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## **Constitutionalism Web-Papers, ConWEB No. 2/2007**

### **The Function of a European Basic Law: a Question of Legitimacy**

Tor-Inge Harbo<sup>1</sup>

**Abstract:** This paper addresses the function of a European basic law. The author argues that if the basis of the original legitimising act of a basic law is weak, or even non-existing, a need arises for succeeding or continuous legitimising acts. The concept of continuous legitimation implies that the basic law has to be legitimised through the ongoing political consensus formation giving the basic law a dynamic nature. Furthermore, the need for continual legitimation juxtaposed with a dynamic nature of a basic law obstructs the idea of a disabling function of a basic law. The author concludes that the dynamic nature of the European basic law and its corresponding concept of legitimacy – ever forming and reforming overlapping consensuses among the decision-making actors in low as in high politics – can only underpin an enabling European basic law.

**Keywords:** democracy, legitimacy, sovereignty, constitutional change, constitution for Europe

#### **Introduction<sup>2</sup>**

The discussion as to whether the European Union (EU) has a constitution, rather than a treaty, as its basic law or whether it could have one, and if it could, whether it needs one, has been occupying political as well as legal scientists at least since the adoption of the Maastricht Treaty (TEU). The Treaty has by many been perceived as one of several constitutional moments of the European Community transforming itself from an

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economical community into a political union. The constitutionalisation process<sup>3</sup> of the EC Treaties has found its temporary consolidation in a Treaty establishing a constitution for the European Union (Constitutional Treaty - CT) – a hybrid with features of a constitution as well as a treaty. In the wake of the French and Dutch rejection of the Constitutional Treaty, politicians and academics alike have been preoccupied with the question of its (democratic) legitimacy.

The object of this paper is to deepen the on-going debate by examining the function a European basic law (be it the Constitutional Treaty or a “mini-treaty”) will, or rather can, have.<sup>4</sup> Is it a basic law that mainly draws up the competences of the governmental institutions, or is its primary effect to impose restraints on the political institutions policymaking ability? More concretely, and in connection to the EU, the question to be discussed in this paper is whether the legal framework of the EU limits or enables Community policies, i.e. whether institutions are given competences to pursue policies which in most cases would imply the further integration of the European Union, or not. My hypothesis is that if the basis of the original legitimising act of a basic law is weak, or even non-existing, a need arises for succeeding or continuous legitimising acts. The concept of continuous legitimation implies that the basic law has to be legitimised through the ongoing political consensus formation, exposing it to changes reflected in day-to-day political decision-making. The need for continual legitimation juxtaposed with a dynamic nature of a basic law obstructs the idea of a disabling function of a basic law. The reason for this is that a restraining function presupposes that the constitution is of a static nature, and in addition that it is based on an original legitimising act of a higher order. A dynamic nature of the basic law legitimised through political processes of day-to-day – or if we stick to Ackerman’s terminology<sup>5</sup> – low politics could, on the contrary, support an enabling function.

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<sup>3</sup> Mancini, Federico *Democracy and Constitutionalism in the EU* (Oxford: Hart, 2006).

<sup>4</sup> On the European Council meeting in Berlin in March 2007 it was suggested to abandon the reference to a “constitution” in the title of the document.

<sup>5</sup> The concepts of high and low politics can be found in Ackerman, Bruce *We the People* (Cambridge: Harvard University Press 1991).

In the following, I will briefly discuss the constitutionalisation process of the EU wherein the pending question, in my opinion, is that of legitimacy. The legitimacy question, in turn, at least if we are to take the ideas of constitutionalism seriously, leads us to a discussion of the *pouvoir constituant* and to the idea of constitutional moments and constitutional change. These considerations, finally, lead back to the question as to which function the Constitutional Treaty has, and could have.

### **A European Basic Law**

Clearly, the treaties that provide the legal basis of the European Community are treaties of international law, although, it can be argued that international treaties establishing an international (or for that sake a regional) organisation – as opposed to traditional bilateral or multilateral treaties – do have some constitutional characteristics. The question has been raised as to whether international organisations' law is part of international law, or whether it has created a new category of law between a treaty and a constitution.<sup>6</sup> The so-called constitutionalisation of international treaties is what the European Court of Justice (ECJ) had in mind when stating in *Les Verts* that the founding treaties of the Community are its “Basic Constitutional Charter”.<sup>7</sup>

One could claim that the ECJ through its jurisprudence has itself contributed significantly to the so-called constitutionalisation of the EC Treaties. In *Van Gend & Loos*<sup>8</sup>, the Court stated that the Treaty provisions were to have “direct effect” vis-à-vis individuals. The Court concluded that the Treaties, although they did not have the qualities that we would attribute to a traditional constitution, nevertheless, had created a “new legal order of international law” in which “independently of the legislation of Member States, community law (...) not only imposed obligations on individuals but is also intended to

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<sup>6</sup> For example Shaw, Malcolm N. *International Law* (Cambridge: Cambridge University Press 1997, 4th edition).

<sup>7</sup> Case 294/83 *Les Verts-Parti Ecologiste v Parliament* [1986] ECR 1339.

<sup>8</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belasting* [1963] ECR 1.

confer upon them rights which become part of their legal heritage”.<sup>9</sup> As opposed to the original rationality of international law, which only imposes rights and duties on the sovereign contracting states, the EC Treaties, according to the judgement, confer rights directly upon individuals, clearly a feature of a (national) constitution rather than an (international) treaty. However, aspects of a vertical approach are not novel in the field of international law. What the ECJ refers to as direct effect does not necessarily imply something more than a monistic approach to international law would. And, regardless of the approach to international law a country has chosen – a monistic or dualistic – international customary law may nevertheless have direct effect upon individuals.<sup>10</sup>

The claimed particularity of the EC founding Treaties was restated in *Costa v ENEL*<sup>11</sup> in which the ECJ established the supremacy<sup>12</sup> of the EU law:

By creating a Community of unlimited duration ... the Member States have limited their sovereign rights, albeit in limited fields, and thus created a body of law which binds both their nationals and themselves.<sup>13</sup>

One could, however, argue that the judges of the ECJ hardly had any choice. Without the judgment of *Costa v ENEL*, (but also that of *Van Gend Loos*) Community law would within a short period of time have been reduced to a paper tiger since there would not have been any obligation for the Member States to abide by it in the case of conflict with domestic law. The principles of supremacy and direct effect that have by many been celebrated as the factors that have contributed most significantly to the

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<sup>9</sup> By “constitutionalisation” in this case one clearly has in mind the dichotomy of international law – constitutional law. One could, however, argue that to the degree constitutionalism concerns the limitation of public power, the principles of direct effect and supremacy has not contributed to the constitutionalisation of the Community, since these principles clearly reinforce Community powers rather than constraining them. However, constitutionalism can contain both the enablement and the constraining of public power, see below.

