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A *Dynamic Europe*

- An Analysis of the Treaty Establishing a Constitution for Europe

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Contents

Summary

In the spring of 2005, the Treaty Establishing a Constitution for Europe (CT) was rejected in French and Dutch referenda. The document, that was to lead the recently expanded European Union (EU) into the future, was instead put on pause for reflection. Why was there such fear and scepticism towards the CT? What was the CT really all about? In this analysis of the CT, I look at the CT from three legal/political theoretical perspectives; the International Law Perspective, the Constitutionalist Perspective and the Dynamic Perspective.

According to the International Law Perspective, the CT is considered to be a treaty between sovereign Member States under international law. This perspective is influenced by the theories of Hobbes, which states the importance of absolute power. The so-called exit clause (article 59 of the CT) provides for unilateral withdrawal by a Member State from the EU. The Membership is in this sense a constantly renewed voluntary act, and it can, from this point of view, be argued that the Member States are still fully sovereign. Further, the principle of conferred powers stated in Article 9 of the CT, seems to be in agreement with the International Law Perspective. According to this principle, all the competences of the EU are derived from the Member States. From this point of view, EU can be considered not vested with any sovereignty by itself. However, in this paper I put the International Law Perspective in contrast with the Constitutionalist and Dynamic perspective.

From the Constitutionalist Perspective, which is influenced by the theories of Locke, the CT is a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities within its jurisdiction. Furthermore, it is built upon the principle of division and limitation of power. The primary interest is the rights of the individual. However, in pre-war Europe it was difficult to view constitutionalism outside the idea of the sovereign nation state. The traditional approach has been that individual rights should be respected only within the nation-state. From the Constitutionalist Perspective, the EU and the CT have therefore come to be seen as the beginning of a federal European State.

From the third perspective, the Dynamic Perspective, I view the CT in the light of post-war European development, where individual rights have come to be respected not only within the borders of the Nation State. The European Court of Justice (ECJ) has referred to the legal system of the European Community (EC) as *sui generis*, or in other words, as a unique legal system. This idea of Europe as a unique legal order is also the basic idea behind the Dynamic Perspective. Europe is seen as a pluralistic normative order, where the role of sovereignty and the importance of the idea of absolute and supreme power of the nation-state have declined. In this aspect, the Dynamic Perspective can be seen as standing opposed to the

International Law Perspective. On the other hand, the Dynamic Perspective can be seen as a development of the Constitutionalist Perspective. It views a Constitutionalist Europe beyond the idea of the sovereign nation-state.

In the Dynamic Perspective I conceptualize the EU as something that is constantly changing and developing. As was argued by Machiavelli already in the 16th Century, conflicts can create a creative tension, which lead to positive and dynamic changes of society. From this point of view, the outcome of the normative conflicts that occur within the EU, can be seen as a way for a progressive and dynamic development of a new post-war Europe.

In the Dynamic Perspective, I also picture the EU and the CT from a social constructive point of view. According to this view, identities is not something fixed, rather it can be seen as something constantly constructed and reconstructed. From this point of view, a person can have multiple identities at the same time. In the Dynamic Perspective, I take account the force of nationalism in the European process of integration. I distinguish between civic and ethnic types of national identities. The CT can be seen as a constitution among the *Peoples* of Europe, rather than the People of Europe. Further, the respect of the national identities of the Member States is stated in Paragraph 5 (1) of the CT. Further, the motto of the EU, as stated in the preamble, is "*united in diversity*". The *Dynamic Europe* is built upon the diversity of its peoples and not on a single European demos.

In the Dynamic Analysis of the CT, I conclude that the CT should not be seen in the light of the nation-state. The CT should rather be seen as a unique legal order, which takes constitutionalism and the idea of the right of the individual and the limitation of power beyond the borders of the nation-states to an international European level. Further, according to the Dynamic analysis, the CT does not try to create a European identity as a projection of the national identities of the Member States. Rather, it tries to create a type of constitutional patriotism based on certain common values and objectives, which can coexist with the national identities of the Member State. This strictly civic based European identity can work as a limit and safeguard for the exclusionary and racist tendencies of the national identities.

Preface

This paper is a part of the ongoing intensive debate on the future of the European Union and European Integration. In the process of writing, the CT was rejected in the French and Dutch referendums, and was set on a paus for reflection. The rejection was a revelation for the politicians, who did not expect such a prominent opposition towards the CT from the citizens. These turbulent political events, and the ongoing intensive constitutional debate, have been encouraging and have come to enrich the whole process of writing. Many important constitutional challenges lye ahead, and I will follow the coming discussions with great excitement.

I would like to thank my thesis supervisor, Ola Zetterquist, for his time and valuable guidance and for introducing me to the European Constitutional debate. I would also like to thank my friends for support and ideas, as well as my family for always encouraging me in my studies. Thanks!

Abbreviations

CFRU	Charter of Fundamental Rights of the Union
CFSP	Common Foreign and Security Policy
CT	Constitutional Treaty
EC	European Community- This refers to the first of the three pillars of the European Union. EC Law and the jurisdiction of the European Court of Justice are confined to the first pillar. The second and the third pillars are of essential intergovernmental character.
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECSC	The European Coal and Steel Community
ESCP	European Security and Defence Policy
EU	European Union- refers to all the three pillars of the Union
PJCC	Police and Judicial Co-operation in Criminal Matters
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
WWII	World War Two

1 Introduction

1.1 Background

In 1952, France, Germany, Italy, and the three Benelux countries entered into an agreement to create The European Coal and Steel Community (ECSC). Today, that organization has morphed into the European Union (EU) and has 25 members. From a legal perspective, and according to the rulings of European Court of Justice (ECJ)[1], the EU has created its own legal system, *sui generis.* The EU of today can neither be considered an international organisation under international law, nor a sovereign Federal State. Rather, it is something new; hard to describe with the language of traditional legal theories and concepts.

The most prominent reason behind the Constitutional Treaty (CT) seems to be that the institutions and the structure of EU were originally designed for six countries. After tension and struggling with 15 Member States, the recently extension to 25 Member States called for a reform of the basic structure of the Union. The EU was considered to be in a need of more efficient and democratic procedures. Besides this reason, the CT was also aimed at simplify the current maze of treaties, principles and doctrines into one single document, which would be more understandable to the citizens. In order to deal with these challenges, the Laeken Declaration established the Convention on the Future of Europe in 2001, with the aim of producing a basic Treaty for the EU.[2] After eighteen months, the convention presented the Draft Constitution for Europe on the 18 of July 2003. The document was approved and finally signed in October 2004 and was ready for national ratification in the Member States. In the spring of 2005, France and the Netherlands rejected the CT in referendums and the European constitutional debate was set on a "*pause for reflection"*.[3]

According to recent French research, the main reason for the French rejection of the CT was the "fear of loss of national identity as a result of the European integration process."[4] The lack of knowledge and the uncertainty of what the Union really is and will be, have obviously created a fear towards the EU integration. The Europeans seem to fear to lose what is familiar to them; their nation-state and their national identity. However, it has also been argued that even if EU is seen to some degree in terms of its threat to the long established national-identitites, it is perceived far more in terms of the benefits it can provide or costs it imposes, both to the individual

[1] Van Gend en Loos, Case 26/62, [1963] ECR 1 at 12, Costa v. ENEL, Case 6/64 , [1964] ECR 585 at 593
[2] Anneli Albi, *EU Enlargement and the Constitution of Central and Eastern Europe,* Cambridge University Press, 2005, p 179
[3] The Economist, *The Future – A venture at a standstill,* May 27th-June 2nd 2006, p 21-23
[4] Bruno Jérome, Nicolas G. Vaillant, *The French Rejection of the European Constitution: An Empirical Analysis,* European Journal of Political Economy, 7 September 2005

and to the country. The general feeling and satisfaction with the current government has also shown to have an impact on the level of support for the EU. The scepticism towards the Union does also vary between the different Member States. [5] However, regardless of the cause of the scepticism, the rejection of the CT was a revelation that the European citizens want to know what the CT really is before adopting it. They do not trust the politicians arguing that it is not more than a simplification of the current treaties. The current European Constitutional debate is complex and there are many questions to be answered. In this paper, I will analyse the CT from different perspectives, which will help us to better understand the process of European integration and what the CT and the EU is really all about.

1.2 The Objective

In this paper, I will analyse the CT from the point of view of three different perspectives. The first two perspectives presented, the International Law Perspective and the Constitutionalist Perspective, are anchored in the debate whether the Union is an international organisation or if it is the beginning of a federal European State, or in other words, a United States of Europe. These two perspectives are the foundation to the European legal integration debate and are an important starting point of any analysis of the CT. However, the objective of this paper is to widen the European constitutional debate with a third perspective, which I will call the Dynamic Perspective. The purpose of this Perspective is to conceptualise the EU and the CT as a progressive and constantly developing unique legal order, where the protection of individual rights goes beyond the borders of the nation-state and the concept of sovereignty. With the introduction of the Dynamic Perspective, I want to give a nuanced picture of the CT, which stand in contrast to the view of the International Law perspective and its focus on the idea of absolute power and the importance of sovereignty.

1.3 Method

This paper constitutes an analysis of the CT from the point of view of three different perspectives. By using and comparing the different perspectives, I will give a further understanding of the CT and show the complexity of the CT and the European Constitutional debate. The three perspectives will further the understanding of how sovereignty, constitutionalism and national identity can be understood in relation to the CT. An interdisciplinary approach has been necessary to able to understand some of the most essential parts of the CT. The Dynamic Perspective has therefore come to include legal, political and sociological theories.

[5] Lauren M. McLaren, *Opposition to EU integration and fear of loss of national identities:Debunking a basic assumption regarding hostility to the integration project,* European Journal of Political Research, Volume 43 Issue 6, October 2004.

1.4 Material

This Paper is based on a variety of materials; classical text, books of contemporary authorities on the subject, legal and political periodicals and academic dissertations.

1.5 Outline

In the second chapter of this paper, a theoretical introduction will be given for the three different perspective, which will be the analytical tool for the analyse of the CT, presented in chapter three. In chapter four, I will present my conclusions of the analysis, and I will describe the *Dynamic Europe* which is the very title of this very paper.

2 The Theoretical Framework

I will in this chapter present the three perspectives- the International Law Perspective, the Constitutionalist Perspective and the Dynamic Perspective, which I will use as the theoretical framework for the analysis in chapter three.

2.1 The International Law Perspective

2.1.1 The Sovereign State

This perspective is built upon a conception of a world consisting of sovereign nation-states. This idea is most often cited to have its origin in the Treaty of Westphalia in 1658. The gradually diminished power of the Holy Roman Empire and the papacy in Western Europe, led to the development of states, who did not consider themselves bound by supranational laws or subject to supranational institutions. Instead a world order consisting of sovereign states developed. The main idea behind the sovereign state was that externally, the state should by itself decide about its relations to other states. Internally, the citizens are subjected completely and solely to the national lawgiver, the national government and the national judicature.[6] This world order, consisting of Sovereign States as the prime actor on the international arena, is in international relation theory often cited as the realistic school.[7] In the pre- WWII Europe, the ideas of Hobbes and of sovereignty played a very prominent role.

