


“EU constitutionalism: the great simulator?”

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**PhD in Law
University of Edinburgh
2004**



To my family
To whoever embarks on troubled seas...

Declaration (Regulation 3.8.7)

I declare a) that this thesis has been composed by me, b) that the work is my own and c) that the work has not been submitted for any other degree or professional qualification.

Tania Kyriakou

Abstract

This thesis is a normative critique of EU constitutionalism. Its aim is not to expose the flaws of EU constitutionalism by reference to the templates of the nation state and our inherited constitutional vocabularies, but to articulate an internal, immanent critique, which will bring to the fore the internal contradictions of the EU constitutional order. The argument put forward in this thesis shows that the initial solely economic focus of the Community has influenced its gradual evolution into a political entity and has kept its current political character subordinated to economic definitions. Due to the specific conditions of its historical development (the process through which the EC Treaty was constitutionalised was to a large extent judicially driven), EU constitutionalism has been marked by a substitution of juridification for politicisation. Furthermore, the legal outcome of this juridification has enshrined the exigencies of the market within its deepest structures (this will be shown through an analysis of the concept of EU fundamental rights). This double substitution of the legal for the political and of the economic for the legal amounts to a simulation of the political; political power is in essence no longer present except to conceal that there are no effective mechanisms for the exercise of political power in the EU. At the same time, this simulation of the political functions in a deeply ideological way, because it renders invisible the existing structures of political economy and the asymmetrical relations of domination which have been established through them.

Acknowledgements

The writing of this thesis has been a tragicomedy in several acts. Some of its acts have been more dramatic than others, yet the comic element has been unfailingly creeping in and overshadowing with its lightness the more obscure overtones.

The main characters of the play:

My supervisors: Emilios and Zenon (not only very wise, irritatingly so sometimes, but also, supporting and patient). My overriding intellectual debt is to Emilios, whose work has been a constant source of inspiration for me.

The loving family: mum, dad and above all Christina, offering invaluable psychological support over the phone during periods of crisis.

Friends, frenemies and other demons (in order of appearance): Sofia, Stavros, George, Tonia, Effie, Olga, Nikos, Frosso, Lili, Virginia, Hristos (in Athens). Antonis, Veera, Bernie, Denise, Kristina, Hildegunn, Lene, Francois, Gunnar, Juan, Celina, Dimitris, Elias, Yiannos, Ernesto, Claudio, Kevin, Manolis, Dimitra, Maria, Nikos, Alexandra, George, Nadja, Liz, Shane, Vito, Hinsh, Stefano, Jane, Nikos (yet again), Stephen, Nicolas, Marina, Alison, Camille, Robert, Stella, George, Foteini, Alan, Harm, Spyros, George (yet again), Salina, Olga, Yoko, Chiara, Barbara, Sam, Nickie, Liva, Phil, Anne (Edinburgh 1998-2002). Francis, Ben, Begona, Ariel, Regina, Rebecca, Ralf, Julio, Nicolas, Sammy, Ben (yet again), Hege, Kjell, Foteini, Janice, Reena, Gary, Matthew, Andreas, Yusuf, Thalia, Angeliki, Surbhi, Annette, Julia, Pavithra, Alessandra, Luca, Letizia, Marcello, Claudia (Warwick 2002-2004). Given the amount of entries under this section, it is no wonder that this has been such a long play.....

Last, but not least *my institutional friends:* the completion of this thesis would not have been possible without the generous contributions of IKY, the Greek Foundation

of Scholarships (I was an IKY scholar from October 1997 until March 2001), the Bank of Scotland (an ex deus machina providing overdrafts and visa cards in periods of empty-pocketedness) and the Warwick School of Law (the sweetest employer I have encountered). To the extent that ideas are a reflection of material conditions of being, your contribution, my dear institutional friends, has, from a Marxist point of view, been the most important one.

The end is yet to be written. But if this play is to remain faithful to its tragicomic character, it'd better be a happy one.....

Tania Kyriakou

Coventry, July 2004

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Concluding Preface

In my beginning is my end...
The end is where we start from...
T.S.Eliot (Little Gidding)

Only when reflection comes to a halt can a beginning be made...
Kierkegaard

The European Community¹ initially set up as an international organisation concerned mostly with economic matters², has gradually acquired a sui generis character, which distinguishes it radically from international law, to the extent that its founding text (the Treaty) has been qualified by the European Court of Justice, as a Constitutional Charter³. Last year the Convention on the Future of Europe produced a draft of an EU constitution⁴, which having failed to attract the unanimous support of the Member-States in the Intergovernmental Conference in Brussels (12-13 December 2003)⁵, was finally signed in the recently concluded Intergovernmental Conference that took place in Brussels (16-17 June) under the presidency of Ireland. EU constitutionalism is at the forefront of EU developments. The emergence of a formal document which will possibly⁶ be the official Constitution of the EU has been welcomed by many as an exhilarating development that will overshadow all the

¹ Although constitutionally separate, the three European Communities (European Coal and Steel Community, European Economic Community and European Atomic Energy Community) have for practical reasons been administered as one, especially since the merger of the institutions in 1967. In 2003 the ECSC expired.

² The aims of the EEC Treaty (signed in Paris in 1957), as set out in the Preamble and in article 2 were "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated rising of the standard of living and closer relations between its member-States." According to P.Craig and G. de Burca "the economic impetus behind the 1957 Treaties was made clear. In accordance with the thrust of the Spaak report, the EEC treaty avoided the explicit political aims of the earlier draft European Political Co-operation (EPC) Treaty, and concentrated on economic integration setting out its aims in the preamble and in Article 2." In P. Craig and G. de Burca, *EU Law*, Oxford: Oxford University Press, 2nd ed., 1998, p.11.

³ Case 294/82, *Les Verts v. Parliament*, [1986] ECR 1339 at 1365 No.23, repeated in Opinion 1/91, [1991] ECR I- 6079 at 6102.

⁴ The official term at the time was "Constitutional Treaty".

⁵ Discussion of the proposed Constitutional Treaty faltered over disagreement about the voting rights of different Member States. Spain and Poland, each with around 40 million people, having been given 27 votes by the Nice Treaty -compare with 29 votes given to Germany (82 million), France, Britain and Italy (approx. 60 million each)- would not agree to a new balancing of voting rights.

previous stages in the history of EU constitutionalism. The underlying assumption seems to be that a formal Constitution will be the panacea for all the EU constitutional problems of the past. My thesis will resist this unqualified optimism. The argument I will put forward here will expose the deeper problems of EU constitutionalism; it will reveal that some of these problems have been incorporated into our current *acquis constitutionnel*. To the extent that the new Constitution does not break with these aspects of the *acquis communautaire*, certain fundamental problems will pertain after the ratification of the new Constitutional Treaty.

For a long time the EC/EU⁷ constituted the novel parameter of our political environment that challenged in the most fundamental way the theories we had developed in terms of what counts as a political entity and what the conditions required for its constitution are. During this time legal theorists seemed to focus more on constructing theoretical models that would offer an apologetic confirmation of the European project rather than on subjecting the EC/EU structures to a critical discourse. The idea was that the shortcomings of the EC/EU were somehow connected only with the fact that the EC/EU failed to comply with the templates of the pre-existing political entities, the nation-states, and that this failure was unavoidable since the EC/EU inaugurated a new model of political organisation. In an attempt to avoid measuring the EC/EU against the benchmark of the statist standards, legal theorists ended up creating theoretical models that would necessarily accommodate and account for the actual structures of the EU. It is only during the last fifteen years or so that the critical leverage of legal theory vis a vis the EC/EU has been fully recovered and different aspects of the EC/EU constitutional/legal order have been put to scrutiny. There is now a significant body of theoretical work

⁶ The most difficult part, the ratification of the Constitutional Treaty, subject to the turmoil of a national referendum in up to 20 Member States, is still ahead of us.

⁷ Since 1993, when the Treaty of Maastricht came into force, the European Community has been one of the three pillars, which form the European Union. The other two pillars, the ones on the Common Foreign and Security Policy (CFSP) and on Justice and Home Affairs (JHA) remain to a great extent "more like familiar creations of international law, not sharing the institutional structure, law-making processes or legal instruments of the Community pillar, largely beyond the jurisdiction of the European Court of justice and lacking the key Community law characteristics of supremacy and direct effect." P. Craig and G. de Burca, *EU Law*, Oxford: Oxford University Press, 1998, p.1. For the purposes of this thesis the terms EC/EU law, Union/Community will be used interchangeably. Besides, the new constitution abolishes the three-pillar structure.

that has shed light to different aspects of EC/EU constitutionalism. Some theorists have concentrated on the procedural and political deficit of EU constitutionalism, while others have focused on certain substantive issues (fundamental rights, development of direct effect, supremacy etc). This thesis will adopt a holistic perspective in its analysis of the problematic areas of EU constitutionalism, bringing together both procedural and substantive aspects of the EU constitutional order. This holistic approach is premised upon the belief that certain problematic aspects of the EU constitutional order can only be fully appreciated when viewed in their interconnection.⁸

The argument put forward here will be that EU constitutionalism has been marked by a substitution of juridification for politicisation (judicially driven process of constitutionalisation of the EC Treaty) and that the legal outcome of this juridification has enshrined the exigencies of the market within its deepest structure (this will be shown by reference to the concept of EU fundamental rights). This double substitution of the legal for the political and of the economic for the legal has negative implications both on the level of normative coherence and on the level of political representation. I will suggest that this problem stems from the fact that the EU is a goal-oriented entity and that its goals, mainly associated with economic integration, seem to have been decided prior to its constitution as a political entity. The problem is that the choice of the EU's goals is not politically (and consequently not democratically) controlled.

My analysis will suggest that the Community constitutional/legal system functions as the mediator, or rather, the vehicle that neutralises and, thus, enables the substitution of the "economic" for the "political". This phenomenon partly reproduces the existing situation within national liberal democracies, which participate in a globalised economy. At the same time it is quite accentuated due to the specific constitutional history of the Union and the novel features of political unity such a multi-national project involves. I will argue that to regard the market as an end and politics as a means to that end constitutes a very substantive reversal, which not only

⁸ This does not in any way mean that the analysis will be an all-encompassing or an exhaustive one.

severs the emancipatory character of politics, but also unavoidably affects the coherence of the legal system. Thus, the aim is to bring to the fore the specificity of the political realm vis a vis the economic.

I accept that in a system of globalised economy there will always be close connections between economy and politics. I reject, however, the fatalistic approach according to which every political decision is or, even worse, should be reduced to market considerations. I am not putting forward an argument against the market. I accept that democracy and the market can be mutually sustaining institutions and I am willing to explore whether the latter sets certain necessary limits to the function of democracy. My view, however, is primarily concerned with the subordination of politics to the demands of market orthodoxy, or rather with the replacement of deliberative governance by a commodification of the political process.

Having clarified that my argument is not against the EU, nor the market, but against the substitution of the market for politics, I will furthermore argue that the project of European integration can in fact help us break the vicious circle of material determinism and monocausal explanations which seems to be the trend in our current political universe. One could argue that by reproducing and magnifying (both quantitatively and qualitatively) the already existing problems of national liberal democracies, the EU legitimises in a way the national systems, because it offers an even worse normative alternative; everything seems better than it truly is, if compared with something worse. I believe, however, that there is a positive element in this; the magnification of the problems raises their visibility. As a result it is easier to recognise and de-codify the substitution, which takes place at the level of the EU, than it is to perceive its equivalent on the national plane. And, once revealed, the substitution can also be identified at other levels. This is not only a matter of perception; it is also a matter of size and corresponding power. Within a globalised economy it is easier for the big players to change the rules of the game. Even before the recent accession, the EU, having a nominal GNP of about \$6 trillion (compared with \$5 trillion for the USA and \$3 for Japan) and a population approaching that of

the United States and Japan combined, represented the largest single unit in the world economy. This overwhelming power enables the European Union to take the risk, innovate and make the beginning of a new conception of politics, which will not be frustrated by overriding economic restraints and which will change our self-understanding both on the national and on the international level.

It is believed that a good introduction presupposes the mastery of the art of flirting; namely it is a game of hide and seek, in which a good player should reveal only what is necessary to stimulate the interest of one's readers, but he/she should at the same time conceal what is necessary to keep this initial infatuation going throughout the book. As Mark Taylor puts it, "mastering the art of beginning requires cultivating the ability to be sufficiently suggestive to interest and allure without becoming overt enough to bore and dissuade".⁹ Being an unrepentant fan of openness and transparency in all (alas!) fields, I will not follow this tactic. In fact I will express my firm opposition to this tendency to associate fascination with what remains unsaid in what is said, by giving a summarised, yet quite revealing presentation of my argument in this introduction. This is why I am calling it "concluding preface"¹⁰. The chapters to follow will flesh out the argument suggested here.

In the first chapter I will analyse my methodological tools and my theoretical premises. Law is a social practice and its knowledge cannot be simply a matter of immediate observation. It is instead mediated by the observer's presuppositions about the world. These shape the decisions of the observer as to what is worth noticing, which in their turn shape his/her assessment of the way the social practice works as a whole. As Terry Eagleton argues, "there is no such thing as presuppositionless thought"¹¹; there are more or less explicit presuppositions. The above indicate that the legal scholar actually participates in the making of Community law, or any kind of law for that matter. Since analyses affect outcomes, this means that knowledge is necessarily bound up with power. With these points in

⁹ M. Taylor, *Journeys to Selfhood: Hegel and Kierkegaard*, Berkeley: University of California Press, 1980, p.2.

¹⁰ I am borrowing here Mark Taylor's use of the term. See above fn. 9.

¹¹ T.Eagleton, *Ideology: An introduction*, London: Verso, 1991, p.3.

mind I will try to render explicit the ideas that have informed my own investigations in this thesis.

I will devote a big part of chapter 1 in exploring the concept of ideology. I will explain that ideology refers to the way in which meaning is bound up with power and I will look closer at the different ways in which this coupling of meaning and power can take place (ideological modes/strategies). My defence of the pertinence of the concept of ideology against those who view it as belonging to the past (a past in which liberalism and capitalism had not overwhelmingly triumphed over their competitors) will lead me to post-modernism and in particular to Baudrillard's theory of simulation. My analysis will argue against the opposition between ideology and simulation and it will reveal the underlying intimacy (if not complicity) between the two. The argument here will be that simulation corresponds to advanced commodification, which is organised around configurations of sign value (political economy of the sign); simulation is, thus, intricately connected with capitalism and the structures of domination which are associated with it. In fact, simulation is the mode in which ideology functions most effectively today.

Since my thesis is a critique of the EU, it necessarily involves a certain deconstruction of the European politico-legal system. I will, thus, employ deconstruction as a methodological tool and I will try to defend it against the prejudices that have been associated with it. However, my deconstructivist approach has the aspiration of forming the basis for a radical reconstruction of the EU project, because, as I will analyse in Chapter 1, the aim of this thesis is not to argue against the European project as such, but against its current normative structure. If I dwell on European legal proposals concerning democratic and constitutional legitimacy and if I do so in connection with the concepts of simulation and ideology, this is because, by decoupling actuality from potentiality, I seek to affirm the truly progressive possibilities stemming from the European project.

Chapter 2 will be a rebuttal of the no-demos thesis, which, if true, would make my argument redundant. In the heart of this thesis lies the argument that the EU can

never be legitimate, because it can never be satisfactorily democratic due to the absence of a European people. Under this approach, the concept of the people of a polity is an organic one, based on common ethnic origin, shared values, language and common cultural habits. When applied to the European Union, this stance leads us to pessimistic conclusions as to the prospects for a community of Europeans, because it implies that every attempt to legitimise the Union by transferring the allegiances of the citizens from their national to a trans-national European level will not be successful.

I will start with an analysis of classical theories of community which are based on the assumption that organic homogeneity is a prerequisite for the existence of a demos, and by contrasting them with modern theories of citizenship and community, I will show that the absence of a homogeneous demos does not pose insuperable obstacles to the legitimation of European integration. I will argue that we do need some type of common culture, “a European identity”, but that this can be conceived in civic terms. Habermas’s theory of constitutional patriotism, offering a model of post-national citizenship, which can be based on constitutional principles, will be the focus of my analysis.

Having argued in Chapter 2 that the concept of the demos need not be rooted in the national identity of a people and that democratic processes can function within the wide EU boundaries provided that the citizens are socialised into a common constitutional culture, I will then turn to the constitutional framework of the EU and explore whether it can function as the basis around which the European citizens will unite. At this point I will develop an argument at two steps: the first step will be to show how the EU constitutional order has been brought about by judicial fiat (chapter 3), while the second step will explore the impact of this judicial process of constitutionalisation on the normative content of the EU constitutional order (chapter 4).

Although it is not my aim to undertake a systematic reconstruction of the relevant judicial judgements, in chapter 3 I will challenge the Court’s narrative of the process

of constitutionalisation of the Treaties. It is part of the construction of any narrative to forget or trivialise things which disrupt the coherence of received ideas and my intention is to bring these forgotten scrolls to the surface in order to rearticulate the current formulation of the European integration's narrative. The brief exploration of the *acquis communautaire* in Chapter 3 will show that the constitutionalisation process has been mainly the product of the European Court of Justice and has taken place in the absence of deliberative constitutional politics. As a result, it reflects the participation and representation of European citizens in the judicial rather than the political process. Due to the different modalities of communication associated with law and politics, this development has in its turn contributed to the institutionalisation of the absence of democratic participation which could substantiate the EU as a political project.

Chapter 4 will constitute the second part of the argument put forward in Chapter 3. As mentioned above, this argument is a two-fold critique of the EU constitutional order. The first part (Chapter 3) concerns the judicial impetus of the constitutionalisation process, while in this chapter the focus will shift from the procedural to the substantive. The focus will no longer be the process of constitutionalisation as such, but its normative outcome. A number of theorists have viewed the constitutional initiative of the Court as legitimised, because its case-law granted fundamental rights to individuals. In this chapter I will analyse the notion and the position of the right in the structure of the EU and find it insufficient in terms of conceptual clarity, coherence and consistency. This part will reflect on some of the broader theoretical questions concerning the role of fundamental rights in a democratic context. Through an analysis of the way the term "fundamental right" is being used within the EU, it will be shown that the initial solely economic focus of the Community has influenced its gradual evolution into a political entity and has kept its current political character bound and subordinated to economic definitions, so much so that membership to the EU civil society has relied until recently on the participation of the individual in the common market. This substitution of marketisation for juridification constitutes the second part of the "EU simulation" that I want to expose. The aim in chapter 4 is to show that, even if we view the EC

Treaty as a constitutional charter, this has enshrined commodification within its deepest structure and is, therefore, unable to offer a coherent basis for the Community legal order. Hence, even if we could disconnect the substantive issues from the procedural ones (in my opinion in democracy procedure is a matter of substance), the former are in the case of the EU unable to offer a normatively viable alternative. I will argue that commodification and economic integration cannot offer a satisfactory alternative basis for representation. These are associated with a fixed ideal of usefulness, which cannot exhaust the concept of the political nor the meaning of representation, because it rejects contingency and it welcomes a certain kind of closure (the closure which refers to the goals of the polity).

A democratic society, as Lefort reminds us, is radically indeterminate; it is characterised by the dissolution of the markers of certainty. The ECJ, following the treaties has posited the common market as the purpose and ultimate foundation of Community law. The market has therefore become the indisputable marker of certainty for the EU and it has been postulated as its common good. This postulation, however, is not a simple procedural one. It constitutes a substantive closure and it is incompatible with the contestability presupposed by politics.

The EU needs to relativise what is now taken for granted in the light of new alternatives; it needs to re-define its own telos, or rather it needs to subject the choice of its telos to an on-going constitutional political debate. To this effect, I will propose a concept of politics (and a corresponding concept of politics of identity), which embraces difference and contingency, and recovers the field of political possibility by keeping any definition of its telos open to constant revisability. And although the existence of a formal constitution is not necessarily incompatible with such a reflexive concept of politics¹², the text of the EU constitutional treaty, incorporating the main features of the existing constitutional *acquis communautaire*, may not be very promising about the openness of our EU constitutional future.

¹² On the concept of “reflexive politics” see E. Christodoulidis, *Law and Reflexive Politics*, Dordrecht: Kluwer Academic Publishers, 1998.

Chapter 1

Methodological Prolegomena

Every tool is a weapon if you hold it right.
Ani DiFranco

Wo die Gefahr waechst, waechst das Rettende auch.
(where danger is, grows the saving power also)
Hoelderlin

Introduction

In a fascinating article on international relations theory, Robert Cox starts with the observation that “theory is always for someone and for some purpose”¹. His argument is that no theorist is a tabula rasa and that even if he/she manages to attain a certain self-reflective attitude and thus a distance from his/her own perspective, this perspective can never be completely overcome. He concludes that: “there is no such thing as theory in itself, divorced from a standpoint in time and space”². Agreeing with Cox regarding the necessarily purposive character of theoretical approaches, I will clarify in this chapter the theoretical standpoint that will be underlying my critique of EU constitutionalism. Hence, this first chapter will be an exercise in self-reflection.

The starting point for the analysis of my methodological approach will be an exploration of the concept of immanent critique. The argument put forward in this chapter will develop immanent critique as critique of ideology exploring both concepts and tracing their connection. A clarification of the particular conception of ideology that I embrace and the different ways in which ideology can function, will be followed by an excursus on the end of ideology debate. Post-modernist theorists question the theoretical pertinence of ideology. Their argument is that in light of the current relativisation of any given reality, ideology, being premised upon the possibility of representation of reality, has become obsolete.

¹ R.Cox, “Social forces, States and World Orders: Beyond International Relations Theory”, 10 *Millenium* (1981), p.128.

² *ibid.*

The focus in this part will be Baudrillard's theory of simulation. Remaining ambivalent towards Baudrillard's theory, I will reject its "end of ideology" implications as being itself ideological, but I will rescue from it the notion of simulation as the mode in which ideology functions most effectively today. Both these aspects of simulation (nature and effectiveness) will be rendered explicit through the exposure of the underlying connection between simulated hyperreality and the political economy of late capitalism.

a) From immanent critique to critical theory

Let me first of all start with a brief explanation of my use of the word "critique". My conception of critique is aligned with the Marxian tradition of immanent critique. Marx objected to idealist philosophical theorizing on the basis that it distracted us from historical conflicts by offering to resolve them at a higher imaginary level. His objection is epigrammatically encapsulated in his celebrated eleventh thesis on Feuerbach: "The philosophers have only interpreted the world in different ways; the point is to change it"³. This objection was not in fact a dismissal of philosophical thinking in its entirety, but of a certain type of philosophical thinking that abstracted from and, thus, neglected the existing social inequalities. In doing so, idealist philosophers failed to point out the numerous social injustices that surrounded them and their philosophy ended up providing justifications for bourgeois society.

As an alternative to abstract idealist philosophy, Marx developed a new type of theorising as a 'practical-critical activity'. This new form of theorising is oriented towards transformative action and emancipatory practice, "a kind of practical philosophy which will help to transform what it is seeking to comprehend"⁴. In a letter written in 1843, Marx explains his vision of philosophical enquiry:

³ K.Marx, *Early political writings* (edited and translated by J. O' Malley), Cambridge: Cambridge University Press, 1994, p.118.

⁴ T. Eagleton, *Marx and freedom*, London: Phoenix Press, 1997, pp.3-4.

“Philosophy has become worldly and the most decisive proof of this is that philosophical consciousness has been drawn into the torment of struggle not only externally but internally as well. Just as the construction of the future and becoming fit and ready for all times is not our task, so is all the more certain what we have to accomplish in the present. I mean the ruthless critique of all that exists, ruthless in the sense that critique does not fear its own consequences, and just as little, conflicts with existing powers.”⁵

And despite the fact that this ruthless critique is geared to changing the social surrounding within which it takes place, it is very much embedded within the objective process of a particular history and society. It is clear that, for Marx, the critic must begin with existing forms of consciousness. The critic should “begin with each form of theoretical and practical consciousness and out of the very form of existing actuality he can develop true actuality as its ought and its goal”⁶. In this sense critique, or immanent critique as it is called, resists the divorcing of symbolic action from social reality (which is what idealist philosophers do) and it “juxtaposes the immanent normative self-understanding of its object to the material actuality of this object”⁷. In immanent critique there is no transcendental or ready-made system against which existing forms of consciousness are juxtaposed; the object of inquiry is reflexive; it presupposes that what is investigated is a social reality which has its own self-interpretation. Furthermore, the task of immanent critique is not only “not to juxtapose an ideal, eternal standard to the existent”, but also “through a ruthless critique of the existent to reveal that what is, already contains within itself what ought to be as a possibility....The task of the critic is to show that the given is not a mere fact, that to understand it to be actuality is also to criticise it by showing what it could be but is not”⁸.

Since Marx’s time, this particular tradition of critical knowledge, which is ultimately oriented towards the transformation and emancipation of its object of study, has been

⁵ K.Marx and F.Engels, *Werke*, Berlin: Dietz, 1980, volume 1, p.344.

⁶ *ibid.*, p.345.

⁷ S. Benhabib, *Critique, Norm and Utopia*, New York: Columbia University Press, 1986, pp. 34-35.

⁸ *ibid.*

revisited, further elaborated and developed by a number of theorists⁹. Here I will only make a brief comment on two influential accounts of critical theory in the twentieth century, the ones given by Horkheimer and Habermas.

Horkheimer's account of critical theory developed mainly as a reaction to positivism. He argued that the empirical methods employed by natural sciences cannot offer a viable model for social enquiry. Horkheimer insisted that positivism's focus on the empirical study of social life (parallel to the empirical study of nature) tended to "absolutize" knowledge and present it "as though this were grounded in the inner nature of knowledge as such or justified in some ahistorical way"¹⁰. By describing, explaining and predicting regularities, positivism as applied in the sphere of social sciences ended up presenting social phenomena "as an unchangeable force of nature, a fate beyond man's control"¹¹.

In other words, according to Horkheimer, positivism in the sphere of social sciences contributed to a naturalisation of the existing social conditions. As a result of this process, "men see themselves only as onlookers, passive participants in a mighty process which may be foreseen, but not modified."¹² It is obvious that such a kind of theory leads to disempowerment, because individuals do not perceive themselves as active producers of their social cosmos. It makes individuals experience society as a nonhuman natural process.¹³ Horkheimer, drawing from the Marxian tradition of critique, resists this passivity imposed by positivism and suggests another approach to the study of social life, which he calls critical theory.

Critical theory takes "seriously the ideas by which the bourgeoisie explains its own order- free exchange, free competition, harmony of interests, and so on and follow(s)

⁹ In her book *Critique, Norm and Utopia* (op. cit. fn.7), Seyla Benhabib gives an enlightening account of the historical development of the critical theory of society. For a brief summary of the same account see S. Marks, *The Riddle of all Constitutions*, Oxford: Oxford University Press, 2000, pp.121-146. See also D.Held, *Introduction to critical theory*, Cambridge: Polity Press, 1980, S.E. Bronner and D. MacKay Kellner (eds) *Critical Theory and Society*, London: Routledge, 1989 and S. E. Bronner *Of Critical Theory and Its Theorists*, Oxford: Blackwell Publishers, 1994.

¹⁰ M. Horkheimer, *Critical Theory: Selected Essays*, New York: Herder & Herder, 1972, p.194.

¹¹ *ibid.*, p.204.

¹² *ibid.*, p.231.

¹³ *ibid.*, p.207.

them to their logical conclusion”,¹⁴ where the inner contradictions of the bourgeois society are fully exposed. In this sense critical theory is not just “an expression of the concrete historical situation, but also a force within it to stimulate change.”¹⁵ It is important to note here that critical theory is not so much concerned with the improvement of certain aspects of social structure. Rather, it focuses on structural change.

Habermas further develops Horkheimer’s opposition to positivism. As we saw above, Horkheimer distinguished between positivist/traditional and critical theory with their different methods and aims. Habermas,¹⁶ on the other hand, identifies three different forms of enquiry, which correspond to different cognitive interests. First of all, there are the natural sciences, which employ empirical analytical methods. Their aim is to describe and explain existing regularities in a way that will allow us to make predictions about material conditions. But then again our ability to make predictions about future conditions is connected with the ‘technical exploitability’ of this particular type of knowledge. Thus, according to Habermas the cognitive interest that corresponds to natural sciences with their empirical-analytical methods is a ‘technical’ one.

The second type of knowledge, as identified by Habermas, is associated with disciplines such as history and literature. These ‘historical-hermeneutic sciences’ involve interpretive rather than predictive propositions. The aim here is clearly not to predict, but to comprehend. As a result these sciences are not technically ‘exploitable’; they are connected with a certain cultural tradition and they enable people within that tradition to understand each other and to interact more effectively. Hence the cognitive interest behind historical-hermeneutic knowledge is a practical one aiming at “the preservation and expansion of intersubjectivity”.¹⁷

¹⁴ *ibid.*, p.215.

¹⁵ *ibid.*

¹⁶ J. Habermas, *Knowledge and Human Interests*, Cambridge: Polity Press, 1987.

¹⁷ *ibid.*, p.310.

Finally Habermas examines the social sciences. Aligned with Horkheimer, he distinguishes between ‘positivist’ and ‘critical’ social science. The former is geared to developing predictive propositions about social structures and adopts the methods of empirical-analytical sciences. Its final aim is to identify relations of causation which will allow us to control social structures. In this sense positivist social science is no different from empirical-analytical sciences and, likewise, the cognitive interest underlying it is a technical one.

On the other hand, the objective of critical social science is neither to predict nor to comprehend existing social structures, but to transform them. Its aim is “to determine when theoretical statements grasp invariant regularities of social action as such and when they express ideologically frozen relations of dependence that can in principle be transformed.”¹⁸ The paradigmatic method employed by critical social science is self-reflection. Critical social science invites social actors to reflect upon their position/role within the social structure and to engage in emancipatory action. In Habermas’ view the legitimate task of social enquiry is to actively transform relations of domination/oppression and, thus, to emancipate society.

Although critical theory is not a tightly woven project and it does not in any case form a unity, its variants have developed around certain central axes. At this point I am not going to expand on the theoretical differences between the central figures of critical theory, but I will briefly highlight the common thread that runs through the various accounts of critique and critical theory. First of all, critical theorists view theorising as a form of praxis. They agree that the aim of social enquiry is neither a simple understanding/interpretation nor a prediction regarding social structures, but an active participation which will bring about the emancipatory transformation of the existing social order. In this sense, both critical theory and social enquiry feature a certain degree of reflexivity. This means that theoretical analyses affect outcomes and in any case it is affirmed that knowledge can never be neutral, but is in one or the other way, bound up with power. The purpose of theory is to “analyse and expose the hiatus between the actual and the possible, between the existing order of

¹⁸ *ibid.*

contradictions and a potential future state”¹⁹. The theorist is part of the societal process and her task is to bring to the surface what is latent in objective reality.

By bringing theoretical proposal to the level of the praxis, critical theory assumes the present as “vide pour le futur”²⁰, empty for the future. This approach refuses any deterministic conception of historical development and any rational celebration of the result²¹. It views society as a social product, which is open to transformation; it rejects “resignation to the powers that be, to the nature-like process of social fate”.²² Its method of procedure is immanent critique, according to which the critic cannot be abstracted from the contradictory dynamics of power underlying the object of its study. Critical theory examines the contradictions between the object’s idea of itself and its actual existence, questioning the object’s self-image and revealing its unfulfilled potentialities.

However, critical theorists, unlike Marxists, do not themselves advance a clearly defined political agenda, because they believe that “the process of liberation entails a process of self-emancipation and self-creation.”²³ In other words, the project of actualising the multiple immanent possibilities of society is not viewed as an issue that theory can or should resolve on its own; it is a practical question that can only be answered by the historical subject. Critique cannot on its own transform particular historical conditions, but it can help to create the preconditions for their alteration. Ultimately, it is only in historical struggles that the essential theoretical truths can be verified.²⁴ Hence, critical theory acknowledges the existence of a gap between theory and practice and further contends that this gap needs to be filled by a conscious emancipatory politics.

¹⁹ D.Held, *Introduction to Critical Theory*, Cambridge: Polity Press, 1980, p.22.

²⁰ L. Althusser, “Machiavel et nous” in F. Matheron (ed) *Ecrits philosophiques et politiques*, vol. 2, Paris: Stock/IMEC, 1995, p. 62.

²¹ M. Hardt, A.Negri, *Empire*, Harvard: Harvard University Press, 2001, p.48.

²² T. Adorno, *Minima Moralia*, London: New Left Books, 1974, p.98.

²³ *ibid.*, pp.25-26.

²⁴ H. Marcuse, “The concept of essence” in *Negations: Essays in Critical Theory*, Boston: Beacon Press, 1968, p.73.

b) Critical theory and the EU constitutional/legal order

It is this reflexive and necessarily political vision of theory, as outlined above, that will inform my thesis and its critique of the EU constitutional/legal order. Having given a brief analysis of the particular conception of critique that I endorse, let me now proceed with an exploration of certain methodological approaches to the European project, which exemplify the “orthodox” stance in this area. I will argue that, despite their self-declarations, they are not critical, or at least not critical enough, and by not being critical, they end up providing a basis for legitimacy for the actual (and to a great extent unsatisfactory) structure of the EU.

Catherine Richmond has written a very sophisticated article on the need to preserve the current indeterminacy of the EU. Her argument starts with an analogy:

“Once upon a time the sun rose in the morning and set in the evening. The earth was the centre of all creation, and around it giving life and sustenance to the creatures upon it, circled the sun. Stars, galaxies, the universe, all that exists to survey and understand, were measured and examined in relation to this focal point: the planet earth.

The sun still “rises” in the morning and “sets” in the evening. However, our view of the world has changed; it no longer rests upon the earth as our single, taken for granted, point of reference. We have been able to test through physics our initial model of the universe, find it wanting and change it accordingly. But the initial, inadequate model was a necessary starting point, and when we revise it we are improving our theoretical model; *what we seek is a “best” model for making intelligible what we observe*. We never observe without some implicit conceptual model, though at any given time the element of choice in the adoption of a particular theory is easily overlooked.”²⁵(my emphasis)

Her analogy is quite clear. The nation state used to be the centre of our political universe. We used to measure and examine all political phenomena in relation to this

“focal point”. Now we need to revise our initial theoretical model and recognise the European Union as the focal point of our political life. I find Richmond’s analogy wanting; she uses one particular similarity (in our case the need for the revision of theoretical models) as a sufficient basis for drawing conclusions regarding other dissimilar aspects of the two terms of the analogy.

One first obvious objection to Richmond’s analogy is the difference of objective between natural and social sciences. Even though modern physics has destroyed the myth of determinism, it is still the case that physical laws indicate more or less rigid causal connections and are statements of fact. In the sphere of political and legal institutions, however, the object of enquiry is different, in the sense, that the social scientist cannot impose an external logic on her data; she must understand the internal logic of social life and at the same time she can call into question this very logic. Drawing from Habermas’s taxonomy, as mentioned earlier, one could observe that Richmond fails to distinguish between two completely different forms of enquiry and their corresponding different cognitive interests.

Although Richmond acknowledges that “we cannot empirically test the nature of the Community legal order”, she goes on that “we therefore choose concepts and theories that allow us to impose order upon it, *to enable us to understand what we see*”²⁶ (my emphasis). Richmond defines comprehension as unreflective acceptance of the self-understanding of our object of enquiry. This unnecessary equation forces understanding to mean “to come to terms with” and with it the role of theory becomes a profoundly conservative one. In fact, ‘understanding what we see’ may be as conservative a choice as deciding not to ‘see’ and acknowledge the changes that have already taken place in the social/political sphere.

In the theoretical debate concerning European integration, the ‘cardinal’ dilemma usually presents itself as a choice between the existing nation-states and the existing

²⁵ C. Richmond, “Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law” in N. MacCormick (ed) *Constructing Legal Systems: European Union in Legal Theory*, Dordrecht/Boston/London: Kluwer Academic Publishers, 1997, pp.47-90 at p.48.

²⁶ *ibid.*

Community legal order. According to this mapping, the ones who insist on the primacy of the nation-state are the 'conservative' party of the debate and the ones who choose European post-nationalism/supra-nationalism over state-nationalism, are the 'non-conservative' ones. In their effort to argue for the necessity to surpass the narrow-minded logic of the nation-state, it seems to me that a significant number of legal theorists tend to construct theoretical models, which are orientated to accommodating rather than criticising the European Union's normative reality.²⁷

I recognise that the European legal system is a novel species of legal system which, being a hybrid, dynamic, metamorphic system can only be theoretically accommodated if we revise our traditional theories. It offers us the possibility to test them and at the same time to develop them in more fruitful ways. Having said that, however, I do not agree with what seems to be the current trend in legal theory; that is to construct theoretical models, whose ultimate aim is to silence or explain away all contradictions and, effectively, to offer an apologetic confirmation of the actuality, the present shape of the European legal system.

In the chapters to follow I will question the normative basis of the European legal system by bringing to the fore its internal contradictions. I should emphasise at this point that my aim is not to argue against the European project; it is to argue for a European order with a sound normative basis. I will agree with Curtin that "it is vital that those who believe in the overall imperatives of the march towards closer and deeper European integration critically examine the many imperfections of the Union...so as to determine by positive choice rather than inertial navigation the desirable destination of the European journey".²⁸

²⁷ As Ian Ward puts it, "discovering critical approaches to European legal studies is, to use Eisenhower's familiar adage, like trying to catch lightning in a bottle- possible, but it just never seems to happen". I. Ward, "In Search of a European Identity", 57 (1994) *Modern Law Review*, p.315.

²⁸ D. Curtin, "The constitutional structure of the Union: A Europe of bits and pieces", 30 (1993) *Common Market Law Review*, p.21.

Weiler, on the other hand, takes a different approach. In his influential article “The Transformation of Europe”,²⁹ he explores the evolution of the Community over time. His contribution is important because it helps us understand not only the direction in which the European Community has developed, but also the different forces involved in this development.³⁰ There are, however, some objections, against his analysis. Weiler accepts that the plea for a law in context approach (be it law and economics or law and society etc) is *de rigueur*³¹, yet he chooses what he calls a “pure theory” explanation of the development of the European Community. This is a self-referential explanation which is extracted from within the phenomenon itself. It seeks to rationalise its internal development by reconstructing its coherence as if the internal dynamics of the system were insulated from every external aspect.

Weiler admits that the insulation cannot be total and that his contribution cannot but be a part of a more totalistic and comprehensive history. His endogenous explanation of the constitutional development of the European Community, although mainly legalistic, is necessarily –Weiler does not doubt this³²– a partly historical and political explanation. However, by presenting itself as a philosophically unproblematic activity, it ends up being a status quo account of what has happened, because it embraces the implicit assumption that the phenomenon to be studied is a straightforward given beyond change and that the future will be a continuation of the present. Here again, drawing on Horkheimer, one can raise the objection that the positivist approach (because what is a pure theory of law if not a positivist one?) brings forward a passivity which is incompatible with a truly critical approach to social phenomena.

According to Allott, “when we seek to explain philosophically a set of political phenomena such as the constitutional development of the European Community, we find ourselves caught in a hermeneutic web, explaining phenomena by explaining

²⁹ J. Weiler, “The transformation of Europe” first published in 100 (1991) *Yale Law Journal*, p.2403 and then with changes in J. Weiler, *The constitution of Europe: do the new clothes have an emperor?*, Cambridge: Cambridge University Press, 1999.

³⁰ H. Schermers, “Comment on Weiler’s The Transformation of Europe”, 100 (1991) *Yale Law Journal*, pp.2525ff.

³¹ J. Weiler, *op. cit.* fn.29, p.15 (of the book).

explanations of phenomena, making phenomena in explaining them”.³³ In his search for methodological tools, Allott rejects deterministic and sub-deterministic approaches, which view history as either a chain of cause and effect akin to natural sciences or as an identification of macro-patterns in the past, which somehow affect our understanding of the present and influence our future making behaviour.

His preferred kind of history-making is the one which views history as an ever-present reality in consciousness. The relevant past in this case is not only a certain historical reality of events, but also the subjective reality of social consciousness. And social consciousness, because of its evaluative character, conceives of the past and the future as realms of choice. Instead of identifying a certain point in time and recounting a story from that point onwards (and this is what Weiler does), this particular method views history as a web of different strands whose interaction presents us with different sets of possibilities. We are the only ones who can choose among the possibilities left open for the future, as we are responsible for the choices of the past. It makes sense to control the choices of the past so that we can reach the best decisions regarding the future. Allott’s point is that history is not fate. I fully agree with him and I will use the same line of reasoning to rebut the concept of retrospective inevitability in the constitutional development of the EU.

Weiler, unlike Allott or Curtin, approaches history based on what seems to be ‘unreasoned abandon’. He believes that history is an inevitable dynamic of doing first and thinking later. He agrees that the constitutionalisation process in the European Union was a veritable revolution that occurred without a profound debate within the European polity³⁴ and he attempts to rationalise this process by using a metaphor from the old testament:

“And Moses wrote all the words of the eternal... And he took the book of the Covenant and read in the audience of the people: And they said, All that the Eternal hath spoken we will do and hearken.”

³² *ibid.*

³³ P. Allott, “The European Community is not the true European Community”, 100 (1991) *Yale Law Journal*, p.2485.

³⁴ J. Weiler, *The Constitution of Europe: do the new clothes have an emperor?*, Cambridge: Cambridge University Press, 1999, p.4.

The anomalous textual inversion, first we do, then we hearken -that is try to understand what it is we are doing- is a metaphor that Weiler thinks we can apply to the discussion of EU constitutionalism. He believes that the dynamic of praxis preceding deliberation “is an act of existential decisiveness, of veritably taking one’s destiny in one’s hand, of following an intuition, an ideal, an aspiration”³⁵. In this I will disagree with him. Following Allott, I will argue that the constitution of a political society constitutes, as much as it expresses its own identity and, as a result, it must be a reflection of the interactions that take place within it. “A society imagines what it might be, struggles to decide what it shall be and becomes what it has chosen to become”.³⁶ After all, as Hardt and Negri poignantly remind us, theory/philosophy “is not the owl of Minerva that takes flight after history has been realised in order to celebrate its happy ending”, but it “is subjective proposition, desire and praxis that are applied to the event.”³⁷

c) Ideology critique

The two approaches discussed above (Richmond, Weiler) do not only exemplify the “orthodox” and to a great extent apologetic theoretical stance towards EU constitutionalism, but they also function, as I will argue in this part, as ideological mechanisms. This brings me to my next methodological point, which is connected with the use of the concept of ideology as a distinctive analytical tool in the development of my argument. When I recapitulated the main tenets of critical theory, I mentioned that the critical approach is intended to bring to light the contradiction between the object’s idea of itself and its actual existence. This gap between self-image and actuality is ideological, to the extent that the distorted image of actuality, allows it to evade critique and to safely re-produce itself. Through the critique of this ideology and the deconstruction of the EU constitutional history as we have inherited

³⁵ *ibid.*, p.27.

³⁶ P. Allott, “The crisis of European Constitutionalism: reflections on the revolution in Europe” 34 (1997) *Common Market Law Review*, p.468.

³⁷ M. Hardt, A.Negri, *op. cit.* fn. 21, 2001, pp.48-49.

it, the immanent possibilities of alternative political/constitutional organisations for the EU can be revealed.

We saw earlier how immanent critique is closely bound up with Marxism. Similarly, a big part of the analysis of the term ideology has sprung from the Marxist tradition. However, the concept of ideology is not linked with any single intellectual movement; the term was coined before Marx³⁸ and it has acquired a variety of new meanings since Marx's time. I am aware of the fact that since its inception two centuries ago ideology has undergone many transformations; it has evoked a whole array of different notions and has served a variety of purposes, not all of them compatible with one another. As Eagleton puts it, ideology is "a text woven of a whole tissue of different conceptual strands"³⁹. For this reason, I will not even attempt to give an exhaustive definition, or rather catalogue of definitions for ideology⁴⁰. Instead I will briefly sketch the particular conception of ideology that I will be employing and I will then engage with the post-modern end of ideology debate that tends to consider ideology as an obsolete concept. By exploring different ideological strategies, I will defend the interpretive validity of ideology critique and I will argue that a rejection of ideology functions as an endorsement of the political status quo and is, thus, in its turn, yet another expression of ideological practice.

³⁸ The term was coined by Antoine Destutt de Tracy. See T. Eagleton, *Ideology*, London: Verso, 1991, p. 66

³⁹ *ibid.*, p.1.

⁴⁰ Terry Eagleton (*op. cit.* fn. 38 pp.1-2) gives the following non-exhaustive list of definitions of ideology:

a) the process of production of meanings, signs and values in social life; b) a body of ideas characteristic of a particular social group or class; c) ideas which help to legitimate a dominant political power; d) false ideas which help to legitimate a dominant political power; e) systematically distorted communication; f) that which offers a position for a subject; g) forms of thought motivated by social interests; h) identity thinking; i) socially necessary illusion; j) the conjunction of discourse and power; k) the medium in which conscious social actors make sense of their world; l) action-oriented sets of beliefs; m) the confusion of linguistic and phenomenal reality; n) semiotic closure; o) the indispensable medium in which individuals live out their relations to a social structure; p) the process whereby social life is converted to a natural reality.

For a survey of different theories of ideology see also N. Birnbaum, "The sociological study of ideology 1940-1960", 9 (1960) *Current Sociology* and J.B. Thompson, *Studies in the Theory of Ideology*, Cambridge: Polity Press, 1984.

In an effort to systematise the different meanings of ideology, Raymond Geuss⁴¹ has suggested a quite interesting taxonomy that seems to account for some of the most prominent conceptions of ideology. He distinguishes between descriptive, pejorative and positive conceptions of ideology. Ideology in the purely descriptive or anthropological sense refers to the psychological dispositions and beliefs of the agents within certain social groups or classes. This non-evaluative, non-judgemental meaning of ideology comes close to the notion of a world view, a *Weltanschauung*. On the other hand, ideology in the positive sense is viewed as a set of beliefs that inspires a certain social group or class and aims at the radical transformation of society as a whole. The person who considers this type of ideology to be positive necessarily approves of the particular goals and motivations put forward by the social group in question. Some Marxists for example speak approvingly of the socialist ideology.

In its pejorative meaning, ideology refers to a set of values and beliefs that can be viewed critically/negatively in virtue of their epistemic, functional or genetic properties⁴². When Geuss says that a form of consciousness can be ideologically false in virtue of epistemic reasons, he refers to situations in which the beliefs of the ideology are not supported by empirical data. A form of consciousness, on the other hand, can be ideologically false from a functional point of view, when it plays a role/function in concealing social contradictions and in stabilising/legitimising certain kinds of institutions and practices. As for genetic ideology, it refers to false consciousness connected with facts about its origins, genesis or history; it requires ignorance or false belief on the part of the agents of their true motives for accepting it.

The reference to ideology in the descriptive sense is a neutral one, while ideology in the pejorative sense obviously implies an oppositional perspective. As Eagleton puts

⁴¹ R. Geuss, *The idea of a critical theory: Habermas and the Frankfurt School*, Cambridge: Cambridge University Press, 1981, Chapter 1.

⁴² In Geuss' own summary, consciousness may be false because it "incorporates beliefs which are false, or because it functions in a reprehensible way, or because it has tainted origin". Op. cit. fn. 41, p.21.

it, in this pejorative sense “ideology, like halitosis, is what the other person has”.⁴³ As far as the subcategories of this critical conception are concerned, most theorists concentrate on two of the three types identified by Geuss; the most commonly drawn distinction is between epistemological conceptions of ideology and sociological/political/ethical (or functional in Geuss’s terms) ones. We saw above that the former entails some error in the understanding of empirical reality, while the latter is instrumental to the maintenance of particular political/social structures. This type of ideology may also involve mystification and to a certain extent illusion regarding the processes through which these particular structures are being rationalised and thereby legitimated. In the former case (epistemological conception) the illusion is external to empirical reality, it concerns our understanding of it, but is not internally connected with it, while in the latter (political conception) this illusion is part of the reality, whose structures it legitimises.

The epistemological version of the pejorative conception has been strongly criticised during the last few decades mainly due to the development of new theories of knowledge and the emergence of a far-reaching pluralism, which is coupled with a touch of moral and cognitive relativism. The argument in a capsule is that a correspondence theory of truth /knowledge according to which our ideas are external to and match the physical/material world is not plausible. It is argued that there can be no epistemic space and therefore no external relation between our practices and our ideas of them. Besides, this particular cognitive model somehow assumes the existence of one truth, one way of viewing the world, which is at odds with the pervasive pluralism of our societies. What makes such epistemological approaches even more suspect is the fact that they give immense power to a handful of experts on theoretical issues of establishing truth to the detriment of the vast majority of the democratic body. For these reasons epistemological conceptions of ideology are fairly unpopular nowadays.

Thompson, like Geuss, distinguishes between neutral and critical conceptions of ideology. Being opposed to the neutralization of the concept of ideology, he

⁴³ T.Eagleton, *op. cit.* fn. 38, p.2.

formulates a critical conception of ideology, which preserves the negative, political connotations of the Marxist legacy, but dispenses with its epistemological assumptions.⁴⁴ For Thompson, false consciousness and illusion are not intrinsically connected with the concept of ideology. Neither is the working of a dominant class a pre-requisite for ascertaining the operation of an ideological practice.

While Thompson argues against the reduction of all social conflicts to the opposition between bourgeoisie and proletariat, he retraces in Marx's work elements of a different, 'a latent conception of ideology'. Epistemological issues of misrepresentation are still present in this conception, but the focus shifts from the reproduction of the interests of the dominant class to a more general interconnection between meaning and relations of domination. According to this latent Marxist conception, as reconstructed by Thompson, "ideology is a system of misrepresentations which serves to sustain existing relations of class domination by orientating individuals towards images and ideals which conceal class relations and detract from the collective pursuit of change"⁴⁵.

Drawing on this latent Marxian conception of ideology, Thompson binds the analysis of ideology to the question of critique and reformulates it in terms of the interplay of meaning and power. He concludes that "the study of ideology requires us to investigate the ways, in which meaning serves in specific contexts to establish and sustain relations of domination"⁴⁶. This particular conception of ideology owes something to Marx's latent notion of ideology, but diverges from that account in significant aspects.

First of all, it avoids the epistemological presuppositions connected with the tendency to think of ideology as pure illusion, as a realm of ideas which reflects inadequately "the social reality that exists prior to and independently of these images"⁴⁷. Thompson recognises that ideas are as much reflective as they are

⁴⁴ J.B. Thompson, *Ideology and Modern Culture*, Cambridge: Polity Press, pp.40-44.

⁴⁵ *ibid.*, p. 41.

⁴⁶ *ibid.*, p. 56.

⁴⁷ *ibid.*, p. 9.

constitutive of social reality. Hence a clear-cut divide between material reality and its intellectual representation is not possible, or rather it is not plausible. According to Thompson's conception, the falsity of particular representations is a contingent, but not necessary characteristic of ideology. What is crucial is whether a particular symbolic form can actually serve to establish and sustain relations of domination; unlike the Marxian conception of ideology, for Thompson, the truth or falsity of a symbolic form is almost irrelevant.

Another point of departure from the Marxian tradition of ideology is the significance of class. In Marx's work, class domination constitutes the principal axis of his analysis. In Thompson's definition, on the other hand, we can speak of domination "when established relations of power are systematically asymmetrical, that is when particular agents are endowed with power in a durable way which excludes and to some significant degree remains inaccessible to other agents or groups of agents, irrespective of the basis upon which such exclusion is carried out"⁴⁸. The link with class struggle is again a contingent, not a necessary one.

According to Thompson's definition of ideology, which is the most widely accepted definition of ideology today, ideology is a body of meaning and values (rather than solely ideas), a discourse bound up with specific social interests and, thus, related to questions of power. Ideology is a matter of discourse rather than language. In this sense, ideology concerns "less signification than conflicts within the field of signification"⁴⁹. This necessarily also means that ideology is less a matter "of the inherent linguistic properties of a pronouncement than a question of who is saying what to whom for what purposes".⁵⁰ On its grammatical surface it may appear to be referential⁵¹, however, its true end is persuasion and through that, production of certain effects and furtherance of specific political purposes. In other words, ideology is action-oriented discourse, or to use Austin's term, it is performative rather than constative language.⁵² One cannot decide in abstracto the ideological or non-

⁴⁸ *ibid.*, p.59.

⁴⁹ T.Eagleton, *op. cit.* fn. 38, p.11.

⁵⁰ *ibid.*, p. 9..

⁵¹ *ibid.*, p.19.

⁵² *ibid.*

ideological character of an utterance; this can only be decided by an analysis of its relation to its social/discursive context. As a consequence, the exact same linguistic formulation may be ideological in one context and non-ideological, or even emancipatory, in another.

Let me take stock of the analysis so far. I have explored the distinction between neutral and critical conceptions of ideology and I have investigated the different variations of the critical conception. I have briefly sketched the problems which stem from focusing too much on the epistemological premises of the concept. I concluded this part of the analysis with Thompson's reformulation of the Marxian concept of ideology. Having taken away from the definitional core of ideology the element of epistemic misrepresentations, Thompson focuses mainly on the interplay of meaning and power. He views ideology as discourse that aims to defend and thereby reproduce existing relations of domination.

In developing my argument about the constitutional order of the EU, I will be employing the concept of ideology in its critical/pejorative sense. It is this perspective that is connected with the aims of critical theory, as analysed in the first part of this chapter, and will bring to the fore the possibility of promoting emancipatory change in the EU. For the purposes of this thesis, my critical conception of ideology will focus on the ways ideas are constructed and mobilised in order to sustain "actuality" in the EU with all its underlying structures of political, legal and economic domination.

d) Ideological modi operandi

Having clarified the conception of ideology that will inform my analysis in the following chapters, let me now briefly examine the different ways in which meaning can actually serve to establish and sustain relations of domination. Here I will only give a summary of the theoretical and to a great extent overlapping accounts given by Thompson and Eagleton. In the following chapters I will pursue in greater detail

these issues and I will show how these general modes of operation of ideology are instantiated in the EU context.

One can distinguish between five general modes through which ideology operates: legitimation, dissimulation, unification, fragmentation and reification. Each of these modes of operation can be linked with a number of different strategies of symbolic construction. According to Susan Marks' clear exposition, the difference between a mode of operation and a strategy of symbolic construction is that the latter indicates the way "in which meaning capable of operating as ideology is mobilised", while the former refers to the ways "in which meaning, thus mobilized, may come to sustain relations of domination"⁵³.

To clarify the difference between a mode of operation and a symbolic strategy, let me start with an analysis of legitimation. Legitimation is a mode of operation of ideology; the ultimate outcome of this operation is to represent certain relations of domination and their corresponding socio-political structures as just and worthy of support. The particular strategies employed to this end are: rationalisation, universalization and narrativization. All these strategies ultimately seek to present certain established relations (of domination) as just and worthy of support; they pursue, however, the same aim in different ways. Rationalization is the strategy that defends existing relations and institutions by presenting them as the outcome of a perfectly logical and coherent chain of reasoning. Universalization, on the other hand, legitimizes an order that serves the interests of a group of people by representing it as serving the interests of all people. Finally narrativization justifies claims to legitimacy by presenting them as part of stories that "recount the past and treat the present as part of a timeless and cherished tradition."⁵⁴

A second mode of operation of ideology is dissimulation. This particular *modus operandi* establishes and sustains relations of domination by concealing, denying or obscuring them. Some of the strategies of symbolic construction it employs are displacement (a term usually associated with one object/individual is used as a

⁵³ S. Marks, *op. cit.* fn. 9, p. 19.

signifier of another object/individual, thus transferring any established positive or negative connotations to the “new” object/individual), euphemization (whereby the relations /structures of domination are described in positive terms e.g. foreign workers with no citizenship rights are described as “guest workers”) and trope (figurative use of language).

Another ideological *modus operandi* is unification. This conceals the existence of the multiple divisions of society and embraces individuals in a form of unity or otherwise in a collective identity (e.g. construction of symbols of national unity such as flags, national anthems, emblems etc). In practice this *modus operandi* can be very similar with some of the symbolic strategies of legitimation such as universalization or narrativization.

Fragmentation, yet another mode of operation of ideology, is exactly the opposite of unification. Rather than presenting unconnected individuals as a form of unity, it dis-unites and fragments social groups, thereby reducing their power to challenge the existing structures of domination (strategy of differentiation) or, equally frequently, it tends to emphasise the existence of an enemy, which threatens the otherwise idyllic existing collectivity. Thompson calls this particular strategy “expurgation of the other” and offers the example of the Nazi propaganda against Jews and Communists.

