

# A European Social Contract?

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## 1 Introduction and Aim of the Article

The European Union (EU) has given rise to a constitutional enigma. The EU is neither a state nor an organisation otherwise vested with sovereign powers but nevertheless it exercises a considerable amount of state power over both Member States and European individuals alike. These powers are of legislative, executive and judicial character. What is more, these powers, manifested in EC-law, have direct effect in the Member States, are supreme in relation to conflicting Member State law and pre-empts the legal capacity of the Member States in those fields regulated by Community law. These constitutional features have all sprung from the case law of the Court of Justice of the European Communities (ECJ) and were not found in the treaties, nor acknowledged by the Member States in the proceedings in which these principles emerged. The ECJ has furthermore held that the powers stemming from the European institutions are established by what the ECJ has described as “a constitutional charter” for the EC, namely the EC-treaty. The constitutional character of EC-law is thus ultimately founded on the claim by the ECJ that the EC had such characteristics as to qualify as a constitutional legal order rather than a traditional inter-governmental organisation. The important point in this regard is that the claim for constitutionality rests on the arguments of the ECJ. It is an argument that is ultimately *moral* in character and an inquiry into the constitutional nature of the EC must thus address the moral aspect of the constitution in general.

While it may be true that the EC has an operative system more akin to constitutional than to international law, the Member States are clearly still not to be characterized as mere sub-units in a larger European state. They retain a monopoly on physical means of enforcement and their status as subjects of international law is not lost as a consequence of membership in the EU. Furthermore they also retain a full-scaled constitutional structure within of legislative, executive and judicial powers established by the respective national constitutions independently of the constitution of the EU.

It is by now almost trite knowledge that this *co-habitat* of two constitutional legal orders is difficult to reconcile with traditional constitutional theory which has been much focused on the notions of state and sovereignty, areas where the EU admittedly does not (fully) qualify on either point. The constitutional enigma has generated much discussion over the years and has led to many interesting and stimulating ideas being exchanged on the constitutional character of the EU ranging from Charles de Gaulle’s famous remark that there was no Europe except that of the states, that is if one did not count “the Europe of the fairies”, to professor Neil MacCormick’s idea of a “post-sovereign” Europe made up by no longer sovereign states in conjunction with a non-sovereign European Union.<sup>1</sup> In spite of these important attempts at analysing the deep structure of European Union law it is still widely recognised that Joseph Weiler hit the nail on the head

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1 N. MacCormick, *Questioning Sovereignty – Law, State and Practical Reasoning*, Oxford University Press, 1999, p. 123-136.

when he stated that the European Union could be thought of as “a constitutional legal order the constitutional theory of which has not been worked out.”<sup>2</sup>

This article aims at contributing to the solution of the constitutional enigma by using a re-examined classical social contract theory in the EU context. The contract is a central feature in constitutional aspects of the EU. As a general observation the EU is obviously based on a contract in the shape of international treaties and the notion of the contract is thus central to any constitutional analysis of the EU. The more compelling reason for choosing the social contract as a point of departure is that it is universalistic and places the individual in focus. It is based on assent rather than descent and historical community. Therefore, it is more readily adaptable to supra-national constitutional theory than collectivist notions like nation or historical community. If international law and EC-law are supposed to include not only states but also individuals as their subjects, it is necessary to find a theoretical foundation that focuses on the individual rather than the state. The same can be said if representative European democracy is to be achieved on the supra-national level. Such a foundation is found in the social contract. Complex constitutional questions, like and constitutional pluralism, are raised by the EU and have not so far been given satisfactory answers. It is fairly evident that there is a friction between supra-national constitutional theory and national constitutional principles. The point is that these questions can be fruitfully analysed according to a social contract theory that does not take state sovereignty for granted. My claim is thus that the constitutional character of the EC could be justified with reference to a re-invented social contract theory and that this new form of civil government is an important development of classical constitutional theory.

I am aware of the fact that this article is unlikely to be the sword that cuts the Gordian knot of EU constitutional theory. The article will in that sense be, at best, a magnificent failure. The aim is rather to attack the knot from a neglected angle, an angle that, so I will claim, is the one most related to our understanding of Western constitutional theory in general. Having chipped at the knot is, after all, a good start compared to being only confused about it.

## 2 The Social Contract – Purpose and Structure

### 2.1 Short Historical Overview and Purpose

The social contract theory has a long lineage that could be traced back to antiquity and the writings of Plato<sup>3</sup> and medieval times. It is, however, a theory

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2 J.H.H. Weiler, *The Constitution of Europe – Do the New Clothes Have an Emperor?*, Cambridge University Press, 1999, p. 8.

