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The EU and the Right to Self-Government

By

Erik Oddvar Eriksen

ARENA, University of Oslo

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Abstract

In this paper, the constitution making process in Europe is assessed with emphasis on incorporating the Charter of Fundamental Rights. Is the Charter a means to reduce the democratic deficit even if it does not fully comply with the notion of people-made law? The EU establishes *post-national rights*, including fundamental rights of a constitutional type. The focus is on the contribution of fundamental rights to constitutionalism and to cosmopolitan democracy. Rights are necessary for democracy to prevail, but rights have to be right. In Europe, there is a constitution in the making, as the citizens have been assigned rights, but as they have not given themselves the rights explicitly, the validity of the rights may be of a dubious quality.

‘The people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which several branches of government hold their power, is derived’

Federalist Papers, No. 49 (Madison 1788)

I. Introduction

The EU is in the midst of a constitution making process, viz., in a process of specifying the rights and obligations of the citizens of the Union.¹ There are long traditions of rights entrenchment to build on and there are well developed systems with legal personalities and adjudicatory machinery. The initiative taken to incorporate a *Charter of Fundamental Rights* into the new Treaty of the EU indicates that a new order is underway. At the December 2000 Summit in Nice the Charter was solemnly proclaimed. The eventual incorporation into the Treaties is postponed until 2004 – to be decided by the next IGC.

The Charter is a step in the process of constitutionalising the EU. It is a constitution making vehicle (Eriksen, Fossum and Menéndez 2003). This process of constitutionalisation is no doubt driven forward by the particular developments within the EU pertaining to closer integration, and given impetus by the particularly vexing challenge of enlargement. The development interacts with and reinforces the European Court of Justice’s own embrace of constitutional principles and practices from the constitutional arrangements of the Member States. This process was taken a firm step forward by establishing *the Convention on the future of Europe* 2002, and which deemed itself a constitutional convention. It was originally initiated by Declaration 23 annexed to the Nice Treaty and put into motion by the Laeken declaration 2001. A proposal for a *Constitutional Treaty* was submitted to the Council 20 June 2003, in which the Charter of Fundamental Rights is incorporated as Part Two.

¹ I am grateful for comments made by John Erik Fossum, Agustín José Menéndez and Anders Molander.

The Convention on the Future of Europe was spurred by the Charter Convention, which it largely duplicated in terms of its composition: it was made up of a majority of parliamentarians. Its deliberations were public, and so were the relevant documents.² It organised links to civil society organisations and was open to inputs and submissions from civil society actors. However the convention did not really comply with democratic criteria, as it was not mandated by the people through popular vote nor is its proposals as of yet subjected to a genuine public debate. Thus there is a ‘constitution-making process’ going on and the citizens have been assigned rights but they have not given these rights to themselves. Moreover, due to the establishment of the internal market, the citizens have already obtained a whole range of rights. For example, as employees in foreign countries they have the rights to the same kind of social security rights as the native residents. Citizens can now sue their own government in case it does not comply with Community law. The EU establishes *post-national rights*, including fundamental rights of a constitutional kind. But as the citizens have not given themselves the rights, what kind of validity can they possibly possess?

Judge made law is undemocratic. A proper constitution should not, according to democratic criteria, be made unless it has been mandated by the people and been subjected to public debate and ratified through proper legislative processes subjected to judicial review. In this paper I assess the constitution making process with emphasis on the incorporated Charter of Fundamental Rights. Is the Charter a means to reduce the democratic deficit even if it resonates badly with the idea of people-made law? What is the connection between rights and democracy in a cosmopolitan perspective?

I proceed by outlining the democratic problem of the Union, in section two, then I address the Charter and its politico-legal implications – in section three. The question is why a constitutionalized bill of rights is needed to bolster post-national democracy. Rights require democratic enactment in order to be legitimate. I therefore, in section

² They can be accessed from the Convention website. See <<http://european-convention.eu.int/>>. See also the discussion in the last section of Eriksen, Fossum and Menéndez (forthcoming).

four, delineate the basic democratic assessment criteria: congruence and accountability. In section five, I address the internal relationship between rights and democracy in a post-national order. Section six holds the conclusion.

II. The democratic deficit

The EU is a mix of intergovernmental, supranational and trans-national elements. It is a construction that is demanding both in descriptive and normative terms. It is a complex network of institutions for regulating common affairs, but it is not unitary and self-contained as a political unit. It is an entity with strong *supranational elements*, as evidenced in the supranational character of the legal structure, which is supported and enhanced in particular by the European Court of Justice. As I will return to, it has in its rulings long asserted the principles of supremacy and direct effect. Those principles have informed the actual operations of the EU and the legal development. Based on the Treaties the ECJ has been a firm interpreter and developer of Community law. Over time, Community law has developed into a pseudo-constitutional system based on a set of fundamental principles. It has emerged into a body of law which is autonomous of and separate from and superior to Member State law. The integration process is based on non-arbitrary norm-enforcement in which the same obligations are conferred upon all. This has unifying consequences as law is a medium for stabilising behavioural expectations. It connects non-compliance with foreseeable sanctions and subjects all to the same norms and obligations. But the law is not made in a very democratic manner as *the Council of Ministers* which is the most powerful EU institution, is made up of representatives from the member states. It legislates on behalf of the Union (together with the EP) and enjoys near exclusive executive competences within pillar II and III. It is the co-legislator (with the EP) in pillar I and decides some things by unanimity and some by qualified majority vote. It has a rotating presidency lasting for six months. *The European Council* is not formally part of the EU structure but is arguably the most important of the EU's five major institutions as it convenes heads of state and the government for short summit meetings. It meets at least twice a year with Commission representatives present.

In contrast to the intergovernmental Council *the European Parliament* is a supranational institution. It is directly elected by the citizens of the member states but has not until

recently had much legislative power. Nor has it had much authority to hold the executive accountable. However, the Treaty of Amsterdam (1997) increased its role, as also the Maastricht Treaty did. The Parliament's powers *vis-a-vis* the European Commission have been enhanced. The system now resembles the structure of well known federal states with two legislative chambers where a single Council for legislative affairs being equivalent of a Senate or Bundesrat, and the Parliament a Congress (or the House of Commons). However, as there are now seven different procedures for the EP's participation in Council decisions, there is a great need for simplification of procedures, and of the Union's institutions. Analysts and decision-makers recognize also the need for clarifying the competencies and the powers of the institutions. The Nice Treaty (2000) added complexity by approving a qualified majority system which privileged the larger states. It was imposed in order to safeguard their ability to block decisions in an enlarged Union. Once again an IGC failed to make necessary decisions. The really hard decisions were postponed.