Finally, reification is another general mode through which ideology can operate. Reification stabilises existing relations of domination by representing them as a permanent and natural state of affairs. It thus situates them outside of time and outside of history. Ideology qua reification employs different strategies, among which naturalization and eternalization are the most important. The former treats social/historical products as the inevitable outcome of natural processes (e.g. unequal treatment of the sexes may be presented as the natural outcome of their physiological differences), while the latter conceals the historical character of relations/structures/institutions and portrays them as permanent and unchanging givens. The obvious outcome in both cases is the tendency to promote passivization;

⁵⁴ J.B. Thompson, *op. cit.* fn.44, p. 61.

existing relations seem to be a given outside the realm of intervention of any individual or collective subject.

From this brief discussion of ideological modes and strategies it may seem that distinguishing between the different ideological manoeuvres is a straightforward task. The truth is that, although they can be usefully separated for analytical purposes, in reality they rarely work independently. Nor, of course, do the modes and strategies mentioned here exhaust the possible ways in which meaning can serve to establish and sustain powers of domination. In fact different writers give slightly different accounts of the *modi operandi* of ideology and their corresponding strategies. One could even argue that they can all be subsumed under the general heading 'legitimation'. Eagleton, for example, argues that Thompson's definition of ideology effectively equates ideology with legitimation.⁵⁵

On the other hand, as explained earlier, ideology is a matter of context and cannot be diagnosed in abstracto. This also means that the different strategies employed by ideology are not necessarily always ideological. For example rationalisation may be used to legitimise the authority of a tyrannical monarch, but it can also be used to legitimise a revolution against the same monarch. Depending on the way it is deployed, rationalisation may sustain relations of domination or equally plausibly, it may challenge them. Hence no symbolic form is ideological as such. Thompson is adamant that "whether the meaning generated by symbolic strategies, or conveyed by symbolic forms, serves to establish and sustain relations of domination is a question that can be answered only by examining the specific mechanisms by which they are transmitted from producers to receivers, and only by examining the sense which these symbolic forms have for the subjects who produce and receive them"⁵⁶.

Another point that arises from the analysis of the different ideological strategies is that most of them involve a certain degree of mystification; they somehow "mask existing social conflicts" and "they offer an imaginary resolution of real

⁵⁵ T.Eagleton, *op. cit.* fn. 38, p.5.

⁵⁶ J.B.Thompson, *op. cit.* fn. 44, p.67.

contradictions”⁵⁷. Given, however, that I earlier rejected the epistemological conception of ideology arguing that false consciousness is not a necessary, but only a contingent feature of ideology, I need to clarify the relation between this seemingly recurrent mystification and false consciousness. Do the two effectively go hand in hand or can we meaningfully distinguish between them?

Ideology as false consciousness, as we saw, is based on a cognitive model, which assumes that ideas correspond to the empirical evidence of the surrounding social reality. When this correspondence is broken, then the existence of false consciousness is affirmed. In the case of the illusion or mystification involved sometimes in the operation of ideological strategies, falsity is not connected with the non-correspondence of ideas with a pre-constituted reality, but with the fact that there is no single vantage point from which one can perceive reality. In other words, falsity here consists in the fact that a particular arrangement of social structures or relations, which may be perfectly logical/coherent/beneficial/ ‘true’ for a certain social group, is actually presented as logical/coherent/beneficial/ ‘true’ for everyone. The falsity, the mystification and the illusion lie in the fact that one particular point of view presents itself as the Archimedean point beyond dispute. This is a much more subtle cognitive model. Epistemological concerns do arise, but they focus mainly on the way in which a certain perspective of knowledge can sustain power, which is effectively a political concern; a cognitively shaded concern perhaps, but a deeply political one nevertheless.

e) Simulation: the end of ideology or the latest stage of ideology?

I have so far given a brief analysis of the concept of ideology and the particular conception of it that I shall employ in my thesis. During the last 50 years, however, numerous theorists have announced the death of ideology. “The end of ideology” discourse started in the fifties as a reaction to the experience of totalitarian ideologies such as fascism, Stalinism and Nazism. Later on, with the demise of the socialist

⁵⁷ T.Eagleton,, op. cit. fn. 38, p.6.

regimes in Eastern Europe, Francis Fukuyama declared that the end of the history had been attained. As he put it, this world-wide expansion of liberalism was “not just the end of the cold war or the passing of a particular period of post-war history, but the end of history as such: that is the end point of mankind’s ideological evolution and the universalisation of western liberal democracy as the final form of human government.”⁵⁸ His point is pretty clear. Western liberalism has triumphed over all other ideologies. Hence, ideological competition has practically ended and the concept of ideology has lost its pertinence. In this particular strand of the “end of ideology” discourse (undertaken mainly by right-wing theorists⁵⁹), it seems that ideology is taken to signify a comprehensive system of ideas, a *Weltanschauung*, or a particular political tradition. To the extent that this is a rejection of the descriptive version of ideology, it does not affect the critical conception of ideology that I sketched above.

On the other hand, more recently, post-modernist theorists⁶⁰ have also raised objections to the usefulness of the concept of ideology on a completely different basis. Ideology is an obsolete concept, so goes their argument, because it presupposes the existence of something that counts as truth; it relies upon the possibility to distinguish between correct and false representation of reality. Since, however, according to post-modernism, reality is utterly fragmented, its representation can only be a matter of perspective rather than a matter of fact; an absolute notion of truth is not tenable. This particular strand of the end of ideology debate is mainly targeting the epistemological premises of ideology. The most significant representative of post-modernism in this area is Jean Baudrillard. I will look at his work in a way that will allow me not only to rebut the post-modernist rejection of ideology, but also to dismiss the “end of ideology” debate as an ideological tool.

⁵⁸ F. Fukuyama, “The End of History?”, 3 (1989) *National Interest*, p.4.

⁵⁹ See among others D. Bell, *The End of Ideology*, Glencoe, IL: Free Press, 1962, S. M. Lipset, *Political Man*, London: Heinemann, 1964 and E. Shils, “The End of Ideology?”, 5 (1955) *Encounter*.

⁶⁰ M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (edited by C. Gordon), Brighton NY: Harvester press, 1980. For an overview of different post-modern theories, see also F. Jameson, *Post-modernism: the cultural logic of late capitalism*, London: Verso, 1991.

Baudrillard is undoubtedly the one post-modern theorist “who has gone furthest toward renouncing Enlightenment reason and all its works, from the Kantian-liberal agenda to Marxism, Frankfurt Critical Theory, the structuralist ‘sciences of man’ and even- on his view- the residual theoreticist delusions of a thinker like Foucault.”⁶¹ Baudrillard rejects the meta-narratives of enlightenment and their capacity to distinguish truth from falsehood. The ideas of truth, validity and reason become suspect in his work. In our current system, he points out, reality is constructed through the interaction of media, advertising strategies and codes. Political rhetoric backed by mass media techniques of disinformation has substituted political debate, while the coverage of political life by the media reduces substantive policy issues to meaningless slogans⁶². In this political environment public opinion and consensus are manipulated by suitably chosen poll systems and methods of statistical analysis that magically yield the desired outcomes. As a result, the conditions of an informed public debate have now broken down. Baudrillard concludes that rationalist epistemologies are inadequate for the analysis of such media-centred socio-political activities. In this new stage of post-modern evolution the old paradigms/categories of knowledge and pseudo-knowledge (ideology), truth and falsehood, reason and rhetoric, essence and appearance do not make sense any longer.

Notwithstanding his earlier affiliation with Marxist thought, Baudrillard is very critical of the Marxian theory on the basis that this is only another variant of the enlightenment theme, since it basically embraces the idea that one can criticise existing beliefs from some vantage point of truth. Marxism privileges the material conditions of being and their interconnection with the mode of production (what he calls “base”) over the superstructure which embraces politics, philosophy, art, religion etc. To the extent that Marx’s theory presents itself as providing the one right answer to the way base and superstructure interact, it is aligned with the Enlightenment aspiration to provide meta-narratives and through them an infallible method for explaining the world.

⁶¹ C. Norris, “Lost in the Funhouse: Baudrillard and the Politics of Postmodernism” in M. Gane (ed) *Jean Baudrillard*, vol. 1, London: Sage Publications, 2000, p. 363.

⁶² *ibid.*, p. 369.

As for Marx's methodological weapon, his concept of critique, Baudrillard dismisses it as follows: "the concept of critique...as the quintessence of Enlightenment rationality, is perhaps only the subtle, long-term expression of the system's expanded reproduction...Perhaps under the guise of producing its fatal internal contradiction, Marx only rendered a descriptive theory. The logic of representation – of the duplication of its object- haunts all rational discursiveness. Every critical theory is haunted by the surreptitious religion, this desire bound up with the construction of its object, this negativity subtly haunted by the very form that it negates."⁶³ Hence, according to Baudrillard, Marx's critical project ends up being part of a repressive simulation; very much like its idealistic predecessors, Marx's theory pretends to give an authoritative answer to a question that can have more than one answers. Moreover, given that truth and rationality have turned out to be fictive, it is not only Marxist theory, but theory in general that has lost all credibility.

Norris summarises Baudrillard's argument as follows: "1) Theory is a discredited enterprise, since truth has turned out to be a fictive, rhetorical or imaginary construct; 2) this prevents (or ought to prevent) our engaging in activities of "rational" argument or Ideologiekritik and 3) we must henceforth drop all talk of the "real" as opposed to its mystified, distorted or ideological representation, since such talk continues to trade on old assumptions that no longer possess any force or credibility."⁶⁴

Baudrillard further elaborates his objection against the possibility to distinguish between real and non-real in his book *Simulacra and Simulations*, where he presents the different stages of dismantling truth. "These would be the successive phases of the image: 1) It is the reflection of a basic reality 2) It masks and perverts a basic reality 3) It masks the absence of a basic reality 4) It bears no relation to any reality whatever; it is its own pure simulacrum."⁶⁵ He is adamant that what simulation is all about "is no longer a question of a false representation of reality (ideology), but of concealing the fact that the real is no longer real and thus of saving the reality

⁶³ J. Baudrillard, *Selected Writings* (edited by Mark Poster), Cambridge: Polity Press, 1988, p.116.

⁶⁴ C. Norris, op. cit. fn. 61, p. 369.

⁶⁵ J. Baudrillard, op. cit. fn. 63, p.170.

principle.”⁶⁶ In other words, ideology is, in his view, only an alibi for the existence of truth. The only truth for Baudrillard is that there can be no truth; truth is forever beyond reach.

His preferred examples of hyperreal simulacra include Disneyland and Watergate. Disneyland represents for Baudrillard “the idealised transposition of a contradictory reality.”⁶⁷ “Disneyland is presented as imaginary in order to make us believe that the rest (i.e. the world outside Disneyland) is real, whereas in fact all of Los Angeles and the America surrounding it are no longer real, but of the order of the hyperreal and simulation.”⁶⁸ Likewise, Baudrillard claims that the Watergate scandal was used instrumentally to re-affirm the morality of the political system in the USA. The fact that Watergate was exposed as a scandal functioned at the same time as a way of legitimising the system. Effectively the system’s outrage over the scandal was the perfect disguise for its own scandalous immorality.

But where do these examples and the overall theory of simulation lead us? One cannot deny Baudrillard’s description of our life according to which, we are indeed dominated by the media and their numerous manipulative marketing strategies. Present day politics seems to be completely void of reason, or at least of any reason that can be meaningfully communicated to the citizens. In fact, the citizens, these supposedly political animals, have been overburdened by too much information, channelled to them through the media, so much so that they have retreated from political life. The media have colonised political life to the extent that they have pushed the proper subjects of politics out of it.

There is very little one can say about Baudrillard’s diagnosis of the hyperreality of our political life. The question, however, remains whether, this persuasive diagnosis justifies Baudrillard’s pessimistic prognosis regarding the impossibility to change the current state of affairs and to recover the reality principle. What Baudrillard actually does, is to treat a description of the current hyperreal state of affairs as evidence of

⁶⁶ *ibid.*, p.172.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

the theoretical impossibility of the existence of reality. In political terms this stance basically amounts to an acquiescence to the current state of affairs. In fact Baudrillard makes clearly this point in his recent book “The Masses”, where he argues that apathy is the most effective weapon against hyperreality.⁶⁹ This theory’s radical scepticism leaves us with no tools or reasons to challenge the status quo. In this sense its function is highly ideological, because it facilitates the reproduction of the existing structures of actuality and their corresponding relations of domination.

For Baudrillard no meaningful distinction can be drawn between truth and falsehood. What we experience in our lives is “a hyperreal henceforth sheltered from the imaginary, leaving room only for the orbital recurrence of models and the simulated generation of difference.”⁷⁰ However, as Norris argues, “the fact remains that there is a difference between what we are given to believe and what emerges from the process of subjecting such beliefs to an informed critique of their content and modes of propagation”⁷¹. And although correspondence theories of truth may not be tenable any longer, one can still apply other criteria of truth and falsehood such as “a fairly basic coherence-theory that would point out the various lapses, inconsistencies, non-sequiturs, downright contradictions and so forth which suffice to undermine the official version of events...”⁷²

Why only the official one?

Ironically enough, even Baudrillard sometimes refers to the distinction between truth and falsehood. The examples of simulation we saw above, in a way, are premised upon the possibility to distinguish between the real and the non-real; otherwise the distinction between Disneyland and the world outside it would collapse. Besides, his claim that “the media are nothing else than a marvellous instrument for destabilising the real and the true”⁷³, also presupposes the distinction between truth and falsehood. Hence, it seems that occasionally Baudrillard appeals “for purposes of contrastive

⁶⁹ J. Baudrillard, “The Masses” in *Selected Writings*, Cambridge: Polity Press, pp.207-219.

⁷⁰ J. Baudrillard, op. cit. fn. 63, p.167.

⁷¹ C. Norris, op. cit. fn. 61, 190-191.

⁷² *ibid.*, 190-191.

⁷³ J. Baudrillard, op.cit. fn 63, p.217.

definition”⁷⁴ to the very criteria whose theoretical validity he purports to have discredited.⁷⁵

The extreme post-modern attack on reason, according to which there are no valid criteria of justification, but only multiple interpretations competing with one another on the basis of the power they possess, rather than their reasoning, seems to have gone too far. One can reject the Enlightenment obsession with the certainty offered by meta-narratives without at the same time giving up all effort to clarify the conditions “under which we can make reasonable judgments about the plausibility or implausibility of an interpretation, or the justness or otherwise of an institution”⁷⁶.

It can be validly argued that no single theory offers an infallible method of rational appraisal and no single normative standpoint can be valid for all societies and for all purposes. However, this acceptance of the contextual limits of truth and rationality does not prove theory to be inconsequential, nor does it discredit all theoretical attempts to resist the current hyperreality. Critique may not be able to transcend the historical context within which it has been produced, but once applied reflexively to the social/legal/political background of its own production, it can provide reasons for rejecting unreflective consensus or true-seeming ideological beliefs. Thus, giving up the search for an Archimedean standpoint, does not unavoidably entail giving up all theoretical resistance and all commitment to the values of rationality, truth and critique⁷⁷.

This chapter started with an analysis of the deeply political role of theory and it then moved in full circle to the post-modern disenchantment with critique, according to which there is basically no point in theory. I explained that Baudrillard’s theory of simulation gives one of the most accurate accounts of contemporary social reality, but it is seriously flawed in terms of its normative agenda as it deprives us of any

⁷⁴ C. Norris, *op.cit.* fn. 61, p. 379.

⁷⁵ Besides, if reason does not make sense any longer, how could he ever convince us that his arguments and his line of reasoning is correct?

⁷⁶ J.B. Thompson, *op. cit.* fn. 44, p.26.

argumentative grounds upon which to challenge the current state of affairs. It is this intimate complicity with the status quo that I find very interesting, because it refers back to the very definitional core of ideology.

Baudrillard and his post-modern companions seem to welcome the death of reality and the consequent death of the subject as a positive development that allows us to discard all enlightenment illusions regarding the certainty of knowledge, subjectivity and truth. The death of this supposedly unitary reality (together with the death of its tools of oppression) is celebrated because it raises our awareness of multiplicity, of the infinite number of co-existing perspectives and their corresponding realities. The problem, however, is that post-modern theorists, with few exceptions, fail to see the latent connection between the current state of (non)reality and (non)subjectivity with political economy and more particularly with commodification.

Debord was one of the first to perceive this sinister link. In his book “The Society of the Spectacle” he announced the ‘materialization of ideology’ in the form of the ‘spectacle’, which is ‘ideology par excellence’.⁷⁸ Going back to Marx, he had depicted commodity exchange as involving a representation; the recognition of one object in the image of the object with which it is to be exchanged. At some point this representation is objectified in the sense that the image of one object is believed to be objectively present within the body of the object it is exchanged with. This is the stage of commodity fetishism. Eventually the generalised use of money “as the universal commodity which secretly represents alienated human activity”⁷⁹ gives rise to the ideological phenomenon of ‘reification’⁸⁰, whereby the relationship between human beings and things, between the subject and the object, between the ideal and the material, effectively is distorted. And of course this distortion is intricately connected with the development of that initial representation involved in commodity exchange.

⁷⁷ Habermas for example introduces a type of transcendental pragmatics, which allows for a critique of existing consensus values. His theory defends critical reason against a consensus view of truth and meaning. See more about his theory in Chapters 2 and 4.

⁷⁸ G. Debord, *Society of the Spectacle*, Detroit: Black & Red, 1967, p. 215.

⁷⁹ D. Hawkes, *Ideology*, London: Routledge, 1996, p.168.

Debord, in agreement with this Marxian/Lukacsian analysis, acknowledges that commodity fetishism and the representation upon which this is based (Debord refers to this as ‘the spectacle’) have taken over reality. His account of our current situation is, in fact, very similar to that given by Baudrillard. “...the tangible world is replaced by a selection of images which exist above it, and which at the same time are recognised as the tangible par excellence.”⁸¹ Furthermore, “..the real world changes into simple images, simple images become real beings and effective motivations of a hypnotic behaviour”.⁸² The prevailing consumerism and commodification of our societies means that exchange-value is much more important than use-value or, in other words, the symbolic sphere has taken over the material one. This distortion is, once again, supported by a very well-organised media-centred system of advertising strategies that manipulate the needs and the desires of the (objectified) consumer/subject.

Given his intellectual affinity with Marxism, however, Debord stresses the link between this post-modern condition and the developments of commodity exchange. For him the post-modern condition corresponds to a certain level of development of economic activity, in which the products of human labour, through the mechanisms of the market, have dominated the lives of human beings. In other words, it is the intensification of commodification that has brought about “the materialization of ideology.”⁸³ This is why, rather than celebrating the advent of the post-modern condition, Debord deplors it.

On a similar note, Žižek, too, underlines the link between the post-modern condition and political economy. He agrees with Debord that advanced commodification is responsible for the un-doing of reality. He then ‘revives’⁸⁴ the concept of ideology in order to describe the malign impact of commodity fetishism on the subject. Like

⁸⁰ Reification is connected mainly with the work of G. Lukacs. See his book *History and Class-consciousness*, Cambridge, Mass: M.I.T. Press., 1971.

⁸¹ G. Debord, op.cit. fn 78, p.36.

⁸² *ibid.*, p.18.

⁸³ *ibid.*, p.217.

⁸⁴ R. Hawkes, op. cit. fn. 79. p. 177.

Debord, he accepts that real life itself has become ideological. The problem is not any longer that ideas do not correspond to material reality, but that material reality itself is false; it has turned into an objectified illusion.

“Ideology is not simply a ‘false consciousness’, an illusory representation of reality, it is rather this reality itself which is already to be conceived as ‘ideological’- ‘ideological’ is a social reality whose very existence implies the non-knowledge of its participants as to its essence.... ‘Ideological’ is not the ‘false consciousness’ of a social being but this being in so far as it is supported by ‘false consciousness’.”⁸⁵ Thus, for Žižek, the concept of ideology is still meaningful, referring not solely to a set of ideas, but to the totality of our existence, including material practice.⁸⁶ His conclusion regarding the post-modern condition is clear: “Far from containing any kind of subversive potentials, the dispersed, plural, constructed subject hailed by post-modern theory... simply designates the form of subjectivity that corresponds to late capitalism.”⁸⁷ By analogy one could say (and indeed this seems to be Žižek’s argument) that simulation is the ideological form that corresponds to late capitalism.

Similarly Der Derian argues that simulation has come to play the fin de siècle ideological role once monopolised by imperialism. In his view, the proliferation of simulation processes “represents –as imperialism did at the turn of the century- the gravest danger and the greatest deterrent for change in the so-called new world order”.⁸⁸ And in order to establish this claim he turns to the historiography of imperialism and simulation. In his effort to explain why, contrary to Marx’s predictions, the revolution did not take place in Western Europe, Lenin diagnosed that Western Europe (unlike Russia) had avoided the revolution, because it had managed, through its imperialistic expansion to the colonies to dilute the intensity of the reactions against its own capitalist system. In other words, the colonial imperialism of the European states managed to appease their working classes by

⁸⁵ S. Žižek, *The Sublime Object of Ideology*, New York: Verso, 1989, p. 21.

⁸⁶ Thompson’s definition indeed does not refer to ideas, but to meaning and it can thus accommodate Žižek’s conception of ideology.

⁸⁷ S. Žižek, *Tarrying with the Negative: Kant, Hegel, and the Critique of Ideology*, Durham: Duke University Press, 1993, p.216.

exporting and rendering invisible (at least to their own proletariat) the exploitative nature of capitalism. Simulation today plays a similar role. It dissolves the class struggle and the commodity form into a play of signs and simulacra. In doing so, it also brings forward the passivity of the confused masses, the “silent majorities”.

In part (d) of this chapter dissimulation was presented as a mode of operation of ideology, establishing and sustaining relations of domination by concealing, denying or obscuring their existence. This process of concealment and denial is obviously also linked with legitimation. By obscuring the actual relations of domination, dissimulation tends to represent the overall system of power as just and worthy of support. Simulation, although the opposite of dissimulation, is in fact its postmodern equivalent. In one case (dissimulation) it is the concealment of the existence of relations of domination that ensures their reproduction,⁸⁹ in the other case (simulation) it is the hyper-real (non) existence of political power in its entirety that enables commodification and capitalism to build undisturbed their system of “invisible” power structures. The simulated existence of political power effectively has the same consequences as the dissimulated existence of the relations of domination; it contributes to the legitimation of the system by presenting it as just. Despite sharing the same aims with dissimulation, simulation is much more difficult to decode (the simulacrum has all the signs of the real after all) and, therefore, much more effective in its ideological function. In fact, simulation is the mode in which ideology functions most effectively in our highly sophisticated post-modern era. The significance of Baudrillard’s work ultimately consists in the fact that it illuminates the present age and its political economy of the sign. By drawing our attention to the inadequacy of the existing critical theory to analyse the current form of capitalism, which is organised around configurations of sign value, the theory of simulation reminds us (this is its positive side-effect, not its aim) that “the classical Marxian critique of political economy needs to be supplemented by semiological theories of the sign.”⁹⁰

⁸⁸ See also the article by J. Der Derian, “Simulation: the highest stage of capitalism?” in D. Kellner (ed) *Baudrillard: A Critical Reader*, Oxford: Blackwell, pp. 189-209.

⁸⁹ One could say that colonial imperialism relied on the dissimulation of its own relations of domination.

⁹⁰ D. Kellner, *Baudrillard: A Critical Reader*, Oxford: Blackwell, 1994, p.3.

Conclusions

The aim of this chapter was to clarify the basic methodological and theoretical presuppositions that will inform my critique of EU constitutionalism. I started by explaining the meaning of immanent critique and by placing it in the centre of my theoretical inquiry. I then clarified that I view theory as praxis that aims to emancipate society. The largest part of this chapter was devoted to the concept of ideology. After elucidating some initial terminological ambiguities, which are connected with the concept's long history, I specified the particular conception of ideology that I will use in my thesis. Drawing mainly on the work of Thompson, Eagleton and Marks, I have chosen a critical, political/sociological conception that refers to all the different "ways in which meaning serves to establish and sustain relations of domination"⁹¹.

Given, however, that, even despite discarding its epistemological premises, ideology is still treated by some as anachronistic, the chapter ended with a quite long excursus on the end of ideology debate. I focused mainly on the post-modernist theorists who argue that at the current stage of hyperreality, which is a distortion and effectively an annihilation of reality, ideology has become meaningless. I rebutted this argument by stressing the important role commodification has played in the construction of this hyperreality. Simulation and hyperreality were, thus, exposed to be the highest stages of capitalism. This latent link with political economy, brought to the fore the capacity of the hyperreal post-modern condition to sustain relations of domination and, in doing this, it also verified the deeply ideological role of all attempts to discredit the theoretical pertinence of ideology.

Through its different modes of operation, ideology makes the social world appear to those who inhabit it as just, rational, reasonable or natural. Thus, ideology operates as a defensive confirmation of the past and its practices, narrowing down the spectrum of choices left open for the future. In what follows, I will throw the

⁹¹ J.B. Thompson, *op. cit.* fn. 44, p.56.

spotlight on the historical trajectory of the EU with the intention to re-claim some decision-making space for the future. Chapter 3 will revisit some of the orthodoxies of EU constitutionalism, aiming to show how the judicially driven process of constitutionalization in the EU, conveniently masked and, thereby facilitated a substitution of juridification for politicization at the heart of EU governance. Chapter 4 will then explore the different ways in which the legal outcome of this juridification is subordinated to the needs of advanced commodification as expressed within the Common Market.

This double substitution of the legal for the political and of the economic for the legal has a twofold effect. First of all, there is a general paralysis of the political in the EU public space, so much so, that, to paraphrase Baudrillard, political power is in essence no longer present except to conceal that there are no effective mechanisms for the exercise of political power in the EU; the political has entered the hyper-reality of simulation. And EU constitutionalism is the vehicle par excellence, through which this simulation has taken place in the EU. At the same time, this simulation of the political functions in a deeply ideological way, because by making us believe that the existing system of power in the EU is the product of fully legitimated democratic politics, it distracts our attention from (in fact it renders invisible) the existing structures of political economy and the asymmetrical relations of domination that have been established in one or the other way through them.

Chapter 2

The EU as a site for democracy and constitutional debate: theorising the symbiosis of Eros *and* civilization¹

Whatever is given
can always be re-imagined,
however four square
.....it happens to be
S. Heaney (*Frontiers of Writing*)

Introduction

As mentioned in the preface, this thesis is a normative critique of the EU constitutional order. The argument is that the EU, in its current shape, does not fulfil the conditions necessary for the exercise of the political and as a consequence it constitutes an insufficient locus for democracy. However, at the same time the intention here is to affirm the progressive possibilities stemming from the European project. Despite sharing the concern about the risks for democracy that loom on the

¹ The terminology employed by Joseph Weiler (“Legal Framework: Bread and Circus, The State of European Union”, 4 (1998) *Columbia Journal of European Law*, p. 246) “eros” as a signifier of the national and “civilization” as a signifier of the universal/supranational, refers to the categories introduced by Freud. In S. Freud, *Civilisation and its discontents*, London: Hogarth Press, 1949, the main argument is that civilization is based on the permanent subjugation of the human instincts. According to Freud, culture constrains not only the societal, but also the biological existence of man, the basic instincts of man, the uncontrollable Eros. This constraint is the very precondition of progress (transformation of the pleasure principle into the reality principle). Thus, the notion that a non-repressive civilization is impossible is a cornerstone of Freudian theory. In his book *Eros and Civilization* Marcuse employs these same psychological categories as political categories. “..formerly autonomous and identifiable psychical processes are being absorbed by the function of the individual in the state- by his public existence. Psychological problems therefore turn into political problems. Private disorder reflects more directly than ever before the disorder of the whole, and the cure of personal disorder depends more directly than before on the cure of the general disorder....the terms of psychology become the terms of the societal forces which define the psyche. Under these circumstances, applying psychology in the analysis of social and political events means taking an approach which has been vitiated by these very events.” The argument advanced by Marcuse breaks this fatal union of productivity and destruction and affirms the possibility of using “the social wealth for shaping man’s world in accordance with his life instincts, in the concerted struggle against the purveyors of death” (H. Marcuse, *Eros and Civilization*, London: Abacus, 1972, p.11). Marcuse insists that the repressive interrelation between civilisation and repression is not a necessary one, but results from a specific historical organisation of human existence. Similarly, my argument here does not view the interrelation between the EU project and its current un-democratic structure as unavoidable, but as stemming from very particular historical, politico-legal choices.

European level, I do not accept the conclusion drawn by some that the attempt to strive for a democratic and coherent EU legal order should therefore be dropped. On the contrary, I believe that the EU integration has the potential to create new political arenas and that it can function as an incentive to create new strategies of governance, which will not be frustrated by overriding economic restraints and which will change our political self-understanding.

The reasons for the distance between the actual and the potential shape of the EU will be analysed in detail in the following chapters. There, it will be explained that the political and democratic deficit of the EU are intricately linked with its flawed constitutionalisation process. Once this constitutionalising process is decoupled from the narrative of retrospective inevitability, it will be clear that the current structure of the EU does not constitute the only viable alternative.

Before I explore the internal inconsistencies and incoherencies of the EU constitutional order (this will be at the centre of my ideology critique as exposed in Chapter 1), I will tackle first a radically pessimistic and, therefore, debilitating, external criticism that has been raised against the very possibility of the EU to be an appropriate site for constitutional debate. The ultimate aim of this chapter is to show that the reasons for the current deficits are only contingent and not inherent in the integration project. The central argument here will be a rebuttal of the no-demos thesis, which if true, would make my project (insofar as it aims to a democratic reconstruction of the EU) redundant. In the heart of this thesis lies the argument that the EU can never attain democratic legitimacy due to the absence of a European people. The argument goes as follows: Democracy is built around the concept of demos, that is the people or the community of persons who are collectively self-governing. In other words, democracy does not exist in a vacuum, but is premised on the existence of a demos, by whom and for whom democratic discourse takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos. Hence, the boundaries within which democratic governance is to be practiced are not only geographical; they also refer to

criteria of membership to the citizenry/democratic body. The crucial shift in this argument takes place when the concept of the demos is given a homogeneous twist.

According to the no-demos thesis, as exemplified in the Maastricht Judgement² of the German Constitutional Court, some type of homogeneity is required to bind together the members of a polity. The identity of the people is in this case associated with common ethnic origin, shared values, language or common cultural habits. Far from having a single cultural identity, however, the European Union is made up of a co-existence of peoples with particular, varied identities. Thus, when applied to the project of European integration, the requirement of homogeneity among the members of a polity, leads us to pessimistic conclusions as to the prospects of a true community of Europeans.

In this chapter my aim is to refute the radical pessimism³ of this scenario. Its pessimism is radical, because the deficit at the level of the demos is “irredeemably corruptive”⁴, in the sense that it cannot be remedied as the EU evolves⁵. I will agree with the diagnosis of the no-demos thesis that there is no overriding cultural convergence among the peoples of the different EU Member States. However, a different theoretical analysis of the preconditions for the existence of a people will lead me to a more optimistic prognosis as to the future of European integration.

² *Brunner et al. v. The European Union Treaty*, 1 (1994) *Common Market Law Review* 57ff.

³ According to Neil Walker the No-demos thesis is a characteristic case of constitutional denial. “Various brands and shades of Euroscepticism have engaged in a symbolic practice of constitutional denial claiming that the EU is not an appropriate subject for constitutional debate and design. The concern that motivates this approach is that the very acceptance of the EU as an appropriate site for constitutional debate should endow that entity with greater authority and momentum as a putative self-standing polity than is deemed appropriate by the Eurosceptic.” See his article “The Idea of Constitutional Pluralism”, 65 (2002) *Modern Law Review*, p. 317.

⁴ I borrow the term from Neil Walker, *op. cit.* fn.3, p.321.

⁵ As Weiler argues “one can, *more as an hypothesis than a reality*, imagine that should the objective conditions sufficiently change, and a measure of homogeneity in language, culture, shared historical experience develop, a subjective consciousness could follow and a new Volk/nation emerge. But realistically, these mutations are possible in a “geological” time frame-epochal, not generational (my underlining).” “Does Europe need a Constitution? Demos, Telos and the German Maastricht Decision”, 1 (1995) *European Law Journal*, p.227.

The emergence of the EU as an “unidentified political object”⁶ has put into question the map of our political universe. Resisting stubbornly the existing political dualism (states and international organizations) and its respective categories, the project of European integration invites us to challenge our shared political understandings. The task is bigger than it seems, because hidden theoretical premises in political life have the tendency to assume the status of naturalness and to transform themselves into rigid orthodoxies. Political integration and its corollary notions of identity, loyalty, citizenship and democratic participation have remained exclusively within the nation-state and have not been projected to the supra/post- national level. For this reason, there is an enduring tendency to measure the normative shortcomings of the EU against the procrustean benchmark set by national and statist standards. It is more than obvious, however, that the nation-state models cannot serve in any meaningful way as interpretive schemata for a supra-national entity. By defending the viability of democracy at the level of the EU, this chapter effectively explores the philosophical potential of the Union to challenge the inherited forms of the state.

As Curtin puts it “the European Union can only become a conceivable or identifiable political object at the price of a considerable effort of re-imagination or re-conceiving of fundamental ‘shared understandings’.”⁷ In order to arrive at the requisite effort of re-imagination, we need to separate a number of ideas and images that have conditioned our understanding of a political culture. The conceptual couples of state and nation, culture and political identity, nationality and citizenship, nation and sovereignty need to be disentangled. These have remained with the nation-state and now the challenge is to project them beyond that level. And although the purpose of the exercise is not “to make a bonfire of the certainties”⁸ that have accompanied our conception of a political community so far, we need to go

⁶ P. Thibaud, “L’ Europe, Essai d’ identification”, *Esprit*, Nov. 1991, p.47.

⁷ See D. Curtin, *Postnational Democracy*, Hague: Kluwer Law International, 1997, p.3. In Curtin’s view this exercise of re-conceptualising the inertial frame of reference of the nation-state resembles the exposure of the limits of the inertial frame of reference on which Newtonian physics were once thought to depend. For Newton space was absolute, always similar and immovable. It was only in the late 20th century that Stephen Hawking localised the applications of the Newtonian theory and revealed the fragmentation and indeterminacy of space. The new theories are shifting old perspectives and opening up new perspectives for the future.

⁸ *ibid.*, p.5.

beyond the limits of the nation-state⁹ and employ different variables in the re-organisation of our political space.

I will start with the “infamous”¹⁰ Brunner/Maastricht judgement of the German Constitutional Court. It seems that since 1994, when it was passed, this judgement has been at the centre of the theoretical debate concerning different perspectives of European integration. To participate in this overflowing debate is a risk, because it seems that everything has already been said one too many times. I am willing, however, to take this risk, because I believe that this judgement offers a very good map of the jurisprudential issues connected with the feasibility of creating a European identity, the uncertainty about the ingredients that can be used to invent such an identity and its compatibility with the already existing national identities.¹¹

At this point I will limit myself to a brief exposition of the decision and I will try to de-codify its hidden theoretical premises regarding the identity of a community. I will then connect its underlying theory with the wider debate concerning nationalism. This will bring me to the distinction between ethnic and civic nationalism. Ethnic nationalism is grounded in attachment to a pre-political community of descent, while civic nationalism expresses devotion to political principles and values. Habermas’s theory of constitutional patriotism, considered to be one of the most prominent accounts of civic nationalism, will be suggested as an alternative to the Maastricht judgement’s conceptualisation of identity. I will examine in particular whether the sort of commitment constitutional patriotism involves, is thick enough to foster social solidarity and to offer a satisfactory basis for the affective dimensions of political life in the EU.

Having defended both the feasibility and the desirability of a non-cultural political identity for the EU, I will then argue that such an identity should not be seen as a magnified replication of the civic national ones, but as a qualitatively different,

⁹ See N. McCormick, “Beyond the nation-state”, 56 (1993) *Modern Law Review*, pp. 1-18.

¹⁰ M. Everson, “Beyond the Bundesverfassungsgericht: on the necessary cunning of constitutional reasoning”, 4 (1998) *European Law Journal*, p.390.

¹¹ See B. Lafan, “The Politics of Identity and Political Order in Europe”, 1 (1996) *Journal of Common Market Studies*, pp. 81ff.

transcendental identity, which not only re-defines actual political boundaries, but also re-defines the very concept of boundaries. I will, thus, suggest that any emerging European identity should be civic and post-national. The choice of post-nationalism as a theoretical framework for the EU will be based on its implications both at the national and the sub-national level. Apart from promoting a symbiotic relationship between the national and the supra-national (meaning that the European identity will not effectively replace the existing national ones), by raising our sensitivity to difference, post-nationalism also has the potential to empower sub-national, regional and local claims to self-government.

a) The Maastricht Urteil: the hidden ethnos

Mr. Manfred Brunner and others¹² raised a challenge to the validity of Germany's accession to the Maastricht Treaty on the ground that the Union Treaty was capable of infringing the right conferred on them by Article 38(1) of the German Constitution. According to Art. 38(1), Germans have "the individually assertable right to participate in the election of deputies to the Bundestag (German Parliament)". This right, which is declared by Art. 79(3), in conjunction with Art. 20(1) and (2) to be unassailable, allows the citizens to cooperate in the legitimation of state power and to have an influence over its exercise. The constitutional complaint in this case was that the complainants' rights as arising from article 38 of the constitution would be infringed if the transfer of powers from the Bundestag to the institutions of the European Union reduced the content of legitimation of state power beyond the limits set by articles 79(3) and 23(1) of the German Constitution.¹³ In other words the argument was that, if the Bundestag surrendered a big part of its functions and powers on legislation to the European organs, this would make the fore

¹² "The others" in this case were Members of the European Parliament elected in Germany, who made, however, the complaint as citizens of the Federal Republic of Germany.

¹³ These effectively define the substance of the guarantee provided by the right established under Art. 38. In particular Art. 23(1) of the Constitution enables the federal legislature, under the conditions there specified, to grant the Union the right to exercise sovereign powers independently up to the limits imposed by article 79(3), which declares the democratic principle unassailable.

mentioned right of Mr. Brunner and every other German citizen devoid of any substantive content.

I do not need to analyse here in detail this case, which is well known and has been subjected to extensive commentary. I will just reconstruct the main arguments of the German Constitutional Court, which expressed quite explicitly the view that the nation-state is the ideal, or rather, the sole for the time being, locus for democracy. The German Court in this case was concerned with the dangers involved in the process of European integration, and in particular with the potential threat that the Maastricht Treaty posed to the democratic character of the German polity. The Court addressed the potential for democratisation of the European Union at the European level and its conclusions were very sceptical as to any hope for the future. The Court's scepticism was at the end of the day informed by the No-demos thesis, which again rests on a certain constitutional understanding of the German polity.

Let us have a closer look at the arguments put forward in this case. The decision delivered by the German Constitutional Court on the compatibility of the Maastricht Treaty with the German Constitution interprets the principle of democracy as requiring that each and every execution of sovereign rights derive directly from the people of the state (*Staatsvolk*). Furthermore, the framing of the political will of the people postulates the existence of a form of public opinion, which can only be created through the free exchange of ideas and an on-going process of interaction between social forces and interests.

“Democracy, if it is not to remain a merely formal principle of accountability, is dependent on the presence of certain pre-legal conditions, such as a continuous free debate opposing social forces, interests and ideas, in which political goals also become clarified and change course, out of which comes a public opinion which forms the beginnings of political intentions. That also entails that the decision-making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood and therefore that the

citizen entitled to vote can communicate in his own language with the sovereign authority to which he is subject.”¹⁴

The Court observes that such factual conditions do not yet exist in the EU and this leads the judges to the conclusion that in the meantime (until the necessary institutional framework is put in place in the EU) democratic legitimation ultimately stems from the parliaments of the Member States.¹⁵ According to the Court’s reasoning, and this is the interesting twist, in contrast to the EU, the Member States satisfy the conditions of social interaction, because they enable their respective peoples to develop and express what binds them together –“to a greater or lesser degree of homogeneity- spiritually, socially and politically”.¹⁶

The truth is that contrary to the accusations that have been levelled against it, the German Court avoids the overt language of nationalism¹⁷ and the vocabulary of chauvinism. Instead it presents itself as adopting a position that guarantees the democratic nature of the polity as framed by the German Constitution. Hence, prima facie the German Court is not the defender of Germany’s national particularism, but the guarantor of the universal values of democracy as expressed in the country’s constitution. The Court puts forward the idea that a democratic state is inconceivable without a democratic society and that institutionalised opinion and will formation processes of the demos depend on supplies coming from the informal contexts of communication found in civil society.

¹⁴ Para C I 2b b1.

¹⁵ Besides, the Member States are viewed as the Masters of the Treaty.

¹⁶ Para C I 2b b2.

¹⁷Anthony Smith for example argues that although modernity has changed in significant ways the ethnic foundations of the modern nation-state, by adding important civic elements to it, ethnicity still plays an important role. The unity of a nation is ultimately founded on the historical collective memories and most importantly on the pre-modern myths referring to its ethnic origins. Unlike Smith, the German Constitutional Court does not refer to ethnicity. For an analysis of Smith’s arguments see A. Smith, *The Ethnic Origins of Nations*, Oxford: Blackwell and A. Smith, 1986 and “National Identity and the Idea of European Unity”, 68 (1992) *International Affairs*, pp.55-76. Other writers, e.g. Isensee do not consider common ethnic origin as an indispensable feature of a state, but as the optimal condition both to the state and to democracy. I.Isensee “Abschied der Demokratie vom Demos. Ausländerwahlrecht als Identitätsfrage fuer Volk, Demokratie und Verfassung” in *Festschrift Paul Mikat*, 1989, pp. 705-740, at 709.

The authors of the Maastricht judgement are aware that “the Staatsvolk which they regard as the only basis for democratic authority and legitimate law-making might be understood in the light of the elements used to define the notion of Volk by the romantic movement dominant at the beginning of the last century (a natural whole having an origin and a destiny of its own)”¹⁸. They, thus, try to avoid this risk by placing emphasis on “the indispensable nature of a political discourse and the conditions that make it possible, that is to say a widespread and elaborate communications system or the existence of “mediatory” agencies (political parties, institutes of learning, interest groups of all sorts)”¹⁹. However, this endeavour fails as is easy to see from the passage of the decision referring to the “spiritual, social and political homogeneity”²⁰ of the people.

According to the Maastricht judgement’s line of reasoning, the people of a polity have a subjective socio-psychological component, which is necessarily conditioned on some objective elements. The subjective manifestation refers to the collective feeling of social cohesion, shared identity and destiny. This, however, presupposes and is grounded upon the existence of certain objective elements such as common ethno-cultural criteria (common language, common history, common culture), which express the people’s “existential sameness”²¹.

As Christian Joerges observes, although “...the judgement contains Kantian passages that are open to a further development of the EC’s political system...the link between democracy and the nation-state is then constructed in such a Herderian”²²

¹⁸ F. Mancini, “Europe: The Case for Statehood”, 4 (1998) *European Law Journal*, p.34.

¹⁹ *ibid.*

²⁰ *Op. cit.* fn. 16.

²¹ “Existentieller Gemeinsamkeit” is the expression used by the BVerfG in the *Brunner* case [1994], ICMLR at para 56.

²² Herder is a representative of the German romantic thought. His aim was to oppose the universalism of the Enlightenment. His point of departure was quite simple: only language makes man human. Man is defined by his language capacity. On the one hand, language can only be learnt in a community and, on the other hand, language is synonymous with thought. But if language is thought and if it can only be learnt in a community, it follows that each community has its own mode of thought. In fact, if each language is a different way of expressing universal values, then it is also the manifestation of unique values and ideas. The same logic is then applied to customs, traditions, ceremonies and the like, each of which can be considered as another sort of language. Community is, however, more than the mere collection of all these parts; it has a unity of its own. The main theme in his theory is the quest for authenticity. In his view language mirrors the national soul and to purge the language of alien

way that a democratic supranationality becomes inconceivable”.²³ The insistence on language and homogeneity in particular implies that the unity of the people is postulated. The people as a bearer of democratic order are bound together by a social, spiritual and political homogeneity and form a pre-given existential unity. Turning to Europe it is obvious that the conditions required for the existence of a political community, as described in the Maastricht Judgement, are not fulfilled. First of all there is no European public. The decisions made at the European level are not the outcome of a generalised European wide debate, but very often the result of bureaucratic compromises. The European Union is far from constituting a common European public sphere. As Meyer has put it, “...there is nothing like a European wide discourse of the key issues of the European agenda which connects the arguments and counter arguments, competing opinions and interpretations on a European scale, so that arguments from various national, regional or sectoral quarters of the EU can regularly, continually and in a sufficiently structured manner meet and form something like a European public opinion.”²⁴

A European wide integrated public sphere entails public communication transcending the boundaries of so far limited national public spheres. This will include a European wide civil society with interest associations, non-governmental organisations, citizens’ movements, etc. interconnected with but at the same time with a separate existence from the national public spheres. The creation of a European political public sphere will involve a process of nesting smaller (national and local) public spheres in a larger (European) one.²⁵

impurities was to defend the national soul against subversion by foreign values. The political implications of these ideas are easy to guess: national communities are unique formations, which may have forgotten their true natures, but they need to recover and reclaim their true, authentic selves. Authenticity is prior to the community and restrains any changes to its identity. For a more detailed analysis see J. Breuilly, *Nationalism and the State*, Manchester: Manchester University Press, 1993, pp. 56-64.

²³ C. Joerges “Taking the law seriously: on political science and the role of law in the process of European Integration”, 2 (1996) *European Law Journal*, p. 115.

²⁴ T. Meyer, “European public sphere and societal politics” in M. Telo (ed.), *Democratie et Construction Europeenne*, Brussels: Universite de Bruxelles, 1995, pp. 123, 126.

²⁵ The emergence of civil society at the European level, although still nascent, is a significant factor in the construction of a public sphere. Curtin suggests that the transformation of our shared understandings may be enabled by advanced information technology. Apart from being a means of communication that facilitates the dialogue among the citizens, cyberspace also underlines the irrelevance of borders and thus offers an exercise in re-imagining political communities, op. cit. fn. 7,

In Europe there has been a limited harvest in terms of social cohesion. Neither a European public, nor a European debate, are detectable²⁶. Today such conditions exist only within the nation-state due to its homogeneity. On such a definition there is of course no demos at the European level, nor is there any likelihood that there will be one in the near future. But democracy is premised on the very existence of a demos, by whom and for whom, democratic discourse takes place. Consequently, thus goes the German Constitutional Court's argument, democracy cannot be constituted at the level of the EU itself, but only at the level of the individual member-states.

The gist of this argument is that, since there is no European people now, the European parliament is by definition not a popular representative body. As a result an excessive transfer of functions and powers from the national level to the European institutions will weaken democracy in the Member States. On the other hand, to strengthen the European Parliament's powers cannot counterbalance the loss of democracy on the national level. On the contrary, the empowerment of the European Parliament may actually exacerbate legitimacy problems in the sense that a parliament without a corresponding demos is no less despotic than an emperor.²⁷

What is, however, much more alarming is that apart from the conclusions drawn by the Court as to the existence of a European demos here and now (I would willingly agree – in fact this is the gist of my argument- that in the current state of affairs democracy cannot be sufficiently constituted at the level of the EU), the Court's reasoning has important implications as to any attempt to conceptualise European identity in the future. Democracy is possible in the Member States, because a homogeneous construction renders them socially coherent. Europe lacks cultural

pp. 59-61. Similarly Weiler views the internet as the starting point for the emergence of a functioning deliberative political community, a European "polity-cum-civic-society" and proposes the implementation of what he calls "Lexcalibur: the European public square". See J. Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, pp. 350-353.

²⁶ F. Mancini, op. cit. fn. 18, p. 33.

²⁷ The Court seems to contradict itself, because it suggests that a strengthening of the powers of the parliament will add to the democratic legitimacy of the Union. However, if it were consistent with its

homogeneity and is therefore denied cohesion. Hence, the democratic deficit of Europe is inborn and cannot be realistically removed, “within a timeframe, which is other than geological”.²⁸

This so-called no-demos thesis, as expressed by the members of the German Constitutional Court, is much more pervasive in its critique than the classical analysis of the European democratic deficit in that one can proclaim the latter and still accept the possibility of the emergence of a truly democratic European Union (provided that its institutional shortcomings will be overcome), while the Maastricht decision of the German Court rejects this possibility for as long as a relative homogeneity is not achieved.

The position of the Court has been that in the interest of a coherent legal system it alone has the power to review and annul Community measures on any grounds, including lack of competences. In the same way the competence to determine the competence of the European organs, the so-called *Kompetenz-Kompetenz*, cannot lay within these organs. The German Constitutional Court in this decision reserved for itself the ultimate authority in issues of democratic control of the German people and although Mr. Brunner’s challenge to the validity of the German ratification of the Treaty failed, future challenges might actually be upheld, should the European organs adopt an expansionist view of their competences. Strangely enough, it is because the Court adopts a uni-dimensional approach and sees sovereignty as still lying on the national level that it rejected Mr. Brunner’s claim. It is in my view surprising and at the same time ironic that the Court’s final approval of the already existing European Community can be seen as compatible with the non-existence of a European demos.

A further, very important implication of the above judgement is that one cannot think of a European demos without the replacement of the various Member States demoi. Hence the future of European integration poses a huge threat for the existing

own line of reasoning (negation of a European demos), it should be denouncing the representation of the peoples of the individual states by a European parliament as an exercise of hollow rhetoric.

²⁸ J. Weiler, *op. cit.* fn.5, p. 227.

European nations. If the only way to think of a demos is in terms of homogeneity, this fear is inevitable. It seems that on the judges' reading there are only two options available: either a European state or a Union of states. This attitude clearly precludes a simultaneity of multiple identities which would be based on polycentric thinking.

b) From ethnic to civic nationalism

From a theoretical point of view, there are two opposing conceptions of nation, which have been the basis for the development of two different types of nationalism. According to the classical usage, nations are communities of people of the same descent, who are integrated geographically in the form of settlements or neighbourhoods and culturally by their common language, customs and traditions, but who are not yet politically integrated through the organisational form of the state.²⁹ This is the organic conception of a nation, which has given birth to ethnic nationalism.

On the other hand, the French revolution transformed the meaning of nation from a pre-political quantity into a constitutive feature of the political identity of the citizens of a democratic polity. From that point in history onwards the intentional democratic community has taken the place of the ethnic complex. The nation of citizens finds its identity not in ethnic and cultural commonalities but in the practice of citizens who actively exercise their rights to participation and communication. This change marked the passing from ascribed nationality to an achieved one, which demanded a high degree of personal commitment and was, thus, a conscious product of one's own efforts³⁰.

²⁹ J. Habermas, "Citizenship and National Identity: Some reflections on the future of Europe", 12 (1992) *Praxis International*, pp. 3-6.

³⁰ For a civic formulation of the nation see E. Renan, "What is a nation?" in A. Zimmern (ed.) *Modern Political Doctrines*, London: Oxford University Press, 1939, pp. 9-10. According to Renan's classical description the state is a daily plebiscite. Corresponding to the two different conceptions of nation (ethnic-civic), the formulation of the modern state as a nation-state has accordingly taken two extremely different meanings, whose ideal types are best represented by France and Germany. According to the French concept the nation is a purely political community; it consists of the active citizenry. In the German (and East-European) model, the nation is viewed as a pre-political community of individuals who are bound to each other on the basis of their natural (blood) or cultural (language, history, literature or religion) particularities.

This civic form of nationalism has in its turn been given two different formulations in the liberal and the republican traditions. According to the former, the element of commonality required for the existence of a community, stems from the consensus of its members upon a set of procedural rules, which in our pluralistic societies are expressed in the constitution. In contrast to the liberal view, the republican one puts the emphasis on the self-organisation of the community through its citizens' exercise of their rights to participation and communication. On this republican reading, it is the very participation in self-rule and not the granting of political rights that is of essence for freedom and for cohesion. Hence, liberalism understands the dignity of a person in terms of human rights, while republicanism understands it in terms of self-rule. Liberalism conceives of society as made up of individuals with life plans, based on their conceptions of the good but without a commonly held conception espoused by the society itself. In republicanism the citizens have a deeper patriotic identification with their regime. This patriotism involves, beyond convergent values, a love of the particular. It is a common identification with a historical community founded on certain values.

If we try to locate the German Constitutional Court's position within this theoretical framework, we are confronted with a problem. The Court's reasoning seems to be defying the clear-cut distinction between ethnic and civic nationalism.³¹ On the one hand it uses the language of civic nationalism by resorting to the symbolically laden vocabulary of democracy³² and, on the other, it appeals to a linguistic (and therefore cultural) homogeneity, an existential unity.

³¹ C. Laborde dismisses the dichotomy between civic and ethnic nationalism as simplistic and unhelpful. In her view national identity is a complex, multi-layered phenomenon, which eludes any either-or approach. She identifies instead four layers of identity in a national community. The first one is that of ethnic, primordial links based on birth and kinship. The second is that of the broad culture, language, ways of life and social customs characteristic of a particular community. The third is that of the political culture embodied in political institutions, practices, symbols, ideological and rhetorical traditions and so forth. The fourth level finally is that of abstract, universalist political ideals and procedures usually expressed in the form of general principles outlined in the constitution. Laborde argues that levels two and three of the pyramid of identity provide a better account of what in practice binds people together than either levels one and four, upon which ethnic and civic accounts concentrate exclusively. C. Laborde, "From Constitutional to Civic Patriotism", paper delivered in the Exeter Colloquium, 24-25 November 2000.

³² Strangely enough, to set as a pre-condition for the framing of the political will the formation of public opinion through the free exchange of ideas and an ongoing process of interaction between

Dieter Grimm (a member himself of the Federal Constitutional Court of Germany) offers a civic interpretation of the Maastricht Judgement and rejects a European Constitution on the basis that there is, as yet, no European demos.³³ His arguments seem to offer an expanded and more sophisticated version of the German constitutional decision. It is thus useful to follow them a little closer and see if they offer a satisfactory answer to the objections raised earlier.

Grimm hastily distances himself from the concept of a homogeneous in organic terms “Volksgemeinschaft”. He clarifies that the people of any democracy do not constitute a community with a pre-given unity and will, but are permeated by divergences of opinion and interest. Consequently, a mediation process is needed in order to reach a temporary unity, expressed by a majority decision. However, the parliamentary process does not by itself guarantee democratic structures. Given that the voters’ individual preferences are not adequately expressed in the electoral option between vaguely defined parties, the party-recruited parliament cannot reflect the multiplicity of social interests. Hence, the parliamentary process needs to be grounded on a social process of interest mediation that enables the individuals and the social associations to influence the decisions of the state bodies. This mediation process, guaranteeing constant interaction between people and state is enabled through a communication system, which creates the public needed for any general opinion forming and democratic participation. The success of democratic institutions does not only depend upon the intrinsic excellence of their regulation, but also upon the external conditions for their effectiveness. Without the constant interaction between people and the state the democratic substance is lacking even if its forms (e.g. function of the parliament) are present. At the European level these mediatory

social forces and interests is a very Habermasian approach. Besides, the judges refer to Herman Heller as an authority for their proposition regarding the homogeneity of the Demos. In Weiler’s terms, given that Heller was “socialist, anti-fascist, Jew, critic of Schmitt”, this choice amounts to an attempt to find “a kosher seal of approval for this late Twentieth Century version, albeit anaemic and racially neutral of what in far away times fed the slogan of Blood (Volk) and Soil (Staat)”. See J. Weiler, *op. cit.* fn. 5, p.223.

³³ D. Grimm, “Does Europe need a Constitution?”, 1 (1995) *European Law Journal*, p. 288.

mechanisms seem to be completely absent. There is no European system of parties, no European associations or citizens' movements³⁴ and no European media.

According to Grimm, the prospects for Europeanisation of the communication system are absolutely non-existent. This is due to the fact that communication is bound up with language³⁵ and so is the participation in democratic procedures. The co-existence of so many different languages and the absence of one language covering a majority of the population imply that the majority of community citizens do not have a direct understanding in a Europe-wide communication. "They are instead participatively restricted and therefore disadvantaged in the European opinion-forming and interest-mediation process, which suffers much more than any national one from remoteness from its base."³⁶ Thus, Grimm downplays in his analysis the requirement of cultural homogeneity viewed as a prerequisite for the existence of a *demos* by the German Constitutional Court and attempts to restrict it to linguistic homogeneity, viewed in its turn as a *sine qua non* for the development of the political identity of the people it refers to.

