WHY THE EUROPEAN UNION NEEDS A TRUE CONSTITUTION

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I ABSTRACT

The advancement of the European project necessitates the making of a Constitution for Europe. In a politico-democratic context, Constitutions are universally defined in both functional and formal terms. From a functional perspective, a Constitution is the answer to democratic calls for political rule to be legitimised and legalised. From a formal perspective, a Constitution is a body of primary norms coming from the people, commanding supremacy over the legal order and capable of amendment by the people only. In the light of this definition, I argue that the European Union is not founded upon a Constitution and that, therefore, it needs one. Functionally, political rule by the Union is illegitimate. It is a case of democratic deficit. Formally, the living Constitution of the Union, the Treaties and the case law whose interaction has the effect of adequately institutionalising and regulating political rule at the Union level, cannot be said to represent a body of primary norms.

II INTRODUCTION

Last year, in the aftermath of enlargement, the citizens of France and the Netherlands affirmed the crisis of the European project in their vote against the ratification of the Treaty establishing a Constitution for Europe. In June 2005, days after the French and Dutch referendums, the United Kingdom announced the suspension of its parliamentary ratification process of the Constitution. Meeting as the European Council, the Heads of State and Government of the Member States of the European Union[1]

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1 *The Treaty on European Union,* opened for signature 7 February 1992, OJ C 191 (entered into force 1 November 1993) ('TEU') established the European Union, a partly supra-national construct founded on three pillars comprising the European Community (the European Community arose out of the merger of the European Coal and Steel Community (1951), the European Atomic Energy Community (1957), and the European Economic Community (1957)), a common foreign and security policy, and a common home affairs and justice policy. The European Community rests on a legal order. This is in contrast to the common foreign and security policy and the common home affairs and justice policy, both of which rely on political co-operation.

followed suit, adopting a declaration setting an indefinite period of reflection on the question of the Constitution. Rather than address the concerns and worries of citizens, European leaders opted to settle for the status quo framed by the Treaty of Nice, thus leaving the Union divided, confused and condemned to a period of stagnation.

The European Union needs a Constitution because it does not have one in the true sense of the term. The living Constitution upon which the Union is based, the product of the interaction between the Treaties and the case-law, does not meet the *functional* and *formal* criteria that are understood to universally define Constitutions in a politico-democratic context.[2]

III CONSTITUTIONS DEFINED – FUNCTIONALLY AND FORMALLY

A functional definition of the Constitution concentrates on the two purposes it must serve.[3] First, a Constitution must legitimise political rule. It does this by establishing the legitimising principle for political rule and the basic legitimacy conditions of its exercise along democratic lines. That is, the Constitution places sovereignty in the trust of the people, the pouvoir constituant, and makes its exercise by the State, the pouvoirs constitués, admissible only on their behalf and for the purposes they set. Secondly, a Constitution must legalise political rule. This it does by institutionalising and regulating political rule. In other words, the Constitution gives effect to the rule of law: that political rule should be through law, via its institutionalisation, and under law, via its regulation.[4]

A formal definition of the Constitution concentrates on the character of the legal norms constituting it.[5] A Constitution is a body of primary norms. The primary character of these norms is traced back to three factors. First, because primary norms are responsible for legitimising and legalising State power, they are, out of democratic necessity, formulated by the popular sovereign and not the State, which is responsible for enacting secondary norms only.[6] Secondly, to prevent the State power from enacting norms in contradiction with the Constitution, primary

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2 In this regard, it is noted that constitutions do not need to be expressed in the form of a written document. For example, the English legal system is underpinned by an 'unwritten' constitutional framework.

3 Dieter Grimm, 'Does Europe Need a Constitution?' (1995) 1(3) *European Law Journal* 286-7.

4 Stephen Bottomley, Neil Gunningham, and Stephen Parker, *Law in Context* (Leichardt, NSW: Federation Press, 1994) 12.

5 Grimm, above n 3, 287.

6 Secondary norms are for the conduct and relations of the individual.

norms take primacy over secondary norms. Thirdly, to bar the State power from amending the Constitution, it is established that primary norms be amended by the people only. They cannot be modified by the same flexible procedures that apply to secondary norms.

Turning to the European Union, as a matter of empirical observation, based on these functional and formal criteria, I argue that the Union does not have a Constitution and that it needs one. Functionally, political rule at the Union level is legalised but is not legitimated: it is a case of democratic deficit. Formally, the Treaties and the case-law, the living Constitution upon which the Union is based and whose functional scope is confined to the legalisation of political rule by the Union, neither originates from the people nor can it be amended by them. Moreover, the quality of legal supremacy that has been judicially conferred on the Treaties[7] contrasts with, and its alleged certainty is potentially put into doubt by, the precariousness of judicial decisions which, in a system dismissive of the value of precedent, have no supremacy except between the parties and with respect to that particular case. It is for these reasons that I argue that Europe needs a Constitution.

A *Functionally – Political Rule is Legalised but Not Legitimated*

The problem is that European leaders are not convinced that Europe needs a Constitution. They firmly believe that political rule at the Union level is perfectly legalised. To an extent, I agree.

