

Constitutions, Constitutionalism, and the European Union

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Abstract: *The institutional reforms of the EU, coupled with the EU Charter of Fundamental Rights, have fuelled the debate about a European Constitution. This paper begins by examining the nature of constitutions and constitutionalism. The focus then turns to the EU itself. It is argued that the Community has indeed been transformed into a constitutional legal order, and that the arguments to the contrary are not convincing. This does not however mean that the EU has, or should have, a European Constitution cognisable as such which draws together the constitutional articles of the Treaties, together with the constitutional principles articulated by the European Court of Justice. The difficulties with this strategy are examined in detail, and the conclusion is that we should not at present pursue this course. It would be better to draw on the valuable work done by the European University Institute in its recent study in order to simplify and consolidate the Treaties.*

Institutional reform preparatory to enlargement of the EU, combined with the drafting of the EU Charter of Fundamental Rights, has fuelled the debate about a European Constitution. For some the Charter of Rights is the core of such a constitution. Others regard it as but a further constitutional block to be added to those which already exist. Approval and disapproval are to be found in equal measure. Some advocates of the EU see such a constitution as a way to legitimate the European enterprise. Critics regard talk of constitution-building as further confirmation of their own predictions as to the demise of the Nation State and the creation of a European Super State. Heat does not always generate light. Passionate adherence to a cause may not be conducive to analytical clarity.

The object of the present paper is therefore to consider the issues surrounding a European Constitution in a somewhat more detached manner. The discussion will begin by analysing the nature and meaning of constitutions in general. This will be followed by an examination of constitutionalism, and constitutionalisation. These terms have a plethora of meanings, which must be distinguished if confusion and error are to be avoided. The focus will then shift to the EU itself. It will be argued that the EU has been transformed from an international into a constitutional legal order. There are however very real differences between affirming this proposition, and claiming that the EU does, or should, have a separate constitution cognisable as

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such. The dangers and difficulties attendant upon such an enterprise will be considered, and it will be argued that we should not presently pursue this course. It is equally important to be aware of the difference between a separate constitution, and the formulation of a Basic Treaty, as exemplified by the study undertaken by the European University Institute (EUI). It will be contended that reforms of this latter kind provide the best way forward for the EU in the coming years.

I Constitutions: Theoretical Foundations

It is fitting at the outset to consider from first principles what constitutions are, and the functions that they perform. It is only when we have some idea of the role played by constitutions within Nation States that we can begin to think sensibly about a European Constitution. This is not to say that a European Constitution must necessarily follow the format of constitutions commonly found in Nation States. The national constitution is nonetheless the best starting point for thinking about the function which constitutions play in a body politic.¹

Joseph Raz's work is of importance in this respect.² He distinguishes between two senses of the term constitution. In a thin sense the term is simply the law that establishes and regulates the main organs of government, their constitution and powers. This sense of the term constitution is, as Raz points out, tautological, in that every legal system will have rules of this nature.

Raz accepts that the thick sense of constitution is more contestable. He regards seven features as important in this respect. First, the constitution will be *constitutive* in the sense of defining the main organs of government and their powers. Constitutions will contain both substantive and procedural norms of this nature. In Nation States which are federal, or where there is some measure of devolution, the structural provisions of the constitution will also identify the powers of the federal and state or regional governments. This captures the thin sense of constitution. A second feature is that a constitution is meant to be *stable*. It can of course be altered, but it is meant to serve as a stable framework for the political and legal institutions of the country. Third, constitutions have what Raz terms a canonical formulation: they are normally enshrined in one or a small number of *written* documents. The fourth attribute of constitutions is that they are *superior law*. Ordinary law that conflicts with the constitution will be invalid or inapplicable. Fifth, constitutions are *justiciable*, meaning that there are judicial procedures whereby the compatibility of laws and other acts with the constitution can be tested, and those that are incompatible can be declared invalid. The penultimate feature of constitutions is that they are *entrenched*. The constitution can only be amended by special procedures, which are different from those governing ordinary legislation. The nature of these rules will vary from legal system to legal system. The common theme is however that by denominating an issue as 'constitutional' we recognise that it is taken off the agenda of normal politics. The norms enshrined in a written constitution are not at the whim or mercy of the party that happens to control the ordinary legislative agenda at that time. This does not mean that the constitutional norms are ossified and incapable of being changed. It

¹ It should be made clear that this part of the discussion is concerned with formal constitutions. The impact which informal constitutional practices can have will be considered in due course.

² J. Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in L. Alexander ed., *Constitutionalism* (Cambridge University Press, 1998), pp. 152–153.

does mean that they cannot be altered simply by the passage of ordinary primary legislation. Finally, constitutions express what Raz terms a *common ideology*. They contain provisions about issues such as democracy, federalism, civil and political rights which 'express the common beliefs of the population about the way their society should be governed'.³

It is important to understand that Raz is concerned with the nature of constitutions in general. Any particular constitution might exhibit these features to a greater or lesser degree. Some constitutions are 'fat' and address the features set out above in great detail. Others are 'thin' in the sense of being confined to relatively abstract statements of principle. Moreover, not all constitutions will necessarily contain all the features listed above.

It is equally important to realise that the inclusion of certain features in the list is normatively contestable. Whether, for example, courts should have the power to invalidate primary legislation on the ground that it is incompatible with a constitutional provision has always been controversial.⁴ Here is not the place to engage in this debate. While the existence of a constitution does not inexorably mean that the courts should be able to invalidate primary legislation, it is equally important to realise that this is not the only form of constitutional review open to the courts. There are a number of options in this respect.⁵ The existence of a written constitution with rights-based guarantees contained therein will normally trigger at least one of these judicial responses.

II Constitutionalism: Divergent Meanings

It is equally important to be clear about the meaning of two other terms: constitutionalism and constitutionalisation. This is more difficult than the previous inquiry since the terms are used in various ways. It is important to distinguish these meanings since otherwise confusion will result.

First, the term constitutionalism can be used to refer to the difficult philosophical issues that surround the existence of a constitution. When used in this sense it embraces questions such as why a constitution is legitimate, why it is authoritative and how it should be interpreted?⁶ This usage includes the deeper justificatory rationale for the particular constitutional rules that a legal system has adopted. Some refer to this as a meta-constitutional inquiry.⁷ Others speak in terms of an *ethos* and *telos* to justify the particular constitutional rules found in that system.⁸

A second sense of constitutionalism is more descriptive in nature. The inquiry is as to the extent to which a particular legal system does or does not possess the features associated with a constitution set out above. On this view constitutionalisation expresses the movement towards attainment of those features.

³ *Ibid.*, pp. 153–154.

⁴ J. Waldron, *Law and Disagreement* (Oxford University Press, 1999).

⁵ P. Craig, 'Constitutional and Non-Constitutional Review' [2001] (CLP, forthcoming).

⁶ L. Alexander, 'Introduction', in L. Alexander ed., *Constitutionalism* (Cambridge University Press, 1998), pp. 1–13.

⁷ R. Kay, 'Preconstitutional Rules' (1981) 42 *Ohio State Law Journal* 187.

⁸ J. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 *ELJ* 219, 220–221.

We find a third sense of constitutionalism used to describe the juridical shift that has occurred in many continental legal systems post-1945. Here the term captures the following features of a polity.⁹ State institutions are established by, and derive their authority from, a written constitution; the constitution assigns ultimate power to the people by way of elections; power is only lawful if it conforms with precepts of the constitution; and these will be policed by a specialist constitutional court.

A fourth usage of constitutionalism is common within public law. It is used to connote not whether a legal system has the features of a constitution, but also the extent to which it satisfies desirable precepts of good governance which go beyond those normally expressed within the constitution itself. Issues such as the accountability of government, broadly conceived, principles of good administration and mainstreaming of human rights, are, for example, said to express a culture of constitutionalism.

Fifth, the term constitutionalisation is used to describe the extent to which norms of a constitutional nature, commonly applied as between citizen and state, do and should apply as between private parties. This is exemplified by the debate concerning the constitutionalisation of private law and the horizontal application of the European Convention of Human Rights.¹⁰

The terms constitutionalism and constitutionalisation also bear a particular connotation within EU law. They refer to the transformation of the Community from an international to a constitutional legal order.¹¹ The precise juridical consequences of this shift, and indeed its very nature, are, as will be seen, contested by those within the field.¹²

III A Constitutional Legal Order

A *The Nature of the Argument*

The transformation thesis connotes the idea that the EC has developed from a legal relationship binding upon the states *qua* states, to an integrated legal order that confers rights and obligations on private parties, and one in which the controls on the exercise of public power are similar in nature to those found in nation states.¹³ This story has been told in detail elsewhere, and therefore only the bare outlines of the argument need be considered here.¹⁴ The argument is based on the Treaties themselves,

⁹ A. Stone Sweet, *Governing with Judges, Constitutional Politics in Europe* (Oxford University Press, 2000), p. 37.

¹⁰ M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423; B. Markesinis, 'Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1998) 114 LQR 47; Sir H. W. R. Wade, 'The United Kingdom's Bill of Rights', *Constitutional Reform in the United Kingdom: Practice and Principles* (University of Cambridge Centre for Public Law, 1998), Ch. 6; N. Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' [1999] CLJ 159; Sir R. Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48; Sir H. W. R. Wade, 'Horizons of Horizontality' (2000) 116 LQR 217.