<sup>10</sup> On *jus cogens* direct applicability in Norwegian internal law see the Klinge ruling, Rt. 1946: 198.

<sup>11</sup> Case 6/64 *Costa v. ENEL* [1964] ECR 585.

<sup>12</sup> Note the difference between primacy (*Anwendungsvorrang*) and supremacy (*Geltungsvorrang*). It has been argued by German scholars that EC law is primary and not supreme to national law, see von Bogdandy, Armin “Constitutional Principles” in von Bogdandy, Armin and Bast, Jürgen (eds.), *Principles of European Constitutional Law* (Oxford: Hart 2006) pp. 3-52.

<sup>13</sup> Case *Costa v ENEL* note 11 above, p. 593.

constitutionalisation of the EC Treaties are merely features that any efficient-working international organisation (of which, however, there are not very many today) would have to possess.

All international cooperation will have the effect of limiting some aspects of a nation state's sovereignty. However, sovereignty is not a monolithic or holistic concept but must rather be seen as a bundle of many sovereign rights. Therefore, what counts in assessing whether a state's sovereignty has been limited or not is whether the nation state, in entering into an international arrangement, also gains some sovereign rights, i.e. whether one could say that its "net-sovereignty", i.e. the sum of the rights lost and gained by international cooperation, increases or decreases. It is, for example, clear that countries would have to cooperate in order to solve the global warming problem. The cooperation would imply the pooling of sovereign decision-making on environmental issues to an international organisation, which, in turn, would make binding decisions for all countries, for example on the reduction of CO<sub>2</sub> emissions. Only when all major emitting countries abide by the decision to reduce emissions would it be possible to avert climate change with potentially local catastrophic consequences, such as a rising sea-level. However, sovereignty perceived as a bundle of rights implies that one has to accept a more utilitarian approach to the concept, which would imply downplaying the importance of participation in the decision-making procedures and rather focusing on the output of the decision-making process being in conformity with the state's interest. The expectation of an overall net increase in sovereignty – perceived one way or the other – is obviously the reason why a nation state would enter into an international cooperation in the first place. Whereas it is clear that the European Community, after the establishment of the Treaties, does have the competences to make law and that this law-making implies that Member States and their respective citizens are bound by legal norms without their express consent, this does not mean that the EU represented by its supranational institutions can make and unmake or revise the Treaties. The Member States remain the "masters of the Treaties" and, according to Art. 48 EC, have the competences to change them.

However, what some would perceive as a legal interpretation others would view as judicial activism and law-making. It could be claimed that the reading of human rights into the original Treaties provides an example of an original act of constitutional law, i.e. it could be an indication of the existence of *Kompetenz-Kompetenz* located at the supranational level of the Community. Having first rejected that Human Rights were a part of the Treaties<sup>14</sup>, the ECJ in *Stauder* held, albeit in an *obiter dictum*, that "fundamental human rights [were] enshrined in the general principles of Community law and protected by the Court".<sup>15</sup> This approach has been followed, also in the *ratio decidendis*, by the Court ever since.<sup>16</sup> True, this move by the ECJ was not controversial among the Treaty parties, but this is not the point. It is difficult to interpret the inclusion of human rights into the Treaties as anything other than an act of constitution-making. Provided that this is indeed the case, the next question would have to be: What could legitimate this act of constitution-making beyond the notion of tacit consent? Put in terms of a more general question: how are constitutions legitimised?

There are alternative ways in which constitutional provisions can be constituted. One of them is through so-called customary constitutional law, which, in short could be described as customary law with a constitutional content.<sup>17</sup> Customary constitutional law does not have to be judge-made law, merely a result of judicial activism, as this phenomenon has often been referred to in the case of the EU. Customary constitutional law has a stronger basis of authority and legitimacy since it is not only a result of judicial activism but rather the result of an overlapping consensus formed by a great variety of societal actors who actively or passively participate in the formation and consolidation of

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<sup>14</sup> Cases 1/58 *Stork v. High Authority* [1959] ECR 17; 36-38 and 40/59 *Geitling v. High Authority* [1960] ECR 423; 40/64 *Sgarlata and others v. Commission* [1965] ECR 215.

<sup>15</sup> Cases 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

<sup>16</sup> Cases 11/70 *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, 4/73 *Nold v. Commission* [1974] ECR 491, 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

<sup>17</sup> A combination of the Norwegian Basic Law (*Grunnlov*) being perceived as a national symbol (in addition to being positive law) and complicated revision procedures has led to the consequence that customary constitutional law still forms an important part of the Norwegian constitution.

a practice of constitutional nature.<sup>18</sup> In the case of the EC/EU this would imply the involvement of supranational as well as intergovernmental institutions, but also other actors informing these institutions.

As international customary law, constitutional customary law is dependent on certain conditions being fulfilled for its generation, namely that the practice is unitary, that it has taken place over a certain time-span, and that it is believed to be legally binding (*opinio juris*) by those practicing it. In order for it to be of a constitutional order the custom would have to be of constitutional content. Catalogues of human rights form important part of many Western constitutions.

But this is the exception that confirms the main rule, which is that modern constitutions are constituted and revised through democratic processes, normatively conceptualised through the *pouvoir constituant* and institutionally through a democratically elected assembly – a parliament. The problem is, however, that the EU does not have a *pouvoir constituant*, at least not in a democratically demanding sense. One of the reasons for this situation is believed to be the lack of a European people.<sup>19</sup> Furthermore, it has forcefully been argued that the EU lacks a proper democratic institution – a parliament, which, elected according to democratic principles, in turn could form the basis of a European democratic *pouvoir constituant*.<sup>20</sup>

### **Legitimising a European Basic Law**

The question of democratic legitimation of a European basic law is obviously its Achilles heel, at least if one holds that the constitutional language that infuses the political as well

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<sup>18</sup> Tully, James in *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press 1995) p. 59 points out that the Greek term of constitutional law, *nomos*, means both what is agreed upon by the people and what is customary, see Wiener, Antje "Soft institutions" in *ibid.*; von Bogdandy and Bast note 12, pp. 419-449 on the application of the Greek dual concept of constitutional law – what she refers to as organisational and cultural practices – in case of the EU.

<sup>19</sup> It has been argued that the Member States constitute a "pouvoir constituant sans peuple".