Indeed, on the question of legalisation, political rule at the Union level adequately meets the standard normally set by Constitutions.[8] Primary Union law[9] together with the principles established by the European Court of Justice have had the effect of both institutionalising and regulating political rule by the Union. In other words, Treaties and case-law combine to engender a living Constitution[10] which secures the rule of law throughout the Union: that political rule should be through law and under law.

Primary Union law institutionalises political rule at the Union level and, in so doing, it ensures that political rule is through law.[11] It does this in

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7 See *Costa v ENEL* (C-6/64) [1964] ECR 585; [1964] CMLR 425.

8 Grim, above n 3, 291.

9 Primary Union law refers to the Treaties and other acts of the same force that the Member States have concluded to advance the European project.

10 Ernst-Ulrich Petersmann, 'Proposals for a New Constitution for the European Community: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU' (1995) 32(5) *Common Market Law Review* 1126.

11 Jo Steiner, Lorna Woods, and C Twigg-Flesner, *Textbook on EC Law* (8th ed, Oxford: Oxford University Press, 2003) 19-39. Political rule is through law insofar as it has been infused with law-making powers through which to rule.

four ways: first, it constitutes the Union;[12] secondly, it sets its objectives;[13] thirdly, it establishes its institutions;[14] and, fourthly, it assigns their powers and orders their procedures.[15] Apart from institutionalising political rule, primary Union law also legalises it and thus partly ensures that political rule by the Union be under law as well as through law. More particularly, primary Union law binds the exercise by the Union of public power and claims comprehensive validity.

First, primary Union law regulates political rule by binding the public power and sovereignty transferred to the Union by the Member States in those areas agreed by them.[16] It establishes a basic order which regulates the Union's exercise of public power both in organisation and in content with the Union. Secondly, primary Union law regulates political rule by claiming comprehensive validity.[17] It governs those who may act bindingly for the Union and what conditions have to be complied with thereby. There is no European public power outside primary Union law and no manifestation that cannot be traced back to it.

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12 See *Treaty establishing the European Community,* opened for signature 25 March 1957, 298 UNTS 11, art 1 (entered into force 1 January 1958)('*EC*'). Also see Grimm, above n 3, 289 for an account of how political rule is legalised at the Union level.

13 See *EC*, above n 12, Preamble and arts 2-3, as amended by subsequent Treaties, alongside the Preamble and *TEU,* above n 1, arts 1-45.

14 *EC*, above n 12, art 7 prescribes that the tasks entrusted to the Union shall be exercised by the Council, the Commission, the European Parliament, the Court of Justice and the Court of Auditors, all of which are established in that same Treaty. The European Parliament is established by *EC,* above n 12, art 189; the Council of Ministers by *EC,* above n 12, art 202; the Commission by *EC,* above n 12, art 211; the European Court of Justice by *EC,* above n 12, art 220; and, the Court of Auditors by *EC,* above n 12, art 246. *EC,* above n 12, art 9 provides for the establishment of the European Investment Bank while *EC,* above n 12, art 8 provides for the creation of the European System of Central Banks and the European Central Bank. *EC,* above n 12, art 7 prescribes that the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity: *EC,* above n 12, art 7(2). It ought to be noted that, by virtue of the Merger Treaty, these institutions are responsible for the three existing Communities (the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community) and, as a result of Art 3 TEU, for the European Union too.

15 *EC,* above n 12, Part 5 assigns the powers of the Union's institutions and orders their procedures. The European Parliament is governed by *EC,* above n 12, arts 189-201; the Council by *EC,* above n 12, arts 202-210; the Commission by *EC,* above n 12, arts 211-219; the Court of Justice by *EC,* above n 12, art 220-224; the Court of First Instance by *EC,* above n 12, art 225 (detailed rules in *Decision 88/591*); the Court of Auditors by *EC,* above n 12, arts 246-248; and, the European Council by *TEU,* above n 1, art 4. Under *EC,* above n 12, art 7, each institution is confined to the powers conferred on it by the EC Treaty.

16 Grimm, above n 3, 289-90.

17 Grimm, above n 3, 290.

There are some aspects of the regulation of political rule which are, inevitably, not met in the Treaties, the Union's primary source of law.[18] It has been the main endeavour of the European Court of Justice to remedy the inadequacies of the Treaties.[19] Interpreting them in a typically teleological style,[20] the European Court of Justice has sought to constitutionalise the Treaties: that is to fashion a framework for the regulation of political rule in Europe.

Observance of the law is a principle central to the effective regulation of political power which must not only be exercised through law but also under it. In the case of the Union, the problem lay not so much in having the Union itself comply with the laws that governed it but in having the Member States comply with Union law. Appreciating the magnitude of the problem, the European Court of Justice has sought to ensure that Union law be observed throughout the Union in three main ways.[21]

One way has been to find Union provisions, relating to policy areas where the Union had exclusive competence, supreme over all conflicting national laws. The cases consistently demonstrate[22] not only that Union law, be it either of a primary or a secondary character, takes primacy over all forms of ordinary national legislation[23] but also that it is supreme over national constitutional law.[24]

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18 See G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26(4) *Common Market Law Review* 596.