¹¹ Weiler, note 8 *supra*, pp. 219–220; A. Stone Sweet, 'Constitutional Dialogues in the European Community' in A-M Slaughter, A. Stone Sweet, and J. H. H. Weiler eds., *The European Court and National Courts, Doctrine and Jurisprudence* (Hart Publishing, 1998), Ch. 11.

¹² Compare Weiler and Stone Sweet, note 11 *supra*, with T. Hartley, *Constitutional Problems of the European Union* (Hart Publishing, 1999).

¹³ There is of course no reason in principle to prevent other international organisations from making the same transformation.

¹⁴ J. Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403; Stone Sweet, note *supra*; J-C. Piris, 'Does the European Union have a Constitution? Does it Need One?' (1999) 24 ELR 557, 559–565.

European Court of Justice doctrine and the language that the European Court of Justice has used. These will be examined in turn.

There is little doubt that the existing Treaties contain certain features of a constitution when judged by the criteria articulated by Joseph Raz. The Treaties clearly do contain provisions in the thin constitutional sense of the term. Treaty articles define the powers of the respective institutions, and the way in which legislation is made. The Treaties also contain features that relate to the thicker sense of a constitution as articulated by Raz. The fact that decision-making within the Council is commonly by qualified majority and not unanimity, and the existence of a European Parliament which now has real power, are both features which render the EC distinct from most international Treaties. So too is the existence of a European Court of Justice with express power both to condemn Treaty violations by Member States,¹⁵ and also to judicially review acts of the Community institutions for compliance, *inter alia*, with the Treaty and the rules of law relating to its application.¹⁶ The EC Treaty also contains rights of a kind that would be found in many national constitutions. The provisions on citizenship, Articles 17–22; those prohibiting discrimination on a wide variety of grounds, Articles 12 and 13; and the prohibition on gender discrimination, Article 141, all fall within this category.

It has however been the European Court of Justice's jurisprudence which has done most to fuel the claim that the EU been transformed from an international Treaty to a constitutional legal order.¹⁷ The European Court of Justice's enunciation of the doctrines of direct effect, supremacy and pre-emption are the key elements in this transformation.¹⁸ It should be accepted that there is, as de Witte has pointed out,¹⁹ an element of circularity in the European Court of Justice's reasoning. At first, direct effect and supremacy were judicially proclaimed because the EC Treaties were unlike other Treaties, whereas now EC law is often presented as being distinct because it is endowed with these characteristics. These are not however the only factors of importance. The interpretation accorded to Article 234²⁰ has had a profound effect on the relationship between the European Court of Justice and national courts, transforming the latter into Community courts in their own right.²¹ It has moreover been the European Court of Justice that has read into the Treaty principles of good administration, such as proportionality, legitimate expectations and due process, akin to those found in national regimes.²² It was the European Court of Justice that fashioned the fundamental rights' jurisprudence, thereby subjecting Community norms, and certain national norms, to scrutiny for compliance with rights-based constraints on government.²³ To this list can be added the Court's broad interpretation

¹⁵ Art 226 EC.

¹⁶ Art 230 EC.

¹⁷ G. F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLR 595.

¹⁸ P. Craig and G. de Burca, *EU Law, Text, Cases and Materials* (Oxford University Press, 2nd edn, 1998), Chs. 4–6.

¹⁹ B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Burca eds., *The Evolution of EU Law* (Oxford University Press, 1999), p. 208.

²⁰ Previously Art 177.

²¹ Craig and de Burca, note 18 *supra*, Ch. 10; T. de la Mare, 'Article 177 in Social and Political Context', *The Evolution of EU Law*, note 19 *supra*, Ch. 6.

²² Craig and de Burca, note 18 *supra*, Ch. 8; T. Tridimas, *The General Principles of EC Law* (Oxford University Press, 1999).

²³ P. Alston, M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999); Craig and de Burca, note 18 *supra*, Ch. 7.

of the Community's implied internal powers,²⁴ and its expansive reading of the Community's external competence.²⁵

The 'transformation argument' has gained added currency not only because of what the ECJ has done, but also because of the language it has used. Thus in *Van Gend* the European Court of Justice spoke in terms of the Communities creating a 'new legal order of international law for the benefit of which the states have limited their sovereign rights'.²⁶ Shortly thereafter the language subtly shifted. In *Costa*, when articulating its view on supremacy, the European Court of Justice began its judgement by distancing EC law from international law. It held that 'by contrast with international Treaties, the EC Treaty has created its own legal system . . . which became an integral part of the legal system of the Member States, and which their courts are bound to apply'.²⁷ The language used thereafter tended to be that of a new legal order without the reference to international law.²⁸ The terminology shifted yet again in *Les Verts* where the European Court of Justice described the Treaty as the basic constitutional charter of the Community.²⁹ This language of constitutional charter was repeated in Opinion 1/91 where the European Court of Justice distinguished the character of the EC Treaty from other international Treaties.³⁰ The reasons for the use of this language will be considered below.

B The Counter-argument and a Response

There has, however, been debate about the extent to which EU law is distinct from international law.³¹ Hartley's work can be taken by way of example. He contends that the features of the Treaty do not themselves serve to distinguish EC law from international law. He acknowledges that the existence of the European Court of Justice's power under Article 226³² creates an impressive system of compulsory dispute resolution, but denies that this calls into question the character of the European Court of Justice as an international tribunal.³³ He accepts that the jurisdiction under Article 234³⁴ is an unusual power for an international tribunal to have, but states that it would not be inappropriate for this power to be accorded to an international tribunal.³⁵ Hartley argues furthermore that direct effect is not as innovative as might be thought. Treaties can, he says, give rise to individuals rights that can be enforced by national courts. The novelty is that, while self-executing provisions of ordinary international

²⁴ Weiler, note 14 *supra*, pp. 2445–2446.

²⁵ D. McGoldrick, *International Relations Law of the European Union* (Longman, 1997); M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', *The Evolution of EU Law*, note 2 *supra*, Ch. 4.

²⁶ Case 26/62, *N. V. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

²⁷ Case 6/64, *Costa v ENEL* [1964] ECR 585, 593.

²⁸ Cases 90, 91/63, *Commission v Luxembourg and Belgium* [1964] ECR 631.

²⁹ Case 294/83, *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339, 1365.

³⁰ Opinion 1/91 (Re Draft Agreement on a European Economic Area) [1991] ECR 6102.

³¹ P. Pescatore, 'International Law and Community Law—A Comparative Analysis' (1970) 7 CMLR 167; D. Wyatt, 'New Legal Order, or Old' (1982) 7 ELR 147; T. Hartley, note 12 *supra*, Ch. 7; de Witte, note 19 *supra*, pp. 208–209.

³² Previously Art 169.

³³ Hartley, note 12 *supra*, pp. 131–132.

³⁴ Previously Art 177.

³⁵ Hartley, note 12 *supra*, pp. 132–133.

Treaties will have direct effect in the courts of the contracting states only if their constitutions provide for this, EC Regulations have this effect irrespective whether the state has a monist or dualist view of the relation between national law and international law.³⁶ He concludes therefore that while the Community Treaties have novel features, there is no justification for believing that the framers intended to create any new legal order.³⁷ Hartley reaches this conclusion on the basis of the Treaty alone, and consciously ignores what he terms *de facto* amendment of the Treaties by the European Court of Justice.³⁸ Debate on this issue is healthy. The argument advanced by Hartley is however problematic in a number of respects.

First, the fact that a feature found within the EC, such as the Article 234 jurisdiction, would not, be *inappropriate*³⁹ in international law is a weak counter to the new legal order argument. Given that international law is based largely, albeit not exclusively, on the consent of sovereign states, they could clearly agree on many types of provisions within an international Treaty. This does not alter the fact that provisions of the kind found in the EC Treaty, whether relating to compulsory jurisdiction or preliminary rulings, are not normally to be found in other international Treaties. A related point can be made about direct effect. There are instances of international Treaties having direct effect. They are however relatively rare,⁴⁰ and do not have the scope of application to be found in EC law.

Second, the argument advanced by Hartley disaggregates the factors which serve to distinguish EC law from international law, thereby hiding the true extent of the differences between the two once the factors are put together. Thus even if it could be said that every single feature found in EC law could be located in some international Treaty, this would not be conclusive against the new legal order argument. The very fact that all such features are present within a particular regime is itself of real significance.

Third, Hartley's argument focuses, as we have seen, on the original Treaty: what he terms *de facto* amendments by the European Court of Justice are not taken into account. This serves to preclude from consideration important aspects of the new legal order thesis. There is no justification for this exclusion. It is one thing to focus on the original, explicit provisions of the Treaty *stricto sensu*. The claim that anything not found therein should be regarded as a *de facto* Treaty amendment by the European Court of Justice is a *non sequitur*. It is commonplace for courts to read into treaties, constitutions, and indeed statutes, provisions that are not found explicitly therein. It does not thereby follow that they are amending such documents. Whether they are doing so depends on the nature of what the court reads in. It also depends crucially on a theory of adjudication that frames our understanding of how courts should interpret these written norms.⁴¹

³⁶ *Ibid.*, pp. 134–135. Even this difference is said to be less great than might have been thought, since for the UK, which subscribes to the dualist view, Community law becomes effective because of the European Communities Act 1972. Section 2(1) of this Act provides *in advance* for the direct effect of Community legislation, thereby obviating the need for separate legislation to be passed in each instance.