The European Commission has executive functions – within pillar I - and is endowed with the right of initiative, which includes the right to issue legislative proposals. In addition, hundreds of Committees, which were originally established to control delegation of powers from the Council to the Commission, are in operation. They are involved in the process of shaping and adopting statutory acts within the confines of the delegated authority of the Commission. Initially it covered such areas as agriculture, trade, and customs policies. It now also comprises amongst others research and development, environmental affairs and telecommunications. Such a system blurs the constitutional distinction between legislative and executive powers, between politics and administration. It is not democratically accountable, and control by the European Parliament is a recurring theme. Consequently, even if the institutional make up of the Union resembles the separation of powers, akin to the separation of power in a nation state, there are profound differences and problems. Hence, the so-called *democratic deficit* which is due to the lack of a truly European public sphere, inadequate entrenchment of citizens' rights, executive dominance, judicial activism, lack of Europeanized political parties, weak representation and representativeness of the system. In the indirectly elected Council common affairs are conducted according to diplomatic and intergovernmental bargaining modes of decision-making, behind closed doors, while the Parliament lacks power, is remote and has low voter turnout.

In the areas in which it does co-decide legislation, it does not have the right of initiative and does not even have the last legislative word.³

To summarize, the democratic problems of the Union are due to the following deficiencies:

- European citizens do not have proper rights, nor do they have the ability, to make the laws that affect them.
- The final legislative power lays with the Council of Ministers, a body whose democratic representativeness is clearly inadequate, in that the ministers are accountable to their state only and not to all of Europe's citizens.
- The European Parliament is a representative body, but one with circumscribed legislative powers and prerogatives.
- There are also no truly European wide political parties that in organisational terms reach down into the national arenas.
- The EU's 'constitution' is not based on a coherent and consistent set of democratic principles and the procedures for constitutional change are democratically deficient in that each member state is left with a veto.

Consequently democratic reforms are called for. One should, however, recall that the EU itself for a long time now has committed itself to the norms of the democratic Rechtsstaat. The Maastricht Treaty represented the most important single change here in that it laid down the basic principles for democracy in the Union. These principles were further amplified in the Amsterdam Treaty, in terms of democracy, freedom, the rule of law, social policy, solidarity and cohesion. The terms indicate that the evaluative standards, as expressed in official submissions to the process, have become more explicitly linked to democratic legitimacy. There is thus not only a gap between democratic principles and actual practice, but a gap between the self proclaimed aims and principles of the Treaties and the actual situation in the Union as well. Is the proposed Charter of Fundamental Rights a means to close this gap? Several measures are required in order to mend the democratic deficit of the Union. The question is

³ On this see further Grimm (2003); and Eriksen, Fossum and Menéndez 2003: 22-23.

whether a Charter in the form of a constitutionalised bill of rights enhances the democratic quality of the system.

III. Chartering the Constitution

All articles on the rights of EU citizens in the Treaty of the Union have now been collected in one document of 54 articles, inspired by Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR (without substituting it), the Social Charters adopted by the Council of Europe, the common constitutional traditions of the member states and by the Community and the case-law of the ECJ.

A citizen based polity

The Charter adds to the fundamental rights of Union citizens by expressing the principles of humanism and democracy in the preamble. The Charter contains provisions on civil, political, social and economic rights. Put together, these are intended to ensure the dignity of the person, to safeguard her essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity, and to establish justice. The numbers of rights that are listed are comprehensive. They range from classical civil rights to social and economic rights. In addition to provisions which most charters and bills of rights hold, and which pertain to such clauses as the right to life, security, and dignity, there are numerous clauses that seek to respond directly to contemporary issues and challenges. For instance, there are clauses on protection of personal data (Article 8), freedom of research (Article 13), protection of cultural diversity (Article 22), protection of children (Article 24), right to collective bargaining (Article 28), and protection of the environment (Article 37). It prohibits eugenic practices, the trafficking of human bodies and body parts, the reproductive cloning of the human organism and it forbids the death penalty. The latter is a forceful reminder of the disasters that originally initiated the EU, and is symbolizing its ethical distinctiveness and value-base. The rights in the Charter are of a diverse nature and it is not always clear what they actually stand for.⁴ In the final section of the preamble a distinction between ‘rights, freedoms and principles’ are drawn which is hard to uphold. Some are pure rights which are legally binding of the powers, others are principles or policy clauses, and the Charter also contains precepts that designate

⁴ For an extensive comment see Meyer 2003.

responsibilities with no connection to rights at all. This may be confusing (cp Llorente 2003: 420). In the categorization of the Charter's rights, Menéndez (2003a: 184) distinguishes between fundamental *rights proper*, *ordinary rights* and *policy clauses*.

Despite ambiguities the Charter marks the *EU as a polity* with extended domains of competencies, and as an entity in need of legal constraints. The EU is consequently not merely conceived of as an instrument for solving the problems of the Member States or as a common market. This is consistent with the fact that the Union clearly has moved beyond an intergovernmental organization, which is evidenced in the supranational character of the legal structure. The case law of the ECJ rendered explicit the latent principles of *the doctrines of Supremacy* (1964) and *Direct effect*. The former states that, in case of disputes between a national norm and an EC legal norm, the national norm must give way; and *the doctrine of Direct effect* (1962, 1974), says that under certain conditions EC norms (Treaty law and secondary legislation) confer rights on citizens that must be protected in national courts.⁵

‘Direct effect implies supremacy, but the latter has wider significance, since all Community law, irrespective of its direct applicability, is supreme over national law, constitutional law included.’

(Baquero Cruz 2002:94)

Albeit their precise status in relation to national constitutional orders remains unclear, due to legal disagreement over the actual primacy of Community law,⁶ there is a hierarchy of legal sources placing Community law above national law. In the draft of the new Constitution of June 2003, the following wording has been agreed upon:

‘Article 1-10: Union Law

1. 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.

⁵ Van Gend, Case 26/62 (1963), ECR: 1. Case Costa 6/64 (1964), ECR: 585).

⁶ This is evidenced for instance in rulings on the constitutionality of the Maastricht Treaty by the German Constitutional Court and the Danish High Court, both of which refused to grant EU law *Kompetenz-Kompetenz*.

2. Member States shall take all appropriate measures, general or particular, to ensure fulfillment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts.'

(CONV 850/03)

Even though the Member States are the contracting partners so that a new 'constitution' has to be accepted by an IGC, the EU increasingly takes the shape of a polity in its own right. In many regards the EU is a political entity performing many of the functions of the nation-state. The Commission, the EP and the ECJ form a new supranational power-wielding regime with far-reaching consequences for the ordinary man and woman in Europe. The EU allocates resources throughout Europe; it affects the distributive pattern and shifts the balance of goods and burdens between states, regions and groups. Its lawmaking affects the interests and values of the European citizens and the identities of the Member States, but the power of the Union is not balanced by a proper set of enforceable citizens' rights:

'The treaties lack a catalogue of fundamental rights bringing the relations between the Community and the natural and legal persons subject to it under the guiding principles of freedom and equality.'