The existence of multilingual states like Switzerland, Belgium or Finland does not provide for Grimm sufficient evidence that a European communication system can be feasible. He firmly believes that linguistic diversity is an insuperable impediment to the formation of a European communication system and a corresponding European political discourse. His argument appeals to quantitative differences (the European Union has 370 million inhabitants and more than 12 official languages) and differences of historical context (e.g. Switzerland had formed a national identity well

³⁴ Paradoxically enough, the first such movement seems to be the anti-globalisation movement. Although not strictly European and mainly opposed to the idea of globalisation, it views the EU as a major player in the game of globalisation and its recent massive demonstrations in Gothenborg and Genova mobilised mainly the European public. In this sense it is ironic that the first movement that seems to be able to transcend the political and linguistic borders in Europe is directed against the EU. Could it be that the significant other in opposition to which the European people will gain a sense of identity will be none else but the EU herself?

³⁵ Similarly Smith argues that "given the multiplicity of language groups and ethnic heritages in Europe it is reasonable to expect the persistence of strong ethnic sentiments... fuelled by the quest for ethnic traditions and cultural heritages of distinctive myths, memories and symbols" in "National Identity and the Idea of European Unity", 68 (1992) *International Affairs*, pp. 65, 74.

³⁶ J. Weiler, *op. cit.* fn. 5, p. 205.

before constitutionalisation and could thus relate its multilingual political discourse to it).

As for the quantitative difference, this does not substantiate any incommensurability between the EU and any other multi-lingual state. The co-existence of so many European languages may make things more difficult or more costly, but does not preclude the emergence of a European communication system (either respecting the existing linguistic diversity or promoting some lingua franca for the EU citizens alongside their mother tongues). As for the historical reasons, these could establish some qualitative incommensurability, if only they were grounded on solid theoretical analysis. However, this is not the case here as Grimm only mentions en passant the case of Switzerland's pre-constitutional formation of national identity and there is no account for the existence of other multi-lingual countries. Therefore, I do not think that the reasons given by Grimm are conclusive as to the impossibility of creating a European communication system.

Interestingly enough, Karl Deutsch uses the very same example of Switzerland to illustrate how the co-existence of different languages is not an obstacle to the development of a sense of community. Deutsch articulated a theory according to which social communication is the key factor to building and sustaining communities. For him, "membership in a people essentially consists in wide complementarity of social communication. It consists in the ability to communicate more effectively, and over a wider range of subjects with members of one large group than with outsiders".³⁷ Deutsch accepts the role of language, territorial residence, traditions, habits, historical memories and the like in the enhancement of a people's communication ability. At the same time, however, he points out certain empirical examples (the linguistic diversity of Switzerland is one of these), which belie the necessary connection of any of these features with nationhood. He

³⁷ K.W. Deutsch, *Nationalism and Social Communication: An inquiry into the foundations of Nationality*, Cambridge, Mass: MIT Press, 1966, p.97.

concludes that no simple factor's presence or absence can guarantee the development of a sense of community.³⁸

This theory, unlike the one put forward by the German Constitutional Court or Grimm, does not view linguistic homogeneity as a *sine qua non* for communication and, hence, offers a more optimistic prospective about European integration. Effectively, it views an increased quantity of communication within the EU combined with a set of "learned memories, symbols, habits, operating preferences and facilities"³⁹ as an adequate integrative element. A wider European community is bound to grow out of the separate ethno-national groups over a long-term process.

Paul Howe⁴⁰, on the other hand, raises the objection that people can develop the sense of belonging to the European community without necessarily dissociating themselves from their particular national features and developing a European nation. Deutsch's theory fails to capture the very essence of communication in the modern liberal community. For Deutsch the ability to a high degree of communication is constitutive of community, whereas for Howe the ability to communicate is reflective of our human solidarity and only secondarily formative of integration. In other words the quality of our communication is affected by our perception of the boundaries of our community. Swiss people communicate efficiently, because they believe they are members of the same community and not vice-versa. Of course the establishment of a good network of communication contributes to a further forging of the sense of belongingness to the same group, but it cannot create it *ex nihilo*.

There is another serious objection against Grimm's arguments. If we take language to be the basis for the collective identity of a people, despite our insistence on

³⁸ J. Breuilly challenges this view. He remarks that intensified communications between individuals and groups can as often lead to an increase in internal conflict as to an increase in solidarity. For a more detailed analysis see J. Breuilly, *op. cit.* fn. 22, pp. 406-407. If a community's cohesion is based on its communication ability, then it becomes clear that superior communication networks are of vital importance. Deutsch does not clarify though whether the superiority of the communication networks consists in the size of their quantity, the level of their quality or an optimum equilibrium between the two.

³⁹ K.W. Deutsch, *op. cit.* fn. 37, p.174.

⁴⁰ P. Howe, "A Community of Europeans: The Requisite Underpinnings", 1 (1995) *Journal of Common Market Studies*, pp. 35-42.

democratic discourse, we automatically make this identity dependent upon something existing prior to the democratic process itself. So in a way, we premise the feeling of belongingness on a pre-political substrate, something already shared between the members of a community before they even obtain membership. Habermas makes this point very clear in his comment on Grimm's "communicative approach". "To be sure, a politically constituted context of solidarity among citizens who despite remaining strangers to one another are supposed to stand up for each other is a communicative context rich in prerequisites. On this point there is no dissent".⁴¹ But then he describes the prerequisites for the communicative context as follows: "The core is formed by a political public sphere which enables citizens to take positions at the same time on the same topics of the same relevance....This public sphere must be embedded in the context of a freedom-valuing political culture and be supported by a liberal associational structure of a civil society. Socially relevant experience from still intact private spheres must flow into such a civil society so that they may be processed there for public treatment. The political parties -not state-dependent- must remain rooted in this complex so as to mediate between the spheres of informal public communication, on the one hand, and the institutionalised deliberation and decision processes, on the other."⁴² Hence the functional requirements of democratic will formation, as identified in the above citation, are: a political public sphere embedded in a political culture that values freedom and a system of political parties that allows the interaction between civil society and public decision-making processes.

Habermas accepts that the fulfilment of these criteria is scarce in the nation-state framework and is even more problematic for Europe. He insists, however, that to regard a pre-political collective identity/substrate (such is language) as necessary for democratic procedures, amounts to accepting a very concretistic understanding of the people and ultimately rests upon some type of cultural homogeneity. He concludes that the political self-understanding of citizens in a democratic community should not be taken as a historical-cultural a priori, but should be seen as generated by political

⁴¹ J. Habermas, "Reply to Grimm" in P. Gowan, P. Anderson (eds.) *The Question of Europe*, London: Verso, 1997, p.216.

⁴² *ibid.*

institutions.⁴³ Therefore it is to be expected that the political institutions to be created by a European constitution would have an inducing effect in the framing of a EU political will. Under this approach, there is no reason why a EU constitution could not generate the political communicative context necessary for a democracy.

This view obviously reverses the pessimism of the no-demos thesis, since it regards the emergence of a European demos as independent of any cultural substrata and as solely connected with the framing of a European Constitution. Grimm's fear of a European constitution is premised upon his acceptance of the impossibility of political self-constitution at the European level. Habermas on the other hand, grounds the very possibility of creating a European demos on the framing of a EU constitution. More about the EU constitution will be said in the next chapters. I will now turn to the theory of constitutional patriotism, which, although not explicitly mentioned in the Habermasian critique of Grimm's exposition, informs the above thoughts.

c) The model of constitutional patriotism

The concept of constitutional patriotism has been developed within the context of the recently emerged debate between ethnic nationalists and communitarians, on the one hand, and civic nationalists, on the other.⁴⁴ Ethnic nationalists and communitarians argue that a commitment to the cultural community and its way of life is required for social integration. This expresses the need for a commitment to the people viewed as an ethnos. In opposition to this, civic nationalists argue in favour of an attachment to the demos and a commitment to the universalistic political principles of the nation-

⁴³ *ibid.*

⁴⁴ For the arguments of the ethnic nationalists and communitarians see among others H. van Gunsteren, "Admission to Citizenship", 98 (1988) *Ethics*, pp.731-741, C. Taylor "The Politics of Recognition" in A. Gutman (ed) *Multiculturalism and the Politics of Recognition*, Princeton: Princeton University Press, 1994, pp.25-75, M. Walzer, *Spheres of Justice*, New York: Basic Books, 1983. Representatives of the other camp are J. Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos", 14 (1999) *International Sociology*, pp.245-268, S. Benhabib, "Citizens, Residents and Aliens in a changing world: Political Membership in the Global Era", 66 (1999) *Social Research*, pp.709-744, A. Appadurai, "Full Attachment", 10 (1998) *Public Culture*, pp.443-449.

state. Civic nationalism thus intends to increase social inclusiveness and open a space for cultural pluralism in our highly heterogeneous societies.

It is against this background⁴⁵ that Habermas⁴⁶ argues in favour of the attachment to the political culture⁴⁷. His idea of constitutional patriotism is taken to be a commitment to abstract universal principles that can serve as a least common denominator among a “diversity of cultural life-forms, ethnic groups, religions and world-views”.⁴⁸ Such an approach, unlike other forms of patriotism and nationalism puts the emphasis on a set of universal norms rather than a concrete historical community. In doing so, it does not generate irrational hostility toward people and groups whom it positions as its others⁴⁹ and it renders political affect safe for (liberal) democracy. In the context of the EU, constitutional patriotism urges us to explore the possibility of a political union held together by willing subscription to a system of authority created and maintained by a constitution.⁵⁰

The concept of constitutional patriotism as expressed in Habermas’s writings has been the object of a very animated debate. Built upon a set of universal norms rather than a historical community, it is accepted that constitutional patriotism avoids the excesses of political affect as associated with the pre-political unity of the *Volksnation*. But if its abstract universal principles are insulated from historical and

⁴⁵ For a comprehensive, critical overview of the different theories on nationalism see U. Ozkirimli, *Theories of Nationalism, A critical Introduction*, London: MacMillan Press Ltd, 2000.

⁴⁶ The term constitutional patriotism does not appear in Habermas’s work until the 80s when he participated in the *Historikerstreit*. For more information see below in this chapter p. 67.

⁴⁷ Habermas’s “discourse theory of law and democracy” (see for example his book *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge Mass.: The MIT Press, 1996) is a reworking of Kant’s effort to reconcile universalistic aspirations with the diversity of national cultures. Having had the benefit of two hundred years’ hindsight, Habermas manages to alter Kant’s project of conceptual reconciliation in important aspects. For an account of Kant’s views on cosmopolitanism and nationalism see H. Reiss (ed) *Kant: Political Writings*, Cambridge: Cambridge University Press, 1991 and especially the essays “Idea for a universal history with a cosmopolitan purpose”, “On the common saying: this may be true in theory, but it does not apply in practice” and “Perpetual Peace: A Philosophical Sketch”.

⁴⁸ J. Habermas, “The European Nation State. Its Achievements and its Limitations. On the Past and Future of Sovereignty and Citizenship”, 9 (1996) *Ratio Juris*, pp.125-137. On the abstract and procedural character of constitutional patriotism, see J. Habermas “Historical consciousness and post-traditional identity” in Nichol森 (ed) *New Conservatism*, Cambridge MA: MIT Press, p.261.

⁴⁹ See P. Markell “On Constitutional Patriotism”, 28 (2000) *Political Theory*, p.44.

⁵⁰ A. Ingram “Constitutional Patriotism”, 22 (1996) *Philosophy and Social Criticism*, p.2, J. Habermas, “Citizenship and National Identity: some reflections on the future of Europe”, 12 (1992) *Praxis International*, p.17.

cultural context, the question then becomes whether these can provide a sufficient basis for identification and passionate attachment with a concrete historical community. This seems to be the argument around which most criticisms against constitutional patriotism converge; it is too thin to provide a solid basis for the affective dimensions of political life and thus to foster social solidarity. The exchange of “the dangerous romance of polis and patria for the calm certitudes of reason”⁵¹ has been rejected as unsustainable, because abstract principles cannot possibly serve as a foundation of national pride and collective self-esteem. Or at least so goes the argument.

But before I analyse any further the criticisms concerning the ability of constitutional patriotism to sustain the cohesion of a community, it is useful to situate constitutional patriotism in the context of Habermas’s wider opus. Going as back as 1974, Habermas is interested in the conditions of rationality, which are imposed by modernity. His concern seems to be that modernity “introduces an inevitable cleavage between ego-identity derived from universalistic structures and collective identity bound up with a particular community”.⁵² On the one hand, the entities possessing an identity-forming power (e.g. family, tribe, city, state, nation) cannot justify their boundaries on the basis of universalistic norms and, on the other hand, if these loci of passionate identification ceased to exist, “universalistic morality, in the same way as the ego structures consistent with it, would remain a mere postulate”.⁵³

Habermas’s solution to the above tension is an optimistic one. He suggests that the basic norms of rational discourse, upon which the universalistic morality of modernity rests, could themselves become the foundation of a new form of collective identity through which universal principles would acquire effectiveness and social reality.⁵⁴ This marks the passage from a stage of conventional, blind identification with traditional groups and corresponding roles (the individual secures identity only

⁵¹ P. Markell, op. cit. fn.49, p.38.

⁵² J. Habermas “Koennen komplexe Gesellschaften eine rationale Identitaet ausbilden?” in *Zur Rekonstruktion des historischen Materialismus*, Frankfurt am Main: Suhrkamp, 1976, p.101. An abridged translation of this article was published as “On Social Identity”, 19 (1974) *Telos*, pp.94ff.

⁵³ *ibid.*

⁵⁴ *ibid.*, p.100.

at the cost of blindly accepting the traditional roles assigned to him by others) to a stage of post-conventional identification⁵⁵, in which the individual develops a critical view of the social expectations he/she is confronted with. And although the individual can never position himself/herself outside society, the dimension of intersubjectivity in the post-conventional stage takes a different meaning.

In Habermas's essay "Individuation through Socialization: On Mead's theory of subjectivity"⁵⁶ the individual's identity is presented as autonomously formed. It appeals to the other subjects for recognition, but it is not unilaterally determined by their demands. By analogy Habermas applies the same argument regarding the formation of the individual's identity to the development of collective identities. Hence, while conventional collective identities are grounded in fixed attributes such as kinship, ethnicity and territory, the post-conventional identity would "no longer require fixed contents", but a "consciousness of universal and equal opportunity to participate in value and norm-forming processes".⁵⁷

Viewed in the light of the above, constitutional patriotism can no longer be seen as pure attachment to abstract principles, but responds to the need to overcome the cleavage between universalistic structures and particularism. Hence, if post-conventional ego-identity refers to the stage of development of a mature individual who has overcome the certitudes of tradition and social convention, constitutional patriotism is correspondingly the appropriate form of affect for a mature politics that has overcome the need for a pre-political ground⁵⁸. Thus, rather than referring outside politics to "a prior homogeneity of descent or form of life" constitutional

⁵⁵ On post-conventional ego-identity, see J. Habermas, "Moral Development and Ego Identity" in *Communication and the Evolution of Society* (translated by Thomas McCarthy), Boston: Beacon, 1979. Habermas does not actually use the term "post-conventional" to characterize collective identity in this essay, but the usage seems consistent with his intentions in this piece. On the postconventional as a stage in the history of social organisation see J. Habermas *The Theory of Communicative Action, vol. 2: Lifeworld and System: A critique of Functionalist Reason* (translated by Thomas McCarthy), Boston: Beacon, 1987, pp.153-197.

⁵⁶ J. Habermas, "Individuation through Socialization: On Mead's Theory of Subjectivity" in *Postmetaphysical thinking: philosophical essays*, Cambridge, MA: MIT Press, 1992, pp.183-188.

⁵⁷ P. Markell, op.cit. fn. 49, pp. 40-41.

⁵⁸ *ibid.*, p.43.

patriotism directs citizens allegiance toward the nation now conceived simply as “a self-determining political community”.⁵⁹

Habermas’s position is that “a liberal political culture is only the common denominator for a constitutional [not a cultural] patriotism...that heightens an awareness of both the diversity and the integrity of the different forms of life co-existing in a multi-cultural society.”⁶⁰ He believes that multi-cultural societies should be premised on common legal principles. His nation of citizens pivots on the exercise of citizenship rights rather than on similarities of cultural or ethnic identity. His reason for objecting to the requirement of commitment to a society’s cultural way of life is that this would protect the “ethnic-cultural substance of the particular form of life” connecting citizenship with historically specific cultural identities.⁶¹

Amy Bartholomew⁶² offers a similar reading of constitutional patriotism according to which the insulation of constitutional patriotism from concrete historical contexts is not necessary. Her argument is based on the following: In “Struggles for Recognition”⁶³ Habermas argues that social solidarity can only be achieved, and (once achieved) maintained, by a constitutional patriotism that integrates citizens politically rather than ethically. In order to mutually recognize all forms of life (provided these are compatible with constitutional democracy), we need to distinguish between ethical/cultural and political integration. On the other hand, and this is the interesting aspect of this theory, Habermas argues that political integration is also ethically⁶⁴ permeated, because political culture is based upon a constitution and a legal system which are embedded in particular historical contexts. These are

⁵⁹ J. Habermas, “Citizenship and National Identity”, Appendix II to *Between Facts and Norms: Contributions to a discourse theory of law and democracy*, Cambridge MA: MIT Press, 1996, p. 496.

⁶⁰ *ibid.*, p.500.

⁶¹ *ibid.*, p.513.

⁶² A. Bartholomew, “Constitutional Patriotism and Social Inclusiveness: Justice for Immigrants?”, paper presented at the Exeter Colloquium, 24-25 November 2000.

⁶³ J. Habermas, “Struggles for Recognition in the Democratic Constitutional State”, in Amy Gutmann (ed) *Multiculturalism: Examining the Politics of Recognition*, Princeton: Princeton University Press, 1994, p.134.

⁶⁴ According to Habermas “ethical issues are those that come up when we are concerned with questions of my or our own plan of life, questions of the good life, while moral issues are at stake when we wish to solve interpersonal conflicts in concordance with the interests of everybody involved and affected.” See his article “Human Rights and Popular Sovereignty: The Liberal and Republican Versions”, 7 (1994) *Ratio Juris*, p. 3.

inescapably permeated by ethical considerations since they are the expression of the community's (political) history. Hence constitutional patriotism has an ethical component, a "politico-cultural context"⁶⁵, which depends upon a certain nation's "historical experience"⁶⁶.

It is also interesting to note that the very term "constitutional patriotism" does not appear in Habermas's work until the 80s when he participated in the Historikerstreit (historians debate). This was a heated debate concerning the public use of history. The controversy was triggered in 1985 when Reagan was visiting West Germany (in his official capacity as President of the USA) at Chancellor Kohl's invitation. His itinerary included among other places a German military cemetery at Bitsburg, where members of the SS and the Wehrmacht were buried. Although, Reagan's official visit also included a concentration camp, it was argued by Habermas and others that by presenting the two visits as symmetrical, if not equivalent, the German state was downplaying the importance of the Holocaust and was attempting to rehabilitate its national history. The historians' debate ultimately concerned the interpretation of the Nazi past and centred on the problematic relationship between historical consciousness and contemporary self-understanding.

In his intervention in the Historikerstreit⁶⁷, Habermas argued that constitutional patriotism requires a commitment to abstract and universalist principles whose legitimacy is not based upon "the concrete totality of the nation".⁶⁸ At the same time, however, this very same intervention underlined the importance of the historical past and the obligation of remembrance this imposes on us. Hence, universalist principles upon which constitutional patriotism rests, must be seen in the light of the historical past (constitutional and other) of a specific country.

⁶⁵ J. Habermas, op. cit. fn.59, p.513.

⁶⁶ J. Habermas, op. cit. fn. 63, p.134.

⁶⁷ For Habermas' stance in the Historikerstreit see his articles "Defusing the Past: a politico-cultural tract" in Hartman (ed) *Bitsburg in Moral and Political Perspective*, p.46 and "Apologetic Tendencies" in Nichol森 (ed) *The New Conservatism*, Cambridge MA: MIT Press, 1989 and the essays collected in his book *The Past as Future* (translated by Max Pensky), Lincoln: University of Nebraska Press, 1994.

In his article “The European Nation-State: On the past and the future of sovereignty and citizenship” Habermas repeats his main thesis that the political culture of a country crystallises around its constitution: He furthermore clarifies that “each national culture develops a distinctive interpretation of those constitutional principles that are equally embodied in other republican constitutions- such as popular sovereignty and human rights- in light of its own national history”.⁶⁹ This shows clearly that constitutional patriotism is not an abstract commitment to political values. It is a commitment to the historically constituted ethical-political culture, rather than to the ethical-cultural ways of life.⁷⁰

Besides, in his recent book “Between Facts and Norms” Habermas suggests that it is the creation of positive law and the coercive state that provide the necessary supplements to the normative principles of a legal order. The universal principles of modernity only acquire binding force and become effective if they are embodied in a particular system of positive law. And again the particularity of this cannot be defined by norms, but is provided by the element of facticity. Habermas is very clear on this: “The identity of a person, of a group, of a nation or of a region is always something concrete, something particular and it can never consist merely in general moral orientations and characteristics, which are shared by all alike”.⁷¹

Habermas, thus, views constitutional patriotism as involving an on-going interpretation of a particular historical tradition that is embedded in the political culture⁷². He insists that the political culture of a polity is ethically permeated, but

⁶⁸ J. Torpey quoting Habermas, “Introduction: Habermas and the Historians”, 44 (1998) *New German Critique*, p.18.

⁶⁹ J. Habermas, “The European Nation-state: on the Past and the Future of Sovereignty and Citizenship” in P. de Greiff (ed) *The Inclusion of the Other*, Cambridge MA: The MIT Press, 1998, p.118.

⁷⁰ J. Habermas, op. cit. fn. 63, p.138.

⁷¹ J. Habermas, “The limits of neo-historicism” in P. Dews (ed) *Autonomy and solidarity: interviews with Jurgen Habermas*, London: Verso, 1996, p.239

⁷² For a different interpretation of constitutional patriotism, see C. Laborde, op. cit. fn. 31. In her view the patriotic commitment implied by constitutional patriotism is detached from particular cultural contexts. She argues that this strategy of complete insulation of politics from culture is self-defeating. She puts forward instead the concept of civic patriotism, which recognises the role of particularist political cultures in grounding universalist principles. Her idea of civic patriotism acknowledges that the boundaries between the cultural and political levels of identity are porous (political institutions

that the ethical substance of constitutional patriotism cannot be permitted to undermine the constitution and the legal system's neutrality or impartiality toward cultural forms of life that are ethically integrated around their own conceptions of the good. He distinguishes between ethical and political integration and between the political culture that is ethically permeated in the sense of being constituted by more than just universal rights (including the history of interpretation of the constitution)⁷³ and a majority culture that would allow a particular hegemonic ethical culture to prevail.

Effectively, Habermas's patriotism is based upon the interpretation of constitutional principles within the context of a particular national history and tradition. This type of constitutional loyalty can be expected if citizens are in a position to adopt what he calls the "we perspective of active self-determination"⁷⁴ and conceive the constitutional state as an achievement of their own history. For this to be possible universalist principles must be woven into the fabric of local conversations in ways that resonate with the political self-understanding of the society in question.⁷⁵ The constitution is treated as an open-ended process, such that can endure only as an on-going interpretation.⁷⁶

and practices cannot be entirely separated from their wider political context) and is aligned with the interpretation of constitutional patriotism as put forward here.

⁷³ Habermas uses the term "ethical" in somewhat the same way Hegel used "sittlich" and "Sittlichkeit" to represent cultures and forms of life from a normative and evaluative perspective.

⁷⁴ J. Habermas, op. cit. fn. 59, p.263.

⁷⁵ C. Laborde, op. cit. fn. 31, p.5.

⁷⁶ Similarly, Attracta Ingram argues that the post-national identity is "a political identity founded on recognition of democratic values and human rights as these are contextualised in a particular constitutional tradition." A. Ingram, op. cit. fn. 50, p.9. Ingram associates constitutional patriotism with liberalism and the idea that the state is the source of unity of the body politic. She defends the capacity of liberal unity to establish a collective identity. In her opinion the charge against liberal unity's ability to foster solidarity and a sense of belongingness rests upon the mistaken belief that "collectives can only be spawned by previous collectives". According to her argument, which employs Searle's account of social phenomena on the basis of intentional causation, both nations and states are similarly constructed phenomena; they are both produced by "collective intentionality" (this is a primitive individual capacity of identifying with others similarly equipped as parts of a collective "we"). Similar arguments emphasising the socio-culturally constructed (as opposed to the natural) character of nations have been put forward before. Benedict Anderson's "imagined communities" and Max Weber's "imagined communalities" show that national consciousness typically includes "a belief by the members of the national community that they share some distinct subset of such "objective" features as common descent, language, culture, homeland, customs, traditions, religion, history, destiny or the like. But these commonalities are as often fictive as real." T. McCarthy, "On Reconciling Cosmopolitan Unity and National Diversity", 11 (1999) *Public Culture*, p.177.

The analysis so far has aimed to show that constitutional patriotism is not as thin as some theorists have claimed it is and that its embeddedness in a particular political culture can provide the basis for identification with a political community. One of the main accusations levelled against constitutional patriotism is that, if we found our political allegiances upon universalist principles, we cannot reasonably defend the existence of any boundaries other than the global ones. I believe that the interpretation of constitutional patriotism presented above shows how the universal principles can be perfectly compatible with different, specific spatial and temporal boundaries.

At this point one could argue, however, that the conception of constitutional patriotism I have presented here is actually too thick rather than too thin, because by being situated in the constitutional history of a particular political community, it invokes “a historical community of descent that imposes unchosen and inescapable obligations on its members”⁷⁷. Going to the opposite end of the spectrum, could it be that, given its embeddedness, constitutional patriotism expresses an unreflexive loyalty to the predominant political culture?

The term banal nationalism has been employed by Billig⁷⁸ to signify the continual “flagging” or reminding of nationhood, which is so discreet as to be found in the daily rhetoric of “we”, in the embodied habits of social life. Could it be that constitutional patriotism is too attached to its particularistic heritage? Can constitutional patriotism challenge those expressions of banal (civic) patriotism, which may be found to be offensive or alienating to certain groups in society? Can constitutional patriotism be sensitive to the ways in which certain expressions of its particularism alienate cultural minorities? Can it manage to dissociate itself from the majority’s culture and to contribute to sustaining feelings of solidarity between all citizens?

⁷⁷ P. Markell, op. cit. fn. 49, p.53.

⁷⁸ As Billig contends “our” nationalism is not presented as nationalism, which is dangerously irrational, surplus and alien; it is presented as “patriotism” which is good and beneficial. Could it be that constitutional patriotism is as embedded in historical particularity (and therefore irrationality) as any other type of nationalism? See M. Billig, *Banal Nationalism*, London: Sage, 1995.

The ability of constitutional patriotism to resist an unreflexive attachment to the existing political culture can be affirmed through reference to another event in the recent political life of Germany. In the aftermath of a neo-nazi attack against foreigners in the newly unified Germany⁷⁹, people organised massive demonstrations against violence. In an article published in *Die Zeit* on 11th December, Habermas greeted these demonstrations of public indignation as admirable examples of constitutional patriotism. In his view, the protests were seen as “putting a stop to the half-hearted and ambivalent reactions on high”.⁸⁰ He explained that, by voicing its protest, the people displayed empathy and democratic indignation and distinguished itself from the official spokespersons of the state. The people’s renunciation of what was trying to present itself as political normality was an admirable defence of minoritarian, and therefore vulnerable, groups and a transcendence of Germany’s hegemonic political culture.⁸¹

One can find a similar example in the work of Jacques Ranciere who wrote about the French protests during the Algerian war: “For my generation politics in France relied upon an impossible identification- an identification with the bodies of the Algerians beaten to death and thrown into the Seine by the French police, in the name of the French people, in October 1961. We could not identify with those Algerians, but we could question our identification with the “French people” in whose name they had been murdered. That is to say, we could act as political subjects in the interval or gap between two identities, neither of which we could assume”.⁸²

These two historical examples illustrate how constitutional patriotism cannot simply be identified with an unreflexive attachment to the hegemonic political culture of a

⁷⁹ On 23rd November 1992, neo-nazis threw firebombs into two homes on Moelln, a town in the northern German state of Schleswig-Holstein. As a result three people were killed. Although this was not the first instance of violence against foreigners, this event triggered a very strong public response. Massive demonstrations took place not only in Moelln, but also in all big cities in Germany.

⁸⁰ J. Habermas, “Die zweite Lebensluege der Bundesrepublik : wir sind wieder normal geworden”, *Die Zeit*, December 11, 1992, p. 48.

⁸¹ *ibid.*

⁸² J. Ranciere, “Politics, Identification and Subjectivization” in J. Rajchman (ed) *The Identity in Question*, New York: Routledge, 1995, p.67. See also J. Ranciere, *Disagreement: Politics and*

community. On the contrary, it is usually by putting in question certain expressions of majoritarian politics that it demonstrates itself and it differentiates itself from nationalism (even in its civic form). The universal normative principles upon which constitutional patriotism is grounded are not self-sufficient; they depend on supplements of particularity that allow them to inspire attachment and identification; on the other hand, constitutional patriotism resists its equivalence with any particular set of already available universals “for the sake of the ongoing, always incomplete and often unpredictable project of universalization.”⁸³

I will return to this incomplete and open character of the process of universalization later. At this point suffice it to say that constitutional patriotism can be seen as promoting a mainly political identity, whose predominantly political nature makes it compatible with a variety of practices and beliefs, but whose thin particularistic content justifies citizens’ commitment to specific institutions and practices. In this sense political culture can be defined as the loose and malleable framework, which sustains our political conversations over time. It includes familiarity with collective institutions, political rituals and rhetoric, types of discourses and accumulated habits and expectations stemming from previous conversations, which does not in any way assume substantial agreement.

Given that my analysis of constitutional patriotism was elaborated against the background provided by the distinction between ethnic and civic nationalism, one might reasonably believe that my so far arguments point to the construction of a civic EU nationalism which will replace the national identities existing in the member states. This scenario would have the same implications for the national identities, as the one described by the German Constitutional Court, the only difference being that the new European identity would be civic rather than ethnic/cultural. Having defended the theoretical possibility of a non-cultural political identity above, at this point I will argue that such an identity should not just be a replication of the civic

Philosophy, translated by Julie Rose, Minneapolis: University of Minnesota Press, 1999. Ranciere does not explicitly identify this practice as an exercise of constitutional patriotism.

⁸³ P. Markell, op. cit. fn. 49, p. 40.

national ones. Any emerging European identity should be civic and post-national at the same time.

Before I embark upon an analysis of supra/post-nationalism, I would like to clarify the relationship between civic nationalism and constitutional patriotism. According to most analyses, constitutional patriotism is taken to be either synonymous with or a sub-category of civic nationalism. This seems quite straightforward since both civic nationalism and constitutional patriotism refer to abstract –albeit inevitably embedded– principles as a basis for political identification. Given, however, the stance Habermas has taken in recent events of the German history (e.g. demonstrations of German citizens expressing their solidarity to immigrants), I think that these taken for granted close links between constitutional patriotism and civic nationalism are contestable.

To understand the difference between the two, one needs to exercise historical imagination and reflect upon cases in which citizens can or have been asked to test their political principles in a case of dramatic conflict with the national feeling. In France for example, where the universalist principles are constitutive of a very important aspect of the people's political identity, the French had the opportunity to test these principles during the Algerian war. Opposition to the official French government's foreign policy choices was a clear case of conflict between universalist principles and national feeling.⁸⁴ Hence, the nation, even in its civic French version, “remains within the domain of the theologico-political” and “the ethos of constitutive

⁸⁴ It is interesting that Jean-Marc Ferry (in P. Thibaud, J.-M. Ferry, *Discussions sur l' Europe*, Paris: Calman-Levy, 1992)) in exercising his historical imagination is unable to think of an example illustrating how French national feeling came into conflict with universalist principles. He examines the case of the French resistance to the Vichy government, but argues –quite rightly– that this resistance was above all national, since people fought against the Nazi occupier forces in the name of France and its territorial integrity. Of course by fighting against their occupier they were also fighting against nationalsocialism. He concludes that in France one cannot isolate national patriotism from constitutional patriotism, because within its republican culture the nation and democracy are interlinked in such a way that national sovereignty has become an extension of popular sovereignty. The same ambivalence is obviously not present in the case of the German resistance against nationalsocialism. Intellectuals and politicians like Thomas Mann, Karl Jaspers or Konrad Adenauer, had to choose between nationalist solidarity and constitutional patriotism. Even if they claimed that they represented the true Germany, even if they still wanted to belong to the German nation, they still had to break the ties with a certain part of their people, their nation, their state. As we saw above,

submission”. It has the symbolic meaning of an imaginary community and is in search of a foundation transcending the political. It is “a singular universal”,⁸⁵ defining the limit beyond which the other is not regarded as a co-citizen.

To use a term from Lefort, democratic indeterminacy stops at the level of the nation. Even though in the civic model national sovereignty has become an extension of popular sovereignty, the nation is still a symbol with a politically ascriptive value imputing on its members the will to live and act together. This does not mean that the civic nation is constituted in an unreflective way. Voices against (any) civic nationalism’s mainstream expressions can indeed be raised. There is in fact a vast bibliography on the openness of the (civic) nations and I do not intend to question its accuracy here. My argument insists, however, that in constitutional patriotism –at least in its most radical interpretation- there is a right to civil disobedience rather than a simple right to contest verbally the majority expression of a political identity, when this comes into conflict with universalist principles.⁸⁶

In an article on civil disobedience Habermas stresses that every constitutional democracy that is sure of itself “considers civil disobedience as a normalised-because necessary- component of its political culture”⁸⁷ He is adamant that the democratic state is not reducible to its legal order and that its legitimacy is grounded upon the supra-legal validity of human rights. In order to protect itself against the moral uprooting of its system, the constitutional state must protect and sustain the idea of distrust towards itself.⁸⁸ This paradox “finds its resolution in a political culture that provides its citizens with the sensibility- with the measure of judgement and willingness to take risks- which is necessary in transitional and exceptional situations

Ranciere pointedly puts things into the right perspective by reminding us the Algerian fight for independence.

⁸⁵ *ibid.*

⁸⁶ I would be tempted to say (although I don’t think that this is Habermas’ interpretation) that this is in fact a duty to resistance and civil disobedience.

⁸⁷ J. Habermas, “Civil disobedience: Litmus test for the democratic constitutional state”, 30 (1985) *Berkeley Journal of Sociology*, p. 99.

⁸⁸ This distrust cannot always assume an institutionally secured form.

to recognise the legal offences against legitimacy and if need be to act illegally out of moral insight.”⁸⁹

Habermas insists that “the realisation of exacting constitutional principles with universalistic content is a long term process which historically has been by no means linear and is instead characterised by errors, resistances and defeats.”⁹⁰ This means that the constitutional state as a whole appears from this historical perspective not as a finished product, but rather as a susceptible, precarious undertaking which is constructed for the purpose of establishing or maintaining, renewing or broadening a legitimate legal order under constantly changing circumstances. He concludes that “that which is *prima facie* civil disobedience may soon prove to be the pace-setter for long overdue corrections and innovations because law and policy depending on principles are in a constant process of adaptation and revision. In these cases civil violations of rules are morally justified experiments without which a vital republic can retain neither its capacity for innovation nor its citizens’ belief in its legitimacy.”⁹¹

Conclusions

The objective of this chapter was to rebut the no-demos thesis, according to which the current (constitutional and democratic) shortcomings of the EU are inherent and not contingent in a multi-cultural project of this magnitude. The no-demos thesis as expressed by the German Constitutional Court is an external criticism which puts into question the very possibility of imagining a normatively coherent, democratic, constitutional order in the EU. As I explained in Chapter 1, the aim of this thesis is to deconstruct the constitutional actuality of the EU. The deconstruction put forward here, however, does not only aim to show that what already exists does not work, but also to suggest how an alternative viable approach might be designed.

⁸⁹ J. Habermas, *op. cit.* fn. 87, p.103.

⁹⁰ *ibid.*, p.104.

The Bundesverfassungsgericht in its Maastricht judgement challenges the political character of the EU by reminding us that in democracy all normative relations must be referred to the sovereign people and since in Europe there is no sovereign people that could be represented by the European institutions (only multiple sovereign peoples represented by the national institutions), the EU cannot constitute an independent political order. By putting forward this argument the federal court seems to conceive political unity as based on a certain degree of cultural homogeneity and consequently lapses into a form of representationalism in the sense that the legal order represents a pre-given existential unity. Its pessimistic conclusion is that the process of European integration cannot be legitimated for the time being and the EU cannot be a site for democracy and constitutional debate, since a culturally homogeneous European nation has not emerged yet.

Against this background, I argued that the absence of an organically homogeneous demos does not pose insuperable obstacles to viewing the EU as a site for democratic decision-making and constitutional design, because the common European identity that will provide the glue for the new political entity can be based on universal principles rather than on cultural traits. More specifically the feasibility of constructing a political community in the EU was defended by reference to Habermas' theory of constitutional patriotism. Having clarified that according to the Habermasian model, the constitution (with its universal normative principles) is the source of unity of the body politic, I then defended constitutional patriotism from the two main objections raised against it on the grounds of a) political specificity and b) contextual dependence.

According to the former, the universal principles, upon which constitutional patriotism is based, are unable to offer the framework for a political identity (a European political identity in our case), because they are too abstract and they cannot justify the existence of any boundaries. The argument here is that a consistent application of universal principles goes hand in hand with unqualified cosmopolitanism. Against this objection, I argued that the project of universalisation

⁹¹ *ibid.*

is an on-going process, open to different interpretations. The European Union, if it were to embrace constitutional patriotism, would offer its own interpretation of the meaning of universalism.

As far as the latter objection is concerned, this refers to the inability of any political identity to transcend (or in Hegelian terms “Aufheben”) its culture of origin. By pointing to examples such as the French protest against the treatment of Algerians, the German opposition to the Nazi regime or the very recent German demonstrations renouncing any type of violence against foreigners, I showed that a transcendence of our culture is not inconceivable. In fact it is not even a novel idea.

I am aware of the fact that both of these objections stem from the tension that underlies the relationship between juridical universalism and cultural singularity. I do not claim that the tension does not exist, nor that it is an easily manageable one. On the contrary, I acknowledge the immense difficulties one is confronted with while trying to articulate any proposal that deals with this fundamental tension. At the same time, however, I welcome both the tension and the difficulties lying within it, because of their potential to challenge constantly and radically our multiple boundaries and self-perceptions.

Chapter 3

The juridification of the political: constitutional law without constitutional politics

Memory is a snare, pure and simple: it alters,
it subtly rearranges the past to fit the present.
Mario Vargas Llosa (The storyteller)

Introduction

In Chapter 2 I defended both the feasibility and the desirability of a non-cultural, identity for the EU. Within that context I argued that constitutional patriotism could foster social solidarity and offer a satisfactory basis for the affective dimensions of political life in the EU. Since the model of constitutional patriotism is grounded on the concept of a political constitution, I will now turn to the EU constitutional order¹ and explore whether its actual institutionalisation fulfils the conditions required for the development of a politically inspired patriotism. The conclusion drawn from this enquiry will allow me to establish whether the present EU constitutional order can function as a matrix for social cohesion among the peoples of Europe.

The Convention for the future of Europe, which prepared the draft of the European Constitution last year, triggered an intensification of the debate over the constitutional question, which in its turn consists of a series of very fundamental questions. What does “constitution” mean in the European context? Can we really claim that the EU Treaties

¹ G. de Burca argues that there is a misfit between “the formal institutional picture presented by the Treaties and the Court” and “the more complex and nuanced reality of the evolving EU governance structure”. De Burca argues that this gap between formality and reality can be used as an objection to the constitutional character of the EU as a whole. G. de Burca, “The Institutional Development of the EU: A Constitutional Analysis” in P. Craig, G. de Burca (eds.) *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, p. 55. Strictly speaking it is the supranational EC Treaty as opposed to the intergovernmental second and third pillars that is constitutional. For a different opinion see also J. Shaw “Process and Constitutional Discourse in the European Union”, 27 (2000) *Journal of Law and Society*, pp. 4-16. Here the term “EU” will be used as an umbrella term for EU and EC.

qualify as a constitution? And, if they do, do we need a new constitution? Apart from the ontological question of the existence of an EU constitution, there is of course the theoretical question about whether the EU should have a constitution at all. The answers given by the literature are divided not only on the relevant questions of theory, but also, and more surprisingly so, on the very questions of constitutional ontology. Given that the proposed Constitutional Treaty, which was agreed upon and signed in the recently concluded Intergovernmental Conference in Brussels (16-17 June), has not been ratified yet, my critique of the EU constitutional order in this and the next chapter will not touch upon this text. Once my argument is completed, I will turn to the work of the Convention for the Future of Europe and the new EU constitution and, assuming the EU constitution is ratified, I will examine the impact of this change on my argument.

Starting from the descriptive or ontological question regarding the existence of a 'European Constitution': the European Treaties, as they stand now, initially signed as international treaties, have already acquired a sui generis character, which distinguishes them from international law. Although the "founding fathers" did not set up a constitutional decree according to which the European system would develop, the EC Treaties gradually "evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law"².

In light of these developments, it has been suggested that "in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but,, a constitutional charter governed by a form of constitutional law."³ In fact, the ECJ officially introduced the concept of the Treaty as a Constitutional Charter in its *Les Verts*⁴ judgement, while in its 1/91 opinion⁵

² As quoted by J. Weiler "The Reformation of European Constitutionalism", 35 (1997) *Journal of Common Market Studies*, p.97.

³ *ibid.*, p.96.

⁴ Case 294/83, *Parti Ecologiste "Les Verts" v. Parliament* [1986] ECR, p.1339.

it went as far as to suggest that some parts of the Treaty were of such importance that they could not be modified at will by the Member States, thus hinting at the irreversibility of the so-called *acquis communautaire*.⁶ The term “constitution” (as opposed to constitutional charter) only reached the intergovernmental discourse in the declaration adopted by the European Council in the December 2001 meeting in Laeken. There, in the section entitled “Towards a Constitution for European citizens” the European Council was asking “whether this simplification and reorganisation (of the Treaty texts) might not lead in the long run to the adoption of a constitutional text in the Union.”⁷

As far as the question regarding the need for a formal Constitution⁸ is concerned, there seem to be two camps in this field. On one hand, there is the “pro-constitutional” camp, which views an EU formal constitution as an indispensable part of a legitimate political union. There is a wide diversity of sub-divisions within this camp, ranging from those who welcome the advent of an EU state⁹ to those who prefer a novel type of federation

⁵ In its opinion concerning the Draft agreement relating to the creation of a European Economic Area, the Court stated that: “The EEC Treaty, albeit concluded in the form of an international agreement nonetheless constitutes the constitutional charter of a community based on the rule of law. The essential characteristics of the Community legal order are its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States”. ECJ 14 December 1991, Opinion 1/91, Opinion delivered pursuant to the second subparagraph of article 228 (1) of the Treaty, “Draft Agreement between the Community, on the one hand, and the Countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area”, O.J.E.C. 1992 C 110/1. Interestingly enough “the Court insisted on the qualitative uniqueness of Community law even though the text of the Draft Agreement was to the last word identical with those of the EEC Treaty” and “the qualitative difference is directly related to the role of the Court”, R. Dehousse, *The European Court of Justice*, London: Macmillan Press, 1998, p.36. See also E-J Mestmaecker, “On the Legitimacy of European Law”, 58 (1994) *Rabelszeitung*, p. 623.

⁶ The term “*acquis communautaire*” refers to the body of EC law that has been produced at any given point of time and to the shared political/legal properties of the system. Its function is to protect the integrity of the system. Today it is guaranteed by Article 2 TEU. For a refreshingly original analysis of the concept of the *acquis communautaire* from a theoretical point of view see H. Lindahl, “Acquiring a Community: The *Acquis* and the Institution of European Legal Order”, 9 (2003) *European Law Journal*, p.433.

⁷ Annexes to the Presidency conclusions- Laeken, 14 and 15 December 2001, SN 300/01 ADD 1, Annex I, Laeken Declaration on the Future of the European Union.

⁸ For a review of the different functions/definitions of constitutions and a very good analysis of these issues within the EU context see G. Frankenberg, “The return of the contract: problems and pitfalls of European constitutionalism”, 6 (2000) *European Law Journal*, pp. 257-276.

⁹ Mancini believes that the EU has already moved beyond the structures of an international organisation and that its structures compromise the concept of democratic representation in the individual Member-

of states which will not be a sovereign state of its own¹⁰.

On the other hand, there is the “anti-constitutional” camp, rejecting the adoption of a formal constitution, because this would inexorably lead to the creation of a federal super-state, the United States of Europe, which would erode the national identities of the Member States¹¹. Others reject the necessity for a EU constitution on the basis that the rigidity of a formal constitution would come into conflict with the dynamic character of the Community legal order. Weiler is one of the most prominent representatives of the “anti-constitutionalists”, proclaiming with his usual verbal expressionism that, “if a formal constitution is to be the European Promised Land, I think I will join Moses and stick to the desert”¹². He justifies his stance on the basis that a direct validation of the European constitutional architecture through a process of constitutional adoption by a European constitutional demos would, “as a matter of both normative political principles and empirical social observation”¹³ transform the union into a federal state.

States. According to Mancini, the only way in which we could deal with the current democratic deficit in the EU would be to take one step further and become a fully federal democratic state. “Indeed the Union is doomed never to be truly democratic as long as not only its foreign and security policies which are openly carried out on an intergovernmental basis, but the very management of its supranational core, the single market, are entrusted with or without a circumscribed control by the European parliament to diplomatic roundtables”. G.F. Mancini, “Europe: The Case for Statehood”, 4 (1998) *European Law Journal*, pp. 29ff.

¹⁰ A. Weale, “Democratic Legitimacy and the Constitution of Europe” in R. Bellamy, V. Buffachi and D. Castiglione (eds) *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian Foundation Press, 1995, pp.81ff. Lars Siedentop, on the other hand, is ambivalent as to the choice between a federal state and a confederation. He starts from the premise that constitutional forms are the most promising means of reconciling participation and representation. He continues that “a great constitutional debate need not involve prior commitment to federalism as the most desirable outcome in Europe. It may reveal that Europe is in the process of inventing a new political form, something more than a confederation, but less than a federation- an association of sovereign states which pool their sovereignty only in very restricted areas to varying degrees, an association which does not seek to have the coercive power to act directly on individuals in the fashion of nation-states.” L. Siedentop, *Democracy in Europe*, London: Penguin Books, 2000, p. 1.

¹¹ As we saw in Chapter 2, Dieter Grimm too rejects the need for a European Constitution. He does not object to the creation of a European State on the basis that this would supersede the existing states, but because of its inherent inability to be democratically structured. This inherent inability is linked with the linguistic diversity of the peoples of Europe, which, according to Grimm, does not allow them to participate in a unified democratic debate. “Since this state would not...have the mediatory structures from which the democratic process lives, the community would after its full constitutionalisation be a largely self-supporting institution, further from its base than ever”. D. Grimm, “Does Europe need a Constitution?”, 1 (1995) *European Law Journal*, p. 299.

¹² J. Weiler, “The Promised Constitutional Land”, 12 (2001) *King's College Law Journal*, p.5.

¹³ *ibid.*, p. 7.

This animated debate between “pro-constitutionalists” and “anti-constitutionalists”, accompanied sometimes by a more detailed discussion of the substantive provisions and institutional reforms that a new formal Constitution should contain (obviously by “pro-constitutionalists”), monopolises the focus of attention. I would like to shift the focus of our constitutional debate to issues of constitutionalism and constitutional ethos instead. Constitutionalism is an ideal consisting of different requirements (limited government, adherence to the rule of law, protection of fundamental rights), while constitutions are only the vehicles for the institutionalisation of the essential requisites of constitutionalism. Hence, constitutionalism furnishes normative criteria for the critical evaluation of existing constitutions.

The argument that will be put forward here is that there is already an EU constitutional framework, which is, however, unsatisfactory. In this chapter, the emphasis will be mainly on the procedural issues associated with its development, while in the next chapter the focus will shift to the critique of certain substantive issues. Given its procedural and substantive deficiencies, I will argue that the current structure is unable to provide the proper constitutional framework for a political union and should be replaced by a formal constitution that would break with the EU constitutional past. I will insist, however, that neither institutional reforms nor substantive amendments of our constitutional architecture will be successful in addressing the normative inadequacies of the EU constitutional order, unless they are coupled with a change in constitutional ethos. A constitution, due to its brevity and generality is an open-ended text; much more so than any other legislative text. Its success therefore, depends not only on its architectural arrangements, but even more so, on the historical and institutional treatment of the constitutional text in the hands of different actors of the wider interpretative community (consisting of judges, legislators, bureaucrats, legal scholars etc) that flesh out its underlying principles.

This chapter starts with some brief comments concerning the role of history. Given that

the argument put forward here challenges certain aspects of the received *acquis constitutionnel*, the aim in this part will be to show that the construction (and interpretation) of political and legal history is never final nor authoritative. Therefore the fact that something has been registered in the records of history in a certain way should not prevent us from trying to re-qualify it. Past events are not beyond change, as traditional historiography would have it; they are always present, open to re-interpretation. History is a palimpsest, whose original writings can be effaced to make room for new writings. Thus, the basic premise here is that not only the present can never be free from the past, but also that the past can never be free from the present. And at the same time that our inherited narrative of the past may be superseded.

In the next part of this chapter, I will give a summary of the development of the EC legal order focusing mainly on the deployment of its constitutionalisation process. And since this development has been mainly the product of the European Court of Justice, the history of the EU as a constitutional order has been the history of this court's case law. The analysis of the ECJ case law does not have the ambition of exhausting the relevant material; it will only pinpoint certain significant normative choices and identify their underlying constitutional ethos.

In the third part the focus will shift from the descriptive to the normative analysis of the constitutionalisation process. I will examine the self-referential character of the EU legal order and I will analyse the reasoning of the Court in its major "constitutional" cases. The analysis will show that the constitutionalisation of the Treaties has been a judicially driven process, which has taken place mainly in the absence of political discourse. This privileging of law over politics amounts to the juridification and more particularly the judicialisation of EU constitutionalism. The last part of this chapter will explore certain interesting aspects of this juridification. It will be shown that the juridification/ judicialisation of the EU constitutionalisation process is connected with issues of representation; it reflects the participation (and therefore the representation) of European citizens in the judicial process, which is, for a number of reasons (different

modalities/resources required), not symmetrical to participation in the political process. This raises serious concerns about the proper exercise of constituent power and the principle of popular sovereignty in the EU.

The aim of this chapter is twofold. On the one hand, it aims to rebut the argument of retrospective inevitability in the Communities' development, according to which the path of European integration that the ECJ chose (and which we are still following) was the only available one and, on the other hand, it will show how this type of ad hoc piecemeal, judicially driven, constitutional development has affected in a detrimental way the present normative shape of the EU (the argument initiated here will be completed in the next chapter). This chapter will focus on the substitution of the legal for the political in the EU constitutionalization process. The next chapter will show how the "juridified political" has integrated (and to a great extent has been substituted by) the needs of the market. In the end it will be shown that this double substitution, which is by now a structural feature of the EU, affects representation in a very fundamental way and severs the true emancipatory potential of the European project.

a) The archaeology of EU constitutionalism

The term "constitutionalisation" in the EU context refers to the process by which "the Community legal order has evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law."¹⁴ This process has been a very contested one. Some analysts view constitutionalisation as a revolutionary break from the rules of both international and national law and identify the ECJ as the initiator of the revolution, while others downplay the role of the ECJ putting the emphasis on the intentions of the

¹⁴ U. Alter, "Pathos and patina: the failure and promise of constitutionalism in the European imagination", 9 (2003) *European Law Journal*, p.15.

founding fathers, the tacit consent of the national governments and the collaboration of the national courts. This latter stance tends to regard the ECJ as the executor rather than the initiator of the EC break with traditional international law.

Independently of whether one views constitutionalisation as preordained by the Treaties or as an unforeseen consequence of them, the fact remains that it was the interpretation put forward by the ECJ of the EC legal norms and of the place of those norms within the legal system that provided the catalyst.¹⁵ That is why any account of constitutionalisation must begin with this jurisprudence. This does not mean that the ECJ jurisprudence alone can fully account for all constitutional developments. It is, however, a very good starting point. My intention is not only to give a historical account of what happened, but most importantly to challenge the way in which what happened was presented.

One could raise the objections that a) going back to the beginning of the process of constitutionalisation is anachronistic and cannot be relevant to any contemporary discussion (especially not after the signing of a new formal Constitution) and that b) challenging ex post facto the process through which our constitutional *acquis* was shaped is not only irrelevant to any new Constitution we may have, but also a futile intellectual activity, since there is no way back. In fact, it has been suggested that to do so would amount to trying to push the toothpaste back in its tube¹⁶. My answer to this, as I suggested above, is that an evaluation of the past is necessary for the understanding of the present and an indispensable tool for the shaping of our expectations from the future. Our approach to the future cannot be ahistorical. Hence, if we want to recover the lost “normative sanity” of our constitutional system, we will have to go back to the “original

¹⁵ A. Stone Sweet “Constitutional Dialogues in the European Community” in A.M. Slaughter, A. Stone Sweet, J. Weiler (eds), *The European Court and National Courts- Doctrine and Jurisprudence*, Oxford: Hart Publishing, 1997, p. 306.

¹⁶ For an analysis of this idea see J. Weiler and U. Alter, “The Autonomy of the Community Legal Order: Through the Looking Glass” in J. Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press, pp. 286- 323.

acts of sin”¹⁷. And this is exactly why we need to start from the “archaeology”¹⁸ of our constitutional narrative.

The term archaeology refers to Foucault’s conception of history. The Foucaultian use of history rejects teleology. Unlike history in the traditional sense, which is built upon a coherent, linear narrative that functions as a confirmation of the inherited “established narrative, because it presents it as resting on firm foundations, as the rational effect of certain causes or even necessary outcome”¹⁹, the Foucaultian conception of history (history as archaeology or genealogy) disturbs what is taken-for-granted. History as archaeology, brings to the surface the contingent features of history, thereby disturbing “what was previously considered immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself”²⁰. The effect of describing a historical event as contingent²¹, is to question the causal logic that may present the emergence of this particular event as necessary.

Hence, Foucault’s theory “strives to alter the position of the historian from one who gives support to the present by collecting all the meanings of the past and tracing the line of inevitability through which they are resolved in the present, to one who...., by demonstrating the foreignness of the past, relativises and undercuts the legitimacy of the present.”²² Viewed in this light, history is not only a form of knowledge, but also a form of power; it produces a discourse with a set of meanings. Historical writing can reassert “the inevitability with which the past leads to the present” (traditional historiography) or

¹⁷ Louis Henkin employs the term “genetic defects”. See his article “A New Birth of Constitutionalism: Genetic Influences and Genetic Defects” in M. Rosenfeld (ed.) *Constitutionalism, Identity, Difference and Legitimacy*, Durham/London: Duke University Press, 1994, p.39.

¹⁸ The term “archaeology of knowledge” is borrowed from Foucault. In his book *Madness and Civilization: a history of insanity in the age of reason*, London: Tavistock/Routledge, 1989(translated from French) Foucault draws on etymology and associates archaeology with an “arche”, a beginning, an origin. This was later rejected in his book *The archaeology of knowledge*, London: Routledge, 1969.

¹⁹ S. Marks, *The Riddle of all Constitutions*, Oxford: Oxford University Press, 2000, p. 135.

²⁰ P. Rabinow (ed.), *The Foucault Reader*, London: Penguin, 1984, p.82.

²¹ On the contingent constitution of our memory (history necessarily depends on memory) see P. Ricoeur, *The Symbolism of Evil*, Boston: Beacon Press, 1967, p.23.

²² M. Poster, *Foucault, Marxism and History*, Cambridge: Polity Press, 1984, p.74.

“it can undermine the present order by reversing its images of the past”²³ (history as archaeology/genealogy²⁴). Depending on which of these two types of historical investigation one chooses to pursue, history can be viewed as conserving the status quo or subverting it.