In Black's Legal Dictionary, the Sovereign State is defined as:

"A state that possesses an independent existence, being complete in itself, without being merely part of a larger whole to whose government it is subject; a political community whose members are bound together by the tie of a common subjection to some central authority, whose commands those members must obey."[8]

The concept of the independent and sovereign state is one of the basic ideas of the International Law Perspective.

2.1.2 Thomas Hobbes

The philosophical background to the international law perspective and of the concept of sovereignty will for the purpose of this paper be derived from the

[6] R. C. Van Caenegem, *An Historical Introduction to Western Constitutional Law,* Cambridge University Press: 1995
[7] John Baylis, Steve Smith, *The Globalization of World Politics,* Oxford University Press, 1977, p 109
[8] "sovereign state", *Black's Legal Dictionary* St. Paul, Minn., Seventh Edition, 1999

theories of the English philosopher Thomas Hobbes (1588-1679). His theories became influenced of the fact that he lived in England during the time of the civil wars. He was of the opinion that the struggle between the King and Parliament was not for law, but for master, and only one could be the master over the other. It was from this observation that Hobbes came to develop his theory of sovereignty. The sovereign power derives from the authority that can enforce actual obedience. It is the might and not the laws, which make the rights, and it is authority, and not reason, which makes a law.[9]

In his book, *Leviathan* (1655), he tries to build a theory of the foundation of society and legitimate government. His theory is based on a pre societal hypothetical condition, referred to as *the state of nature.* Scarcity of resources in the state of nature leads to a constant war of all against all. To avoid this anarchy, as he regards as the ultimate evil, men band together for mutual protection. In a *social contract* every man surrenders all his natural rights, except the right to self-preservation, to the sovereign power, which is the ultimate authority. What the sovereign actually consists of is of less interest for Hobbes, as long as one sovereign power can be identified. [10]
A prominent principle in the theory of Hobbes is the negative version of the Golden Rule, which states that do not do to another, what you would not have done to yourself.[11] This implies that the sovereign should not infringe on the life of the individual more than necessary. The problem with the Hobbesian theory is that since there is no power above the sovereign, there is nothing to keep him from breaking this rule.

According to Hobbes, laws are a human creation and laws therefore do not exist by nature. Law is the same as the command from the sovereign and the judiciary is viewed as a part of the sovereigns attribute, rather than an independent power. Hobbes is considered to be one of the first *legal positivist.* According to this view, there is no law anterior to the state. Law is the creature of the established human ruler and the social contract makes his will and commands to law.[12] This idea of a positive law stands in contrast to the other two perspective of this paper, the Constitutionalist Perspective and the Dynamic Perspective, which are based on the idea of a natural law with universally accepted moral principles.

2.1.3 The International Law Perspective and the EU

From the International Law Perspective, the EC was created by a set of treaties under international law and the validity of the EC depends on those treaties. Only actors of international law, namely states and international

[9] Ibid. P 56
[10] Ola Zetterquist, *A Europé of the Member States or of the Citizens,* KFS i Lund AB: 2002, p 74-76, 78-79, see also Thomas Hobbes, *Leviathan,* Chapter XIII (http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII)
[11] Thomas Hobbes, *Leviathan,* Chapter XV
[12] Neil MacCormick, *Questioning Sovereignty*, Oxford University Press: 2001, p 17

organisations, can enter into a treaty as a binding agreement under international law. From this point of view, the EU is built on the mutual acknowledgement of each country's sovereignty. This view is often advocated by the Member States, who argues that they have not given away sovereignty to the EU.[13]

2.2 The Constitutionalist Perspective

2.2.1 Constitutionalism

As we saw in chapter 2.1, a treaty is a binding agreement under international law between sovereign states or international organisations. However, what is the meaning and purpose of a treaty establishing a *constitution* for Europe? A constitution is most often a written document, however not necessarily, which codifies the rules and principles by which an organisation or political entity is govern.

What kind of constitution is the CT? Is it meant to be the fundament of a future United States of Europe, or is it a constitution for an international organisation? The word constitution refers to an actual text, document or uncodified system of laws. It is important to distinguish the constitution from the theory of constitutionalism, which is the theory behind the constitutions of modern liberal nations or states. Constitutionalism has a pessimistic view of human nature and of absolute power. Limitiation of power and the protection of individual rights, which the government is unable to infringe upon, is therefore the core element in the theory of constitutionalism.

However, the constitutionalism which emerged in the nineteenth century Europe was clearly associated with the formation and consolidation of nation-states. The progress towards constitutional governments was thought to go hand in hand with the recognition of national ties and identities. This stress was reinforced by the principle of self-determination as the basis for redrawing the political map of large parts of Europe.[14] Constitutionalism in the framework of the EU, has therefore often been conceptualized in the light of the nation-state.

2.2.2 John Locke

The philosophical foundation of constitutionalism is found in the theories of Johan Locke (1632-1704), who is regarded as one of the fathers of modern liberalism. He agreed with Hobbes that the state of nature was founded on

[13] This idea is also referred to as the Member State Model, see Ola Zetterquist, *A Europe of the Member States or of the Citizens,* p 232
[14] Nevil Johnson, *Constitutionalism in Europé Since 1945: Reconstruction and Reappraisal,* in Greenberg et al. (eds.), Constitutionalism & Democracy: Transitions in the Contemporary World, Oxford: OUP (1993), p 34

equality of man. However, in opposition to Hobbes, Locke did not believe that war was the natural consequence of the state of nature:

"The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions[…]."[15]

In this famous passage, Locke puts the foundations to the *natural law.* Independently of any political society and the state, humans have certain rights and obligations. According to Locke, individuals have the right to interpret and implement the natural law in the state of nature. Equality of man means that no one shall harm another in their life, health, liberty or possession.[16] The insecurity and the fact that enforcement would rest on private actions, makes it necessary to uphold a government to secure everybody's rights. In the state of nature, people will therefore agree to establish a government.[17]

Locke also introduced the idea of division and limitation of power. A secure government according to Locke, would include a legislature, an independent judiciary and an executive branch concerned with external protection and internal law-enforcement. State institutions are legitimate as far as they uphold the law and the rights derived from that law. According to this theory, the law comes before the state, or in other words, *the state is law-dependent.*[18]

From the idea that the state is law-dependent grew the idea of *the rule of law.* The core of the principle is that it should be a government of law and not of man. The rule of law implies that government authority may only be exercised in accordance with the law, which has been adopted through an established procedure. The principle is intended to be a safeguard against arbitrary rulings in individual cases.[19]

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[15] John Locke, Two Treaties, II, §6 (http://libertyonline.hypermall.com/Locke/second/second-frame.html) 2006-04-09
[16] Ola Zetterquist, *A Europé of the Member States or of the Citizens,* p 98-100
[17] Neil MacCormick, *Questioning Sovereignty,* p 19
[18] Ibid. p 18, 19
[19] "The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it[…] freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man, as freedom of nature is to be under no other restraint but the law of Nature." John Locke, *Two Treaties of Government*, Chapter IV, § 21

2.2.3 Constitutional Perspective and the EU

The Constitutionalist Perspective is based on the ideas of Constitutionalism as on the theory of Locke. EC is a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities within the jurisdiction of EC.[20] From this point of view, the EC treaties can be seen as mutated into a European Constitution. The Citizens of EC are already subjects under EC-law, which are the mutated treaties.[21] However, as constitutionalism often has been conceptualized as going hand in hand with the nation-state, the constitutional construct of the EU has come to be viewed as a development towards a Untied States of Europe, which is the projection of a European Super State. The following perspective, the Dynamic Perspective, can be considered as an extension of the Constitutionalist Perspective. In this perspective, I will look upon the possibility of European constitutionalism beyond the borders of the nation-state.

2.3 The Dynamic Perspective

2.3.1 Background

The Constitutionalist Perspective takes into account the ideas of Locke and the importance of limitation of power and the protection of individual rights. However, constitutionalism has often come to be perceived in the relation to the nation-state. In the Dynamic Perspective, I look upon the EU in a wider post-war context. The WWII led to the uprooting of large part of Europe, both population wise, politically, economically and morally. There was a huge vacuum that needed to be filled. A constitutional setup that was more durable than the pre-war era and its idea of the importance of national self-determination, needed to be constructed. In Western Europe, or the part of Europe that did not fall under the influence of the Soviet Union, was there a desire to create stability and security both within individual states and in relations among them. Nevil Johnson describes this development as following:

"Nevertheless, the reaction against national exclusiveness and in favour of far closer ties among the European States did have an effect on constitutional reconstruction reflected in less emphasis on national identity, a greater readiness to acknowledge the claims of minorities to special treatment, and in the sphere of interstate relations some dispositions to tone down the earlier stress on untrammelled national sovereignty."[22]

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[20] J. H. H. Weiler and Joel P Trachtman, *European Constitutionalism and Its Discontents*, Northwestern Journal of International Law & Business, Winter 1996/Spring 1997, p 354

[21] This idea is refered to as the European Citizen Model, see Ola Zetterquist, *A Europé of the Member States or of the Citizens,* p 249

[22] Nevil Johnson, *Constitutionalism in Europé Since 1945: Reconstruction and Reappraisal,* in Greenberg et al. (eds.), Constitutionalism & Democracy: Transitions in the Contemporary World, Oxford: OUP (1993), p 28

According to the Dynamic Perspective, the European integration can be seen as going hand in hand with this post-war European development, where the concept of state-sovereignty has come to play a diminished role. However, an important point of the Dynamic Perspective, is that the process of European integration and the development of constitutionalism within the EU, does not have to go hand in hand with the recognition or creation of a common European identity, which will infringe on the national identities of the Member States. The Dynamic Perspective argues for the possibility of constitutionalism beyond the idea of the nation-state.

Critical decisions by the ECJ in the formative period of the Community held that the Community constituted a new legal order. [23] First, it was interpreted as a new legal order of international law. However, later the concept of international law was dropped, and left was only a "new legal order".[24] The Dynamic Perspective is founded on the idea that EU is a unique legal order, or in other words, an order *sui generic.*[25] The Dynamic Perspective views the CT as a kind of federal constitutional discipline, which however, is not rooted in the conformity of the nation-state.

Further, the CT and the EU can be seen as a pluralistic normative order. In the modern State, legal and political power works naturally together. The law is enforced by the political power. However, political and legal power can work together even outside the framework of the nation-state. EU is a forum where norms and ideas interact and come in conflict. However, the Dynamic Perspective regards normative tensions and conflicts as a source for a progressive and dynamic development of the EU.