(Grimm 2003)

The interests and values of the citizens are not properly protected by the system in place; they need to be safeguarded by a system of entrenched rights.

Direct legitimacy

The Charter denotes the EU as an entity built upon the individual, her freedom and well-being, with rights that should not be outweighed by collective welfare claims or national concerns. The citizens of Europe have now, in principle, achieved rights over and above their resident states. Further, the proposed Charter can be read as one of, if not the most, explicit statement on the EU's commitment to *direct legitimacy* that has ever been produced in the EU. The institutions and rights provided to the citizens by the EU in themselves are to provide the necessary basis for legitimate government. It speaks to the claim that the EU is a full-blown polity.

‘Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for legitimacy.’⁷

As mentioned in the introduction, in reality the Charter is a clear manifestation of the EU as a political entity and not a market. The four market freedoms are merely listed as policy goals in the Preamble of the Charter, whereas there are a wide range of social rights listed as fundamental and ordinary rights in the Charter. However, the Charter is not without defects. As I will return to, it does not have any direct effect with regard to the established institutional structure. Further, the Charter only applies to the actions of the EU institutions and the Member States’ authorities when implementing Community law. It is not designed to replace other forms of fundamental rights protection. Article 51 (Section 2) states that the Charter does ‘not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’. Section 1 states that the Charter will only be made to apply to the ‘institutions and bodies of the Union’ and only to the Member States ‘when they are implementing Union law’. Formally it is not binding, even though it is written *as if* ‘it were a binding legal text’ following a proposal made by member Cisneros and endorsed by president Herzog.⁸

Even though the Charter is not as yet legally binding, ‘(i)n practice, (...) the legal effect of the solemn proclamation of the Charter of Fundamental Rights of the European Union will tend to be similar to that of its insertion into the Treaties on which the Union is founded’ (Lenaerts and De Smitjer 2001: 298-99). The Charter reflects the well established rights - and value-basis of the Community. The Charter ‘(...) is a legally enforceable text which underlines the importance of the rule of law in the EU and it is the ultimate proof of the focal role that EU citizens have come to play in the European integration process’ (ibid. 300). Moreover, since it codifies existing positive law in one sense it may be seen as already binding. It has also increased its legal bite over a short period of time as the Court of first Instance has invoked the Charter as legal authority in several judgements (cp Menéndez 2002:

⁷ ‘European Council decision on the drawing up of a Charter of Fundamental Rights of the European Union,’ Annex IV to the Conclusions of the European Council in Cologne (3-4 June 1999).

⁸ See CHARTE 4105/00. See also Eckhout 2000: 98.

474). It has been referred to by institutional actors like the European Ombudsman and the Commission, and some Advocates-General have also pointed to the quality of the processes drafting the Charter as a special source of justification:

‘I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.’⁹

However, the European Constitutional Convention reached an agreement 13 June 2003 that it should be incorporated in full in the future constitution of the EU. It did not reopen the text.¹⁰ The Charter is, however ambivalently reflective of a rights-based constitutional patriotism (Fossum 2003: 336). It is an answer to the problem of the potential intrusive power of the EU. The Charter has merits from a normative point of view, but why did it come about? By what reasons was it sustained?

Predictability and security

The Charter enhances the *legal certainty* of the citizens of Europe as everybody can claim protection for the same interests and concerns. The principle of legal certainty is only secured in a limited sense at the Community level. The citizen can not be sure what rights she really is entitled to. Not all the Member States, for example, have ratified all the ECHR’s subsequent protocols and the ECJ has no clear and incontestable foundation on which to base its rulings. A bill of rights enhances consistent rights enforcement in the EU area. This especially important in the pluralistic constitutional setting of the EU. As these often reflect particular traditions and customs they potentially give rise to conflicting court rulings.

⁹ Advocate-General Mischo in Joined Cases C-20/00 and C-64/00, Booker Aquaculture Ltd. Cited from Brand 2002: 401-402.

¹⁰ Except for a change, on a British initiative, in the preamble saying that the ECJ must pay ‘due regard’ to an interpretative text underlining that the Charter does not create new rights.

‘The rights regime of the European Union is inconsistent in terms of content as well as variable in terms of implementation and levels of enforcement between Member States.’

(Duff 2000: 4-5)

The founding treaties of the European Community contained no reference to fundamental rights. However, as integration deepened, and as the Community came to have more far-reaching effects on the daily lives of citizens, the need for explicit mention of fundamental rights was realized. The European Court of Justice (ECJ) developed this idea¹¹ as the Community is not bound by the ECHR in the same way as the subscribing Member States. The EU is not itself a signatory to the Convention. It has been argued by many over the years, that the power of the legislative and administrative bodies of the Community needs to be constrained by a set of fundamental rights, in the same way as constitutions and the ECHR constrain the authorities of the Member States. The problem was attended by the IGC leading to the Maastricht Treaty (TEU), and in what is now Article 6(2) of the Amsterdam Treaty, recognition of the concept of fundamental rights is enshrined. By this clause the EU is obliged to respect the rights guaranteed by the ECHR and deriving from the constitutional traditions of the Member States. However, the text is rather weak and imprecise. The EU-Committee of the British House of Lords in England urged for a legally binding charter based on the ECJ as the legal authority, because: ‘Within the framework established by the Maastricht and Amsterdam Treaties, there is greater scope than before for EU actions and policies to impinge on individual rights and freedoms’.¹²

Another source of the initiative of making a charter of fundamental rights is the argument that the EU which is ‘(...) a staunch defender of human rights externally’ (...) ‘lacks a fully-fledged human rights policy’.¹³ A constitutionalized bill of rights provides the EU with the legal competence required to carry on being a firm promoter of

¹¹ The leading Case is *Internationale*, 11/70, (1970) ECR 1125.

¹² House of Lords European Union Committee Session 1999-2000, Eight Report: The EU Charter of Fundamental Rights, 2000

¹³ And further ‘(...) the Union can only achieve the leadership role to which it aspires through the example it sets’ (Alston and Weiler 1999: 4-5).

human rights worldwide. It is difficult to be a champion of cosmopolitan law and urge others to institutionalize human rights when one is not prepared to do so oneself. When basic institutions are lacking in the EU with regard to human rights, it is difficult to *lead by example*. The ensuing document is intended to do something about this deficiency. The Charter substantiates the rights mentioned in Article 6(2) of the Treaty on European Union (TEU) by spelling out the specific obligations of the institutions.