On a similar note, Robert Cover has explored the dual character (conserving and subversive) of a constitutional narrative. It is clear in his mind that “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture”²⁵. Cover, thus, stresses how important constitutional narratives are in legitimating a legal order and in stabilising its actuality. This can be easily explained by reference to the intense sympathy between narrative and democracy. As Ball has put it, “in contrast to the language of command, which is hierarchical and distancing and therefore unsuitable to democracy, narrative is inherently communal. A story is shared. It establishes a relation of mutuality between narrator and hearer. When it works, the audience becomes a participant in the performance.”²⁶

In this chapter the focus is on the constitutional narrative of the EU. Our constitutional narrative is in this case embroidered with a story of origins of the EU. And this story of origin, like all stories of origin, has the tendency to be a conservative one, because “it exerts the gravitational pull of past generations upon those of the present.”²⁷ As Cover,

²³ *ibid.*, p.89.

²⁴ As for the distinction between archaeology and genealogy, as Foucault himself puts it: “If we were to characterise it in two terms, then ‘archaeology’ would be the appropriate methodology of this analysis of local discursivities, and ‘genealogy’ would be the tactics whereby, on the basis of the descriptions of these local discursivities, the subjected knowledges which were thus released would be brought into play.” M. Foucault, “Two Lectures” in C. Gordon (ed.) *Michel Foucault. Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, Brighton: Harvester, 1980, p.85. From the above extract it seems that archaeology is the method, while genealogy is the strategic development of archaeological research. For an analysis of this, see also G. Kendall and G. Wickham, *Using Foucault's Methods*, London: Sage Publications, 1999, pp.30-32.

²⁵ R. Cover, “The Supreme Court, 1982 Term- Foreword: Nomos and Narrative”, 97 (1983) *Harvard Law Review*, pp. 4-68.

²⁶ M. Ball, “Stories of Origin and Constitutional Possibilities”, 87 (1989) *Michigan Law Review*, p. 2288

²⁷ *ibid.*, p. 2294. This resonates Marx’s discussion in the *Eighteenth Brumaire of Louis Bonaparte* of the role of tradition in the shaping of history: “tradition from all the dead generations weighs like a nightmare

however, also argues, it is always possible for the generations of the present to return to the originating acts recounted in the constitutional narrative, renounce the established narrative's claim to singularity, its monopolistic absolutes and certainties and enrich it with new meanings.²⁸ Every story of origins has, thus, the plasticity of a work of art; it is never finished; its content is never static. In this sense the story of origins, the constitutional narrative, is not only conserving, but if open to dialogue, it may also be transforming and empowering. It is this transforming possibility that I would like to bring to the fore by revisiting the EU constitutional narrative. Viewed in this light this process of re-evaluation of the past and its inherited vocabulary presents some similarities with the method followed by psychoanalysis.

In psychoanalytic therapy, one is asked to re-enact and re-experience one's own past. It is believed that past events, whose very happening or significance we have somehow repressed, misplaced or mislabelled in our memory, can help us understand the way we feel and explain our current reactions to different stimuli. We, thus, need to go back, re-qualify the certainty of (the existence or inexistence of) an event and restore its true meaning. This process of confronting our "misremembered"²⁹ past and dealing with all false memories, enables us to come face to face with our responsibilities concerning not only the identity we have so far constructed, but also its continual re-evaluation and re-shaping in the future. At the same time it frees us from repressed syndromes of guilt. A brave and bias-free confrontation with our past seems to be a necessary, though not always sufficient, condition for catharsis, which, in its turn, is a precondition for the healthy re-making of our self-consciousness. Psychoanalysis is, thus, associated with the subject's need to confront the narrative of his/her life, to assume the errors he/she may have made and accept his/her flaws. In other words, if we hope to improve our performances, we must confront our past, understand it and analyse it. In this, social

on the brain of the living. And just when they appear to be revolutionising themselves and their circumstances...that is when they nervously summon up the spirits of the past." K. Marx, *Later Political Writings* (edited and translated by T. Carver), Cambridge: Cambridge University Press, 1996, p.32.

²⁸ Op. cit. fn. 25, pp. 23-24.

²⁹ On the concept of "misremembering" see J. Prager, *Presenting the past, Psychoanalysis and the sociology of misremembering*, Massachusetts: Harvard University Press, 1998.

transformation is very much like individual regeneration; the point of departure for a new start is a re-evaluation of the past and its inherited vocabulary.³⁰

Sharing to a great extent the method and the aims of psychoanalysis, the revisiting of the constitutional narrative of the EU in this chapter, will be a process of confrontation with our mis-remembered constitutional past³¹. To proceed to a re-evaluation of the past – such as the one undertaken by the Convention for the Future of Europe and the IGC(s) that preceded the signing of the Constitutional Treaty- without having identified its problematic aspects could only lead to their being perpetuated in the new structures. A certain de-glorification of our constitutional past is necessary for the construction of a better constitutional future. We can certainly not “un-live our past”³², but we can try to re-constitute its meaning. And in re-constituting our history, we will be transforming the European way of self-identifying and self-imagining, we will be reforming European self-consciousness, because “to speak of history” is, ultimately “to speak of our accumulated social self-consciousness.”³³

³⁰ In his book *Eros and Civilisation* Marcuse transferred the insights of psychoanalysis and the arguments about the therapeutic role of memory from the individual sphere to that of a political collectivity. In his mind “the psychoanalytic liberation of memory explodes the rationality of the repressed individual”. Similarly at the level of social psychology “the rediscovered past yields critical standards that are tabooed in the present”. Marcuse, thus, employs memory in the service of praxis. He manages to re-politicise memory by bringing to the surface its disruptive potential. H. Marcuse, *Eros and Civilisation*, Boston: beacon Press, 1966. Against Marcuse’s faith in the possibility of recovering memory, Christodoulidis argues that “the immemorial” (reduction of memory and a certain inability to redress this reduction) is structurally embedded in law. See E. Christodoulidis, “Law’s Immemorial” in E. Christodoulidis, S. Veitch (eds.), *Lethé’s Law: Justice, Law and Ethics in Reconciliation*, Oxford: Hart, 2000.

³¹ Allott takes the metaphor of psychic healing even further: “To redeem and to perfect Europe’s re-unifying is not a matter of institutional reform but of psychic healing. To suppose that the crisis of European constitutionalism can be dealt with by institutional reform is like offering minor surgery to a psychotic. And the metaphor is more than a metaphor. If one defines psychosis as the domination of the patient by a private reality, which is life-threatening, then something very close to that is what has happened in Europe. Official Europe- politicians and technocrats- are locked into a private reality, the so-called European Union, which threatens the future stability and prosperity of the people and the peoples of Europe”. P. Allott, “The crisis of European Constitutionalism: Reflections on the revolution in Europe”, 34 (1997) *Common Market Law Review*, p.467.

³² *ibid.*, p.465.

b) We, the Court?

i) A constitution by judicial fiat

The direct effect doctrine: penetrating national legislation

Eric Stein's classical account of the story of EU constitutionalisation starts like this:

"Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."³⁴ Let us follow a little more closely the fundamental moments in the gradual construction of this so-called constitutional framework.

The first historically critical point for the separation between public international law and European Community Law and, thus, for the constitutionalisation of the Treaties was the *Van Gend en Loos* case³⁵. The Van Gend en Loos company had imported a quantity of chemical substance from Germany into the Netherlands. It was charged by Customs and Excise with an import duty, which the company alleged had been increased since the time of the coming into force of the EEC Treaty, contrary to Art. 12 of that Treaty.

³³ *ibid.*, p.470.

³⁴ E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution", 75 (1981) *American Journal of International Law*, pp. 1-27. For a more recent account of constitutionalisation see G. F. Mancini, "The Making of a Constitution for Europe", 26 (1989) *Common Market Law Review*, pp.595-614, K. Lenaerts, "Constitutionalism and the Many Faces of Federalism", 38 (1990) *American Journal of Comparative Law*, pp. 205ff., S. Cassese, "La Costituzione Europea" (1991) *Quaderni Costituzionali*, pp.487ff., J. Weiler "The Transformation of Europe" 100 (1990-1991) *Yale Law Journal*, pp. 2403ff. and by the same author "The Reformation of European Constitutionalism" 35 (1997) *Journal of Common Market Studies*, pp. 97ff. L. Hancher, "Constitutionalism, The Community Court and International Law" 25 (1994) *Netherlands Book of International Law*, pp.259ff, compares the elements of Community constitutionalism (direct effect, supremacy, human rights) with international law and concludes that all these elements can also be found in international law, but their combined impact on the development of legal remedies is much stronger at the Community level than it is at the international level.

³⁵ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1. According to E-J. Mestmaecker "the chain that bound sovereignty and law together was broken when the Luxembourg Court of Justice ruled that the Treaty conferred upon individuals the right to enforce specific Treaty obligations of member states in their domestic courts of law." Von E-J Mestmaecker, "On the Legitimacy of European Law", 58 (1994) *Rabelszeitung*, p.622.

An appeal against payment of the duty was brought before the Dutch Tariefcommissie and Art. 12 was raised in argument. Van Gend en Loos asked for an annulment of the decision of the Netherlands Inland Revenue Administration on the ground that the Netherlands had failed to comply with its Treaty obligations. In its preliminary reference, the Tariefcommissie asked the ECJ whether article 12 of the EEC Treaty had direct application within the territory of a Member State, in other words whether nationals of such a state could on the basis of Art. 12 lay claim to individual rights, which the Court should protect.³⁶

The texts of the EC Treaties made no reference to the effect which their provisions were to have. It is also apparent from arguments made in the early cases before the Court that at least some of the Member States did not envisage that the provisions of these treaties would be any different, in terms of their domestic effect, from other international treaties and conventions. The ECJ, however, based on the vision that the Treaties had set out to create a certain community and that the effective creation of such a community would necessitate a certain kind of legal system, put forward the doctrine of direct effect.

Thus, the ECJ argued that:

“...to ascertain whether the provisions of an international Treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions....The objective of the EEC Treaty which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting parties. This view is confirmed by the Preamble to the Treaty, which refers not only to governments but also to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens.... The conclusion to be

³⁶ P. Craig, G. de Burca, *EU Law*, Oxford: Oxford University Press, 2nd edition, 1998, p.164.

drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights, which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”³⁷

The three governments which intervened in the case- Belgium, Germany, the Netherlands (it is useful to remind that at that time there were only six Member States) submitted observations according to which they obviously did not agree with this interpretation of the obligations they had assumed when they became parties to the EEC Treaty. They all³⁸ argued a) that a charge of Treaty infringement against a Member State could be brought before the Court by the Commission or by another Member State and could not be referred to the ECJ by a national Court unless “the legal protection” of the state “was considerably diminished”³⁹ (Art. 169,170, 177) and b) that even if such a reference were admissible, this particular case concerned an internal constitutional problem and, consequently, the ECJ had no jurisdiction under Art. 177.

According to the Court, on the other hand, its jurisdiction was well grounded since the case in question did not concern national law as such, but the application of Art.12 EEC and its effect on individuals. The contractual model of public international law⁴⁰,

³⁷ Op.cit. fn.35, para.12.

³⁸ Belgium and the Netherlands questioned the jurisdiction of the Court expressly, while Germany only by implication.

³⁹ Case 26/62, [1963] ECR at 6-9.

⁴⁰ The *Van Gend en Loos* ruling was the ECJ’s way of dealing with different incorporation systems existing in the different member states. For example in monist countries such as Luxembourg and the Netherlands, international treaties become part of their domestic law executed like any other statute and supersede all provisions of domestic law, whereas in countries employing a dualist system such as Germany and Italy, international treaties become domestic law through a time-consuming legislative

according to which the intention of the parties, as expressed in their interventions in this case, should decide the internal or non-internal effect of certain Treaty provisions, was rejected. Having discarded the subjective intention of the parties, the Court put the emphasis instead on “the spirit, the general scheme and the wording of these provisions”. All of the above, according to the interpretation of the Court, pointed at the establishment of a common market, and this objective was then interpreted to be of direct concern to individuals⁴¹, whence the conclusion that the EC Treaty was different from an international law agreement creating obligations based on the principle of reciprocity between the contracting states⁴².

The governments were adamantly opposed not only to the introduction, but also to the consequent, very important expansions of the direct effect doctrine. In *Van Gend en Loos* the Court set the criteria for the direct effect of Treaty provisions. A provision could have direct effect provided that it was “clear, negative, unconditional, containing no reservation on the part of the Member State and not dependent on any national implementing measure.”⁴³

Three years after its initial description of the direct effect doctrine, the ECJ expanded the scope of this principle by affirming the direct effect of a provision, which imposed a positive (rather than a negative) obligation on Member States provided that the period

procedure. On the basis of *Van Gend en Loos* Community law is different from international law in that it is directly incorporated into the Member States’ domestic legal orders independently of whether they have a monist or dualist system of incorporation of international law.

⁴¹ M. Poiares-Maduro calls “subjectivation” the process by which the Court moved from a state-based interpretation of the Treaties into an individual based interpretation. See his book *We, the Court*, Oxford: Hart Publishing, 1998, p. 9. It is interesting to note that later on the doctrine of direct effect acquired a legitimacy in the edifice of EC law which was independent of its original foundation. The rationale offered later on was that the doctrine of direct effect was necessary in order to protect the community from embarrassment if the Member States failed to implement an agreement concluded by the Community with a third state. See D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, Dublin: Sweet & Maxwell, 1997.

⁴² In fact there have been cases of international treaties creating individual rights enforceable in national Courts. The Permanent Court of International Justice in 1928 affirmed that the agreement between Poland and Danzig created such rights. The Court held that the presumption against direct effect could be overturned by explicit evidence of the intention of the parties to the contrary.

⁴³ P. Craig, G. de Burca, *EU Law*, Oxford: Oxford University Press, 1998 (second edition), pp.168-169.

within which the states were required to act had lapsed.⁴⁴ The second extension of the direct effect principle took place when the Court held that a prohibition of discrimination on the basis of nationality is not only applicable “to the action of public authorities, but extends likewise to rules of any other nature aimed at collectively regulating gainful employment and services.”⁴⁵ In doing so, the Court accepted that legal provisions fulfilling the conditions of direct effect, do not only have a vertical effect, but also a horizontal one, meaning that they can be invoked by individuals against both governmental action and/or other individuals. The last very important –and a quite controversial one⁴⁶– expansion concerned the direct effect of community measures other than Treaty provisions. Slowly, but steadily, the Court embraced within the scope of the direct effect doctrine all community legislation.⁴⁷

The introduction of the direct effect doctrine brought about the subjectivation of the Treaties. In other words it underlined the move from a state-based interpretation of the Treaties into an individual-based interpretation. From that point onwards the Treaties were not interpreted as an agreement between states, but as a social contract among the

⁴⁴ In case 57/65, *Alfons Luetticke GmbH v. Hauptzollamt Saarlouis*, [1966] ECR 205, the ECJ held that Art. 95, which imposed on the member states a positive obligation to abolish discriminatory internal taxes on imports, had direct effect.

⁴⁵ Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union Cycliste Internationale*, [1974] ECR 1405. Case 43/75, *Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, [1976] ECR 455 constituted one step further in the expansion of the horizontal dimension of direct effect. In this case the relevant provision was Art. 119, according to which men and women should receive equal pay for equal work. Unlike the prohibition of discrimination on the basis of nationality, Art. 119 is not one of the fundamental objectives of the Community enumerated in Art. 3, but contains a principle to be implemented by national legislation.

⁴⁶ In France the Conseil d’Etat in its *Minister of the Interior v. Daniel Cohn-Bendit*, [1980] I CMLR, p. 543 judgement ruled against the ability of an individual to rely on a directive at national level. Claiming that in principle no directive could have direct effect in a national legal order. In doing so, the Conseil d’Etat defied the authority of the ECJ which had already ruled that as long as directives/decisions were by their nature, background and wording “unconditional and sufficiently clear and precise to be capable of producing effects in the legal relationship between the member states and those subject to their jurisdiction”, they could be invoked by an individual. See S. Weatherill, *Law and Integration in the European Union*, Oxford: Oxford University Press, 1995, p.122 and E. Stein, op. cit. fn. 35, p.22 .

⁴⁷ In Case 9/70, *Franz Grad v. Finanzamt Traunstein*, [1970] ECR 825 the Court held that a Council decision addressed to a Member State, which by its nature, background and wording was “unconditional and sufficiently clear and precise to be capable of producing effects in the legal relationship between the Member States and those subject to their jurisdiction”, could be invoked by an individual. In Case 41/74, *Yvonne van Duyn v. Home Office*, [1974] ECR 1337 the Court clearly stated again that the direct effect doctrine included directives as well as decisions addressed to Member States.

peoples of Europe. The introduction of the direct effect doctrine enabled Community law to present itself as a new source of rights for the individuals of all Member States and subsequently as the protector of these individuals vis a vis their states.⁴⁸

The hidden dimension of direct effect: supremacy

According to the Court's reasoning in *Van Gend en Loos*, the newly created Community legal order would not merely create mutual obligations between the contracting states; individual citizens of the Member States could also invoke the direct effect of Community law before national courts. In this case the Court focused on the direct effect and no explicit consideration was given to the problem the direct effect doctrine might create for domestic courts, if they had to choose between a Community norm and a conflicting national one.

In *Costa v. Enel*⁴⁹ the ECJ came face to face with the constitutional implications of the direct effect doctrine. Mr. Costa was an attorney who did not want to pay his electricity bill claiming that the law nationalising the electricity company was in fact violating the EEC Treaty and the Italian Constitution. As a result, the Italian judge who was assigned the case, made references to the ECJ and the Italian Constitutional Court. The Constitutional Court's ruling was that, since the EEC had been ratified in Italy by ordinary law, and given that the nationalisation of the electricity industry had also taken place by ordinary law, the national judge was confronted with a straightforward case of conflict between two hierarchically equal norms and, as a result, the appropriate interpretation rule to be applied was "lex posterior derogat priori". Therefore, according to the Italian Constitutional Court, the reference to the ECJ was pointless.

The ECJ, however, took a quite different stance. It rejected the submission put forward by Italy regarding the inadmissibility of the reference, on the basis that its ruling would

⁴⁸ M. Maduro, op. cit. fn. 41, p. 11.

⁴⁹ Case 6/64 *Costa v. ENEL* [1964] ECR at 585.

concern the validity of national law. Although it ruled that it could not decide on the validity of national law, the ECJ reached the conclusion that Community law had to be given primacy by national courts over all incompatible national law.

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system, which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”⁵⁰

Once again one has to bear in mind that there was no provision for the supremacy of

⁵⁰ Ibid.

Community law in the Treaty, since this was silent on the question of the relationship between national and Community law and that the ECJ gave its own interpretation of the spirit and the aims of the Treaty. The ECJ's first argument was that the Treaty created its own legal order, which immediately became integral part of the legal systems of the Member States. This refers to and repeats the doctrine of direct effect as stated in *Van Gend en Loos*. The next argument is a teleological interpretation of the spirit and the aims of the Treaty, which cannot be realised unless uniformity and effectiveness are secured. Since the aims of the Treaties are integration and co-operation, it would be impossible to regard national law as superior to community law. The truth is that, even if a Community law right was denied in a Member State, an action could always be brought by the Commission (Art. 169) or by a Member State (art. 170) to the Court of Justice. Eventually the non-abiding Member State would have to comply with the declaration of the Court and uniformity could be achieved.

The Court of Justice followed once again the stance of hermeneutical/interpretative inevitability. Costa "had to happen as a matter of the European Community legal reasoning which *Van Gend en Loos* championed"⁵¹. *Van Gend en Loos* had established that the national courts had to give effect to community law rights without the need of a national *lex anterior*, whereas Costa established that no national *lex posterior* could derogate from Community law.

It needs to be reminded here that had the judgement not accepted the independence of the Community legal order from international law, the principles of *pacta sunt servanda* and reciprocity would have been the applicable law in this case. According to the public international law perception, national law cannot provide a defence in international law for the international responsibility of a contracting party to a Treaty. Although international law does not regard itself as superior to national law, an international judge cannot accept the conflict between national and international law as a valid reason for the non-conformity of a state party to a treaty with the international obligations

stemming from this very same treaty.⁵² As a result, distinguishing itself from international law was not necessary for the Community legal order in order to achieve uniformity and effectiveness within its sphere of application.

Defending supremacy: the protection of fundamental rights

In the original treaties there was no legal basis for human rights. Neither the Treaty of Paris (European Coal and Steel Community), nor the Treaties of Rome (European Economic Community and European Atomic Energy Community) contained any allusion to the protection of fundamental human rights.⁵³ When the direct effect and the supremacy of European law were asserted, however, it became legally and politically imperative to find a way to vindicate fundamental human rights at the Community level. How could one vest huge constitutional power in the political organs of the Community without postulating embedded legal and judicial guarantees on the exercise of such power? How could one expect the High Courts of the Member States to accept the direct effect and the supremacy without an assurance that human rights would be protected within the Community and that individuals would not lose any of the protections accorded to them under national constitutions?

In fact, the German Constitutional Court in its “so lange”⁵⁴ judgement declared that as long as (“so lange” in German) the EC did not contain a catalogue of basic rights adopted by a parliament that provided the same guarantees as the German Basic Law,

⁵¹ D. R. Phelan, op. cit. fn. 41, p.103.

⁵² This is explicitly stated in Art. 27 of the Vienna Convention to which all the EC/EU Member States are parties. See also Oppenheim’s *International Law*: “It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its national law...contained rules in conflict with international law; this applies equally to a state’s assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement”. *Oppenheim’s International Law, Volume I: Peace*, London: Longman, 1992, pp. 84-85.

⁵³ For an analysis see M. Dausès, “The Protection of Fundamental Rights in the Community Legal Order”, 10 (1985) *European Law Review*, pp. 398-399 and H. Ipsen, *Europäische Gemeinschaft*, Tübingen: Mohr, 1972, p. 721.

⁵⁴ The Bundesverfassungsgericht’s first *Solange* decision is reported at 2 (1974) *Common Market Law Review*, p.540.

that Court reserved the right to ensure that EC law did not violate fundamental rights contained in the Basic Law. In response to this very tangible threat that national courts would opt for the supremacy of their own constitutional provisions on fundamental rights⁵⁵, the ECJ discovered the protection of fundamental rights as a general principle of EC law.⁵⁶

The detailed story of the development of the ECJ's case law on general principles of Community law and fundamental rights has been told many times and does not need to be rehashed in detail here.⁵⁷ It may be recalled briefly that the first time the issue of

⁵⁵ This was later qualified by *Wunsche Handelsgesellschaft*, 3 (1987) *Common Market Law Review*, p. 225, (also known as "so lange II"), where the German Court ruled that in view of the development of a doctrine of protection for fundamental rights "it must be held that, so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German Courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution". For the concerns raised by the Italian courts see J. Cocco, "Una convivenza voluta ma sofferta: il rapporto tra diritto comunitario e diritto interno", 1 (1991) *Rivista Italiana di Diritto Pubblico Comunitario*, p.649. All commentators seem to be in agreement that the first phase of the development of the ECJ's human rights jurisprudence was a defensive one, that is, it developed in response to the concerns voiced by national courts either in the cases they referred to Luxembourg or in the positions they adopted in domestic proceedings. H. Rasmussen, H. Rasmussen, *On Law and Policy in the European Court of Justice*, Dordrecht: Martinus Nijhoff Publishers, 1986, pp. 397-400, J.Coppel and A. O'Neill, "The European Court of Justice: Taking Rights Seriously?", 29 (1992) *Common Market Law Review*, pp.670-674, F. Mancini, "A Constitution for Europe", 26 (1989) *Common Market Law Review*, p. 611, D. R. Phelan, op. cit. fn. 41, p. 128, T. Hartley, *The foundations of European Community Law*, Oxford: Clarendon Law Series, 1988, pp.132ff.

⁵⁶ F. Mancini, "A Constitution for Europe", 26 (1989) *Common Market Law Review*, p. 595. As far as the protection of general principles is concerned, there were three provisions in the original Treaty, upon which the Court based its giving the force of law to them:

- a) According to article 164 EC "The Court of Justice shall ensure that in the interpretation and application of this Treaty, the law is observed."
- b) Article 173 EC provides that "the Court may review the legality of the acts of Community institutions on the grounds of lack of competence, infringement of this Treaty or of any rule of law relating to its application or misuse of powers." The rule of law in this case is a separate ground for judicial review of legality, independent of the other grounds of illegality.
- c) Article 215 EC recognises a source of law outside the Community texts by providing that the contractual liability of the Community will be governed by "the general principles common to the laws of the member states."

⁵⁷ For a detailed historical analysis see M.Hilf, "The Protection of Fundamental Rights in the Community" in M. Hilf, *European Law and the Individual*, Amsterdam: North Holland, 1976, P. Pescatore, "The context and significance of Fundamental Rights in the Law of the European Communities", 2 (1981) *Human Rights Law Journal*, p.295, A. Clapham, "A Human Rights Policy for the European Community",

compatibility of Community law with basic rights was raised in *Stork*⁵⁸, the applicants were seeking annulment of a decision made by the High Authority of the Coal and Steel Community relying inter alia on articles of the German Constitution (free development of personality/ free choice of trade, occupation or profession). The ECJ, which held itself incompetent to annul a decision on the basis of national, as opposed to Community law,⁵⁹ finally broke the silence of the treaty in the *Stauder*⁶⁰ judgement of 1969, where it hinted at the fact that fundamental rights might be part of the general principles of Community law.

In this case the Court was asked to judge whether a certain Community act (a Commission decision) was in conflict with the right to dignity. According to the decision in question, which was a scheme for the reduction of the surplus of butter, social security recipients could receive subsidised butter from national traders. Given that in Germany the beneficiaries had to reveal their names and addresses, the applicant argued that this constituted an infringement of his right to dignity. The ECJ was able to avoid the issue of the conflict, because according to its interpretation, the community measure did not actually require identification of the recipients of subsidised butter by name. However, in the final paragraph of its judgement, the ECJ, contrary to its previous case law, accepted for the first time that “fundamental human rights (are) enshrined in the general principles of community law and protected by the court.”⁶¹

This was solemnly confirmed shortly afterwards in the *Internationale*

10 (1990) *Yearbook of European Law*, p.309, J.Coppel and A. O’Neill, “The European Court of Justice: Taking Rights Seriously?”, 29 (1992) *Common Market Law Review*, p.669 and J.Weiler and N.Lockhart, “Taking Rights Seriously” seriously: The European Court and its Fundamental Rights Jurisprudence”, 32 (1995) *Common Market Law Review*, p.51(Part I) and p.579 (Part II).

⁵⁸ Case 1/58 *Stork v. High Authority*, [1959] ECR 17 at 26-27 (para 4)

⁵⁹ In case 40/59 of Joined cases 36-38 &40/59 *Geitling and Nold v. High Authority* the applicant relied on the Grundgesetz right to private property as interpreted by the German courts and stressed the necessity of interpreting the provisions of the Treaty establishing the ECSC in a way that would not conflict with fundamental rights under national law, but the court rejected this argument holding that it was not for the Court “to ensure that rules of internal law, even constitutional rules, enforced in one or other of the member states are respected”. This case must be distinguished from the case 4/73 *Nold v. Commission* [1974] ECR 491.

⁶⁰ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419, at 425.

*Handelsgesellschaft*⁶² judgement. In this case the issue at stake was a council regulation (120/67), according to which exporters had to lodge a deposit in order to obtain an export licence. This deposit could then be forfeited, if the licensed transaction were not carried out within the period of time set. The applicant questioned the validity of the deposit system claiming that it was contrary to principles of national constitutional law (proportionality, freedom of action and disposition, economic liberty). The Court concluded that there had been no infringement of the rights claimed in this case. It repeated that respect of fundamental rights formed an integral part of the general principles and clarified that inspiration was drawn from the constitutional doctrines common to the Member States, adding, however, that the fundamental rights protection “must be ensured within the framework of the structure and objectives of the Community.”⁶³

In 1974, the *Nold*⁶⁴ case offered the occasion for the ECJ to add that also international human rights could provide inspiration. The Court considered the ECHR and national constitutional law as sources of inspiration in some detail in the *Hauer* judgment of 1979⁶⁵. The next important moves took place around 1990, when the ECJ stated in cases like *Wachauf*⁶⁶ and *Elliniki Radiophonia*⁶⁷ that its review powers also extended to Member States’ acts⁶⁸, but only to the extent that those acts came within the sphere of

⁶¹ *ibid.*

⁶² Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, at 1134.

⁶³ The Court’s reasoning as laid out in a number of cases, makes it quite clear that the general principles of law are to be regarded as a primary source of law. However, the common constitutional traditions of the Member States and the international treaties for the protection of human rights, to which the ECJ resorts as sources of inspiration, do not constitute a primary source of law in the Community legal order, but are mere sources of recognition of law. See M. Dausies, *op.cit.* fn. 54, p.411.

⁶⁴ Case. 4/73, *Nold KG v. Commission* [1974] ECR 491, at 506.

⁶⁵ Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, at 3744-7.

⁶⁶ Case 5/88 *Wachauf v. Germany* [1989] ECR 2609, at 2639.

⁶⁷ Case 260/89 *Elliniki Radiofonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I- 2925, at 2964

⁶⁸ In *Cinetheque and others v. Federation Nationale des cinemas francais*, the Court had accepted that: “Although it is true that it is the duty of this court to ensure observance of fundamental rights in the field of community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls *within the jurisdiction of the national legislator* (my emphasis).” Cases 60-1/84, [1985] ECR 2605, para 26. This was restated with a slight but crucial change, in *Demirel v. Stadt Schwabisch Gmund*: “The Court has no power to examine the

community law.⁶⁹

The general principle doctrine may best be summarised by quoting the account given by the ECJ itself in *Kremzow*⁷⁰:

“As the court has consistently held... fundamental rights form an integral part of the general principles of community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. The ECHR has special significance in that respect. As the court has also held, it follows that measures are not acceptable in the community which are incompatible with observance of the human rights thus recognised and guaranteed

compatibility with the European Convention on Human Rights of national legislation lying *outside the scope of Community law* (my emphasis).” Case 12/86, [1987] ECR 3719, at 3754, para 28. The Court has also used other wider formulas to delineate its human rights jurisdiction such as Member State law that is touched by Community law” or “influenced by Community law”. The problem with these formulations is that the reach of Community competence and law has been constantly evolving and as a result “there is simply no nucleus of sovereignty that the Member States can invoke as such against the Community”. See K. Lenaerts “Constitutionalism and the many facets of federalism”, 38 (1990) *American Journal of Comparative Law*, pp. 205ff. at 220.

⁶⁹ Coppel and O’Neill distinguish between the defensive (see fn. 56) and the offensive use of fundamental rights by the ECJ. The latter refers to the extension of applying human rights not only to Community acts, but also to the acts of the Member States. They accuse the ECJ of transgressing the jurisdictional limits of its fundamental rights case law and they further criticise the way this jurisdiction has been exercised. Their point is that the ECJ has been employing the human rights talk instrumentally as a means to extend its own jurisdiction into areas previously reserved to member states’ courts. Furthermore, and this is the second part of their critique, the Court refuses to take the discourse of human rights seriously by subordinating human rights to the end of closer economic integration in the Community. In fact “there would appear to be two standards in operation- one standard for community acts, another standard for individual Member States’ acts derogating from Community law. In the former, human rights are subordinated to and have to be interpreted in the light of Community objectives. In the latter, human rights are presented as an additional hurdle which national states’ acts have to negotiate in order to be accepted as valid.” And in any case “(whenever) the Court has adopted fundamental rights discourse, it has been the general Community rule or the Community objective which has prevailed against claims as to the violation of fundamental rights.” Op.cit. fn. 58, pp.669-672. Apart from the issues of usurpation of national sovereignty this accusation raises, it is obvious that it involves major practical problems. Since the EU has not acceded to the ECHR, the ECJ’s decisions cannot be controlled by the Court of Human Rights in Strasbourg; yet if the ECJ decisions can control the compatibility of national legislation with human rights, there is the danger of contradictory decisions passed by the ECJ and the Court in Strasbourg, since the Member State legislation would at the same time be liable to control on the basis of the ECHR and its institutions.

⁷⁰ Case C-299/95, *Friedrich Kremzow v. Austrian State* [1997] ECR I- 2629, at 2645. See also Case 44/79 *Liselotte Hauer* [1979] ECR 3727 at 3744-3745, Case 4/73, *Nold KG v. Commission* [1974] ECR at 491.

.....It is also apparent from the Court's case law...that, where national legislation falls within the scope of Community law, the Court in a reference for a preliminary ruling, must give the national court all guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the convention- whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of community law.”

Expansion of competences

The constitutionalization of Community law goes beyond the principles of direct effect and supremacy and the recognition of fundamental rights. A very important part of the Community's constitutional development is the expansion of its competences. The EC Treaties established a legal order of limited powers and did not confer on it any legislative Kompetenz-Kompetenz. This means that unless a power is explicitly attributed to the Community, it is reserved to the legislative competence of the Member States and the Community is not authorised to pass legislation in a specific area. Failure of the EC legislative institutions to point to a legal basis for action in the Treaty can be a ground of judicial review, meaning that the act in question will be declared void for lack of competence⁷¹.

The delimitation of competences⁷² is not, however, as straightforward as one might think for the following reasons: Apart from the fact that there may be disagreement about the ambit of a Treaty article, or the precise division of competence between the EC and the

⁷¹ See articles 5 (1), 7 and 230 EC.

⁷² There is a very wide literature on the issue of EC competences. See e.g. K. Lenaerts, “Constitutionalism and the Many Faces of Federalism”, 38 (1990) *American Journal of Comparative Law*, pp.205ff; T. Hartley, “Federalism, Courts and Legal Systems; the emerging Constitution of the European Community”, 34 (1986) *American Journal of Comparative Law*, pp.229ff.; J. Temple Lang, “European Community Constitutional Law: the division of powers between the Community and the Member States” 39 (1988) *Irish Legal Quarterly*, pp.209ff; J. Usher, “The Scope of Community Competence- Its recognition and Enforcement” (1985) *Journal of Common Market Studies*, pp.121ff.

Member States in the cases where there is shared competence, things become even more complicated because of the notion of implied powers and its expression in article 308 (ex 235). As far as the notion of implied powers is concerned, Hartley defines it as follows: “According to the narrow formulation, the *existence of a given power* implies also the existence of any other power which is reasonably necessary for the exercise of the former; according to the wide formulation, *the existence of a given objective or function* implies the existence of any power reasonably necessary to attain it (my emphasis).”⁷³ Article 308, on the other hand, provides that: “If action by the Community should prove necessary to attain in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.” It, thus, seems to support the wide formulation of the doctrine of implied powers.⁷⁴

The wide spectrum of the Treaty objectives combined with the teleological interpretation employed by the ECJ has meant that “it is virtually impossible to find an activity which (can) not be brought within the objectives of the Treaty.”⁷⁵ Similarly, Koen Lenaerts affirms that “there is simply no known nucleus of sovereignty that the Member States can invoke”.⁷⁶ Evaluating the broadening remit of EC competence, Weiler talked of a veritable mutation in the constitutional structure of the Community (he identified 4 categories of “mutation”: extension, absorption, incorporation and expansion), which, given both its significance and the little attention it attracted, actually amounted to a

⁷³ T. C. Hartley, *The Foundations of European Community Law*, Oxford: Oxford University Press, 1998, p.102.

⁷⁴ Joseph Weiler has gone as far as to suggest (ironically) that Article 308, given its wide use, could also be used to defend the introduction of a defence policy for the EC, since the function of the Common Market presupposes a certain freedom from external powers. J. Weiler, “The Division of Competences in the European Union”, *European Parliament DG for Research Working Document, Political Series W-26*. In his eyes, article 308 is “the locus classicus of true expansion”. J. Weiler, “The Transformation of Europe”, 100 (1991) *Yale Law Journal*, p.2468. One could raise the objection that the expansive use of Art. 308 is not really significant in any way, since its use presupposes a unanimous decision of all Member States. The answer to this would be that its significance consists in the fact that expansion of EC competences through the use of Art. 308 bypasses the requirements of ratification by the Parliaments of the Member States.

⁷⁵ *Ibid.*, p.2446.

“silent constitutional revolution”.⁷⁷ Needless to say, once again, the biggest part of the expansion of competencies occurred incrementally through the judgements of the ECJ without any Treaty amendments. Warnings against this silent revolution can be found in the so-called Maastricht Judgement⁷⁸ of the German Constitutional Court or in the insertion of the principle of subsidiarity by the TEU, according to which decisions must be taken at the most appropriate level. In response to these warnings, the ECJ has started being more cautious in its interpretation of EC competences. It, thus, held in opinion 2/94⁷⁹ that the EU could not accede to the ECHR on the basis of Art. 308 EC. Finally for the first time in its history the ECJ annulled the Tobacco Advertising Directive⁸⁰ on the basis that the EC lacked the necessary competence.⁸¹

ii) Non-judicial constitutional input

We saw above that the documents, which were initially signed as international multi-partite treaties gradually acquired constitutional features, mainly through the judgements of the European Court of Justice. Through its teleological interpretation of the EC Treaty, the ECJ created the supranational “first pillar”. The combined application of direct effect and supremacy meant that EC law was not only part of national law, but also took precedence over it (including national constitutional provisions). Later on the principle of state liability for breach of EC law required national courts to ensure the availability of an action for compensation against the Member State that had failed to comply with EC law.⁸² This intensified the already existing organic connection between

⁷⁶ K. Lenaerts, op.cit. fn. 72, p. 205.

⁷⁷ J. Weiler, op. cit. fn. 74, p.2439.

⁷⁸ *Brunner v. European Union Treaty* 1[1994] *Common Market Law Review*, p.57. See also Chapter 2.

⁷⁹ Opinion 2/94 [1996] ECR I-1759. It has been argued of course that the self-restraint of the ECJ in this case is connected with the fact that had the EU acceded to the ECHR, the judgements of the ECJ would be subjected to the scrutiny of the court in Strasbourg.

⁸⁰ See case C-376/98 *Germany v. Council and Parliament* and case C-74/99 *R v. Secretary of State for health ex parte Imperial Tobacco* [2000] All ER (EC), p.769.

⁸¹ On the change of attitude of the ECJ regarding the interpretation of EC competences see M. Pollack, “The End of Creeping Competence” 38 (2000) *Journal of Common Market Studies*, p.519.

⁸² See Cases C-6, C-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357. The principle of state liability in damages for loss to individuals caused by the state breaching EC law was further clarified in cases C-46/93 *Brasserie du Pêcheur SA v. Germany* and C-48/93 *R. v. Secretary of state for Transport, ex*

the national and the Community judicial systems (initially established via the system of references for preliminary rulings under Art. 234 EC). In the meantime constitutionalization had been further enhanced by the construction of a system of fundamental rights protection within the EU and by the incrementally evolving competencies of the Community and its institutions.

While all these important developments were taking place at the judicial level, the stagnation and sluggishness that followed the Luxembourg crisis⁸³ and the consequent de facto recourse to unanimity voting, were the main features at the political level. Most of these “constitutional” changes took place in the absence of any textual amendments in the original documents. The successive accessions of the new members changed the number of their signatories, but the actual content of the Treaties remained unchanged until the first amendment of the Treaty with the Single European Act in 1986. The SEA set out the internal Market aim, defining the internal market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. It shifted the focus from intergovernmentalism to supranationalism by reviving qualified majority-voting and it added new areas of Community competence, thus codifying some of the judgements of the Court.⁸⁴

parte Factortame Ltd and others [1996] ECR I-1029. For a theoretical analysis of this issue see P. Craig, “Francovich, Remedies and the Scope of Damages Liability” 109 (1993) *Law Quarterly Review*, p. 595, C. Harlow, “Francovich and the Problem of the Disobedient State”, 2 (1996) *European Law Journal*, p.199, M. Ross, “Beyond Francovich”, 56 (1993) *Modern Law Review*, p.55 and T. Tridimas, “Liability for Breach of Community Law: Growing Up and Mellowing Down?”, 38 (2001) *Common Market Law Review*, p.301.

⁸³ In 1965, according to the transitional provisions of the EC Treaty, the Council of Ministers would move to qualified-majority voting (as opposed to unanimous voting). After a failure to reach a compromise in the Council, France refused to attend any further Council Meetings and adopted the “empty-chair” policy. A few months later the Luxembourg accords were signed, according to which unanimity should be sought after whenever important national interests were at stake. This effectively signified a return to intergovernmentalism, since qualified-majority voting was re-established as the norm in the decision-making process in the Council. See J. Pinder, *The Building of the European Union*, Oxford: Oxford University Press, 1998, p.12 and W. Nicholl, “The Luxembourg Compromise”, 23 (1984) *Journal of Common Market Studies*, p.35.

⁸⁴ For an analysis of the SEA see K. Armstrong and S. Bulmer, *The Governance of the Single European Market*, Manchester: Manchester University Press, 1998, G. Bermann, “The SEA: A New Constitution for the European Community?”, 27 (1989) *Columbia Journal of Transnational Law*, p.529, A. Moravcsik, “Negotiating the Single European Act”, 45 (1991) *International Organisation*, p.19 and P. Pescatore, “Some Critical Remarks on the SEA”, 24 (1987) *Common Market Law Review*, p. 9.

In 1992 the Treaty on European Union (more commonly known as Maastricht Treaty)⁸⁵ further expanded the competence of the Community in fields such as culture, education and health, set the Economic and Monetary Union as one of the objectives of the Union, established the Union citizenship, but most importantly it introduced the three pillar structure, according to which the first pillar included the Community Treaties, the second pillar covered Common Foreign and Security Policy, while the third pillar was about Justice and Home Affairs (the second and the third pillar being mainly intergovernmental and not subject to the jurisdiction of the ECJ). The common provisions of the TEU (expressly non-justiciable) talked about human rights and the need to safeguard the *acquis communautaire*

In light of the opposition raised against Maastricht during its ratification process⁸⁶, the 1996 intergovernmental conference that produced the Treaty of Amsterdam was far less ambitious than the 1992 one. Hence the Treaty of Amsterdam aimed at simplification and consolidation rather than expansion of the EU powers. Article 6 TEU declared that the Union is founded on respect for human rights, democracy and the rule of law, while Art. 6(2) declaring that the Union shall respect fundamental rights as protected by the ECHR and the national constitutions was rendered justiciable. Other than that, the most important change was that a big part of the third Pillar was incorporated into the EC Treaty (its subjects touch on fundamental rights issues). As for provisions of differentiated integration/variable geometry that had been introduced in Maastricht, these were further enhanced by the Treaty of Amsterdam⁸⁷.

⁸⁵ D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", 33 (1993) *Common Market Law Review*, p.17.

⁸⁶ Ratifying Maastricht proved to be a very difficult process. The Danish voted against it (see K. Siune and P. Svensson, "The Danes and the Maastricht Treaty: the Danish EC Referendum of June 1992", 12 (1993) *Electoral Studies*, p.99) and the French gave a very narrow majority vote in favour. In Germany a case was brought before the German Constitutional Court on the basis that the ratification of Maastricht violated the German Basic Law. *Brunner et al. v. The European Union*, 1(1994) *Common Market Law Review*, p.57.

⁸⁷ For a comprehensive analysis of the Amsterdam Treaty see A. Duff (ed), *The Treaty of Amsterdam*, London: Sweet and Maxwell, 1997, J. Monar and W. Wessels, *The European Union after the Treaty of*

Given that the Treaty of Amsterdam had failed to make the necessary institutional preparations for the accession of the 10 new members, the 2000 IGC in Nice (labelled as the “Amsterdam leftovers”)⁸⁸ dealt with the institutional arrangements and made some amendments to the co-operation procedure. No major constitutional changes took place; there was in fact a constitutional disappointment since the decision on the legal status of the EU Charter of Fundamental Rights was postponed until the 2004 IGC.

In fact, the signing of the EU Charter of Fundamental Rights has been the most important non-judicial development in this area so far. And although the official rationale given for its creation was the “need...to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union’s citizens”⁸⁹ rather than anything else (change, improvement etc of the existing protection of fundamental rights), its genesis was prototypical in that it was characterised by parliamentary predominance. The Convention, as the body responsible for drawing up the Charter was called, included representatives of four constituencies; the Member State governments (15), the Commission (1), the European Parliament (16) and the national parliaments (30).⁹⁰ Although there is a strong argument to be made about the need to involve in the deliberative processes the actors within civil society as well as the organs of the government,⁹¹ there is no doubt that the drafting of the Charter constitutes a clear improvement in the so far records of deliberative/discursive methods

Amsterdam, New York: Continuum, 2001, D. O’Keeffe and P. Twomey, *Legal Issues of the Amsterdam Treaty*, Oxford: Hart, 1999.

⁸⁸ On the Treaty of Nice see M. Bond and K. Feus, *The Treaty of Nice Explained*, London: federal Trust, 2001, J. Wouters, “Institutional and Constitutional Challenges for the European Union: some reflections in the light of the Treaty of Nice”, 26 (2001) *European Law Review*, p. 342 and X. Yataganas, “The Treaty of Nice: the Sharing of Power and the Institutional balance in the European Union- A Continental Perspective”, 7 (2001) *European Law Journal*, p.242.

⁸⁹ Cologne European Council Conclusions, June 1999. U. Everling, “The Maastricht Judgement of the German federal Constitutional Court and its Significance for the development of the European Union”, (1994) *Yearbook of European Law*, p.1. For an analysis of this judgement see also Chapter 2 of this thesis.

⁹⁰ The Convention also included observers from the Council of Europe and the Court of Justice.

⁹¹ See for example de Burca’s comment that the drafting process “was not to be a genuinely participative process, but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level”. G. de Burca, “The drafting of the European Union Charter of fundamental rights”, 26 (2001) *European Law Review*, p.126.

followed in the EU decision-making system.

The Charter, which was solemnly proclaimed during the Intergovernmental Conference in Nice, was supposed among other things to function as a symbol that would “counterbalance the Euro and become part of the iconography of European integration and contribute both to the identity of and identification with Europe”⁹². Due, however, to the opposition of some prominent Member States, the Charter was not enshrined in the Treaties. As a result, its final legal status for the time being is that of a declaratory, non-binding document which does not confer direct and tangible benefits on the individuals, since it lacks justiciability.

Although the courts do not have the obligation to use the Charter as a legal basis for the cases they decide, it is anticipated that they will refer to it for simple inspiration or confirmation of their rulings. “We can therefore look forward to the Charter becoming binding through its being interpreted by the Court of Justice as enshrining the general principles of law.”⁹³ Hence, the courts can use the Charter as confirmation rather than legal basis of their rulings on fundamental rights issues⁹⁴. In my opinion this is a somehow self-defeating argument. If the charter has been created in order to address among other things the problem of democratic legitimacy and “to provide judges with an explicit guide to their reading of fundamental rights”⁹⁵, how can we assign its becoming binding to (one of) the institution(s), which should be bound by it?

In any case it is obvious that the declaratory character of the Charter does not have any practical value as far as the normative status of fundamental rights within the EU is concerned. Had the Charter been enshrined in the Treaties, it would have become

⁹² J. Weiler, “Does the European Union truly need a Charter of rights?”, 6 (2000) *European Law Journal*, editorial, p.2

⁹³ See the official website of the EU: http://www.europa.eu.int/comm/justice_home/unit/c.../welcome.htm

⁹⁴ P. Eeckhout, “The proposed EU Charter: some reflections on its effects in the legal systems of the EU and of its member-states” in K. Feus (ed) *The EU Charter of Fundamental Rights*, London: Federal Trust for Education and Research, 2000, pp.104-105.

⁹⁵ Official website on the EU Charter of Fundamental Rights, Frequently Asked Questions, Question no.13.

directly binding. For the time being, though, and until the ratification of the Constitutional Treaty, which incorporates the Charter, there is no change in the constitutional status quo. The fundamental rights are still protected on the basis that they are an integral part of the general principles of community law⁹⁶. This outcome undermines the deliberative process through which the Charter was drafted and may backfire by discouraging involvement in such processes in the future. After all, what is the point of setting up open and inclusive processes, if their end-result is devoid of any legal strength?

Putting aside, however, the thorny issue of its legal force, I would like to stress that the Charter is a useful instrument with a number of very important (even if only potential, for the time being) benefits. The most obvious one is that it provides a very useful point of reference for the protection of fundamental rights in the Community legal order. The jurisprudential nature of the solution adopted by the Court of Justice, although offering the advantage of flexibility, was unable to provide a definite and coherent code of rights. Even after the introduction of Art.6 TEU, according to which “the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States as general principles of Community law”, there was a lack of certainty concerning not only the corpus of rights, but also the restrictions imposed upon them.⁹⁷

⁹⁶ For a more detailed analysis of the legal effects of the Charter see: B. Hepple, “The EU Charter of Fundamental Rights”, 30 (2001) *Industrial Law Journal*, pp.225ff, K. Lenaerts and E. de Smijter, “A Bill of Rights for the European Union?”, 38 (2001) *Common Market Law Review*, pp.273ff, J. Liisberg, “Does the EU charter of Fundamental Rights threaten the supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?”, Harvard Jean Monnet Working Papers 4/01, available at HYPERLINK "<http://www.jeanmonnetprogram.org/papers/01/010401.html>" <http://www.jeanmonnetprogram.org/papers/01/010401.html>, M. Wathelet, “La Charte de droits fondamentaux: un bon pas dans une course qui reste longue”, 36 (2000) *Cahiers de droit Europeen*, pp.585ff, F. Jacobs, “Human Rights in the European Union: the role of the Court of Justice”, 26 (2001) *European Law Review*, pp.331ff. and T. Kyriakou, “The impact of the EU Charter of Fundamental Rights on the EU system of protection of rights: much ado about nothing?”, 5(2001) *Web Journal Current legal Issues* at www.webjcli.ncl.ac.uk/2001/issue5/kyriakou5.htm

⁹⁷ This issue will be further explored in Chapter 4.

c) With the benefit of hindsight: some glosses on legal reasoning

The above description does not, obviously, pretend to be a complete statement of the EU constitutional architecture. It is only a brief sketch for the development of the main concepts that enable us to talk of the Community legal order as a constitution in practice, if not in form. Even such a brief sketching, however, shows clearly that most of the major constitutional developments were initiated by the ECJ and were ex-post facto confirmed by the intergovernmental conferences. In fact, the major part of constitutionalization had been completed before the Community Treaties were amended for the first time with the Single European Act in 1986. Hence, the Court, an unelected judicial body, was the motor of constitutionalization, the process through which a new political entity came about.

It is interesting to remind, once again, that the EC Treaties were initially concluded in the form of international agreements and that “although including certain novel institutional features, they were, in line with precedent, expected to be interpreted in accordance with the normal canons of Treaty interpretation, one of which is a presumption against loss of sovereignty by states”.⁹⁸ The recurring question then is how was the transformation (we saw the description of this process above, now we will turn to the normative explanation of it) of traditional multipartite international treaties into the constitution of a quasi-federal Europe brought about?

The Court of Justice tried to ensure the effectiveness of Community law (which would at the same time secure its own effectiveness) without entering any political conflicts. Each one of the fore-mentioned major constitutional judgements⁹⁹ was presented as the logical consequence of a previous one and was thus, grounded, in settled precedent. Hence, according to its self-descriptions, the Court functioned within the limits of a legalist

⁹⁸ As quoted by Richard Kuper, *The politics of the European Court of Justice*, London: Kogan Page, 1998, p.270.

⁹⁹ With the exception, of course of *Van Gend en Loos*, which was the first case that broke with international law. More will be said about the justification of this case in the next pages.

world that is hermetically closed to considerations of power, while legal integration is presented as a *fait accompli* that came about solely through the power of the law. Joerges describes the paradox of the Community legal self-referentiality as follows: “It is as fascinating for legal sociologists and political scientists as Baron von Munchhausen’s tale about pulling himself out of a swamp by his hair: can it really be true that, by its own resources, the law raised itself above inter-governmental politics and imposed its validity on sovereign states?”¹⁰⁰

Burley and Mattli take this one step further and expose the inevitably political meaning of the self-referential and ‘politically neutral’ development of Community law: “At a minimum the margin of insulation necessary to promote integration requires that judges themselves appear to be practising law rather than politics. Their political freedom of action thus depends on a minimal degree of fidelity to both substantive law and the methodological constraints imposed by legal reasoning.” They conclude that “the staunch insistence on legal realities as distinct from political realities may in fact be a political tool”.¹⁰¹

Given that law has its own normative criteria and that the authority of any court judgement, lacking inherent or direct democratic legitimacy, depends primarily on its legal justification, in this part I will start with an analysis of the legal reasoning methods employed by the ECJ. After examining some interesting aspects of these methodologies, I will explore the significance of the judicial development of the EU constitutional Charter.

Since the principle of supremacy was presented as the corollary of taking the doctrine of direct effect seriously, and then later the protection of fundamental rights was again put forward as an indispensable means of defending the supremacy of EC law vis a vis the

¹⁰⁰ C. Joerges, “The Law in the Process of Constitutionalising Europe”, *EUI Working Paper LAW No. 2002/4*, p.6.

¹⁰¹ A.-M. Burley and W. Mattli, “Europe before the Court: a Political Theory of Integration”, 47 (1993) *International Organization*, p.44.

constitutions/ constitutionally protected rights of the Member States, it seems in a way that the principle of direct effect was not only the first, but also the most important building block in the process of constitutionalization. Once that step was taken, everything else was presented as flowing from it; the process of integration was then presented as irreversible and acquired an almost natural momentum of its own. This is why I will not only start from, but I will also insist, to a great extent, on the analysis of the justification given in *Van Gend en Loos*.¹⁰² My intention is to raise some question-marks regarding the “naturalness” of the constitutional narrative that the ECJ has constructed.

In *Van Gend en Loos*, as we saw, the Court decided that: “The Community *constitutes a new legal order of international law* for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals”(my emphasis). The Court adopted a particular type of formal reasoning in this case (which was solemnly repeated in the consequent cases), giving the form of a straightforward syllogism to its judgement. This model of justification argues that the decision can be obtained from the premises. Formal reasoning is associated with judicial neutrality and thus corresponds to the traditional conception of the role of judges as appliers of pre-existing law rather than legislators. It also denies judicial discretion and presents judicial decisions as independent of political or any other type of non-legal considerations. This in its turn enhances the authority of Courts and contributes to the acceptance of and compliance with their decisions by the citizens.

In line with the ideas put forward by formalism, the legal reasoning of the ECJ is, or

¹⁰² Mancini and Keeling describe the importance of *Van Gend en Loos* as follows: “The epithet ‘landmark’ is sometimes bestowed too frivolously on judicial decisions that do not deserve it. But surely no-one would contest the claim of the *Van Gend en Loos* judgement to be described thus. It is rare that judges are given a chance to change the course of history. But if the European Community still exists 50 or 100 years from now, historians will look back on *Van Gend en Loos* as the unique judicial contribution to the making of Europe.” G.F. Mancini, D. Keeling, “Democracy and the European Court of Justice”, 57 (1994) *Modern Law Review*, p.183.

rather presents itself, as limited to deductive reasoning. Deductive argumentation, however, “cannot guide us to the very end of the chain of justifications”.¹⁰³ It only operates on an intermediate or inferential level. What deductive reasoning tells us is that if the premises of our syllogism are true, then our conclusion/decision, ought also to be true. And this means that there is a further need to give reasons for the premises from which deductive justification proceeds.¹⁰⁴

One does not need to explain in detail why formalism is not an accurate depiction of the way any legal system actually works. The open texture of language, the indeterminacy of legislative scope/aim and the inability to predict the developments in all spheres of life indicate some of the difficulties one is confronted with in the formulation of the premises (particularly the major premise). And it has not been just the realists who reacted against formalism¹⁰⁵. In light of the above mentioned difficulties, even positivists like Hart,¹⁰⁶ Alexy¹⁰⁷ and MacCormick¹⁰⁸ have accepted that the automatic processes of syllogisms are unable to exhaust all legal reasoning.

But if legal reasoning, in general, cannot be fully contained by the processes of formal reasoning, it is extremely unrealistic to expect that Community law could do so, since

¹⁰³ J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford: Oxford University Press, 1993, p.152.

¹⁰⁴ Bengoetxea admits, however, that our ultimate normative premisses are not the product of a chain of logical reasonings. He continues that “once we have climbed to the initial premisses, the deductive ladder can be dropped and an engagement is necessary, a personal and autonomous commitment to a certain value-system postulated by no one but ourselves and to a deeper value: to participate in a discourse.” Ibid., pp.152-153.

¹⁰⁵ For an analysis of the different versions of realism see J. Frank, *Law and the Modern Mind*, London: P. Smith, 1949, J. Frank, *Courts on Trial: Myth and Reality in American Justice*, New York: Atheneum, 1963, O.W. Holmes “The Path of the Law”, 10 (1897) *Harvard Law Review*, p.457, K.N. Llewellyn, “Some Realism about Realism”, 44 (1931) *Harvard Law Review*, p. 1222, R. Pound, “The Call for a Realist Jurisprudence”, 44 (1931) *Harvard Law Review*, p. 697.