3 Plato lets Glaucon express this view in the following terms: “As a result when people wrong one another and are wronged by one another, and get a taste of both, those who are unable to avoid the one and achieve the other think it will pay them to come to an agreement with one another not to do wrong and not to be wronged. That’s how they come to start making laws and agreements with one another, and calling lawful and just that which is laid down by the law. They say that this is the origin and essential nature of justice...”, Plato, *The Republic*, Cambridge University Press, 2000, II s 359, p. 39. Socrates (i.e. Plato), however, rejects the contract as the proper foundation of the state.

that is mostly associated with the age of the enlightenment when the social contract became the dominant theory for explaining the legitimacy of the state (i.e. government) or, occasionally, the legitimacy of revolution against government. The social contract theory was in decline during the better part of the 19:th and 20:th centuries, when utilitarianism, nationalism and socialism provided heavy criticism of it. Nevertheless, contractarian theory has now re-emerged, notably in the theories of John Rawls and Robert Nozick, but also in the field of law and economics where the most significant development of the theory has consisted in mathematical formulae, based on rational choice, that explain the rationality (or lack thereof) of the legal order.<sup>4</sup>

The purpose of the social contract theory is mainly to explain the political obligation (i.e. whom to obey, to what extent and why) of the subjects by resorting to the idea of a voluntary agreement laying down this obligation. The core of the social contract theory is that legitimate political power can only arise as a consequence of agreement between equal individuals. Although some early social contract theories had explained this agreement as one between the ruler (most often the king) and the ruled people, the thrust of enlightenment and contemporary social contract theory was to explain the contract as one between individuals. One of the reasons for the lasting appeal of the social contract theory is its emphasis on individual consent as the foundation of political obligation. Nobody can, in other words, claim a *natural* right to rule over others. Likewise, membership in a political society, and its corollary political obligation, cannot be a product solely of birth, force or moral wrongdoing.<sup>5</sup> The legitimacy of the political power must therefore rest on the *consent* expressed by the individual and the idea is that political obligation may be understood as an analogy to the contractual obligation to respect a valid agreement under civil law.

Apart from the idea of individual assent, the social contract embraces the idea that political society is created by man rather than divinely ordained or given by nature. The social contract could thus be understood as an explanatory model based on the rational choice of the participating individuals.<sup>6</sup> A political society is to be considered a creation of human will (laid down in the contract). Rousseau formulated this idea quite strikingly in his famous opening statement in the classical *On the Social Contract*:

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4 For one instructive such example see R. Posner, *Economic Analysis of Law*, Aspen Law & Business, 1988.

5 Cf. A.J. Simmons, *On the Edge of Anarchy – Locke, Consent and the Limits of Society*, Princeton University Press, 1993, p. 57. Even though Simmons is pronouncing himself on the Lockean contract in this context, there does not seem to exist any difference on this point in regard to other contractarians. Even Hobbes, who by far has the most generous attitude to force, holds that the political obligation stems from the consent of the coerced rather than from the force of the coercer: “It is not therefore the Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant.”, T. Hobbes, *Leviathan*, p. 141.

6 As noted by, for instance, John Rawls, *A Theory of Justice*, Harvard University Press, 1999, p. 16.

“[But] the social order is a sacred right, which provides the basis for all the others. Yet this right does not come from nature; it is therefore founded on conventions.”<sup>7</sup>

An advocate of the social contract thus argues that there are no automatic laws that direct a society in a certain direction unaffected, in the last resort, by individuals.<sup>8</sup> On the contrary, civil society must be understood in terms of a series of individual contracts as Hobbes forcefully argued in the introduction to *Leviathan*:

“[Lastly], the *Pacts and Covenants*, by which the parts of this Body Politique were at first made, set together, and united, resemble that *Fiat*, or the Let us make man, pronounced by God in the Creation.”<sup>9</sup>

This is not the place to give a full account of the historical development of the social contract theory.<sup>10</sup> My intention is to focus on the essential components of the social contract as it emerged in the theories of Thomas Hobbes (1588-1679) and John Locke (1632-1704). Hobbes may be the single most important contractarian in history, having fathered the modern theory of sovereignty and methodological individualism, and has enjoyed a well deserved renaissance during the 20:th century. Nevertheless, my main focus will be on the theory of Locke, who is the most important philosophical representative of the ideas of constitutionalism and rule of law since these aspects are central in the argumentation of the ECJ. I will also adjoin some of the developments of the contract theory from its remarkable come-back during the 20:th century, particularly on Locke’s notoriously weak spot of how consent to the social contract is given.

## 2.2 *The Problematic State of Nature*

Just as in any contractual relationship one can distinguish between a time before the contract, when the relationship between the parties is not regulated by any agreement, and the time after the contract, when the rights and duties of the parties follow from the terms of the contract. In the social contract theory the time before the contract is usually referred to as *the state of nature* and the time after as the *civil* or *political society*.