A bill of rights, even one that is not more than the codification of existing law, decreases the room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The need for legal certainty has been accentuated by the recent development towards an actual Justice and Home Affairs policy of the EU. It is in policy fields such as migration law, border control, police cooperation etc. that the rights of the citizens most often are threatened.¹⁴

A political document

Although the Charter was not made by a specifically designated Constitutional convention and thus lacks legitimacy, as J.H.H. Weiler contends, it is *a public document* that was made by political actors - 46 out of 66 voting members, and 26 out of 39 from the candidate countries. The deliberations were relatively open and inclusive (De Schutter 2003; Schönlaui 2003). The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council (3-4 June 1999). In October 1999, at the Tampere European Council, it was decided to establish a 62-member Convention (headed by the former German President Roman Herzog) to draft

¹⁴ In its first report on human rights, The EU-Committee of the House of Lords Committee emphasised that 'the Community has no criminal jurisdiction, no police, no criminal courts, no prisons' and that a number of ECHR provisions would thus be largely inapplicable within the Community. While it remains the case that the Community has no explicit powers in these areas, important changes have taken place: '...There is provision under Title VI of the TEU, for closer operational co-operation between police and customs officials, also involving Europol, in the prevention and combating of crime. While such co-operation remains essentially inter-governmental there is greater involvement of Community institutions and a greater choice of legally binding instruments'. (House of Lords European Union Committee Session 1999-2000, Eight Report: The EU Charter of Fundamental Rights, 2000).

a Charter of Fundamental Rights of the European Union.¹⁵ This is the first time that the EP was represented in the same manner as the Member State governments and the national parliaments in a process of a constitutional nature.

The process resembled a constitutional one and this new regime moves the system of human rights beyond the present one which is dominated by the courts. The Charter was made by the representatives of the citizens of the Member States. It was openly deliberated by representatives of national governments and national parliaments, the Commission and the EP and has also received inputs from NGOs.¹⁶ To some extent it was also subjected to public debate.¹⁷ The Charter was politically decided and so implies a *democratisation of human rights politics*. From the Charter onwards, fundamental rights are not merely judge made. Even though the Charter is not made directly by the people or by a constitutional convention, it was made by representatives of the people and is important in order to curb the impression of, and also the actual power of judge-made law in the EU. Democratic legitimacy is also the reason for the European Council's decision in Cologne:

‘Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy (...) There appears to be a need (...) to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.’¹⁸

¹⁵ The Convention consisted of (a) representatives of the Head of State or Government of the Member States, (b) one representative of the President of the European Commission, (c) sixteen members of the EP, and (d) thirty members of the Member State Parliaments (two from each of the Member States). It was led by a Presidium of five.

¹⁶ The process is unique in the EU. There are reports of processes of ‘a genuine dialogue’ within the Convention which led to change of positions over time. See Schönlaue 2003: 131.

¹⁷ The drafting of the Charter took place in an open manner, in contrast to the IGC-2000 process, which was mainly conducted behind closed doors. The Convention consulted with other organisations and conducted open hearings to representatives from civil society. Hundreds of NGOs submitted briefs to the Convention on different aspects of the Charter. It received more than 1000 documents from more than 200 different sources. These briefs can be accessed on the Internet:

<<http://db.consilium.eu.int/df/default.asp?lang=en>>.

¹⁸ <<http://db.consilium.eu.int/DF/intro.asp?de>>.

In general a Constitution containing a bill of rights increases transparency and comprehensibility for ordinary citizens and makes existing law liable to public scrutiny. It enhances the possibility of public reflection and democratic deliberation. Furthermore, as it is merely consolidating already existing rights, and as its provisions are based on the common European constitutional traditions, the burden of legitimation may be rather modest, as Menéndez (2003b) contends. But a constitution requires legitimation. What are the basic democratic assessment criteria?

IV. Congruence and accountability

Constitutions protect citizens' freedom by entrenching a host of individual rights and state that basic rights should not be altered by simple majority vote. It is a means not only to curb the stupidity and maliciousness of popular rule, but also to institutionalize and regulate it properly.

Rights and democracy

Rights entrenchment enhances the predictability and legal security of the citizens. The Charter process represents a very important development in the constitutionalisation of the EU, a constitution that limits the powers of the Union. Constitutions guarantee civil and political rights, they regulate the activity of political bodies by stating rules for elections, representation, and decision-making, and they generally establish areas of competence, terms and qualifications. Bills of rights empower the judges to protect liberty and hinder that democracy by means of majority vote crushes individual rights (Brennan 1989: 432). In this perspective the Charter is, however, found wanting. It is weakly developed with regard to citizenship rights as a person must be citizen of a member state to qualify as a citizen of the Union, and with regard to political rights. The onus is on human rights, which undoubtedly has been strengthened but it has not introduced '... any concrete policy changes nor altered anything significant within the existing legal, political and constitutional framework' (de Búrca 2001: 129).

The Charter is not only limited in substantive terms, with regard to institutional reforms, but also in procedural terms. Direct participation in legislative processes is required for the system to be deemed democratic, for the people to give themselves the laws they are to obey by, and the rights they need for protecting their values and

interests. The need for participatory rights and further democratization of the EU, can be supported by an additional argument: In situations where rights collide, a correct interpretation of the situation is needed to choose the appropriate norm. Only the hearing of all affected parties can provide an adequately informed basis for resolving hard questions. This is so because what is right or good for A in one context, may be wrong or bad for B in another context. Rights need to be interpreted and adapted to the task environment – they need to be contextualized. Human rights, which can be correct by abstract moral standards, by the rational will of autonomous persons, require democratic legitimation and public deliberation to be correctly implemented (cp. Brunkhorst 1999; Michelman 1999). According to the discourse theory of democracy a common action norm is legitimate only when it has been accepted in a free, open, inclusive and rational debate, i.e., where all affected parties can be effectively heard.¹⁹ Thus the reasons why proper rights protection calls for adequate legislative procedures.

Democracy is a *principle* specifying what it means to get political results right. Only by adhering to democratic procedures can power holders justify their decisions, only by employing these procedures can collective goals be achieved legitimately, and only through legal procedures can laws be changed and new laws enacted correctly. Accordingly, to be legitimate a constitution-making process should comply with the criteria of *congruence and accountability*.

The hub of rights

Constitutional democracy designates a system of procedural rules with a normative content. It specifies not only who is authorized to make collective decisions through what procedures, but also what it takes to justify them to the people who are bound by them, viz., vis-à-vis the citizenry. The normative principles of the democratic constitutional state can be pinned down to two basic legitimating criteria: *congruence and accountability*. By congruence is meant the basic democratic principle that those affected by decisions should also be responsible for them: it pertains to the need for egalitarian procedures of decision-making. This is an approximation: little congruence

¹⁹ ‘Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted’ (Habermas 1996: 110).

will lead to lack of legitimacy as too few are participating, while ‘too much’ is held to reduce efficiency in large polities, because the larger the number of actors that are to have a say, the longer it takes to reach a common position. In real world democracies, there has to be a proper balancing between legitimacy and efficiency.