¹⁰⁶ In Hart’s words “it is a feature of human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim.” H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1972, p.125.

¹⁰⁷ R. Alexy, *A Theory of Legal Argumentation*, Oxford: Clarendon Press, 1989.

¹⁰⁸ N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978.

there are so many more sources of indeterminacy at this level.¹⁰⁹ Such problems are exacerbated at the Community level where we have a plurality of legal systems reflecting different legal cultures, different social values and different interests (both national and ideological). As Lord Mackenzie Stuart, a former member of the ECJ, puts it “it has been known for those who sought to negotiate a text and who have been unable to agree, to settle for an ambiguous expression in the hope that the Court would one day be able to resolve the ambiguity.”¹¹⁰ In other words, agreement at the Community level is very frequently reached in the form of words when there is no agreement on what the words mean.¹¹¹

Moving on to the formation and justification of the major premise in the ECJ syllogisms/judgements, we can see that this involved a teleological approach to the meaning of the Treaty. The teleological tradition “allows the ‘ultimate purpose’ of a piece of legislation to be taken into consideration. This means that it is entirely legitimate, with respect to a particular text, to take not only the exact purpose of the words into account, but also anything that may usefully and convincingly be adduced about the intention behind the words.”¹¹²

The problem with teleological interpretation, however, lies in the possible duality or even plurality of “teli” and the eventual identification of the right “telos”. In other words, how do we establish the telos of the legislative material to be interpreted? Do we look at the intent of the founding fathers/legislators in order to establish the telos of a Treaty/provision etc (subjective teleological interpretation) or does the legislative text, situated as it is within the legal system, acquire autonomy vis a vis its authors and can

¹⁰⁹ T. Hartley, “Five Forms of uncertainty in European Community Law”, 55 (1996) *Cambridge Law Journal*, p.265.

¹¹⁰ Lord Mackenzie Stuart, *The European Communities and the Rule of Law*, London: Stevens & Sons, 1977, p.81.

¹¹¹ Thus, Lord Denning argues that “the Treaty lacks precision...It uses words and phrases without defining what they mean...All the way through the Treaty there are gaps and lacunae. They have to be filled by the judges, or by regulations and directives. It is the European way”. In *Bulmer v. Bollinger* [1974] 2 WLR 202.

raise a claim to a telos not necessarily envisaged by its drafters (objective teleological interpretation)?¹¹³

In the *Van Gend en Loos* case the ECJ paid relatively little attention to the apparent intent of the contracting parties¹¹⁴ - suffice it to remind here that three of the six at the time Member States explicitly disagreed with the interpretation put forward by the ECJ- and postulated instead a certain conception of integration as the telos of the communities. Having identified an ever-growing vertical integration as the *raison d'etre* of the EEC, the ECJ was then able to proceed with its teleological interpretation. This particular identification was justified by reference to the objectives stated in the Preamble of the EC Treaty, especially the mention of a “union among the peoples of Europe”. The political and potentially simply declaratory character of these objectives¹¹⁵ became automatically part of the Community legal system and was then translated into operational constitutional law.

In following this interpretative route, the Court never acknowledged the existence of any other hermeneutic alternatives. The ideological gap between the preamble’s reference to a union among peoples (which may indeed be taken as an indication towards the construction of a supranational entity) and Art.100 EC Treaty, which back then established the requirement of unconditional unanimity in the decision-making processes of the Council (thus emphasising the intergovernmental character of the Community) was conveniently silenced. This silencing enabled the ECJ to present its own reasoning

¹¹² T. Bainbridge and A. Teasdale, *The Penguin Companion to European Law*, London: Penguin, 1995, pp.99-100.

¹¹³ For the distinction between the two see S. Douglas Scott, *Constitutional Law of the European Union*, Essex: Pearson Education, 2002, p.208. Douglas Scott refers to the subjective teleological interpretation as the “historical interpretation.”

¹¹⁴ Besides, the work of Alan Milward has established beyond reasonable doubt that according to the founding fathers’ intention and despite the limitations of national sovereignty this would entail, the EC Treaty did not represent “the intellectual counter-current to European nationalism, which it is so often said to represent, but...a further stage in the reassertion of the role of the nation-state. The common policies of the European Community came into being in the attempt to uphold and stabilise the post-war consensus on which the European nation state was rebuilt. They were a part of the rescue of the nation-state.” A. Milward, *The European Rescue of the Nation-State*, London: Routledge, 1992.

¹¹⁵ It is useful to remind that the preamble is not justiciable.

as devoid of any elements of judicial discretion.

This point is a very interesting one especially if we take into consideration the different levels of justification that should be present in a judicial decision of this type. At the first level we identify what is a valid answer in a legal system. Since, however, there may be more than one valid answer, we need to proceed to the second level of justification that will enable us to choose the most appropriate answer.¹¹⁶ The existence of more than one valid answer already affirms in a way judicial discretion. At this level of second-order justification, deductive reasoning is to no avail. This does not necessarily mean that the judge is free to choose any of the available valid answers (as, for example, a theory like Hart's might suggest),¹¹⁷ nor that there is only one acceptable answer (as Dworkin insists).¹¹⁸ There are theorists who acknowledge the existence of judicial discretion, yet try to tame it through the use of certain criteria/rules of justification.

According to MacCormick, judges do have a scope of discretion, but they also have the duty to give only such decisions as can be justified by a good justificatory argument¹¹⁹ and they can only exercise their discretion in accordance with constraints posed by the legal system as a whole. Thus, in cases where problems of interpretation or classification of the rules are raised, then the justification of decision must look beyond the rules; "if there is no relevant principle or analogy to support a decision, that decision lacks legal justification; and if there is a relevant principle or analogy the decision supported thereby is a justifiable decision- but the adduction of the principle or analogy, although

¹¹⁶ Compare H.L.A. Hart, op. cit. fn. 106, R. Dworkin, *Law's Empire*, Oxford: Hart Publishing, 1998 and N. MacCormick, op. cit. fn. 108.

¹¹⁷ According to Hart, rules have a core of certainty and a penumbra of vagueness and open texture, so in cases outside the core of certainty (hard cases), judges "must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests", op. cit. fn. 106, pp.123-128.

¹¹⁸ According to Dworkin, a constructive interpretation based on principles can yield "the one right answer" that fits and justifies the legal system as a whole and it can consequently eliminate the judicial discretion that positivists like Hart have affirmed in hard cases. See R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977 and R. Dworkin, op.cit. fn. 116, pp.225ff.

¹¹⁹ N. MacCormick, op. cit. fn. 108, p.250.

necessary to is not sufficient for a complete justification of the decision.”¹²⁰

He continues that “the ruling which directly governs the case must be tested by consequentialist argument as well as by the argument from coherence involved in the appeal to principle and analogy. And just as the absence of any supporting principle or analogy renders a decision impermissible, so the test for consistency must be applied: it must be shown that the ruling in question does not controvert any established rule of law, given a proper interpretation or explanation of such a rule in the light of principle and policy.”¹²¹ The discretion then allowed to judges is a limited one and it is a discretion to give the decision which is best justified within the existing requirements of the system the judges purport to serve.

MacCormick, however, unlike Dworkin, accepts that the requirements of the legal system can only offer modes of argument to justify a decision, but that these do not settle what decision is in the end completely justified. There is, in his view, an inexhaustibly residual area of pure practical disagreement. At the level of second-order justification, as opposed to a simple deductive (or first-level) justification, there are different, competing, but equally well justified answers to the same question. At this level one needs to justify choices between rival possible rulings.¹²²

This second order justification seems to be absent from the ECJ case law. The Court of Justice has been presenting its rulings as a logical consequence of the Treaty rules without even acknowledging its exercise of judicial discretion or the different conflicts of values involved in the cases it decides.¹²³ The application and interpretation of law

¹²⁰ *ibid.*

¹²¹ *ibid.* It would be interesting to see, for example, if the ruling in *Van Gend en Loos* case came into conflict with prior constitutional rules of the Member States regarding national sovereignty etc.

¹²² *ibid.*, p.101.

¹²³ Miguel Poiares-Maduro gives a very good example of the Court’s tendency to silence such a conflict of values arising from the application of free movement rules to a large area of national economic, social and cultural policies. Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 731 which is the leading case in free movement of goods is a clear example of formal reasoning. The main issue in this case was “the validity under Community law of a Belgian provision requiring that imported goods bearing a designation

has always been presented as fitting perfectly the patterns of syllogistic reasoning.¹²⁴ This adoption of formal reasoning has helped the ECJ preserve an image of neutrality and impartiality and thus establish its judicial authority.¹²⁵ Since the Court ignored conflicts of values and presented its own judgements as “the inevitable working out of the correct implications of the constitutional text”,¹²⁶ the specific internal logic of legal rules became “the determinant factor of interpretation, independent of the context”.¹²⁷ However, as Holmes (and other realists) had long ago stressed, the fact that “judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage” does not do away with the problem, as “the duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgements inarticulate, and often unconscious.”¹²⁸

It is interesting, however, to turn to the way the judges themselves have viewed interpretation within the context of the EC/EU. Judge Kakouris insists that the Court is a selfless reflection of the conscience of Europe; it never makes law, but always finds it in the “Idea of Law”¹²⁹. Kutscher (president of the Court elected in 1976), on the other hand, connects teleological interpretation with a certain dynamism: “The principle of progressive integration of the Member States in order to attain the objectives of the

of origin should be accompanied by a certificate of origin.” The Court stated: “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions”. The Court presented this as the only possible legal decision. It did not acknowledge at any point its judicial discretion and the fact that Art. 30 provided a choice among different major premises. See M. Poiares-Maduro, *We, the Court*, Oxford: Hart Publishing, 1998, p.21.

¹²⁴ For a different opinion see J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford: Clarendon Press, 1993.

¹²⁵ J. Weiler, “Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration”, 31 (1993) *Journal of Common Market Studies*, p.432.

¹²⁶ M. Shapiro, “Comparative Law and Comparative Politics”, 53 (1980) *Southern California Law Review*, p.538.

¹²⁷ M. Poiares Maduro, op. cit. fn. 123, p.23.

¹²⁸ O.W. Holmes, “The Path of Law”, 10 (1897) *Harvard Law Review*, p.467.

¹²⁹ And he continues that “the peoples of Europe expect from the Court the concretisation of values that come from the Absolute, from the idea of Law”. See C. Kakouris, “La Cour de Justice des Communautés

Treaty does not only comprise a political requirement; it amounts rather to a Community legal principle which the Court of Justice has to bear in mind when interpreting Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets and applies the Treaties.”¹³⁰ Similarly Judge Pescatore views the objective of economic and political union “as the completion of a conception left incomplete in the Treaty of Rome. Even if this project still seems far from achievement, it has the advantage of enabling us henceforth to envisage the evolution of the Community in the light of a coherent and complete plan.”¹³¹

Judge Mancini goes even further arguing that: “The preference for Europe is determined by the genetic code transmitted to the Court by the founding fathers, who entrusted to it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an ‘ever closer union among the peoples of Europe’.”¹³² The use of the genetic code analogy expresses very well the stance of the Court, which goes beyond rationalisation and embraces the naturalization of the constitutional development of the Community.¹³³

The message is clear. “Im Zweifel für Europa.”¹³⁴ “Tucked away in the fairyland Duchy of Luxembourg and blessed with benign neglect by the powers that be and the mass media”¹³⁵ the Court has viewed the Treaties as “an embryonic federation

Europeennes comme Cour Constitutionnelle: Trois observations” in O. Due, M. Lutter and J. Schwarze (eds) *Festschrift für Ulrich Everling*, Baden Baden: Nomos Verlag, 1995, p.629 ff.

¹³⁰ In 1976 when the President of the ECJ, Robert Lecourt, announced his intention to retire, the Court called a Judicial and Academic Conference. The above is from H. Kutscher’s paper, which was presented in that conference, as quoted by H. Rasmussen, *On Law and Policy in the European Court of Justice*, Dordrecht: Martinus Nijhoff Publishers, 1986, p. 179.

¹³¹ P. Pescatore, *The Law of Integration: Emergence of a new phenomenon in International Relations based on the experience of the European Communities*, Leiden: A.J. Sijthoff, 1974, pp.22-23.

¹³² G.F. Mancini and D. Keeling, op. cit. fn. 102, p.186.

¹³³ Hartley gives examples of judgements in which the ECJ has not only refused to accept the natural meaning of Treaty provisions, but has also proceeded to interpretation contrary to the text. T. Hartley, “The European Court, Judicial Objectivity and the Constitution of the European Union”, 112 (1996) *Law Quarterly Review*, pp. 95ff.

¹³⁴ There was an article with this title (meaning “when in doubt, opt for Europe”) in the *Frankfurter Rundschau* of December 7, 1992.

¹³⁵ E. Stein, “Lawyers, Judges and the Making of a Transnational Constitution”, 75 (1981) *American Journal of International Law*, p.1.

inherently committed to a process of growth by which it will become an actual federation.”¹³⁶ As a result the objective of incremental integration has been postulated as the telos of the Community/Union. In light of this postulation, the Court resorts very often to apagogic argument (*argumentum ad absurdum*), the use of which allows it to eliminate the alternative meanings of a provision. In *Van Gend en Loos*, for example, the direct effect of Art. 12 EC was affirmed on the basis that had a different effect been ascribed to this provision, the consequences would have been undesirable for and, thus, incompatible with the (postulated) aim of incremental integration.¹³⁷

In a similar vein, the Court has regularly argued that the EC system can only retain its integrity as long as its supremacy over conflicting national law is safeguarded. The implication is that without supremacy, integration would necessarily be destroyed. “Even one breach in the dam would be too many, for one fissure would inevitably breed others.”¹³⁸ This is usually referred to as “the ruin argument”. The ruin argument goes like that: unless the *acquis communautaire* is kept intact, unless the doctrines of direct effect and supremacy retain their validity, the Community will disintegrate. Furthermore, the integration project cannot stay still; it needs to constantly move forward. This gives a quite interesting twist to the ruin argument. Somek calls it “the bicycle theory of integration”, according to which falling down can only be avoided by constantly moving forward. “What gives life to the integration process and what indirectly lends coherence to that which has already been achieved is that it is constantly

¹³⁶ T. Hartley, *op. cit.* fn. 133, p.109.

¹³⁷ Derrida, commenting on Benjamin’s *Critique of Violence*, uses the grammatical category of the future anterior to explain the process through which law is in effect only legitimated retrospectively. A new legal order is always inaugurated in violence (symbolic, if not physical). This violence has also been present in the case of the establishment of the Community legal order. The Court postulated the creation of a certain Community and this postulation relied on the use of future anterior. The use of future anterior modifies the present to describe the symbolic violence in progress. “Those who say ‘our time’, while thinking ‘our present’ in light of a future anterior present do not know very well, by definition, what they are saying. It is precisely in this ignorance that the eventness of the event consists, what we naively call its presence.” J. Derrida, “Force of Law: The ‘Mystical Foundation of Authority’ ” in D. Cornell, M. Rosenfeld and D. Gray Carlson (eds) *Deconstruction and the Possibility of Justice*, New York/London : Routledge, 1992, p.35.

¹³⁸ S. Weatherill, *Law and Integration in the European Union*, Oxford: Clarendon Press, 1995, p.104.

challenged by ambitious goals.”¹³⁹ This is a mentality widely shared among the members of the Court and has been- as we saw above- the main justification for the developments that came after the introduction of the doctrine of direct effect. Supremacy was introduced, because otherwise direct effect would be meaningless and then later fundamental rights had to be protected, because otherwise the supremacy of Community law would be at a risk. The judges had “une certaine idée de l’ Europe”¹⁴⁰ of their own and they were determined to accord to Community law a status different from that of international law.

It seems that the Court has viewed from the very beginning the process of integration as legally irreversible. Thus, this particular conception of integration premised upon the doctrines of direct effect and supremacy has been postulated as a teleological inevitability. The founders aimed, according to the Court’s interpretation, at incremental integration, the Court as the guardian of the Treaties had to make sure that integration would be legally brought about and new generations of politicians and citizens are deprived of the right to control the pace of the movement toward the ultimate common goal, which is sacrosanct and therefore untouchable. Not only is the process of integration irreversible, but the particular conception of integration that happened to materialise has emerged as the only acceptable type of integration. Whoever puts in question the current shape of the EC/EU, is taken to be a narrow-minded Eurosceptic who wants to turn back the Community clock in order to favour the old schemas of the nation-state.

It is within this context then that Shapiro caustically comments on the auto-poetic self-descriptions of the Community legal order: “the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of correct implications of the constitutional text;

¹³⁹ A. Somek, “On Supranationality”, *European Integration online papers (EIOP) Vol.5 (2001) No 3*; <http://eiop.or.at/eiop/texte/2001-003a.htm>, p.1.

and the constitutional court as a disembodied voice of right reason and constitutional teleology.”¹⁴¹

Some theorists, like Rasmussen¹⁴² and Phelan¹⁴³, have analysed the argumentative strategy of the ECJ in an effort to question the legitimacy of the Community legal order

¹⁴⁰ The expression was used by Judge Pescatore, who observed that “the reasoning of the Court shows that the judges had une certaine idée de l’ Europe of their own” in “The Doctrine of Direct Effect: an infant disease of Community law”, 8 (1983) *European Law Review*, p. 157.

¹⁴¹ M. Shapiro, “Comparative Law and Comparative Politics”, 53 (1980) *Southern California Law Review*, p.538.

¹⁴² In 1986 Hjalte Rasmussen was one of the first critics of the Community legal order. He argued that the decisions made by the ECJ surpassed the acceptable limits of judicial power and that the ECJ actually engaged in judicial activism. Being the first one to put in question the integrationist orthodoxy and the formal rationality of the Court he was accused of launching a crusade against the European project. His argument based on very systematic and extensive analyses of the ECJ case-law, was that the Court’s federalising of the EC took place in disrespect of the “legal commands of the Treaty’s texts” and the “founders’ intentions”, until this eventually led to a decline of the Court’s judicial authority and legitimacy. As a result of this decline, the Member States “lost their trust in the neutrality of the Court” and the Court was dragged into judicial restraint. H. Rasmussen, *On Law and Policy in the European Court of Justice*, Dordrecht: Martinus Nijhoff Publishers, 1986. For reviews of this book see A. G. Toth, “Book Review”, 7 (1987) *Yearbook of European Law*, p.411, M. Cappelletti, “Is the European Court of Justice running wild?”, 12 (1987) *European Law Review*, p.3 and J. H.H. Weiler, “The Court of Justice on Trial”, 24 (1987) *Common Market Law Review*, p.555. In his 1998 book (H. Rasmussen, *The European Court of Justice*, Dordrecht: Kluwer, 1998), responding to Joseph Weiler’s review of his earlier book, Rasmussen argues that “the judicial role ought to shrink to the point where the Court’s law and politics accomplish nothing more than to compensate for what the political processes and institutions unlawfully left undone”. For a review of this book see H. Schepel, “Reconstructing Constitutionalization: Law and Politics in the European Court of Justice”, 20 (2000) *Oxford Journal of Legal Studies*, p.457.

¹⁴³ Diarmuid Rossa Phelan, like Rasmussen, also scrutinises the “constitutional” jurisprudence of the ECJ and finds it contentious. He confronts the doctrines of constitutionalisation with the doctrines of public international law and he argues that the development of the Community legal order as a sui generis order (effectuated through the rulings of the ECJ) lacked the explicit consent of the Member States and was illegitimate to the extent that it contributed to a corrosion of the sovereignty of the Member States. Rossa Phelan’s analysis focuses on the fact that the ECJ views the supremacy of Community law as arising directly from the Community legal order, while the national courts view the same principle as deriving from their own national constitutions, since these enabled the member States to join the EC in the first place. As a result, the constitutional/supreme courts of the Member States are faced with an impossible dilemma, that of choosing between fulfilling their constitutional responsibilities under their national constitution and following the authoritative interpretations of the ECJ. Rossa Phelan presents this as being ultimately a dilemma of revolt (against the Community legal order) or revolution (against the national constitutional order). His proposal is that “ a European Community law constitutional rule [ought to be] adopted to the effect that the integration of European Community law into national law is limited to the extent necessary to avoid a legal revolution in national law. The extent to which such limitation is necessary is to be finally determined by national constitutional authorities in accordance with the essential commitments of the national legal order, not by the Court of Justice.” D. R. Phelan, *Revolt or Revolution: the Constitutional Boundaries of the European Community*, Dublin: Sweet & Maxwell, 1997, p. 417. For a review of the same book see N. MacCormick, “Risking Constitutional Collision in Europe?”, 18 (1998) *Oxford Journal of Legal Studies*, p.517 and M. Poiras Maduro, “The Heteronyms of European Law”, 5 (1999) *European Law Journal*, p.60.

and to ensure that sovereignty is not usurped from the national level. The intention here is not to question the legitimacy of the Community legal order; the aim is to challenge the naturalness of its constitutional narrative. There are objections against the peculiar combination of formal-teleological reasoning that has been employed by the Court, but this does not necessarily mean that the Court's decisions were arbitrary¹⁴⁴; only that their justification was not complete. Contrary to the Court's statements, theirs was not the only valid choice; it was just one of the valid interpretative choices which were open to the Court and it was certainly not a natural or inevitable one. By questioning the naturalness and the inevitability of the particular conception of integration that has been followed so far, my intention is to re-claim some decision-making space from the past for the present and the future.

Going back, however, to the competing, equally valid, interpretations (and justifications) among which the Court could actually choose, one is confronted with the following dilemma: Why was there (with very few exceptions) no serious questioning of the Court's choices from the national courts or the political actors of the Member States at the time? Given that the transformation brought about was a profound structural one and that this was not, as I showed above, the one "irresistibly" right choice, why was acquiescence and reception so easy?¹⁴⁵ There are various explanations¹⁴⁶ for the

¹⁴⁴ MacCormick and Poiares Maduro (op.cit. fn. 143) agree with Rasmussen and Phelan that constitutionalisation was not "the logical causality" of the Treaties, but they reject the objection of illegitimacy (connected with the lack of explicit national consent) by arguing that the Member States could have reversed the constitutionalisation process "through treaty provision or by evading the application of community law". Besides, as MacCormick puts it, "for states such as the UK and Ireland, which acceded to the Communities only some time subsequently to such decisions as Costa and Van Gend, this is not quite convincing". Op. cit. fn. 143, p.525.

¹⁴⁵ Of course there have been some 'pockets of resistance' to this quiet revolution, but not many. Weiler distinguishes between two periods in the relationship of the ECJ with its main interlocutors: the first one, until the SEA, was a period of extended honeymoon, and the post-SEA period, which is one with "all the ups and downs of a mature marriage" in J. Weiler, "Journey to an Unknown Destination: a Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", 31 (1993) *Journal of Common Market Studies*, pp. 426, 433-434. For a comprehensive analysis of the reception of the constitutional doctrines in the member States, see H.G. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities*, Deventer/Boston: Kluwer, 1992.

¹⁴⁶ See F. Snyder, "The effectiveness of European Community Law: Institutions, Processes, Tools and Techniques", 56 (1993) *Modern Law Review*, p.19, M. Volcansek, "Judges, Courts and Policy-making in Western Europe", 15 (1992) *West European Politics*, p. 1, J. Gibson and G. Caldeira, "The Legitimacy of

paradoxical, albeit persistent, triumph of EU law.

Starting from the national courts, whose willingness to collaborate with the ECJ seems to have been a sine qua non of the development of the Community legal order¹⁴⁷ not only because they submit references under Art. 177, but also because they have the monopoly on the execution of the Court's judgements¹⁴⁸. Despite their vast heterogeneity, all these courts are expressions and products of particular national legal traditions, which one would normally expect them to defend. How did they overcome their national allegiances? Why did they show such a high degree of deference to the Court's doctrines? According to one explanation based on group relations analysis¹⁴⁹, the reason for this is a shared judicial identity, a common consciousness for all judges, or even 'a similarity of species'¹⁵⁰; this is built around the use of a common legal discourse¹⁵¹. The ECJ used "the language of reasoned interpretation...the artefacts which national courts would rely upon to enlist obedience within their own national orders."¹⁵²

On the other hand, there is the very important issue of judicial empowerment. Lower national courts were immensely empowered through the references for preliminary

Transnational Legal Institutions: Compliance, Support and the European Court of Justice" 39 (1995) *American Political Science Review*, p.459. For a more general analysis see T. Tyler, *Why People Follow the Law: Procedural Justice, Legitimacy and Compliance*, New Haven: Yale University Press, 1990.

¹⁴⁷ On the dialogue between the ECJ and the national courts, see A.-M. Slaughter, M. Shapiro, A. Stone and J. Weiler, *The European Court and National Courts- Doctrine and Jurisprudence: Legal Change in its Social Context*, A. Stone Sweet, *Constitutional Dialogues in the European Community*, Florence: European University Institute, 1995.

¹⁴⁸ Weiler comments that: "When European Community law is spoken through the mouths of the national judiciary it will also have the teeth that can be found in such a mouth and will usually enjoy whatever enforcement value that national law will have on that occasion", op. cit. fn. 145, p.422.

¹⁴⁹ See D. Chalmers, "Judicial Preferences and the Community Legal Order" 60 (1997) *Modern Law Review*, pp.176-178.

¹⁵⁰ Weiler, op.cit. note 145, p.425.

¹⁵¹ Formalism is one important aspect of this discourse. When the ECJ interpretation on the direct effect of directives (case *Van Duyn*) did not follow the conventions of formalistic reasoning, the national judiciaries reacted negatively. The ECJ qualified its original reasoning in subsequent cases (*Ratti*, *Becker* and *Marshall*). For a discussion of this, see J. Weiler, "The Transformation of Europe", 100 (1991) *Yale Law Journal*, p.2403.

rulings and the dialogue established thereby between them and the ECJ. Even in countries in which the concept of judicial review was non-existent, lower courts were given power of judicial review over the executive and the legislative powers. This was a novelty in some countries because the concept of judicial review was non-existent prior to the development of the Community legal order, while in others where the concept (and the practice) existed, it was mainly reserved to the highest courts. Thus, the enthusiastic acceptance of the Community constitutional doctrines by the national (lower) courts can be viewed as a way of challenging their own national hierarchies¹⁵³.

As far as the acquiescence of the political actors is concerned, one needs to keep in mind that EU law is highly technical and therefore obscure to the non-specialists. Legal processes are conducted in an insular, specialised discourse meaningfully distinct from the “normal”, power and interest based language of politics and political science. Put baldly, governments could not predict the full spectrum of the ECJ decisions at the time these were given and “did not understand what was happening until it was too late, presumably until the costs of changing the system had risen to unacceptably high levels.”¹⁵⁴ Weiler himself admits that the constitutional revolution was not immediately apparent even to relatively informed audiences.¹⁵⁵ Besides, the legal principles put forward by the Court in its decisions were only given full effect in decisions following those in which they were initially introduced. Reactions were understandably softened by the time delay and by the compliance of their national judiciary (as respect for the rule of law is a deeply rooted principle in European legal culture). The non-resistance of the national governments was further facilitated by the fact that even though the Court was occasionally perceived to be policy driven, it meticulously abstained from inter-

¹⁵² J. Weiler, “Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration” 31 (1993) *Journal of Common Market Studies*, pp.424-425.

¹⁵³ There is also the argument based on reciprocity and trans-national judicial cross-fertilisation, according to which judges working in a transnational context are interested in what their colleagues on other Member-States are doing. Once a trend of acceptance is established, it is difficult for a judge to resist what other judges have accepted.

¹⁵⁴ For an analysis of this argument see W. Mattli and A-M. Slaughter, “Law and Politics in the European Union: a reply to Garrett”, 49 (1995) *International Organisation*, pp.183-190.

state politics and was neutral, not favouring in its judgements any particular Member State.

It has also been argued that the “informed audiences” wishing to further integration actually welcomed the silencing of the conflicts offered by the legal authority of the Court judgements. According to this explanation the political actors themselves desired the developments put forward by the ECJ and consciously looked the other way as the Community expanded. At a point when political supranationalism was weak and the capacity to reach decisions in the political forum was limited, it was easier to achieve integration through law rather than politics. By letting the court make policy choices, the supranational political actors could avoid conflicts that might undermine the impetus of integration.

Game theory analysts,¹⁵⁶ on the other hand, have suggested that the governments of the individual member-states welcomed the development of the Community legal order and the consequent growing power of the ECJ on the basis that a strong, independent Court would ensure the even application of Community law, thus advancing their collective agenda and saving individual governments the trouble to worry about the compliance of their partners with their contractual obligations. As Chalmers puts it “the development of the Community legal order has solved the prisoner’s dilemma for most governments; namely the problem of complying with EC law without being able to ensure that others will do so.”¹⁵⁷

I will not enter any further analysis¹⁵⁸ of the empirical reasons for which this de facto

¹⁵⁵ J. Weiler, op. cit. fn. 152.

¹⁵⁶ See for example G. Garrett, “International Cooperation and Institutional Choice: The European Community’s Internal Market”, 46 (1992) *International Organization*, pp. 557-558.

¹⁵⁷ D. Chalmers, “Judicial Preferences and the Community Legal Order” in 60 (1997) *Modern Law Review*, p. 173.

¹⁵⁸ For an analysis for example of the role academia has played in the acceptance of the ECJ’s constitutional doctrines, see D. Chalmers, “Community Trade mark Courts: the Renaissance of an Epistemic Community?” in J. Lonbay and A. Biondi (eds) *Remedies for Breach of EC Law*, Chichester:

constitutionalization prevailed in the end. If I have briefly touched upon them, it is only because I want to clarify that my intention is not to attribute to the ECJ exclusive responsibility for the juridification of the EU constitutional process¹⁵⁹. For the purposes of my argument it is important that the constitutionalization process took place in the absence of a political debate; it is not important to identify “the guilty parts”.

Let us now shift the focus from the singularity of our inherited EU constitutional vocabulary to analysing the significance of the fact that this vocabulary was judicially, rather than politically, constructed. Before I explore the latent meanings of juridification and given that in the preceding paragraphs I accepted that the deployment of constitutionalization involved multiple interlocutors, let me briefly reiterate why I insist that the constitutionalization process took place in the absence of any public political debate. We saw that most constitutional changes were introduced through the ECJ’s case-law and were later confirmed (sometimes under the general umbrella “respect of the *acquis communautaire*”) or further enhanced by the intergovernmental conferences. One could claim that the intergovernmental conferences, preceding all official amendments of the Treaties, offered the political forum within which such a public political debate could, and actually did, take place. Or, indeed, that the ratification of the amended Treaties, taking place in each Member State according to their own constitutional provisions, is an expression of the Member States’ democratic institutions (or the European electorate’s in the cases in which there is the requirement of a referendum) and, thus, a perfectly authentic political process, capable of re-balancing the initial political deficit of the process.

As far as the temporal reversal of praxis and deliberation is concerned (first the Court

John Wiley, 1997 and J. Weiler, “A quiet Revolution: The European Court of Justice and its Interlocutors” 26 (1994) *Comparative Political Studies*, p.510.

¹⁵⁹ The Member States governments could have, if they so wished, reversed the developments put forward by the ECJ by amending the Treaties. They could have equally easily changed the function and the role of the ECJ through amendment of the relevant Treaty provisions (e.g. limitation of its jurisdiction). According to one reading, the Treaty on the European Union, with the introduction of the two intergovernmental pillars, upon which the ECJ enjoys a very limited monitoring role, can be viewed as an attempt to put limits to the ECJ’s (self) expanding competence.

develops aspects of the EU constitution and then the political actors participate in a debate about it), I will just refer back to the objections raised in Chapter 1 (see Weiler's suggestion that "we do and then we hearken"). I argued there that the very meaning of deliberation consists in enlightening the participating subjects and in enabling them to reach an understanding of each other's positions and to make the best decisions. If the decision-making process precedes deliberation, then the latter can only be used functionally as a method of rationalisation (and thus legitimation) of the decisions that have already been made. "The work of the public mind is logically and practically prior to the process through which a society determines its collective willing and acting".¹⁶⁰

Putting aside for the time being the fundamental importance of this temporal reversal, however, if we were to concentrate on the intergovernmental conferences as the source for the political input of the constitutionalization process, we would still be facing a major disappointment. The intergovernmental conferences are based on negotiation of interests rather than deliberation. To make things worse, this negotiation of interests, following the secretive routes and rules of diplomacy, is not open to public scrutiny (not to mention participation of the wider civil society)¹⁶¹. Openness, inclusiveness and transparency are absent from the state-dominated IGCs, while tough bargaining and closed diplomacy are the rules of the game. Allott is adamant that "...the infinitely complex phenomenon known as politics, which is at the heart of the process of will formation in a democracy can (not) be transmuted and subsumed in a bargaining process among the controllers of the respective public realms, spuriously legitimated by mobilizing the ante-hoc or post-hoc consent of this or that institution within the member States."¹⁶² He, thus, denounces as one of the major fallacies of the EU the idea that democracy can be conducted as if it were a species of diplomacy.

¹⁶⁰ P. Allott, "The crisis of European Constitutionalism: Reflections on the Revolution in Europe", 34 (1997) *Common Market Law Review*, p.489.

¹⁶¹ Jon Elster observes that it is common in consociational political regimes that politics takes the form of elite negotiations behind closed doors and that members of the elites reach agreement among themselves without any further popular consultations. J. Elster, "Ways of constitution-making" in A. Hadenius (ed.), *Democracy's Victory and Crisis: Nobel Symposium No. 93*, Cambridge: Cambridge University Press, 1997, p. 130.

¹⁶² *ibid.*, p.477.

On the other hand, the ratification processes taking place at the national level have a take-it- or-leave-it character, which means that the ambit of any deliberative process they are associated with, is materially seriously limited from the very beginning. Participation in the debate concerning ratification of Treaty amendments cannot affect the actual substance of these amendments. The substantive part of the amendments is formulated by the executive branches of the member States, who in their turn depend upon the high technical competence of civil servants. Needless to say, the fragmented strictly national character of the ratifying processes is not in any case conducive to the creation of a European-wide forum.

Besides, if we were to accept, for the sake of the argument, that the post hoc approval of the judicial initiatives, through their adoption by the IGCs as Treaty amendments and the ratifying processes at the national level fulfil the conditions of exercise of the political and the requirements of political consent, we would be, yet again, confronted with another interesting reversal. The voting procedure for Treaty amendments at intergovernmental conferences is unanimity; unless all Member States agree, Treaty Amendments cannot take place. If, however, the Court passes a judgement which effectively amends the Treaties (and most of its constitutional judgements have done so), this judgement can only be reversed by a unanimous decision of the Member States at the IGC; one Member State could block this reversal. So in a way, Treaty amendments effectuated through the Court's judgements seem to be procedurally privileged vis a vis their political counter-part (Treaty amendments put forward by the Member States at intergovernmental conferences). In one case amendments require unanimity, in the other, it is their reversal that requires unanimity.

d) The significance of juridification in the EU context

So far I have argued that the EU has a constitutional charter (albeit one without some of the classical conditions of constitutionalism) and that despite the occasional post-hoc political confirmation, this constitutional charter has been judicially built in the absence of a political debate. Thus, the synopsis of the first two parts could be “constitutional law without constitutional politics”. This means that we have witnessed a judicialisation of our constitutional life in the EU. The EU has substituted to a great extent litigation for legislation and formal constitutional amendment. Furthermore, it has substituted litigation for public deliberation and for the exercise of primary constituent power. In this part I will examine the significance of this substitution.

Judicialization is an expression of juridification. Juridification is the process through which the social sphere is almost exclusively regulated by law, and judicialisation is the particular type of juridification that privileges the judicial/litigious expression of law. Juridification signifies a privileging of law over politics¹⁶³, while judicialisation is associated with a further shift of power from the legislative to the judicial branch. But let us take things gradually.

Juridification has been described as signifying among other things a ‘legal pollution’¹⁶⁴, the bureaucratization of the world¹⁶⁵, the colonization of the life world by law¹⁶⁶. In his article “Juridification: Concepts, Aspects, Limits, Solutions”¹⁶⁷, Teubner gives a brief but comprehensive account of the phenomenon¹⁶⁸. He distinguishes between three

¹⁶³ There is the tendency to identify the law-making process with the political process. However, the former is only one moment (the final moment) of the decision-making process and cannot in any case exhaust its meaning.

¹⁶⁴ T. Ehrlich, “Legal Pollution”, *New York Times Magazine* (February 8), 1976, p.17.

¹⁶⁵ H. Jacoby, *Die Burocratisierung der Welt. Ein Beitrag zur Problemgeschichte*, Neuwied: Luchterland, 1969.

¹⁶⁶ J. Habermas, “Law as Medium and Law as Institution” in G. Teubner (ed.) *Dilemmas of Law in the Welfare State*, Berlin/New York: De Gruyter, 1985, p.203.

¹⁶⁷ G. Teubner, “Juridification: Concepts, Aspects, Limits, Solutions” in G. Teubner (ed) *Juridification of Social Spheres*, Berlin: de Gruyter, 1987.

¹⁶⁸ For a critical analysis of Teubner’s article see E. Christodoulidis, *Law and Reflexive Politics*, Dordrecht: Kluwer Academic Publishers, 1998, pp.97-101.

different accounts of juridification. According to the first one, juridification (Verrechtlichung) subsumes all tendencies towards an extension and intensification of law, “a legal explosion”, “an inflation of norms”. Being a purely descriptive and quantitative approach, this is not very useful as it relies upon the further definition of the tolerable threshold of acceptable quantity of law.

According to the second approach, juridification is the expropriation of conflict. In this view, juridification is the “process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes”¹⁶⁹. Juridification is the process which decontextualises social/political conflicts and subjects them to the rationality of law. The objection is that the rationality /language of law reduces political conflict to a legal case and applies to it legally specific criteria of right and wrong, thereby neutralising it and excluding the possibility of a socially rewarding resolution in the future¹⁷⁰. “Social conflicts trigger processes in law which formulate legally specific conflicts of expectations...social conflicts are not merely translated into legal terminology; they are reconstructed as autonomous legal conflicts within the legal system”¹⁷¹. In this way, juridification functions as the expropriation of conflict.

Those who rely on the concept of juridification as expropriation of conflict, usually embrace the delegalisation movement (delegalisation being the remedy to the expropriation of conflict) and focus on alternatives to law¹⁷², such as arbitration, out of court proceedings, community courts, etc. Teubner rejects this return to informal justice,

¹⁶⁹ G. Teubner, *op.cit.* fn. 167, pp. 7-8.

¹⁷⁰ For a further analysis of this argument see E. Christodoulidis, *Law and Reflexive Politics*, Dordrecht: Kluwer Academic Publishers, 1998. For the incomparability and incompatibility of different ‘sectoral’ rationalities and their corresponding languages see J.-F. Lyotard, *The Differend: Phrases in Dispute*, Manchester: Manchester University Press, 1988 and for a more specific application of the concept of “differend” in the relationship between law and politics see E. Christodoulidis, S. Veitch, “The Ignominy of Unredeemed Politics: Revolutionary Speech as Differend”, 29 (1997) *International Journal of the Semiotics of Law*, pp.141-157.

¹⁷¹ G. Teubner, *Law as an Autopoietic System*, Oxford: Blackwell, 1993, p.58.

because it ends up “surrendering conflict to the existing power constellations.”¹⁷³ And since he rejects the suggested strategy of dealing with the dysfunctional problems of juridification as expropriation of conflict, he also finds this particular conception of juridification wanting.

The third account of juridification analysed by Teubner is that of depoliticisation. Focusing mainly on labour law, Teubner explains that “juridification reinforces co-operative trade union policies...at the expense of conflictive trade union policy”¹⁷⁴. On this account, juridification “tends to de-politicise social conflicts by drastically limiting the labour unions’ possibilities of militant action”¹⁷⁵. So in a way, the fear is that institutionalisation of labour law relations will neutralise genuine political class conflict¹⁷⁶ and will “petrify the political dynamics of the working class movement.”¹⁷⁷ Once again, Teubner finds this particular concept wanting, because “it is restricted to the politics of organised labour” and, thus, “abstains from socio-structural explanations”.¹⁷⁸

Teubner is convinced that legal sociologists have been misguided in their assessment of juridification, by focusing on partial aspects of the phenomenon. He accepts that juridification cannot be analysed as a universal historical phenomenon and focuses his analysis on the juridification of modern regulatory law, which he then relates to Weber’s concept of materialisation of formal law¹⁷⁹. Legal explosion, expropriation of conflict and depoliticisation are all viewed as different expressions of the juridification that has

¹⁷² For an overview of different delegalisation strategies see R. Abel (ed) *The Politics of Informal Justice*, New York: American Press, 1982 and M. Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law” in M. Cappelletti (ed.), *Access to Justice and the Welfare State*, Alphen: Sijthoff, 1981.

¹⁷³ G. Teubner, op. cit. fn. 167, p.8.

¹⁷⁴ *ibid.*, p.9. For a further analysis of this conception of juridification see R. Erd, *Verrechtlichung industrieller Konflikte. Normative Rahmenbedingungen des dualen Systems der Industrie*, Frankfurt a.M.: Campus, 1978.

¹⁷⁵ G. Teubner, op. cit., fn. 167, p.9.

¹⁷⁶ O. Kirchheimer, “Verfassungsreform und Sozialdemokratie” in O. Kirchheimer (ed.) *Funktionen des Staates und der Verfassung*, Frankfurt: Suhrkamp, 1972, p.79 as quoted by G. Teubner, op.cit., fn. 167, p.9.

¹⁷⁷ E. Fraenkel, “Die Politische Bedeutung des Arbeitsrechts” in T. Ramm (ed.), *Arbeitsrecht und Politik*, Neuwied: Luchterhand, 1966, p.255, as quoted by G. Teubner, op. cit. fn. 167, p.9.

¹⁷⁸ G. Teubner, op. cit. fn. 167, p.10.

¹⁷⁹ M. Weber, *Economy and Society*, Berkeley: University of California Press, 1978, pp. 644ff.

taken place in modern welfare states.¹⁸⁰ I will draw from Teubner's analysis some insights, which are very useful in the context of juridification of EU constitutionalism.

Unlike Teubner, Christodoulidis believes that it is a mistake to reject certain definitions of juridification on the basis that "they do not suggest feasible or desirable counter-strategies".¹⁸¹ Christodoulidis maintains that juridification is the expropriation of conflict. He further argues that the distinction between expropriation of conflict and depoliticisation cannot be maintained, because the expropriation of conflict is its depoliticisation. Hence, his account of juridification is a combination of expropriation of conflict and depoliticisation, the latter not being restricted solely to the field of labour law.

Christodoulidis argues that the re-enactment of conflict from law's point of view inevitably expropriates and de-politicises conflict. Drawing on Luhmann¹⁸², he shows that the appropriation of conflict by the law means that conflict is institutionally domesticated; on the one hand, external third parties (judges) enter the conflictual interaction. On the other hand, the choice of legitimate means employed for the resolution of the conflict is significantly restricted. Furthermore, there is a significant filtering of what can qualify as a legal conflict, since not all conflicts are litigable or worth litigating. "Law allows for conflict selectively, by setting the thresholds of valid dissensus, the when and how of possible conflict."¹⁸³ Hence, legal conflict is necessarily reduced conflict. This reduction does not only structurally change conflicts, but it furthermore does not allow all conflicts to register.

Christodoulidis is adamant that all constitutionalism severs the reflexivity of politics and

¹⁸⁰ I will not analyse any further Teubner's concept of materialisation of law, because it refers to a particular context, the welfare state. The EU, not having a welfare policy of its own, but mostly relying on the welfare policies of its Member States, does not, in my opinion, fit the requirements of this context.

¹⁸¹ E. Christodoulidis, *op. cit.* fn. 170, p.100.

¹⁸² The reference here is mainly to Luhmann's article "Interaction, Organisation and Society" in N. Luhmann, *The Differentiation of Society*, New York: Columbia University Press, 1975, pp. 82ff.

¹⁸³ E. Christodoulidis, *op. cit.* fn. 170, p. xv.

he employs systems theory to explain the incommunicability between law and politics. Law and politics are two different systems with different functions. Law's function is to achieve normative closure, while politics is about the on-going and reflexive process of articulating the always changing common good. Christodoulidis views the constitution as the vehicle that allows the systemic exigencies of law to take over the public sphere and imbue it with their logic. His target is what he calls "the containment thesis" of the republicans, according to which "the constitution contains the deliberative practice of a community, the dialogue of all about all"¹⁸⁴. The republican thesis is that constitutionalism provides the institutional form of political communication through freedom of speech, press etc and, hence, the constitution is the home for political deliberation.

In my opinion the containment thesis, as reconstructed by Christodoulidis, does not do justice to the republican ideal of the internal connection between law and politics, because it focuses on the way law/the Constitution defines the space of political possibility and understates the fact that the Constitution itself should be seen, according to the republicans (at least some of them) as the continuously changing –and, therefore, eternally temporary- outcome of an on-going process of political contestation. Politics depends upon law because it is exercised within the legal framework set by the constitution. At the same time, however, law's legitimacy, according to the same republican view that Christodoulidis rebuts, relies upon a democratic process of jurisgenesis.

Teubner argues, and I will agree with him, that juridification is part of a great historical process¹⁸⁵ and cannot be reversed as such. What we can do is try to compensate for its

¹⁸⁴ *ibid.*, pp. 61-69.

¹⁸⁵ Habermas gives the wider historical context of juridification. He distinguishes between four different thrusts of juridification, which are actually described as counter-movements to the differentiation of the economic and political system. The first thrust led to the bourgeois state, which in West Europe developed in the form of absolutism. The next one brought about the rule of law. In a further thrust the democratisation of the constitutionalised power of the state was introduced by law. The last thrust, which occurred in the social state, brought about the constitutionalisation of the economic system. The social state controls the economic system in a similar fashion to that in which the two previous thrusts of

negative side-effects. He accepts the inevitability of interaction between law and politics and he suggests that we should focus our efforts on defining the conditions of a successful structural coupling between the two systems. Teubner's approach is, hence, premised upon the fact that a certain extent of juridification is the inevitable outcome of the historical process that has given rise to constitutionalism. He realises, however, that to denounce constitutionalism in abstracto as ideology¹⁸⁶ - and this is what Christodoulidis does- does not do justice to the emancipatory potential of constitutional law¹⁸⁷.

A constitution is the intersection of law and politics. It is a legal text as much as it is a political one. Being the intersection of two different systems, it is bound to reflect the tension between these systems' different rationalities and aspirations. I will agree with Christodoulidis that usually constitutions are unreflexive, fixed, perfectionist articulations of the common good (in its procedural or substantive formulation) that resist political change by rendering the amendment of their norms particularly difficult. And in doing so they sometimes end up sustaining the political status quo. But this is not a reason why we should give up on constitutionalism. There is also the possibility of viewing the constitution as the on-going interpretation and instantiation of political praxis and desire as articulated within a particular political culture.

Christodoulidis argues that the intersection of political decision-making and legal norm-making that inevitably takes place through constitutional law amounts to a de facto juridification of our political life. Some political changes never reach society, because they disappear when they are translated into law. In this he is right. The answer to the

juridification controlled the political system. For a detailed analysis of the historical development of juridification see J. Habermas, *The Theory of Communicative Action*, Cambridge: Polity, 1984 and J. Habermas, "Law as Medium and Law as Institution" in G. Teubner (ed.) *Dilemmas of Law in the Welfare State*, Berlin/New York: De Gruyter, 1985, p.208.

¹⁸⁶ E. Christodoulidis, op. cit. fn. 170, p. xiii where Christodoulidis announces: "I will attempt to make a case for the critique of legal ideology".

¹⁸⁷ See Chapter 1, where it was argued that ideology is a matter of context and cannot be diagnosed in abstracto. Depending on the way different symbolic forms are deployed they may be ideological or revolutionary.

problem, however, is not to denounce constitutionalism and the possibility of adequate communication between different systems, but to define the conditions for a successful structural coupling against which we can evaluate particular instances of interaction between law and politics. It is true that constitutions set out the legal conditions of exercise of political power and they specify the procedures through which closure can be attained, binding decisions can be made. Therefore constitutionalism legalises political processes to a certain extent. However, the successful structural coupling of law and politics respects the limits of the respective self-reproduction of these two different sectors (law and politics). Depending on whether these limits are observed, we can distinguish between different qualitative levels of constitutionalism. To reject the constitutional project as such in the absence of any feasible alternatives would leave no room for any qualitative stipulation as to the structure and content of the constitutional and legal order before us. This reduction of our critical leverage vis a vis constitutional reality would end up being disempowering rather than emancipatory. In this light, constitutionalism, even if far from perfectly reflexive, may actually secure the reflexivity of politics in a more durable or a more workable way than any available alternative.

Christodoulidis believes that politics is about relativising givens in the light of alternatives¹⁸⁸. I fully agree with him. In fact this thesis is about relativising the givens of EU constitutionalism in the light of its alternatives. What Christodoulidis fails to do, however, is to suggest an alternative to constitutionalism. His argument is theoretically solid. Since, however, it is an argument about the emancipatory character of politics and given that emancipation is achieved at the level of praxis, not theory, the argument's effectiveness cannot be judged against its theoretical integrity alone. I will agree with Teubner's more pragmatic approach, according to which sometimes theoretical arguments must be judged on the basis of the remedies/alternatives they suggest to overcome the very problem they diagnose.

Ending this detour on juridification, let me reiterate that the concept will be used here in

a critical sense. When I refer to the juridification of the EU constitutionalisation process, I do not refer to the inevitable, to a certain extent, legalisation of political power that aims at the production of binding decisions, but to the over-stepping of the boundaries of self-production of the political. The argument here is that the EU constitution is an instance of unsuccessful coupling of law and politics, because, by exercising primary constituent power, the ECJ and the Community legal order, as a whole, did not respect the limits of self-production of politics. Let me explain why.

According to its own declarations, the EU claims to be based on the principle of democracy (Article 6 EU Treaty). Democracy, on the other hand, is connected with popular sovereignty¹⁸⁹, which signifies that the people, the demos, are placed under their own political agency, their own rule¹⁹⁰. In line with the above, the constituent power, being inseparably connected with the principle of democratic sovereignty, is the power of a collective body to exercise (through the very fundamental act of constitution giving) its right to self-rule.¹⁹¹ Given a number of practical restrictions, the democratic ideal of

¹⁸⁸ Op. cit. fn. 170, p. 284.

¹⁸⁹ J. Waldron maintains, however, that the two (democracy and popular sovereignty) are not co-terminous. As he explains, the principle of popular sovereignty requires that the people should have whatever constitution, whatever form of government they want, while democracy is one of the forms of government from which the people can choose. According to this approach, popular sovereignty is connected with the founding moment of a polity, signifying a democratic method of constitutional choice while democracy refers to the decision procedures that will be employed in all subsequent political decision-making. The difficulty, however, is that it is not always prima-facie obvious what the constitutional moments of a polity are, as “these may be woven into the fabric of ordinary political life”. Thus, the attribution of popular sovereignty becomes a matter of theoretical judgement, because it requires a decision as to what counts as constitutive of the polity in question. See J. Waldron, “Precommitment and Disagreement” in L. Alexander (ed.) *Constitutionalism, Philosophical Foundations*, Cambridge: Cambridge University Press, 1998, pp. 271-277.

¹⁹⁰ This in its turn “springs from the natural law assumption that all men are by nature equally free, since all voluntary act of free men could justify their duty to comply to any kind of human rule. Hence, only the collective acts of free men could be accepted as the legitimate source of political rule.” U. Preuss, “Constitutional Power-making for the new polity: some deliberations on the relations between constituent power and the Constitution” in M. Rosenfeld (ed.) *Constitutionalism, Identity, Difference and Legitimacy*, Durham/London: Duke University Press, 1994, p. 143. To the extent that the constituent power springs from natural law, it is the secularised equivalent of the divine power to create the world ex nihilo. See C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (translated by George Schwab), Cambridge, Mass: MIT Press, 1985.

¹⁹¹ Ulrich Preuss (ibid. pp.143-144) distinguishes between the active making of a new order and its gradual emergence in the course of a continual historical development. The former stance grounds the constitution in men’s will, while the latter in tradition, historical teleology or simply facticity. Edmund Burke was one of the proponents of the latter approach, claiming that constitutions are “made by the

popular sovereignty operates within the schemes of representative government in which the actual production of the people's political will does not always involve their express political exertion. But then the pressing question is can we have representation at the constitutional level? How can we attest a constitutional system's fidelity to the constitutional will of the people? What counts as the will of the people at this level? Can it be that a decision by the people is equated with the vote of majority of their representatives?

Bruce Ackerman's work focuses on what counts as an expression of a people's constitutional will¹⁹². He accepts that this can never be corporately or instantaneously present, but can only be represented by time-extended courses of political events. He, thus, draws our attention to events disclosing the existence of a "mobilised majority"¹⁹³ in favour of a major constitutional change. In which way is a "mobilised majority" different from one based on a simple tally of votes? It is a clear, strong, sustained and committed majority that arises, consolidates and persists over a time during which the fundamental, constitutional matters in question are publicly controverted at a high level of energy and concern. During this period of mobilized deliberation, which is energetic and multi-vocal "apathy gives way to concern, ignorance to information, selfishness to serious reflection on the country's future."¹⁹⁴ There is a great deal of passion and personality, action as well as argument, drama as well as debate. The contending parties have an energetic exchange of public views, they address each other's critiques as they seek to mobilize deeper and broader support from the

peculiar circumstances, occasions, tempers, dispositions and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time". Edmund Burke, Speech in the House of Commons against Pitt's proposal for a committee to consider parliamentary reform (May 7, 1782), in D.B. Horn & M. Ransome (eds) *English Historical Documents 1714-1783*, 1957, p. 226, as quoted by Preuss. It seems that EU constitutionalism has relied more on "the peculiar circumstances" rather than on the will of the people. In a similar vein Heidrun Abromeit and Tanja Hitzel-Cassagnes discuss the difference between "creeping constitutionalisation", which is a process not fully politically controlled, and active constitutional engineering. H. Abromeit and T. Hitzel- Cassagnes, "Constitutional Change and Contractual Revision: Principles and Procedures", 5 (1999) *European Law Journal*, p.26.

¹⁹² B. Ackerman, *We, the People: Foundations*, Cambridge, Mass.: Harvard University Press, 1991.

¹⁹³ *ibid.*, pp. 236, 260-262, 274-275, 285-288.

¹⁹⁴ *ibid.*, p.287.

general citizenry.¹⁹⁵

Constitutional law is, Ackerman continues, “a conversation between generations”¹⁹⁶, each generation being obligated to honour the “sound and fury” of previous generations. His conclusion is clear: what reveals the constitutional will of the people is their mobilized political action. Our “reception” of constitutional law can only be based on its being the expression of the political mobilization of the self-legislating people. This is the ultimate criterion of constitutional authority and bindingness.

If we turn to EU constitutionalism, we are confronted with judicialisation (as an expression of juridification) and its concomitant depoliticization of the constitutionalization process. Not only is the existence of a “mobilised majority” absent, since the development of the EU constitution has failed (has not even tried?) to capture the imagination of the political body, but also the existence of a simple vote-majority may be questionable, since the Constitution was actually shaped by the workings of an unelected judicial body rather than by the representatives of the political body.¹⁹⁷ Hence, the ECJ’s initiative to exercise constituent power by transforming what was initially signed as an international treaty into a constitutional charter is problematic, due to the fact that only the non-constituted power, namely the people, can own the constituent power.¹⁹⁸

Ackerman adopts the decisional approach as far as constitutional bindingness is

¹⁹⁵ *ibid.*

¹⁹⁶ B. Ackerman, “Generation of Betrayal”, article delivered at a conference titled “Fidelity in Constitutional Theory”, pp.1519-50 (of the conference proceedings, as quoted by F. Michelman, “Constitutional Authorship” in L. Alexander (ed.) *Constitutionalism, Philosophical Foundations*, pp.76-77.

¹⁹⁷ It is important, however, to underline at this point that when we are talking about the political body in the EU we cannot only refer to the citizens of the Member States; as long as we want to keep the individual identities of the European peoples intact, the Member States themselves will have their own standing as participants in a second-order political body, co-existent to the first one that consists of the unified European citizenry.