<sup>20</sup> See, for example, Jürgen Habermas, note 31 below.



as academic discourse is more than about semantics.<sup>21</sup> In short, the argument against the existence of a European constitution runs as follows: since there is no European people (*nation* or *Volk*), there cannot be a European state; since there is no European *demos* – only the *demos* of the Member States – there can be no European democracy; without a European state and a European democracy, a European constitution appears plainly inconceivable. According to this view, any (quasi)constitutional arrangement which would be created without the existence of a people would be an *Akt der Fremdbestimmung* (heteronomous European law), rather than a democratically legitimate *Akt der Selbstbestimmung* (autonomous European law).<sup>22</sup>

It is too simple to dismiss a constitution's link to a state polity as well as to the principle of democracy as merely historical curiosities. There is a conceptual link between these phenomena that cannot be disregarded.<sup>23</sup> However, the state polity is, it has been revealed, a dynamic concept, and democracy has, through history, been given different interpretations. Although one sticks to the theory of an intrinsic link between constitution, democracy and state, these three concepts can themselves be interpreted in so many different ways that the connection between them does not have to hinder a pragmatic approach when attempting to find a way in which a European basic law could be democratically legitimised.<sup>24</sup>

Democratic legitimacy, for example, is not only about democratic decision-making procedures in the form of elections – input. Democratic legitimacy is also about results –

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<sup>21</sup> Löwenstein, Karl in Möllers, Christoph "Pouvoir Constituant – Constitution – Constitutionnalisation" in *ibid.* von Bogdandy and Bast, note 12 above, pp. 183-126 at 226.

<sup>22</sup> Grimm, Dieter "Verfassung – Verfassungsvertrag – Vertrag über eine Verfassung" in Beaud, Olivier; Pernice, Ingolf et al. (eds.) *L'Europe en voie de Constitution. Pour un bilan critique des travaux de la Convention* (Bruxelles: Brylant 2004) pp. 279-287 at pp. 282-3.

<sup>23</sup> Others would claim that constitutionalism can be seen as a mobile set of ideas, equally at home in non-state as state settings, see for example, Shaw, Jo and Wiener, Antje "The paradox of the European Polity" in: Green Cowles, M. and Smith, A. (eds.) *State of the European Union 5: Risk, Reform, Resistance and Revival* (Oxford: Oxford University Press 2000).

<sup>24</sup> On this problem see, for example, Walker, Neil "Constitutionalism and the Problem of Translation" in: Weiler and Wind *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2004) pp. 27-54.

output.<sup>25</sup> An international organisation traditionally achieves more of its democratic legitimacy through producing results than through democratic decision-making procedures. There are strong indications that this is the case for the EU as well: what the European citizens want is, it first of all economic security. The discussion about democratic procedures we are led to believe is first of all of interest to European federalists, European parliamentarians and the academic elite.

It has, nevertheless, been claimed that the constitutionalisation of the EC-Treaties – in the sense of juridification without democratic politics – has in itself increased the legitimacy of European Law.<sup>26</sup> It could be questioned whether legitimacy deriving from the rationality of law, or for that sake the rationality of the free market will suffice in legitimising the EU democratically. True, both the rule of law, and the rationality of the market economic system underpin the idea of autonomous citizens, which obviously also is a prerequisite for the active participation in the forming of democratic politics, at least if one perceives self-determination in an individual rather than a collective sense.<sup>27</sup> It has, however, been argued convincingly that any political agenda that formulates politics beyond a libertarian minimum would demand cooperation between the citizens of another quality than that of the actors in a market place. The formulation of policies of redistribution, for example, clearly requires a common idea about the need for such a policy with a basis in a feeling of solidarity between the citizens.<sup>28</sup> After all, redistributive policies would necessarily have to imply that some individuals have to give up part of their wealth for the benefit of their more needy brethren. One could hardly claim that the EU, despite its redistributive and social policies, has exceeded politics of a libertarian minimum. The EU budget, which forms the financial basis of the redistributive policies of the EU, is merely around one per cent of the respective Member States'

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<sup>25</sup> Scharpf, Fritz *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press 1999)

<sup>26</sup> Ibid. Möllers, Christoph in von Bogdandy, Armin and Bast, Jürgen note 21 above, pp. 220.

<sup>27</sup> Zulegg, Manfred "The Advantages of the European Constitution – A German Perspective" in: ibid. von Bogdandy, Armin and Bast, Jürgen note 12 above, pp. 803-25 at 812.

<sup>28</sup> Ulrich K. Preuss refers in this case to Karl Deutsch's notion of *Solidaritätsgemeinschaft* as opposed to *Transformationsgemeinschaft*; see Preuss, Ulrich K. "Europa als politische Gemeinschaft" in: Schuppert, Gunnar Folke; Pernice, Ingolf; Haltern, Ulrich (eds.) *Europawissenschaft* (Baden-Baden: Nomos 2005). Also see the argument developed by Habermas, Jürgen (1998) *Die Postnationale Konstellation: Politische Essays* (Frankfurt a.M: Suhrkamp 1998).

budgets and the redistributive policies do not even amount to half of this total budget. Although the social aspects of cooperation are underlined in the Constitutional Treaty (CT) – according to article I-2 CT justice, solidarity and non-discrimination are defining features of the European society, and furthermore, article I-3 (3) (2) CT commits the Union to pursuing the objective of social justice – this does not necessarily imply a quantum leap towards a social Europe.

Whereas many would claim that democratic legitimacy would have to be found or originate in a sociological fact, typically a nation or a people,<sup>29</sup> or for that matter a European society,<sup>30</sup> or at least a common European public sphere,<sup>31</sup> clearly democratic legitimation could also be sought in a political process. Political processes do not necessarily presuppose the existence of an idealised European public sphere. They provide merely open decision-making procedures in which individuals and groups of individuals have free access to information as well as a right to voice their opinions and thus a possibility to influence the decision-makers<sup>32</sup> before the decisions are taken. Provided open channels of information and participation decision-making would form the

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<sup>29</sup> See the so-called *Maastricht Urteil* by *Bundesverfassungsgericht* 1989, 155.

<sup>30</sup> This is asserted in Art. I-2 CT.

<sup>31</sup> Jürgen Habermas' deliberative democratic model, for example, requires a common public sphere. Habermas argues himself for the existence of such a "European Public sphere" in "Remarks on Dieter Grimm's: Does Europe Need a Constitution?" in *European Law Journal* 1995, Vol. 1, No. 3, pp. 303-7. However, most scholars would deny the existence of a European public sphere; see for example Peters, Bernard et. al. "Die Transnationalisierung von Öffentlichkeit am Beispiel der Europäischen Union" in Leibfried, Stephan und Zürn, Michael (Eds.), *Transformationen des Staates* (Frankfurt a.M: Suhrkamp 2006) pp. 230-61.

<sup>32</sup> Dehousse, Renaud has suggested something similar in: "Beyond Representative Democracy: Constitutionalism in a Polycentric Polity" in: Weiler, Joseph and Wind, Marlene (eds.) *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press 2003) pp. 135-156.

basis of political consensus or “overlapping consensus”<sup>33</sup> between a *pluriverse* of actors taking part in the decision-making process.<sup>34</sup>

For there are different ways in which law can originate in a democratic, legitimate way. On the one hand, we have the hierarchical law regime, which includes a constitution and its legitimatising basis of a unitary *pouvoir constituant* inspired by the universalism of the enlightenment. The constituting power can, however, have different sociological bases. Whereas the constituting power according to the theory of Emmanuel Sieyès was based in the political French *nation*, it could be held that the German constituting power was based in the Herderian cultural (ethnic) concept of the German *Volk* and, finally, the (historical) American in the pluralistic concept of *We the people*. However, none of these different sociological bases of the constituting power can escape the concept of the one ultimate source of democratic constitutional authority – the Kelsenian *Grundnorm* combined with the Schmittian or Jacobine concept of democracy – as found within the nation state. This fact makes the traditional concept of the constituting power, but also the concept of a constitution, difficult to apply in the case of the European Union.