19 Mancini, above n 18, 595-8.

20 Simon Bronitt, Fiona Burns, and, David Kinley, *Principles of European Community Law: Commentary and Materials* (North Ryde, NSW: Law Book Co, 1995) 164-5.

21 Dominik Lasok, *Lasok and Bridge's Law and Institutions of the European Union*, (6th ed, London: Butterworths, 1994) 140.

22 Nigel Foster, *EC Law*, (2nd ed, London: Blackstone Press, 1995) 101-4.

23 *Costa v ENEL* (C-6/64) [1964] ECR 585; [1964] CMLR 425.

24 *Internationale Handelgesellschaft v Einfuhr und Vorratsstelle* (C-11/70) [1970] ECR 1125; [1972] CMLR 255. The supremacy principle has been further reinforced and developed ever since the *Costa decision* was held. In *Amministrazione Delle Finanze Dello Stato v Simmenthal SpA* (C-106/77) [1978] ECR 629; [1978] CMLR 263, the European Court of Justice held that a provision of Union law must be executed as effectively as possible. Directly effective provisions of Union law bar the valid adoption of new national legislative measures to the extent that they would be incompatible with Union provisions. Moreover, it held that national measures which conflict with Union law must be disregarded without waiting until those measures are set aside by national legislative or other constitutional means. In *R v Secretary of State for Transport; Ex parte Factortame* (C-213/89) [1990] 1 ECR 2433; [1990] 3 CMLR 1, it was held that a national court must suspend national legislation that may be incompatible with Union law until a final decision on its compatibility has been reached. According to Weatherill, an associated principle is that of pre-emption which refers to the view taken by the European Court of Justice that where the Union actually or potentially occupies a certain policy area, it is entitled to preclude the intervention of Member States in that area. See *Commission v Council (ERTA case)* (C-22/70) [1971] ECR 263; [1971] CMLR 335. Stephen Weatherill, *Cases and Materials on EC Law*, (7th ed, Oxford: Oxford University Press, 2005) 94-8.

Another way in which the European Court of Justice has sought to ensure national compliance with Union law has been through the doctrine of direct effect. This doctrine empowers the Union citizen, subject to certain conditions, to plead any Union provision in the national courts to secure the rights conferred on him or her by it.[25] While the doctrine extends to any form of Union law,[26] it is particularly relevant to provisions lacking direct applicability,[27] namely, directives.[28]

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25 Klaus-Dieter Borchardt, *The ABC of Community Law* (5th ed, Luxembourg: Office for Official Publications of the European Communities, 1999) 97.

26 This includes treaty articles (*Van Gend en Loos v Nederlandse Administratie der Belastingen* (C26/62) [1963] ECR 1; [1963] CMLR 105); regulations (*Leonesio v Ministero dell'Agricoltura e delle Foreste* (C93/71) [1972] ECR 287; [1973] CMLR 343); directives (*Van Duyn v Home Office* (C-41/74) [1974] ECR 1337; [1975] 1 CMLR 1); decisions (*Grad v Finanzamt Traunstein* (C-9/70) [1970] ECR 825, [1971] CMLR 1); and international agreements (*Bresciani v Ministry of Finance* (C-87/75) [1976] ECR 129; [1976] 2 CMLR 62). The doctrine of direct effects was first devised in the case of *Van Gend en Loos*. According to that case a provision of Union law that generates direct effects (except for provisions not directly applicable) should be clear and precise; be unconditional; not require implementing measures by the State or Union institutions; and not leave room for the exercise of discretion by the Member States or Union institutions.

27 Regulations (*EC,* above n 12, art 249) and certain Treaty provisions are directly applicable in the sense that Member States do not have to pass any more national laws to implement them.

28 Directives spell out the aims that must be realised but leave the choice of the form and method of execution to the Member States. This is done to ease the way in which national laws can be brought into line with Union law, and offers the Member States a broader spectrum of discretion to do this.

For a directive to generate direct effects, its implementation period must have expired (*Pubblico Ministero v Ratti* (C-148/78) [1979] ECR 1629; [1980] 1 CMLR) and it must be unconditional and precise (*Van Duyn case*).

Direct effects *vis-à-vis* directives can be enforced vertically only, that is, enforceable against the State or arms of the State only: *Marshall v Southampton and South-West Hampshire Area Health Authority* (C-152/84) [1986] ECR 723; [1986] 1 CMLR 688. Whilst vertical direct effects can arise from all forms of Union law, direct effects in relations between citizens themselves, that is, horizontal direct effects, are accepted in respect of treaty articles (*Defrenne v SABENA II* (C-43/75) [1976] ECR 455; [1976] 2 CMLR) and regulations (*Leonesio case*) only.

To overcome the absence of horizontal direct effects in relation to directives, the European Court of Justice has developed in (*Sabine Von Colson & Elisabeth Kamann v Land Nordrhein-Westfalen* (C-14/83) [1984] ECR 1891; [1986] 2 CMLR 430) and (*Marleasing SA v La Comercial International de Alimentación SA* (C-106/89) [1990] ECR 4157; [1992] 1 CMLR 305) the doctrine of indirect effects which applies whether or not the action brought is against the State. The doctrine obliges the national courts to interpret national law in such a way as to ensure that obligations of a directive are complied with, regardless of whether the national law is founded on any particular directive.