³⁷ *Ibid.*, pp. 135–136.

³⁸ *Ibid.*, p. 131.

³⁹ *Ibid.*, p. 133.

⁴⁰ I. Brownlie, *Principles of Public International Law* (Oxford University Press, 5th edn, 1998), pp. 50–51, 558–559.

⁴¹ Raz, note 2 *supra*; C. Richmond, *Perspectives on Law: System, Authority and Legitimacy in the European Union* (PhD, EUI, Florence, 2000), pp. 208–215.

Finally, understanding why the European Court of Justice used language such as 'new legal order' or 'constitutional charter' reinforces the transformation argument. Some view this linguistic shift as evidence of a Machiavellian plot by the European Court of Justice. Others simply regard it as tendentious and unwarranted. The reality is that the European Court of Justice's terminology was driven in significant part by arguments advanced by the Member States. These arguments, while differing in detail and nuance, had a common theme. The Member States claimed that the *general or standard* position in international law supported their claims. The fact that, as a matter of theory, the contrary might be maintained did not divert them. The fact that there might be some evidence from international law pointing the other way did not do so either. The Member States fought, as might be expected, on what they submitted was the central terrain of international law. The European Court of Justices's response was to blunt this argument, initially by distinguishing the EC as a new legal order of international law, later by using language that demarcated EC law and international law more sharply.

The reference, in *Van Gend*,⁴² to the EC as a new legal order of international law becomes explicable when viewed in this light. The Netherlands argued strongly that 'so far as the necessary conditions for the direct application of Article 12 are concerned, the EEC Treaty does not differ from a *standard* international treaty'.⁴³ The conclusive factors were said to be the intent of the parties and the provisions of the Treaty. Judged by these criteria the government contended that Article 12 should not have direct effect. This was more especially so given that the Treaty already contained Article 169, now 226, which enabled the Commission to bring enforcement proceedings against the states before the European Court of Justice. The Belgian and German governments put similar arguments.⁴⁴ These governments did not deny that self-executing Treaty provisions could exist whereby individuals would derive rights from Treaties that they could enforce in their national courts. What they argued was that this was not commonly the case under standard international Treaties, and that the same conclusion should be reached in relation to the EEC Treaty. The European Court of Justice's language is more readily understood from this perspective. It denied that the Treaty was simply a compact between states, and it affirmed that the Treaty also concerned the peoples of Europe. This laid the foundation for its conclusion that the 'Community constitutes a new legal order of international law'⁴⁵ for the benefit of which states have limited their sovereign rights, the subjects of which are the Member States and their nationals. The language was clearly intended as a response to the arguments put by the states. The riposte of the European Court of Justice was that the incidence of direct effect might well be different in the EEC, as opposed to 'standard' international Treaties, and this was so because the EEC Treaty itself was distinctive.

Paying due regard to the arguments put before the European Court of Justice is equally instructive in relation to the other cases mentioned earlier. In *Costa* the Italian government submitted that the request for a preliminary ruling made by the Giudice Conciliatore was absolutely inadmissible, inasmuch as a national court that was obliged to apply a national law could not avail itself of Article 177.⁴⁶ The only court

⁴² Note 26 *supra*.

⁴³ *Ibid.*, p. 8. Emphasis added.

⁴⁴ *Ibid.*, pp. 6-8.

⁴⁵ *Ibid.*, p. 12.

⁴⁶ Note 27 *supra*, p. 589.

endowed with the power of invalidating national legislation was the Italian Constitutional Court.⁴⁷ The European Court of Justice responded by stating that ‘by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which . . . became an integral part of the legal systems of the Member States and which their courts are bound to apply’.⁴⁸ While ordinary international treaties might not become an integral part of the legal systems of the Member States, this was not so for the EEC Treaty. This contrast between the EEC Treaty and other treaties had both a jurisdictional and a substantive dimension. Jurisdictional in that the European Court of Justice rejected at root the Italian claim that lower national courts could not take cognisance of EEC law in proceedings before them. Substantive in that it foreshadowed the European Court of Justice’s conclusion, to be fleshed out in the remainder of its judgment, that Community law had supremacy over national law. This duality is captured brilliantly in the phrase ‘bound to apply’.

The shift to the language of ‘new legal order’, shorn of reference to international law, appeared early in the European Court of Justice’s jurisprudence. It is to be found in *Commission v Luxembourg and Belgium*.⁴⁹ The two states argued by way of defence to enforcement proceedings, that the Community itself had failed to fulfil its obligations. They claimed that under international law a party injured by the failure of the other party to fulfil its obligations was entitled to withhold its own performance. It was in response to this argument that the shift in language occurred. The European Court of Justice rejected the defence. It held that the EEC was not limited to creating reciprocal obligations between the parties to which it applied. It was rather a new legal order, in the sense that the Treaty not only stipulated the rights and obligations of the parties, but also the procedures and penalties to be applied when a breach occurred. It was for this reason that states operating under the EEC Treaty could not take the law into their own hands, even if the Council had in some way failed to fulfil its obligations. The general principle of international law on which the states relied could not therefore justify their actions. The shift of language to ‘new legal order’ without reference to international law was a rejection of the states’ argument based on mutuality of reciprocal obligations. It was also an affirmation of the extent to which the EEC had gone beyond this model by providing mechanisms to determine breach of the Treaty, thereby precluding states from taking the law into their own hands.

The likening of the Treaty to a constitutional charter in *Les Verts*.⁵⁰ is also more readily understood against the background of the issue in the case and the arguments of the parties. The European Court of Justice had to determine whether measures adopted by the European Parliament (EP) were subject to judicial review under Article 173, given that the Article only spoke of review of acts of the Council and Commission. The European Court of Justice decided that such an action could lie. The reference to the Treaty as a constitutional charter appears as part of the European Court of Justice’s justificatory rationale for reading Article 173 so as to include measures of the European Parliament. The European Court of Justice spoke of the Community as being based on the rule of law, in the sense that neither the states nor

⁴⁷ M. Cartabria, ‘The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Union’, *The European Court and National Courts, Doctrine and Jurisprudence*, note 11 *supra*, pp. 136–137; Stone, note 9 *supra*, pp. 32–34, 40.

⁴⁸ Note 27 *supra*, p. 593.

⁴⁹ Note 28 *supra*, p. 631.

⁵⁰ Note 29 *supra*.

the Community institutions could avoid review to determine whether their measures were in conformity with the Treaty conceived as the basic constitutional charter.⁵¹ In the remainder of this same paragraph the European Court of Justice set out the system of remedies found in the Treaty as a whole designed to ensure that legality was observed. Even though measures of the European Parliament were not mentioned specifically in Article 173, the European Court of Justice held that if these measures were to be unreviewable it would be contrary to the spirit and scheme of the Treaty.

The language of constitutional charter was appropriate in the context of the issue raised, and the way in which the European Court of Justice chose to resolve it. Review of legality in the manner provided for in the EC is, to say the least, not common in international law. It is common within national legal systems. The rule of law is seen as a central foundation for such review, and it can be used to ensure conformity with, *inter alia*, basic constitutional norms of a national legal system. The specific measure of the European Parliament being challenged, budgetary allocations to prepare for elections that disadvantaged the Greens, further enhanced the constitutional dimension of the action.

C *The Consequences of the Transformation Thesis*

The thesis that the EC has been transformed from an international to a constitutional legal order is of importance, in helping us to understand the nature of the Community. There is however no cause for complacency. We must construct an appropriate normative foundation for the legal order conceived in this manner.⁵² We must also be careful when deducing particular consequences from the transformation thesis.

Precepts derived from general international law will not always be of relevance to, or suitable for, the EC. This is readily apparent from the matters considered by the European Court of Justice in the case law considered above. Other matters of importance are not resolved in and of themselves, even if one does accept the transformation thesis. An example will make this clear.

Whether Community law should be supreme over national law, whether there should be any limits to this supremacy, and who should have the ultimate power to decide the boundaries of Community competence, are questions of considerable importance. The answers do not inexorably follow from the choice between the competing visions of the Community legal order. The internationalist perspective does not necessarily generate pro-state answers to these questions. Indeed, it has been convincingly argued that if one does view the EC from an international law foundation then the claim for the European Court of Justice to possess a judicial *Kompetenz-Kompetenz* is compelling.⁵³ Nor does the constitutional perspective necessarily lead to

⁵¹ Note 29 *supra*, para. 23.

⁵² Space precludes discussion of this issue. A thought-provoking analysis can be found in J. Weiler, 'The European Court of Justice: Beyond "Beyond Doctrine" or the Legitimacy Crisis of European Constitutionalism', *The European Court and National Courts, Doctrine and Jurisprudence*, note 11 *supra*, Ch. 13.