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7 J. J. Rousseau, *The Social Contract in The Social Contract and other later political writings* (ed. V. Gourevitch), Cambridge University Press, 1997 [1762], p. 41.

8 Plato, Hegel and Marx are examples of philosophers who have argued differently on this point by claiming that every society develops according to some inescapable law laid down in history.

9 T. Hobbes, *Leviathan*, Cambridge University Press, 1996 [1651] p. 9f. This idea is also echoed in Locke’s theory: “Power has its Original only from Compact and Agreement, and the mutual consent of those who make up the Community”, *Two Treatises of Government*, Cambridge University Press, 1988 [1689], p. 382, § 171.

10 For an overview of the historical development of the social contract theory see M. Lesnoff, *Social Contract*, Macmillan Education, 1986, p. 12-96.

In order to explain the rationality of the political society it is first necessary to imagine a state of affairs *without* political society; a sort of “hypothetical situation”<sup>11</sup> or a “state of nature”. This state of nature is populated by certain individuals who may be “real” individuals (as in the case of Hobbes’ and Locke’s theories) with all their different characteristics or they may be “idealised” individuals that have no knowledge of their own particular strengths or weaknesses (as the individuals in Rawls’ “original position”).

In the next step focus is placed on what reasons that might move politically rational individuals to, by means of an agreement, institute what is lacking in the state of nature, namely the political society and which principles of justice that ought to guide such a society. In other words there must always be a rational *reason* for setting up civil society and that if this reason undergoes change, so does (or, at any rate, may) the contract and, as a consequence, the political society itself.<sup>12</sup>

Practically all social contract theories use different varieties of the so called “prisoners’ dilemma” in order to expound the case for the social contract. The “prisoners’ dilemma” essentially means that where two or more actors face a choice, rational individual behaviour, expressed as maximization of individual utility, leads to a collectively destructive or at least suboptimal result.<sup>13</sup>

The “prisoners’ dilemma” may be of a more or less vicious kind. It is fairly well known that the two main contractarian philosophers, Hobbes and Locke, have different views on the problems in the state of nature. Hobbes famously held that the state of nature was absolutely lawless in the traditional sense and offered little more than violent death following a life described as “...solitary, poore, nasty, brutish and short”. Locke was content to hold that there did exist some objective rules, by him termed as the “Law of Nature”, based on reason, for human conduct. The main problem was instead that in the absence of a common legislator and judge, everyone must be judge in their own cases and this fact might indeed lead to violence among men. Civil government was therefore “...the proper Remedy for the *Inconveniencies* of the State of Nature.”<sup>14</sup> From a legal perspective it is important to underline that the “prisoners’ dilemma” in the state of nature has a clear connection with the ontological and epistemological question of the character and existence of legal norms. With Hobbes and Locke we have the main dichotomy that has defined legal science ever since, namely whether there can exist legal norms independently from the state and whether legal norms are to be seen as an expression of will and command or as a reflection of human reason.

The dichotomy logically leads to two diverging views of the contract necessary to proceed from state of nature to civil society. According to Hobbes the lawless character of the state of nature justifies a contract of *alienation*

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11 J.S. Kraus, *The Limits of Hobbesian Contractarianism*, Cambridge University Press, 1993, p. 4-10.

12 Cf. J. Hampton, *Hobbes and the Social Contract Tradition*, Cambridge University Press, 1986, p. 283.

13 See further J.S. Kraus, *The Limits of Hobbesian Contractarianism*, p11ff.

14 J. Locke, *Two Treatises of Government*, p. 276, § 13 (my italics).

where the participants give up their freedom in the state of nature to the sovereign created by the contract who will thereafter possess the unlimited freedom of the state of nature. Locke on the other hand holds that the existence of the Law of Nature means that the social contract can only be one of *delegation* whereby the individuals delegate their executive power of the law of Nature to the institutions of civil society.

The state of nature concerns a problem of collective action which can only be solved by an agreement, a social contract. By means of the social contract, everyone could accordingly be better off without anyone thereby being made worse off (compared to the state of nature). It is, however, not sufficient that there is a widespread knowledge that there is a better way. The agreement in the state of nature also depends on the conditions of the environment and on the capabilities of the inhabitants. If the individuals are incapable of reaching an agreement, because of the hostile environment or their own shortcomings, a solution must be imposed “externally” whereas a solution that is available directly to the inhabitants in the state of nature can be said to be “internal” to the state of nature.<sup>15</sup>

### 2.3 *Contract and Commonwealth*

The third step in a contractarian argument concerns the content of the contract or more specifically the legitimacy of political authority or the nature of morality.<sup>16</sup> In particular this step of the contract concerns the institutional design of the political society that will be appropriate to fulfill the objectives of the social contract. While practically all contractarian philosophers agree on the methodological aspects (i.e. its individualistic, universal and rational character) of the social contract, there is considerably less agreement as to the substance of the contract. For the sake of simplicity I will suggest that it is sufficient to fall back on the dichotomy, established by Hobbes and Locke. According to Hobbes, the contract exists to create law and rights (i.e. the contract is primarily constitutive) whereas Locke argued that it exists in order to safeguard rights that are prior to the contract (i.e. the contract is primarily declarative) although the way of reaching an agreement on these positions may of course vary