The question of terminology is important in the Dynamic Perspective. To use models and standards derived from the nation-state misjudges the particular nature of European unification. The EU is not as existing federal states, the consequence of historical processes, hegemonic structures, or outside pressure. It is rather a consequence of a voluntary unification of independent states. [26] According to the Dynamic Perspective, a European Constitution should therefore not be conceptualised in the same way as the constitutions of the Member States. Terminology of constitutional law is normally used to describe a static condition. If it is a state and possesses executive power, the question of democratic legitimacy follows naturally. However, in the case where some characteristics of the state are missing, as in the case of the European Union, it becomes much more difficult to use

[23] Case 26/62 Van Gend en Loos v Nederlandsie Aministratie der Belastingen [1963] E.C.R. 1, Case 6/64 Costa v Enel [1964] E.C.R. 585, Case 106/77 Amministrazione delle Finanzie dello Stato v Simmenthal [1978] E.C.R 629.
[24] Neil MacCormick, *Questioning Sovereignty,* p 106
[25] Literally *sui generic* means of its own kind or unique in its characteristics. It indicates an idea, an entity or a reality that cannot be included in a wider concept. (http://www.answers.com/topic/sui-generis) (20060803)
[26] J. Frowein, *Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie fur den europäischen Integrationsprozess* EuR, 1983, p. 301, in Schuppert F. G.1995, p 347

the terminology of constitutional law.[27] I will now look further into the different aspects of the Dynamic Perspective.

2.3.2 Pluralistic Normative Order

A normative order is a reference to an ideal order. It is a view of the world as it could be or could become, and therefore different from what the world actually is. In relation to the normative order, it is possible to talk about right and wrong actions.[28] A normative order involves judgement if your behaviour does not match the required norm. In an institutional normative system, there is a way for determining what counts as an authoritative norm of the system, or what is an established right or duty of a person in the system. Competent judgement should be certain within the system, except to the extent that there is coordinated cross-recognition of different orders. The theory of law as an institutional normative order, is an inherently pluralistic conception of a legal system. Distinct systems of law can co-exist without any one having to deny either the independence or the normative character of another. Through history, legal systems has coexisted in many areas (eg. Papacy and the Empire).

According to Hobbes, if we take away the idea of a sovereign, we may face the state of Anarchy and a "war all against all".[29] Contrary to the theories of Hobbes, the pluralistic normative order postulates that the existence of a supreme authority is not necessary. MacCormick argues that the pluralistic view has a "certain persuasiveness as a descriptive account".[30] However, this approach is not incompatible with the theory of sovereignty, and sometimes the institutional normative order needs to be enshrined in territorial supremacy. Further, the idea of an absolute power and of a sovereign cannot be the end of the legal thinking. Europe rather needs legal philosophies that open up for practical solutions without constantly asking of where in politics lie the things of ultimate value, and what these are.[31]

When it comes to understanding how a pluralistic institutional normative order functions, we have to add a political dimension. Political power is about the ability to enforce the law with predictability and to make a judgement prevail in the last resort. It is the political power that backs up and to a degree reinforces the authority and prestige of the Court and to the normative order, whose judgement is enforced.[32] The power to enforce has in our modern world been territorially concentrated to the form of the state.

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[27] Folke Gunnar Schuppert, *On the Evolution of a European State: Reflections on the Conditions of and the Prospects for a European Constitution,* edited by Jens Joachim Hesse and Nevil Johnson, *Constitutional Policy and Change in Europe,* Oxford University Press, 1995, s. 345
[28] Neil MacCormick, *Questioning Sovereignty,* p 4
[29] Thomas Hobbes, *Leviathan,* Chapter XIII (http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII) 2006-03-31
[30] Neil MacCormick, *Questioning Sovereignty,* p 78
[31] Ibid. p 78
[32] Ibid. p 9

However, according to MacCormick, they have rarely, if ever succeeded in absolutely eliminating rival orders of one kind or another.[33] Even though politics and law are interrelated in many aspects, it is important to distinguish them from each other. The *legal power*, or in other words, the normative power, is related to the realm of "ought". The *political power*, on the other hand, is the "power-in-fact", or more precise, the power to make sure that somebody actually acts in a certain way."[34]

Law is a normative order, which confers normative power. It determines what is right and wrong according to that specific normative system. It can not by itself exercise any "power-in-fact". Further, the law is bound to a specific normative system and its judgement can not apply outside of this. Laws are also distinguished from moral principles, in the sense that they are not universally applicable and they do not have to account of the interests and ideals of all persons capable of participating and being affected by its outcome.[35] In the modern State, legal and political power works naturally together. The law is enforced by the political power. However, it is not necessary that the political and legal power can work together only inside the nation-state. The Dynamic Perspectives suggests that legal and political forces work together even outside the nation-state, in a complex system of interdependence as a cohesive force.

The theory of Multilevel Governance opens up for the possibility of pluralistic normative orders and argues against the International law perspective, which says that the EC is a normal international organisation between sovereign states operating under international law. The theory of multilevel governance diminishes the importance of the nation-state. Instead of conceptualizing regional policy as a national issue in which the leading role is taken by the institutions of the nation-state, we should regard it as an arena for multilevel governance where the EU plays an integral role in policy-making, together with the separate regional authorities and the central national institutions. The theory differentiates between government and governance. While the term government is mainly concerned with formal structures of state authority, the latter is a much wider term, which takes notion of decision-making on different levels, including the international level.[36] According to this theory, the interdependence on each other's resources, the protection of individual rights and the limitation of powers, makes us avoid the "war all against all" as described by Hobbes. The decision making process between different levels and institutions is loosely interconnected and does not have to take a hierarchical form. The political theory of Multilevel Governance is represented by the principle of subsidiarity in the CT.

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[33] Ibid. p 9
[34] Ibid, p 13, 14
[35] Ibid. 13
[36] David March and Gerry Stoker, *Theory and Method in Political Science,* New York: Palgrave Macmillan, second edition, 2002

In a pluralistic normative system it may occur a conflict of norms at some point. According to MacCormick, such a conflict does not necessarily have to be solved, or it may be a matter for a political rather than legal process.[37] From a Dynamic Perspective point of view, in the EU legal system, it is of less importance to find an ultimate norm where all other norms are derived from, or as *Hans Kelsen* put it, a *Grundnorm* as a closure of the norm system. [38] The EU legal system can rather be seen as built on a common and ultimate value, which is the rights of the individual.

2.3.3 The Theory of Conflicts

As we have previously seen, conflicts may occur in a pluralistic normative system. However, conflicts of norms and ideas, can be seen as a source of creative tension which promotes a progressive development. As part of the Dynamic Perspective, I will therefore look closer on the theory of conflicts and its view on the development of the society.

Conflicts occur when it is difficult to bring together different interest. There also has to exist some kind of dependence between the parties of the conflict and something that forces them to act together.[39] According to the theory of consensus, the society is being held together informally by norms, values, and a common morality. [40] EU can also be seen as held together by a certain consensus regarding norms, values and common morality. When this consensus is interrupted, a conflict occurs, and a new consensus has to be reached. Nicoló Machiavelli (1469-1527) was an early exponent of the theory of conflicts and wrote in his book *Discourses* as following:

"I say that those who condemn the tumults between the nobles and the plebs, appear to me to blame those things that were the chief causes for keeping Rome free, and that they paid more attention to the noises and shouts that arose in those tumults than to the good effects they brought forth, and that they did not consider that in every Republic there are two different viewpoints, that of the People and that of the Nobles; and that all the laws that are made in favor of liberty result from their disunion, as may easily be seen to have happened in Rome, for from Tarquin to the Gracchi which was more than three hundred years, the tumults of Rome rarely

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[37] Neil MacCormick, *Questioning Sovereignty,* p 75

[38] Hans Kelsen (1881-1973) was an Austrian philosopher. According to the theory of Kelsen, law can be seen as a system and hierarchy of legal norms. Ultimately, all legal norms gain legitimacy from a superior norm. The basis of validity of a norm rests in the objective validity of a higher norm. The highest norm in the legal system is the constitution, which derives its legitimacy from a hypothetical norm, the *Grundnorm.* It is seen as transferring legal validity down to the lower norms. The term *Grundnorm* refers to the closure of the norm system and not to an ultimate principle. It is the through the *Grundnorm* the laws become normative, or in other words, go from "Is" to "Ought". See Uta Bindreiter, *Why Grundnorm?* Kluwer Law International: 2002, p 11-13, 46

[39] D. I. Jacobsen and J. Thorsvik, *Hur moderna organisationer fungerar,* Studentlitteratur 2002, p 202

[40] George Ritzer, *Sociological Theory,* University of Maryland: The Mcgraw-Hill Companies, INC. Forth Edition, 1996, p 266

brought forth exiles, and more rarely blood[…] for he who examines well the result of these, will not find that they have brought forth any exile of violence prejudicial to the common good, but laws and institutions in benefit of public liberty"[41]

Even though customarily the blame for the collapse of the Roman Republic has been assigned to warring factions that eventually ripped it apart, Machiavelli points out that it was conflict that generated a creative tension, which led to the a positive development of laws made in favour of liberty.

Karl Marx (1818-1883) is another prominent philosopher who has dealt with the question of conflict as part of societal changes. Marx theories is interesting because they raise fundamental questions about social structure and social dynamics. Marx adopted the dialectical theory of the German philosopher G.W.F Hegel (1770-1831), which said that contradiction and negation have a dynamic quality to lead to further development until a higher unity is reached. Hegel described it as a three step process from thesis, to antithesis, which leads to synthesis. However, whereas Hegel was concerned with the dialectic of ideas, Marx tried to apply the theory to the material world. This took the ideas from the realms of philosophy and made it applicable in the realm of social science.[42] Marx argued together with Frederick Engel in the book *Manifesto of the Communist Party,* that the competition of individuals and groups for wealth and power is the fundamental process shaping social structure:

"The history of all hitherto existing society is the history of class struggles. Freeman and slave, patrician and plebian, lord and serf, guild-master and journeyman, in a word, oppressor and oppressed, stood in constant opposition to one another, carried on an uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary reconstitution of society at large, or in the common ruin of the contending classes."[43]

According to Marx, the conflict between classes produces changes in the society. He sees it as a positive progressive development of the society. Even though the Dynamic Perspective does not take account of the revolutionary character of the societal changes in Marx theory, it looks upon the EU and the CT as a forum where norms and interest collide and conflicts occur. This conflicts are seen as leading to dynamic and progressive developments of the EU.

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[41] Niccolo Machiavelli, *Discourses,* Chapter IV, (http://worldebooklibrary.com/eBooks/Adelaide/m/m149d/bk1ch4.html) (11/08/2006)
[42] George Ritzer, *Sociological Theory,* 1996, p 44, 48, 49, for dialectical theory of Karl Marx see, Karl Marx, *The Poverty of Philosophy, Chapter Two: The Metaphysics of Political Economy,* (http://www.marxists.org/archive/marx/works/1847/poverty-philosophy/ch02.htm) (17/08/2006)
[43] Karl Marx, Frederick Engels, *Manifesto of the Communist Party,* 1848, (http://www.anu.edu.au/polsci/marx/classics/manifesto.html#Bourgoise) (14/08/2006)

2.3.4 Social Constructivism and National Identity

I will use the theory of social constructivism to put the CT in relation to the question of identity construction. As we have seen, the French rejected the CT mainly because of fear of lost of National Identity.[44] The question of National Identity takes a very prominent role in the CT. There is a special protection set up in paragraph 5 (1) of the CT, which states that the Union shall respect the national identity of the Member States. In the awakening of the modern nation-state, the national identity and nationhood was often seen as something ethnically based given by nature and as a fixed component of the individual. However, social constructivism has questioned these ideas. To understand the dynamic relationship between sovereignty, constitutionalism and the national identity in the CT, I will use the theory of social constructivism.