⁵³ J. Weiler and U. Haltern, 'Response: The Autonomy of the Community Legal Order—Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411; J. Weiler and U. Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial *Kompetenz-Kompetenz*', *The European Court and National Courts, Doctrine and Jurisprudence*, note 11 *supra*, Ch. 12; E. Osiekie, 'Ultra Vires Acts in International Organizations: The Experience of the International Labour Organization' (1977) 48 *BYIL* 259; E. Osiekie, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1983) 77 *AJIL* 239. Cf. T. Schilling, 'The Autonomy of the Community Legal Order — An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389.

pro-Community answers to these questions. The fact that the EC may have become a constitutional legal order does not logically tell us that the entirety of the supremacy debate should be decided in favour of the EC. The features of a constitution described at the outset provide no conclusive answer as to the distribution of powers between component parts of that constitutional order.⁵⁴ Nor do most advocates of constitutionalisation claim that this is so.⁵⁵ Some supporters of constitutionalisation do argue that the Treaties are no longer dependent for their validity on international law, or on the legal systems of the Member States, but are self-validating.⁵⁶ This is a controversial theoretical claim, but it does not in any event lead inexorably to a particular conclusion as to the distribution of power between the Community and the Member States.⁵⁷

IV The Creation of a European Constitution: The Rationale

We have seen that the EU at present already possesses certain of the characteristics of a constitution. It does not however possess a constitutional document that is identifiable as such containing these features. There is no document that treats the constitutional attributes in a manner separate from the many other norms contained within the Treaties. Nor is there any such document that draws together the constitutional articles of the Treaty, with the constitutional doctrine developed by the European Court of Justice. The prospect for a European Constitution will be assessed as a constitution defined in this manner.

The motivations of those who are desirous of such a constitution differ. For some a European Constitution is perceived as valuable in its own right. Its creation will simplify and reduce to order the messy constitutional tapestry that presently exists.⁵⁸ This development is seen in tandem with the Community Charter of Rights. The Charter draws together in one visible document the rights to be found in the Treaties and those recognised in the ECJ's jurisprudence. The argument for a separate European Constitution, in which the Charter would form but one part, is motivated by similar desires for constitutional clarity and order. It is therefore unsurprising that some commentators view the Charter as integrally linked with the broader constitutional enterprise.⁵⁹ Others, while sharing the desire for clarification, have a more specific political aim, and see a constitution in consequentialist terms. They believe that a strong Federation is the desirable telos of the European venture begun in 1951, and that a European Constitution should embody this vision. This is the view of

⁵⁴ See the following works of N. MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1; 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 ELJ 259; 'Liberalism, Nationalism, and the Post-Sovereign State' (1996) 44 Pol Stud. 553; *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford University Press, 1999), Ch. 7; P. Craig, 'National Courts and Community Law', in J. Hayward and A. Menon eds., *Governing Europe* (Oxford University Press, 2001), Ch. 4.

⁵⁵ Stone Sweet, note 11 *supra*, pp. 319–320, makes it clear that in his view there is no logical resolution to the most difficult aspects of the supremacy issue.

⁵⁶ J-L. Cruz Vilaca and N. Picarra, 'Y a-t-il des limites materielles a la revision des traites instituant les Communautes europeenes' [1993] CDE 3, 9.

⁵⁷ Cf. Hartley, note 12 *supra*, pp. 180–181.

⁵⁸ See, e.g., J. Chirac, *Our Europe* (Federal Trust, European Essay No. 9, 2000), pp. 16, 18; E-U. Petersmann, 'Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU' (1995) 32 CMLR 1123.

⁵⁹ Select Committee on the European Union, Eighth Report, *EU Charter of Fundamental Rights* (2000; H.L. 67), paras. 50, 52, 53, 54, 60, 67, 69, 122.

Joschka Fischer, Germany's foreign minister, albeit writing in his private capacity. He believes that Europe should move from a confederation to a strong federation, described as the finality of European integration. A European Constitution would give expression to this ideal, and its provisions would delineate, *inter alia*, the respective competences of the 'Federation' and the Nation States.⁶⁰ It would however be wrong to believe that all have the same vision of Europe,⁶¹ or that advocates of a European Constitution share the same teleological perspective. The views of Fischer are in marked contrast to, for example, those of the European Constitutional Group. The conceptual foundation for the European Constitutional Group's approach is public choice. Its vision of a European Constitution has a strong bias towards decentralisation and the demarcation of the 'optimum domain' of decision-making.⁶²

There is therefore no reason why such a European Constitution should necessarily be seen either as the foundation for a super state, or as a return to outdated concepts of the Nation State at European level, or as set in stone.⁶³ Claims of this nature simply reflect implicit assumptions as to the form, content, and manner of amendment of any such constitutional document, the very issues that would have to be decided in framing such a constitution. Nor is there any reason why a European Constitution should have to mirror that of a nation state.⁶⁴ The very fact that the EU is not a nation state means that any exercise in constitution building would have to pay due regard to the particular facets of the EU when constructing such a document.

V The Creation of a European Constitution: The No *Demos* Thesis

The particular difficulties attendant upon the creation of a European Constitution will be addressed in the following section. Before doing so it is important to consider a more general objection to this enterprise. The nature of this objection is succinctly summarised by Habermas: constitutional Euro-scepticism encapsulates the view that so long as there is not a European people which is sufficiently 'homogenous' to form a democratic will, there should not be a constitution.⁶⁵

This view has been advanced most notably by Grimm.⁶⁶ He accepts that the Treaties, coupled with the European Court of Justice's jurisprudence, meet many of the requirements of modern constitutionalism.⁶⁷ Grimm contends however that it is inherent in a constitution in the full sense of the term that it 'goes back to an act taken by or at least attributed to the people themselves, in which they attribute political capacity to themselves.'⁶⁸ This is not so in the context of the EU where the Member

⁶⁰ J. Fischer, *From Confederation to Federation: Thoughts on the Finality of European Integration* (Federal Trust, European Essay No. 8, 2000). See also, G. Mancini, 'The Case for Statehood' (1998) 4 ELJ 29. For comment, see C. Joerges, Y. Mény, J. H. H. Weiler eds., *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Harvard Jean Monnet Working Paper 7/00).

⁶¹ Tony Blair, *Superpower—Not Superstate?* (Federal Trust, European Essay No. 12, 2000).

⁶² European Constitutional Group, *A Proposal for a European Constitution* (European Policy Forum, 1995); R. Vaubel, 'The Constitutional Future of the European Union' (1996) 7 *Constitutional Political Economy* 317; F. Vibert, 'How not to Write a Constitution—The Maastricht/Amsterdam Treaties' (1999) 10 *Constitutional Political Economy* 149.

⁶³ Cf I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited' (1999) 36 CMLR 703, 729.

⁶⁴ Cf Piris, note 14 *supra*, p. 569.

⁶⁵ J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' (1995) 1 ELJ 303, 304.

⁶⁶ D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 ELJ 282.

⁶⁷ *Ibid.*, pp. 290–291.

⁶⁸ *Ibid.*, pp. 290, 299.

States remain the Masters of the Treaties. European public power is ‘not one that derives from the people, but one mediated through the states’.⁶⁹ Grimm argues further that there is, at present, no collective identity within the peoples which comprise the EU, as judged by criteria such as a Europeanised party system, European media, European civic associations, and the like.⁷⁰ Their absence means that the ‘European democracy deficit is structurally determined’, and that attainment of a democratic constitutional state ‘can for the time being be adequately realised only in the national framework’.⁷¹ For Grimm the absence of this collective identity means that there is no foundation or justification for grounding any European Constitution in the people. He believes that if constitutional legitimacy were to be derived directly from the people the Member States would cease to be Masters of the Treaty, and the EU would be transformed into a state.⁷²

It is important in evaluating this argument to clear the ground. It can be readily accepted that if there were to be an act of, or attributed to, the people, whereby they arrogated political capacity to themselves, this might in a general sense imbue the resultant constitutional document with legitimacy and authority. If this occurred, *and* if the constitution were to give the central authorities powers redolent of those possessed by states, *and* if it contained rules for constitutional amendment concentrating such power in the central authorities, leaving little or no power to existing state entities, then the EU would be transformed into a super state. This too can be accepted.

This does not however establish that ‘true constitutions’ must be based on act of the people in the above sense, *nor* more importantly does it establish that the existence of such an act necessarily transforms a polity into a state. Both aspects of this argument are problematic, as is the claim that there is no collective identity within the EU. These issues will be addressed in turn.

The *first* claim, that constitutions in their ‘true’ sense must go back to an act taken by or attributed to the people, whereby they attribute political capacity to themselves, is asserted with vigour, but the empirical and normative foundation for it is not readily apparent.

In empirical terms, this has not always been so,⁷³ although many modern constitutions are framed in this manner.⁷⁴ There is moreover an ambiguity in the proposition, particularly that part of it which is framed in terms of an act ‘attributed’ to the people. It might of course be argued that even where there is no such explicit act, state entities are ‘necessarily’ acting on behalf of their people. This reductionism however denudes the idea of an act being attributed to the people of any independent meaning.