On the other hand, there is the (social) contract which is a product of a dialectical process between equals, but at the same time in many respects (ethnical, cultural, linguistic) different parties which able them to unite and at the same time preserve their particularism. The glue that binds the numerous Madisonian factions together is not agreement on substantial values, but rather an agreement (pronounced or tacit) on

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<sup>33</sup> This is John Rawls’ concept; see his *Political Liberalism* (New York: Columbia University Press 1993). The overlapping consensus might ideally be referred to as a deliberative process, although it in reality nevertheless also could be a product of a bargaining process, see Harbo, Tor-Inge *Legitimising a European Constitution: a Limited, Pluralistic and Efficient Democratic Model for the European Union* (Baden-Baden: Nomos 2007) p. 85.

<sup>34</sup> See for example Fritz Scharpf “Introduction: The Problem Solving Capacity of Multi-Level Governance”, *JEPP* 1997, p. 520 where he characterises the political process of, for example the Council as a contract-like cooperation between different political-administrative systems that are largely independent of each other. This concept of democracy has many similarities with so-called pluralist models of democracy, or what Dahl, Robert *Democracy and its Critics* (New Haven: Yale University Press 1989) has called “Polyarchy”, which presupposes that popular elected democratic institutions are heavily influenced and sometimes even bypassed (in the case of they directing their lobbying efforts toward other institutions, for example the executive branch) by a strong channel of interest-group democracy; Polyarchy in the EU, see Harbo, Tor-Inge, *ibid*.

decision-making processes – an agreement on the rules of the game. Whereas the American creed had its British antecedents and the citizens of the thirteen states were therefore not that heterogeneous after all at the time of the original constitutional moment, the thirteen states of the confederation were nevertheless separate political units. In that respect one could hold that the integration of the black population, which started after the Civil War and was first achieved in the 1960s, represented a far greater challenge to the constitutional order and thus the stability of the country. One could therefore hold that the authority of the American constitution today rests on an overlapping consensus between ever more diverging groups rather than a potentially assimilative concept of “we the people”. In addition to allowing a greater plurality to exist on a permanent basis, the concept of an overlapping consensus is more dynamic than the concept of “we the people” since it allows for permanent re-weighting and rebalancing processes in the redefining of the equilibrium of the consensus. If perceived as a (social) contract – an overlapping consensus – the origin of law does not have to be absolute or ultimate, neither normatively nor sociologically. Rather it is open-ended allowing the alteration of norms according to the product of overlapping consensuses formed by a plurality of actors in a body-polity; a policy-making process in which the federal principle of diversity complements the democratic principle of equality.

If democratic legitimacy is based on an overlapping consensus, rather than deriving from a sociologically or politically defined fact, clearly this would make it possible to legitimise politics or to establish a democratic constitution in a polity in which there is more than one nation or people. In Switzerland, for example, four different nations are said to make up the societal basis of the Swiss polity. It has, thus, been argued that democratic decisions can also be legitimate in states of multiple *demos*.<sup>35</sup> The point to make here is that a concept of overlapping consensus provides the theoretical explanation for the possibility of establishing a democratic *pouvoir constituant* where there is no one nation or people, but rather many nationalities or many peoples. Conceptualised this way,

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<sup>35</sup> Abromeit, Heidrun *Democracy in Europe: Legitimising Politics in a Non-State Polity* (Oxford: Berghahn Books 1998) p. 49.

it can be argued in favour of the existence of a democratic constituting power for the European Union as well.<sup>36</sup>

### **A Constitutional Moment or Constitutional Moments?**

If we perceive the politically dynamic concept of an overlapping consensus as the legitimate basis of a European basic law, clearly this will also have consequences for the nature of a European constitution. Sieyès's theory on the *pouvoir constituant* was conspired in and for a revolutionary epoch in order to justify the rise of the bourgeoisie to counter and overthrow the power of the absolute monarchy. Thus, the *pouvoir constituant* was to act within a limited time-frame establishing a constitution to secure the (through revolution seized) powers of the new ruling class. However, in his own country the concept of a punctual constitutional moment combined with a historical *pouvoir constituant* was soon left and replaced by a notion of continual revolutions, the permanent presence of the *pouvoir constituant*, and an endless number of constitutions.

In order to conceptually explain a somewhat more cautious approach to constitutional amendments and change the idea of one historical constitutional moment combined with the *pouvoir constituant* acting within a limited time-frame can be supplied with a concept of a latent *pouvoir constituant*. The latent *pouvoir constituant* does not cease to exist after having constituted the original constitution. But at the same time it does not interfere in times of normal politics either. The latent *pouvoir constituant* withdraws from the day-to-day politics and law-making and erupts only in times of, so-called, high politics. The concept of a permanent *pouvoir constituant* as well as a latent *pouvoir constituant* provides us with an alternative evolutionary, rather than revolutionary, theory of constitutionalism, i.e. constitutionalisation as a series of events rather than one event.

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<sup>36</sup> Whereas an overlapping consensus could legitimise a European democracy, the concept of a constitutional culture, see Snyder, Francis "The unfinished constitution of the European Union: principles, processes and culture" in: *ibid.* Weiler, Joseph and Wind, Marlene pp. 55-73, can, in my opinion, not, since it does not necessarily involve shared norms based on, for example, common principles of justice.

The concept of an evolutionary constitutionalisation process could be particularly suitable to describe the establishment of a European basic law. Thus, the European basic law is, as has been indicated above, not established through one historical act or by a *pouvoir constituant* with basis in a people or peoples. Its establishment is, on the contrary, marked by an evolutionary step-by-step process – what Jean Monnet termed piecemeal steps – in which a number of actors, i.e. peoples, institutions and interest groups are involved; a process of creeping constitutionalisation in contrast with constitutional engineering.<sup>37</sup> The process of European constitution-making is a process in which facts and norms are dialectically and interdependently bound together in an evolutionary process.<sup>38</sup> An evolutionary concept of a constitution would imply the fusion of constitution-making and constitution changing which would also imply the dethronement (or demystification) of the concept of *pouvoir constituant*. The basic law of the EU can, therefore, be referred to as a “change constitution” (*Wandelsverfassung*)<sup>39</sup>; a dynamic legal document open for revisions, and, thus, adaptable to the conjunctures of politics – of the rule of men over law.<sup>40</sup> In the EU, this process has in the later years been reflected in frequent Treaty revisions during the 1990s, which temporarily has culminated in the Constitutional Treaty.