As previously said, the contract theory operates on the assumption that individuals consent to the legitimacy of the legal and political authority and that it is this consent which is the foundation of all such authority. Obligation and authority are accordingly the product of the original freedom and equality of man.<sup>17</sup> Likewise, man does not undergo any politically relevant change upon

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15 J.S. Kraus, *The Limits of Hobbesian Contractarianism*, p. 16-18.

16 J.S. Kraus, *The Limits of Hobbesian Contractarianism*, p. 19-21.

17 Cf. *The Blackwell Encyclopaedia of Political Thought*, ed. D. Miller, Blackwell Publishers, 1991, p. 479.

entering civil society and political society therefore cannot be an end in itself<sup>18</sup> – the whole is never more than the sum of its parts.<sup>19</sup>

The idea of consent captures one of the most compelling arguments of social contract theory, namely that it strives to show not only that the individual has, equally with other individuals, assented to political authority. The social contract also, like an ordinary agreement under contract law ideally does, supposedly promotes the interest of all concerned.<sup>20</sup> In contrast to utilitarianism, a contractarian view implies that the loss of freedom for some cannot without further ado be explained by the gains of others.<sup>21</sup>

On the other hand, the idea of individual consent has historically been the notorious weak spot of the social contract theory. Such consent can rarely, if ever, be established to actually have occurred and if actually expressed may be of entirely other reasons than those of the legitimacy of the social order.<sup>22</sup> Hobbes and Locke both resorted to the idea of a tacit consent to solve the problem of consent but tacit consent is also problematic from a contractarian point of view.<sup>23</sup> There may, as Hume pointed out in his withering criticism of the social contract, be no other alternative to the individual than to perish and what sort of “consent” can be expressed by such a person.<sup>24</sup> If consent is given tacitly in such loose manner as by simply “traveling freely on the highway”,<sup>25</sup> as Locke would have it, one could ask if we have not actually abandoned the notion of contract in all but name.

It is with regard to the Achilles heel of consent that the most interesting development of the contract theory occurred in the 20:th century. The most serious attempt to address the objections against the contract theory is to be found in the Rawlsian argument of the “original position” and the “veil of

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18 D. Gauthier, *The Social Contract as Ideology*, in eds. R.E. Goodin and P. Pettit, *Contemporary Political Philosophy*, Blackwell Publishing, 1997, p. 31.

19 Hobbes set out this argument in the introduction to *De Cive*: “...I took my beginning from the very matter of civill government, and thence proceeded to its generation, and form, and the first beginning of justice; for every thing is best understood by its constitutive causes; for as in a watch, or some such small engine, the matter, figure, and motion of the wheeles, cannot well be known, except it be taken in sunder, and viewed in parts; so to make a more curious search into the rights of States, and duties of Subjects, it is necessary, (I say not to take them in sunder, but yet that) they be so considered, as if they were dissolved, (i.e.) that we rightly understand what the quality of humane nature is, in what matters it is, in what not fit to make up a civill government, and how men must be agreed among themselves, that intend to grow up into a well-grounded State”., *De Cive*, Hackett Publishing, 1991 [1642] p. 98f.

20 Cf. M. Lesnoff, *Social Contract*, p. 150.

21 As noted by for instance John Rawls, *A Theory of Justice*, p. 25.

22 As for instance when a person expressly agrees to become citizen of some state because of reasons of employment or family reunion rather than ideological zeal.

23 Less so for a Hobbesian contractarian since Hobbes sees no problem with the legitimacy of a forced contract entered into under the threat of violence and sudden death.

24 D. Hume, *Of the Original Contract*, in *Essays – Moral, Political, and Literary*, Liberty Fund, 1985, p. 475.

25 J. Locke, *Two Treatises of Government*, p. 348, § 119.

ignorance”.<sup>26</sup> These notions refer to the inhabitants of the hypothetical scenario and are designed to allow us to find a way to establish consent in a rational way that will allow us to draw conclusions as to the legitimacy of political authority and principles of justice without having to solve the riddle of personal consent. In this sense Rawls’ theory makes virtue out of necessity by turning the inhabitants into hypothetical persons making a hypothetical contract.