The theory of Social Construction emphasises that the national identity is something constantly changing in relation to the environment. The national identity is constructed of many different components on different levels in the individuals consciousness.[45] Further, a national identity is considered to develop in relation to an "other" and on a perceived common heritage.[46] However, it is not only constructed on the premise of "we and them", it also tends to pictures "we" in positive words and "them" in negative.[47] According to the social-constructivist theory, national identities is something that is constantly being constructed and reconstructed and it is rather built on a common mythology than on blood- ties.[48]

Since the Treaty in Westphalia in 1658, we have had a world order built on the concept of the nation-state. Democracy has come to be closely connected and finally realized through the nation-state and the majority rule has also gained legitimacy inside its boundaries.[49] Further, it has been something deeply rooted in our consciousness. The Nation has become a way through which the individual can feel a collective identification and a sense of cooperation and togetherness in a wider perspective.[50]

Nationalism has many different sides and it is common to distinguish between different forms such as; Western and Eastern, political and cultural, civic and ethnic, and liberal and illiberal kind of nationalism. However, it can be dangerous to underestimate what different forms of nationalism have

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[44] Bruno Jérome, Nicolas G. Vaillant, *The French Rejection of the European Constitution: An Empirical Analysis,* European Journal of Political Economy, 7 September 2005
[45] Helena Lindholm Schulz, *Krig i vår tid,* Lund: Studentlitteratur, 2002, p 68
[46] Thomas Hylland Eriksen, *Kulturterrorismen: En Uppgörelse med tanken om kulturell renhet,* Fagernes: Nya Doxa, 1999, p19
[47] Helena Lindholm Schulz, *Krig i vår tid,* p 68
[48] Thomas Hylland Eriksen, *Kulturterrorismen; En Uppgörelse med tanken om kulturell renhet,* p 23, 24
[49] Neil MacCormick, *Questioning Sovereignty,* p 169
[50] John Baylis & Steve Smith, *The Globalization of World Politics – An Introduction to International Relations,* 2nd edition, 2001, Oxford University Press: New York, p 440

in common, and the problems they may pose. What is considered "good" nationalism can easily be turned into something bad, and encourage intolerance and exclusion, rather than instilling a positive collective identification and sense of togetherness.[51] I will now present some different forms of nationalism and how a national identity can be constructed.

Ethnic Nationalism is many times also referred to as "Eastern Nationalism". It is rather cultural than political, and is more built on emotions than rationality.[52] According to Ethnic Nationalism, we are born into certain given nations. Nationality is dependent on "blood- ties" (*Ius Sanguinis*).[53] Nationality is therefore something unavoidable given, with no voluntary elements or openings. When you are a member of a nation, loyalty to that nation is also required, no matter if you like it or not. Further, this kind of nationalism is rooted in primordial thought about ancestry and genetics.[54] From the mindset of ethnic nationalism, combined with the Hobbsian thought of Sovereignty, a belief that "all people have the right of self-determination" was developed.[55] The Belief in a society that can include a variety of cultures, the multicultural society, contradicts the thought that every nation has the right to self-determination. Most of the modern Nation-States consist of more than one nationality (in the ethnic context) and there simply exist too many possible nations on earth to make the principle exhaustive.[56]

The Civic Nationalism is also sometimes seen as *"Western political nationalism"*, and is closely connected to the liberal theory of Locke. A central theme is constitutionalism, civil rights and the limitation of government[57] Civic nationalism is built in a legal context and refers to a political community. Membership/Citizenship is seen as voluntary and requires allegiance to the institutions.[58] Citizenship is also built on the principle of nativity (Ius Soli). The civic nation can be described as an association of citizens.[59] Nationalism in the civic sense is often referred to as patriotism. Habermas promotes the possibility to create a "constitutional patriotism", with a common sense of loyalty to a common constitutional order, regardless of ethnic differences.[60] Even though the civic/western nationalism is pictured in positive terms, it has also been argued that it is not always better than the eastern/ethnic nationalism, since it often have come to assume the assimilation of ethnic minorities within the borders of the

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[51] Philip Spencer & Howard Wollman, *Nationalism- A Critical Introduction,* London: SAGE publications, 2002, p 96
[52] Anthony D. Smith, *National Identity and the Idea of European Unity,*
[53] Philip Spencer & Howard Wollman, *Nationalism- A Critical Introduction,* p 101
[54] Neil MacCormick, *Questioning Sovereignty,* p 169-171
[55] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights open with the stipulation: "All peoples have the right of self-determination[…]".
[56] Jyoti Puri, *Encountering Nationalism,* Oxford: Blackwell Publishing Ltd, 2004
[57] Ibid. 98-100, see also, Anthony D. Smith, *National Identity and the Idea of European Unity,* Royal Institute of International Affairs, Vol. 68, No 1, 1992, p 61
[58] Neil MacCormick, *Questioning Sovereignty,* p 188
[59] Philip Spencer & Howard Wollman, *Nationalism- A Critical Introduction,* p 101
[60] Neil MacCormick, *Questioning Sovereignty,* p 144

nation-state through acculturation to a hegemonic majority ethnic culture.[61] In this sense, both civic and ethnical nationalism have negative sides. The former tries to impose the majority culture on the minorities internally through assimilation and the latter tries to defend their cultural and national identity by excluding or raising barriers against others.

It is important to avoid seeing and defining the civic and ethnic nationalism in straightforward either/or terms. Nationalism often comes in mixed forms and is more a question of degree. For also the strictly civic type of nation-state, develop certain cultural practices and institutions around them.[62] The civic nationalism is in this way not purely institutional, it also becomes cultural. In accordance with civic nationalism, we can also feel attachment to the geographical country, to the institutions and the culture and a relationship between a certain territory and a way of living can be created. The individual can in this sense be considered to be contextual, or in other words, formed in an interaction with the social environment.[63] The nationalism of the Member States often appears in a mixed form and is to a certain degree attached to the geographical country, culture and a certain way of living. For the Dynamic Perspective, it is important to acknowledge and respect the national/cultural-identities of the Member States. As the question of national and cultural-identity remains at the Member States level, it can be possibly to create a strictly civic European identity, based on certain common values, such as the right of the individual.

Human beings have always been striving to identity with something greater than themselves. Through history, people have gradually organized into larger and larger societies. In this process, the number of identifications has multiplied, from gender, age and clan, toward village, communities, religion and the nation-state. All these identities work more or less side-by-side or crosscut each other. Under normal circumstances, human beings are able to move between their different layers of identities, or in other words, their multiple identities.[64] From the Dynamic Perspective, I examine the CT in the light of the idea of multiply identities. According to the Dynamic Perspective, it is possibility to create a sort of European "constitutional patriotism", founded upon the value of the individual rights and the idea of "united in its diversity"[65], which can coexist with the national identities of the Member State.

According to Weiler, "states" and "nations" do not need to be rooted, or even coincide, with each other. National consciousness and vibrancy do not by themselves require statehood. Weiler questions the belief that nationality/citizenship has to coincide with the State and that it is possible

[61] Philip Spencer & Howard Wollman, *Nationalism- A Critical Introduction,* p 100
[62] Neil MacCormick, *Questioning Sovereignty,* p 171
[63] Yael Tamir, *Liberal Nationalism,* Princeton University Press: UK, 1993, p 32-34
[64] Anthony D. Smith, *National Identity and the Idea of European Unity,* 1992, p 58, 59
[65] See Preamble to the CT: *"Convinced that, thus "united in its diversity", Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope."*

for an individual to feel affiliated to another ethno- cultural group than the dominant.[66] The State does not have to extend its claim of loyalty of the individual that far. Separation of nationality and citizenship does not imply the end of the nationality and its positive parts, such as feeling belongingness, social cohesion, and the cultural and human richness, which may be found in the national ethos.[67] From the Dynamic Perspective, EU can be seen as a possibility to loosen up the relationship between the territorial state and nationality. With the diminished importance of sovereignty and state borders, and with the existence of a strictly civic European identity, it can be easier for minorities within the state to explorer their minority national or cultural identity.

An important question for Europe is how to deal with the "we and them", which is a fundamental part of the construction of identities. How should we view the "other"? According to Weiler, the solution is not to assimilate the other to be one of us, because this solution means tolerating the alien, by enforcing him to assimilate and be like us.[68] As I mentioned previously, the civic nationalism has sometimes come to assume the assimilation of minorities to the hegemonic majority culture to be necessary.[69] According to Weiler, it is important to let the identity of the other be maintained, rather than forcing him to be one of us. It is important to except the "other" as different.[70] This is the foundation of a pluralistic society with respect for each others differences. From Dynamic Perspective, to show tolerance for the "other" is a prominent principle. The EU motto, "United in Diversity", came in use for the first time around the year 2000 and was for the first time mentioned officially in the CT Article 1-8. The motto means that the Europeans are united in working together for peace and prosperity, and that the diversity of cultures, traditions and languages in Europe are a positive asset for the continent. However, to make this society of diversity possible, it is important to emphasise the importance of a basic consensus regarding some fundamental values, such as the rights of the individual and democracy.

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[66] J. H. Weiler, *Europe: The Case Against the Case for Statehood,* European Law Journal, Vol. 4, No. 1, 1998, p 45, 46

[67] J. H. Weiler, *Does Europé Need a Constitution: Demos, Telos and the German Maastricht Decision,* 1995 1 ELJ p 219-223

[68] Ibid. p 61

[69] See Civic Nationalism in this paper (2.3.1.3.2)

[70] Comment: Weiler derive this idea from Mosaik law and Jewish Sages. See J. H. Weiler, *The Case Against the Case of Statehood,* p 61, 62

3 A *Dynamic Europe* – An Analysis of the CT

In this Chapter, I will make a Dynamic analyse of the CT from the theoretical framework set up in the previous chapters.

3.1 The Question of Supremacy and Sovereignty

The supremacy of the Community law over National law has been a fact ever since the ECJ decisions in the famous *Van Gend en Loos Case*[71] in 1963 and *Costa v Enel Case*[72] in 1964. Now, for the first time, this old doctrine of ECJ has a statutory equivalent in Article 1-10 (1) of the CT;

"The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States".

What does the principal of supremacy mean? Whenever there is a conflict in a national court between a national rule and a European rule, precedence must be accorded to the latter. According to doctrine, the rule only applies when the European rule is sufficiently clear to be suitable for application by the court. The necessity of precision is not mentioned in the CT, but the effect of the case law would seem to be preserved by Article 4-3, which states that:

"The case law of the Court of Justice of the European Communities shall be maintained as a source of interpretation of Union law."

The implementations of international agreements have normally depended on whether the country in question is of monistic or dualistic character. In a monistic country, the substance of an international treaty becomes domestic

[71] Case 26/62, NV. Alegemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1, 12. *"The Conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of Which compise not only Member States but also their nationals".*

[72] Case 6/64[1964] ECR 585, 593 *"The precedence of Community law is confirmed by Article 189, whereby a regulation "shall be binding" and "directly applicable in all Member States". This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of legislative measure which could prevail over Community law […] It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".*

law upon execution of the agreement. In a dualistic system on the other hand, the Member State must implement the treaty in domestic legislation.