¹⁹⁸ U. Preuss, “Constitutional Power-making for the new polity: some deliberations on the relations between constituent power and the constitution” in M. Rosenfeld (ed.) *Constitutionalism, Identity, Difference and Legitimacy*, Durham/London: Duke University Press, 1994, pp. 159-160.

concerned. According to this, the constitution gains its bindingness and consequently its authority by the fact that it is the intentional production of the sovereign people's will. If we take this to be our guiding principle in constitutionalism, then constitutional legal authority depends on constitutional legal authorship. This underlying link between authority and authorship emphasises the political aspect of the constitution and resists Christodoulidis' reading of all constitutionalism as an unqualified privileging of law over politics.

This is not, however, the only theoretical possibility of attributing bindingness to the Constitution. Constitutional bindingness may also be existential (a constitution is binding just because it is accepted as the Country's constitution) or rational (the constitution is binding as a product of right reason). In this chapter I have questioned the bindingness of the EU constitution on the basis of its judicial, non-democratic authorship. In the next chapter I will turn to the possibility of its being binding as an expression of right reason (rational bindingness). Anticipating at this point much of what is to come, let me say that in the next chapter it will be shown that the EU constitution can only claim the normative force of the factual. The EU constitution fulfils the requirements of neither decisional nor rational bindingness; it can only claim to be binding on the existential basis of its having been accepted as binding.

Not everyone, however, agrees with Ackerman's populist approach, which locates the deliberative practice in the constitutional mobilisation of the citizenry. Even republicans such as Michelman and Sunstein rely on more elitistic institutional solutions. For Sunstein the best forum for constitutional politics is the legislative body, because "representatives...have the time and temperament to engage in a form of collective reasoning."¹⁹⁹ Furthermore, Sunstein puts forward a number of institutional safeguards that will ensure the representatives' independence from their constituents'/lobbyists' influence and will enhance their predisposition toward deliberation from which the

¹⁹⁹ C. Sunstein, "Interest Groups in American Public Law", 38 (1985) *Stanford Law Review*, p.140.

common good will emerge.²⁰⁰

Michelman, on the other hand, although acknowledging Ackerman's project as "the most deeply populist and genuinely republican one", dismisses the criterion of popular mobilisation on the basis that actual episodes of constitutional politics are rare. In Ackerman's theory the court's interpretative choices are defined by prior jurisgenerative constitutional moments, which in their turn are expressions of prior popular mobilisation. This means that "the judiciary is cast as the agent of our constitutional past... it cannot also be a spontaneous agent of our future...the judiciary's role in the process of constitutional change is benedictory rather than prophetic."²⁰¹ Michelman wishes to enhance the Court's ability to play a prophetic role by becoming the very bearer of constitutional transformation. This is a case of virtual representation; the nine members of the US Supreme Court, prior to reaching a decision they engage in a dialogue that represents the missing dialogue of the people.²⁰² Under this approach the counter-majoritarian paradox of judicial review is reversed; the judge's role is not restricting but facilitating the political process.

This view is very close to the ECJ's self-declarations as to its own role within the Community legal order. In the absence of popular/political participation, the ECJ has taken it on itself to keep the dialogue about the Community going. The problem is that by assuming this role and by "offering" this institutional solution to the lack of participatory politics, the ECJ has contributed to the very institutionalisation of the absence of participation. And this is exactly the crux of elitist approaches, such as these that have been put forward by Sunstein and Michelman. It is very difficult, if not impossible for them, to argue persuasively in favour of self-rule and autonomy, when their point of departure is one of distrust of the outcome of participatory democracy.

The first objection to the judicial constitution-making that has taken place in the EU, as

²⁰⁰ *ibid.*

²⁰¹ F. Michelman, "Law's Republic", 97 (1988) *Yale Law Journal*, p. 1521.

described above, is that it has happened in the absence of a genuine political debate, and, consequently, without the participation of the people, thus defying the principle of popular sovereignty. One could, however, argue that the citizens have actually contributed indirectly in the incremental building of the EU constitution by participating in the litigation before the Court of Justice. In fact, members of the Court have attempted to rebut the objection regarding the procedural lack of democratic legitimacy in the construction of the EU constitution, by presenting the subjectivation of the Treaties as the mode of legitimation par excellence, which allowed the citizens to participate in the shaping of the EU constitutional order. In their analysis of *Van Gend en Loos*, Mancini and Keeling insist that: “The effect of *Van Gend en Loos* was to take community law out of the hands of politicians and bureaucrats and to give it to the people. Of all the Court’s democratising achievements none can rank so highly in practical terms...”²⁰³ The argument is that the combined effect of the principle of direct effect and the use of Art. 177 EC (*preliminary rulings*) has broadened considerably the possibilities for all private persons to participate in the European legal discourse and thereby influence its shaping. According to this approach, participation and representation in the European judicial process was the substitute for participation in the political process.

Against this stance, I will argue that participation in the judicial process is not an adequate substitute for participation in the political process. Furthermore, I will maintain that this particular substitution is responsible for the biased structuring of the EU constitution. As far as my first claim is concerned, the one regarding the inadequacy of the substitution of litigation for politics, this is based on the following: participating in the political process contrary to what the liberals may suggest, is not just about bargaining within a framework of constitutional procedural rules. To go back to Arendt “the realm of politics is the organisation of the people as it arises out of acting and speaking together, and its true space lies between people living together for this

²⁰² F. Michelman, “Foreword: Traces of self-government, 100 (1986) *Harvard Law Review*, p.77.

²⁰³ G.F. Mancini and D.T. Keeling, “Democracy and the European Court of Justice”, 57 (1994) *Modern Law Review*, p. 183.

purpose.”²⁰⁴ This stance brings to the fore the constitutive element of the political process. It is in the very process of political participation that the citizens engage with one another and their feeling of belongingness to the same political community is forged. Obviously litigation cannot claim any such formative character as it polarises the participating parties. The litigants are opponents; they do not try to reach a common understanding of the issues at stake; they are simply trying to persuade the judge/jury about the rightness of their own claims. Hence, communication gives way to persuasion.

I mentioned earlier that to view participation in the judicial process as a substitute for participation in the political process severs the constitutive character of politics. I further claimed that this particular substitution is responsible for the biased structuring of the EU constitution. Let me explain why. The institutional complexity of the EU in combination with the lack of other alternative political proceedings usually initiated by political parties have intensified the juridification of the EU political process. As a result of this generalised juridification, “many actors, both public and private, view the legal sphere as a battleground where they can secure results unattainable through more classical political channels.”²⁰⁵ As far as the use of litigation by public actors is concerned, the best example can be found in the inter-institutional disputes that eventually enabled the Parliament to acquire locus standi and to safeguard its prerogatives.²⁰⁶

Similarly, in the private sphere, juridification is reflected in the strategic use of litigation by individual actors. Private individuals realised that participating in the EU judicial process (rather than the EU political process) was a more efficient way of pursuing their

²⁰⁴ H. Arendt, *The Human Condition*, Chicago: Chicago University Press, 1958, p.198.

²⁰⁵ R. Dehousse, “Integration through Law revisited: some thoughts on the Juridification of the European Political Process” in F. Snyder (ed.) *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford: Hart Publishing, 2000, p.16. See also R. Dehousse, *The European Court of Justice- The Politics of Judicial Integration*, London: MacMillan Press, 1998.

²⁰⁶ Failing to wrest a Treaty revision from the Member States, the Parliament endeavoured to convince the Court that it ought to have similar prerogatives to the Council or the Commission. On the saga of the judicial expansion of the European Parliament’s prerogatives see the following cases: *Roquette Freres v.*

interests. This led to the emergence of “repeat players”, actors who have the necessary resources and experience to face legal battles with the intention to draw the attention of public opinion to a problem and thus achieve their objectives in the long term.²⁰⁷ Given, however, how long and costly such strategic utilisation of the legal procedure can be, it is not surprising that the majority of repeat players in the EU sphere are big financial companies or interest groups²⁰⁸. As a result, the voice given to individual participants is not the same. Powerful corporations can participate in the judicial process to a higher degree than other individuals. Companies have actually initiated a big part of the litigation that has led to some of the most important constitutional judgements passed by the ECJ. As Poiares Maduro puts it, “litigation actors have given life to a constitutional body created by the Court, but in doing this they have also impacted on its soul”²⁰⁹.

One can validly claim that this is the standard outcome of formal equality when it is not accompanied by substantive equality. The situation, however, seems to be more complicated at the EU level, where this uneven participation in the judicial process contributes to the creation of the constitutional instrument, which is supposed to be setting out, among other things, the conditions of participation in the political process. So, in a way, citizens (or companies) of a higher economic status have been structurally privileged through their indirect participation to the EU constitution shaping.

In light of these, it is fair to conclude with Dehousse that juridification aggravates the already existing political deficit of the EU and that it helps replace “the citizen’s

Commission, Case 138/79, Parliament v. Council, Case 13/83, Parliament v. Council, Case 302/87 and Parliament v. Council, Case C-70/88.

²⁰⁷ For a further analysis of the significance of repeat players see M. Galanter, “Why the ‘Haves’ Come out ahead: Speculations on the Limits of Legal Change”, 8 (1974) *Law and Society*, pp.95-160.

²⁰⁸ On issues regarding litigation strategies and access to the ECJ see C. Barnard, “A European Litigation Strategy: The Case of the Equal Opportunities Commission” in J. Shaw and G. Moore (eds.), *Legal Dynamics of European Union*, Oxford: Clarendon Press, 1995, pp. 253-272, C. Harding, “Who goes to Court in Europe? An analysis of Litigation against the European Community”, 17 (1992) *European Law Review*, pp.104-125 and C. Harlow, “Towards a Theory of Access to the European Court of Justice”, 12 (1992) *Yearbook of European Law*, pp.213-248.

²⁰⁹ M. Poiares-Maduro, op. cit. fn.123.

democracy founded on universal suffrage by a form of judicial democracy”.²¹⁰

A considerable number of decisions has been withdrawn from the political power to pass under the control of the judiciary. By replacing conflicts of interests with matters of principle, judicial politics clearly contribute to de-politicise the political process.

Partisan conflict is transformed into supposedly non-controversial questions about the proper interpretation of the Treaty. This signifies a transformation of the nature of political debate from contingent struggle to an absolute zero-sum-game.

Another objection against the judicialisation/juridification of EU constitutionalism is connected with the concept of the rule of law. The ECJ often justified its recourse to teleological reasoning whenever the Treaty was silent on an issue by reference to Art. 164 EC Treaty, according to which “the European Court is to ensure that in the interpretation and application of the Treaties the law is observed.” This article was interpreted as establishing the principle of legality and as mandating the Court to develop, or rather extrapolate the principles, which correspond to the notion of the rule of law.²¹¹

Pescatore defends teleological interpretation as the method of interpretation par excellence within the context of the EC and maintains that : “Contrary to a widespread idea, this is not simply ‘one method among others’. *The rule of law* being by its nature a provision with a certain objective, the teleological method is, in the last analysis, the decisive criterion of every legal interpretation. This is doubly true in the context of Treaties which proceed by laying down objectives rather than substantive rules.”²¹²

The rule of law is an aspiration; it denotes an ideal state of affairs. It is widely accepted as a fundamental requirement of any modern system of democratic government, but

²¹⁰ R. Dehousse, op.cit. fn. 205, p. 27. For a similar argument see also J.-P. Chevenement, “Cinq Ans Apres” in J.-P. Chevenement, *Le Betisier de Maastricht*, Paris: Arlea, 1997, pp.7-34.

²¹¹ For an analysis of the concept within the EU context see K. Bradley and A. Sutton, “European Union and the Rule of Law” in A. Duff, J. Pinder and R. Pryce (eds) *Maastricht and Beyond*, London/New York: Routledge, 1994.

²¹² P. Pescatore, op. cit. fn.131, p. 88.

there is no clear consensus as to its exact content. Thus, the answers to the question what the rule of law is cross the political spectrum from right to left. A minimalist definition of the rule of law would be that law should consist of rules and that the government should act in accordance with fixed and identifiable rules and principles. However, if citizens and the government are to be ruled by the law, that means that the law must be capable of being obeyed and of guiding action, which brings to the fore the requirement of legal certainty. The piecemeal and incremental character of the constitutionalisation process, as undertaken by the ECJ, has offered the advantage of flexibility, but at the same time it is characterised by a certain lack of clarity and coherence²¹³, which undermine the certainty required by the rule of law. This is one of the cases in which irony seems to become a key feature of EU action; the very same move that aims to promote the rule of law, ends up undermining it. Similarly, we saw above that the subjectivation of the Treaties, which took place in the absence of popular sovereignty, was presented as democratically empowering the EU citizens.

Conclusions

Part Four of John Steinbeck's book *East of Eden* starts like this: "there is one story in the world and only one". On a similar line, EU orthodoxy has claimed that "there is one constitutional story in the EU and only one". And according to this story the Treaty was meant to be the Constitution all along. The Court simply brought to the surface the text's one and only one underlying telos. In doing so it never crossed the boundaries of acceptable judicial power. It never undermined popular sovereignty; it only faithfully served it. Until very recently the story that there were no alternatives to the course of the EU constitutionalisation process monopolised theoretical accounts of the Community legal order. By dissecting some of the constitutional moments of the EU history, I joined the league of "the EU heretics" and showed that this stubborn claim to narrative

²¹³ The development of the fundamental rights protection illustrates this very clearly. In *Stork* fundamental rights were not recognised as part of the Community legal order, while later in *Stauder* they became part of the general principles of law. See pp. 101-104 of this chapter.

singularity may be questioned.

After clarifying that revisiting the past is a necessary task for the designing of our future, I focused on the major constitutional judgements of the ECJ. I pointed out that these initiated the constitutionalisation process in the EU by breaking with the usual methods of interpretation of international law. I then turned to their justification and I found it unsatisfactory, in that, although employing teleology, the Court never discussed the possible choice between rival, equally valid rulings.

My intention at this point was not to question the validity of the ECJ rulings, but the adequacy of the ECJ reasoning. It was, however, this peculiar combination of formal and teleological reasoning that allowed Community law, basically relying on its self-referentiality, to expand and to effectively penetrate the national legal systems. Through its rulings, the ECJ set the course for a process that proceeded in the familiar categories of law without ever allowing the political alternatives to be the object of a public discussion. This signified the juridification of the constitutionalisation process in the EU.

Drawing on Christodoulidis and Teubner's analyses, I explained that for the purposes of my thesis, juridification does not refer to the inevitable, to a certain extent, legalisation of politics that takes place through the function of a constitution. I restrict its use, instead, to the pathological overstepping of the boundaries between the political and the legal systems, according to which law does not respect the limits of self-reproduction of politics. My main concern is that the procedure of constitutionalisation in the EU never won any genuine political dynamic of its own. The limited non-judicial constitutional input came from the proceedings of the intergovernmental conferences, which are mostly structured on the basis of the rules of diplomacy rather than those of deliberation. A broad popular participation or a "mobilised majority" have been absent from the constitutional moments of the EU. As a result, at no point has the current EU constitutional framework been understood as the normatively willed act of the EU

citizens.

Apart from the serious issues of legal certainty and popular sovereignty that this piecemeal judicial process raises, it has also impacted upon the content of the EU Constitutional Charter. The analysis of the substantive shortcomings of the EU constitution will be given in the next chapter, where it will be shown that the particular conception of fundamental rights that has developed in the EU, has incorporated the logic of the market. In this part I only highlighted the fact that the judicialisation/juridification of the EU constitution put forward the substitution of participation in litigation for participation in the political process. Given, however, the possibility of a strategic use of litigation by repeat players (heavily relying on resources), participation in litigation is not always symmetrical to participation in the political process. Therefore, this substitution, which is by now a structural feature of our current constitutional framework in the EU, creates asymmetries in participation.

An endnote

In a speech delivered in Oxford some years ago, Delors did not hesitate to acclaim the primacy of law in the Community, justifying it as follows: “The primacy of law in the construction of Europe stemmed, of course, from the founding fathers’ original determination to substitute decisions based on law for those based on might, to settle conflicts henceforward not by arms but by a rule of law accepted by all. In other words to make law the *ultima ratio regis* of our continent.”

This is a fine example of the rhetorical fabric of Community law. The emotionally laden use of vocabulary such as “the founding fathers”, combined with a very subtle and elegant reminder of the atrocities of the second-world war make a strong case for juridification. It all seems very noble at first sight. Law is inimical to excesses; it speaks the sober language of rationality. Might, on the other hand, is blindly competitive and therefore irrational. It settles conflicts by arms, not arguments and is responsible for disastrous havocs of the magnitude of the second world war. The antithesis between law

and might works very well and it obviously works in favour of law.

As we saw earlier, this is a familiar tactic usually incorporated by the ruin argument²¹⁴; the alternative to integration through law is non-integration with all the dangers of intra-national competitions looming at the background. Here the emphasis is on integration. The existence of different types of integration (integration through law/through politics, integration of different paces) is conveniently silenced.

Politics, however, is not, as Delors' statement may subtly suggest, identified with pure might; it refers to the exercise of power, but this exercise of power is actually circumscribed by constitutional norms. And, of course, constitutional norms are legal norms, but their content is politically defined and decided. This is the paradox, which lies in the heart of constitutionalism. A constitution is the meeting point for the legal and the political system. Law is politically produced, yet it limits political power.

The depiction of politics as violent might that tends to be aggressive to its enemies is very close to Carl Schmitt's conception of politics, according to which the specific political distinction to which political actions and motives can be reduced is that between friend and enemy²¹⁵. But then again Schmitt's definition of the political is not the most widely accepted one. Yet, ironically enough, this underlying link with Schmitt, if further pursued, would bring to the surface a very profound critique of the EU juridification and the primacy of law over politics.

²¹⁴ See pp. 123-124 of this Chapter.

²¹⁵ C. Schmitt, *The Concept of the Political*, Chicago: Chicago University Press, 1996, p.26.

Chapter 4

The marketisation of the Community legal order

The bourgeoisie has resolved personal worth into exchange value, and in place of the numberless infeasible chartered freedoms, has set up that single, unconscionable freedom- Free Trade.
Marx and Engels (The Communist Manifesto)

Introduction

The theoretical analysis in Chapter 3 re-visited the official narrative of the development of the EU constitutional order. It was shown that the EU constitutionalising process was judicially driven and took place largely in the absence of a political debate. This signified the juridification, and more particularly, the judicialisation of EU constitutionalism. As a result, political conflicts of interest have been remoulded as legal conflicts within the EU. In light of the inherent structural features of litigation, this substitution of the legal for the political conflict has had a significant impact upon the access and the participation of EU citizens in the shaping of the EU constitutional order.

In the previous chapter I alluded to three different possible sources of constitutional bindingness: one based on authorship, one grounded on reason and one stemming from pure performativity. The analysis in the previous chapter showed that the EU constitution cannot claim any bindingness on the basis of democratic authorship as it developed through the Court's case-law, without the participation of the appropriate political forces. In this chapter I will turn to the argument that the EU constitutional charter can claim its bindingness from reason.

In response to the criticisms raised against the judicial impetus of the EU constitutionalisation process, a number of theorists have argued that the constitutional initiative of the Court can draw its legitimacy from the fact that the

Court's jurisprudence granted fundamental rights to individuals. Deirdre Curtin defends the Court's constitutionalising enterprise as follows:

“The guarantee of judicial control by a court concerned to protect the rights of individuals and their fundamental freedoms may be essential to fulfil the characteristics of the EC Treaty as a constitutional Charter based on the rule of law. It is also much too simplistic to believe that the only valid form of legitimacy in the context of the Community is that of the democratic system. The rule of law and the protection of fundamental rights, which constitute fundamental elements of any political legitimacy do not emanate from democracy as such, but from the independence of the judiciary. It is precisely the function of an independent judiciary to guard the unique legal system it has been so instrumental in constituting.”¹

Here Curtin argues that human rights constitute a sufficient basis of political legitimacy quite independently from the democratic or non-democratic structure of the polity in question. Besides, her contention in the same article that “lawyers may, after all, be better equipped than politicians for the kind of work the European integration process involves”², illustrates explicitly how, in her view, issues of democratic representation are not necessarily insuperable impediments for the legitimacy of the EU. It seems that for Curtin –and she is hardly alone in claiming this³– human rights, which underlie any political legitimacy, can compensate for an incomplete political constitution. In other words, the protection of fundamental rights is considered to be capable of counterbalancing the democratic and political deficit of the Union.

¹ D. Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, 17 (1993) *Common Market Law Review*, pp.65-66.

² *ibid.*

³ For similar arguments in the context of the EU see also G.-F. Mancini and D.T. Keeling, “Democracy and the European Court of Justice”, 57 (1994) *Modern Law Review*, p.183 and N. Reich, “A European Constitution for Citizens: reflections on the Rethinking of Union and Community Law”, 3 (1997) *European Law Journal*, pp.131-164. For a more theoretical analysis of the opposition between the reason of rights and the passion of politics see, among others, J. Elster, *Ulysses and the Sirens*, Cambridge: Cambridge University Press, 1979 (where the self-binding of the people in a democracy through the constraints of rights is likened to the binding of Ulysses to the mast of his boat in his effort to resist the invitations of the Sirens) and S. Holmes, *Passion and Constraint: on the Theory of Liberal Democracy*, Chicago: Chicago University Press, 1995.

In this chapter the focus will no longer be the problematic process of EU constitutionalisation, but its substantive outcome. My critique will concentrate on the actual content of the EU constitutional charter with particular emphasis on the concept of fundamental rights. The aim of the analysis is to show that, due to the specific conditions of their development, fundamental rights in the EU have incorporated commodification within their inner structure and have been conceptually subordinated to the economic objectives of the Treaties. As a result, the EU legal/constitutional system has not only appropriated the sphere of the political (as analysed in Chapter 3), but it has furthermore integrated the logic of the market (as will be analysed in this chapter). This is a fundamental structural substitution that allows the logic of the market to penetrate the Community legal order and, through it, effectively to colonise the EU conception of the political.

In the first part of this chapter, attention will be centred on the normative evaluation of the human rights protection in the EU. This inquiry will focus on the more specific issue of the normative force of human rights within the Community legal order. According to most national constitutional systems, human rights are treated as the hierarchically highest rules of validation against which other rules of law are to be measured, whereas in the EC/EU these same rights have been assigned the status of the general principles of law. I will explore the normative significance of this difference.

A further analysis of the way in which the term “fundamental rights” is being used within the EU will clarify that the initial solely economic focus of the Community has influenced its gradual evolution into a political entity and has kept its current political character bound and subordinated to economic definitions. This part will reflect on some of the broader theoretical questions concerning the role of fundamental rights in a democratic context.

According to theoretical orthodoxy, human rights are supposed to give priority to certain interests of individuals and to insulate them from the vicissitudes of majoritarian-based decision-making processes. I will argue that within the EC/EU

context, human rights have not been an effective barrier to aggregate-utility rationales, but have in fact been conceptually subordinated to the Community objectives, interpreted as expressing ipso facto the common good of the EU.

After a brief exploration of the incomplete character of the newly established EU citizenship and its hitherto inability to overcome the pre-existing economic orientations of EU fundamental rights, in the last part of this chapter I will turn to the arguments of those who maintain that the market can be a pivotal element of cohesion for the European Union and that it can meaningfully express the logic of representation. I will argue that economic integration cannot offer a satisfactory basis for representation, because it is associated with a fixed idea of usefulness, which cannot exhaust the concept of the political. I will argue that to regard economics as an end and politics as a means to that end constitutes a very substantive reversal, which unavoidably affects the coherence of the legal system.

a) The marketisation of EU fundamental rights

As we saw in the previous chapter, in the original Treaties there was no legal basis for human rights⁴. In response, however, to the threat that the national Courts would opt for the supremacy of their own constitutional provisions on fundamental rights, the ECJ recognised fundamental rights as part of the general principles of Community law and gradually put in place an unwritten Bill of Rights⁵ against which it could examine the legality of Community legislation.

⁴ The historical reasons for such silence are well-known. Under the Draft Treaty for a European Political Community of 1953, a prominent role was envisaged for human rights: Section I of the European Convention of Human Rights and the First Protocol were to be applied in that Community as part of its basic law. However, the project “foundered on political rocks” (namely the French National Assembly failed to ratify the European Defence Treaty) and the three Communities set much less ambitious goals, aiming not at creating a new form of society (at least initially), but more modestly at regulating economic issues. Their scope was primarily economic and social aspirations only entered the picture sporadically. For a discussion of this see A. H. Robertson, “The European Political Community” in 29 (1952) *British Yearbook of International Law*, p.383.

⁵ See Chapter 3, pp. 100-105.

This state of protection of fundamental rights in the Communities has been repeatedly the subject of scepticism and disapproval. It has been contended that the jurisprudential development of the rights as adopted by the ECJ was inconsistent with the notion of fundamental rights as constituent factors of a society which claims to be based on the rule of law and that in a pluralistic society the protection of fundamental rights can only be provided by representative institutions with democratic legitimacy.⁶

There are two important issues raised here. The first issue is that of democratic legitimacy. Human rights are part of the constitutional structure of a polity and the regulation of their protection is connected with the exercise of constituent power. Essentially the constituent power is the power of a collective body to exercise through the very act of constitution-giving its right to self-rule and is, therefore, inseparably connected with the principle of democratic sovereignty (see previous chapter). The second issue raised above (also explored in Chapter 3) is connected with the concept of the rule of law. The ad hoc jurisprudential development of a community rights corpus was by definition unsystematic and has not been able to offer legal certainty in the sphere of protection of rights in EC law.

In view of the above criticisms⁷ and in the absence of accession of the Union to the ECHR,⁸ which meant that the EU institutions were not directly bound by any international human rights treaties,⁹ the EU Charter of Fundamental Rights was

⁶ M. Dausès, "The Protection of Fundamental Rights in the Community Legal Order", 10 (1985) *Legal Issues of European Integration*, p.413.

⁷ The decision to draft a Charter of Fundamental Rights has also been viewed as connected with the specific legitimacy and credibility problems that the EU was facing at the time e.g. resignation of the Commission because of allegations of corruption.

⁸ Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Fundamental Rights and Freedoms* [1996] E.C.R. I-1759, makes clear that the European Community has no human rights competence, express or implied, on which specific measures can be taken. It is not clear if the Charter of Fundamental Rights has changed this. Accession of the EU to the European Convention could only take place after amendment to the Convention, since article 66(1) permits accession by members of the Council of Europe, membership of which is comprised of states only. Alternatively, accession could take place if the EU became a state itself.

⁹ This again means that the individual's rights of recourse against EU institutions are more limited than they are against national authorities. The individual has no recourse to Strasbourg in the case of breaches of the ECHR by Union or Community Institutions. The ECJ, on the other hand, will consider allegations of breaches of the ECHR by Union or Community institutions only in the context of a breach of Community law.

signed.¹⁰ Given, however, that it has not been incorporated in the Treaties¹¹, it is only a soft-law instrument¹² that lacks justiciability.¹³ The Charter gives a codified catalogue of the existing rights and raises their visibility, contributing at the same time to their invocability by the subjects of the EU legal order¹⁴. It furthermore gives the judicial enforcement of fundamental rights in the EU a legally more stable foundation¹⁵ and it, thus, remedies to a certain extent the lack of clarity regarding the corpus of EU fundamental rights.¹⁶ Nevertheless, for the time being there is no change in the constitutional status quo. It is true that the enumeration of fundamental rights has now become clearer, in the sense that the rights protected by the Charter are obviously considered to be fundamental. However, even after the signing of the Charter, the legal status of fundamental rights in the EU has not changed and these are still protected on the basis that they are an integral part of the general principles of Community law.

Unlike what happens in the Community legal order, where fundamental rights are protected as general principles of law, at the national and international level these same rights usually take the form of rules. The difference between principles and rules is at the centre of the old jurisprudential debate concerning legal reasoning and

¹⁰ The Charter was signed during the Intergovernmental Conference in Nice.

¹¹ This will change after the ratification of the Constitutional treaty.

¹² J. Liisberg, "Does the EU Charter of Fundamental Rights threaten the supremacy of Community Law? Art. 53 of the Charter: a fountain of law or just an inkblot?", Harvard Jean Monnet Working Papers 4/01, available at <http://www.jeanmonnetprogram.org/papers/01/010401.html>. On the legal effects of the Charter see also: P. Eeckhout, "The proposed EU Charter: some reflections on its effects in the legal systems of the EU and of its Member-States", K. Feus (ed.) *The EU Charter of Fundamental Rights*, London: Federal Trust for Education and Research, 2000, p.104 and M. Wathelet, "La Charte des Droits Fondamentaux: un bon pas dans une course qui reste longue", 36 (2000) *Cahiers de droit Europeen*, p.591.

¹³ The Charter has already been cited in opinions by Advocates General of the Court. See Opinion of March 22, 2001, by Advocate General Jacobs in case 270/00P, *Z. v. European parliament*, para. 40 where it is stated that "the Charter while itself not legally binding, proclaims a generally recognised principle" on the right to have affairs handled by the institutions within a reasonable time. Also opinion of February 8, 2001, by Advocate General Tizzano in Case C-173/99, *BECTU*, paras. 26-28: "Formally the Charter is not in itself binding, but it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments...Accordingly I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right."

¹⁴ K. Lenaerts and E. de Smitjer, "A Bill of Rights for the European Union?", 38 (2001) *Common Market Law Review*, p.281.

¹⁵ *ibid.*, p. 274.

¹⁶ The rights comprised in the Charter are without doubt fundamental rights. It could be, however, that this list of rights is not exhaustive.

judicial discretion. Dworkin's theory, in particular is the most prominent attempt to bring to the fore the importance of principles. In response to Hart's theory, Dworkin has argued that the representation of law as a system of rules fails to account for the principles. Unlike rules, which have an all or nothing character, meaning that if they are valid, they either determine a decision or contribute nothing to it, principles have a dimension of weight and may compete with each other without their validity being put into question. Principles give arguments in this direction rather than the other one, but do not set out legal consequences that follow automatically from them. "All that is meant when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another."¹⁷ Thus, prima facie, different particular results can be compatible with the same principle.

Similarly, Joxerramon Bengoetxea explains that both rules and principles fall under the category of norms, but while rules "have a specific binary structure: a) a protasis which foresees the operative facts....and b) an apodosis which provides the legal consequences of those operative facts"¹⁸, legal principles lack this binary structure and "they do not enter into logical relations as readily as legal rules do."¹⁹ In other words, principles are articulated at a higher level of abstraction and they operate to rationalise rules, but do not yet determine specific outcomes. What is significant in the EU context is that the determination of principles takes place against the framework of the objectives of the Community²⁰ and it leads (as will be shown

¹⁷ R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1978, p.24.

¹⁸ J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford: Clarendon Press, 1993, pp.60-61.

¹⁹ *ibid.* In the same vein Pescatore argues that principles are too general, too abstract, too broad, too vague in order to serve as premises of a legal deduction. P. Pescatore, *Introduction a la Science de Droit*, Luxembourg: Office des Imprimeries de l'Etat, 1960, p.120.

²⁰ In his analysis of the ECJ fundamental rights case law, Manfred Dauses explains that the common constitutional traditions of the Member States and the international treaties for the protection of human rights, to which the ECJ resorts as sources of inspiration, do not constitute a primary source of law in the Community legal order, but are mere sources of recognition of law (*fontes cognoscendi*). This means that although these sources offer inspiration and guidance and can help to ascertain the fundamental rights of the Community legal order, the EC/EU protection of fundamental rights is, however, autonomous, in the sense that its interpretation has to be also consistent with the distinct characteristics and needs of the Community legal order. M. Dauses, *op. cit.* fn. 6, p. 411. Similarly Clapham argues that the characterisation of fundamental rights as general principles of law enables the ECJ "to selectively distil common practices from some Member States" and to treat them as mere

below) to their commodification. Hence, the elasticity which is connected with the classification of fundamental rights as general principles of law does not favour their operation as genuine subjective rights.²¹

The protection of rights in the EU differs from the national and international standards not only in terms of the conceptual difference between principles and rules, but also from a (very subtle) terminological point of view. Instead of the term “human rights” usually employed by national constitutional and international law²², Community law uses the term “fundamental rights”. The term “fundamental rights” may not be a novel one, but it is the abbreviated version of “fundamental human rights” one usually encounters outside the scope of Community law as an alternative to the standardised use of “human rights”. In fact the terminological deviation is such a subtle one that it has not to my knowledge attracted any theoretical analysis so far. Sharing at this point a deconstructivist’s obsession with language, I believe that the avoidance of the adjective “human” from the EU vocabulary of rights is not as casual as it may seem. I will support this claim by reference mainly to the marketisation of the EU conception of fundamental rights. I will argue that the incorporation of the logic of the market by the Community legal order has brought about an objectification of the EU conception of rights, which entails among other things that fundamental rights are not accorded to individuals on the basis of their human substance, but they are somehow dependent on the ability of the individuals to establish some connection with an economic activity.

The marketisation of rights can be described as a three step process; i) elevation of the market freedoms to the status of fundamental rights, ii) restriction of fundamental

guidelines. A. Clapham, *Human Rights and the European Community: a Critical overview*, Baden-Baden: Nomos, 1991, pp.50-51.

²¹ S. O’ Leary, “The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law”, 32 (1995) *Common Market Law Review*, p.543. See also S. Douglas-Scott, *Constitutional Law of the European Union*, Essex: Longman, 2002, p. 453. Besides, in *Wachauf*, Case 5/88 [1989] ECR at 2639-2640, the Court stated that “Member States must, as far as possible, apply those rules in accordance with the requirements of fundamental rights protection”. For Coppel and O’ Neill the use of the words “as far as possible” is a clear indication that human rights are principles of interpretation rather than validation. J. Coppel and A. O’ Neill, “The European Court of Justice: Taking Rights Seriously?”, 29 (1992) *Common Market Law Review*, pp. 689-690.

²² Droits de l’ homme, derechos humanos, diritti dell’ uomo, Menschenrechte (also, however, Grundrechte).

rights in the name of the market and iii) establishment of an economic nexus as a criterion for distribution of rights to the EU citizens.

i) The elevation of market freedoms to the status of fundamental rights

As we saw above²³, the initial treaties were silent about fundamental rights. In fact the only rights specifically mentioned in the Treaty were the four market freedoms (free movement of persons, services, goods and capital). In *Procureur de la Republique v. ADBHU* the Court stated that “it should be borne in mind that the principles of free movement of goods and freedom of competition together with freedom of trade as a fundamental right are general principles of Community law of which the Court ensures observance.”²⁴ Although it is not explicitly stated that the free movement of goods and the freedom of competition are fundamental rights (in fact it is only the freedom of trade that is defined as a fundamental right), it seems that they are treated as general principles enjoying the same status as (the general principles of) fundamental rights. This is one of the first cases in which the Court flirted with the idea of raising market freedoms to the level of fundamental rights.

Three years later in *UNECTEF v. Heylens*, a case concerning national rules on the possession of diplomas for admission to certain occupations, the Court further established this line of reasoning as follows: “since free access to employment is a fundamental right which the Treaty confers individually on each worker of the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for this right.”²⁵ Once again the free movement of persons, or rather of workers, is treated as a fundamental right. It is not unreasonable to follow Coppel’s and O’Neill’s interpretation of this case²⁶, according to which all four market freedoms (free movement of workers, services, goods and capital) are translated into fundamental rights.

²³ See p. 150 of this Chapter and pp. 96-98 of Chapter 3.

²⁴ Case 240/83, *Procureur de la Republique v. ADBHU*, [1985] ECR 520 at 531.

²⁵ Case 222/86 *UNECTEF v. Heylens*, [1987] ECR 4098 at 4117, para 14.

²⁶ J. Coppel and A. O’Neill, *op. cit. fn.* 21, pp. 689-690.

This elevation of the market freedoms to the status of fundamental rights entails a huge conceptual difficulty for the Community legal order. If the market rights, upon which all (secondary) community law is in one or the other way grounded, are indeed treated as fundamental rights, one cannot speak of any hierarchical relationship between secondary Community law and the basic human rights as known from the national constitutions and the European Convention on Human Rights, because any potential conflict between the two may be represented as a conflict between fundamental rights.

Within national legal orders the specific constitutional provisions, which incorporate a statement or bill of rights are usually given the status of fundamental law. These are then regarded as superior to ordinary legislation and are used to render invalid any legislative action, which is held to run counter to the listed rights. Thus, according to theoretical orthodoxy, when a legal order recognises a right as fundamental, this means that the public authorities have the burden to justify restrictions upon it, or to use Dworkinian terminology, the individual has a trump card²⁷ against public authorities given to him/her by the law.

As Coppel and O' Neill pointedly argue, within the EU legal order "the invocation of the idea of fundamental rights by the European Court does not set essential limits to lawful executive action, because executive action which has as its object the promotion of the four market freedoms is itself in the vocabulary of the European Court, instantiating a fundamental right. A claim to violation of certain fundamental human rights hence ceases to be a trump-card against executive action. It is no longer possible to speak of a validation of a lower norm by a higher norm. Instead two norms of equal qualitative significance are balanced against each other."²⁸

²⁷ R. Dworkin, *op. cit.* fn. 17, pp.184-206.

²⁸ J. Coppel and A. O'Neill, *op. cit.* fn.21, p. 690.

Weiler and Lockhart object that this is “a colossal non-sequitur”²⁹, an unjustified leap from a simple lexical equivalence to normative equivalence. They insist that just because the Court uses the term “fundamental” to describe two different types of rights, this should not be taken as an indication that these different types of rights are normatively equal. Weiler and Lockhart thus claim that a legal regime can have more than one concept of what is a fundamental right/ principle. If, indeed, as Weiler and Lockhart claim, the Court of Justice uses the term “fundamental” for rights of different normative value, then this raises some very serious issues about the clarity and the consistency of the fundamental rights terminology employed by the ECJ.

Ward opines that by treating as fundamental “all manner of supposed rights, from the most revered fundamental rights to human dignity, to life and to liberty, to the altogether more prosaic rights to access ombudsmen, to conduct a business and to a high level of consumer protection”,³⁰ the Community legal order is in danger of “losing sight what a human right is really supposed to be”. He seems to suggest that the proliferation of what is termed “fundamental rights” in combination with “the lack of conceptual distinction between the right to fish and the right not to be subjected to torture”³¹ leads to a trivialisation of the concept of EU fundamental rights.

Drawing on Barthes and on semiology, one could actually maintain that within the EU the term “fundamental rights” is used as an empty signifier³², that is as a signifier without any fixed content, one that can be used in many different ways. Semiology postulates a relationship between two terms, a signifier and a signified. The correlation that unites the signified and the signifier is the sign, the associative total of the first two terms. Barthes uses the example of a black pebble (a signifier) and a death sentence in an anonymous vote (a signified). The black pebble on its own is an empty signifier that may be given different meanings. It is only in its correlation with a definite signified that it becomes meaningful (as in “full of meaning”), a sign with

²⁹ J. Weiler and N. Lockhart, “ ‘Taking Rights Seriously’ Seriously: the European Court and its Fundamental Rights Jurisprudence” part II, 32 (1995) *Common Market Law Review*, p.595.

³⁰ I. Ward, *A Critical Introduction to European Law*, London: Lexis Nexis Butterworths, 2003, p. 89.

³¹ *ibid.*, p.88.

³² R. Barthes, *Mythologies* (translated by J.Cape Ltd), London: Vintage, 1972, p. 113.

functional implications.³³ If we accepted Weiler's and Lockhart's contentions about the non-significance of lexical equivalence between different types of fundamental rights, then we would have to treat the term "fundamental rights" as an empty signifier that would only become a sign full of meaning in its correlation with a particular signified. It is obvious that such an approach undermines the fundamental character of the (truly) fundamental rights, since, by making the assignment of meaning dependent upon a second-order semiological correlation, the term "fundamental rights" is no longer the sign for the highest rule of validation; it is only a signifier, which depending on the signified it is correlated with, may or may not be a rule of validation.³⁴

In conclusion, the relationship of lexical equivalence between market freedoms and fundamental rights amounts to either a normative equivalence between the two (which is problematic because it effectively undermines the role of fundamental rights as rules of validation of secondary Community law) or to a confused and inconsistent use of the term "fundamental rights" (which is equally problematic because once again it puts into question the conceptual underpinning and the normative weight of the term "fundamental rights" in the Community legal order). The choice between the two interpretations is almost indifferent, because they are both equally undermining in one or the other way the protection of fundamental rights in the EU.

ii) Restricting fundamental rights by reference to the needs of the market

We saw above that human rights as trump cards are rules of validation creating an area of freedom for the individual, which has to be respected by public authorities. But even if viewed as trump cards, the exercise of fundamental rights is not without

³³ *ibid.*

³⁴ It is interesting to compare the argument about the non-significance of lexical equivalence with the theories by Dworkin and Rawls regarding the *lexical* priority of rights over other aggregate interests. In Rawls's theory for example it is explicitly stated that the equal liberty principle is lexically prior to the difference principle. J. Rawls, *Theory of Justice*, Oxford: Oxford University Press, 1973, pp.37-38, 53.

limits; restrictions may be introduced in order to safeguard other fundamental values. An important aspect of the human rights protection, however, is that the possibilities of limiting the exercise of human rights are themselves restricted. In general, restrictions on the exercise of human rights must be prescribed by law and be necessary in a democratic society to safeguard such values as the rights and freedoms of the others, public safety, health or morals and in accordance with the principle of proportionality.³⁵

Similarly, the ECJ has confirmed that a person's rights may be restricted provided that the restrictions correspond to objectives of general public interest and do not constitute a disproportionate and intolerable interference with the very substance of the right protected. However, in the absence of limitations prescribed by law, legal certainty cannot be guaranteed merely by decisions of the ECJ. It is worth noting here that the EU Charter of Fundamental Rights has no provisions on the permitted restrictions to fundamental rights. Hence, even after the ratification of the Constitutional Treaty, which has incorporated the EU Charter of Fundamental Rights, this uncertainty regarding restrictions will not be effectively removed from the EU system of protection of fundamental rights.

Putting aside, however, the issue of legal certainty that cannot be warranted by the jurisprudential and therefore ad hoc development of the permitted restrictions, let us have a closer look at the way in which the ECJ has actually handled the issue of fundamental rights' limitations. In *Nold v. Commission*, in which a coal wholesaler challenged a decision taken under the ECSC as being in breach of the company's fundamental right to the free pursuit of business activity, the Court made clear that fundamental rights had meaning in European Community law only so far as they were fitted into the Community framework. The protection of rights "is always subject to limitations laid down in accordance with the public interest" and "within the Community legal order it likewise seems legitimate that these rights should, if necessary be subject to certain limits justified by the overall objectives pursued by

³⁵ These are the general criteria provided by the ECHR (Article 10).



the Community, on condition that the substance of these rights is left untouched”.³⁶ In this quote the Court affirms the possibility to introduce limitations to the exercise of fundamental rights. It furthermore specifies that such limitations are justified by reference to the concept of public interest. The interesting twist is in the fact that the objectives of the Community are put forward as criteria for the concretisation of the abstract notion of “public interest”. In 1974, when this case was decided, the common market was at the centre of the objectives of the Community (as stipulated by Art. 2 EC Treaty). Hence, although not explicitly stated, the Court in *Nold v. Commission* effectively argues that fundamental rights’ restrictions can be justified by reference to the needs and the organisation of the Common Market.

The underlying premises of the above approach were spelled out and further strengthened in *Wachauf*, a case concerning the correct interpretation of a Commission regulation governing the transfer of milk producing agricultural units. The issue raised by the preliminary reference from a lower German Court was whether the lessee of agricultural land was entitled to compensation for the milk quotas that had been achieved during his lease. In this case, the ECJ stated that: “The fundamental rights recognised by the court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights”.³⁷ Here the public interest is presented in terms of “a social function” and the market is clearly pinned down as the paramount criterion of social function.

The combined effect of elevating the market freedoms to the status of fundamental rights and of restricting fundamental rights in view of the Community’s objectives (namely the Common Market) practically amounts to a neutralisation of the deeper

³⁶ Case 4/73 *Nold v. Commission*, [1974] ECR 491, at 508, para 14. Although this case was not successful, the Court asserted strongly its commitment to fundamental rights.

³⁷ Case 5/88 [1989] ECR 2639, para 18.

structure of fundamental rights as entitlements to protection from collective invasion. For the purposes of the EU the common good (because the public interest is necessarily an expression of the common good) is identified with the common market and the common market in its expression as the four market freedoms acquires the status of fundamental rights. Through this double equation (common good=common market, market freedoms= fundamental rights) and given that the market freedoms are ipso facto instantiations of the common market, the common good, the source of the most obvious collective invasions, effectively becomes the equivalent of rights. There is no conceptual or hierarchical differentiation and, hence, no tension between the two.

We saw above that the development of fundamental rights protection in the Community legal order is not only characterised by a lack of clear conceptual underpinning, but it has also incorporated within its deeper structures the logic and the exigencies of the market. In light of the still predominantly economic objectives of the treaties, the Community legal system has integrated a structural selectivity in favour of market efficiency³⁸. What is remarkable is that the incorporation of this particular structural selectivity in favour of the market by the EU has been successfully presented as a neutral process. But then again this is intricately connected with the juridification process that we discussed in the previous chapter. The deeply politicised choices of market efficiency and utility maximization were presented as legal (and therefore neutral) interpretations of a legal text. Thus, the (neutral) authority of law functioned as a shield that protected economic integration and economic liberalisation from the scrutiny of a political debate. It is interesting to remind ourselves that similar choices at the Member-State level have been the object of animated political debates. The outcome of this structural privileging of economics is that the underlying coherence of fundamental rights judgements seems to be underpinned by the exigencies of economic integration; the market freedoms qua fundamental rights are prominent in the rights-related cases of the ECJ, the proceedings for which are more often than not initiated by companies and big economic actors.

As for the substantive outcomes, these show a great deference to the Community interest. Coppel and O' Neill have argued that the Court has adopted a two-standards approach to fundamental rights; a strict one when it scrutinises national legislation and a much more relaxed one when it decides the compatibility of Community legislation with fundamental rights protection³⁹. According to their analysis, the overwhelming majority of the cases concerning a conflict between fundamental rights and community legislation were decided in favour of Community law. On the basis of these findings they level the accusation of instrumental manipulation of rights against the ECJ. Weiler and Lockhart have vehemently contested these findings and have cited a number of cases in which rights have been successfully invoked against Community legislation.⁴⁰ They actually criticise the Court for being too deferential to the sensibilities of the Member States.

Evaluating the outcomes of the ECJ jurisprudence on fundamental rights, Foster and De Witte (the former writing in 1987, the latter in 1999), aligned with Coppel and O' Neill, also argue that the success rate of claims regarding violation of fundamental rights before the ECJ is very low. Foster reviewed the fundamental rights jurisprudence of the Court of Justice over a period of twenty years⁴¹. During this period the protection accorded by the ECHR had been raised in 45 cases. Foster found that only in two of these cases the Court upheld the fundamental rights claim. Similarly in his evaluation of the ECJ's case law in the field of fundamental rights, De Witte verifies the low number (low in comparison to those of the ECHR and the national legal orders) of rights-related cases decided by the Court.⁴² He further suggests that the Court should exercise "a somewhat stricter review" in economic regulation disputes.

³⁸ On the concept of structural selectivity see B. Jessop, *State Theory: Putting the Capitalist State in its Place*, Cambridge: Polity Press, 1990, p.268.

³⁹ J. Coppel and A. O' Neill, *op.cit.* fn. 21, pp. 670-689.

⁴⁰ J. Weiler and N. Lockhart, *op. cit.* fn. 29, pp. 84-92.

⁴¹ N. Foster, "The European Court of Justice and the European Convention for the protection of Human Rights", 8 (1987) *Human Rights Law Journal*, p.245.

⁴² B. De Witte, "The Past and Future Role of the European Court of Justice in the Protection of Rights" in P. Alston (ed.) *The EU and Human Rights*, Oxford: Oxford University Press, 1999, p.859.

I would like to stress, however, that independently of the empirical data that may (according to Coppel, O'Neill, Foster, de Witte) or may not (according to Weiler and Lockhart) suggest that the Community objectives override fundamental rights, in my opinion the real problem is that once the deeper meaning of rights is trivialised (through their equation with market freedoms and their unqualified restriction in light of economic objectives), there is always the theoretical possibility that they can give way to unqualified aggregate utility considerations. The statistical frequency of an actual subordination of fundamental rights to the exigencies of the Common market ceases to be as significant. One such case is one too many. The proclamations of the Court regarding the conceptual status of fundamental rights and their hierarchical relationship with the Community objectives constitute an inherent part of the *acquis communautaire* and as such they may be retrieved from the Court's archives and can be put in practice at any time. In his critique of the liberal system of rights Unger presents the concept of rights as "a loaded gun that the right-holder may shoot at will in his corner of town".⁴³ This unattractive picture is reversed in the EU. One would hope that the reversal of an unattractive picture might give way to a more attractive one. This is unfortunately not the case here, as the loaded gun is still part of the picture, but it somehow seems to have passed in the hands of the dominant market players and is in any case instrumentalised in view of the economic objectives of the Treaties.

One possible objection to the accusation that the concept of the EU fundamental rights has integrated the logic of the market could be that all rights are market rights and there is nothing *sui generis*/idiosyncratic about this development within the EU legal order. On the contrary, this is perfectly consistent with the philosophical tradition within which the concept of right as such has developed. One could in fact argue that it is a positive development that the EU has brought to the fore this common topos of political and economic liberalism. Let us not forget that according to Locke, whose theory of political obligation is the background foundation of liberalism, all rights ultimately stem from property rights. Human beings are creatures of God and as such they are free, they cannot be slaves of anyone. This

⁴³ R. Unger, *The Critical Legal Studies Movement*, Cambridge, Massachusetts: Harvard University

freedom is interpreted by Locke as entailing that human beings own themselves. But if they own themselves, they necessarily own their labour, so goes Locke's theory, and eventually whatever is mixed with their labour becomes part of their property. This describes the state of affairs in the state of nature. Before the introduction of money as a means of exchange, people only appropriated small quantities of perishable goods for their own use. The advent of money meant that wealth could be finally accumulated. This in combination with the fact that natural resources are limited created problems, the solution to which could only be provided by the institutionalisation of the State. In other words the government's main task is to protect property. Individuals consented to a limitation of their freedom by the State thus surrendering their state of nature in the knowledge that this was the only way in which they could effectively protect their property. Consequently, according to Locke's theory, the legitimacy of political power actually depends on its ability to protect property.⁴⁴

This exegesis views property rights and by analogy all economic rights, including the EU market freedoms, as an intrinsic part of the human essence and dignity. In this light, the distinction between market freedoms and what Phelan⁴⁵, Coppell and O'Neill treat as "more fundamental rights" cannot be sustained. Property is in fact presented as stemming from human dignity and there is nothing more fundamental than human dignity.

The problem, however, with the collapse of political into economic liberalism is that it is premised upon an unfeasible and undesirable psychological theory, according to which the existence of the individual, necessarily driven by self-interest, not only precedes the constitution of society, but it also remains unalterable by his/her participation in the Community's life. I will not, however, elaborate the problems associated with the basic premises of liberalism. Given that my thesis is a critique of EU constitutionalism and not of liberal theory in abstracto, I will return to this

Press, 1983, p. 36.

⁴⁴ J. Locke, *The Second Treatise of Government*, 3rd ed., Oxford: Blackwell, 1966.

⁴⁵ See D. R. Phelan "Right to Life of the Unborn v Promotion of Trade in services: The European Court of Justice and the normative shaping of the European Union", (55) 1992 *Modern Law Review*, pp. 670-689.

argument below. In the following section I will argue that even if we were to accept this conceptual affinity between property (and consequently economy) and fundamental rights, the EU model would still fall below the standards of formal equality set by liberalism, while in the last part of this chapter, arguing mainly against the liberal faith in the market, I will question the ability of the market to sustain a sense of belonging to a community.

iii) Uneven distribution of rights to EU citizens

I have so far analysed one expression of the marketisation of rights, which consists in their being balanced against and possibly overridden by the good of the common market (sections i and ii are in fact the two faces of the same phenomenon). I will now turn to another, very important but rather hidden aspect of marketisation which consists in the following: not only is the exercise of EU fundamental rights subordinated to the exigencies of the market, but their distribution to the EU citizens also depends upon an economic element. EU fundamental rights are granted to individuals, when they can establish some kind of economic nexus.

Let me use the *Grogan* case as an example of this.⁴⁶ This decision has been extensively used in the past as an example of a case in which Community law undermined the constitutional order of a Member State and failed to acknowledge the profound moral dilemma inherent in the prohibition of abortion⁴⁷. Quite interestingly, others have used it as an example of the great deference that the ECJ shows to the political and constitutional sensibilities of national authorities whenever it is alleged that there is a conflict between national rules and fundamental rights protected in the Community legal order.⁴⁸ I will briefly comment upon these points, but I have chosen this same case as a basis for my analysis, mainly because it exemplifies the economic orientation of European fundamental rights and their uneven distribution to the citizens of the Community legal order.

⁴⁶ *The Society for the Protection of Unborn Children (Ireland) Ltd v. Stephen Grogan and others*, Case 159/90, reported in [1991] 3 CMLR 689.

⁴⁷ D. R. Phelan, op. cit. fn. 45. See also J. Coppell and A. O'Neill, op. cit. fn.21, pp. 685-689.

In 1983 an amendment was made to the Irish constitution according to which: “The state acknowledges the right to life of the unborn and with due regard to the equal right to life of the mother guarantees in its laws to respect and as far as practicable by its laws to defend and vindicate that right”⁴⁹. It is interesting to note that the Irish Constitution’s recognition and protection of the right to life of the unborn is a case of a fundamental right, which is expressed in only one Member State of the community. In 1989 the Society for the Protection of the Unborn Child (SPUC) brought a case against various Students’ Unions in Ireland, which were distributing information about clinics performing abortions in Great Britain. The Society was in fact seeking an injunction to prevent the students from distributing such information. The Irish Court referred the case to the ECJ for a preliminary judgement under article 177 of the EEC Treaty. The direct issue was not the Irish ban on abortion, but the interdiction to advertise commercially available abortions in other Member States. It was argued, on behalf of the students’ unions, that such an interdiction was a restriction of the freedom to provide services and, that derogations⁵⁰ to that principle had to respect fundamental community principles including the freedom of speech.

The ECJ accepted this line of reasoning and the Irish constitutional protection of the unborn child was effectively treated as a simple restriction on abortion. The ECJ further accepted that abortion came under the definition of services within the meaning of article 60 [50], because abortion is “a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity”.⁵¹ The Court, however, came to the conclusion that as the legislation at

⁴⁸ R. Dehousse, *European Court of Justice: the politics of judicial integration*, Basingstoke: Macmillan, 1998, pp. 60-70.

⁴⁹ Article 40(3) (iii) of the Irish Constitution.

⁵⁰ In general national derogations from the principles of free movement in Community trade law must be compatible with fundamental rights standards. See for example Case 36/75 *Rutili* [1975] ECR 1219 at 1231, para 27 where the Court restricted France’s attempt to derogate on the grounds of public policy pursuant to article 48(3) EC and held that the derogation must “be interpreted strictly so that its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the community.” Thus, the Court of Justice held that derogations to fundamental freedoms could not be tolerated unless the action was necessary to protect national security or public safety, as those interests are understood in a democratic society. Similarly in Case C-260/89 [1991] ECR I-2925, the Court ruled that Greek legislation which had the effect of impeding market access by broadcasters could not be justified because of its damaging effect on freedom of expression.

⁵¹ Case 159/90, 4 Oct 1991, reported in 3 (1991) *Common Market Law Review*, p. 689.

issue was in this particular case primarily applicable to Irish student associations, and not to clinics trying to market their “services” from abroad, it did not constitute a prohibited restriction. As a result, the ECJ avoided pronouncing itself on the delicate issue of the compatibility with freedom of speech and was able to stay out of the heated abortion debate.⁵²

By defining abortion as a service rather than as a violation of a fundamental right guaranteed in the Irish constitution,⁵³ the regulation of abortion became a justiciable matter under community law. It was only because abortion was defined in terms of the possible commerce and profit resulting from it that the Court did not prohibit the Irish restrictions on abortions. Had the Society for the Protection of the unborn child brought a case against an economic operator based in another Member State, the latter would have received full protection against the specific provision of the Irish Constitution.⁵⁴

It is quite clear, it seems to me, that this specific outcome was dictated not because of a respect to a national constitutional order, but because the necessary economic link was missing. *Grogan* exemplifies how individuals must assert their objectified economic status in order to fall within the protection of EU law. In this case the students needed to defend their actions in economic terms, but, because they were not economically linked with the providers of the services, they could not be protected by the treaty articles referring to the freedom to provide services. In fact Rigaux⁵⁵ makes a very interesting observation. He points out that at the time of the

⁵² R. Dehousse, op. cit. fn. 48, p. 66.