The argument is also problematic in normative terms. To be sure, constitutions may be traced back to an act of the people, but it is not clear why this is a necessary

⁶⁹ *Ibid.*, p. 291.

⁷⁰ Grimm, *ibid.*, pp. 295–296, explicitly distances himself from the more ethno-centric conception of a ‘people’ of the kind associated with the decision in *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

⁷¹ Grimm, note 66 *supra*, p. 297.

⁷² *Ibid.*, pp. 298–299.

⁷³ G. Frankenburg, ‘The Return of the Contract: Problems and Pitfalls of European Constitutionalism’ (2000) 6 *ELJ* 257, 258–266.

⁷⁴ See, e.g., Article 20.2 of the German Constitution, Article 3 of the French Constitution, Article 1 of the Italian Constitution, Article 1.2 of the Spanish Constitution. For general discussion see, B. de Witte, ‘Sovereignty and European Integration: The Weight of Legal Tradition’, *The European Court and National Courts, Doctrine and Jurisprudence*, note 11 *supra*, Ch. 10.

normative prerequisite of a true constitution, more especially one that might be adopted at the supranational level. This might be felt to be so on grounds of legitimacy or for more *a priori* reasons.

The legitimacy argument has been touched on already. An act of, or attributed to, the people might be felt to imbue the constitution with legitimacy and authority. This might be so in a general sense. The real relationship between an act of, or attributed to, the people, and constitutional legitimacy and authority, is more complex. It begs the question as to the role of consent, both actual and hypothetical, in the acceptance of governmental obligations. It has been argued that consent is not the primary normative rationale in this respect, and that it can play even less, if any, role where the consent is hypothetical.⁷⁵ The argument that such an act is necessary for a true constitution, also begs the question as to why constitutions have, and continue to have, legitimacy and authority. This is, as Raz has shown, a complex issue,⁷⁶ which cannot be examined here. Suffice it to say for the present that it is questionable whether actual consent is the primary rationale for the authority of a new constitution;⁷⁷ and that there is a strong argument for old constitutions deriving their current validity from a source other than the authority of the original author.⁷⁸

The *a priori* rationale for requiring that a true constitution must be derived from an act of the people whereby they attribute political capacity to themselves takes the following form. We have seen that constitutions include provisions for their modification. It might then be argued that in a true constitution these provisions for modification must be autonomous, in the sense that they are independent of any other legal order. On this view, it might be claimed that the existing rules for modification of the Treaties do not qualify since they require the consent of all Member States,⁷⁹ and that this requirement is itself based on international law. There are difficulties with this argument. It depends on complex issues concerning the nature of legal orders and their interrelationship. The argument also elides the existence of a constitution with the issue as to whether it is part of some broader legal order. It is, for example, commonly accepted that states that exist within a federal structure can and do have constitutions. The validity of these constitutions will, however, be dependent in part on the rules of the federal constitution. The rules for the modification of state constitutions are not therefore wholly autonomous in the sense demanded by the *a priori* argument. Moreover, the existence of an act of the people attributing political capacity to themselves tells one nothing as to the type of rules for modification which they will see fit to enshrine in a constitutional document. They might, for example, decide in the supranational context that constitutional amendment should be predicated in part on state consent.

The *second* aspect of Grimm's argument is perhaps more important for present purposes. This concerns the consequences that he draws from the existence of a European Constitution which was legitimated by an act of the people. There is no reason why such a constitution should inevitably lead to a European state. It would be perfectly possible for a constitution formulated from this foundation to accord sharply

⁷⁵ J. Raz, *Ethics in the Public Domain, Essays in the Morality of Law and Politics* (Clarendon, 1994), Chap. 16; A. Follesdal, *Liberal Contractualism: Partial and Particularist, Impartial and Cosmopolitan* (ARENA Working Paper 16/2000).

⁷⁶ Raz, note 2 *supra*, pp. 157–176.

⁷⁷ *Ibid.*, pp. 162–164.

⁷⁸ *Ibid.*, pp. 164–169.

⁷⁹ Art 48 TEU.

defined competences to the EU, and to enshrine protections for states' rights. It would be equally possible for it to define the rules that would operate in the event of a clash between EU and national law so as to incorporate much of the thinking of national constitutional courts on this matter. It might stipulate voting rules for constitutional amendment which render it difficult for the central institutions to change the essential attributes of the EU, or which give some real say to the Member States *qua* Member States.⁸⁰ It would of course be equally possible for a European Constitution with the 'people at the helm' to frame its substantive content in a more pro-centralist manner, but there is no necessary reason why this should be so. There is a range of options as to the substantive content of any European Constitution, and this is so even if one posits the states as the Masters of the Treaties.

Third, the claim that a European collective identity does not exist is contestable. It begs the question as to how such an identity might be expected to develop. There is, as Habermas states, no justification for assuming that such an identity must exist independently and prior to the democratic process at the European level.⁸¹ It is that very process at the European level, necessitated by the inability of the nation state to cope alone with the problems created by international trade, which will itself help to cultivate the desired collective identity.

VI The Creation of a European Constitution: Difficulties

We should nonetheless be mindful of the difficulties attendant upon the constitution-building enterprise. These will be addressed within this section, taking due account of the differences of view as to the purpose that a European Constitution is intended to serve. The nature of the argument presented in this section should be made clear at the outset. It is in no way 'anti-European'; quite the contrary. It addresses the difficulties to be resolved in any constitution-building exercise that seeks to incorporate the constitutional articles of the Treaty, and the constitutional jurisprudence of the European Court of Justice. This exercise is moreover 'temporally grounded'. It considers the constitution-building enterprise at the present stage of the Community's development. Whether the difficulties discussed below would be less intractable at some later stage remains to be seen. Nor should it be thought that the difficulties considered below preclude reasoned future discussion about matters such as, for example, allocation of competence between the EU and the Member States.

A Constitutional Stability: The Allocation of Power between EU Institutions

The proper division of power and allocation of function between the institutions is itself normatively contestable, which has implications for the stability of any European Constitution. Most nation states work on the basis of some division between executive, legislature, administration and bureaucracy. The constitution is premised on a separation of governmental powers which is ordered in this manner. The precise division of power between the executive and the legislature does of course vary in different states. Notwithstanding this, most constitutions are premised on the

⁸⁰ It is interesting in this respect that national constitutions which do base sovereignty in the people, also exhibit a range of methods of amendment which accord differing degrees of power to central and regional authorities, Stone, note 9 *supra*, p. 57.

⁸¹ Habermas, note 65 *supra*, pp. 305–306.

assumption that it is a valid basis from which to make normative assessments about the appropriate allocation of power in a constitutional document.

The EC does not conform to this presupposition. Legislative power is, for example, divided in a complex manner between the Commission, Council, and European Parliament. Institutional balance between the three is the guiding principle of the EC. It is this, rather than some model of separation of powers, which accurately captures the reality of Community decision-making. The precise degree of power which each of these institutions possesses has evolved since the Community's inception. It continues to do so. The precise degree of power which each ought to have is both normatively contestable and contested as a matter of political fact.

This is of significance when thinking about a European Constitution. Any such document might capture the presently accepted thinking about the appropriate division of power between the Commission, Council, and European Parliament. However, what was politically acceptable and normatively sustainable in 1984 had radically altered by 1994, and might well change again by 2004. Now it is of course the case that constitutions can and do alter. The point being made here is important nonetheless. In the EC the very starting point about the correct allocation of power as between the big three players is normatively contestable in a way which it is not in most nation states.⁸² It is not therefore possible to imagine a European Constitution being created in which the structural division of power between the organs of Community government can be set out as definitively as in the case of most Nation States.⁸³ Those who hope that a European Constitution will provide some enduring constitutional stability are therefore mistaken.

Nor is this difficulty necessarily resolved even if one does adopt a specific substantive vision as to the future of Europe. It is of significance in this respect that Fischer's vision of a strong Federation still leaves much room for debate as to fundamental matters such as the composition of the legislative chamber, and the location of the 'European executive or government'. Thus Fischer argues that the latter could, for example, be vested either in the Commission or the European Council, but he admits that 'there are various other possibilities between these two poles'.⁸⁴ It is therefore doubtful whether, even on this view, a European Constitution would be stable as to the division of power between the major institutions.

The problem being considered here is exacerbated when one factors in the complexities of the three-pillar structure. It is clear that the balance of power as between the Council, Commission, and European Parliament is radically different within pillars two and three as opposed to pillar one. It is clear also that the degree of difference has shifted even in the narrow span of time between the Maastricht and Amsterdam Treaties, and that it will continue to do so.

⁸² Contrast, for example, P. Craig, 'Democracy and Rule-Making within the EC: An Empirical and Normative Assessment' (1997) 3 ELJ 105, and R. Bellamy and D. Castiglione, 'Democracy, Sovereignty and the Constitution of the European Union: The Republican Alternative to Liberalism', in Z. Bankowski and A. Scott eds., *The European Union and its Order* (Blackwell, 2000), Chap. 9, with Vibert, note 62 *supra*.

⁸³ See also, The Independent Commission for the Reform of the Institutions and Procedures of the Union (ICRI), *Advancing the Union* (1999), pp. 37–39.