Under the (*Francovich v Italian Republic* (C-6 & 9/90) [1991] ECR I-5357; [1993] 2 CMLR 66); (*Brasserie Du Pecheur SA v Germany; R v Secretary of State for Transport et a l* (C-46 & 48/93) [1996] 1 CMLR 889) decisions, Member States are liable to pay damages to the plaintiff where he or she has sustained loss by reason of the State's failure to implement a directive properly in whole or in part.

Directives were often not adequately implemented or not implemented at all, wholly challenging the rule of law at the Union level. Through direct effects, the European Court of Justice has greatly reduced the advantages to be gained by the Member States from non-compliance.

A final way in which observance of the law has been promoted by the Court is through the doctrine of judicial review of legislation. The Treaty establishing the European Community empowers the European Court of Justice to review the validity of acts (Art 230)[29] and failures to act (Art 232)[30] of certain Union institutions. The Treaty, however, does not enable the European Court of Justice to review national laws, apart from the obvious exception of review under Art 226, which empowers the Commission to bring actions against the Member States on the grounds of Treaty infringement.[31] The European Court of Justice, therefore, has interpreted Art 234, originally a tool whereby the uniform application of Union law throughout the Member States was to be realised, into a tool whereby the Court may monitor national laws for incompatibility with primary or secondary Union law. Strictly, Art 234 merely empowers the European Court of Justice to rule with binding character, on a reference

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29 Acts of the Council, the Commission, the Parliament and the Central European Bank may be reviewed by the European Court of Justice under *EC,* above n 12, art 230 in actions brought by those institutions (Parliament can only do so in very limited circumstances; the European Central Bank is excluded), by the Member States and even, albeit within very restrictive *locus standi*, affected citizens and firms. If the act is found to be invalid, the European Court of Justice may declare it void with or without retroactive effect. *EC,* above n 12, art 241, which is available to any party, provides a right to plead the illegality of a Union regulation in different circumstances from the direct challenge under *EC,* above n 12, art 230. The result of an *EC,* above n 12, art 241 action is that the regulation is declared inapplicable in that case and not generally void *Meroni v High Authority* (C-(9/56) [1957-58] ECR 133).

30 Failures to act of the Council, the Commission, the Parliament (as amended in the *TEU*) may be reviewed by the European Court of Justice under *EC,* above n 12, art 232 EC in actions brought by any Union institution, by the Member States and, albeit within very restrictive *locus standi*, affected citizens and firms. In the case of omissions, the judgement may simply find that the neglect was unlawful in which case the European Court of Justice is not empowered to order that a decision be taken.

31 Under *EC,* above n 12, art 226 (as is the case under *EC,* above n 12,art 232), the European Court of Justice cannot annul the laws it finds invalid: its judgement is merely declaratory and carries no specific sanctions. The obvious lack of effectiveness this implies is, to some, extent remedied by *EC,* above n 12, art 228 which obligates the Member States to comply with the Court's judgement. A failure to do this will subject the State concerned either to further action against it under *EC,* above n 12, art 226 for a breach of *EC,* above n 12, art 228 (as in the *Commission v Italy (Second Art Treasures)* (C-48/71) [1972] ECR 527; [1972] CMLR 699) or to pay lump-sum fines imposed by the European Court of Justice (*EC,* above n 12, art 228 EC).
Under *EC,* above n 12, art 243, the European Court of Justice may prescribe the necessary interim measures. These were successfully used in some *EC,* above n 12, art 226 cases: for example, (*Commission v UK (Pig Producers)* (C-53/77) [1977] ECR 921; [1977] 2 CMLR 359.

from the national courts, on any question of interpretation and legality of Union law raised before them.[32] Having done that, the Court will usually go further and indicate to what degree a certain type of national legislation can be considered as compatible with that measure.[33]

In contrast to the initial reluctance of the Treaties, the European Court of Justice has, from the time of its establishment, been fully committed both to the protection of fundamental rights and to the generation of related principles of law.[34] The two are necessary to define the limits to state coercion, ensure that political rule is under law, and, hence, that it be better regulated. First, the European Court of Justice endorses the catalogue of fundamental rights provided by the *European Convention on Human Rights* as part of the general principles of Union law.[35]

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32 Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC*, (2nd ed, London: Sweet & Maxwell, 1987) 77. See the decision in *Van Gend en Loos*. The preliminary rulings procedure is open to all official, independent (not bound by instructions) dispute-settlement authorities in the Member States. The national court's decision whether or not to refer to the European Court of Justice will depend on its evaluation of the importance of the point of Union law in question for the resolution of the dispute before it. The parties may ask, but not demand, the Court to refer. The European Court of Justice assesses the importance of the point only in terms of whether there is indeed a point of law to be studied that has not already been resolved. A national court or tribunal against whose decision there is no judicial remedy in national law is obliged to refer (*EC,* above n 12, art 234) unless the point is of no importance for the result of the case before it, or has already been settled by the European Court of Justice, or the interpretation of the relevant provision of Union law does not generate reasonable doubt. The preliminary ruling is directly binding on the referring court and all other courts hearing the same case: Borchardt, above n 25, 54.