⁵³ *Open Door Counselling & Dublin Well Woman v. Ireland* [1992]ECtHR Series A No.246, a similar case that came before the ECtHR, was decided on the basis of freedom of expression rather than freedom to provide services. Once again, the issue of whether Art. 8 of the ECHR (right to respect one’s private life) contains a further right to abortion was not decided.

⁵⁴ A protocol annexed to the Maastricht Treaty on European Political Union provides that nothing in the Treaties of the European Communities shall affect the application in Ireland of Article 40.3.3 of the Constitution (Protocol annexed to the Treaty on the European Union” European Document 175051 of 13 Dec.1991). Although this was an attempt of the Irish government to prevent a future challenge to the Irish constitution, it is questionable if this protocol can ensure that the right to life of the unborn will be upheld against the principle of freedom of services in cases in which an Irish citizen travels abroad in order to have an abortion. A similar case came up in 1992 (reported in the Irish Times of March 6 1992) when the Irish Supreme Court lifted an injunction prohibiting a 14 year-old Irish girl from leaving Ireland in order to have an abortion.

⁵⁵ F. Rigaux, “EEC Competence in the Cultural Field”, 17(1992) *Forum Internationale*, p.8.

proceedings against the students no sanctions were in place in Ireland against the numerous advertisements in magazines giving information about abortion services. Hence, EC law protects commercial advertising, but not the liberty of information through non-profit organisations. I do not believe that the ECJ should have taken a moral position regarding abortions, nor that it should have adopted the maximalist approach of recognising the Irish constitution's protection of the unborn as a community fundamental right. My point is that the students were not accorded the protection of EC law, only because they were not directly involved in the common market.

On the other hand, the defendants in *ERT* were granted the free speech protection that the students in the *Grogan* case were denied, because they were economic agents⁵⁶. This case too concerned the validity of measures instituted by a Member State (Greece) in derogation from Community law. The applicant, ERT, was a state radio and television company having exclusive rights to provide television services within Greece. It was forbidden under statute for any other party to broadcast television programmes in Greece. This state monopoly was challenged by an independent information company and the Mayor of Thessaloniki who had set up their own television station. ERT sought an injunction from a domestic court against the company and the Mayor. The defendants argued that the television state monopoly was contrary to the free movement of goods and services as protected by EC law and to the provisions of the ECHR concerning freedom of expression.

The Greek government's argument that the television monopoly was a public policy derogation from the free movement of goods and services under article 66 was rebutted by the ECJ on the basis of the following: "the limitations imposed on the power of the Member States to apply the provisions referred to in articles 66 and 56 of the Treaty on the grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Art. 10 of the European Convention on Human Rights."⁵⁷ The comparison

⁵⁶ *Elliniki Radiofonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, Case 260/89, [1991]ECR I-2925.

⁵⁷ *ibid.*, para.45.

between these two cases –*ERT* and *Grogan*- reveals the gap between rhetoric and reality in the EU. Those within the sphere of exchange are accorded different rights than those outside it.

Coppel and O’Neill are disappointed because the Court failed to acknowledge in the *Grogan* case “the way in which abortion exemplifies a situation of profound moral dilemma”⁵⁸, while Weiler and Lockhart try to rebut their objection by reminding us that “in the context of a preliminary ruling it is often the referring Court which determines the parameters of the reference. The first question asked by the Irish Court was ‘does the organised activity or process of carrying out an abortion come within the definition of services in article 60 of the Treaty’...”⁵⁹ Their argument is that the ECJ had to reply to the question posed to it and it should, thus, not be accused of something, which was the national court’s choice. They fail to acknowledge that the national court could only phrase its question in these terms in order to be understood by the Community system.

The terms of a preliminary reference have been set out by the Community legal order. This order has its own language and its own logic. Due to the principles of supremacy and direct effect of Community law, the national courts have become part of this order. Hence, whenever they refer to it, they have to abide by its terms. They cannot challenge its foundations nor its presuppositions. It seems that Weiler and Lockhart are concerned with defending the ECJ against the accusation of instrumental manipulation, but fail to see how the Community legal order as a whole is liable to the accusation of not taking fundamental rights seriously. Coppel and O’Neill⁶⁰, on the other hand, make the mistake of identifying the Court as being

⁵⁸ J. Coppel and A. O’Neill, op. cit. fn. 21, p. 687.

⁵⁹ J. Weiler, N. Lockhart, op. cit. fn. 29, p.599.

⁶⁰ Coppel and O’Neill distinguish between the ECJ’s initial defensive use of fundamental rights (defence of Community law supremacy over national law) and its consequent offensive use of fundamental rights. According to the latter, “references to fundamental rights are now being made by the Court in order to extend its jurisdiction into areas previously reserved to Member States’ courts and to expand the influence of the community over the activities of the member States”, op. cit. fn. 21, p. 669.

solely responsible for what is the outcome of the specific structure of the Community system.⁶¹

There is a long chain of cases that further attest to the fact that conferral of the Community fundamental rights depends on the exercise of some economic activity and that there is a structural privileging of economic activities over other activities. Indicatively, in the *Levin* case⁶² it was stated that a person falls in the purview of Article 48, which concerns the freedom of movement of persons, if he/she is involved in some kind of economic activity.

“...it follows both from the statement of the principle of freedom of movement for workers and from the place occupied by the rules relating to that principle in the system of the Treaty as a whole that those rules guarantee only the free movement of persons who pursue or are desirous of pursuing a genuine economic activity.”⁶³

Hence, participation for example in a community based on religion falls within the field of application of community law only in so far as it can be regarded as an economic activity. In *Steymann v. Staatssecretaris van Justitie*⁶⁴ a German called Steymann after having worked in the Netherlands as a plumber, joined a religious order that provided for his living requirements. The Dutch court denied him the residence permit for foreign workers he had applied for. The ECJ, however, argued that, although “it must be observed that in view of the objectives of the European Economic Community, participation in a community based on religion or another form of philosophy falls within the field of application of Community law only in so far as it can be regarded as an economic activity within the meaning of Art. 2 of the Treaty”, in this particular case the economic nexus could be established since the religious community’s provision of food and lodging to Steymann could be taken as

⁶¹ In a fascinating article, Gustav Peebles analyses a number of similar cases through the perspective of the Marxist theory and shows that the European Union Treaties revolve around the rights of things (commodities) rather than of people. His point is that people primarily gain rights within the EU by demonstrating that they embody exchange value and they are not accorded rights merely for being human. His conclusion is clear: the EU treaties and the ECJ jurisprudence have enshrined the Marxist notion of commodity fetishism into European law. See G. Peebles “A very Eden of the Innate Rights of Man? A Marxist look at the European Union Treaties and Case Law”, 23 (1998) *Law and Social Inquiry*, pp. 581 ff.

⁶² Case 53/1981, 1982 ECR-1035.

⁶³ P. Craig and G. de Burca, *EU Law*, Oxford: Oxford University Press, pp. 664-665.

indirect remuneration for “his work”. He was, thus, entitled to the rights enshrined in the Treaty of Rome.

In this case, the Court classified religious activity as economic activity in order to protect it. This is yet another example of the broadening reach of EU law into non-economic spheres, a development that the Member States could not have anticipated or envisioned in the Rome Treaty. But when religion must be equated with economic activity in order for its practice to be protected, it becomes clear that the laws of the market are the reigning governing ideology of the EU. On the other hand, this very same case shows that the Court’s intention was to give a very wide interpretation of the concept of worker so that any person would fall within its scope, if his/her work consisted of the pursuit of genuine and effective activities and was not so minimal as to be purely marginal and ancillary. In doing so, the ECJ was trying to include as many as possible within the right of free movement.

Similarly, in *Cowan v. Le Tresor Public*,⁶⁵ even the use of the transport services of a Member State by a tourist seemed to satisfy the threshold of involvement in an economic activity. Cowan, a British national visiting Paris was attacked near a metro station. When he applied to the French authorities for compensation (there was a relevant criminal injuries compensation scheme), he was turned down on the basis that he was not a French national nor a holder of a permit of residence. The ECJ, however, ruled that he was entitled to compensation and grounded its decision on the non-discrimination principle set out in Art. 12 EC (ex art.6). This could only apply in the context of a specific provision of the Treaty, that is, if Cowan could show that he was in some way participating in the economic function of the Community. Indeed this was affirmed on the basis that he was a tourist using the French transport service system.

From the above it is clear that human rights are conferred by the EU legal apparatus on those individuals who are part of the economic process. Even though, the ECJ has tried to reduce the financial threshold of the economic activity required for the

⁶⁴ Case 196/87, 1988 ECR- 6159.

affirmation of certain rights, participation in this economic process still stands as the essential criterion that allows one to properly assume status as a citizen with all that category's corresponding rights.⁶⁶ As a result, one is effectively not a member of EU civil society unless one can somehow make connection to an economic activity. Those outside the economic sphere do not achieve full EU legal citizenship; certain Europeans have a more privileged legal status than others just because they have a more privileged economic status.

It cannot be denied that the ECJ has exhibited an interest in protecting the human rights of the citizens regardless of the needs and demands of capital and on occasion it has confronted the demands of capital enshrined in the treaties by favouring the protection of other demands. In fact, Mancini contends that "the Court has done all within its powers to dilute the concept of economic activity. It has even applied it to cases where the work was carried out in the context of activities like prayer and meditation"⁶⁷. But despite all efforts to extend protection to individuals outside the narrow definition of worker, human protection under EU law is ultimately bound to economic definitions. Every time a fundamental right is invoked by people before the Court, this must have a baseline relation to economics.

In any case and independently of its own responsibility, the fact remains that the Court has been caught between protecting fundamental rights on the basis of some economic nexus, on the one hand, and extending human rights protection beyond the economic sphere (as delineated by its own competencies), on the other. In this latter case, that is when the court tries to confront the economic structures of the Treaties and accord protection of rights on some other basis, it ends up expanding the competencies of the Union from the back door, which effectively amounts to a usurpation of national sovereignty. It is useful to remember that national sovereignty, too, can be analysed in terms of human rights, as the sum total of the political rights

⁶⁵ *Cowan v. Le Tresor Public*, Case 186/87, [1989] ECR-195.

⁶⁶ G. Peebles, *op. cit.* fn. 61, p.608.

⁶⁷ F. Mancini "The free movement of workers in the case-law of the European Court of Justice" in D. Curtin, D. O' Keefe (eds) *Constitutional adjudication in European and Community Law*, 1992, Dublin: Butterworth, p.70.

of the citizens of polities, whose sovereignty is being limited (namely the Member States).

This aspect of EU marketisation is another serious deviation from liberal theoretical orthodoxy, the starting point of which is formal equality in the conferral of rights to individuals; all individuals have the same fundamental rights. The Marxists may be right to criticise this formal equality on the basis that it facilitates the reproduction of the existing economic inequalities, but the EU scenario, as described above, stands one step behind the formal equality of liberalism, to the extent that it actually makes the conferral of rights dependent upon the prior participation of individuals to the market. Here the problem is no longer that formal equality may allow people of different economic status to enjoy different levels of exercise (and thus enjoyment) of their formal rights; the problem is that some individuals are excluded from the system of rights simply because they are not active participants in the market. Effectively this means that non-participation in the productive process of the EU translates into legal “invisibility” (no standing in law).

b) Excursus on the theory of human rights: questioning the liberal tenets

My analysis so far has been pointing out the flaws of the EU protection of fundamental rights. These flaws have been identified by reference to the tenets of liberal theory. To the extent that the EU presents itself as embracing liberalism, this is an internal critique. It, thus, shares the assumptions of the liberal theory of rights according to which rights are apolitical products of reason destined to protect individuals and groups from the vicissitudes of the political, majoritarian will. In this part I would like to challenge the liberal tenet concerning the apolitical character of rights. This questioning of theoretical liberal orthodoxy will lead me to a re-qualification of the role of rights in a legal order. I have so far shown that the status of fundamental rights in the EU falls below the standards set by liberalism. Hence, the EU is not consistent with its own normative demands from its Member States and

the acceding Members. I will now show that the liberal conception of rights is itself problematic. In doing so, my aim is not to vindicate the EU conception of rights. On the contrary, my re-qualification of the role of rights in this part will only make even more apparent the deeper deficiencies of the EU system of fundamental rights.

Martti Koskenniemi, giving a theoretical account of the development of fundamental rights' protection within liberal theory, stresses that human rights were initially introduced as a mechanism that would protect the individual from the vicissitudes of political passion and from the potentially threatening (for minorities or individual citizens) role of majoritarian rule⁶⁸. The clash of the right versus the good is one that has dominated political philosophy. Originally fundamental rights were viewed as stemming from an autonomous "reason" (naturalism) that delimited the sphere of individual freedom from/against the homogenising social order. Later, when faith in the power of enlightenment reason started to lose its appeal, constraint and protection from political controversy was sought "from legal rules and textual form (positivism)".⁶⁹ Eventually the loss of faith in formalism gave way to realism and to arguments regarding social ends, predominantly utility and effectiveness. Koskenniemi's very concise but accurate account brings to the surface the tension that underlies the relationship between rights and social utility arguments. This tension is an intrinsic feature of the very essence of rights. In a way, rights only exist as a mechanism for protecting the individual from the pull of majoritarianism. The common good then is the common measure of utility against which individual rights are defined.

However, one needs to unpack the polarised antithesis between rights and common good as presented by liberal theory. On the one hand, rights cannot be wholly independent from concepts of good, but are constantly examined, limited and criticised from the perspective of alternative notions of the good. On the other hand, the concept of the common good is not a fixed one, but is subject to constant re-

⁶⁸ M. Koskenniemi, "The Effect of Rights on Political Culture" in P. Alston (ed.) *The EU and Human Rights*, Oxford: Oxford University Press, 1999, pp.100-101.

⁶⁹ *ibid.*

negotiation. The contestation of new rights and through this the re-configuration of political power is part of this on-going re-negotiation.

As far as the partial dependence of rights on the concept of common good is concerned, this is illustrated quite powerfully in the case of conflicts of rights. If rights are universal and foundational (and this is the argument behind the theoretically orthodox view of rights as trumps), these have to be independent of any concept of the good. However, in cases of conflicts of rights where we have to define the scope of rights and their limitations, we need something beyond rights that will allow us to balance them. To use a rather trivial example, in all the cases in which VIPs sue the media when these disclose details of their personal lives, we have a conflict between two rights: the freedom of speech enjoyed by the media in question and the right to privacy of the individual whose life has been exposed. Since we cannot in abstracto privilege one right over the other, we need to proceed to an ad hoc balancing that will allow us to articulate the specific meaning of these rights in every single case.

According to liberal theory there is a presumption in favour of freedom and we are all allowed to do anything as long as we do not harm others. Thus, a case of conflict of rights such as the one mentioned here, would be resolved on the basis of the principle of harm. But this only transfers the problem of deciding the scope of rights to the problem of defining the concept of harm. And again the concept of harm is socially conditioned and cannot in any way be seen as a politically neutral concept, since there are competing conceptions of it. For example feminists who are opposed to pornography, do so, on the ground that the production and circulation of pornographic material is harmful for women in general, while the defenders of pornography rebut any causal link between pornography and harm against women.

But even if we are not confronted with a conflict between different rights, rights are very often insufficiently concrete to be policy-orienting. This indeterminacy is not only due to semantic openness, but is also connected with normative evaluations. The obvious example is the self-evident right to life (Art. 2 ECHR), which is,

however, given different interpretations in different jurisdictions. Hence, in some cases the protection of the unborn is included within its meaning, and thus abortion is forbidden, while in some cases it is not. These interpretive variations are institutionally embraced by the Court of Strasbourg through its jurisprudentially developed doctrine of the margin of appreciation. This is nothing more than a healthy admission that there is indeterminacy in the interpretation of particular rights and that every interpretation is embedded in a particular (political and legal) culture. In other words, the articulation and concretisation of the meaning of rights presupposes a balancing between the different values of a society. And these are the very same values that define the concept of the common good.

Jurgen Habermas is adamant that any actually existing system of rights is and can only be a situated interpretation of the idea of rights. “The system of rights is not given to the framers of a constitution in advance as a natural law. These rights first enter into consciousness in a particular constitutional interpretation. No one can credit herself with access to the system of rights in the singular, independent of the interpretations she already has historically available. “The” system of rights does not exist in transcendental purity.”⁷⁰

Hence the relationship between rights and democratic politics is an instance of the relationship described in Chapter 2 between juridical universalism and cultural particularism. The two are in a constant interplay. The existence of rights limits the concept of the common good (as articulated by democratic politics), but at the same time the on-going articulation of the common good defines the particular meaning of rights.⁷¹ The coming back and forth between rights and common good can be

⁷⁰ J. Habermas, *Between Facts and Norms*, Cambridge: Polity Press, 1996, p.415. For a similar position see also J. Waldron, *Law and Disagreement*, Oxford: Oxford University press, 1999, pp.107-118. Waldron explains that rights as “circumstances of justice” need to be interpreted in the “circumstances of politics”.

⁷¹ There is an indirect recognition of this in the ECHR and the jurisprudence developed around it. Thus, according to the Convention, the power to derogate from the rights provided for in it is conditioned by the criterion of what may be necessary in a democratic society. In their interpretation of what is necessary in a democratic society the Commission and the Court have introduced the notions of “reasonable”, “proportionate”, “public order” and “morals”. At the same time the development of the concept of “margin of appreciation” recognises that rights are contextualized. For an analysis of the above concepts as developed within the context of the ECHR, see P. Van Dijk and

presented as producing different and constantly changing images of reflective equilibrium. As I argued in Chapter 2, to acknowledge the necessarily particularistic expression of universals (in this case rights), does not annul their universalism; it does not make the role of rights redundant; it only pins them down in time and place.

Philip Alston, arguing in defence of human rights, maintains that although these rights are not rigid, absolute or forever enduring, they can provide a meaningful basis for social order, because they are “capable of partly transcending the institutions that gave birth to them and those very same institutions (or their successors) which seek to exercise responsibility for their elaboration and interpretation”.⁷²

This position is aligned with Habermas’s attempt to connect internally the basic values of liberal individualism and civic republicanism.⁷³ Habermas accepts that both popular sovereignty and human rights are the modern pillars of legal legitimacy and political power. Unlike liberals and republicans who put the focus on one of these two pillars⁷⁴ and tend to subordinate either popular sovereignty to human rights or vice versa, Habermas views these two concepts as mutually presupposing and supplementing each other. In his view, “the liberal paradigm does not exhaust the full-fledged meaning of the autonomy of a sovereign citizenry, because it introduces human rights as antecedent or external constraints on the democratic process, whereas the republican paradigm cannot account for the universalistic meaning of human rights, because it ties the democratic process to the prior bond and shared understanding of some particular ethical community.”⁷⁵ The Habermasian approach views the internal connection between popular sovereignty and human rights as

G.V. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Deventer: Kluwer, 1990, p. 604.

⁷² P. Alston, “Introduction” in P. Alston (ed) *Human Rights Law*, The International Library of Essays in Law and Legal Theory, Areas 27, New York: New York University, 1996, pp.xv-xvii.

⁷³ J. Habermas, “Human Rights and Popular Sovereignty: the Liberal and Republican Versions”, 7 (1994) *Ratio Juris*, pp.1ff.

⁷⁴ “The liberal tradition conceives human rights as the embodiment of moral autonomy and gives them priority over popular sovereignty. On the other hand, the republican tradition conceives popular sovereignty as the expression of ethical self-realisation of the people and regards it as prior to human rights.” *Ibid.*, p.6.

⁷⁵ *ibid.*, p.10.

consisting in the fact that private and public autonomy presuppose each other.⁷⁶

Hence, human rights state the conditions under which the various forms of communication necessary for political autonomy can be institutionalised. Human rights are in fact a formal condition of deliberative politics.

To recognise that the idea of human rights and the principle of popular sovereignty mutually interpret each other (hence, public and private autonomy are of equal weight), underlines the inevitably political character of rights⁷⁷ and illustrates how these lose their meaning when taken out of the context of a political constitution. Under such a politically nuanced reading of rights, the political deficit of the European Union would be an insuperable impediment to its achieving a normatively adequate protection of fundamental rights. Hence to view rights as capable of compensating for an incomplete political constitution such as the EU one (this was Curtin's suggestion- see introduction of this chapter) is an illusion, since the meaning of rights can only be sufficiently articulated through its interaction with democratic politics, whose scope again is both enabled and limited by these very same rights. At the same time the constitution offers the institutional framework for the exercise of politics. An incomplete constitution cannot but offer an incomplete framework of politics, which means that the interaction between politics and rights cannot be fully developed.

At this point I would like to argue that although I agree with Habermas's position of co-originality and mutual constitution of rights and democratic politics to a great extent, it is not very clear to me whether his thesis tends to a dialectical synthesis of

⁷⁶ Habermas's approach uses Rousseau's theory as its springboard. According to Rousseau, the sovereign will of the people can express itself only in the language of universal and abstract laws and is thus directly inscribed with the very right to equal liberties. Hence the "normative content of the idea of human rights enters the very mode of carrying out popular sovereignty...According to this idea, the procedurally correct exercise of popular sovereignty simultaneously secures the liberal principle of legal equality (which grants everybody equal liberties according to general laws)". Although Rousseau rightly regards equality in the content of the law as being central to the concept of law's legitimacy, this equality cannot be satisfactorily explained by the semantic properties of the general laws, but by the pragmatic conditions of discourses through which law came about.

⁷⁷ M. Ignatieff connects the inescapably political character of human rights with the fact that they imply a conflict between a rights holder and a rights "withholder", some authority against which the rights holder can make justified claims. M. Ignatieff, *Human Rights as Politics and idolatry*, Princeton: Princeton University Press, 1993, p. 67.

the universal (rights) and the particular (specific political culture). In Chapter 2 when I was analysing his concept of constitutional patriotism, I situated it within an on-going process of universalization. Although there is nothing explicit in Habermas's writings which defies such an interpretation, I suspect that his aspiration would be the consensus-based attainment of some type of dialectical synthesis, even a temporary or purely abstract one. The way I view however the relationship between rights and democratic politics emphasises the continual tension between the two and at the same time acknowledges the impossibility of attaining a state of dialectical synthesis. I am aligned in this with James Tully, who, in advocating an agonistic form of constitutional democracy, not only accepts this impossibility, but he also stresses the positive role of irreducible disagreements in fostering a critical and inclusive democratic ethos.⁷⁸

Claude Lefort is another theorist who emphasises the politically radical aspects of the relationship between rights and politics. In his opinion, democratic politics, apart from contributing to the articulation of the meaning of existing human rights, also creates new rights. Democratic politics "tests our rights which have not yet been incorporated in it, it is the theatre of a contestation, whose object cannot be reduced to the preservation of a tacitly established pact, but which takes form in centres that power cannot entirely master."⁷⁹ Viewed in this light, the gradual recognition of new rights (such as rights to social security, strike and trade unions) has been transgressing the boundaries within which the state claimed to define itself. Equally powerfully, Lefort maintains that this on-going contestation of new rights is guided by "the continuous imperative of a deciphering of society by itself."⁸⁰ A politics of human rights and a democratic politics are thus "two ways of responding to the same need: to exploit the resources of freedom and creativity which are drawn upon by an experience that accommodates the effects of division; to resist the temptation to exchange the present for the future; to make an effort, on the contrary, to discern in the present the signs of possible change which are suggested by the defence of

⁷⁸ J. Tully, "The agonistic freedom of Citizens", 28 (1990) *Economy and Society*, pp. 161-182 and J. Tully, *Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995.

⁷⁹ C. Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism*, Cambridge: Polity press, 1986, p.258.

⁸⁰ *ibid.*, p.260.

acquired rights and the demand for new rights, while learning to discern them from what is merely the satisfaction of interests.”⁸¹

Let me close this excursus on the theory of human rights and pull together the threads of my argument. So far I have attempted to show that the status of fundamental rights in the EU is problematic. If one follows the self-proclamations of the EU and adopts the liberal view that regards rights as trumps, EU fundamental rights have not functioned as trump-cards against EU executive action, firstly because of all the uncertainties that accompanied their judicial development (uncertainty regarding the corpus of rights, the hierarchical position of the general principles of law in the Community legal order and the restrictions that can be imposed on them) and secondly because the Treaty-based market rights upon which all Community executive action is in one or the other way based, have been elevated to the status of fundamental rights and, hence, whenever there is a conflict between the common good (the common market is taken to be the indisputable common good of the EU) and fundamental rights, this is represented as a conflict between rights. In other words, the rights cannot override the concept of the common good, because this has for EU purposes dressed itself up as being a fundamental right (or rather four rights: free movement of persons, services, capital, goods).

Things are much more disappointing once one decides to question the tenets of liberal theory. The brief analysis undertaken above was an effort to articulate a more sophisticated conception of rights, according to which, although these are not rigid and inflexible trumps, they still retain their symbolic value in our system of organising political power. In fact the argument was not only that we need the concept of rights in order to prevent our systems from giving way to totalitarianism, but that the existence of rights – when they are not treated as petrified legal objects – can facilitate the contestation of new rights.⁸² In doing so, rights partly reflect and partly shape and re-shape our political environment.

⁸¹ *ibid.*, p.272.

⁸² Ignatieff argues that the language of human rights is the only universally available moral vernacular that validates the claims of minorities against the oppression they experience in our societies. Rights can legitimise protest against oppression. *Op. cit.* fn.77, p.68. See also Klaus Gunther, “The Legacies

This view rejects both the liberal conceptualisation of rights as merely external constraints imposed on politics and the republican subordination of rights to the principle of popular sovereignty. It acknowledges the two-way relationship between rights and democratic politics, without however viewing it as aiming towards a dialectical synthesis. The two poles- rights and democratic sovereignty- need to keep their relative autonomy vis a vis one another, because the conflict and the tension between the two and what they stand for, that is the universal and the particular, is what ultimately keeps the way open for a reflexive constitution of political power and society. And although the two intertwined categories resist each other, in the sense that they are not subsumed under one another, they can still be viewed as mutually constituted and co-original.

c) From Market citizenship to Union citizenship?

We saw above that the conceptualisation of EU fundamental rights encompassed the role of the individual as a homo economicus⁸³ or, otherwise, as a market citizen (Marktburger)⁸⁴. Europeans were only furnished the full array of rights of the market citizen when “acting as participants in or as beneficiaries of the common market.”⁸⁵ The introduction of the EU citizenship by the Treaty of Maastricht was supposed to signal the transformation of the Community from an economic project into a political union. Hence the union citizenship was intended to distinguish itself from the economic connotations of the pre-existing de facto market citizenship.

The status of citizenship as introduced by the Maastricht Treaty was conferred on those who are already nationals of a Member State⁸⁶ and consisted of 1) a right to

of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture” in P. Alston (ed.) *The EU and Human Rights*, Oxford: Oxford University Press, 1999, pp. 117-147.

⁸³ A. Agh, “Citizenship and Civil Society in Central Europe” in B. van Steenberg (ed.), *The Condition of Citizenship*, London: Sage, 1994, p.108.

⁸⁴ H. Ipsen, *Europaisches Gemeinschaftsrecht*, Tuebingen: J.C.B. Mohr, 1972, p. 187.

⁸⁵ *ibid.*, p.102.

⁸⁶ The Treaty makes it clear that “every person holding the nationality of a Member State shall be a citizen of the Union” and “citizenship of the Union shall complement and not replace national

free movement and residence subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect, 2) a right to vote and to stand as a candidate in municipal and in European Parliament elections in the place of residence, 3) a right to protection by the diplomatic and consular authorities of any Member State in a third country where their own Member State is not represented and 4) a right to petition the European Parliament and to apply to the Ombudsman.

On a first reading it appears that the core right of the Union citizenship remains that of the free movement and establishment, while the political rights attached to it are very limited.⁸⁷ We saw in the previous section that the recognition of fundamental rights in the Community legal order has been associated with the prior establishment of some economic nexus. It is interesting to see whether the introduction of the EU citizenship, presented as the symbol for the transformation of the Community into a political entity, reversed the prevailing marketisation of fundamental rights and the concomitant market citizenship.

First of all, the most important right associated with citizenship is that of free movement and residence. The conferral of a right to free movement and residence on citizens (as opposed to the participants in the market) would *prima facie* seem to make the presence of an economic nexus redundant. However, the crucial restriction that this right “is subject to such limits and conditions as are laid down in the Treaty and by the measures adopted to give it effect”, effectively means that the freedom of movement and residence of the citizens is still subject to the pre-Maastricht relevant secondary legislation. And although the Council had adopted two years before the

citizenship”. See also the *Micheletti* Judgement (Case 369/90 *Micheletti v. Delegacion del Gobierno en Cantabria*, [1992] ECR I- 4239) in which the Court made it clear that only the Member States can determine the criteria for creation/abolition of nationality. “Under international law, it is for each Member State, having due regard of Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the granting of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty”(at para 4262 of the judgement).

⁸⁷ H. d’Oliveira notes: “the core and origin of Union citizenship is the right to free movement. Mobility is the central element around which other rights crystallise” and he concludes that this definition of citizenship is “a gross misnomer”. H. d’Oliveira, “Union Citizenship: Pie in the Sky?” in A. Rosas and A. Esko (eds.), *A Citizen’s Europe: In Search of a New Order*, Thousand Oaks, Cal.: Sage Publications, 1995, pp.65 and 84.

TEU three directives granting rights of residence to categories of persons other than workers⁸⁸, these were still granted under the condition that those persons have adequate resources so as not to become a burden on Member State social assistance schemes and are covered by sickness insurance. As a result, the right of movement and residence, although no longer relying on the exercise of an economic activity, it is still dependent on the ability of the citizen to prove a certain degree of financial self-sufficiency⁸⁹. Unless financially self-sufficient, it is still the case that the citizen exercising her right to free movement and residence needs to establish a link with Community law (meaning an economic activity of some type or other). Hence, the establishment of citizenship has so far not extended the scope of the Treaty as far as its *ratio materiae* is concerned⁹⁰ and, despite the Commission's declarations to the contrary⁹¹, the economic imperative initially attached to the freedom of movement and residence, although set at a minimal level, remains in place⁹².

Turning to the judicial post-Maastricht treatment of the freedoms of movement and residence, the Court -contrary to its usual propensity to expansive teleological interpretation- has taken small steps in the direction of de-coupling the concept of citizenship from its economic affiliations. Despite the statements of the Advocate General in the *Boukhalfa* case,⁹³ according to which "every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the

⁸⁸ See Directive 90/366, which was later replaced by Directive 93/96, governing students exercising the right to vocational training [1993] OJ L317, Directive 90/365, governing employed and self-employed people who had ceased to work [1990] OJ L180/28 and directive 90/364 concerning all those persons who did not already enjoy a right of residence under Community law [1990] OJ L180/26.

⁸⁹ P. Craig and G. de Burca, *EU Law*, Oxford: Oxford University Press, 2003, 3rd edition, p.75.

⁹⁰ In cases C-64/96 *Land Nordrhein-Westfalen v. Uecker and Jacquet v. Land Nordrhein-Westfalen* [1997] ECR I- 3171 the Court made it clear that citizenship provisions could not extend the scope *ratione materiae* of the Treaty to cover internal situations with no link with Community law.

⁹¹ According to the Commission the right of movement and residence is "now regarded as a fundamental and personal right, within the EC, which may be exercised outside the context of an economic activity" (Commission's second report on citizenship, COM (97) 230 para. 4.1.) and that in any case "the introduction of these new provisions underscores the fact that the Treaty of Rome is not concerned solely with economic matters" (Commission's first report on citizenship, COM (93) 702 final).

⁹² T. Downes, "Market Citizenship: Functionalism and Fig Leaves" in R. Bellamy and A. Warleigh (eds.) *Citizenship and Governance on the European Union*, London: Continuum, 2001, pp.93-106.

⁹³ Case 214/94 *Boukhalfa v. Germany* [1996] ECR I-2253.

same obligations”⁹⁴, the Court has been hesitant to ground its rulings on the citizenship provisions of Art. 18. Hence, in cases such as *Sofia Scanavi*,⁹⁵ and *Uecker and Jaquet*⁹⁶, in which issues of citizenship were raised by the claimants, the Court preferred to ground its judgement on Treaty articles other than the citizenship ones.

Maria Martinez Sala has been one of the very few cases in which the ECJ accepted arguments for extension of the rights of individuals based simply on the legal status of Union citizenship⁹⁷. Mrs. Martinez Sala, a Spanish national resident in Germany since 1968 claimed a child raising allowance. Mrs Martinez Sala had worked in Germany for a period of time, but since 1989 she had been receiving social assistance. Until 1984 she had been given residence permits from the German authorities, but from 1984 to 1993 (when she applied for the child raising allowance), she only had documents certifying that she had applied for an extension of her permit (the actual residence permit was given to her in 1994). The German authorities rejected her application for the child raising allowance on the basis that she was not a German national and she did not have a residence permit.

When this case was taken to the ECJ, the Court opined that the requirement of a residence permit for the granting of the allowance was discriminatory since German citizens were not subject to the same condition. Hence, the case came under the scope of Art.12 , which establishes the principle of non-discrimination. Although there was an economic element in this case, not having sufficient information to

⁹⁴ Similarly the Advocate General in his opinion in *Shingara and Radion* stated that: “ the creation of the citizenship of the Union with the corollary described above of freedom of movement for citizens throughout the territory of the member states, represents a considerable qualitative step forward in that...it separates this freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.” Joined cases 65 and 111/95, *The Queen v. Secretary of state for the Home Department ex parte Shingara and Radion*, [1997] ECR I-3343 at 3354 para 34.

⁹⁵ In Case 93/94, *Scanavi v. Chryssanthakopoulos*, [1996] ECR I-929 the ECJ refused to determine a dispute about the exchange of driving licences by reference to the EU citizenship and resorted instead to the economic rules associated with the right of establishment. For a similar position, see also C-5/95 *Stober and Pereira* [1997] 1 ECR I-511.

⁹⁶ In Cases C-64/96 and C-65/96, *Uecker and Jaquet*, [1997] ECR I- 3171, the ECJ repeated its jurisprudence (as developed prior to the establishment of the legal status of the EU citizenship) that the free movement rights cannot apply in a wholly internal situation.

decide whether the claimant could qualify under the rules relating to employment or those relating to social security, the ECJ decided that the right in question could be claimed on the basis of Art. 18 (citizenship) in combination with Art.12, establishing the principle of non-discrimination. The principle of non-discrimination, as mentioned earlier (see *Cowan* case) can only be applied when a case falls within the scope of the Treaty. In this case the Treaty nexus was affirmed by reference to the provisions of citizenship, because Mrs. Martinez Sala “as a national of a Member State lawfully residing in the territory of another Member State...comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.”⁹⁸

Before this case it was assumed that the citizenship rights to freedom of movement and residence, being subject to the limitations and conditions laid down in the Treaty, did not in fact have the same constitutional potential as the market based right relating to free movement of workers. Before we get carried away in our conclusions regarding the significance of Martinez Sala, however, we should remind ourselves that the ECJ did not in fact recognise a right of residence on the basis of citizenship as such, because the Court found that Germany had indirectly authorised the applicant’s residence. Thus, “it remains to be seen whether it [the Court] will take the next step of declaring a general right of residence with associated benefits purely on the basis of citizenship and without reference to any form of market/economic activity...”⁹⁹

In two successive judgements, however, *Calfa*¹⁰⁰ and *Wijsenbeek*¹⁰¹, the Court chose not to ground its judgement on the citizenship provisions. In *Calfa* an Italian national faced a lifetime expulsion from Greece because she was caught drug-dealing. The Advocate general submitted that “Ms Calfa’s position is already protected by her status as a recipient of services...it is therefore superfluous...to have recourse to this further protection offered by Community citizenship.”¹⁰² And although the outcome

⁹⁷ Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern*, [1998] ECR I-2691.

⁹⁸ *ibid.*, at para 61.

⁹⁹ T. Downes, *op.cit.* fn. 92, p.102.

¹⁰⁰ Case 348/96 *Criminal Proceedings against Donatella Calfa*, [1999] ECR I-11.

¹⁰¹ Case 378/97, *Criminal Proceedings against Florus Ariel Wijsenbeek*, [1999] ECR I- 6207.

¹⁰² At para 10 of the Advocate General opinion.

would have been the same, had the Court made use of the citizenship provisions instead, the fact remains that once again the rights of the European “bourgeois”, the economic actor, take precedence over the rights of the European “citoyen”, the political actor. This preference for the employment of some economic nexus, even if a very loose one, (in this particular case the ECJ, following its ruling in *Cowan*, affirmed the economic nexus by reference to the fact that Ms Calfa’s physical presence in Greece necessarily entailed that she was a recipient of services in that country in one way or the other) undermines the symbolic role of citizenship.

In *Wijsenbeek*, a case concerning the refusal of a Dutch national to show his passport at Schiphol Airport who was consequently convicted by a Dutch criminal court, the ECJ in answer to a question addressed to it by the Dutch court, made it clear that the citizenship provisions do not have direct effect and as a result they do not foreclose one’s obligation to present a passport at airports.¹⁰³ However, the imposition of imprisonment was considered to be a disproportionate measure and, therefore, an unjustified restriction to free movement.

While *Calfa* and *Wijsenbeek* demonstrate a more hesitant approach to the citizenship provisions than the one put forward in *Martinez-Sala* (these cases suggest that citizenship on its own is not enough to create an area without internal frontiers), the Court finally returned to its more expansive stance (as demonstrated in *Martinez-Sala*) in *Grzelczyk*¹⁰⁴. *Grzelczyk* was a French national studying and working part-time in Belgium, who in the last year of his studies claimed the minimum subsistence allowance. The Court drawing on its reasoning in *Martinez-Sala*, repeated that “a citizen of the EU lawfully resident in the territory of a host member State can rely on Art. 6...in all situations which fall within the scope *ratione materiae* of Community

¹⁰³ In this case Advocate General Cosmas emphasised that the citizenship provisions are inspired by “une philosophie anthropocentrique” which distinguishes them from the functional character of the traditional free movement rules. As a result he accepts the direct effect of the relevant articles in his opinion (see paras 83, 85, 97, 101).

¹⁰⁴ Case C-184/99, *Rudy Grzelczyk v. Centre Public d’ Aide Sociale d’ Ottignes-Louvain-la-Neuve* (CPAS) [2001]ECR I-6193.

law”¹⁰⁵ and it went on to clarify that the citizenship link could be a basis for the *ratione materiae* application of community law.¹⁰⁶

It appears that the relatively newly developed rights of citizenship have not been able to break completely their links with the concept of market citizen as described in the previous part of this chapter. Independently of whether the ECJ is powerless or simply reluctant to develop citizenship rights outside the market framework, the concept of citizenship is, according to Downes, “no more than a fig-leaf barely hiding the inadequacies of the Treaty”¹⁰⁷. Similarly Craig and De Burca insist that “just as an economic community does not become a political union through the deletion of a word from the title of a Treaty, neither do workers, retired persons, students and their families become citizens of a polity solely through the addition of a set of formal legal rights in a Treaty.”¹⁰⁸

Interestingly, a directive on the free movement of EU citizens and their families is about to replace the existing secondary legislation. However, it only provides to EU citizens and their dependants a general right to move and reside in any member State for up to six months. For rights of residence that exceed this time limit the proposed directive still requires the financial self-sufficiency of the EU citizens.¹⁰⁹ Given that the ECJ jurisprudence has been timid and at times ambiguous in the application and interpretation of the citizenship provisions, it is not really clear whether this legislative initiative intends to make the free movement and residence rights of EU citizens more explicit (at least within the six-month time-limit) or it actually functions as an impediment to a potentially more expansive judicial interpretation in the future (one for example that would ground the movement and residence rights on the provisions of citizenship without any reference to the financial means of the citizens and without any time restrictions).

¹⁰⁵ At para 32 of the judgement.

¹⁰⁶ This judgement effectively overruled *Brown* (Case 197/86 para 18), according to which assistance given to students for maintenance/training fell outside the scope of the non-discrimination principle.

¹⁰⁷ T. Downes, *op. cit.* fn. 92, p.104.

¹⁰⁸ P. Craig and G. de Burca, *EU Law*, Oxford: Oxford University Press, 2nd edition, 1998, p.725.

¹⁰⁹ This directive also introduces a permanent right of residence, which is acquired after four years of continuous residence in the host state. This means that the Member States will no longer be able to

After over a decade since its introduction the limited use of the concept of citizenship by the ECJ has managed to close some pre-existing gaps in the area of free movement, but remains rather insignificant as a source of rights for the European citizens. Its institutionalisation has done very little in the direction of granting rights not only to the market citizen, but also to the non-economically active European citizen¹¹⁰. Shaw's prediction that citizenship will develop "a framework of rights which constitute the citizen as an individual subject of law"¹¹¹ is yet to be fulfilled. Norbert Reich's view, according to which citizenship appears to be "a sleeping fairy princess that has not still been kissed awake by the direct effect of Community law"¹¹² seems to be closer to the EU reality.

The above observations have briefly addressed the ability of the EU citizenship to strengthen the protection of individual rights and to dissociate this protection from economic considerations. This way of conceptualising citizenship corresponds to the liberal model of citizenship as a locus of rights and duties. Under this conceptual approach, citizenship defines an individual's passive legal status. Hence, citizenship is connected with the enjoyment of rights which are not accorded to individuals merely by virtue of being a member of humankind. However, a number of theorists maintain that analysing the rights and duties that are associated with citizenship does not exhaust its deeper meaning; they insist that citizenship should be viewed as participation in communal life.¹¹³ To be a citizen is to be an active member of a polity and, thus, to participate in self-rule. This (mainly republican) conceptualisation of citizenship puts the emphasis on political participatory rights.

deprive those with a permanent right of residence their right of residence on the basis of public order or public security.

¹¹⁰ S. O' Leary, "The relationship between Community citizenship and the protection of fundamental rights in Community Law", 32 (1995) *Common Market Law Review*, p.524. Norbert Reich also makes the distinction between "a bourgeois" and "the citizen", the first being a citizen defined in economic terms, the second by participation in decision-making. N. Reich, "Union Citizenship- Metaphor or Source of Rights?", 7(2001) *European Law Journal*, p.8.

¹¹¹ J. Shaw, "Citizenship of the Union: Towards Post-National membership?" in The European University Institute (ed.), *Collected Courses of the Academy of European Law*, Vol. VI-1, Leiden: Martinus Nijhoff, 1998, p.294.

¹¹² N. Reich, op. cit. fn. 110, p.4.

¹¹³ See for example U. Preuss, "Citizenship and Identity: Aspects of a Political Theory of Citizenship", in R. Bellamy, V. Bufacchi & D. Castiglione (eds.), *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian Foundation Press, 1995, pp.107-121.

The political rights that escort the conferral of Union citizenship are the participation in the elections for the European parliament and the participation in the municipal elections of the host state. It is worth noting that in neither of these cases does the EU citizen actually become a full citizen in the political sense of the term, because he/she does not in fact through his/her participation to municipal/European elections become a member of the corresponding body politic. In one case the municipal representatives are only dealing with locally and most of the times materially specified problems, while the European Parliament's powers do not correspond to those of a legislative chamber, because they are heavily circumscribed. Hence the Union citizen "is attached to two forms of society but is master of neither".¹¹⁴

The political character of EU citizenship "lessens the impact of alienage" to a certain extent, but does not in any way confer to the EU citizen substantial political power. To quote d' Oliveira "the political dimension of EU citizenship is underdeveloped".¹¹⁵ Sionaidh Scott- Douglas concurs that "active citizenship has remained hypothetical, only a pale relation of its imperfect counterpart (market citizenship) capable of producing an anaemic political discourse and an anaemic Union citizen".¹¹⁶ What makes this situation even less encouraging is the fact that there seems to be little scope for the development of active citizenship in the future, because of the lack of the necessary institutional structures.

Active citizenship is connected with political self-determination and is therefore dependent on the existence of a public space that will sustain the deliberation and the debate of the Community about its own self-rule. The institutional structures of public life in the EU are underdeveloped; the unelected Commission has the legislative initiative, the agenda for the EP elections is dominated by national issues, the EP's powers, notwithstanding their gradual expansion are still weak etc. All these function as impediments to the development of a public space of deliberation at

¹¹⁴ M. Everson, "The Legacy of the Market Citizen", in J. Shaw and G. More (eds.), *New Legal Dynamics of the European Union*, Oxford: Oxford Clarendon Press, 1995, p.77

¹¹⁵ H.-J. D' Oliveira, "European Citizenship: Its Meaning, Its potential" in R. Dehousse (ed.), *Europe after Maastricht: An Ever Close Union?*, Munchen: Law Books in Europe, 1994.

¹¹⁶ S. Douglas-Scott, *Constitutional Law of the European Union*, Essex: Longman, 2002, p.496.

European level. Addressing these problems at the institutional level is a pre-requisite for the development of a more active concept of citizenship that could foster the political identity of the citizens and their sense of belonging in the EU political community.

Putting aside its lack of a strong human rights component and its restricted political character, however, the aspect of EU citizenship which has attracted the most prominent criticisms is its exclusionary character.¹¹⁷ Given that EU citizenship is a derived condition of Member State nationality, which means that third country nationals lawfully residing in the Union are excluded from the privileges associated with it and given that EU citizenship could potentially extend the rights of the EU citizens, the difference of status between Member State nationals and third country nationals becomes bigger all the time. This institutionalises an unjustified difference in the treatment of different persons' human rights. The argument is that if EU citizenship is the vehicle through which eventually the marketisation of rights will be counterbalanced, the fact that this (EU citizenship) relies upon Member State nationality further increases the gap between EU citizens and third country nationals.

Citizenship has indeed frequently been coupled with nationality at the national level. However, even in these cases, citizenship is viewed as the criterion for according individuals their political rights rather than their civic ones. Within the context of the EU, Member State nationality is not only the pre-requisite for the enjoyment of the classical political rights (participation in elections etc), but also of the civic rights. And this is exactly the second aspect of the "non-human" character of the EU fundamental rights I alluded to at the beginning of my analysis in this chapter. It is not that fundamental rights in the EU are in-human; rather that their conferral is not in any way a necessary corollary of the human condition. Not only is their enjoyment premised (more often than not) upon the exercise of some economic activity, but it is also dependent upon the prior legal link with one of the Member States. At the same time in most Member States the majority of subjective rights is no longer based on

¹¹⁷ H. d' Oliveira, "Nationality and the EU after Amsterdam" in D. O'Keeffe and P. Twomey, *Legal Issues of the Amsterdam Treaty*, Oxford: Hart, 1999, pp.141-146.

citizenship, but on lawful residence. This has prompted a number of theorists to talk of “Fortress Europe”.¹¹⁸

On the basis of the above objections, different theorists have tried to expose the contingent character of the overlap between citizenship and nationality. Theodora Kostakopoulou argues that the use of nationality as the basis of citizenship is “neither an ‘objective reality’ nor a ‘natural necessity’.”¹¹⁹ Ulrich Preuss has suggested that “European citizenship could even be conferred on individuals who do not possess the nationality of any of the Member States.”¹²⁰ Taking this further, Marie Jose Garot¹²¹ maintains that residence should be the central criterion for EU citizenship and Helen Staples proposes that the citizenship provision is amended as follows: “Citizenship of the Union is hereby established. A person holding the nationality of a Member State or who has been lawfully resident in the territory of a Member State for five years shall be a citizen of the Union.”¹²² In fact the EU institutions seem to have realised how unjustified the discrimination against third country nationals is. The European Parliament in its 1997 White Paper on Citizenship recommended the abolition of this discrimination, while the Commission published a communication in 2000 hinting at the possibility to extend citizenship to certain third-country nationals. Even more important than these promising but intangible so far proposals is Art. 45.2 of the EU Charter of Fundamental Rights, according to which “freedom of movement and residence *may* be granted, in accordance with the Treaty establishing the EC to nationals of third-countries legally resident in the territory of a Member State.” And although this is not enough to extend the freedom of movement and residence to third country nationals, it does, however, facilitate their extension in the future.

¹¹⁸ Seyla Benhabib has argued that the EU self-declarations regarding its internal organisation as a liberal democratic order create certain external obligations towards its “others”. S. Benhabib, “Fortress Europe or the United Colors of Benetton? Dilemmas of European Citizenship”, Paper Presented at the American Political Science Association Annual Meeting, Washington DC, 1997 as quoted by J. Shaw, “The Interpretation of European Union Citizenship”, 61 (1998) *Modern Law Review*, fn.49.

¹¹⁹ T. Kostakopoulou, “Towards a Theory of Constructive Citizenship in Europe”, 4 (1996) *Journal of Political Philosophy*, p. 339.

¹²⁰ U. Preuss, “Problems of a Concept of European Citizenship” 1 (1995) *European Law Journal*, p. 267.

¹²¹ M. J. Garot, *La citoyennete de l' Union Europeenne*, Paris: L'Harmattan, 1999.

¹²² H. Staples, *The Legal Status of third country nationals resident in the EU*, Dordrecht; Kluwer, 1999.

In sum, there has been much debate about the significance of European citizenship. For some the advent of the concept of EU citizenship has signified the beginning of the development of a common European political (as opposed to the previous market-oriented) identity. For others it has been nothing more than a re-statement and a further consolidation of the pre-existing situation; a label for rights of free movement already incorporated in the EC Treaty. In my analysis in this chapter I have found the optimism unwarranted. This has been justified by reference to the limited rights that have been associated with EU citizenship and to the absence of those features that could give rise to a more politically active citizenship (e.g. absence of significant political rights or even reciprocal duties). In light of the above deficiencies, market citizenship still seems to be the main conceptual model for EU citizenship. On top of these (or probably as a result of these), EU citizenship does not do justice to the common humanity and the inherent dignity of all those who live within its borders, but insists –unjustifiedly so in my view- on the conferral of all rights (and not simply the political ones) solely on the basis of nationality of a Member State. In doing so it fails to fulfil the requirements for a properly so-called post-national citizenship.

d) The market as a societal bond

In the previous section I argued that the marketisation of the EU conception of fundamental rights gave rise to the market citizenship and to a market model of society. The market is connected with a certain conception of human rationality, according to which individuals are self-interested, rational profit-maximisers. One of the main accusations that have been levelled against the marketisation of the EU fundamental rights and the emergence of the EU market citizenship is that within a market society which is based on a single metric of value, namely that of profit maximisation/economic efficiency, human relations are instrumentalised, while values such as solidarity, which are necessary for the cohesion of a community may be undervalued and as a result underdeveloped.

As we saw earlier, the institutionalisation of the Union citizenship has not as yet managed to do away with all the instrumental aspects of its forerunner. In light of the fact that the market remains the focal point of the European Community, I will now explore the ability of the market to provide the element of communality which is required among the members of a political community. Bert van Roermund and Hans Lindahl are among the theorists who have clearly argued in favour of the market's ability to offer a basis for political cohesion within the context of the EC/EU. This part will explore their arguments.

In their article "Law without a State? On Representing the Common Market"¹²³, Bert van Roermund and Hans Lindahl acknowledge that the common market is the central category of Community law, but they insist that this development is not deplorable, because the market can satisfy the conditions necessary for political representation and it can, thus, function as the point of reference for the political self-identity of the Community/Union. The main target of van Roermund and Lindahl in this article is the Maastricht judgement of the German Constitutional Court. We analysed this judgement in Chapter 2. Briefly, according to the reasoning of the BVerfG, in democracy all normative relations must be referred to the sovereign people. The EC is not yet a political entity, so goes the reasoning of the federal court, because there is no sovereign European people; only peoples in the plural. The BVerfG argues that what binds the people together (and what consequently constitutes the people as a political unity) is cultural homogeneity. The BVerfG thus views a polity as two orders, an existential and a legal one, where the latter simply reproduces the former. Van Roermund and Lindahl argue that "by contending that the legal order represents a pre-given existential unity, the federal Court lapses into a form of representationalism."¹²⁴

¹²³ B. Van Roermund and H. Lindahl, "Law without a State? On representing the Common Market" in Z. Bankowski and A. Scott (eds.), *The European Union and its Order: the Legal Theory of European Integration*, Oxford: Blackwell, 1999, pp.1-16.

¹²⁴ *ibid.*, p. 12. They explain that "...the Maastricht judgement falls prey to representationalism because it views the distinction between the purpose of a legal order and the order itself as a *distinction in re*". In their view, and in this I agree with them, the distinction between a legal order and its purpose is strictly a *distinctio rationis*. This distinction, which draws on Ernst Cassirer's work, is

In their opinion, the ECJ avoids this flaw by positing the common market as the purpose of Community law. Unlike, however, the ECJ, which hesitates to conclude that the market-oriented community legal order is already a political community, Van Roermund and Lindahl believe that the common market is a full-blooded political project and that economic integration can satisfy the conditions necessary for political representation. They agree with the federal court that the ground of the legal order is “the purpose whence a manifold of relations can appear as a purposive unity, namely the common good”¹²⁵ and that in a democracy the common good is the people. They disagree with the Maastricht judgement only in so far as it introduces homogeneity as a criterion of political unity, because this unavoidably implies that the content of the common good is fixed in advance thereby condemning political identity to immobility.

In their analysis of political power as an institution, Van Roermund and Lindahl argue that this is a default reflexive setting of a purposive behaviour and that its articulation is provided by the relationship between the constitutional/legal order and the re-shaping of the common good. Ultimately, so goes their argument, a polity is a relation between political/legal power and its purpose and the two terms of this teleological relation are co-originary rather than sequential. In light of these considerations, the sovereign people as the purpose of a democratic legal order does not need to be postulated prior to the emergence of the legal order (this is what the federal court did). Positing the realisation of the common market as the purpose of the Community legal order (this is the ECJ stance) is the element of communality that brings these people together as participants to the same community. Thus, the common market provides the default settings of the purpose of Community law. “Economic integration is not the harbinger of European political unity; it is the continued process of re-negotiating the default settings of re-negotiating the default

further explored in H. Lindahl’s article “Sovereignty and Symbolization”, 28 (1997) *Rechtstheorie*, p.3.

¹²⁵ B. Van Roermund and H. Lindahl, op. cit. fn. 123, p.8.

settings of the purpose of Community law, or if you will, of the content of political identity.”¹²⁶

In their effort to demonstrate that the relation between the Community legal order and the common market is a teleological one, which in accordance with the requirements of a non-substantialistic political representation, remains open to renegotiation, van Roermund and Lindahl compare the different default settings of the common market as offered by Art. 2 EC and Art. Gb2 TEU. In the former, the criteria that define what counts as a good market are the following: a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. Art. G.b.2, on the other hand, includes some new objectives and provides a new default setting of the common market. On the basis of this development, van Roermund and Lindahl, then quite hastily confirm that the reflexive relation between a legal order and its purpose, which is at the heart of all political representation, is also present in the EU.

When Van Roermund and Lindahl conclude that the realisation of a common market can be viewed as the common good of the EC and as such it provides the default settings of the purpose of community law, or otherwise put, the content of political identity, they also insert the proviso that they are “neither raising nor answering the question about the institutional conditions necessary to assure the democratic legitimisation of Community law-making.”¹²⁷ But it is exactly their omission to look at these issues from a holistic perspective that does not allow them to see how in light of the institutional shortcomings and the prevailing juridification of the EC/EU political order, the dynamic relationship between political power/legal order and its purpose remains unsatisfactory. And it is because of this pervasive political deficit that the market cannot currently instantiate the common good of the EU.

¹²⁶ *ibid.*, p.13.

If the purpose and the foundation of a legal order is ultimately the sovereign people, as van Roermund and Lindahl seem to accept, the non-participation of this people in the appropriate decision-making processes in which the common good is ultimately shaped and transformed, necessarily entails that the norms specifying the content of the common market cannot be imputed to the people. Van Roermund and Lindahl argue that “determining what counts as a good market is not merely an economic decision; re-negotiating the constitutive and regulative rules of the common market instances the process of political representation”¹²⁸. Although the market is concerned with the fulfilment of private interests, its institutionalisation, that is the putting in place of the rules that regulate its organization, is subject to negotiation. It is clear that for Van Roermund and Lindahl the market as an institution is a matter of public interest; they refer to a properly so-called political economy. In the EC/EU, however, the fore-mentioned re-negotiation (negotiation of the common good, negotiation of the terms of the common market) is presented as a technocratic issue, which is withdrawn from the sphere of political contestation. The criteria for the definition of what counts as a good market are effectively provided from within the market.