⁸⁴ Fischer, note 60 *supra*, pp. 18–19.

B The Nature of the Constitutional Document: Abstraction versus Detail

The second difficulty flows from the first. It is doubtful whether a European Constitution could or should be composed of a few, relatively abstract, principles. Conceptions of what a European Constitution might look like vary enormously. Some have the idea that it might be set at a very high level of generality, leaving matters of detail to be dealt with elsewhere. This may not be plausible, because the devil is in the detail. It is precisely because the balance of power between the big three players is so central whenever there is a Treaty revision, that the details of their respective powers are so important. Anyone familiar with the shift from cooperation to co-decision, and with the changes to the latter in the Treaty of Amsterdam, will realise that these details really matter both politically and as a matter of principle. They serve to define and fine-tune the reality of power in the legislative process. The idea that a constitution could abstract from these detailed norms certain principles about the allocation of legislative power, while leaving the details to be dealt with elsewhere, is therefore doubtful.⁸⁵ If a European Constitution were to be drafted in a very general, abstract manner this would simply lead to conflicting interpretations over central issues being resolved through informal political accommodation, and through recourse to the European Court of Justice. The value of having a European Constitution would thereby be undermined, and the judiciary would be politicised.

C Constitutionalising Rights: The Place of the Charter within the Constitutional Scheme

The place of rights within any such constituent document would clearly be of central importance. Rights-based limitations on the existence of governmental power are to be found in many national constitutions, and they are, as we have seen, one of Raz's defining constitutional features.

The original Treaties contained no such list of rights. The rationale for the development of the fundamental rights' doctrine by the European Court of Justice is well known.⁸⁶ The catalyst was the threat of revolt by national courts, especially in Germany and Italy, who were concerned that Community regulations might violate norms protected in their national constitutions. While the initial response of the European Court of Justice in developing its own fundamental rights' doctrine was therefore reactive, there were good reasons why it might have been minded to develop such protections, even if the threat of revolt had never occurred. The most obvious reason is that it enhances the Community's legitimacy. Rights-based protections against the exercise of governmental power are justly regarded as central in democratic polities. The greater the powers of the Community, and the more that they impinged on matters which were social and political and not merely economic, the greater the need for some *quid pro quo* in terms of individual rights.

The EU has now framed a Charter of Fundamental Rights,⁸⁷ which was accepted the European Council.⁸⁸ The immediate impetus came from resolutions of the

⁸⁵ See below, pp. 147–148.

⁸⁶ Craig and de Burca, note 18 *supra*, Ch. 7.

⁸⁷ *Charter of Fundamental Rights of the European Union*, [2000] C364/1.

⁸⁸ *Draft Charter of Fundamental Rights of the European Union, Informal Council Meeting in Biarritz 13–14 October 2000*, Charter 4955/00 (Convention 51), 17 October 2000.

European Council in Cologne and Tampere in 1999, setting up a Convention to draw up a Charter which was to include social and economic, as well as, political and civil rights. The Convention, composed of representatives from Member States, national Parliaments, as well as the European institutions, has met outside of the ordinary framework of the Inter-Governmental Conference (IGC) which is concerned with Treaty reform consequent upon expansion of the EU from 15 to 28 states. The precise legal status of the Charter was left open at the Nice Summit, but it has been drafted so as to be able to be legally binding. This is not the place for any detailed exegesis on the content of the Charter, or its relation with the European Convention of Human Rights.⁸⁹ It is the relationship between the Charter and a possible European Constitution that is apposite here. There is a certain tension in this respect.

On the one hand, we have already seen the connections drawn by some between the Charter and a Constitution for Europe,⁹⁰ as well as the philosophical link between rights-based provisions and constitutions.⁹¹ If such a constitution were to be developed it would therefore be 'odd' to leave the Charter entirely outside such a document.

On the other hand, placing the Charter within a constitution would undoubtedly 'up the stakes' concerning the Charter's legal status, more especially given the breadth of its content. Member States have differed as to the legal status that the Charter should have, and some are unhappy with it being legally binding. If the Charter is not only made binding, but also given a special status by being placed within a constitutional document, then this is likely to heighten the tensions which already exist between the Member States. It may also mean that Member States would be less willing to include the broad range of rights presently listed in the Charter if it were to be accorded constitutional status.

D Constitutional Reach: The Community Policies that should be included within a Constitution

A further issue which would have to be resolved concerns the extent to which substantive Community goals or policies should be included within a written constitution, and if so in what form. The simplest option would be to replicate Part One of the EC Treaty, which sets out the Principles on which the Community is based, Articles 1–16. Any attempt to narrow this list down would almost certainly meet with substantial objections from those who felt that important Community principles had been left out of the constitutional document. If we were to expand beyond this list it would be difficult to stop short of including, in outline at least, all the policies where the Community has some competence.⁹²

⁸⁹ P. Craig, 'The Rights Stuff', forthcoming.

⁹⁰ Note 59 *supra*.

⁹¹ Note 2 *supra*.

⁹² European University Institute, Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union, A Study of the Reorganisation of the Treaties*, 15 May 2000, pp. 6–7.

E Constitutional Precision: The Allocation of Competence between the EU and the Member States

The discussion thus far has focused on some of the difficulties to be faced in devising a written constitution from the perspective of the allocation of power between the EU institutions themselves. Written constitutions will normally also deal with the division of power between regions or states and the central authorities. It might be felt that constitutional definition is not problematic in this context. It is after all a basic precept that the EU only has the powers accorded to it under the Treaties.⁹³ All other powers thus reside with the Member States. A clause to this effect, redolent of that to be found in the US Constitution,⁹⁴ could then be included within a European Constitution. This could undoubtedly be done. It would however only serve to mask, or push one stage further back, the issues that really serve to define the powers of the EU and the Member States.

This is in part because there is no definition in the Treaties as to the areas that do lie within the exclusive competence of the EU. The definition of this term is central to the application of subsidiarity, and yet commentators disagree markedly over its meaning.⁹⁵ The problem of defining the respective boundaries of competence is compounded by the fact that in a number of areas, such as employment, health, culture, and education, the EU shares competence with the Member States. The precise division of competence will vary even within these areas. The difficulty of allocating competences is further compounded by the presence of the implied powers provision contained within Article 308 EC,⁹⁶ and the liberal construction given to this by the European Court of Justice.⁹⁷

It would therefore be possible to include a general provision on the allocation of power as between the EU and the Member States within a European Constitution. We should not, however, be under any illusion that such a clause would resolve the real difficulties in this area.

This difficulty becomes even more marked when one considers the division of competence between the Community and the Member States from an explicitly normative perspective. The criteria which ought to govern this issue,⁹⁸ and its institutional ramifications,⁹⁹ are controversial.

F Constitutional Tension: Defining the Relationship between the EU and the Member States

The creation of a formal constitution could also lead to tension between the Member States and the EU insofar as key issues such as supremacy are concerned. A

⁹³ A. Dashwood, *The Limits of European Community Powers* (Cambridge Centre for European Legal Studies, 1995).

⁹⁴ 10th Amendment: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'.

⁹⁵ A. Toth, 'A Legal Analysis of Subsidiarity', in D. O'Keefe and P. Twomey eds, *Legal Issues of the Maastricht Treaty* (Wiley, 1994), Ch. 3; J. Steiner, 'Subsidiarity under the Maastricht Treaty', in D. O'Keefe and P. Twomey eds, *Legal Issues of the Maastricht Treaty* (Wiley, 1994), Ch. 4.

⁹⁶ Previously Art 235.

⁹⁷ J. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2445-2446.

⁹⁸ Contrast Vibert, note 62 *supra*, p. 152, with *The Division of Competences in the European Union*, European Parliament, Directorate-General for Research, Working Paper, Political Series W 26.

⁹⁹ J. Weiler, 'European Constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) XLIV *Political Studies* 517.

constitution might reasonably be expected to deal not only with the allocation of power as between the centre and the states, but also with the resolution of clashes between their respective norms. At present this is dealt with largely through the European Court of Justice's jurisprudence. Central issues that have fundamentally shaped the relationship between the Member States and the EU, such as supremacy, direct effect, pre-emption, and the like, have been fashioned by the European Court of Justice. Now it might well be felt that there is no problem in this regard. All existing Member States accept the *acquis communautaire*, and new entrants to the Community must do so too. It might then be argued that if the states accept the *acquis communautaire*, including the specifically constitutional-type norms contained therein which regulate relations between Member States and the Community, they will have no difficulty accepting that such norms should be included within a written constitution. This is a *non-sequitur*. There is a real difference between the existence of norms which regulate the relationship between the Community and Member States being enshrined in the jurisprudence of the European Court of Justice and seeking to encapsulate these norms in a written constitution. The development of such norms by the European Court of Justice, and the reaction thereto by the national courts, is an intricate process. It entails a complex discourse in which the national courts have been able to structure their reaction to the European Court of Justice's jurisprudence in a way that is acceptable to them. It allows for points of difference to exist. It enables national courts, if they so wish, to qualify acceptance of Community law supremacy in certain respects by hypothesising situations in which they would not give unequivocal support to Community law supremacy. The fact that such qualifications remain largely in the realm of hypothesis means that the national courts can send a message to the European Court of Justice and the Community more generally about the limits of what they are willing to accept. The very process of committing this relationship to paper will require the resolution of issues which presently are left hanging by the jurisprudence of the European Court of Justice combined with national constitutional courts.