The principle of direct effect was first declared in the van Gend & Loos case in 1963.[73] According to the rulings by ECJ, EC-law decides whether a provision of a Community Treaty is directly effective or not. With this decision, all the countries were in a sense obliged to follow a monistic adoption of EC-legislation.

The new factor was that EC-law would have direct effect irrespective of the constitutional law of the country concerned. EC-law is applicable even though the national constitutional law does not provide it. Normally, self-executing provisions of ordinary international treaties have direct effect in the national courts only if provided by the national constitutional law.[74] It is clear that the judgement given by the ECJ in the case, are contrary to what the parties to the Treaties intended, and therefore contrary to the Treaties themselves. The most prominent reason behind the principle was its character of *ought,* and not what it actually was. It was made to give enforcement to directives and for the efficiency of the Community. [75]

What would happen, according to the CT, if a National Parliament was to pass a statue going expressly contrary to EC-law? And if the National Parliament refused to implement EC-law? The CT does not give much more clarity to what would happen if a national parliament were to pass a statue going expressly contrary to EC-law. The principle of supremacy only applies to the competences conferred on it, and who will decide what is actually conferred? If we look at the Van Gend en Loos ruling[76] , it seems like the ECJ has a far-reaching freedom to interpret the treaties. However, what if the National Court thinks the limit for interpretation has been exceeded?

This is a question of who has the actual competence to determine the competence? The true sovereign power is whoever has the competence to determine the limits on their own competence. All other competences can therefore be seen as subordinate or derivative.[77] Whether the principle of supremacy has infringed on the sovereignty of the Member States is an unsolved question and the answer depends on whom you ask. However, in the *Dynamic Europe*, the importance and the meaning of sovereignty and supremacy is not what it used to be. The concept of sovereignty has changes with the EU and it is more accurate to talk about post-sovereign Member States. It is therefore more interesting to try to understand and explain the premises of the post-sovereign European State, than to discuss who the possessor of the true sovereignty is. In this sense, it is no longer relevant to

[73] Van Gend & Loos, 26/62, ECR 1963
[74] Trevor C. Hartley, *Constitutional Problems of the European Union,* 135
[75] Trevor C. Hartley, *Constitutional Problems of the European Union,* p 24
[76] Van Gend & Loos, 26/62, ECR 1963, p 1
[77] Neil MacCormick, *The Maastricht-Urteil: Sovereignty now,* European Law Journal 1, 1995, p 259

conceptualize Europe from the point of view of the International Law Perspective.

The fact that the principle of supremacy is included in black and white in the CT, gives it further recognition and legitimacy. It makes the nature of the Union and its unique legal order more apparent and comprehensive for the citizens. The Economist describes the British reaction of including the principle of supremacy in the CT as following:

"It is rather as if, having happily consumed factory made sausage for 30 years, consumers are now being asked to read the ingredients on the side of the packet and consider carefully if they want to keep eating reconstituted udders."[78]

However, it seems as the principle of supremacy and direct effect could be able to extend its applicability in the CT. The Treaty on European Union (TEU)[79] divided EU policies into three pillars. The first is the Community pillar (EC) which concerns economic, social and environmental policies, the second pillar concerns common Foreign and Security Policy (CFSP) and the third pillar concerns Police and Judicial Co-operation in Criminal Matters (PJCC). In the pillar structure the power of ECJ, and therefore also the principle of supremacy, was limited to the first pillar. However, in the CT, the three pillars are to merge into a single structure and are to be fully absorbed into the European Union. It could therefore be possible that the will expand the applicability of the principle of supremacy institutionally to all areas of the Union. According to the institutional theory, organisations and institutions are seen as behaving according to their own logic. Each institution plays a certain role, and has its own definition of this role. For example, the task of ECJ has been to give shape to a Community based on the rule of law, and this has been concretized by ensuring that Community law takes precedence over national law.[80] How this development will be in the CT without the pillar structure is hard to predict. For example, the objectives of the Union stated in Article 3 of the CT[81] may inspire the ECJ

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[78] The Economist, London: May 31, 2003. Vol 367, Iss. 8326; p 37

[79] The Treaty on European Union is also referred to as the Maastricht Treaty. It was signed on 7 February 1992 in Maastricht between the members of European Community. It entered into force on 1 November 1993. It led to the creation of the European Union and was the result of separate negotiations on monetary union and political union.

[80] Gunnar Folke Schuppert, *On the Evolution of a European State: Reflections on the Conditions of and the Prospects for a European Constituion,* p 338

[81] Article 3 of the CT states: *"1. The Union's aim is to promote peace, its values and the well being of its peoples. 2. The Unions shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted. 3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between woman and men, solidarity between generations and protection of the rights of the child. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. 4.*

to do extensive theological interpretations. The Euro-sceptics argues that an expansion of the principle of supremacy could be possible even without the consent or intention of the Member Stats. However, in the *Dynamic Europe,* where post-sovereignty of the Member States is acknowledge and where the Member States coexists in a profound cooperation and interdependence, an extended possibility for ECJ to act, could be seen as an ultimate guarantee that the values of the CT, which also are the values of the Member States, will be upheld. In the *Dynamic Europe,* it is the values which are most important, not the sovereignty.

However, the Member States and their Courts are arguing in the line of the International Law Perspective that they are still fully sovereign. The German Constitutional Court has ruled that they are "the masters of the Treaties"[82] and they can change or abolish the treaties if they want to. The same has been argued in other Member States. The unwritten constitution of England is founded on the principle of the Sovereignty of the Parliament. The principle in essence has been described by the famous English Legal Philosopher A. V. Dicey as following:

"The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[83]

The Parliament of UK, is traditionally seen as having absolute sovereign power, comparable to the sovereign power described by Hobbes. Further, according to Dicey, a sovereign body cannot, while retaining its sovereign character, restrict its own powers by any particular enactment. It is therefore impossible for Parliament to make laws, which cannot be touched by any subsequent Parliament.[84] This poses the question: What happened with the principle of sovereignty of the Parliament when the British enacted the European Community Act 1972? It has been argued that the Act of 1972 has imposed a restriction upon later Parliaments, and in this sense, Britian has gone through a technical constitutional revolution.[85] With the famous

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In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as the strict observance and the development of international law, including respect for the principles of the United Nations Charter. 5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it by the Constitution".

[82] *"Herren der Verträge",* German Maastricht case, Brunner v. Union Treaty, Bundesverfassungsgericht, decision of 12 October 1993, [1994] 1 CMLR 57 (para. [55] of the judgement).

[83] A. V. Dicey, *Law of the Constitution,* p 39, 40

[84] Ibid. p 63, 64

[85] H. W. R. Wade, *Sovereignty – Revolution or Evolution,* (1996) L.Q.R. p 586

Factortame case in 1991, UK finally accepted EC-law as a *sui-generis* legal system.[86]

Has the *"rule of recognition"* of the UK legal system changed? Has the rule of supremacy of EC-law been recognised as valid by the British system? It is the possibility of a unilateral withdrawal from the Union, which saves the principle of Sovereignty of the Parliament from a technical revolution. Future parliaments are bound by section 2 (4) of the Act of 1972 which states that EC-law was to prevail over Acts of Parliament "passed or be passed". This can be seen as a loan of Sovereignty. The EC has borrowed supremacy and also sovereignty from the British parliament for an unlimited time. That the ultimate supremacy still is on the Member- States can therefore be argued from the point of view of the possibility of a unilateral withdrawal from the Union.[87]

The so called *exit clause* can be found in Article 59 in the CT and it states that *"Any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements."* Even though this in some cases would be politically very difficult, almost impossible, still it is possible in legal terms. Countries might not have the power-in-fact to withdraw, especially the countries which have the Euro, but they have the legal power.[88]

On the other hand, does the CT give independent status to EC-law? Even if we would conclude that EC-law was created by another legal system and that the CT can be considered a normal treaty under international law (as was argued in the first perspective), it does not follow that its continuing existence and validity depends on that other legal system. Maybe the CT could provide for the development of a *de facto* independent legal system?

Article 9 of the CT states the principle of conferral:

"1. The limits of Union competences are governed by the principle of conferral […] 2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences

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[86] See Factortame v Secretary for Transport [1991] A. C; Lord Bridge's dictum at pp. 658-659: *"If the supremacy within the European Community of Community law was not always inherent in the E.E.C. Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."*

[87] Robert Jackson, *Sovereignty in World Politics: Glance at the Conceptual and Historical Landscape,* Magazine: Political Studies, September 01, 1999

[88] Trevor C. Hartley, *Constitutional Problems of the European Union,* Hart Publishing: Oxford and Portland, Oregon, 1999, p 165

not conferred upon the Union in the Constitution remain with the Member States."

This principle has always underpinned the EU, but it was explicitly specified for the first time in the CT. According to the principle, all the competences of the EU is derived from the Member States, or in other words, the Union does not have any competences in itself and any areas of policy not explicitly agreed in treaties by all Member States remain in the domain of the Member States. The Danish Supreme Court made this idea clear in the *Carlsen v. Rasmussen*[89] judgement in 1998, where it said that it can not be left to international organisations to determine their own powers. The Court found the activities of EU to be delimited under the principle of conferred powers. The fact that this principle is written down in black and white in the CT, makes it even more apparent to the citizens, that the EU is limited in its power.

From the point of view of the principle of conferral, it is possible to argue that the sovereign power remains at the Member State level. EU is not, according to this principle, vested in any sovereignty by itself, because the Union can only act within the limits of the competences conferred upon it by the Member States.

Conclusively, after this discussion regarding the principle of supremacy and the principle of conferral, it is clear that the sovereignty of the Member States of the EU is not what it used to be, with or without the CT. The Member States tries to argue for their sovereignty on the bases of the exit clause and on the principle of conferral. If we should call the Member States fully sovereign on these bases, we also have to redefine the whole concept of sovereignty.

As we have seen earlier in this paper, legal and political powers have come to work naturally together in the framework of the nation-state. The national laws are backed up by a political power-in-fact. In the case of a conflict between the CT and a Member State constitution, who will prevail? Where is the power-in-fact? When it comes to the EU it is not as clear how the political and legal power-in-fact works together. This uncertain relationship does lead to conflicts from time to time.[90] From the Dynamic Perspective, these confrontations will lead to a constant progressive development of Europe. The EU can be seen as a pluralistic institutional normative order, where legal and political forces can work together efficiently beyond the nation-state and the concept of sovereignty. It is a system where norms are constantly balanced between the Member States and the EU, and where the protection of the individual rights reached beyond the borders of the nation-states.

It is not possible to say that either the legal power or the power-in-fact, nor sovereignty, are fully in the domain of the Member States or the EU.