Seen in Rawlsian terms the problem in the original position is not quite one of a “prisoners’ dilemma” since the persons in the original position are devoid of “real” features (they may in this sense be said to be non-persons). The objective from Rawls’ point of view is to establish the two principles of justice that persons in the original position would agree upon. These principles are (1) that each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others and that (2) social and economic inequalities are to be arranged so that they are reasonably expected to be to everyone’s advantage and attached to positions open to everyone.<sup>27</sup> Rawls argues that the major social institutions of society will reflect the two principles of justice and that the rule of law is a principle that follows from the first principle of justice.<sup>28</sup> The Rawlsian agreement yields much the same result that comes out of the Lockean contract in the sense that both consider the rights and liberties to be “pre-political”, that society is instituted to give the proper effect to these rights and that rule of law is an essential and necessary principle for their safeguarding. It is no exaggeration to hold that Rawls to some degree revitalised the contract as a normative model in constitutional theory of the 20:th century (even though it has never fallen completely out of fashion).

Another common analogy from the field of contractual law is that of *trust*. According to the idea of trust, political power is power that is only delegated from the citizens and that the citizens may revoke if they no longer have faith in the rulers (just as a person conferring can revoke the power of a trustee). In such a case it may not be correct, in the strict sense, to speak of a contract since a trust may be revoked regardless of whether the trustee has fulfilled his duty or not. In this sense the contract theory embodies two of the most important notions of modern democracy, namely that no power can claim to be legitimate if it is not founded on the consent of the governed and that the rulers may be deposed when they no longer enjoy the trust of the citizens (regardless of whether they have governed well or not).<sup>29</sup>

The analogy to trust is most obviously associated with the contract theory of John Locke.<sup>30</sup> The important distinction is that the social contract, whereby political society is instituted, is an agreement between the participating

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26 The original position is explained in J. Rawls, *A Theory of Justice*, p. 102-170.

27 J. Rawls, *A Theory of Justice*, p. 53.

28 J. Rawls, *A Theory of Justice*, p. 206ff.

29 For a further account on the difference see A.J. Simmons, *On the Edge of Anarchy*, p. 68ff.

30 The doctrine of trust is spelled out in J. Locke *Two Treatises of Government*, p. 412ff, § 221ff.

individuals whereas the relation of trust concerns the relationship between rulers and the ruled (which is not strictly contractual). Locke's argument thus proceeds in two steps. Firstly, a number of individuals agree to exit the state of nature and form a political society where laws will be given by a common legislator and adjudicated by an impartial judge. At this stage, the contracting individuals are not certain of how, more precisely, these common institutions are to be framed. In other words, they do not yet have a specific constitution but are nevertheless united in a political society. Locke refers to this "half-way house" between the state of nature and political society as "the Community".<sup>31</sup> The community is not only the preliminary stage of the framing of the Commonwealth, but also the body to which political power reverts when government is dissolved.<sup>32</sup> It is therefore important to distinguish well between the dissolution of government and the dissolution of political society.<sup>33</sup> The Community is the society organised as a political community and thus represents the moral bond between free and equal individuals that is based on consent and consisting in a certain mutuality of rights and obligation<sup>34</sup>, a bond that will eventually manifest itself in the common legal order. This contractual relationship thus makes up the common good or the *res publica* of the political society in question

### *Summary*

The contractarian argument is individualistic and rational in character in the sense that individuals must be understood separately and not as a function of their society. Society is fundamentally instrumental in securing the interests of the individual (which are somehow at risk in the state of nature, i.e. without society) and no society can therefore be an end in itself.

A contractarians model of argument contains a hypothetical scenario where individuals with certain characteristics interact. This scenario contains both problems of interaction (most typically a "prisoner's dilemma") and conventional solutions to these problems. Finally, from the analysis of the problems and solutions of the hypothetical scenario at least some conclusions can be drawn concerning the legitimacy of political and legal institutions and moral principles. Both moral principles and political institutions are thus explained as if they were contractual in nature, i.e. that the result is in the interest of all parties when compared to the alternative state of nature.

## **2.4 The Social Contract and the Constitution**

A constitution is generally defined as a body of rules which regulates the system of government.<sup>35</sup> In the legal sense the constitution is the supreme (positive) legal norm of a certain legal order. This means that it functions as the ultimate

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31 This is most evident in Locke's discussion on the various forms of government. J. Locke, *Two Treaties of Government*, p. 354ff, § 132ff.

32 J. Locke, *Two Treaties of Government*, p. 427f, § 243.

33 J. Locke, *Two Treaties of Government*, p. 406, § 211.

34 A.J. Simmons, *On the Edge of Anarchy*, p. 5.

35 Cf. N. Parpworth, *Constitutional & Administrative Law*, Oxford University Press, 2006, p. 3.

source for all positive law of the legal order. All inferior norms of the system can be assessed against the constitution for their validity whereas the constitution itself cannot. The constitution thereby provides the “operative system” for any legal order.