Since there is no one constitutional moment, but rather constitutional moments, this would also be reflected in the timeframe in which the *pouvoir constituant* is operative. The idea of an *ex-post* legitimation of a constitution has been widely discussed in academic circles, in particular in Germany. This point of view has been reflective of the fact that the German *Grundgesetz* was legitimated *ex-post*. The German *Grundgesetz* had, according to the head of the constitutional commission Konrad Adenauer, been imposed

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<sup>37</sup> Peters, Anna *Elemente einer Theorie der Verfassung Europas* (Berlin: Dunckert & Humblot 2001) p. 375.

<sup>38</sup> In the words of Vlad Constantinesco: “Le ‘droit constitutionnel européen’ est un mouvement, une tendance, une émergence, une dynamique, un devenir plus qu’un être, un processus en marche plus qu’un acquis définitif”, Constantinesco, Vlad “L’émergence d’un droit constitutionnel européen” in : *Revue universelle des droits de l’homme* 1995, 7, p. 445 ff., at p. 447.

<sup>39</sup> Ipsen, Hans Petter “Die Verfassungsrolle des Europäischen Gerichtshofs für die Integration”, in: Schwarze, Jürgen (ed.) *Der Europäische Gerichtshof als Verfassungsgericht und Rechtsschutzinstanz* (Baden-Baden: Nomos 1982) p. 29 ff.

<sup>40</sup> Ibid. Walker, Neil suggests that the “translation process”, i.e. the establishment of constitutional features on the EU-level, is a dynamic and reflexive process.

upon the Germans by the allied forces.<sup>41</sup> However, while some scholars would argue that the *Grundgesetz* was finally legitimised with the reunification process (or the revolution) of 1989, others would claim that the German people missed the constitutional moment that the reunification implied to adopt an original and popular legitimate constitution.<sup>42</sup> The fact that Article 146<sup>43</sup> of the *Grundgesetz* was not taken out in the 1993 revision, including the fact that the document did not change its name from *Grundgesetz* (Basic Law) to *Verfassung* (Constitution) could indicate that the legitimation question is still pending.

At any case, some German scholars have, with reference to the German experience, been eager to play down the perceived problem of an *ex ante* legitimation of a European constitution. Jürgen Habermas has argued that, since there are no European people, but European peoples, a European people would first have to develop in order to legitimately constitute a European constitution. And for a European people to be created, one needs a European identity, which again is dependent on a European public sphere.<sup>44</sup> In other words, Habermas reverses the traditional order of factors when he suggests that a European (*quasi*) constitution could be established first, and, in turn, create the right environment for a European public sphere, which again could foster a European identity upon which a European people or *demos*, or *pouvoir constituant* could be based in order to legitimise the constitution *ex-post*.

However, an *ex-post* legitimation of a dynamic concept of a European basic law will not suffice since an overlapping consensus requires simultaneous legitimacy. The decision-making procedures incorporated in the basic law and changes in these must at all time be accepted by the decision-making actors in order to give them effect. A dynamic concept

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<sup>41</sup> “Wir [the parliamentary council that was assigned to draft the *Grundgesetz*] sind keine Mandanten des deutschen Volkes, wir haben den Auftrag von den Alliierten”, Steingart, Gabor *Deutschland: Der Abstieg eines Superstars* (Muenchen: Piper 2004) p. 154.

<sup>42</sup> Preuss, Ulrich K. *Revolution, Fortschritt und Verfassung* (Frankfurt a. M.: Fischer Taschenbuch Verlag 1994)

<sup>43</sup> Art. 146 *Grundgesetz*: “Dieses Grundgesetz, das nach Vollendung der Einheit und Freiheit Deutschlands für das gesamte deutsche Volk gilt, verliert seine Gültigkeit an dem Tage, an dem eine Verfassung in Kraft tritt, die von dem deutschen Volke in freier Entscheidung beschlossen worden ist.”

<sup>44</sup> *Ibid.* Habermas, Jürgen (1995), note 31 above.



of an overlapping consensus embedded in the political processes would be the only way in which one could be sure that the decision-making actors would abide by ever changing decision-making procedures. The dynamic nature of the European basic law juxtaposed with the way in which its legitimation is conceptualised bears, in turn, upon its functionality, as we shall see below.

### **The Function of a Basic Law**

In a constitution, law and politics meet<sup>45</sup> and the relationship between the two is defined. This is also the case for the European basic law. Whereas a European Constitutional Treaty has by some been called upon in an attempt to redefine the relationship between law and politics in favour of the latter, others would use the opportunity that the drafting of a constitution gives to put clear constraints on a more politicised Union. It is, in this context, worth exploring two historical archetypes of “constitutions” hoping that they could provide us with a conceptual point of departure when examining the function of the European basic law as reflected in the Constitutional Treaty.

The French revolution implied a change of regime; the replacement of the sovereign absolutist monarch with the sovereignty of the people. In order to counter the reactionary monarchy-loyal forces of the ancient regime, which constituted a threat to the achievements of the revolution, absolute loyalty was demanded to the new regime. As long as the Jacobin terror was executed in the name of the revolution, in accordance with the general will, liberty of the individual, it was believed, was not interfered with. The revolutionary concept of liberty was interpreted as liberty from other individuals (feudalist dependence) and not as liberty from the state as the institutionalisation of the general will. A limitation of the state was in accordance with Locke’s contractual theory perceived as an absurdity. Thus, Rousseau argued:

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<sup>45</sup> Preuss, Ulrich K. “Der Begriff der Verfassung und ihre Beziehung zur Politik” in: Preuss, Ulrich K. (ed.) *Zum Begriff der Verfassung: Die Ordnung des Politischen* (Frankfurt a.M.: Fischer Taschenbuch Verlag 1994) pp. 7-33.

Each citizen shall be at the same time perfectly independent of all his fellow citizens and excessively dependent on the republic (...) it is the power of the state alone which makes the freedom of its members.<sup>46</sup>

For Rousseau, the way to liberty is the path of voluntary submission to the state as the interpreter of the “general will”. The purpose of the revolution was first of all the overthrow of the ancient regime and once this was achieved it had to be defended with all means. This included the use of terror, as noted above, but also the use of the constitution in order to bind the achievements of the social progressive revolution, i.e. a political benchmarking in a constitutional form. This gave the first constitution a retrospective, rather than a prospective character: it displayed the political achievements already reached consolidating and facilitating the political power of the regime in charge. If the political realities changed, this would mean that the constitution would have to be changed as well. The constitution, as perceived this way, is an instrument to enable, rather than to restrict political power. Hence, as the political regimes of France have changed rather frequently after the revolution of 1789, so have its constitutions.