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[89] Carlsen v. Rasmussen, judgement, 6 April 1998, [1999] CMLR 858.
[90] See for example Carlsen v. Rasmussen, 6 April 1998 [1999]

Instead, EU can be viewed as a pluralistic normative legal system, where normative conflicts are solved with peaceful means and in tolerance and mutual respect. The Member States, existing in this complex reality of norms and political power, is a kind of post-sovereign states.[91]

In the *Dynamic Europe*, the governance should be conceptualized as horizontal sharing of and transfer of sovereignty, rather than a hierarchy between different legal and political authorities. It is not based on a vertical understanding of governance, where supranational constitutional norms trumping national once or supranational institutions standing above national once. The *Dynamic Europe* is rather a Europe of dialogue. An essential and important part of such a transnational *Dynamic Europe*, is the existence of a mutual tolerance and respect for each others differences.[92]

3.2 The Principle of Constitutional Tolerance

The EU makes increasingly heavy constitutional demands on Member States, which may be seen as analogous to the requirements in federal states. However, even if the "constitutional" principles of Europe are similar to those found in federal states, the framework in which it is rooted is altogether different. Federations are normally premised on the existence of a constitutional *demos* by whose sovereignty and authority federal government is rooted. Most of the federal states, in praxis all, are based on the existence of one people and one demos.[93] For example, the preamble to United States constitution starts with; *"We the People of United States"*[94]. However, in reality, the juridical presupposition of a constitutional demos is not anchored in the political and social reality. It can be argued that the constitution actually presupposes a demos, which it in practice it creates. According to Weiler, no federal state exists, old or new, which does not presuppose the supreme authority and sovereignty of its federal demos.[95] This stands in contrast to the CT that does not have such a presupposition of a demos. Instead, the preamble of the CT refers to the *peoples* of Europe in a plural sense:

"Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient division and, united ever more closely, to forge a common destine[…]".[96]

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[91] see Neil MacCormick, *Questioning Sovereignty*

[92] Kalypso Nicolaidis, *Our European Demoi-crazy*, www.umich.edu/~iinet/euc/PDFs/2004%20Papers/Nicolaidis%20-%20EuroDem1.pdf (17/06/2006) p 146

[93] J. H. H. Weiler, *In defence of the status quo, Europe's constitutional Sonderweg,* p 10, edited by J. H. H. Weiler and Marlene Wind, *European Constitutionalism Beyond the State,* Cambridge University Press: 2003

[94] (http://www.congresslink.org/print_basics_histmats_constitution_preamble.htm) (14/06/2006)

[95] J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices,* Journal of Common Market Studies , Volume 40, 2002, p 567

[96] See preamble of the CT, (http://europa.eu/constitution/en/ptoc1_en.htm#a1) (13/06/2006)

It is the Member States who are the masters of the Treaties and who have to approve and ratify the CT. Article IV-8 of the CT states:

"The Treaty establishing the Constitution shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirement."

The Union does not ask for legitimisation from the European demos. The referendums in the Member States were not a requirement for adoption. It can therefore be argued, that the authority and sovereignty would shift, only if *one* constitutional demos or the peoples of Europe acting as one people, accepted the constitution.

To try to find the ultimate justification for the EU normative system, a European *Grundnorm*, in accordance with the theory of Kelsen[97], may after the discussion in this paper, seem as an almost impossible task. It has been argued, that the supremacy of the European law over national law in case of conflict, has created a European *Grundnorm*. On the other hand, this argument has been contested by those who argue that the ultimate authority still rests in national constitutional orders which "sanction supremacy, define its parameters, and typically place limitations on it."[98]

However, Weiler suggests another kind of *Grundnorm* for the CT than the one presented by Kelsen; the principle of *Constitutional Tolerance*.[99] By this Weiler means that the for a "European Constitution" is not what we think it is. It refers to a different form of European constitutionalism than the constitutional architecture already present in the Member States. As argued by Weiler, an important principle within the Union, is to respect and accept others` as different, and not enforce a hegemonic majority culture or identity on the minorities[100]. In line with this argument, Weiler's principle of *Constitutional Tolerance* suggests a new way of dealing with the "other". It can already be found in the Treaty of Rome as: "[…] an ever closer union among the peoples of Europe".[101]

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[97] Hans Kelsen (1881-1973) was an Austrian philosopher. According to the theory of Kelsen, law can be seen as a system and hierarchy of legal norms. Ultimately, all legal norms gain legitimacy from a superior norm. The basis of validity of a norm rests in the objective validity of a higher norm. The highest norm in the legal system is the constitution, which derives its legitimacy from a hypothetical norm, the *Grundnorm.* It is seen as transferring legal validity down to the lower norms. The term *Grundnorm* refers to the closure of the norm system and not to an ultimate principle. It is the through the *Grundnorm* the laws become normative, or in other words, go from "Is" to "Ought". See further: Uta Bindreiter, *Why Grundnorm?* Kluwer Law International, 2002

[98] J. H. H. Weiler, *In defence of the Status Que: Europe's Constitutional Sonderweg,* p 13

[99] J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices,* Journal of Common Market Studies *,* Volume 40, 2002, p 567

[100] See the chapter Social Constructivism and National Identity

[101] J.H.H. Weiler, *In defence of the Status Que: Europe's Constitutional Sonderweg,* p 17

In the CT, it is also possible to recognise the principle of C*onstitutional Tolerance*. It is reflected in the preamble as "united in its diversity"[102], and in article 5 (1) which states the respect of the national identities of the Member States. The CT seems to be in accordance with what Weiler calls the principle of *Constitutional Tolerance.* The purpose of EU is not to create one European national-identity or culture, the EU should instead remain a Union between distinct peoples and political communities.

The principle of *Constitutional Tolerance* should be applied at all levels of government. The Union requires a constantly reinforced mutual understanding and tolerance between different interests and actors. Weiler explains it as follows:

"Think of the European judge or the European public officials who must understand that, in the peculiar constitutional compact of Europe, his decision will take effect only if obeyed by national courts, if executed faithfully by a national public official with whom he belongs to a national administration which claims from them a particularly strong form of loyalty and habit. This, too, will instil a measure of caution and tolerance".[103]

Normally in a democracy, we accept the authority of the majority only to the polity, which understands itself as being constituted by one people. However, even if the EU is considered to be constituted by a number distinct peoples, or in other words of a people of *others*, we still subject it to constitutional discipline. This shows how the EU legal system and the CT is built up of a kind of *"internal towards myself and external towards others tolerance."*[104]

In federal states, the state is subordinated to a higher sovereignty and authority attaching to norms validated by the federal people. In the CT the Member States accept constitutional discipline as a voluntary act of subordination. According to the exit clause in Article 59, there is always a possibility of unilateral withdrawal from the Union. In this sense, the peoples of Europe are invited to obey the CT. For example, Quebeckers are obliged to obey the Canadian constitution. However, in the case of Europe, every State is *invited* to obey the "constitution".[105]

According to the Dynamic Perspective, the CT can be regarded as a pluralistic normative order. Instead of trying to find a *Grundnorm,* as a

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[102] From the preamble of the CT: *"Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient division and, united ever more closely, to forge a common destiny, Convinced that, thus "united in its diversity", Europe offers them the best chance of pursuing, with due regard for the right of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope [...]"*

[103] Ibid. p 22

[104] J.H.H Weiler, *Hard Choises,* p 12

[105] J.H.H. Weiler, *In defence of the Status Que: Europe's Constitutional Sonderweg,* p 22

closure of the norm system, in accordance with the theory of Kelsen[106], it is in the framework of the EU and the CT more interesting to discuss a *Grundnorm* as an ultimate principle. According to Weiler, such an ultimate principle of the EU system can be the principle of *Constitutional Tolerance.*[107] Further, the fact that the membership is based on a continuously voluntary act with the possibility for unilateral withdrawal from the Union, makes it necessary for the Member States and for the EU to solve any normative conflict that may occur in mutual respect and in peaceful manners. If not, the Union can not work and would have to be dissolved. When it comes to the EU, it is also possible to talk about ultimate values, which permeate the whole system. The rights of the individual within his or her Member State should be seen as European values.

3.3 Individual Rights

The essence of the Constitutionalist and the Dynamic Perspective is that individuals have certain moral rights derived from nature. According to a Lockean theory, the main purpose of the EU should therefore be to protect individual and human rights. From a historical perspective, EU integration and the rulings of ECJ have gradually provided the individual with rights, not only at the Member State level, but also on a European level. This can be seen in a wider dynamic and historical context. The constitutionalism that existed before the Second World War was bound to the ideals of nationhood and the principle of self-determination. After the war, Europe was in need of constitutional reconstruction. Western Europe (the non-Soviet influenced Europe) felt a need to establish conditions of stability and security both within individual states and in the relations among them. In this dynamic post-war process, we have seen a development of individual rights outside the borders of the nation-state. The European Court of Human Rights (ECHR) and the EU are prime examples of this development.

The CT is in many aspects strongly influenced by the theory of Locke, particularly evidenced in Part II of the CT, which articulates the Charter of Fundamental Rights of the Union (CFR). This part tries to describe the *material legitimacy*, or in other words, the moral values of the Union. This discussion has to be distinguished from the debate regarding the *formal legitimacy,* which focus on the logical structure and hierarchy of the EU.

[106] Uta Bindreiter, *Why Grundnorm?* Kluwer Law International, 2002, p 11, 12
[107] J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices,* Journal of Common Market Studies *,* Volume 40, 2002, p 568

The second paragraph of the preamble to part II of the CT states:

"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment".

The CT tries to build a kind of constitutional patriotism and unite the Union in a common belief in certain values, which in many aspects are the same values protected in the constitutions of most of liberal democracies. However, in the second part of the paragraph, it has to emphasise, for a second time, that this will not infringe on the national identities, the cultures and the traditions of the peoples of Europe (this is already stated in Part I of the CT). The CT tries to create a foundation for the development of a European civic identity on top, or besides, existing national-identities. From the Dynamic Perspective, the individual can have multiply identities besides the identification with the nation. This strictly civic European identity, based on the value of the rights of the individual, can be seen as a counterforce to the negative side of nationalism, which protects the national-identities to turn into its discriminatory and exclusionary tendencies.