However, taken in a broader sense the constitution is something more than merely a set of legal rules typically contained in a document called “the constitution”. The constitution also concerns the public morality – the moral fundamental values and structures - of the political society that it regulates and this is where the social contract comes into the picture. The substance of the social contract determines how the major social institutions should be designed and what sort of political and economic action that can be held to be consistent with the principles of justice that can be derived from the social contract. The constitution, that addresses these issues, can be seen as the transformation of the social contract from moral and political philosophy to the domain of law.<sup>36</sup>

The constitution is the legal norm that has the closest connection with other disciplines than the legal (taken in its strict sense), most notably with political and moral philosophy. This aspect of the constitution refers to what the Finnish professor Kaarlo Tuori has defined as the “deep-structure” of the legal order.<sup>37</sup> The arguments from philosophy are of importance for the understanding of legal phenomena since it is being expressed in legal argumentation among lawyers.<sup>38</sup> The fundamental philosophical values thus affect the reasoning and points of reference of both lawyers and politicians and, consequently, legal norms, cases and legal doctrine are all shaped by, motivated and criticised according to these fundamental values. This deep structure view of the law also serves to prove the fact that the ultimate validating constitutional principle is more properly the domain of common law than of statutory law in the sense that it ultimately hinges on a fact which is not legal in character.<sup>39</sup> This distinction between the ultimate constitutional principle and constitutional law in general is important

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36 As, for example, argued by the Spanish scholar Eduardo García de Enterría in *La Constitución como norma y el tribunal constitucional*, Editorial Civitas, 1985, p. 52f.

37 K. Tuori, *Towards a Multi-layered View of Modern Law*, in *Justice, Morality and Society – A Tribute to Aleksander Peczenik*, eds. Aulis Aarnio, Robert Alexy & Gunnar Bergholtz, Juristförlaget i Lund, 1997, s 432ff.

38 It is, for example, common knowledge that an understanding of the American constitution necessarily entails solid knowledge of the philosophical arguments put forth before the constitutional convention in 1787, the most important ones which are found in the *Federalist Papers*, see further J.N. Rakove, *Original Meanings – Politics and Ideas in the Making of the Constitution*, Vintage Books, 1996 and L.H. Tribe & M. Dorf, *On Reading the Constitution*, Harvard University Press, 1991.

39 Cf. H.W.R. Wade, *The Basis of Legal Sovereignty*, Cambridge Law Journal [1955], p. 189f. Legal positivists like Herbert Hart have phrased this ultimate constitutional law as a rule of recognition, H. Hart, *The Concept of Law*, Oxford University Press, 1961, p. 97ff. As an interesting example could be the established fundamental constitutional principle in the United Kingdom of the sovereignty of Parliament – arguably the most sovereign Parliament in the world. If one inquires as to how this sovereignty has actually been established it emerges that Parliament is sovereign largely because the English (and subsequently British) courts have said that it is so. See further H.W.R. Wade, *The Basis of Legal Sovereignty*, Cambridge Law Journal [1955], p. 190.

and can be likened to the relationship between “the rules of the game” and the desire to play the game in the first place.<sup>40</sup> It is true that there may be an undisputed and sovereign umpire in the game, subject to no appeal than his own conscience, but the desire to set up the game does not come from the umpire alone but more likely from the players themselves. Setting up or changing and, ultimately, destroying the game is an activity that goes on outside of the legal system of the game itself, it is *extralegal* in relation to the system it creates or destroys.<sup>41</sup> The desire for instituting the game, rather than the position of the umpire, is the ultimate constitutional principle. This ultimate constitutional rule is the connection between the social contract theory and constitutional law in general. It is appropriate to raise a caution in this regard. No constitution can be interpreted in its entirety (so called “hyper integration”<sup>42</sup>) according to a specific ideology since constitutions are most likely to be the product of compromise between different competing political claims and viewpoints. I do however contend that the basic features – individualist oriented, rationally motivated and based on consent - of the social contract theory are such that they can hardly be in serious dispute among constitutional lawyers in the Western world.

It is, against this background, important for the present purpose to determine what the constitution is *not* according to a contractarian view: The constitution is an expression of the political bond between individuals that can be explained in terms of a rational contract and can therefore not be the expression of a collective identity apart from the individuals. The contractarian constitution is built on assent rather than descent.

Nor can the constitution or the state be seen as means to “perfect” the citizens (a political equivalent of salvation) according to a holistic, more or less Aristotelian, view holding that the political process is not as much instrumental for settling policies as it is a process for disclosing a common good through the political process<sup>43</sup> since the constitution is instrumental only to *individual* interests (or, in the alternative, an aggregate of individual interests). The assumption is that individuals conclude the contract without undergoing any politically significant change. The contractarian constitution leaves salvation (ideological or religious) to the individuals and does not lay down fixed ideology apart, in the Lockean case, from the notion that state power is limited in nature.