33 See Mancini, above n 18, 606. For an illustrative case see *Walter Rau Lebesnmittelwerke v de Smedt PbA* (C-261/81) [1982] ECR 3961; [1983] 2 CMLR 496.

34 Weatherill, above n 24, 37. It ought to be noted that some of the early decisions of the European Court of Justice were not entirely sympathetic to the protection of fundamental rights. See (*Stork v High Authority* (C-1/58) [1959] ECR 17); (*Sgarlata v Commission* (C-40/64) [1965] ECR 215; [1966] CMLR 314).

35 (*Nold v Commission* (C-4/73) [1974] ECR 491; [1974] 2 CMLR 338) and (*Rutili v Minister for the Interio*r (C-36/75) [1975] ECR 1219; [1975] 1 CMLR 140).
The *European Convention on Human Rights* has been referred to by the European Court of Justice in several instances: *Hauer v Land Rheinland-Pfalz* (C-44/79) [1979] ECR 3727; [1980] 3 CMLR 42; *R v Kent Kirk* (C-63/83) [1984] ECR 2689; [1984] 3 CMLR 522.
The Treaties have also been interpreted by the European Court of Justice in ways so as to protect fundamental rights (*UNECTEF v Heylens et al* (C-222/86) [1987] ECR 4097; [1989] 1 CMLR 901).
In *Wachauf v Federal Republic of Germany* (C-5/88) [1989] ECR 2609; [1991] 1 CMLR 328, the European Court of Justice held that the actions of Member States in executing Union law must meet the requirements of human rights provisions. *TEU*, above n 1, art 6 now obligates the Union to respect fundamental rights, as listed in the *European Convention on Human Rights*, as part of the general principles of Union law.

Secondly, the particular principles of equality and non-discrimination enshrined in the Treaty establishing the European Community[36] have been held by the Court to apply to all areas of Union law.[37] Thirdly, the European Court of Justice has recognised several rules of natural justice and procedural law: namely, the right to judicial review,[38] the principle of confidentiality or legal privilege,[39] and the principle of legal certainty.[40] The principle of legal certainty has been held to include the sub-concepts of legitimate expectations and the protection of vested rights;[41] proportionality;[42] and, non-retroactivity.[43]

It is, then, quite clear that insofar as Constitutions are concerned with the legalisation of political rule, the living Constitution of the Union, namely, the interaction between the Treaties and the case-law, leaves little to be desired. From that particular perspective, therefore, I do agree that Europe does not need a Constitution for it has one already.

Nonetheless, I respectfully submit that European leaders are missing the point. They are being unduly legalistic in thinking that nothing further is required. Their support for the status quo is, therefore, not surprising.

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36 *EC,* above n 12: Art 12 (the non-discrimination article); art 141 (on the grounds of sex); art 34(3) (in respect of the common agricultural policy); art 39(2) (for the free movement of workers).

37 *Razzouk and Beydoun v Commission* (C-75 & 117/82) [1984] ECR 1509; [1984] 1 CMLR 160; *Bergmann v Grows-Farm* (C-114/76) [1977] ECR 1211; [1979] 2 CMLR 523; *Prais v Council* (C-130/75) [1976] ECR 1589; [1976] 2 CMLR 708.

38 *Johnston v Chief Constable of the RUC* (C-222/84) [1986] ECR 1651; [1986] 3 CMLR 240; *UNECTEF v Heylens et al* (C-222/86) [1987] ECR 4097; [1989] 1 CMLR 901). The *UNECTEF case* also established that the duty to give reasons was a general principle to be recognised in the Union legal order. The right for both parties to present their cases was held to be a general principle in *Transocean Marine Paint Association v Commission* (C-17/74) [1974] ECR 1063; [1974] 2 CMLR 459. In *Kuhne v Commission* (C-75/79) [1980] ECR 1677 the right to a hearing was recognised.

39 *AM and S v Commission* (C-155/79) [1982] ECR 1575; [1982] 2 CMLR 264. This principle was also guaranteed in *National Panasonic v Commission* (C-136/79) [1980] ECR 2033; [1980] 3 CMLR 169 and *Hilti v Commission* (T-30/89) [1990] ECR II-163; [1992] 4 CMLR 16.

40 *Defrenne v SABENA (II)* (C-43/75) [1976] ECR 455; [1976] 2 CMLR and *Barber v Guardian Royal Exchange* (C-262/88) [1990] ECR 1944; [1990] 2 CMLR 513.

41 *Sugar Export v Commission* (C-88/76) [1977] ECR 709; *Töpfer v Commission* (C-112/77) [1978] ECR 1019; *Commission v Council (Staff salaries case)* (C-81/72) [1973] ECR 575; [1973] CMLR 639.