From its beginning, the enterprise of European cooperation that would eventually lead to the EU, was mainly focused on economic aims and objectives with little reference to other values. For example, the 1957 EEC Treaty was restricted essentially to the aims of economic integration, and no mention of political union or of human rights was included.[108] However, the influence of the Union in other areas than the economic has since increased gradually and it has come to have a considerable influence on many broader political and social issues, and it has affected such areas as environment, consumer protection, culture, health, and education. There has also been a considerable expansion of both judicial and legislative activity in the area of human rights protection and it is now possible for the ECJ to review fundamental rights in certain circumstances to acts of the Member States.[109]

This development has been criticized. It has been argued that the EU is overreaching itself and infringing on areas, that work properly according to national constitutions and the jurisdiction of the ECHR. The incorporation

[108] Craig and De Búrka, *EU Law- Text, Cases and Materials,* Oxford, Third Edition, 2003, p 318
[109] Ibid. p 319

of the Charter of Fundamental Rights in the CT has reinforced this tension.[110]

The Charter of Fundamental Rights grants protection to an extensive set of rights compared to the rights provided by the ECHR. It contains a number of innovations, such as Article II-3 (2d)[111] which prohibits the reproductive cloning of human beings. Further, Title II of the CT concentrates on the basic freedoms, which can also be found in the ECHR. However, it contains in addition certain fundamental social rights such as right to education, right to engage in work, and right to asylum.[112]

From the Member States perspective, there have been concerns that the Charter will infringe on areas, which remain in their primary or exclusive jurisdiction. The inclusion of certain socio-economic rights may lead to the transition of some key decisions on social policy and spending, from the national legislatures to the European court. This would lead to a limitation of participatory government in areas traditionally closely connected to the nation-state. It can also be argued that the CFR is an attempt to make the ECJ act as another ECHR. Instead of creating a charter of fundamental rights, it may be better if EU and its institutions became subject to the ECHR system and its well-developed body of jurisprudence. The ECHR is a well functioning institution for the protection of Human Rights and there remains a potential risk that the ECJ will interpret the language of human rights for the purpose of furthering the economic goals of integration.[113]

Even though the CFR is problematic in many aspects (for example, social rights) and with regard to its uncertain and complicated relationship with the ECHR, it could be seen as part of a Dynamic post-war Europe. This is a model of a Europe geared towards the protection of individual rights outside the borders of the nation-state and a diminished importance of state sovereignty. The CFR could be seen in the light of a post-war trend of decoupling the notion of rights from the nation-state and empowering the citizens against the State. The CFU should guard against abuses of power within the EU's jurisdiction, not supersede national practices.[114]

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[110] Ibid. p 319

[111] Part II, Title I, Article II-3 (2d) "In the field of medicine and biology, the following must be respected in particular: […] the prohibition of the reproductive cloning of human beings."

[112] See CT Part II, Title II, Article II-15, II-16 and II-18.

[113] Craig and DeBurca, *EU- Law, Text, Cases and Materials,* p 363

[114] Kalypso Nicolaidis, *Our European Demoi-crazy*, www.umich.edu/~iinet/euc/PDFs/2004%20Papers/Nicolaidis%20-%20EuroDem1.pdf (17/06/2006) p 148

3.4 A European Identity

Even though European integration may have produced some sense of "Europeness" and sense of a shared identity and collective self, it cannot be compared to the national identity existing within the Member States. Mancini argues that a European state composed of a plurality of nations and yet founded on a demos is indeed conceivable, but its legitimacy is derived from consent rather than descent. Mancini does not believe that an ethnic European identity will ever emerge. Instead, he believes in the creation of an identity connected to the values of the European Union, based on civil loyalty. According to Mancini, this is the only feeling of belonging, which results in an identity as loose and frigid as the European one; the most the EU can hope to create. [115] This civil identity will not, according to Mancini, create a "we and them" between Europe and the rest of the world in a negative sense. Instead, it will focus on the area of free trade and movement of person rather than on issues of ethnic sense and boundaries.[116]

Europeans are *united in diversity*[117]*,* as multiple *peoples* co-existing collectively. Human beings have multiple identities that are co-exist and are constantly constructed and reconstructed. The national and cultural identity does not have to be bound to the state, it can prevail in a pluralistic society, where people accept each other as different. The idea is not to create a homogenous "European People". Instead, the EU is a new species of political community resting on the plurality of its component peoples, which forms a *"demoi-cracy"* [118], which is based on sharing of identities. The European demoi-cracy is a Union of shared projects, values and objectives of multi-centred governance.

The mistake of conceptualizing the Union in the light of the nation-state, makes us misinterpret some of each inventions and positive aspects. The EU is not about creating and enforcing a certain identity for its citizens, as is an important feature within the policies of the nation-state. The ultimate logic of the EU is instead what has so far not been possible to realize within the nation-state, real pluralism and the rejection of identity politics. It is a Union of States and peoples, in a real plural sense. It is a community of *others,* which is predicted on the mutual recognition, confrontation and sharing of our respective and separate identities, not on their merger.

The sense of belonging and commitment to the Union ought to be based on the *doing* more than the *being*. Together the Member States can reach common objectives. As stated in the very first Article of the CT, Member States confer competences on the EU *"to attain objectives they have in*

[115] Federico G. Mancini, *Europe: The Case for Statehood,* European Law Journal, p 35
[116] Ibid. 38, 39
[117] As stated in the preamble of the CT
[118] Kalypso Nicolaidis, *Our European Demoi-crazy*, (www.umich.edu/~iinet/euc/PDFs/2004%20Papers/Nicolaidis%20-%20EuroDem1.pdf) (17/06/2006)

common".[119] The CT is by itself not an expression as some state like collective essence. It is a Union based on certain common values and objectives.[120] The respect and the promotion of these values is the basis for membership in the Union.[121] A Member State, which does not adhere to the common values can ultimately, at least in theory, be kicked out for acting against them.[122]

The EU is based on a utilitarian thought that cooperation between the Member States is profitable for all. The single market is still the most popular shared project in Europe. However, the CT will add further to the moral and idealistic dimension of the Union. With the CT, both material and idealistic goals provide the ties that bind.[123] As long as the Member States shows respect to the common values and objectives, and as long as not discriminating on grounds of nationality, the Union should not infringe on the identities of the Member States.[124] Instead, the Union can be seen as safeguarding that the identity politics of the Member States will remain within the limits set by the values of the Union and not take discriminatory expressions.

The Constitution can also promote a form of identity, which Habermas refers to as "constitutional patriotism". The constitution can also reflect a moral commitment, which can be basis for an identity. It is more than just structuring the power of governance and the relation between public authority and individuals or between the state and other agents. It is also perceived as encapsulate the fundamental values of a collective identity.[125] In accordance with the theory of multiple-identities, it would be possible to feel a kind of constitutional patriotism towards the EU, at the same time as feeling a national belongingness towards the Member State. The identification with the EU is in this sense built upon certain common values, such as the rights of the individual. This is a kind of strictly civic nationalism is hard to fully realize within the framework of the nation-state, where identities often also are mixed with historical and cultural national myths of ethnically based ties. The national-identity and the strictly civic identity of the Union can therefore coexist in a healthy relationship. The European identity, as stated before, can work as a kind of stabiliser for the national-identities of the Member States. This two-level identity construct

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[119] Article I-1 of the CT, Establishment of the Union: *"1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it."*

[120] This objectives and values are stated in the CT Article I-2 and I-3

[121] Article I-1 of the CT: *"2. The Union shall be open to all European States which respect its values and are committed to promoting them together."*

[122] Kalypso Nicolaidis, *Our European Demoi-crazy*, www.umich.edu/~iinet/euc/PDFs/2004%20Papers/Nicolaidis%20-%20EuroDem1.pdf (17/06/2006) p 146

[123] Ibid. 146

[124] See Article 1-4 and I-5 of the CT

[125] J. H. H. Weiler, *Europe's Constitutional Sonderweg,* p 15

could also make it easier for minority national-identities within the Member States to express themselves.

In the *Dynamic Europe,* it is important to delimit the competences of the EU to avoid unwarranted infringement upon the Member States jurisdiction. Paragraph 5 (1) of the CT states:

"The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security."

While national-identities should be actively respected, it should not be at the expense of a European civic identity. One identity should not be played against the other when conflicts arise between collective and state interests. The essence of a European constitutional patriotism is co-existence.

In the *Dynamic Europe*, EU should not be a projection of the nation-state. A European identity therefore does not need to have the characteristics of the often mythically based national identities of the Member States. In the preamble of the CT it is stated:

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

This text further emphasises that a European identity need not be built, as often is the case in the nation-state, on a historical common past. Instead it talks about a common future and destiny, where the rights of the individual are the focus. The identity, which is connected with the past, will remain within the nation-state. It is important, though, that the national identity of the Member States not infringe on the rights of the individual or the values of the Union. Further, paragraph 5 (1) also sets a limit to how much the EU can infringe on the most central state functions, such as territorial integrity and internal security.

Title II Article 1-10 of the CT states that the citizenship of the Union shall be additional to national citizenship and shall not replace it. However, it is nevertheless challenges national status and rights. The purpose with the EU is not to replace national identity and rights, but it hinders it from abuses. For example, the principle of non-discrimination has granted moving citizens a legal instrument to challenge discriminatory national laws and

administrative practices. In the framework of the Union, the peoples of Europe have to confront, adopt and compromise with each other and review themselves in relation to the other Member States. These peaceful confrontations make citizens and nations reflexive. Even though the citizens remain proud of their national-identity, this pride becomes more tolerant, less aggressive and less exclusive.[126] From the Dynamic Perspective European citizenship is something between exclusionary nationalism and cosmopolitanism. Cosmopolitanism stands for the proposition that national identities must be banned in order to build a purely universalistic citizenship. However, this idea has paradoxically led to aggressive nationalism and imperialism. EU citizenship may help to moderate the nationalistic instincts inherent in the peoples of Europe and foster a more cosmopolitan relationship between them. Magnette explains it as following:

"The EU creates a permanent confrontation between national identities and common principles; it erodes the parochialism of national polities, while strengthening their capacity of resistance against the most dangerous trends of modernity. This might help break the vicious cycle, which leads from local prejudice to abstract universalism and from abstract universalism to a rebirth of xenophobic reactions".[127]

Since liberalism and communitarianism seem hard to accommodate, there will be peaceful confrontation within EU. These should be seen as at least offering a negative substitute of an ideal form of membership.[128]

3.5 Subsidiarity

The European Union has many similarities with the federalist structure of decision-making. Federalism may be defined as a state structure with multiple levels of decision making, which are interdependent and often take decisions at the same time. One of the problems of the EC has been in striking the right balance and allocating the appropriate decisions between the Community level and the state level. There exists a fundamental problem with distinguishing decisions necessary to further EC integration from decisions and powers that should remain within the competence of its member states. [129]

The principle of Subsidiarity is entrenched in Article I-9 (3) in the CT:

"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the

[126] ibid. 133
[127] Ibid. 134
[128] Ibid. 135
[129] Gunnar Folke Schuppert, *On the Evolution of a European State: Reflections on the Conditions of and the Prospects for a European Constitution,* edited by Hesse Jens Joachim and Nevil Johnson, *Constitutional Policy and Change in Europe,* Oxford University Press, 1995, s. 330

objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

The wording in the CT is similar to definitions found in previous treaties. But a new Protocol on the application of the principle has been annexed to the CT.[130] It states that all the propositions from the Commission will be sent to the National Parliaments for review with a justification on the proposal with regard to the principle of subsidiarity and proportionality. Within six weeks from the day of transmission, any national parliament of any chamber of a national parliament of a Member State, can give a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. If one third of the Member States find the proposal of the commission non-compliance with the principle of subsidiarity, the Commission shall review its proposal.

This procedure allows national parliament to control how the commission practises the principle of subsidiarity. It also forces the Commission to reflect and, if need be, justify why its proposal should fall under its competence according to the principle of subsidiarity. This two-sided procedure enforces the democratic legitimacy of the legislative process. Provisions such as this are a control mechanism for the Member Stand and works as guarantee against excessive jurisdiction by EU institutions. The different levels of governance within the Union can work as another dimension of the constitutionalist idea of check and balances and separation of power.