Participatory rights are the focal point of rights, and the core element of congruence. Political rights are *the right of rights* (Arendt 1986). They have a special position amongst rights as they constitute the nucleus of citizenship: the member of a state owing allegiance to a government and is entitled to protection from it. Only such rights empower the citizens to affect the conditions for his/her role in society. Civil and social rights, on their part, do not actually extend beyond the private dimension, in that their contribution is to secure the individual’s position as a private actor. It is, however, fair to say that such rights secure the legal and material basis necessary for the realization of political rights and are thus justified.²⁰ But in principle, these may also coexist with paternalistic and authoritarian political conditions in society. Only political rights of participation are of an irreducibly collective nature, as they involve the citizens in processes of opinion and will formation above and beyond their own private reality. Moreover they are not (primary) goods to be distributed: they can only be had by being used – they require the citizens themselves to act.

Entrenching such rights render clear that citizens are capable of regulating their common affairs through law and can give themselves a constitution. Rights then should not be conceived of as merely protective rights against an intrusive government but as instruments for *ensuring equality and freedom in the realization of the idea of people sovereignty*. As an objective legal structure rights impose on the state the duty to protect the citizens so that they may make use of equally distributed rights to govern themselves. Rights are not only for protecting the negative freedom of private persons but for ensuring peaceful co-existence and co-ordination of action plans by means of law. Consequently, one should not understand rights as weapons in the hands of private actors, or as merely protective rights against an invasive government, but as basically cooperative entities mutually assigned to, and by, the citizens themselves. The nexus of rights is internally related to the political autonomy

²⁰ This is not to say that they can not be justified on other grounds. Cp. Eriksen 2003: 367ff.

of the citizens (Habermas 1996: 274). In democracies, rights are not only justified by moral principles, but also in fact authored (ex ante) or at least subscribed to (ex post) by the citizens themselves. However, the mutual recognition of rights is not only a logical, but also a practical prerequisite for democratic constitution-making. This is because it makes clear that the law is a *means for justice*.

Law represents a coercive order that connects non-compliance with sanctions, but as it confers upon all the same rights and obligations, it is at the same time a medium for peaceful conflict-resolution. It subjects power-wielding bodies to principles of correct conduct and is hence a resource for justice. It authorises and also limits the use of political and administrative power. Law is the legitimate organization of power (Kelsen 1944: 7). It is not merely an instrument of power, or a matter of will. While *power* represents the executive authority and is a means of organising efficient realisation of goals, the law prevents the power apparatus of the state from programming itself. Law prevents a situation in which the power holders define what is right. It puts off the power from authorising itself: It prevents might becoming right. Hence political power is institutionalised by way of law; it is only through law that political bodies can claim authority, and it is through legal procedures that the use of power can be justified and checked. Law is janus-faced: It is *the word and the sword* of the sovereign but it also claims to be correct or right, and is therefore in democracies internally related to the approval of the people.

Hence, the salience of *accountability*, which is the second assessment criterion. It designates that the decision-makers can be held responsible by the citizenry and that, in the last resort, it is possible to dismiss incompetent rulers. The significance of accountability as an assessment criterion is due to the fact that representative democracy 'is not a system in which the community governs itself, but a system in which public policies and decisions are made subject to the verdict of the people' (Manin 1997: 192). A range of rights and institutions in modern democracies are to ensure such: Open and free communication, free elections and public scrutiny are to control that the representative acts in the true interests of the ones represented. 'In genuine representation, the representative must eventually be held to account so that he will be responsive to the needs and claims of his constituents, to the obligations implicit in his position' (Pitkin 1972: 57).

On the one hand accountability highlights the importance of elections and representative institutions that stand for or act for the citizens, on the other hand elections are ‘merely one of many possible devices for keeping alive popular acceptance and belief’ (ibid. 108). A plethora of bodies exist towards which decision-making bodies must justify their decisions.

‘Political accountability is not to be confined to electoral accountability but extends also to a continual process of giving account to an informed and active civic society.’

(Harlow 2002: 12)

Whether or not accountability is effective, eventually depends on the actual sanctioning power in the hands of the citizens, whether they really are empowered to throw ‘the rascals’ out of office whenever necessary. In concrete terms there is thus, with regard to control, a distinction to be drawn between *delegate control* in which the citizens mandate the representatives ex ante and *control through sanction*, in which the representatives endorse or rebuke the representatives’ actions ex post.

Democratic requirements

Congruence and accountability are the basic criteria for checking the democratic quality of political bodies of decision-making; they are the criteria for assessing democratic legitimacy. Thus, in order for a regime to be legitimate, it must, at a minimum, be organized in such a way that the public realm is open to free access, that governmental positions are open to all, that those who govern are appointed by election at regular intervals, and that the decision-making power is independent of social and economic interests. However, this is insufficient when considering the complexity of modern politics which today is radically increased because of devolution downwards as well as upwards: delegation of power both down the chain of governance to local municipalities, professions and service producing agencies, and upwards to international and supra-national bodies, in particular the EU. Citizens’ interests are affected by processes of *denationalization*, *globalization* and *multiculturalism* in ways and by bodies which are difficult to hold responsible via the ballot box. Denationalisation, which is a less demanding concept than globalisation, denotes the relative increase of cross-national transactions (compared to

national exchanges) and the extension of social spaces beyond national control (Zürn 1999: 7). There is no longer overlap between decision-making participants and affected parties. Denationalisation shatters the two symmetries necessary for effective participation, first between the citizens and the decision-makers that ‘... they are to hold to account, and secondly between the “output” (decisions, policies and so on) of decision-makers and their constituents’ (Held 1995: 16). Without *input congruence*, participation in making the decisions that affect one, there can be no self-determination; and without *output congruence*, without overlap between the polity and the territory it controls, ‘the *spatial congruence* of political regulations with socially integrated areas’, there can be no effective participation (Zürn 1999: 8).

However, due to the integration processes in Europe there is a multilayered structure of governance in which the national level is merely one. There is not one single demos that can claim exclusive authority, and one on which the political authority can be based. There are multiple and overlapping demoi based on different political authorities and with their own norms of accountability and congruence. The existing institutional multiplicity in a multilevel system of governance suggests that a mix of processes and procedures are relevant for an assessment of the democratic quality of governance today.

From what is said, a political order, to be democratic, has to comply with criteria beyond the legal accountability and electoral representativeness that constitute the nation state model of democracy. The deliberative notion of democratic legitimacy, which hinges on public accountability, non-coercion and non-exclusion, provides us with a far-reaching set of criteria. Democratic legitimacy is ultimately seen to consist in approval of decisions in a free debate (constrained and mediated by rights). This theory, then, is equipped to also assess decentralized sub-national and trans-national institutions of governance as well as supranational polities from a democratic point of view. On the one hand, the question is to subject decision-makers to a certain degree of accountability and responsibility. On the other hand, the question is about the possibilities for participation in collective opinion and will formation in order for people to reflectively and effectively influence decision-making in governmental bodies. The latter, congruence, calls attention to participation rights, viz., elections, referendums, direct representation, and possibilities of voice and popular protest in general with regard to policy making that has consequences for citizens’ interests.