The contractarian constitution is not a constitution for a polity composed of collective entities since the contractarian argument is based on individuals and universalistic values. The contractarian constitution therefore rejects demands for group rights<sup>44</sup> and for political action based on the collective identity that has not been acquired by the individual himself.

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40 J. Hampton, *Hobbes and the Social Contract Tradition*, p. 281.

41 J. Hampton, *Hobbes and the Social Contract Tradition*, p. 282.

42 See further L.H. Tribe & M.C. Dorf, *On Reading the Constitution*, p. 24-30.

43 N. MacCormick, *Democracy, Subsidiarity, and Citizenship in the “European Commonwealth”*, in ed. N. MacCormick *Constructing Legal Systems – “European Union” in Legal Theory*, Kluwer Academic Publishers, 1997, p. 19.

44 A group right is a right for a certain collective, e.g. a religious community, to wield power over its individual members without interference from the state even in cases where the

Not surprisingly, the most prominent theorists of the social contract - Hobbes, Locke, Montesquieu and Rousseau – have yielded a rich stock of constitutional designs to give effect to the principles of justice embedded in their respective theories. The idea of popular sovereignty as a constitutional model for instance has its ideological precursor in the theories of Hobbes and Rousseau whereas the idea that political society primarily exists in order to safeguard the fundamental rights and autonomy of the individual is easily deduced from the theories of Locke and Montesquieu. The contractarians argument has to a large degree defined the rise of Western constitutions which emerged largely during the 17:th and 18:th centuries.<sup>45</sup> It is reasonable to argue that both the modern constitution and the state are children of the social contract.<sup>46</sup> The (social) contract indeed pervades our general outlook on society to such a degree that it at least by some theorists<sup>47</sup> has been held to constitute the “ideology” of our society which can most effectively be seen in the contractual structure of the market economy and the changing conceptions of such social institutions as the family or, indeed, the social security system.<sup>48</sup> Any inquiry into the moral foundations of constitutional theory must for this reason alone address the arguments of the social contract.

The constitution is the instrument for attaining the objectives of the social contract and raises the issue of its purposeful design. Like any other object the constitution must be suited to attain the objectives that have motivated its existence. It is true that one could use a kettle as a flowerpot but such use obviously ignores that it was primarily designed to boil water in. In the same manner it would not make sense to adopt a constitution based on parliamentary omnipotence where the main objective is to protect and entrench the moral rights of the individual against the majority.

Our motives for concluding the social contract will stipulate a certain kind of institutional framework and, possibly, limits to the extent of political power and certain principles of justice. Thus on the view of popular sovereignty the constitution is primarily about instituting the sovereign and how political will is to be articulated. On the constitutionalist view the constitution is rather about securing individual autonomy and limited government by setting up a system of government based on the principle of checks and balances with some sort of bill of rights demarcating the legitimate scope of political power.<sup>49</sup>

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exercise of this power would come into conflict with rights protected by the state. A demand for a group right can thus be translated into a demand for a separate jurisdiction.

45 As an example the U.S. constitution is, if read in conjunction with the declaration of independence of 4 July 1776, clearly based on the Lockean social contract theory.

46 See J. Alder, *General Principles of Constitutional and Administrative Law*, Palgrave, 2002, p. 17-19.

47 For one instructive such example see D. Gauthier, *The Social Contract as Ideology*, in eds R.E. Goodin and P. Pettit, *Contemporary Political Philosophy*, p. 27-44.

48 For an example of this new approach see *Contractualism in Employment Services - A new form of welfare State Governance*, eds. E. Sol & M. Westerveld, Kluwer Law International, 2005.

49 It has been claimed that this actually is the main purpose of all liberal constitutions, see E. Barendt, *An Introduction to Constitutional Law*, Oxford University Press, 1998, p. 21.

The material aspect of the constitution refers to the (moral) principles of justice that it contains. As was mentioned before the material content of the contract, manifested in the constitution, falls back on the dichotomy of the character of rights and legal norms. This dichotomy can also be said to express two opposing views of the constitution, namely whether the constitution is to be viewed as a continuous process of activity which gives the political society its identity (the Hobbesian constitution)<sup>50</sup> or as a “standing rule of reason” designed to ensure limited government in accordance with some certain “pre-political” rights (the Lockean constitution).

The question of whether there actually are rights and norms of legal character prior to and consequently independently of the state is one of the oldest and most vexed of legal philosophy. I do not intend to attempt a solution to this question in this essay. I do, however, contend that the development of constitutional and international law since the end of World War II has shown a marked increase in the protection of moral rights of the individual and an increased emphasis on the rule of law.<sup>51</sup> This change implies a change in the deep structure of international law where the classical notion of state sovereignty is receding in favour of a more cosmopolitan view where the protection of the individual has a more prominent position. This change in the deep structure of international law is also bound to have effects in other legal domains, notably that of constitutional law. Particularly in European constitutional law has there been a development towards enhanced protection of the rights of individuals, rule of law and checks and balances of both horizontal and vertical character. This development squares very well with a Lockean contractarians view of law and political society but is more difficult (although, admittedly, not impossible) to reconcile with a view that all law is ultimately law of the sovereign and that a right that is not expressed in the legal order, i.e. enacted by the political majority, is, to paraphrase Bentham’s famous expression, like a son who never had a father.<sup>52</sup> My argument is that law (both international and constitutional) is experiencing a Lockean moment and the development of EC-law as a constitutional order forms a part of this moment.