The American Constitution was, on the contrary, to be greatly inspired by the Lockean concept of the social contract. Whereas the French Constitution has been described as “statist, meaning that it formed the basis of the establishment of the state – the political, the American Constitution has been categorised as societal.<sup>47</sup> For, the American Constitution implied at the same time the founding of American society. Whereas the subject - the *pouvoir constituant* - of the French Constitution – *la nation* - existed prior to the constitutional act, the *pouvoir constituant* of the American Constitution – “We the People” – was constituted together with the Constitution. Whereas the French *nation* is an independent factor detached from its Constitution(s), the American people is not. Hence, any alteration of the American Constitution would imply a redefinition, not only of American society, but of the constituting power – the people – itself.

<sup>46</sup> Rousseau, Jean-Jacques *Social Contract* (London : Penguin Books 1762/1968) p. 99.

<sup>47</sup> Ibid. Preuss, Ulrich K. 1994 p. 25; Preuss, Ulrich K. “The political meaning of constitutionalism” in: Bellamy, Richard (ed.) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Aveburg: Aldershot 1996) pp. 11-27 at p. 20.

Being a result of a horizontal social contract which creates mutually binding legal obligations between the citizens; a contract which becomes binding upon the constituent power itself, the American Constitution not only degraded the importance of the representative assembly as *pouvoir constitué*, but also the people as *pouvoir constituant*. According to American constitutional theory, the Constitution itself is sovereign. This explains the almost sacred position of the American Constitution – the “political bible” of the land<sup>48</sup>, the political religion of the nation;<sup>49</sup> its long life (oldest Constitution in the world) and, thus, the unwillingness to revise it: by revising the Constitution one could risk jeopardising the very foundation of the society. The American Constitution has therefore never been revised, merely amended 26 times – whereas the French have had almost as many Constitutions. Sovereignty of the constitution means sovereignty of the people acting within the framework of its constitution. Constitution and people are inseparable: the people constitute the constitution; the people are bound by its constitution.

While Rousseau sought to protect the people against a disabling constitution, conceptualising a constitution as a political instrument, rather than a legal strait-jacket, the Founding Fathers of the Lockean inspired American Constitution proposed to construct a constitutional shield against the people’s own potential propensity for myopia, injustice, irresponsibility, irrationality, and stupidity. A constitution could be perceived as an institutionalised cure for this chronic myopia: it disempowered temporary democratic majorities in the name of binding norms. “We the People”, the Founding Fathers suggested, need a constitution to protect us/them from us/themselves; the American Constitution also had to be protected from the revolutionary drive of the *pouvoir constituant* just as Ulysses needed to bind himself to the mast in order to hinder himself from being lured to shipwreck by the Sirens.<sup>50</sup>

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<sup>48</sup> Paine, Thomas *Rights of Man* in *Political Writings*, ed. by Philip, Mark (Oxford: Oxford University Press 1791/1995).

<sup>49</sup> Lincoln, Abraham *Selected Speeches and Writings*, ed. by Vidal, G. (New York 1992).

<sup>50</sup> Elster, Jon *Ulysses and the Sirens* (Cambridge: Cambridge University Press 1979).

Hence, the American people does not embody a homogeneous, revolutionary, political, irrational *volonté générale* but rather a pluralist, tolerant, through law civilised and rationalised *common sense*. According to Preuss:

Der politische Character des durch Einigung geschaffenen Gemeinwesens liegt nicht in der verfassten Einheit und der in sie investierten Macht der Gemeinschaft, sondern in der durch Rechte, Verfahren und Institutionen gestützten und geförderten Fähigkeit der Individuen zur Assoziation, zur Verträglichkeit und auch zur Kooperation im Dissens.<sup>51</sup>

“We the people” indicates that the constituting subject is pluralistic and not a Schmittian: “homogenes Sein des Volkes”<sup>52</sup> or a Bodinean: “une, indivisible, inaliénable et imprescriptible” sovereign nation, as expressed in the French Constitution of 1791.<sup>53</sup> The American Revolution and Constitution were not about informing the political general will, but, the contrary: about restraining the “tyranny of the majority”. The point was to secure the freedom and plurality of the individuals of American society, not to force them into a uniform collective. The Constitution does not legitimise or create a political unified power, rather it creates a common playing field; a framework for societal coexistence and cooperation under the sovereignty of the Constitution. The American promise – the American dream – was the individual’s freedom to pursue his own decent way of life in voluntary cooperation with others with as little interference from government as possible. This was, after all, the reason why its immigrants fled repressive regimes in Europe in the first place. For the French, as well as other Europeans influenced by the feudalist mentality and collectivist spirits, welfare and social security toppled, then (as now), freedom, in the meaning of individualism<sup>54</sup> and entrepreneurial spirit.

If we then turn to the EU, we clearly have some problems applying either of these historical or conceptual models, at least to their full extent. As noted above, the EU basic

<sup>51</sup> Ibid. Preuss, Ulrich K. “Der Begriff der Verfassung...” (1994), note 45 above, p. 17.

<sup>52</sup> Ibid. Preuss, Ulrich K. *Revolution, Fortschritt und Verfassung* (1994), note 42 above, pp. 63-4.

<sup>53</sup> Title III, Art. 1.

<sup>54</sup> Even in a Tocquevillean sense – self-interest rightly understood, see Tocqueville, Alexis de *Democracy in America* (Hertfordshire: Wordsworth Classics 1835/1998).

law is a “Wandelsverfassung”, which is clearly more in line with the French than the American constitutional history. The frequent changes of the European basic law(s), a process which accelerated in the 1990s, imply that it has a dynamic, rather than a rigid or static nature. This nature implies that there is not one “constitutional moment”, but rather many “constitutional moments” reflected in the constitutionalisation process of the EC Treaties.

Yet, it appears that the preferred source of legitimation for a European basic law; the search for a European “we the people” is more in line with the (original) American than the French. However, whereas the purpose of a Rawlsian “overlapping consensus”<sup>55</sup> is to form a value basis through which the consensuses of normal politics can be legitimised, the concept of an “overlapping consensus” suggested in the European context also applies to the legitimation of the low politics. In the case of the EU there is no difference between high politics and normal politics in this regard. The reason for this is the fragile societal basis of the EU: overlapping consensuses have to be formed and reformed continuously in order to legitimise high as well as low policies. The dynamic nature of the constitution – the fusion between constitution-making and changing – adds value to this argument.

The nature of the constitution and the way in which it is legitimised has implications for its functionality. The fact that the basic legal document of the EU is of a dynamic and political, rather than a rigid and legal nature – it is, as noted above, a *Wandelsverfassung* – implies that it cannot have a restraining function on politics since a restraining constitution requires not only that the constitution is the “supreme law of the land”, i.e. that it has the status of supreme positive law within a Kelsenian legal hierarchy. It also requires, and this is closely connected to the first notion, a differentiation between constitution making and constitution changing. In the EU, this is not the case.