According to these criteria we see that there is a long way to go for the European system of governance to be fully democratic. The ones affected do not exert very much influence on the laws and institutions they are influenced by. But what is equally obvious is that a democratic system of governance can only be designed through a set of individual rights. With the charter in place, the EU is taking one step forward in making law enforceable without having recourse to a well developed common identity like the one of nation states. The recent reform processes show that EU institutions increasingly commit themselves to a *post-national mode of legitimation*. This means that the EU itself has to provide the necessary basis for congruence and accountability. There is no well-developed collective identity to appeal to, comparable to nationhood, no collective macro-subject encapsulating *la volonté générale* in the making, but the bare bones of cognitive rational rights and democratic principles. Hence the importance of constitutional arrangements and the positivisation of human rights as identity-shaping mechanisms. But how do we know that a constitution or a bill of rights is legitimate? What is the relationship between rights and democracy?

V. Constitution and/or Democracy

Rights are needed to bolster post-national democracy. But what is the precise connection between rights and popular rule? Why is a bill of rights really needed for democracy to prevail?

Constitutional Authorship

Constitutions assign competences, positions and powers. They specify fundamental procedural conditions for democratic legislation: constitutions contain rules for creating norms, for making statutory law as well as for amending the constitution. A constitution is enabling, it is not merely prohibitive (Holmes 1995: 161ff). As a rule, a written constitution, which cannot be amended by simple majority vote, contains checks and balances, horizontal and vertical separation of powers, overrepresentation of small jurisdictions, judicial review and delegation clauses, etc. Although constitutions make democratic politics possible, they are not self-sufficient – they cannot by themselves provide the legitimacy basis as judges are bound by the

principle of legality. In a legal system, only a norm can ground the validity of another norm (Kelsen 1970). There is a hierarchy of norms and the law itself can not ground its own legitimacy. The judges decide what is legal and illegal, but can not themselves establish the distinction. It is the legislators – the citizens or their representatives – that give the laws, furnish the judicial system with the norms they are to act upon.

The Kelsian *Grundnorm*, stating that the constitution is binding (which is the most basic norm making possible the derivation of other norms), can not on its own ground the legitimacy of constitutions. The legitimacy of the basic norm springs from some extra-constitutional power. The idea of *We the people* amount to the required ‘deus ex machina’. This is what constitutes the legitimating and unifying premise of the constitution.²¹ It is only the people, or the ones authorised by ‘the people’ that can lay down the law and make it binding on every part, as the *pouvoir constituant*, the constitutive power, necessarily lies with the people. In the Republican tradition, the legitimating power is seen to emanate from the free will of the people, a union of free associates; or as Rousseau (1762) framed it, from the discovery of *la volonté générale*, which subjects all particular interests to the higher level interest of all. Kant mediates this idea with the concept of individual rights, the right to freedom, which can only be made possible by a state granting everybody the same rights. In the Kantian perspective the coerciveness of the law is intrinsically linked to the ideal of equal liberties for all (Kant 1785). A constitution is also a system of rights that constitutes the legal medium, and hence is authorized to enforce norms. It is a means for compelling compliance but it cannot itself establish the required legitimacy. The authority of the law stems from the fact that it is made by the people and hence claims to be just or in the public interest, and that it is made binding on every part to the same degree and amount. *The legitimacy of the laws then, paradoxically also stems from the very fact that they are obligatory and coercive.*

²¹ ‘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’, Article 1-1: Establishment of the Union, CONV 797/03.

The right to self-government

Constitutional arrangements not only enable but also require and warrant popular participation in the political process. That is, they enable and warrant *government by the people*. The idea of constitutions or rule of law should be interpreted as a way to explicate the meaning of democratic self-legislation. The democratic principle entrenched in modern constitutions refers to the manner in which citizens are involved in public deliberations, collective decision-making and lawmaking through a set of rights and procedures that range from freedom of speech and assembly to eligibility and voting rights. These political rights, and their attendant institutions and procedures, are to secure the *public autonomy* of the individual. They ensure that the addressees of the law can also participate in the making of the law.

The legitimacy of a constitution-making process in which fundamental rights are positivized, hinges on the actual involvement of the people in collective opinion and will formation processes in the informal fora for public communication of the civil society, as well as the quality of the deliberation and decision-making processes in the institutionalised parliamentary and executive nexus. In this perspective, the constitution establishes procedures for the exercise of the right to self-government. The law is not only justified because it is in accordance with constitutional procedures; it must also reflect the collective opinion- and will-formation processes that precede the legislation. It is not legitimised exclusively by clauses carried by the legislator (Maus 1989: 208).

A constitution should then not be seen as a fixed set of rules, but rather as a principle for how to conduct common affairs with the means of law. As such the idea of a constitution refers more to a set of ideal rules about which one can negotiate and deliberate, but ones that cannot be done away with totally in so far as one lives within and wants to continue living within a law based society. They are constitutive for the game of law and politics, as such. Constitutional rules can be compared to *the rules of the grammar* and ‘should not be thought of as hindrances or chains. Grammatical principles do not merely restrain the speaker, ... Far from simply handcuffing people, linguistic rules allow interlocutors to do many things they would not otherwise have been able to do or even have thought of doing’ (Holmes 1995: 131). In this perspective, Constitutions not only distribute competences, positions and powers; they

also establish a framework for government without any specific goal, but with an infinite number of possibilities (Elkin 1993: 125). Constitutions specify fundamental procedural conditions for democratic legislation, and must therefore be interpreted as *abstract structures of legal principles*, which may be specified in various ways according to empirical circumstances.

Substance or procedure?

To repeat, democracy is internally related to rights. Therefore there is a democratic argument for entrenching a bill of rights in a European constitution. The idea of democracy can only be explained by the concept of rights, which entails the positivisation of human rights and other values and goals. The political process is governed by rights and positive law equips rights holders with resources that can be used against the incumbents of power. The problem is that the rights of the citizens in the EU are not made by citizens themselves (cp. Brunkhorst 2002: 218ff). It is only the political process that can render them legitimate. This links in with a theoretical problem of the discourse theory on how to square the circle between constitutionalism and democracy, between the principle of a legally constrained government and the principle of self-government.

In discourse theory, individual rights – basic rights – are conceived of as taking priority over and restricting collective will-formation, at the same time as they are to be justified in a free discussion. The recognition of basic rights is at the same time the presupposition and the product of democratic discourses (Wellmer 1998: 270). Basic rights are ‘... answers that meet the demands of political communication among strangers and ground the presumption that outcomes are rationally acceptable’ (Habermas 2001: 771). But rights are *reasonably contestable*. This is due to the indeterminacy of moral reasons, the prevalence of normative disagreements, the fallibility of claims, the revisability of moral stands, and the fact that norms are prone to collide. How can we know that rights are ‘right’, how do we know that (or when) rights are justified?

