harvard University Press, 2003; *ibid*, 'The Structure of Blackstone's Commentaries', (1979) 28 *Buffalo Law Review* 209–382; Roberto M. Unger, 'The Critical Legal Studies Movement', (1983) 96 *Harvard Law Review* 561–675.

However, it must be noted that legal principles cannot provide scientific solutions for such conflicts. This, however, does not rule out principle-based *proposals* for solutions by scholars who, owing to their systematic appreciation and their being unencumbered by the pressures of practice, have a specific role in the respective legal discourses.

Author's short biography

Armin von Bogdandy is a director of the Max-Planck-Institute for Comparative Public Law and International Law in Heidelberg and professor of public law, EU law and legal philosophy at the Johann-Wolfgang-Goethe University in Frankfurt/Main. Currently he has been appointed Senior Emile Noel Fellow at the New York University Global Law School for the period of 2010-2015. He is a member of the Scientific Committee of the EU Fundamental Rights Agency and president of the OECD Nuclear Energy Tribunal.