Furthermore, the dynamic nature of the EU basic legal document and its corresponding concept of legitimacy – ever forming and reforming overlapping consensuses among the

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<sup>55</sup> Ibid. Rawls, John (1993) note 33 above.

decision-making actors in low as in high politics – can only underpin an enabling basic legal document. The reason for this is that a restraining constitution would imply that its legitimising act is of a higher order than that of normal politics. A legitimising act of a higher order could, for example, mean that the procedures are more demanding; that more actors are involved; that a higher degree of consensus is required, and so on. An enabling, political basic law of the EU is, as we shall see below, also an empirical fact.

Although the ECJ has claimed in the case *Costa v. ENEL* that “the Member States have limited their sovereign rights,” most Member States, when signing the EC Treaties, were clearly of the opinion that this transfer of power was to take place only “within limited fields”. However, it could be argued that the adoption of the Single European Act and the subsequent harmonisation project introduced in order to create a Single European Market (SEM) has led to the concession of sovereignty in “ever wider fields”<sup>56</sup>. The introduction of the subsidiarity principle in the Maastricht Treaty must be seen as an attempt to slow down the creeping expansion of Brussels’ powers in the aftermath of the latest integrative developments resulting from the establishment of the SEM in 1992. One could very well see parallels between the principle of subsidiarity and the Lockean social contract, in which the prerequisite for the individual consensus to being ruled by a Hobbesian Leviathan was the guarantee of individual rights. Only by ensuring the Member States that Brussels would intervene conditioned to its capacity to solve the task more effectively than the Member States themselves, would they loyally support further integration.

The Madisonian pluralists, on the other hand, would claim that the real challenge is not to protect the Member States from an alleged Leviathan disguised as the EU Commission, but rather to protect them from other Member States’ pursuing their self-interest,<sup>57</sup> a phenomenon Madison referred to as factionalism. In this view, as opposed to the former, there is a need for strong and not weak government in order to curb powers of the stronger factions (read: larger Member States) and, thus, secure the constitutionally

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<sup>56</sup> ECJ Opinion 1/91.

<sup>57</sup> The principle of subsidiarity is supposed to provide a safe-guard here, see also Art. 6 III TEU (Treaty on the European Union).

entrenched (sovereign) rights of the minorities (read: smaller Member States). This need can be illustrated by the following two examples:

Having first attempted to dictate the EU position on Iraq at the 40th anniversary of the Franco-German Elysée-Treaty (Autumn 2002), instead of using the forum designed to discuss common EU foreign and defence policy laid down in the EU Treaties, the “letter of the eight” followed by “the letter of the ten” from EU-member and accession states supporting the American position, cannot have come as a surprise for French and Germans. The French Gaullist President Chirac’s subsequent comment about the Central and Eastern Europeans’ “bad behaviour” illustrates a lack of understanding and consideration for the unique diversity of opinions and values in an enlarged EU.<sup>58</sup> Secondly, the French and the Germans’ refusal to follow the provisions of the Growth and Stability Pact imposed limits on Member States’ budget deficit (although Germany was one of the countries insisting on the Pacts’ rigidity) is another example of how larger countries tend to dominate EU policies. This sends a clear signal to the other law-abiding (smaller) countries that there is a need for strong supranational institutions to enforce the politics of the Treaties. An attempt to enforce the rules seems, however, this far to be in vain. Although the ECJ ruled that the Commission and not the Council had the last word in the interpretation of the Pact,<sup>59</sup> the Commission was urged by the Council to formulate new more flexible criteria, which in effect meant giving in to France and Germany, criteria which have now been adopted by the Council.<sup>60</sup>

The problem with these approaches is that the Franco-German axis, rather than being viewed as the benevolent motor of integration (Tocquevillean pluralists), risks being perceived as partisan, each seeking its own national interest (Madisonian factionalists). One could get the impression that some countries are “more equal than others” and that might override rights; developments which could create antagonism, rather than solidarity

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<sup>58</sup> This refers to the process leading up to the second Iraq war starting in March 2003; see, for example, The Economist *Charlemagne*: “Who speaks for Europe?” 6 February 2003.

<sup>59</sup> Case 27/04 Commission v. Council.

<sup>60</sup> Wernicke, Christian and Hagelüken, Alexander “Reform des Stabilitätspakts: 3 Prozent = 3,25 Prozent = 3,5 Prozent” *Süddeutsche Zeitung*, 22 März 2005, p. 2.

between the peoples of Europe. On the other hand, who would blame the French and Germans for pursuing their national interests in an increasingly heterogeneous Europe, in which it appears that everybody else is doing the same in a time in which it is becoming increasingly difficult to perceive the European integration as a positive sum game?<sup>61</sup> If this is going to be the future “name of the game”, a restraining constitution for Europe, one could assume, would be preferable, since it would contribute to the consolidation of achieved policies (the SEM) and slow down further integration by giving the Member States veto regarding any further integral steps.

However, a halt in the integration process, which in turn could lead to the disintegration of the EU, would definitely not be in the interests of the smaller Member States. In fact, small countries have never had so much nominal and real power in Europe as they now have within the institutional frames of the EU.<sup>62</sup> A resumption of pre-war national European policies of diplomatic secrecy and shifting alliances between the big countries would side-track the smaller states completely.

And we have to admit that the EU is to a great degree reliant on some countries’ leadership in order to point out the direction for continued peaceful cooperation between the European nation states. In a Tocquevillean pluralist perspective, the French-German axis should, therefore be welcomed rather than feared by the other countries as important contributors to the European integration process. Their relentless efforts to strengthen the European cooperation infuse Europe with important inputs and dynamism. This does not mean that all their propositions should be accepted all the time. They would be wise not to expect that either in order to avoid antagonism (the impression of soft imperialism) among the other states. And, even more importantly, if one does not see European

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<sup>61</sup> Whereas the Germans were happy to carry the major part of the burden of, for example, the redistributive policies of the 1960s (Common Agricultural Policy) and the 1990s (structural funds), since they were the main benefactors of a liberalisation of the European market, they are more reluctant to continue this practice vis-à-vis the CEECs, since these countries’ high skilled low cost workforce is partly being blamed for the export of German investment capital and production facilities and ditto souring unemployment numbers in Germany. Subsidising their low tax levels through structural funds would make the Central and East European Countries even more competitive.