42 *Internationale Handelgesellschaft v Einfuhr und Vorratsstelle* (C-11/70) [1970] ECR 1125; [1972] CMLR 255; (*Rutili v Minister for the Interior* (C-36/75) [1975] ECR 1219; [1975] 1 CMLR 140. The principle of proportionality has now been given statutory recognition under *EC,* above n 12, art 5.

43 *R v Kent Kirk* (C-63/83) [1984] ECR 2689; [1984] 3 CMLR 522; *Barber v Guardian Royal Exchange* (C-262/88) [1990] ECR 1944; [1990] 2 CMLR 513*; Public Prosecutor v Kolpinghuis Nijmegen* (C-80/86) [1987] ECR 3969; [1989] 2 CMLR 18.

Faced with the French and Dutch no votes on the European Constitution, European leaders simply decided to revert back to the Treaty of Nice rather than work towards democracy, transparency, and effectiveness.

The heartbreaking fact is that, on the question of legitimacy, political rule at the Union level falls short of the standard normally set by Constitutions.[44] Most Constitutions define legitimacy in democratic terms.[45] Union governance, however, is best defined as a case of democratic deficit.[46]

The public power exercised by the Union does not emanate from the people, but is mediated through the States. Because the Treaties only possess an external, as opposed to an internal, reference point, they cannot be the expression of a society's self-determination as to the form and objectives of its political unity.[47] That it is the voice of the Member States that is being heard by the government of the Union as opposed to that of the people is nowhere else better illustrated than in Strasbourg, the seat of the European Parliament. The European Parliament replicates none of the three basic functions that Parliament, the embodiment of rule by the people, is designed to serve.[48] First, the European Parliament does not keep the Union executive accountable. While the work of the formal executive organ, the Commission, is adequately scrutinised by the European Parliament,[49] the work of the *de facto* executive, the governments of the 25 Member States, is not.[50] Secondly, the European Parliament does not translate policy into legislation. The Council has the

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44 Grimm, above n 3, 291.

45 Obviously, not all Constitutions define legitimacy in democratic terms. Unfortunate examples include the Constitutions of certain states governed by communist regimes. Regardless, notwithstanding that the *United Nations Charter* fails to make a reference to the right to democratic government, the *International Covenant on Civil and Political Rights* does indeed refer to the right to participate in the political process. Commentators are increasingly of the agreement that a right to democratic government is now an established principle of international law: Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (New York: Cambridge University Press, 2000).

46 JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1(3) *European Law Journal* 232.

47 Grimm, above n 3, 291.

48 Weiler, above n 46, 233-4.

49 The European Parliament monitors the Commission by questioning it (*EC,* above n 12, art 197) and discussing its reports (*EC,* above n 12, art 200). Also, the European Parliament is empowered to censure the Commission by dismissing it (a two thirds majority vote is required and the Commission can be dismissed in its entirety only: *EC,* above n 12, art 201).

50 The national governments, much more than the Commission, are responsible for the implementation and execution of Union law and policy (for example, the implementation of directives). Weiler, above n 25, 234.

final power of decision for the adoption of legislative proposals made by the Commission.[51] Thirdly, the European Parliament is not an effective public forum for debate. It is gripped by the problem of structural remoteness.[52]

Other equally significant factors erode the democratic character, the legitimacy, of political rule by the Union. First, the degree of political significance and the level of control of each individual within the functional and political boundaries of the Union polity is minimal. This phenomenon is referred to as inverted regionalism, a consequence of increasing the membership of the polity and of adding a tier of government thereby alienating democratic government further from the people it claims to represent and work for.[53] Secondly, domestic preferences are perverted in a substantive sense.[54] Moreover, the principle of proportional representation means that the smaller States will be, qualitatively, better represented, in both Council and Parliament, than the larger ones.[55] Thirdly, the democratic say of regions that have a certain degree of political autonomy within a broader state framework, as is the case of the Basques in Spain, goes practically unheard in the Union polity, where States are the principal actors.[56] Lastly, the overall

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51 See *EC,* above n 12, art 202. Depending on the particular Treaty provision under which the Council enacts legislation, it may have to consult the European Parliament (*EC,* above n 12, arts 44 and 308) and the Economic and Social Committee; gain the European Parliament's assent (*EC,* above n 12, arts 300, 310 and TEU, above 1, art 49 TEU); or co-operate (*EC,* above n 12, art 252) or co-decide (*EC,* above n 12, art 251) with the European Parliament. The new co-decision procedure, for instance, provides the European Parliament with a final right of veto over Council provisions. The European Parliament is empowered to reject or amend the Union budget: *Treaty amending Certain Financial Provisions of the Treaty establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities,* opened for signature 22 July 1975, OJ L 2 (entered into force 1 June 1977). Despite the changes brought about to the legislative processes by various Treaty amendments, the Council still remains the main legislative organ. Also see Emile Nöel, *Working Together: The Institutions of the European Community* (Luxembourg: Office for Official Publications of the European Communities, 1996) 25-8.

52 See Weiler, above n 46, 233-4 for the causes of structural remoteness.

53 Weiler, above n 46, 232. See Weiler, above n 46, 233 for a list of the factors which further aggravate the de-legitimising effects of inverted regionalism.