Van Roermund and Lindahl clarify that “characterising the common market as a default setting of the common good in no way implies elevating the market into a false historical necessity.”¹²⁹ They believe that, although highly improbable in the near future, there is always the possibility to have a default setting of the common good other than the market. The problem however is that certain aspects of the current default setting of the common good have penetrated the community legal order and have become part of the constitutional *acquis communautaire* (e.g. marketisation of fundamental rights). As a result any prospective change of the default settings of the common good will be meeting resistance from inside the legal system.

¹²⁷ *ibid.*, p.14.

¹²⁸ *ibid.*, p.16.

¹²⁹ *ibid.*, p.15.

In a period of “mounting enthusiasm” for free markets (especially after the demise of the former Communist regimes), it seems almost “unnatural” to raise questions about the proper role of the market in social ordering. But as Cass Sunstein points out, it is imperative that we distinguish between the market as a means, a tool to the promotion of human welfare and the market as an end in itself¹³⁰. If we view the market as an end, then economic efficiency is unavoidably the unitary metric of cost-benefit analysis. If, however, we view the market as a tool for the promotion of welfare and human happiness (as we should), then other factors such as altruism, solidarity, social justice emerge as criteria for a different cost-benefit analysis. This leads Sunstein to the conclusion that, although free markets are indispensable for democratic politics, politics properly so called cannot be conflated with market ordering. Democratic political processes allow for and affirm competing conceptions of the good, while the market is identified with one particular conception of the good. Thus, the market cannot exhaust the concept of the good. Besides, democracy’s role in ensuring autonomy goes beyond the satisfaction of existing preferences and is also concerned with the processes of preference formation. And within these processes, self-interest may not be the only motivating force. Other morally relevant factors may affect the choices of citizens as political participants (as opposed to private consumers). Sunstein reminds us that democratic controls of the market are in any case justified.

Similarly, Michelle Everson draws our attention to the distinction between market as a fact and market as a construct.¹³¹ This is a more sophisticated version of Sunstein’s distinction between the market as an end and the market as a means. The market as a fact is premised upon the possibility of conceptually isolating the economy from politics. This approach views the market as the most efficient form of growth and resources management. It safeguards the internal security and stability of the market from any extra-market considerations, including political intervention. In this view political economy is redundant as the internal legitimacy of the economy rests purely

¹³⁰ C. Sunstein, *Free Markets and Social Justice*, Oxford: Oxford University Press, 1999, pp. 4-9.

¹³¹ M. Everson, “Economic Rights within the European Union” in R. Bellamy, V. Buffacchi, D. Castiglione (eds.) *Democracy and Constitutional Culture in the Union of Europe*, London: Lothian Foundation Press, 1995, pp.138-139.

upon its own procedural norms as expressed by technical regulation. Hence, economic experts' opinions are privileged over political decisions. On the other hand, there is another form of market, the market as a construction or a creation. Under this theoretical scenario, the market, instead of being secured against state intervention, actually depends upon on-going political processes. These define what the market should encompass and which non-market oriented encroachments into the economy are legitimate. Here the competitive impetus and the pure logic of the market give way to politically informed decisions.

Each of the above types of market is associated with a different conception of economic rights. Within the view of the market as a fact, the individual is equipped with "enabling competencies" which are like a double-edged sword "both maintaining the internal security of the market and safeguarding it against any external intrusions motivated by extra-market considerations."¹³² Within the market as a creation, on the other hand, the individual possesses "instrumentalist economic competencies". In this case the economic rights of the citizen are intricately connected with his/her political rights. It is through the exercise of the latter (political rights) that the scope and content of the economic rights/competencies can also be defined.

In her evaluation of the legal status quo in the EU, Everson points out that the four market freedoms (free movement of capital and workers, freedom of establishment and services) were originally designed to be enabling economic competencies.¹³³ The ratification of the Single European Act and the passage from unanimity to qualified majority voting signalled the withdrawal of state control (Member State governments) over the market, the underlying assumption of this development being that the logic of the market could yield the best outcomes. In parallel with the withdrawal of political control came the introduction of the market criteria in the case law of the ECJ (see section c of this chapter). The combination of the two (withdrawal of political control and penetration of the logic of the market into the

¹³² *ibid.*, p. 139.

¹³³ *ibid.*, pp. 140-141.

legal order) makes it apparent that for Community purposes, the market was for a long time viewed as a fact.

After the signing of Maastricht, however, and the incorporation of market externalities among the Community objectives, it can be argued that a created market has started slowly to emerge. Elements of industrial policy, consumer and environmental protection are some of the extra-market considerations that have been integrated into the workings of the EU market. In light of this development, it becomes problematic to decouple economic rights from political ones, because as we saw above within the view of the market as a construction it is through the exercise of their political rights that the citizens can also define their economic competencies. However, as was shown in the previous section, the EU citizenship adds a very limited political role to the status of the market citizen, who is thus unable to exercise any direct influence in the shaping of the emerging created market. The alleviation of this problem necessarily takes us back to the democratic and political deficit of the Union.

And this is exactly the point that Van Roermund and Lindahl seem to be missing. They are right in arguing that the organisation of the market in abstracto could theoretically be viewed as the end-product of an on-going political process that expresses the values of the citizens. The problem, however, is that because of the prevailing juridification of the EU political system and the democratic deficit, no such on-going participatory political processes exist. The political deficit of the Union in combination with the lack of political focus in the institutionalisation of the EU citizenship entails the under-development of the political rights of the citizens. As a result of this lack of clear definition, political rights in their turn cannot control effectively the definition and organisation of the corresponding economic competencies of the citizens.

Van Roermund and Lindahl following the ECJ reasoning in *Van Gend en Loos* view the common market as the end of the European integration. In doing so, they postulate the market as the common good of the EC/EU. This postulation unlike the

one assumed by the BverfG does not fix the content of the common good in advance; the articulation of the market as an institution, a default setting of purposive behaviour is open to re-negotiation and change. However, the very act of instituting a market as a common enterprise is external to the conceptual presuppositions of the market itself. The concept of the market rests upon an exchange of offer and acceptance regarding supplies and demands. This is a factual presupposition. Whether the market actually surpasses this basic factual level and becomes an institution subjected to regulation is a political decision, which is external to the market.¹³⁴ I agree with van Roermund and Lindahl that the market as a process can instance the logic of political representation to the extent that it can be articulated as the on-going redefinition of the rules of this process. However, this on-going re-shaping of its common good can only be reflexive and properly so-called democratic if it is enacted by the people and their representatives. This is not the case with the EC/EU, where the market has been presented as a politically neutral, a technocratic programme that is driven by experts in economics.

Let me end this on a somewhat different note: in an article entitled “The Other Heading”¹³⁵ Derrida, unlike van Roermund and Lindahl, deplores the market orientation of the EU. Drawing on the polysemy of the word “capital”, Derrida is playing throughout this text with the relationship between the feminine “la capitale” meaning the capital city of a country and the masculine “le capital”, which is capital in its monetary sense. The feminine “la capitale”, the capital city of a country can also be seen as referring to the cultural heritage of Europe. And what is proper to the heritage of this culture is not to be identical to itself. “Not to not have an identity, but not to be able to identify itself; to be able to take the form of subject only in the non-

¹³⁴ Despite Smith’s contention that the “invisible hand” will run the market (A. Smith, *An Enquiry into the Nature and causes of the Wealth of Nations*, Oxford: Oxford University Press, 1976), or Hayek’s belief that the free market “dispenses with the need for social control” (F. Hayek, *The Road to Serfdom*, London: Routledge, 1962), it is nowadays accepted, even by neo-liberal theorists such as Posner (R. Posner, *Economic Analysis of Law*, Boston: Little Brown, 1986), that free markets need legal regulation; in the absence of appropriate social control, the creation of monopolies and oligopolies will eventually undermine competition. This further strengthens the argument that political processes are indeed a prerequisite for the good functioning of the market and that, therefore, they cannot be generated by the market.

¹³⁵ J. Derrida, *The Other Heading - Reflections on Today’s Europe* (translated by P.-A. Brault and M.B. Naas), Indianapolis: Indiana University Press, 1992.

identity to itself¹³⁶. Although accepting that the history of a culture presupposes an identifiable heading¹³⁷, a *telos*, he also insists that this heading should not “be identifiable in advance and once and for all”¹³⁸. Derrida urges us “to make ourselves the guardians of a Europe that consists precisely in not closing itself off in its own identity”.¹³⁹

His fear is that the masculine “*le capital*”, the capital in the monetary sense may not be sensitive to the aporetic subtleties¹⁴⁰ of a properly European identity, that is an identity which is at the same time a difference with itself. Derrida strongly believes that we need a new way of taking capital into account; keeping at distance “the totalitarian dogmatism that under the pretense of putting an end to capital destroyed democracy and the European heritage”¹⁴¹, but at the same time resisting the neo-capitalist exploitation of the breakdown of Communism and the equally dangerous dogmatism of an institutionalised religion of capital. This double aim is effectively connected with the idea of a market as a construct, a market which is democratically controlled and which necessarily presupposes the existence of strong political processes in the background.

Conclusions

The analysis in this chapter has aimed to show that fundamental rights have been employed in a conceptually confused way within the EU. This conceptual confusion is mainly the outcome of judicialisation. Due to the judicial constitutionalisation of the Treaties, fundamental rights have been protected as being part of the general

¹³⁶ *ibid.*, p.9.

¹³⁷ The etymological affinity between heading (“*cap*” in French) and capital is lost in English. It is retrievable, however, in the other meaning of “*cap*” which is cape.

¹³⁸ J. Derrida, *op.cit.* fn. 135, p. 18.

¹³⁹ *ibid.*, p.29.

¹⁴⁰ The *aporia* consists in the following: on the one hand, the European cultural identity must not be “dispersed into a myriad of provinces, into a multiplicity of self-enclosed idioms or petty little nationalisms, each one jealous and untranslatable”, while, on the other hand, “it cannot and must not accept the capital of a centralizing authority that would control and standardise”. Neither monopoly nor dispersion, therefore, neither universal nor particular. In this sense it is an *aporia*; an experience and experiment of the possibility of the impossible.

¹⁴¹ J. Derrida, *op. cit.* fn. 135, p.77.

principles of law. This development has entailed a number of uncertainties regarding the corpus of EU fundamental rights, the position of fundamental rights in the EU pyramid of hierarchy and, directly connected with the latter, the permitted restrictions to rights. The signing of the EU Charter of fundamental rights, although a positive step, has not changed the constitutional status quo in the EU and for the time being fundamental rights are still protected as part of the general principles of law. Hence the fore-mentioned uncertainties still remain.

The other problematic aspect of the EU protection of fundamental rights, which is also connected with the judicial constitutionalisation of the Treaties, is marketisation. In light of the mainly economic objectives of the Treaties, the protection of fundamental rights has been conceptually subordinated to (the overriding objective of) the realisation of the common market. My analysis in this chapter identified three different expressions of marketisation. First of all the four market freedoms acquired the status of fundamental rights. This meant that the EU fundamental rights could not really play their role as the highest rules of the system against which the validity of community legislation could be measured, simply because all secondary legislation is in one or the other way connected with the market freedoms. Thus, a conflict between a fundamental right and secondary legislation is no longer a conflict between a higher and a lower norm, but a conflict between hierarchically equal fundamental rights. This obviously undermines the role of fundamental rights.

The second expression of marketisation consists in the fact that, according to the relevant ECJ judgements, restrictions to fundamental rights can be justified by reference to their social function as defined by the needs of the common market. This means that the common market has been postulated as the common good of the EC/EU.

The third aspect of marketisation, the least obvious one, consists in the fact that the actual recognition of rights to individuals is premised upon their ability to establish some link with an economic activity. As a result, formal equality, for the purposes of the EU is conferred to all participants in the market. Those outside the sphere of the

market (unemployed, housewives etc)¹⁴² do not enjoy the same rights as those within it, which raises some serious questions about the social justice of the system.

In light of the above problems it is obvious that the EU system of rights falls short of the requirements of theoretical (liberal) orthodoxy, according to which a) rights are trump cards against public authorities b) fundamental rights are the highest rules of validation within a legal system and c) all citizens have the same rights.

Having demonstrated the inconsistencies and incompatibility of the EU system of protection of fundamental rights with the theoretically orthodox view, which is incidentally the one officially proclaimed by the Community legal order, I then linked the discussion of the deficiencies of the EU system of fundamental rights with some of my conclusions in the previous chapters. By revisiting these previous conclusions regarding the on-going process of universalisation (chapter 2) and the relationship between rights/law and politics (chapter 3), my intention was to question theoretical orthodoxy and to offer a more sophisticated conception of rights, which however, instead of vindicating the EU conception of rights would further expose its deficiencies. According to my analysis in this part, it is far too simplistic to view the concept of rights as being only antagonistic with the concept of the common good. The two are in fact in a constant interplay and mutually define each other's meaning. This relation of mutual constituency does not collapse into one of dialectical synthesis as the tension between the two poles, (universal) fundamental rights and culturally specific (hence, particular) common good is still there. Under this approach, rights cannot be viewed as apolitical constraints on political power (through the exercise of which the concept of the common good is defined); they are

¹⁴² Louise Ackers offers an analysis of the definition of worker in the Community legal order and she concludes that "despite the broad interpretation of the concept of 'worker' to include certain categories of unpaid work or activity of marginal economic value, entitlement to social rights under the free movement provisions nevertheless remains firmly based on the 'male breadwinner' conceptualisation of the family and excludes many areas of work traditionally designated to women." L. Ackers, "Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions", 16 (1994) *Journal of Social Welfare and Family Law*, pp.393-394. For an interesting analysis of women's rights in the EC/EU see also M. Weiner, "Fundamental Misconceptions about Fundamental Rights: The Changing Nature of Women's Rights in the EEC and their Application in the United Kingdom", 31 (1990) *Harvard International Law Journal*, pp. 565-610 and M. Everson, "Women and Citizenship of the European Union" in T. Hervey and D. O' Keefe (ed.), *Sex Equality Law in the European Union*, Chichester: Chancery Wiley, 1996, p.205.

in fact partly constituted by political power. This internal link between rights and politics necessarily discredits any attempt to ground the legitimacy of the Community legal order on fundamental rights in the absence of a fully political constitution.

Given the lacking political character and the market orientation of EU fundamental rights, I explored whether the introduction of the EU citizenship by the TEU changed in any significant way the marketisation of the Community legal order that had taken place prior to its institutionalisation. Through an analysis of a) certain conceptual aspects of the EU citizenship and b) the ECJ case-law in this area, it was argued that EU citizenship, focusing mainly on the mobility of the citizens, currently lacks a truly political character which could transform it into a real lever of participation in the Union. As a result, the EU citizenship has not yet fully overcome the subordination of the Community legal order to the exigencies of the market.

In view of the fact that the market still remains the focal point of the Community legal order, I finally turned to the arguments put forward by van Roermund and Lindahl, according to which the market can offer a basis for political cohesion. I agreed with them that defining what counts as a good market is a teleological project that could instantiate the concept of political representation, but I inserted the proviso that this happens only when the default settings of the market are open to a public negotiation and are not treated as a technocratic issue that has been withdrawn from the sphere of political contestation. Whether this actually happens or not is external to the concept of the market as such. Hence, the proper working of political economy is ultimately premised upon the existence of some democratic political framework. The market can sustain such a framework, but it cannot generate it *ex nihilo*.

Prefatory Conclusion

We shall not cease from exploration
and the end of all our exploring
will be to arrive where we started
and know the place for the first time.....
In my end is my beginning.....
T.S. Eliot (Little Gidding)

Constitutionalism offers a rich vein for philosophical inquiry.¹ Tensions and aporias are part of the constitutional lawyer's professional routine (that is, if she is sensitive enough to acknowledge them). On the one hand, constitutional doctrine partly presupposes the existence of that which it creates; "the demos which is called upon to accept the constitution is constituted legally by that very constitution".² On the other hand, being the medium that enables the communication between abstract universalistic principles and a historically specific political culture,³ a constitution is unavoidably fraught with tension, the tension that underlies the relationship between reason and passion.

The riddle(s) of all constitutions, contrary to Marx's contentions,⁴ remain largely unsolved. And in the midst of all the riddles there is a recurrent theme: "what, if anything, makes a constitution legitimate?" Does constitutional legitimacy stem from the passion of democratic politics or from the reason of rights? Or again, could it be that the legitimacy of law is always arbitrary as Derrida⁵ and Lyotard⁶ insist; a simple performative which presents its own performativity in the form of a constative?

¹ L. Alexander (ed.), *Constitutionalism*, Cambridge: Cambridge University Press, 1998, p.1.

² J. Weiler, "The Promised Constitutional Land", 12 (2001) *King's College Law Journal*, p.6.

³ See Chapter 2.

⁴ According to Marx, "democracy is the solved riddle of all constitutions. Here not merely implicitly and in essence but existing in reality, the constitution is constantly brought back to its actual basis, the actual human being, and established as the people's own work." R. Tucker (ed.), *The Marx-Engels Reader*, 2nd ed., New York: Norton, 1978, p. 20.

⁵ J. Derrida, "Force of Law: The 'Mystical' Foundation of Authority" in D. Cornell, M. Rosenfeld and D. Gray Carlson (eds.) *Deconstruction and the Possibility of Justice*, New York/London: Routledge, 1992, pp.35 ff.

⁶ J.-F. Lyotard, *The Differend: Phrases in Dispute*, Manchester: Manchester University Press, 1988.

The aim of this thesis was not to solve any of the constitutional riddles. The intention here was a much more modest one; to explore the constitutional framework of the EU and the role this has played in the development of a new type of polity. The fore-mentioned tensions in the heart of constitutionalism are obviously both magnified and multiplied when the normative concepts of constitutionalism are translated from the state to the supra-state level. The fact that the EU constitutional framework does not match the pre-existing statist constitutional templates is not necessarily a problem. Besides, the aim of this thesis was not to expose the flaws of EU constitutionalism by reference to our inherited constitutional vocabularies, but to articulate an internal, immanent critique, which, by bringing to the fore the internal contradictions of the EU constitutional order, would also reveal its true potentiality. The critique of ideology was suggested as the particular methodological tool which would help us reveal the contradictions between official rhetoric and reality, but also the emancipatory possibilities stemming from the EU project. Simulation, on the other hand, which is usually associated with the end of ideology debate (hence, a *prima facie* negation of ideology), was presented here as the mode in which ideology functions most effectively today. The ultimate aim of this thesis was to show that EU constitutionalism has facilitated the unfolding of a number of simulations and that these simulations have played a significant ideological role in that they have served to sustain the current asymmetrical structures of power in the EU.

a) Revisiting the basic concepts: simulation as ideology

In his essay “The orders of simulacra” (chapter from the book *Symbolic exchange and death*)⁷ Baudrillard offers a history of simulation. He identifies three successive stages of the simulacrum. The first order is that of the counterfeit; in this period signs do not in fact attempt to pass themselves off as real; they actually refer to the real through their difference to it. The second order of simulacra is that of mechanical production (and reproduction). Within this order, sign and reality become equivalent. The sign no longer relates to the real via its difference from it; it attempts to be the

⁷ J. Baudrillard, *L' échange symbolique et la mort*, Paris: Gallimard, 1976. In English it appears in J. Baudrillard, *Simulations*, New York: Semitext(e), 1983.

same as the real. The best example for this order of simulacra is the assembly line with its logic of serial reproducibility. “The relation [between objects on an assembly line] is no longer that of an original to its counterfeit, neither analogy, nor reflection-but equivalence, indifference. In a series, objects become undefined simulacra one of the other. And so, along with the objects do the men that produce them.”⁸

The third order of simulacra is that of simulation properly speaking. Unlike the second order, where the real disappears in the self-referentiality of the sign, the third order attempts to re-introduce the contingencies of the real. The code of the assembly line and the reproduction of multiple exact copies of the same model here give way to the small variations of the (re-)produced objects. These variations in fact function as an alibi for the “reality” of the (re-)produced objects. This is a technique of “tactical hallucination” which enables the system to justify itself by reference to some prior reality. And while the system justifies itself on the basis that it expresses some pre-existing reality, the system actually constitutes reality in its image. Paradigmatic cases of this third order of simulacra are the referenda; they seem to be open to contingency and to surprise, as one cannot –one, in fact, does not- know in advance what their outcome will be. On the other hand, the very phrasing of the questions in a referendum also defines the possible answers. In this sense answers and questions are bound together. The system presents itself as being open to the contingency of reality, while actually producing reality in its image.

Likewise, the post-industrial form of duopoly (as opposed to the industrial form of monopoly) presents itself as being open to competition, but in fact the presence of two strong powers (be it participants in the market, political parties etc) makes competition even more difficult. “It might appear that the historical movement of capital carries it from open competition towards oligopoly, then towards monopoly-that the democratic movement goes from multiple parties towards bipartism, then toward the single party. Nothing of the sort. Oligopoly or the current duopoly results from a tactical doubling of monopoly. In all domains duopoly is the final stage of

⁸ *ibid.* (English version), p. 97.

monopoly.....Power is absolute only if it is capable of diffraction into various equivalents, only if it knows how to take off so as to put more on.”⁹

In his essay “The Precession of Simulacra” Baudrillard continues the exploration of his order of simulacra using an allegory from Borges about a map of an empire which was so detailed that it fully covered the territory it was supposed to depict. Baudrillard explains that this is still a second-order simulacrum because it is based on the equivalence between the simulacrum (map) and the real (territory). In the third order of simulacra it would no longer be the territory that preceded the map, but the map that preceded the territory. In fact, in the third order of simulacra, there is no relationship, no contact between the original and the copy. The system simply puts forward an other to itself, only in order to exclude the real, so that “the system itself is proved all the more”.

Another example of the way in which the system opens up to the other only to further extend itself is drawn from the sphere of ethnology. Baudrillard analyses the case of the Tasaday Indians found by anthropologists and ethnographers in the rainforest in the Philippines, where they had lived for over 800 years. Upon their contact with civilization, the Indians started decomposing “like a mummy in the open air.”¹⁰ The scientists decided to return them to the rainforest and to put them “out of the reach of colonists, tourists, ethnologists.”¹¹ According to Baudrillard’s analysis, the primary aim of this decision was not to save the Tasaday Indians, but ethnology as a science. Here, we are clearly within the realm of third order simulacra; the system (in this case ethnology) produces an other to itself (the Indians are sent back to the rainforest and kept apart from ethnologists, one could say that this amounts to anti-ethnology), but eventually this other (Indians) can only be conceived by reference to the original system (it is ethnology after all which “saves” the Indians by deciding to put them out of its own reach). Through this reference, the system is actually reaffirmed and further extended. This same tactic is followed with Disneyland and Watergate, the examples of simulation that we explored in chapter 1.

⁹ Ibid., pp.133-134.

¹⁰ Ibid., p. 13.

¹¹ Ibid.

In both these cases the system produces its other (real life-Disneyland, politics-scandal) only in order to exclude the realisation that the “reality” we experience is in fact contradictory; that all life in America is artificial and all politics is scandalous.

Simulation is undoubtedly one of the most confusing concepts. What makes it even more confusing is the fact that Baudrillard does not always follow a clear and consistent taxonomy throughout his work. The main idea, however, remains that simulation defers the real. Simulation is designed by the system (any system) to feign a certain presence and the feigning of this presence (the presence of the real) is functional to the self-reproduction and to the extension of the system¹².

As far as Baudrillard’s normative agenda is concerned, this is quite troublesome. Baudrillard renounces all Enlightenment reason and the possibility to distinguish truth from falsehood; he views theory as a discredited enterprise and dismisses the concept of critique. He asserts that apathy, which is the system’s own logic, is the most effective weapon against hyperreality. Thus, the theory of simulation “leaves us paralyzed without any ground to articulate opposition.”¹³

My use of the theory of simulation in this thesis is a qualified one; I agree with Baudrillard’s accurate description of our present media-controlled hyperreality and I accept that his key-categories can help us understand better our post-modern social environment, but I reject his debilitating normative agenda. Against Baudrillard’s proclamations regarding the obsolescence of Marxist critique and the disappearance of political economy, I argued that simulation cannot be divorced from the analysis of capitalism and political economy. In fact, this theory’s most important contribution is that it can help us expand the Marxist critique of political economy. I will agree with Douglas Kellner that the best way to make use of Baudrillard’s

¹² According to Douglas Kellner, simulation is very much like the code of the DNA “which programs various directions and constraints on behavior in an individual, but which itself is not perceived and which is subject to aleatory combinations and permutations in interaction with other social and environmental phenomena.” D. Kellner, *Jean Baudrillard: From Marxism to postmodernism and beyond*, Cambridge: Polity Press, 1989, p.80.

¹³ S. Best, “The Commodification of Reality and the Reality of Commodification: Baudrillard, Debord and postmodern theory” in M. Gane (ed.) *Jean Baudrillard, Volume 1*, London: Sage, 2000, p.251.

analysis is to treat it as a “semiological supplement to Marx’s theory of political economy.”¹⁴

Consumer capitalism (which is the current stage of capitalism) relies on the increase of consumption. Consumer economy is, therefore, oriented at the creation of needs for goods. In order to achieve this, it employs sophisticated marketing strategies which manipulate our desires and create artificial needs. Commodities are no longer characterised by use-value and exchange value; it is the sign value of the goods that enhances their marketability. Sign value, which redefines the commodity as a symbol to be consumed and displayed, is the key concept of capitalism today. Images, signs and all aspects of symbolic reproduction overshadow production. Everything is reduced to questions of symbolic exchange. Our perceptions are increasingly shaped by market techniques as applied not only in the sphere of the market, but also in politics. Sign value has effectively substituted all meaning.

Due to the proliferation of signs and images, capitalism has become “a system of floating signifiers unchained from any referent whatsoever”¹⁵; it has become almost impossible to distinguish between the object and the sign, between the signified and the signifier, between objective reality and the result of artificial intervention.

And this is exactly what simulation is all about; it is about the collapse of all dichotomies between appearance and reality; the takeover of reality by its image; the disappearance of all referential reason; the implosion of all realms of society into a self-reproducing system of simulacra. Simulation is a functional element of the current form of capitalism, which is organised around configurations of sign value. Therein also lies its ideological function; by promoting the cultural logic of late capitalism,¹⁶ simulation also serves to sustain the relations of domination which have been established by it. The classical Marxian critique of political economy, relying on concepts such as labour and use value, is unable to provide an adequate analysis for the capitalist focus on symbolic exchange today. In this sense, once the

¹⁴ D. Kellner, *Baudrillard: A Critical Reader*, Oxford; Blackwell, 1994, p.3.

¹⁵ A. Huyssen, “In the shadow of McLuhan: Jean Baudrillard’s theory of simulation” in M. Gane (ed.) *Jean Baudrillard, Volume 4*, London: Sage, 2000, p.285.

¹⁶ See for example F. Jameson, *Postmodernism, or, The cultural logic of late capitalism*, London: Verso, 1991.

underlying affinity between simulated hyperreality and capitalism is exposed, Baudrillard's theory of simulation can illuminate the present age by putting the emphasis on the analysis of the political economy of the sign.

b) The multiple facets of simulation in the EU

Chapter 3 re-visited the official narrative of the development of the EU constitutional order in an attempt to challenge the naturalness and the retrospective inevitability of our received *acquis constitutionnel*. Through an analysis of the history of development of the Community legal order it was shown that the EU constitutionalisation process has mainly been the product of the ECJ and has largely taken place in the absence of political discourse. Not only was a mobilised majority of the people not involved in the shaping of the EU constitutional charter (the citizens were most of the times unaware of the constitutional developments and their significance), but the representatives of the political body were also not in charge of active constitutional engineering.

The psychoanalytical regression into the constitutional past of the EU showed that the celebrated EU "constitutional moments", namely the Intergovernmental Conferences, which gave rise to successive accessions and amendments of the Treaties were not as important as the quiet constitutional revolution that was taking place through the judgements of the ECJ; they very often functioned as the post-facto confirmation of the changes that had already taken place at the judicial level. The main structure of EU constitutional law was effectively created through a process of political parthenogenesis. Constitutional law emerged in the absence of constitutional politics; in fact constitutional politics was not only absent, but it was furthermore simulated.

The system of governance in the EU has replaced constitutional politics with its image, the IGCs. The IGCs are presented as providing a deliberative political forum for EU affairs. It is furthermore assumed that decisions at IGC level are the outcome of a public political debate. The reality is that the IGCs are based on negotiation of

interests rather than deliberation and that their workings follow the secretive rules of diplomacy, which means that they are not open to public scrutiny. The IGCs provide all the signs of real political conflicts (conflicts do arise in IGCs), but “short-circuit their vicissitudes.”¹⁷ The highly publicised conflicts that arise in the IGCs, usually associated with the defence of the national interests of the Member States (see for example the conflict regarding the voting rights of Spain and Poland in the IGC in December 2003) do not really concern the important aspects of the EU constitutional framework. The EU produces the “true symptoms” of the political, but the real conflicts of principle are short-circuited (see for example how the latest IGC on the EU constitution avoided any discussion regarding the finality of the EU project). We are experiencing the idealised transposition of a contradictory reality. The conflicts among the different Member-States which appear to be threatening to the EU project, are in reality a functional part of the EU system of simulations; they function as alibis which improve the credibility of the overall political simulacrum.

The same applies to the ratification processes taking place at the national level; in some Member States these involve a national referendum. As we saw earlier, according to Baudrillard’s taxonomy, a referendum is the paradigmatic form of the third order of simulacra in that it presents itself as being open to contingency, while actually pre-defining (through the phrasing of the questions to be answered) the content of the possible answers. Hence, although one is allowed a range of choices, the options are pre-determined. Following this approach, one could say that the problems encountered during the ratification of the Maastricht treaty (negative outcome of the referendum in Denmark) or the treaty of Nice (referendum in Ireland), although *prima facie* oppositional to the EU a-political constitutional structure, they actually re-affirmed its political character, because they presented it as giving real political power to the disenfranchised citizens of the Member- States. But even if one disagrees with Baudrillard’s interpretation of the simulatory role of referenda, it is clear that the ratification processes (with or without a referendum) have a take-it-or-leave-it character, which means that the ambit of any deliberative process they are associated with, is materially seriously limited from the very

¹⁷ J. Baudrillard, *op. cit.* fn. 7, p.4.

beginning. This limited deliberative character is not really compatible with the reflexivity of politics and cannot in any case exhaust the meaning of the exercise of primary constituent power.

In the absence of real constitutional politics, participation in the ECJ litigation effectively became the substitute for participation in the political process. Given, however, that participation in litigation partly relies on financial resources, it is not symmetrical to participation in the political process. In fact, the possibility of strategic use of litigation has led to the emergence of “repeat players” (usually big financial companies or individuals having at their disposal a high level of resources which enables them to undertake costly legal battles). This raises some serious issues about the biased way in which the EU constitutional framework tends to favour structurally the contribution of certain types (if not classes) of citizens. Actors of a privileged economic status have had the opportunity to influence the shaping of the EU constitutional framework more effectively than those who could not afford high legal costs. This uneven contribution at the level of procedural formation of the EU Constitutional charter has inevitably also affected its substance.

This latter point was further explored in Chapter 4. The starting point for this Chapter was the claim put forward by some theorists, according to which the EU protection of fundamental rights can counterbalance the political deficit of the Union. Arguing against this stance, I showed that due to the specific conditions of their development, fundamental rights have incorporated commodification within their inner structure and they have been conceptually subordinated to the economic objectives of the treaties.

The proliferation of what is termed “fundamental rights” in the EU has led to a trivialisation of the concept of EU fundamental rights; the term “fundamental rights” is no longer the sign for the highest rule of validation in the Community legal system, but has ended up being an empty signifier, which depending on the signified it is correlated with, may or may not be a rule of validation. This confused use of the term “fundamental rights” is further exacerbated by the fact that the common market,

being one of the objectives of the Community, has been put forward as a criterion for the concretisation of the abstract notion of “common good” and, as such, it defines the limits of the permitted restrictions to fundamental rights. This means that within the EU, fundamental rights may (and occasionally have done so) give way to unqualified aggregate utility considerations. By being balanced against and possibly overridden by the good of the common market, EU fundamental rights have ended up integrating the logic of the market into their conceptual core.

Another very important expression of the marketisation of fundamental rights is that their distribution, for a long time, was also dependent upon an economic element; namely EU fundamental rights were granted to individuals as long as they could establish some kind of economic nexus (as dictated by the economic objectives of the treaties). Until the institutionalisation of EU citizenship, the EU system made the conferral of fundamental rights dependent upon the prior participation of individuals to the market. Thus, non-participation in the market effectively translated into legal invisibility. The introduction of the EU citizenship seemed to make the presence of an economic nexus redundant. A brief analysis, however, of the relevant secondary legislation and the case-law of the ECJ showed that, although EU citizenship has indeed managed to close some of the pre-existing gaps in the area of free movement, it has not as yet broken completely its links with economic considerations.

These different aspects of marketisation compromise the conceptual coherence of EU fundamental rights to such an extent, that the use of the term “fundamental rights” becomes questionable, if not ironic. Once again, this is a case of simulated reality, in which the substance of fundamental rights is no longer present, but it still somehow retains the signs, the “external symptoms” of the real thing. The simulation of fundamental rights, which instantiates yet another case of distance between EU symbolic order and reality, is also implicated in an asymmetrical distribution of power and resources; the link between the distribution of EU fundamental rights with the participation of the individuals to the market in combination with the elevation of market freedoms to the status of fundamental rights (entailing that fundamental rights are commensurable with the values of the market) favour economically active

individuals (or companies) over other categories of citizens (e.g. unemployed, housewives, students etc). As a result of this development, the already established economic inequalities of the market are translated into codified legal inequalities. Moreover, in light of the absence of constitutional politics, the EU citizens who face this unequal treatment do not have the political power to contest the established EU constitutional order and to change their status within it.

The two facets of simulation as explored in Chapter 3 (simulation of constitutional politics) and in Chapter 4 (simulation of fundamental rights) are internally connected; one sustains and further extends the other. Furthermore, these two simulations are the building blocks for a wider simulacrum. The simulation of constitutional politics has brought about the substitution of law for politics, while the simulation of fundamental rights has been largely responsible for the substitution of economic rationality for the legal one. This double substitution of the legal for the political and of the economic for the legal amounts to the subordination of the EU concept of the political to the exigencies of the market. By doing away with the reflexivity of politics, this subordination has overstepped the boundaries of self-production of the political and has deprived the European people(s) of their right to place themselves under their own political agency, their own rule. Ultimately it is the EU economic system which has put forward its simulated other (politics) only in order to exclude it more effectively. And EU constitutionalism has been the vehicle which has facilitated the exclusion of politics. By masking ideas which are related to the material conditions of people in the EU and by converting them into neutral, objective ones, EU constitutionalism has for a long time accounted for phenomena which would otherwise prove embarrassing to the EU (a)political reality and, in doing so, it has also contributed to that (a)political reality's legitimation.

Afterword

A preliminary assessment of the new Constitution

Ignoranti quem portus petat nullus ventus suus est.
(He who knows not which port he is heading for
never finds a favourable wind).
Seneca

In the course of this thesis I raised certain objections against the current constitutional framework in the EU. My objections were based both on procedural and substantive aspects of EU constitutionalism. The argument put forward showed that the judicialisation of the constitutionalisation process in combination with the marketisation of the concept of fundamental rights has been unable to socialise European citizens into a common political culture; consequently the affective dimension of being a European citizen is underdeveloped, while the emergence of a European demos is yet to be fulfilled. In a series of sequential steps it was, thus, argued that the current constitutional structure of the EU is unable to function as a properly so called political constitution around which the citizens and the peoples of Europe could develop their allegiances at the post-national level. It was, furthermore, argued that this deficiency in terms of social cement, which is inherently connected with the incomplete political character of the current de facto EU constitution, is also implicated in the reproduction of the existing structures of power.

This is, however, a time of great excitement and fast-pacing developments for EU constitutionalism (creating equally fast-pacing Angst for PhD students researching on these issues). My so far analysis refers to the constitutional framework which is offered by the Treaties as they have been amended by successive Intergovernmental Conferences and as they have been interpreted by the ECJ. In 2001 the European Council decided to set up a Convention which would “pave the way for the next Intergovernmental Conference as broadly and as openly as possible.”¹ The declaration of Laeken identified the key issues that the Convention should work on as follows: a) simplification and reorganisation of the treaties, b) definition of

¹ Laeken Declaration of the European Council, 2002.

competences in the EU and c) democracy, transparency and efficiency in the EU. Under the section “Towards a Constitution for European Citizens”, the European Council asked whether the simplification and reorganisation of the Treaties “might not lead in the long run to the adoption of a Constitutional text in the Union.”² One year and a half later (summer 2003) the Convention on the Future of Europe produced a draft for an EU constitution (officially it was called a Constitutional Treaty). This was initially discussed and negotiated at the 2003 Intergovernmental Conference under the Italian presidency (Brussels Summit, 12-13 December), which contrary to Prodi’s hopes, failed to reach an agreement³ and continued into 2004. The discussions continued under the presidency of Ireland and the text of the new EU constitution was finally agreed upon and signed in the recently concluded IGC that took place in Brussels (16-17 June). The most difficult part of this constitutional event, the ratification of the Constitutional Treaty (subject to the turmoil of a national referendum in up to 20 of the Member States), is still ahead of us.

In this part I will very briefly assess certain aspects of the proposed Constitution and the process through which this has been produced. Given that this part refers to a process which has not been completed (the ratification process is expected to last approximately 2 years), the thoughts that will inform my analysis of the EU constitution are unavoidably tentative. In the first chapter I argued that theory must inform/precede praxis and that it cannot be viewed as the owl of Minerva which flies at dusk, after the events have taken place. I do not intend in any way to revoke my earlier proclamations in saying that the reflective stance through which one can theoretically assess a process such as the current changes of the EU constitution require some temporal distance between the event to be theorised and the theoretical evaluation of it. I am not suggesting that theory does not play a role in the actual unfolding of the constitution-making process; on the contrary, it should be in the centre of it, informing its choices. However, there is also a reflective aspect in theoretical analysis which necessarily follows the event to be reflected. The

² Annexes to the Presidency Conclusions- Laeken, 14-15 December 2001, SN 300/01 ADD1, ANNEX 1, Laeken Declaration on the Future of European Union, <http://european-convention.eu.int/pdf/LKNEN.pdf>

³ For the reasons behind this failure see fn. 4 in the Concluding preface.

reflection of the landscape into the water of a lake presupposes that the water is still; otherwise the reflection is disrupted. Trivial as this analogy may be, it evokes clearly the point I want to make.⁴ Besides, as already clarified in Chapter 3, the critical evaluation of a constitution is not a matter of textual analysis alone, but it also needs to take into consideration the particular constitutional practices which underpin it. Before the new constitution enters into force, issues of constitutional practice and constitutional ethos cannot be analysed. In fact, even after the ratification of the new Constitution, it will take some time (probably years) before one can talk about new constitutional practices.

According to the critique which has been put forward by this thesis, EU constitutionalism is faced with two major challenges. The first one is to overcome the monopolisation of the constitutional debate by certain elites (mainly ECJ and, to a certain extent, European Council) and to enhance the inclusiveness of its constitutional processes. The second challenge is for the EU to overcome the prevailing marketisation of public reason. Thus, the starting point for the assessment of the new EU constitution is to examine whether this fulfils the EU constitutional desiderata (or rather desideranda) as described above. In other words, have the recent developments addressed the pre-existing problems of the democratic/political deficit and the marketisation of the EU constitutional order?

As we saw in Chapter 3, the constitutionalisation of the EU took place in the absence of constitutional politics; it was treated as either the negotiation of a Treaty through the routes of diplomacy (Intergovernmental Conferences) or as the interpretation of this Treaty by the ECJ; the specifically political input was limited and the constitutional deliberative moment remained elusive. The limitations of the IGC method, which follows the mechanisms of international treaty negotiation controlled by national governments, with no publicity of their workings and with a limited input

⁴ A more sophisticated version of the same argument is given by Seyla Benhabib, who maintains that there is an inevitable gap between political action and political reflection, as the two are “non simultaneous simultaneities.”

from civil society,⁵ became apparent especially during the Nice Summit, which, due to the oppositional divisions among the Member States and their respective threats of vetoes, failed to produce answers to the questions it was confronted with (mainly questions regarding the distribution of shares of power and votes). This prompted national governments to turn to the convention model that had been successfully tested in 2000 in the preparation of the EU Charter of Fundamental Rights.⁶ The Convention, the novel feature of EU constitution-making introduces a preparatory, deliberative phase which precedes the usual negotiating decision-making process of the IGCs⁷ (it prepares a document which is then submitted to the negotiators of the IGC) and engages a significantly wider range of actors than those involved in the IGCs.⁸ The important feature of the Convention is that it opens up constitutional politics to a deliberative process without, however, relinquishing the power of the national governments, as the outcome of the deliberative phase is not binding on the IGC.

There is a rapidly growing bibliography exploring different aspects of this new method of constitution building.⁹ The convention method has been analysed in terms

⁵ According to D. Dinan, "Institutions and Governance 2001-2002: debating the EU's future", 40 (2002) *Journal of Common Market Studies*, pp.29-43 the IGC method "fed the democratic deficit in the broadest sense of the word".

⁶ Different actors embraced the convention model for different reasons. The small states favoured the convention model on the basis that it could offer a more egalitarian forum. The large states such as France and the UK welcomed the involvement of representatives from their national parliaments into the constitution making process, while some of the EU institutions (EP, Commission) hoped that the Convention approach would enable them to play a more influential role in the shaping of its outcomes.

⁷ The preparatory work done by the Convention was until recently carried out by ad hoc Committees, usually small groups of diplomats working together without any interaction with civil society and without any public scrutiny of their work.

⁸ The Convention on the Future of Europe comprised 105 members: a three-member Presidency, 15 representatives of the national governments, 39 representatives from the national parliaments, 39 representatives from the 13 accession states (one government representative and two parliamentary ones), 16 representatives of the European parliament, 2 representatives of the Commission and 13 observers (6 from the Committee of the Regions, 3 from the Economic and Social Committee, 3 from the Social partners and 1 from the European Ombudsman.

⁹ C. Closa, "Improving EU Constitutional Politics? A preliminary assessment of the Convention", *Constitutionalism Web-Papers*, Con WEB No. 1/2003, <http://les1.man.ac.uk/conweb>, D. Beach, "Towards a new method of constitutional bargaining? The role and impact of EU institutions in the IGC and Convention-method of Treaty reform", *Paper presented to Federal Trust Workshop "From the Convention to the IGC"*, London , 10-11 July 2003, A. Follesdal, "Drafting a European Constitution- Challenges and opportunities", *Constitutionalism Web-papers*, ConWEB No. 4/2002, <http://les1.man.ac.uk/conweb>, L. Hoffmann, "The Convention on the Future of Europe-Thoughts on the Convention-Model", *Jean Monnet Working Paper 11/02*, New York School of Law, 2002, K. Lenaerts and M. Desomer, "New models of Constitution-making in Europe: the quest for legitimacy",

of its representativeness,¹⁰ its autonomy,¹¹ the participation of civil society¹² etc. All the analyses agree that the convention process compared with constitutional transformation by IGC (without the preparation offered by a convention) or by judicial judgements clearly signifies an improvement. The convention model, with all its weaknesses,¹³ has made EU constitutional politics significantly more inclusive, more transparent and more democratic. Having said that, however, one needs to point out that the significantly more open and deliberative process offered by the convention has failed to engage the attention of the disempowered EU citizens. The Convention's appeal to civil society has broadened the scope of those consulted, but should not be confused with the actual participation of the citizens. As Carlos Closa observes, "the European citizens did not take part in the exercise in any great

39 (2002) *Common Market Law Review*, pp.1217-1253, A. Manzella "The Convention as a way of bridging the EU's democratic deficit", 1 (2002) *The International Spectator*, A. Maurer, "Less bargaining- more deliberation: the Convention-method for enhancing EU democracy", 1 (2003) *Internationale Politik und Gesellschaft*, pp. 167-190, J. Shaw, "Process, Responsibility and Inclusion in EU Constitutionalism: the challenge for the Convention on the future of the Union", *Federal Trust Papers on EU constitutionalism* www.fedtrust.co.uk/EU_constitution, updated version, September 2002, J. Shaw, P. Magnette, L. Hoffmann and A. Verges Bausil, *The Convention on the Future of the Union: Working towards an EU Constitution*, London: federal Trust/Kogan page, 2003.

¹⁰ The introduction of the Convention-method signifies a change in the negotiating context of constitutional reform as it changes the power of different EU institutions; in comparison to IGCs which rely almost exclusively on the input of the Council and the Council Secretariat, the convention-method strengthens the negotiating power of the European Parliament and the Commission.

¹¹ As far as the selection process of the conventionnels is concerned, each body was free to choose its own appointment procedures. Depending on the selection process through which the different conventionnels were chosen, they enjoyed a different degree of autonomy vis a vis the body they represented (e.g. different Member States have diverse parliamentary traditions which require a different level of control over their MPs, national governments' representatives are subjected to instructions etc). In the absence of any rules regarding the status of the conventionneers vis a vis the institutions that nominated them, the Conventionneers were free to express their personal views and were not expected to represent (not in the strict sense of the word) the institutional views of the nominating body.

¹² The Convention on the Future of Europe set up a Forum, a network of organizations which received regular updates on the proceedings of the Convention. In terms of accessibility, the only requirement for participation in the forum was the submission of a written contribution. Later on the Convention organised a plenary session with civil society (207 groups participated in the plenary session).

¹³ In terms of weaknesses of representation, on the one hand the participation of the candidate countries was not equal to that of the other participants (they were not able to overturn any emerging consensus among the already existing Member-States), on the other hand, as a result of the diffused nominating system, which naturally lacked any unifying selection criteria, the final composition of the Convention was characterised by a very low representation of women (17 out of 105 members) and of minorities (only 1 non-white member). The organisational autonomy of the Convention as a whole was seriously limited by the fact that its President and the members of the praesidium were appointed by an external body, the European Council. As far as the participation of the civil society is concerned, there was no excitement in the exchanges between the Convention and the representatives of civil society. See J. Scott, "The culture of constitution making? "Listening" at the Convention on the Future of Europe", 3 (2002) *German Law Journal*, <http://www.germanlawjournal.com>

numbers.”¹⁴ Similarly Eurobarometre polls showed that only a small fragment of the European citizenry was aware of the existence and the work of the Convention. This is due to the fact that with few exceptions (e.g. *Le Monde*) the media did not cover in any depth the issues that were discussed by the convention and at the same time the convention itself did not have a specific “communicative strategy” that would allow it to connect with the citizenry.

According to Bruce Ackerman, as we saw in Chapter 3, a constitutional moment is preceded by a period of mobilised deliberation during which there is an energetic exchange of public views and “serious reflection on the country’s future”. A constitutional moment is an episode of constitutional politics which is not only distinguished from ordinary politics, but which “also alters the framework of ordinary politics within which it unfolds”. Hence, for Ackerman, a properly so-called constitutional moment, on the one hand, presupposes mobilisation of the people, while, on the other hand, it marks a rapture in the existing constitutional body, it affects the “macropolitical means and ends” of that polity.¹⁵

The making of the new EU constitution has so far failed to penetrate popular consciousness and to raise the constitutional awareness of the citizens. The Convention method presented as “the golden bullet that is able to blast a hole in the Gordian knot which blocks communication between the Union and the citizens that it wants to be close to”¹⁶ seems to have missed its target. The knot is still in its place. Thus, according to Ackerman’s approach, the recent constitutional development in the EU would not qualify as a constitutional moment. Neil Walker (among others), however, insists that within the EU context with all the problems of dual legitimacy that exist at the supranational level, one needs to adopt a more expansive conceptualisation of what is properly called a constitutional moment. His suggestion is that instead of focusing on popular mobilisation as the defining property of a

¹⁴ *ibid.*, p. 16.

¹⁵ As interpreted by N. Walker, “After the Constitutional Moment”, *The Federal Trust for Education and Research, Online Paper 32/03*, November 2003, p.3.

¹⁶ U. Halltern, “Pathos and patina: the failure and promise of constitutionalism in the European Imagination”, 9 (2003) *European Law Journal*, p. 38.

constitutional moment, one should concentrate on the qualitative changes put forward by the amending process.¹⁷

According to the mandate of the European Council, the outcome of the Convention should be a document that would either suggest the different points of view on the issues to be discussed (also suggesting the degree of consensus) or take the form of recommendations if it achieved some consensus. In any case it was clear from the very beginning that the outcome of the Convention would not be binding on the IGC that would follow it. Despite this lack of mandatory character, the Convention, under the guidance of its Praesidium, oriented itself to a consensus-based process that would lead to the submission of a draft Constitution of Europe. Theoretical questions regarding the “raison d’etre” and the finality¹⁸ of the EU were systematically avoided as it was expected that these would be too controversial to allow the emergence of the sought after consensus. As a result, the new EU Constitution (based on the draft proposed by the Convention) does not break in any significant way with the EU constitutional past; it is more about a reflective consolidation of our *acquis constitutionnel*, a reorganisation and distillation of the already existing constitutional practices, rather than about policy change or redefinition of means and ends. Improvements have certainly been put forward, but in the end incremental tinkering and marginal adjustment were favoured over a more radical re-evaluation of our constitutional framework which would actually open past policy choices to public scrutiny. Thus, the end-result vindicates those who from the very beginning presented the new Constitution as “a tidying up exercise”,¹⁹ aiming at overcoming supposed weaknesses of popular perception rather than addressing actual problems of the EU project.

¹⁷ Op. cit. fn. 15.

¹⁸ On the issue of finality see B. Crum, “Towards finality? A preliminary Assessment of the achievements of the European Convention”, in A. Verdun and O. Croci (eds.) *Institutional and Policy-Making Challenges to the European Union in the Wake of Enlargement*, Manchester: Manchester University Press, 2003 and S. Weatherill, “Is constitutional finality feasible or desirable? On the cases for European Constitutionalism and a European Constitution”, *Constitutionalism Web-papers*, Con WEB No. 7/2002 at <http://les1.man.ac.uk/conweb>.

¹⁹ P. Hain, “The Future of Europe: a Union of Sovereign states”, Speech, Adjournment Debate, Westminster Hall, London, 20 March.

The problem of the marketisation of the EU constitutional order, as we saw in Chapter 4, is inextricably connected with the finality of the European project and more specifically with its economic focus. Since the official rhetoric of the EU has not at any point acknowledged the existence of the problematic relationship between means and ends in the EU project, it is only natural in a way that the new EU constitution does not actively address this problem. The incorporation of the EU Charter of Fundamental Rights into the Constitutional Treaty is undoubtedly a very welcome development as it turns the Charter into a fully binding legal document and, by doing so it also puts an end to a number of uncertainties which surrounded the protection of fundamental rights as part of the general principles of law. Article II-52 (2) of the Constitution, on the other hand, clearly stipulates that rights recognised by the Charter should be exercised in accordance with the rules of the EU Treaties. This brings to the fore the possibility of their being balanced against the Common market and the other economic objectives. In the end, in cases of overlap between the Charter and the rest of the Constitution, it will be, once again, the task of the ECJ to determine the scope of rights; its task will be “to create synergies between the wider and already embedded *acquis* which it has developed in concordance with the existing Treaties and the new constitutional settlement.”²⁰ It remains to be seen, whether the actual interpretation of fundamental rights and their balancing against the other objectives of the Union will resist marketisation once the constitution comes into force.

Article I- 7(2) of the Constitutional treaty declaring that the Union shall seek accession to the ECHR is also a very positive development; the ECHR only allows those restrictions to fundamental rights which are necessary in a democratic society and in a democratic society market efficiency is only one of the several criteria employed in decision-making processes. So, *prima facie*, one could optimistically anticipate that the marketisation of EU rights may be reversed. Before we get carried away, however, we should remind ourselves that the ECHR recognises the existence of a margin of appreciation which enables different polities to give differing interpretations to the same universal rights. As discussed in Chapter 4, this is a

²⁰ J. Shaw, “What’s in a convention? Process and substance in the project of European constitution-

healthy admission of the inevitable cultural contextualisation of the universal meaning of rights. Hence, it cannot be excluded that even after the ratification of the Constitutional treaty, or even after the accession of the EU to the ECHR, the marketisation of the EU conception of fundamental rights may not be affected; it may in fact be acknowledged that within the EU legal order the focal point is the market, that this choice has been the outcome of the appropriate democratic decision-making processes and that it can, therefore, justify a more privileged role of market related criteria in the definition of scope and meaning of rights.

Given that the new Constitution has so far not penetrated popular consciousness and has not (at least not *prima facie*) affected the macropolitical means and ends of the EU, some have reacted to it with cynical pessimism, viewing it as yet another exercise in constitutional inflation; a device of rhetorical discourse aiming at emulating the profundity of political energy usually associated with “constitutional moments”. According to this approach, the EU constitution is nothing more than an expression of consumer aesthetics; its signing is an attempt of the Union “to de-stigmatise itself and to neutralise our distrust.”²¹ Ulrich Haltern maintains that the aesthetics of consumerism (and for him it is clear that the EU is about a Common market and, thus, about consumerism) have incorporated the citizens’ deep-seated distrust into their marketing techniques; one such technique, a symbolic form of resistance to consumerism is the signing of the EU Charter of Fundamental Rights or the Constitution, both appearing as providing a moral and ethical foundation for the Union. By proclaiming a catalogue of rights or a Constitution, the Union “adorns itself with the embellishments of the fountains of democracy.”²² In his analysis of the aesthetics of consumerism, although not explicitly referring to Baudrillard, Haltern seems to be suggesting that both the Charter and the Constitution are simulacra; presenting themselves as promoting democracy, while in reality their sole *raison d’être* is to create the impressions, the signs of democracy, which will enable the a-

building”, 89 Political Science Series, Institute for Advanced Studies, Vienna, June 2003, p. 20.

²¹ U. Haltern, *op.cit.* fn. 16, p.35.

²² *ibid.*, p.36.

political EU system to safely reproduce itself.²³ The Charter and the Constitution as expressions of the European iconography are designed “to inject pathos”, that is stylishly domesticated passion, into the frozen and rigid world of EU consumerism, the faceless Brussels bureaucracy. At the end of the day, all these grandiose constitutional phenomena provide us with nothing more than “an emotional cushion, a form of camouflage, a credible disguise for a culture that refuses to admit the truth about itself.”²⁴

On the other hand, Neil Walker reminds us that both the viability and the success of the recent constitutional development as a community mobilising moment can only be assessed in hindsight. He insists that the constitutional process may not expire with the signing and the ratification of the Constitutional treaty and that this explicit constitutional self-endorsement with all its symbolic resonance may act as a catalyst for the deepening of the EU as a political order. According to this approach, the surplus constitutional value of the new formal constitution (as opposed to the existing pastiche of Treaties) lies in its potentially constructive role in the emergence of a political (id)entity; it is, thus, connected with its capacity to transport symbolic meaning in the future and its potential to be more than the sum of its present parts.²⁵

The new EU constitution does not fulfil for the time being the constitutional “desideranda” of the Union (simply because in the absence of a debate regarding the *raison d’être* of the Union these never transformed into “desiderata”). Haltern’s depiction of the constitution as “a credible disguise for a culture that refuses to admit the truth about itself”²⁶ is probably correct. I will agree, however, with Walker that “in a climate of an as yet unpredictable environment”²⁷ for the reception (ratification, interpretation and application) of the constitution, a conditional assessment of it may be the only plausibly available. I would therefore like to give this new Constitution the benefit of a doubt and remain ambivalent towards it. I reserve some hopes (not

²³ Interestingly enough, Haltern believes that it is wrong to view consumerism as a social pathology that can be played out against “culture” and he suggests that if the EU wants to be close to its citizens, it should openly embrace trade and consumption, abandoning all political rhetoric.

²⁴ Op.cit.fn.16, p.33.

²⁵ N. Walker, op. cit. fn. 15, p.12.

²⁶ op. cit. fn.24.

necessarily rationally founded) regarding the mobilisation of the European citizenry during and after the ratification process and the changes in constitutional ethos that the reception of the new document may bring about.

In any case, if this first formal constitutional text of the EU is ever to become the point of reference for the emergence of an EU political culture, it is essential that the constitutional debate goes on, that it involves not only a wide array of institutional actors, but also the EU citizenry and that it finds the courage to confront our “mis-remembered” past, acknowledging openly the problems of our *acquis constitutionnel*. We can certainly not un-live our past, but we can, at least, try to engage with it and to reconstitute its meaning. And by reconstituting its meaning we can open the way for the reflexive constitution of the EU as a political entity in the future.

²⁷ N. Walker, *op. cit.* fn. 15, p.12.

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