Human rights, which lends justification to basic rights, are moral categories justified by the free will of autonomous persons, but they owe their political legitimacy to a democratic process of enactment. Because they raise different validity claims, the one

is not reducible to the other. While human rights can be justified with reference to universal moral claims and humanity as such, democracy refers to procedurally achieved agreements within territorially circumscribed polities. In principle, the opposition between democracy and constitution is a false one because democracy itself ‘cannot prescribe the procedures for testing whether the conditions for the procedures it does prescribe are met’ (Dworkin 1996: 33). Democracy and constitution mutually presupposes each other, but actually there is a tension between the two as democracy so far is achieved only at the level of the nation state, while moral claims transgress every border and constricted territory. On the other hand, the universal, moral elements are built into modern constitutions as far as they have incorporated human rights. Constitutions with bills of rights contain universal elements that refer to a larger community of citizens, to humanity as such.

Human rights are *supra-positive* but claim universal validity. They stem from the convictions and rational insights of moral self-legislative human beings but they can only be made binding for all members of a polity through a constitutionalizing process. This can also be given a normative twist: unless affected parties have had their say we cannot know whether they have been understood, interpreted and implemented correctly. It is the political enactment through the intervention of political authorities, whose legitimacy is recognised, and who possess capacity to ensure compliance, that transforms human rights into valid basic, constitutional rights, viz., rights that are enacted and can be invoked before courts and whose violation by anyone can be redressed by courts.

A bill of rights, which establishes the boundaries of the polity, draws on substantial moral categories as their legitimating source. A constitutional convention and a political ratification process transform this to a legally binding document. However, if it is the procedure that legitimizes rights, what then legitimizes the procedure? If it is rights that justify the procedure, what justifies the rights then? Circular argumentation crops up here, because rights that are to ensure the process must be justified procedurally. But the procedure rests on rights, which must again be justified etc. etc. (Michelman 1997: 162f). *Infinite regress* arises between procedure and rights, between democracy and constitution, i.e., an procedurally unaccounted for substantial rest. It is for example, not possible to argue for everyone’s right to participate in a

debate without going back on some substantial, normative and non-procedural argument, such as people's freedom, equality and dignity as postulated by natural law. There is a substantial rest – a moral element or a concept of justice un-accounted for – also in the discourse theory of law, which initially claims to have gotten rid of all natural law elements and is procedural all the way down: Whether laws are right depend solely on the quality of the process (Habermas 1996; Apel 1998; Alexy 1996).

The democratic procedure on its part, can not guarantee a correct result. Perfect procedural justice is impossible (Rawls 1971: 198). This is so because even in a just procedure one has to do with cognitively limited and socially constrained actors and fallible processes of deliberation. Hence *the burden of judgement*: even reasonable actors may after a rational discussion remain at odds with each other (Rawls 1993: 54ff). Moreover, legal texts are *irreducibly open textured* and cause indeterminate results (Hart 1961: 128). The net upshot is that the processes that confer legitimacy on the laws cannot ensure correctness:

‘A truly democratic process is itself inescapably a legally conditioned and constituted process. It is constituted, for example, by laws regarding political representation and elections, civil associations, families, freedom of speech, property, access to media, and so on. Thus, in order to confer legitimacy on a set of laws issuing from an actual set of discursive institutions and practices in a country, those institutions and practices would themselves have to be legally constituted in the right way. (...) The problem is that whether they do or not may itself at any time become a matter of contentious but reasonable disagreement ...’

(Michelman 1998:91)

To identify the law without recourse to morality or substance seems impossible. But when we cannot be sure whether these substantial elements are correct, how can we know that a constitution is legitimate?

The legitimacy of the constitution

There is a serious problem in determining the legitimacy of the constitution, and the stated problem of infinite regress of legitimating sources pops up again in the theories that try to do away with it. The regress cannot be ended unless an agreed upon substantial standard have been invoked, according to Michelman (1999: 52). But such a standard subverts self-government (Post 1995). This problem does not disappear in so far as elements that are of a substantial and moral kind are needed for ensuring a correct process, such as constitutional essentials, but we can not know whether these are correct unless there is a democratic process of their assessment and enactment. This process does not necessarily generate a correct result, as mentioned. But even though legitimacy by consent may thus be immoral (Raz 1998: 163), there is no other manner in which to cash in the idea of democratic constitution making than through popular approval.

The legitimacy of the constitution rests on the recognition of political authority, but the authority can not rest on that of its makers, because no one ‘... can have authority over future generations’ (ibid: 164). How can earlier generations legitimately bind later ones? This is the big question in the normative battle over the validity of a constitution and one that in the last resort comes down to the problem of substance and procedure.

The tension is resolved according to Habermas, once the constitution is conceived in generational terms: even though the people are constrained by the constitution authored by their forefathers, the present understanding and the full use of the constitution depend on the agency of the present generation. As a self-correcting learning process ‘... (t)he allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives of the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations’ (Habermas 2001: 768). The constitution is a *cross-generational learning-process* – a self-reflective, self-reinforcing spiral-like historical learning-process. This should not be taken to imply a complete overhaul and change of a constitution, that a new one is made by every new generation - a perpetual constitutional revolution - but merely that the reasons for its justification change and should be subjected to a public test.

‘The same law can be valid for a variety of reasons, and these may change without the law changing’

(Raz 1998:169)

However, this solution is dependent on the *inherent normative quality* of the constitution. It depends on the quality of substantive norms as it is the basic legal structure itself that allow for the possibility of revision and ongoing interpretation of the founding act. It is its democratic character, the way it enables a rational basic law interpretation that has the right warranting effect (Michelman 1999: 57). Put differently, it is the degree to which the constitution ensures equal worth and respect for every person, free and equal access to unrestricted public discourse, a broad and equitable political franchise etc. that make possible constitutional learning process and a rational interpretation of basic law, i.e., for judging whether or not they are just, whether they are in everyone’s equal interest or are equally good for all. Thus, it is not a fully procedural solution.

A bill of rights and a constitution does not settle once and for all the question pertaining to the basic rules of society. In a democratic society based on the rule of law, citizens are conscious (or should be) of the incompleteness and fallibility of institutionalized rules. At least at critical moments, citizens become reflexively aware of the imperfectness of the entrenched rules and procedures. This normative ideal is reflected in the constitutional model outlined by Bruce Ackerman. He sees constitutional politics as happening at over-heated and rare historical moments where it interrupts the normal political process and shifts it into another direction. *A constitutional moment* is not merely a process through which the constitution is made or amended, but one in which it makes sense to say that *the people* has given itself a constitution. That is when *We the people*²² are called upon, when ‘a broad movement of transformative opinion has ... earned the authority to set major aspects of the political agenda’ (Ackerman 1998: 409). We can speak of a constitutional moment

²² ‘We the people of the United States ... do ordain and establish this Constitution for the United States of America’, U.S. Constitution Preamble.

when the citizens are mobilized to lay down the law as equally binding on every part of society.