54 Weiler, above n 46, 235 writes: 'A Member State may elect a centre right government and yet might be subject to centre left policies if a majority of, say, centre left governments dominate the Council. Conversely, there might even be a majority of, say, centre right governments in the Council, but they might find themselves thwarted by a minority of centre right governments or even by a such government where Community decisional rules provide for unanimity.'

55 Petersmann, above n 10, 1126.

56 The Committee of the Regions has an advisory role only (*EC,* above n 12, art 7(2)) restricted to matters such as *EC,* above n 12: education (art 149(4)); culture (Art 151(5)); and, regional development (Art 157).

lack of transparency, as illustrated by the infamous closed-door meetings of the Council, that pervades all Union governance severely undermines the democratic process too.[57]

For the reasons outlined, it thus becomes quite clear that insofar as Constitutions are concerned with the legitimisation of political rule by those subject to it, the European Union falls short and, thus, needs a Constitution.[58]

B *Formally – The Living Constitution is Not a Body of Primary Norms*

I am not for form over substance. Nonetheless, as an enthusiastic advocate of a Constitution for Europe, I feel compelled to report that not only does the so-called living Constitution fail to legitimise political rule by the Union but it also fails to meet formal criteria.

With respect to the first component of the Union's living Constitution, the Treaties, I argue that the validity of their claim to represent norms of a primary nature is, at best, questionable. First, Treaties do not come from the people but from States which, as I have already established, are responsible for enacting secondary norms only. Secondly, their character as supreme provisions of law within the Union has been judicially conferred. Unlike Constitutions, Treaties forming international entities do not usually enjoy higher-law status vis-à-vis the domestic laws of the contracting parties.[59] This is apparent from the Treaties which neither make any express declaration nor provide a specific legal base for the primacy of Union law.[60] Ultimately, it has been through the decisions of the European Court of Justice that a supremacy clause in the Union framework has been recognised to exist.[61] The Court has repeatedly held that the Treaties, along with other forms of Union law, take priority over all conflicting, and hence invalid, provisions of national law.[62] It may be argued that, in practice, the fact that the supremacy now commanded by the Treaties is judicial in origin is not relevant. But it is. While it is true that the principle of supremacy has with time become a well established feature of the Union's legal order, it is also true that it stands on shaky

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57 Petersmann, above n 10, 1125.

58 Grimm, above n 3, 291.

59 Mancini, above n 18, 599.

60 Arguably, some of the articles of the EC Treaty implicitly demand supremacy. These include *EC,* above n 12: art 10 (the fidelity clause); art 12 (the general prohibition of discrimination on the grounds of nationality); art 249 (the direct applicability of regulations); and, Art 292 (the reservation of dispute resolution).

61 Derrick Wyatt and Alan Dashwood, *Wyatt and Dashwood's European Community Law* (3rd ed, London: Sweet & Maxwell, 1993) 56.

62 *Costa v ENEL* (C-6/64) [1964] ECR 585; [1964] CMLR 425.

ground. It is founded on a judicial decision which, in a system that does not recognise the binding character of precedent, is subject to potential revision or even to revocation. Thirdly, the Treaties cannot be amended by the people. They can be amended only by the Member States to which the Union owes its being.

With respect to the second component of the Union's living Constitution, the case-law, it is readily apparent that it meets none of the three formal characteristics of Constitutions or primary norms. First, judicial decisions do not spring from the people. Secondly, they lack primacy over conflicting provisions of law. Because the system of precedent is absent from the Union's legal order, decisions of the European Court of Justice have no binding force except between the parties and in respect of that particular case.[63] Thirdly, judicially established principles cannot be amended by the people. Only the European Court of Justice is empowered to revise or repeal them in its subsequent judgements.

For the reasons outlined, it thus becomes quite clear that, insofar as Constitutions are constituted by primary norms, the living Constitution of the Union fails to meet the formal criteria that have been established to universally define Constitutions. From a formal perspective, therefore, Europe needs a Constitution for it does not have one.

IV CONCLUSION

So does Europe need a Constitution? I argue that it does. In a politico-democratic context, Constitutions are universally defined in both functional and formal terms. From a functional perspective, a Constitution is the answer to the democratic calls for political rule to be legitimised and legalised. From a formal perspective, a Constitution is a body of primary norms coming from the people, commanding supremacy over the legal order and capable of amendment by the people only. In the light of this definition, I argue that the European Union is not founded upon a Constitution and that, therefore, it needs one. Functionally, political rule by the Union is illegitimate. It is a case of democratic deficit. Formally, the living Constitution of the Union, the Treaties and the case-law whose interaction has the effect of adequately institutionalising and regulating political rule at the Union level, cannot be said to represent a body of primary norms. To conclude, the

63 Lasok, above n 21, 146. Under the doctrine of *res judicata*, the judgement is binding upon the Court where there is an identity of parties, cause and object: *Da Costa en Schaake NV v Nederlandse Administratre der Belastingen* (C-28-30/62) [1963] ECR 31; [1963] CMLR 224.

functional and formal insufficiencies of the living Constitution upon which the European Union is based at present reinvigorate the call for the ratification of a Constitution in the true sense of the term.