<sup>62</sup> The weight of Germany in the Council of Ministers, for example, is only seven times that of tiny Luxembourg although the population is 320 times as large. Furthermore, the rotating presidency gives small states the possibility of setting the EU agenda.



integration as a goal in itself, but rather as a means to pursue other goals (e.g. freedom, peace and prosperity), it is not certain that more integration in all policy areas all of the time is always the right answer.<sup>63</sup> The important point is that policies are put on the agenda and subjected to Europe-wide debate, in itself a good starting point for policy formation.<sup>64</sup>

Besides the consolidation of the Treaties, and the incorporation of the Charter of Fundamental Rights, the main tasks for the Convention was, according to the Laeken Declaration, to suggest a clearer division of competences between the Member States and the EU as well as the inclusion of the national parliaments in the institutional architecture.<sup>65</sup> These are typically measures adopted to check EU politics, i.e. disable European politics – feature of a restraining constitution. And although majority voting has been extended to new areas, it is not applicable on, for example, foreign and security policies, or fiscal policy, i.e. the Member States have veto rights in these areas. On the other hand, the decision-making concept of double majority (Article I-25 CT), the reduction of the members of the Commission by 2014 (Article I-26, § 6 CT), as well as the introduction of a (more) permanent presidency of the European Council (Article I-22 CT) are all features that will contribute to the strengthening of the larger Member States at the expense of the smaller ones. These are at the same time features that will make the EU more efficient, which tend to be contrary to the function of a restraining constitution, although it does not necessarily have to be this way. The point of a restraining constitution is not to make the process of government easier, rather the opposite: to make sure that governance is conducted under clear rules and constraints, in the form of individual or minority rights, making it difficult to decide contrary to their interests. In an

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<sup>63</sup> Dahrendorf, Ralf “Vereint oder offen? Die europäische Alternative: Gibt es nicht grössere Werte als die Einheit Europas? Plädoyer für den Vorrang der Freiheit vor der falschen Utopie einer politischen Union”, in *Süddeutsche Zeitung*, 15. Juli 2005 p. 14.

<sup>64</sup> Just see what happened to the British original rejection of the Social Chapter in the early 1990s and the Spanish original rejection of the draft Constitutional Treaty in December 2003.

<sup>65</sup> In the Laeken Declaration [http://europa.eu.int/constitution/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm) the Member States sought to provide a way in which they could solve the so-called Nice leftovers, i.e. the issues that they had not been able to solve at the Nice Intergovernmental Conference in 2000. The Declaration provided the starting point for the Constitutional Convention, headed by the former French President Giscard d’Estaing, which would culminate in the Constitutional Treaty.

EU context, these minority rights could be conceptualised as sovereign rights protected by the principle of subsidiarity.

However, there are other indications that protecting Member States' sovereign rights after all is not the prime aim of the Constitutional Treaty. The foreign and security policy, for example, is included in the Constitutional Treaty and can be activated: "when the European Council, acting unanimously, so decides" (Art. 1-41, § 2 CT). This means that there does not have to be another European Intergovernmental Conference, or for that matter, another Constitutional Convention, in order to breathe life into a common policy on these areas. Furthermore, the Luxembourg Accord<sup>66</sup> – giving every Member State the right to veto policies when conflicting with strong national interests – is not laid down in the Constitutional Treaty, implying clearly the weakening of the rights of the Member States. Protection for subsidiarity is at best weak: national parliaments are invited to speak up, if they think subsidiarity has been flouted, but the European Commission is merely obliged to take note (Art. I-11, § 3 CT). And, finally, lurking in the background is the flexible clause of Art. 1-18 CT, a reinvention of the notorious Art. 308 (235 EC), giving Brussels a quasi *carte blanche* for the development of new policies although this time with the blessing of the European Parliament.

The dynamic nature of the Constitutional Treaty is not least facilitated by the goals stated in its preamble: "united ever more closely" and "forge a common destiny", although the fact that the goals are stated in the preamble rather than included in the legally binding text itself, as they are in the existing Treaty, might imply a weakening of its integrative effect. Anyhow, in the history of the European Community, goal-oriented principles promoting European integration have always played an important role in the interpretation of its basic law. These principles permit a progressive interpretation of its provisions based on the object and purpose – for example, the establishment of a single European market – and thus provide for the dynamic nature of the European legal order. Most importantly, framing the Union's goals as principles ultimately prohibits substantial

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<sup>66</sup> French initiated agreement from 1966 putting an end to its six months "empty chair" policy.

re-nationalisation, which would materially endanger those goals.<sup>67</sup> The goals' integrative consequences undermine therefore the most effective restraint on EU-policy formulated through the federal principle of subsidiarity. And furthermore, the assumption that the Union is more dependent on out-put legitimacy than is a state also speaks against its basic law as having a restraining function. The Union is, in order to secure its legitimacy, still largely dependent on producing certain results, which in many cases could have integrative consequences meaning "more Europe" and "less Member States". Even the constraints posted by judicial review could be perceived as enabling politics since the existence of judicial review mechanisms is perceived as necessary in order to legitimise politics in any liberal democratic political regime. Judicial review is, in the end, not perceived as limits on politics, but rather as the legitimisation of politics. The ECJ, one could say, is a legitimative [legitimating?] agent of EU politics.

### **Concluding Remarks**

Regarding the legitimacy of a European basic law, there is also a conceptual reasoning underpinning the more empirical observations offered above. The fact that the basic law of the EU is of a dynamic and political, rather than a rigid and legal nature – it is, as noted above, a *Wandelsverfassung* – implies that it cannot have a restraining function on politics. A restraining basic law requires not only that it is the "supreme law of the land", i.e. that it has the status of supreme positive law within a Kelsenian law hierarchy. It also requires, and this is closely connected to the first notion, a differentiation between constitution making and constitution changing. In the EU, I argued above, this is not the case.

Furthermore, the dynamic nature of the EU basic law and its corresponding concept of legitimacy – ever forming and reforming overlapping consensus among the decision-making actors in low as in high politics – can only underpin an enabling basic law. The reason for this is that a restraining constitution would imply that its legitimising act is of a

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<sup>67</sup> Ibid. von Bogdandy, Armin note 12 above, pp. 3-52 at pp. 37-8. Bogdandy refers to this as a "principle of integration" in European law, although he reserves himself against the principles' potential homogenising effects.

higher order than that of normal politics. In the case of the EU, the Convention (which drafted the Constitutional Treaty) constituted such a higher order of legitimacy *vis-à-vis* the Council decisions of normal politics. The Constitutional Treaty would, according to the hypothesis of this paper, have this higher order of legitimacy and thus the potential of legitimising a restraining constitution if the Convention had the decisive power on the fate of the Constitutional Treaty. However, it did not.<sup>68</sup>

The dynamic nature of the European basic law and the connected concept of legitimacy defended in this paper do not necessarily have to mean more integration and the unavoidable forming of a European federal state. The political institutions could, for example, decide upon the repatriation of competences to the member states. However, the cooperation tends to have an inner integrative dynamic, which is probably a reason why no competences were suggested repatriated by the Laeken Convention, although this was foreseen in the Laeken Declaration. An enabling basic law would be supportive of a politicisation, as opposed to a de-politicisation, of the Union, of which further and deeper integration is often, although not always, a bi-product.

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<sup>68</sup> The Constitutional Treaty had to be decided upon by the Council in order to be binding.