‘During periods of constitutional politics, the higher lawmaking system encourages an engaged citizenry to focus on fundamental issues and determine whether any proposed solution deserves its considered support’

(ibid: 6)

However, ‘Constitutional moments must come to an end,’ they must result in a written text or be aborted. There are ample historic examples of such moments not necessarily ‘need ripen into a new constitutional solution’ (ibid: 346, 409). The European Union already has a brief history of such attempts, with the draft for a Constitutional Treaty (of June 2003), emanating from the Convention for the future of Europe 2002, as the most far-reaching and promising example, as is discussed in the last section of this volume.

Constitutionalizing post-national democracy

With the recent reform processes and the Charter in place, the EU is taking one step forward in making law enforceable without having recourse to a well developed common identity. It so to say reconstitutes itself on a new basis. As the EU is not a state, nor remotely a nation state it has to find another basis than agreement on substantial values - shared commonality and allegiance, nation hood or collective consciousness - for the substantial legitimation of rights. It has to rely on the bare bones of cognitive rational principles of sovereignty and citizenship. Democracy and human rights refer to the core legitimacy basis of nation states and are the only viable normative resource basis for a post-national political order. For the first time in human history, we are now witnessing the development of a democratic system that is not based on a conception of a culturally homogenized people, or brought about through war or brute force, but one that has emerged through voluntary cooperation, negotiation and deliberation. As other resource bases are lacking, the Union can only build on the two legitimating entities, human rights and democracy. It is the inclusive procedures constituted by the rights of the citizens to participate and hold to account, that bear the burden of legitimation. In such a complex and pluralist setting, one can not plainly base interventions on what Europe is or what it is to be a European, as a

collective identity is lacking or at least is contested. Identification with common concerns is rather to be shaped and struggled for through public and institutionalised processes of political communication. To put it simply: It has to be created. The lack of pre-political identification with the emerging political community can be compensated for by a public debate that forms catalytic functions of enlarged citizenship, solidarity, and plural identities (Kleger 1998: 144f).

Such identification is, however, also needed for more expedient reasons as the Common Market is exhausted as a resource for further integration. With the Internal Market and the Monetary Union more or less in place the Union needs a clearer understanding of what it is and what it aspires to. The pending enlargement to the East and South, the establishment of a common foreign and security policy and, not least, the question of social measures at the EU level, pose new kinds of problems of co-operation. The questions raised in these policy areas are difficult to handle within the established economic, free-trade frame of reference for the politics of the Union, as they affect the very basis for co-operation. They require a notion of the collective enterprise, *i.e.*, a conception of the entity's foundation, mission or vision beyond that of a free market.

The constitutional development of the EU may be a solution to this problem as far as it will have an identity shaping effect. Establishing the convention and a proposal for a European Constitution is an important way to foster such, because they revolve on the basic rules for action coordination and intercultural co-existence and contribute to root such rules in the civic culture European-wide. But how far this will lead depends on a European public sphere that still remains in latency.

VI. Conclusion

In order to meet the challenge of *efficiency*, to face up to new exigencies and to solve problems rationally, nation states increasingly have to establish and partake in international and transnational structures of governance. This however, is detrimental to democratic *legitimacy* as democracy is confined to the territory of the nation state. In a 'globalized', denationalized world the requirements of legitimacy and of efficiency, of input and output congruence, no longer coincide. Those who can be

kept accountable have little control over the factors affecting peoples' lives, and those who have the decisive power are beyond democratic reach. In Europe the EU testifies to political initiatives building up supra-national political institutions, which has shown a remarkable and unprecedented capacity to take on new collective measures and deepen integration. But it is a process that may sap parliamentary sovereignty at the state level, and supranational rights enforcement does not in itself alleviate this problem. At the present level of institutionalization, as long as there is no such thing as a cosmopolitan democracy there is a tension between popular sovereignty and human rights as the former is only institutionalized at the level of the nation state. At the international arena, human rights politics are not democratically enacted. This is the background for the need of democratic procedures over and above the nation state.

There has for some time now been a process of rights entrenchment in the EU, which has come close to a constitutionalizing one. From a cosmopolitan point of view such rights are important as they contribute to establish democratically controlled institutions at a regional level to cope with global problems. State and world citizenship form a continuum as people increasingly are affected by supranational powers. The EU can usefully be conceived of as an *intermediate institution* for grappling with exigencies connected to globalization, and thus is an interesting experiment in post-national regulation. By this, international law is pushed beyond the limitations of the Charter of the United Nations, which on its behalf prohibits violence, and thus aggression against other states, but forbids the intervention in the internal affairs of a state (Article 2.7). The EU has clearly progressed beyond this initial stage of a purely voluntary association. It is not merely an intergovernmental organization, or an economic arrangement but is an entity with strong *supranational elements* equipped with executive power. This is evidenced in the supranational character of the legal structure, which is supported and enhanced in particular by the European Court of Justice. National law gives way to Community law within the competence of the Communities. This increases the need for safeguarding the rights and interests of the citizens and of the member states. Hence, the need for a politically sanctioned constitution entailing a charter of fundamental rights and a catalogue of competencies.

The EU Charter is a very important contribution to a constitutionalisation of the EU. It helped bring about the Convention on the Future of Europe. Further, The Charter enhances the legal certainty of the citizens, clarifies the identity and legitimacy basis of the Union and, consequently, reduces the democratic deficit even though it is weak with regard to protecting the public autonomy of the citizens. Neither the Charter Convention nor the Laeken Convention might not have had a popular mandate. But the Charter consolidates, and therefore derives legitimacy from the authorized character of the common constitutional traditions. Moreover, as most of the decision-makers are parliamentarians, it fares better in democratic terms than what is the case with Treaty making at IGCs. From a democratic point of view, law made through open deliberation by representatives is better than one based on judicial activism or made through closed-door intergovernmental bargaining. However, even though democracy is internally related to rights as there is no democracy without the protection of the fundamental rights of the individual, it is only through a democratic process of enactment that we can know which rights are right, and how they should be delineated. It takes democracy to justify rights and citizenship requires membership and participation in the very structures that affect individual interests. In Europe, state power is being domesticated by supranational law, and the only legitimacy basis for this law is the constitutional developments in Europe that emerged in the wake of the French revolution, and which for more than 200 years now has contributed massively to the stabilization of nation states. In this tradition constitutions are seen as arrangements for respecting the equality and the autonomy of the individual in the realization of the idea of popular self-government.

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