Let it be accepted for the sake of argument that Member States would be willing for there to be some form of supremacy clause placed in a written constitution. There would then be the issue as to the limits of this acceptance of Community law supremacy. There would be likely to be vigorous debate as to whether this *prima facie* supremacy should be limited or qualified in the case of clashes with fundamental rights, or where such supremacy is felt to trespass on key elements contained within the national constitutions of Member States. There would also be the vexed issue of *Kompetenz-Kompetenz*. If we are committed to the idea of developing a written constitution for the EU there are two ways of addressing the problem discussed in this section.

We could attempt to define in detail the legal nature of the relationship between the Community and the Member States in such a constitution, being fully cognisant of the problems that this could produce. This can be demonstrated by the attempts made by the Cambridge group to capture the European Court of Justice's jurisprudence on central issues such as direct effect, and supremacy and commit it to paper in 'statutory' form which might then find its way into a future revision of the Treaty.¹⁰⁰ The clause on supremacy certainly captures the European Court of Justice's thinking in this

¹⁰⁰ Centre for European Legal Studies, Cambridge, 'EC Treaty Project' (1997) 22 ELR 395.

respect.¹⁰¹ However it pays no attention to the qualifications expressed by constitutional courts on the matter. It is doubtful in the extreme whether such a formulation would be acceptable to the Member States, especially if attempts were made to embody it in the Treaty itself.

The alternative strategy would be to leave such matters out of any constitution, and recognise that the constitution thus enacted was only a partial reflection of the constitutional status quo. It might be argued that even if we go for this latter option that this is not so bad. After all many written constitutions do not contain all the norms of a constitutional nature which regulate power within a body politic. This will not do. It is one thing to say that there is a written constitution that is then glossed by legal and political developments over time, as is the case with many if not all such documents. It is another thing entirely to say that constitutional norms which are fundamental to the working of that body politic, *and* which exist at the time when the written constitution is enacted, are consciously left out of it because of the difficulties of committing such norms to paper and securing the agreement of the relevant parties.

G A European Constitution: Formal Status

It is clear that the formal status of any written constitution must be properly thought through.

There are three principal consequences of enacting a constitution within a Nation State. The document has a separate existence and higher status than other norms. There are normally special rules for its modification. There is often some form of constitutional review by a court to ensure compliance with the constitutional norms, although as we have seen the nature of this review can differ from country to country. If we were to have a written constitution within the EU decisions would have to be made about each of these issues.

It would be possible to address these issues by reformulating the existing Treaties. There would be a Basic Treaty that enshrined the Constitution, and a separate Treaty text dealing with other matters presently covered by the existing Treaties. The corollary of this division would be that amendment of the Basic Treaty enshrining the Constitution would require an IGC, unanimity plus ratification in each Member State. Modification of the other Treaty provisions could be through a decision of the Council (acting unanimously or through a super-qualified majority), together with assent from the European Parliament. Compliance would be secured through the European Court of Justice exercising its power of review.¹⁰²

H A European Constitution: Aspiration and Fulfilment

The reasons for wanting a European Constitution are, as we have seen, eclectic. A written constitution may however not achieve what its advocates hope.

Those who see it as a further step towards a desired end of a federal state should pause for thought. It can be accepted that in symbolic terms the existence of a

¹⁰¹ *Ibid.*, pp. 404–405, Art I.1.6.

¹⁰² It should nonetheless be recognised that there are bound to be instances in which a Council decision made other than by unanimity to amend a Treaty provision falling within the latter category will be challenged before the European Court of Justice on the ground that it has an effect on one of the Treaty articles within the Basic Treaty and therefore is not capable of being amended in this fashion.

constitution might enhance the sense that the EU 'looks like' a state. Over and beyond this the mere existence of a constitution is neutral in this respect. The extent to which a constitution did or did not further this ideal would, as we have seen, be contingent on its content. It would, for example, be perfectly possible to draft a constitution which affirmed that the Member States were Masters of the Treaty, which placed strict and meaningful limits on Community competence and which strengthened the role of national Parliaments in the European schema.

Those who believe that a constitution would help to foster a European Union which was principled and orderly, as opposed to the messy constitutional structure found in the Treaties especially since Maastricht, might be disappointed for rather different reasons. The Treaties have evolved in the way that they have precisely because the major power-brokers, the Member States, Council, Commission, and more recently the European Parliament, have engaged in detailed negotiations which have produced these conclusions. The idea that the messy constitutional tapestry that emerged, as reflected in, for example, the complex legislative process, the three pillar structure, or variable geometry, could have been avoided, if we had a written constitution is extremely doubtful in causal terms.

If a European Constitution were to prove too rigid, and incapable of accommodating the wishes of the major power-brokers, then one of two things would happen. Either the written constitution would collapse, and have to be frequently revised in order to reflect the reality of the new political status quo, or institutional developments would occur outside the strict letter of such a constitution which reflected the *de facto* wishes of those who exercise power within the EU, notwithstanding that they were formally inconsistent with any constitutional document.

There is indeed concrete historical evidence for this. The first thirty years of the Community's existence saw the development of important institutions outside the strict letter of the Treaty. These had a significant impact on Community decision-making. If they had been declared illegal there would have been a constitutional crisis in the Community, since it was clear that the Member States were unwilling to contemplate decision-making on any other terms. The Luxembourg Accords were one such development. They were the prime example of negative intergovernmentalism: they gave the Member States the power to block measures they disliked which they felt touched on their vital interests. Statistics as to the number of occasions on which this power was actually used are, of course, only part of the story, since the threat of the veto shaped the very policies put forward by the Commission, and shaped also the negotiations concerning them. The Council's intergovernmental orientation also had a more positive side. The Luxembourg Accords were fine if the ultimate objective was to veto a measure. But the Member States also desired more finely-tuned tools through which to exercise influence over legislation they wished to see enacted. The growing influence of COREPER, the establishment of management and regulatory committees, the increased use of Article 208 EC,¹⁰³ and the evolution of the European Council were all features of positive intergovernmentalism. They were all designed to increase, or had the effect of increasing, Member State influence over legislation that emerged from the Community.¹⁰⁴

¹⁰³ Previously Art 152.

¹⁰⁴ They achieved this in complementary ways. COREPER and the management/regulatory committees provided the means whereby the Council could have a more formalised input into the detail of the emergent legislation. Article 208 EC became a useful vehicle whereby the Council could suggest

I Constitutional Legitimacy: Normative and Social Dimensions

An argument for a European constitution is that it would enhance the normative legitimacy of the EU. Clarification and simplification of the Treaty articles which regulate the power of the principal Community institutions, clear constitutional principles concerning the relationship between the EU and the Member States, a Charter of Rights, and the identification of the Community's main goals and policies, is an attractive package in normative terms. Whether it can be delivered politically is more problematic, a point touched on in the preceding discussion. It must however be recognised that even if the project were to be a success, with a net gain in normative legitimacy, the impact of such a development viewed in terms of social legitimacy is more uncertain. There might well be gains in this respect, in the sense that citizens would feel better about a Community which they could understand more easily, which was more accessible, which had a Charter of rights, and so on. It should also be recognised that Euro-sceptics and the like will read such developments in the most negative way possible. A constitution, combined with a Charter of Rights, will be seen as further evidence of the Community's aspiration to be a state in its own right.

VII The Relationship between a European Constitution and a Basic Treaty

The discussion thus far has focused on a European Constitution. Any such European Constitution, were it to be formulated, would almost certainly be enshrined within a Basic Treaty, in the manner considered above. The remainder of the current Treaties would then be included in a separate Treaty, or in Protocols attached to the Basic Treaty. This should be distinguished from the various suggestions that have been made for consolidation, cleaning up, and simplification of the existing mass of Treaty provisions. Some of these proposals entail a division of the Treaties along the lines described above: some form of Basic Treaty, combined with a second Treaty or Protocols. It is however important not to confuse the two different reform strategies.¹⁰⁵ This is so even though there is some overlap between them, and even though both may employ the language of a Basic Treaty.

A European Constitution properly understood will, in certain crucial respects, include *more* in a Basic Treaty than is to be generally found in the proposals for simplification of the Treaties.¹⁰⁶ It will address the issues which have thus far been dealt with by the European Court of Justice, such as supremacy, direct effect, competence, remedies, pre-emption, and the like. The rationale for their inclusion in a document that can be truly called a constitution has been considered above. They define in important ways the relationship between the Community institutions themselves, and between the Community and the Member States. The constitutional content accorded to these matters will draw on the European Court of Justice's jurisprudence, but may also, as in the case of supremacy, have to accommodate the reservations expressed by national courts.

Community action in particular areas. At the same time, the European Council became a mechanism which enabled Member States to discuss general issues of Community concern, outside the framework of the Council itself. The results of their deliberations were often 'binding', in the sense of laying down the parameters of future Community action, whether this was in relation to the size of the Common Agricultural Policy budget, or the timetable for moves towards closer economic union.