The theory of subsidiarity should be viewed in the light of the theory of Multilevel Governance. While the term "government" is mostly concerned with state authority, "governance" takes account of the decision-making on various levels. In this sense, the EU plays an integral role in policy making together with the Member State. In such a decision-making process, conflicts may occur between the different levels. However, according to the Dynamic Perspective, these conflicts are a way for the progressive and dynamic development of the Union in the long-run. This type of federal decision-making procedure is also necessary in a Europe, where more and more questions and decisions have an international character; and decisions have transnational ramifications.

3.6 Democracy

Today, the democratic legitimacy of the Union is derived from the Member States. The council, whose representatives are elected at the national level, take most of the important decisions of the EU today. Legislative power can

[130]See the CT, *Protocol on the Application of the Principle of Subsidiarity and Proportionality,* p 273

therefore be considered vested with Member State governments A substantial participation of the European Parliament in the legislative power of the Union, may be perceipved as depriving sovereignty from the Member States.[131]

According to the CT Articles 19[132] and 33[133] the role of the Parliament is strengthened by making the co-decision procedure a rule and endowing the Parliament with the right to elect the Commission President. The direct democratic link between the Union and the citizens is also strengthened by the CT Article 46[134], which states the principle of participatory democracy and gives the right of one million European citizens to initiate a petition asking the Commission to present a proposal on a subject relevant to the constitution. This article shows new possibilities on democratic initiatives derived on the European level directly from individuals, and not indirectly through the State.

Today, most regulations and directives are issued by the Council of Ministers, which derives legitimacy from the national parliament. However, the distance between the citizen and the minister is far. In the *Dynamic Europe,* democracy does not necessarily have to be dependent on the nation-state. Within the EU it is possible to create democracy beyond the borders of sovereignty. EU is not only about creating economic interdependence, but also creating political and democratic interdependence between different levels of decision-making. In the *Dynamic Europe,* the democracy does not just move a European super-national level. The EU should be seen as a unique combination of supranational and intergovernmental structures to which nation-states remain central, but where democratic legitimacy emanates from multiple levels.

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[131] Federico G. Mancini, *Europe: The Case for Statehood,* European Law Journal, Vol. 4, No. 1, March, 1998, p 29, 30

[132] CT Article 19 *"The European Parliament shall, jointly with the Council of Ministers, enact legislation, and exercise the budgetary function of political control and consultation as laid down in the Constitution. It shall elect the President of the European Commission".*

[133] CT Article 33 *"1. European laws and European framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council of Ministers under the ordinary legislative procedure as set out in Article III-302. If the two Institutions cannot reach agreement on an act, it shall not be adopted."*

[134] Article 46 of the CT: *"1. The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. 4. No less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. A European law shall determine the provisions for the specific procedure and conditions required for such a citizens initiative."*

3.7 The Process of Decision- Making

In the decision making process of the contemporary EU, national priorities and preferences count higher than collective European interests. This reality will probably not change drastically with the implementation of the CT. Under the CT, the political institutions at the European level remain relatively weak, with most decisions continuing to be taken by representatives of national governments. In this decision making process, the national priorities and preferences count higher than European ones. This fact will probably not change drastically with the CT. According to Article 24[135] of the CT the qualified majority voting will become the rule, limiting the unanimity voting to the few most sensitive areas. For example, unanimity will be replaced by qualified majority voting in matters concerning asylum, immigration and some aspects of criminal law and law enforcement. This will make the decision-making process faster and more efficient, however, it will not change the practical paramountcy of national priorities.

The power to shape external relations is crucial to national sovereignty. According to the CT Article I-39[136] it is clear that the power of the foreign policy will remain at the Member State level with unanimous decision making procedure at the European level, except in limited cases. Whether a decision is taken unanimously or by majority vote is essential to the question of sovereignty. In majority voting, the decision making process becomes more efficient at the expense of nation-state sovereignty. The fact that the unanimously decision-making according to the CT will remain in certain sensitive areas, strengthens the argument that the CT is not an attempt to create a United States of Europe or a European Super State. Instead, the EU could be seen as a complex and dynamic legal system based on unique premises. In chapter 3.8, I will discuss further the decision making process from the point of view of the Dynamic Perspective and Criminal Law.

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[135] Article 24 of the CT: *"1. When the European Council or the Council of Ministers takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union.[…]4. Where the Constitution provides in Part III for European laws and framework laws to be adopted by the Council can adopt, on its own initiative and by unanimity, after a period of consideration of at least six months, a decision allowing for the adoption of such European laws or framework laws according to the ordinary legislative procedure. The European Council shall act after consulting the European Parliament and informing the national Parliaments."*

[136] Art. I-39 of the CT: *"1. The European Union shall conduct a common foreign and security policy, based on the development of mutual political solidarity among Member States […] 7. European decisions relating to the common foreign and security policy shall be adopted by the European Council and the Council of Ministers unanimously[…]"*

3.7.1 The Process of Decision-making and the Criminal Law

Even though criminal law falls largely outside the Union's competence, justice and law enforcement have emerged as the area where calls for more integration are the strongest. Recently the Union approved a "European evidence warrant"[137], requiring police in one country to execute search warrants issued in another jurisdiction. In addition, there are proposals for more powers to fight cross-border crime, such as drug trafficking, fraud and terrorism.[138]

In today's Union, such agreements require unanimity on the rules and standards. The unanimous decision-making model keeps ultimate decision-making at the Member State level and can therefore be seen as protecting national sovereignty. On the other hand, such a process is inefficient, difficult and tiring. The Evidence Warrant for example, took four years to negotiate. The president of the European Commission, José Manuel Barraso, recently suggested that the voting rules should be changed to "qualified-majority" vote, to facilitate better co-operation in criminal matters. Furthermore, he suggested that the Council of Ministers and the European Parliament set minimum judicial standards. And if politicians do not agree, the ECJ may come impose it on them.[139]

What does the CT say about substantive criminal law? According to Article III-171(1) of the CT[140], judicial cooperation in criminal matters is based on the principle of "mutual recognition" of judgement and judicial decisions. Further, according to the 2nd[141] paragraph in the same Article, framework and minimum standards laws may be established in certain areas, but such a decision has to be approved by the Council of Ministers unanimously. Article III-172 of the CT[142], would grant the EU substantive powers over ten specific crimes.

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[137] (http://www.statewatch.org/news/2004/mar/com-2003-688.pdf) (16/06/2006)
[138] The Economist, *Justice by Majority,* June 10th, 2006, p 34
[139] In 2004 ECJ ruled that governments must implement EU criminal-justice agreements even when they contradict national law. It also ruled that the EU could set minimum penalties for breaches of national environmental laws, see futher: The Economist, *Justice by Majority,* June 10th, 2006,
[140] Article III-171(1) of the CT: *"1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgements and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article III-172 […]"*
[141] Article III-171of the CT (2d*)"[…] The Council of Ministers shall act unanimously after obtaining the consent of the European Parliament".*
[142] Article III-172 of the CT *"European framework laws may establish rules concerning the definition of criminal offences and sanctions in the areas of particular serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*
These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

Criminal law is a very sensitive question in the framework of the Union. It is very closely related to national sovereignty and culture. The fact that, there are twenty seven different legal systems in the EU, and some are based on the Napoleonic civil code and others on Anglo-Saxon common law, does not make reaching consensus any easier. Recalling that the principle in the CT regarding criminal matters is still unanimous decision making. It appears that the exceptions in Article III-172 of the CT, which give substantive powers to EU over ten specific crimes, is a development that we will see in the Union even without the CT. Some observers have hailed this area as the "EU's next frontier"[143]

From the point of view of national sovereignty, the purpose of criminal law is an important factor in delimiting individual freedoms. An efficient enforcement of the criminal law is also important for the protection of individual rights. Crimes crosses borders and therefore, the police need more extended international competences to fight crime. An extended and more efficient criminal law at the European level can therefore, from a Dynamic Perspective, be seen as strengthening the individual within the Union.

On the basis of development in crime, the Council of Ministers may adopt a European decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament."

[143] *The Economist, Justice by majority, p 34*

4 Conslusion

This paper sets out a dynamic vision of the CT and the EU. Following from the Dynamic Perspective, the EU and the CT, are the product of post-war development and a shared European experience. Post-war European constitutional reconstruction emphasised individual and human rights and the limitation of power at the expense of the idea of national sovereignty and supremacy. The *Dynamic Europe* stands in contrast to the International Law Perspective, influenced by Hobbes and the idea of absolute power. The International Law Perspective is *state-based* and stands for the proposition that the EU is an international organisation between sovereign nation-states. The Dynamic Perspective, on the other hand, is an extension of the *citizen-based* Constitutionalist Perspective, which emphasises the Lockean values of the rights of the individual and limitation of power. The constitutionalism that emerged in the 19th century was closely associated with the formation and consolidation of nation states. Progress towards constitutional governments was assumed to go hand in hand with the recognition of national ties and identities. The *Dynamic Europe* strives for the better and further protection of individual rights, beyond national sovereignty and identity politics.

The EU and the CT should not be viewed as a projection of the nation-state. The *Dynamic Europe* should instead be seen as a unique legal order, built upon a pluralistic normative system. The principle of supremacy of EU law has long been an integral part of the EU doctrine and is now entrenched in the CT. On the other hand, the *Dynamic Europe* is a system built upon a voluntary act. Member States voluntarily acceded to the Union and according to the CT, can secede from the Union unilateral. The voluntary union of independent, internationally recognised states results in a *Dynamic Europe* that is not fully sovereign; but neither are Member States within the framework of the CT, which endows the EU with its own legal personality. The *Dynamic Europe* is post-sovereign, built upon a constitutionalism that reaches beyond state-boarders and national governments.

However, the *Dynamic Europe* consisting of post-sovereign Member States, is not the harbinger of a European Super State. It is a Union of common objectives and values. The *Dynamic Europe* is built on mutual values as well as the respect and tolerance of the differing cultural values and legal traditions. It does not want to infringe or take over the national-cultural identities within the Member States. This idea of a Europe of diversity is reflected in the EU's moto "united in diversity" as stated in the preamble to the CT. Further, Article 5(1) of the CT, states the respect for the national-identities of the Member States. In the *Dynamic Europe*, the European identity is of strictly civic character. It is a kind of *constitutional patriotism*, based on common values and objectives, which can coexist with the national identities of the Member States. This European identity can maybe realize what has not been able to fully realize at the Member State level, the

strictly civic value based identity, free from mythical, ethnical and cultural ties. The civic European identity can also work as a limit and safeguard for the exclusionary and racist tendencies of national identities.

To fully appreciate the nature and scope of the *Dynamic Europe*, it should be seen as a unique combination of supranational and intergovernmental structures. The member nation-states remain central, but the Union has its own democratic legitimacy emanating from its multiple levels of government. The principle of subsidiarity plays an important role in this process and ensures that decisions are taken at the appropriate level in the system.

The French and the Dutch rejection of the CT, which also put the CT on *pause for reflection*, reveal the difficulty of conceptualising and understanding the reality of the EU; most probably, because our mindsets are still too fixed in the world of the nation-states. This paper envisages a *Dynamic Europe*, which goes beyond the nation-state and emphasises the rights of the individual within the Union, but without the need to construct a European super-state.

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