Indeed, this was recognised in 2002, when, at a meeting of the European Council in Laeken (Belgium), a Declaration on the Future of the European Union was adopted. The Laeken Declaration committed the European Union to greater democracy, transparency, and effectiveness. It, consequently, acknowledged the need to establish a Constitution for Europe.

Delegates from the European Union institutions and the governments of Member States and applicant states were convened to draft a Constitution. The draft was subsequently agreed by the Member State governments and signed at Rome in 2004 as the Treaty for the Establishment of a Constitution for Europe. It aims to replace the existing Treaties with a single text.

The Constitution will not enter into effect until it has been ratified by the 25 Member States. A number of Member States have already ratified the Constitution by parliamentary vote such as Italy and Germany. Other Member States, including Spain, France, and the Netherlands, decided to ratify the Constitution by referendum. The rejection of the Constitution in the French and Dutch referenda in May and June 2005 has given rise to the fear that the European Union will be unable to proceed with the Constitution.

V POSTSCRIPT

Faced with French and Dutch no votes on the European Constitution, Heads of Government called for a 'period of reflection' to enable a broad debate to take place in each Member State.[64] Thus, a period of reflection, explanation and discussion is currently under way in all Member States, whether or not they have ratified the Constitution.

All Member States have committed to undertake broad ranging national debates on the future of Europe. Ultimately, Governments must steer these national debates forward, but the European Commission has a key role in facilitating the process.

In that regard, last year, the Commission launched its Plan D (standing for 'Democracy, Dialogue, Debate') laying the foundations for the profound

64 For further updated information, please refer to the Gateway to the European Union website: http://europa.eu.

debate about Europe's future that is currently taking place. The Commission's Plan D puts in place a common framework, through national governments, for a 25 country debate on Europe's future. Plan D provides potential models and structures for national governments (such as the National Forum Ireland) and suggests certain common processes and key themes. The clear objective is to build a new political consensus about the right policies to equip Europe to meet the challenges of the twenty-first century.

The Commission is structuring the feedback process. A first feedback of the national debates took place in April this year. A European Conference on the future of Europe (nostalgically named 'The Sound of Europe', perhaps after the popular musical set on the Austrian Alps) was organised in Mozart's Salzburg (to continue the musical theme) in late January 2006. The conference drew together the main conclusions from the debates thus far. The Commission then prepared a synthesis report of the national debates in time for the June 2006 meeting of the European Council under the Austrian Presidency. The state of discussions on ratification of the Constitution was also examined by the European Council.

Recalling its conclusions of June 2005, the European Council welcomed the various initiatives taken within the framework of the national debates as well as the contributions of the Commission and Parliament to the reflection period.[65] The European Council noted that the significant efforts made to increase and expand the dialogue with Europe's citizens, including the Commission's Plan D initiative, should be continued.

According to the European Council, the reflection period has overall been useful in enabling the Union to assess the concerns and worries expressed in the course of the ratification process. It considered that, in parallel with the ongoing ratification process, further work, building on what has been achieved since June last year, is needed before decisions on the future of the Constitution can be taken.

In the opinion of the European Council, after last year's period of reflection, work should now focus on delivery of concrete results and implementation of projects. The European Council agreed a two-track approach. On the one hand, best use should be made of the possibilities offered by the existing treaties in order to deliver the concrete results that citizens expect.

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65 Presidency, Council of the European Union, *Presidency Conclusions 15/16 June 2006*, Number 10633/1/06 REV 1 (17 July 2006) 16-7.

On the other hand, the Presidency of the European Council will present a report to the European Council during the first semester of 2007, based on extensive consultations with the Member States. This report should contain an assessment of the state of discussion with regard to the Constitution and explore possible future developments.

The report will subsequently be examined by the European Council. The outcome of this examination will serve as the basis for further decisions on how to continue the reform process, it being understood that the necessary steps to that effect will have been taken during the second semester of 2008 at the latest. Each Presidency in office since the start of the reflection period has a particular responsibility to ensure the continuity of this process.

Finally, the European Council called for the adoption, on 25 March 2007 in Berlin, of a political declaration by Union leaders, setting out Europe's values and ambitions and confirming their shared commitment to deliver them, commemorating 50 years of the Treaties of Rome.

Fortunately, the process of ratification by the Member States has not been abandoned. If necessary, the timetable will be adjusted to reflect the circumstances in the countries which have not yet ratified the Treaty.

Not all is lost. Fifteen Member States have now said 'yes' to the Constitution, including two by referendum, representing a total population in excess of 300 million. Only two states, France and the Netherlands, have said 'no', representing a total population of 76 million.

In the end, I am convinced that the democratic spirit of the peoples of Europe will prevail and with it so will the Constitution. With the Constitution, Europe is taking a decisive step towards a political union: citizens and Member States will, as the preamble to the draft states, be 'united in their diversity'.

I believe that the Constitution will triumph. It strikes the necessary balance between people, between states new and old, between institutions, and between dreams and reality.