¹⁰⁵ See also, ICRI, note 83 *supra*, pp. 69–70.

¹⁰⁶ The Cambridge Study does however address these issues, note 100 *supra*.

A European Constitution would, in other respects, probably include *less* in a Basic Treaty than is to be found in proposals for simplification of the Treaties, judged by the evidence that exists thus far. Most of the proposals for simplification and consolidation of the Treaties contain more coverage of substantive EU law than would be found in most constitutional documents.¹⁰⁷ There is however nothing in theory to prevent a constitution properly so called from including material of this nature on substantive EU law.

It is equally important to realise that a European Constitution would be essentially forward looking, in the sense of addressing the issues considered in the previous section and thereby encapsulating a vision of the Community for the future. The EUI study is by way of contrast concerned with simplification and clarification of obligations which Member States have already accepted.

Space precludes any detailed analysis of all attempts made at simplifying the Treaties.¹⁰⁸ The discussion will focus on the most recent such effort undertaken by the European University Institute at the behest of the Commission. The Commission, as part of its contribution to the 1999–2000 Inter-Governmental Conference, suggested that a reorganisation of the Treaties might be beneficial,¹⁰⁹ more particularly in the light of the enlargement of the Community.¹¹⁰ The Robert Schumann Centre at the EUI was commissioned to undertake a feasibility study. It submitted its Report to the Commission in May 2000.¹¹¹

The EUI study was conducted within certain parameters, most of which were set by the terms of reference. It was drafted on the basis of the existing Treaty law, and was not designed to amend this. The Treaty on European Union and the Treaty establishing the European Community were included in the exercise, but the ECSC Treaty and the Euratom Treaty were not. The study did not include the European Court of Justice's jurisprudence, and it did not consider the methods of amendment that would apply to the Treaties.

In positive terms the EUI study opted for a Basic Treaty which would, in contrast to previous consolidation exercises, be relatively short, thereby enhancing legal certainty and accessibility. The Basic Treaty consists of eight titles, containing 95 clauses. The first three titles contain the provisions relating to the foundations of the Union, fundamental rights,¹¹² and citizenship. Title IV covers the 'Objectives and Activities of

¹⁰⁷ *A Basic Treaty for the European Union*, Commission Communication, COM (2000) 434 final, p. 5.

¹⁰⁸ Lausanne Draft, *The Simplification of the EU Treaties and the IGC of 1996*, European Parliament, Political Series W-16, March 1996, and *Draft of a Consolidated Treaty of the European Union*, European Parliament, Political Series W-17, March 1996; J. Lipsius, 'The 1996 Intergovernmental Conference' (1995) 20 ELR 235, 265–267. Florence Draft, *A Clarified and Simplified Model of the European Communities Treaties and the Treaty of European Union in Just One Treaty*, European Parliament, Legal Series W-9, October 1996; C-D. Ehlerman and A. von Bogdany, 'Consolidation of the European Treaties: Feasibility, Costs and Benefits' (1996) 33 CMLR 1107. Cambridge Study, note 100 *supra*. For general discussion see, C. Schmid, 'Ways out of the Maquis Communautaire on Simplification and Consolidation and the Need for a Restatement of European Primary Law', European University Institute, Working Paper RSC No. 99/6.

¹⁰⁹ *Adapting the Institutions to make a Success of Enlargement*, Commission Communication, COM (1999) 592; *Adapting the Institutions to make a Success of Enlargement*, Commission Opinion, COM (2000) 34.

¹¹⁰ Report by Weizsacker, Dehane and Simon, *The Institutional Implications of Enlargement—Report to the European Commission*, published in *Europe*, Document No. 2159, 20 October 1999.

¹¹¹ European University Institute, Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union, A Study of the Reorganisation of the Treaties*, 15 May 2000.

¹¹² The EUI Study acknowledges that the nature of the provisions relating to fundamental rights will have to be modified if the Charter of Rights is integrated into the Treaties, *ibid.*, p. 5.

the Union'. This deals with some general principles governing the relationship between the Union and the Member States, such as subsidiarity. It also covers substantive Community policies in clauses 21–45. The Report from the EUI acknowledged that these could be left out of a Basic Treaty, thereby shortening it to some 70 clauses. It was however felt that it was better to include the fundamental principles governing these areas, both because they were central to the objectives of the Community, and because their inclusion ensured a proper balance of institutional and substantive provisions within the Basic Treaty.¹¹³ Title V of the Basic Treaty is concerned with institutional provisions. It concentrates on the composition and functions of the institutions, and their voting procedures. The provisions which specify the decision-making procedures, such as cooperation, co-decision, and the like are not included, either in general, or in relation to the operational legal base of a particular clause in the Basic Treaty. It was felt that these technical provisions would overburden the Basic Treaty, and that they would continue to evolve. Financial matters are covered in Title VI. The penultimate title deals with closer cooperation. The final title covers a range of matters such as the jurisdiction of the European Court of Justice, the relationship of the Basic Treaty and the other Treaties, ratification, and the like.

The relationship between the Basic Treaty and the existing Treaties is of importance. The EUI study produced a Basic Treaty of the European Union.¹¹⁴ All of the existing provisions of the TEU are included either in the Basic Treaty itself, or in the two protocols attached thereto, one dealing with common foreign and security policy, the other with police and judicial cooperation in criminal matters. The TEU would therefore cease to exist.¹¹⁵ The EC Treaty was necessarily treated differently. Full legal force was to be given to the consolidated version of this Treaty annexed to the Amsterdam Treaty. Those provisions of the EC Treaty contained in the Basic Treaty would then be repealed from the EC Treaty itself.¹¹⁶

The Commission has reacted favourably to the EUI study, stating that it proves the feasibility of a reorganisation of the Treaties.¹¹⁷ There were inevitably some issues on which the Commission thought that a different view might be taken. Thus the Commission did not rule out the possibility of extending the reorganisation to all the primary Treaties.¹¹⁸ It also felt that other matters such as the powers of the European Court of Justice, the operation of the co-decision procedure, and conclusion of international agreements, might be included within the Basic Treaty.¹¹⁹ The Commission made it clear that limits of time precluded Treaty reorganisation from being included in the agenda for the 2000 IGC, but felt that this IGC could set a procedure and timetable for completion of the task.¹²⁰

The EUI study is to be welcomed. Treaty reorganisation and simplification is undoubtedly needed, but it is no easy task. The balance between principle and detail is always a fine one, but in general the line taken in this study gets the balance right. Any commentator will have views as to which issues ought to be included within a Basic Treaty. My own view is that the EUI report was right to prefer the rather longer

¹¹³ *Ibid.*, pp. 6–7.

¹¹⁴ *Ibid.*, p. 8.

¹¹⁵ Existing Protocols would be attached to the Basic Treaty, *ibid.*, p. 9.

¹¹⁶ *Ibid.*, p. 9.

¹¹⁷ Note 107 *supra*, p. 2.

¹¹⁸ *Ibid.*, pp. 4–5.

¹¹⁹ *Ibid.*, p. 5.

¹²⁰ *Ibid.*, p. 6.

version of the Basic Treaty, which includes the fundamental principles governing the substantive areas of Community law. I am, like the Commission, more sceptical as to whether it is possible to leave the decision-making procedures out of the Basic Treaty. The EUI's motivation for doing so is readily understandable. These procedures are, however, central to the nature of the institutional balance that exists in the EC. It is not going too far to say that they have been one of the principal factors defining that balance. It is this that merits their inclusion in the Basic Treaty.

VIII Conclusion

The prevalence of debate about the constitutional nature and future of the EU is unsurprising. It is one important manifestation of the more general discourse about the nature and future of the polity itself. An understanding of the characteristics of constitutions, and the various meanings of constitutionalism, provide an essential foundation for reasoned analysis in this area. It is equally necessary to be clear as to the specific nature of the constitutional inquiry. Three such issues have been addressed in this paper.

It has been argued that the EC has indeed been transformed from an international to a constitutional legal order, and that the arguments to the contrary are not convincing. This does not however mean that it has or should have a constitution which draws together in a separate document the constitutional norms presently enshrined in the Treaties, together with constitutional doctrine emanating from the European Court of Justice, and national courts. A constitution thus conceived would not have to mirror that of a Nation State. It should not be ruled out on the grounds that there is no European *demos*. Nor would it necessarily transform the Community into a super-state. We should however be mindful of the difficulties attendant upon creating a European Constitution. This is so whether the motivating rationale is for order and simplicity *per se*, or whether this is combined with a specific *telos* that the constitution is to embody. The preferable way forward at this stage of the EU's existence is therefore to proceed with a Basic Treaty, along the lines of the study undertaken by the EUI. It would not preclude future discussion of constitutional issues, whether they are concerned with the allocation of power between the Community institutions, competences, supremacy, or the plethora of other matters considered above. The approach taken by the EUI study is less ambitious and far-reaching than a fully-fledged European Constitution, but it would simplify and render more accessible the central precepts of EU law, thereby providing a more secure foundation for any future discussion of a European Constitution. That would be a valuable step forward in its own right.