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50 Cf. E. Lagerspetz, *Hegel and Hobbes on Institutions and Collective Actions*, Ratio Juris, vol 17, No. 2, p. 227-240 at p. 228f.

51 The UN General Assembly declaration of universal rights and the European Convention on Human Rights are a few examples of international instruments that protect the moral rights of individuals in rather Lockean fashion. In domestic law there has, since the end of World War II, been a sharp increase of constitutions that contain bills of rights. For a fuller discussion see O. Zetterquist, *International Courts and Supra Statal Democracy – Part of the Problem or Solution?*, in eds. J. Nergelius and O. Zetterquist, *Law, State and Democracy in Multi-level Governance*, Stockholm Studies in Democratic Theory, Thales, forthcoming during 2006.

52 J. Bentham, *Anarchical Fallacies*, in *Nonsense upon Stilts – Bentham, Burke and Marx on the Rights of Man*, ed. Jeremy Waldron, Methuen, 1987, s 73.

### 3 A European Social Contract?

#### 3.1 *What Sort of Contract?*

The EU is based on contracts in the shape of the treaties concluded by the Member States according to the rules of international law.<sup>53</sup> An argument against the constitutional character could be based on this formal fact, namely that the Member States have never signed up to a European constitution and that international law can, even though it may be atypical, accommodate the fact that individuals acquire both rights and obligations directly from international law and institutions.<sup>54</sup> This argument, however, is slightly off the mark if we are enquiring about the *constitutional (moral) legitimacy* of the (supposedly) European constitutional order as it has been claimed by the ECJ and as it has, at least apparently, been accepted by the courts and administrative bodies of the Member States in their day to day business. Dismissing the question on a formal ground of this character would be like arguing that the U.S. Constitution of 1787 is lacking constitutional legitimacy since it was not enacted by the British Parliament. If we are to dismiss the EU as a constitutional entity it must be on its merits rather than on formal grounds and these merits will now be discussed in accordance with a social contract model.

#### 3.2 *The European State of Nature*

##### 3.2.1 *The Setting*

Any social contract analysis must start in the state of nature and it is therefore necessary to consider this hypothetical scenario in the European setting. The first question to tackle is the one of who the persons in the state of nature are and the conditions of that state of nature. As we have seen before such a definition could be “realistic” (real persons are in the state of nature) or “idealistic” (imagined persons are in the state of nature or, in the Rawlsian case, in the original position). On this point both versions could be employed in a contractarian argument. It is certainly true on both Hobbesian and Lockean premises that the European individuals were, before the creation of the EC, in a state of nature vis-à-vis one another. There was no common sovereign power over all European individuals (necessary on the Hobbesian account) nor were there any common legislator and judge over them (as required by Locke). For once, then, it seems that one of the alleged traditional weaknesses of the social contract theory, that a state of nature actually never existed, is not present in the European context. One could then proceed on the assumption that the very persons who existed in the various Member States at the moment of accession constitute the inhabitants of the state of nature.

Another possibility would be to, along the lines of Rawls’ argument, position the European individuals as being in the “original position” vis-à-vis one another. In order to adapt the model in accordance with Rawls’ argument it must

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53 More specifically these treaties are the Euratom treaty and the Treaty establishing the European Community (as these have been amended by later treaties) from 1957 and the Treaty establishing the European Union from 1991.

54 As argued for instance by Derrick Wyatt in *New Legal Order, or Old?*, *European Law Review* [1982] p. 147-166.

then be assumed that these individuals are ignorant not only in relation to their social skills or circumstances but also in relation to their respective nationality which is in such a case also included in the veil of ignorance. One of the advantages of using Rawls' model rather than that of Hobbes or Locke is that it dispenses of the need to prove actual consent of the specific (real) European individuals.

### 3.2.2 The Problem in the European State of Nature

The second step in the contract model entails an analysis of the problems in the state of nature (or the original position) and which solutions are available to the individuals who try to rationally solve them. As was mentioned before the problem of the state of nature is essentially to be defined as a "prisoners' dilemma", i.e. that uncoordinated rational individual behaviour will be destructive or at least sub-optimal compared to rational coordinated behaviour.

A straightforward Hobbesian approach would hold that the European state of nature entails, in the absence of a European sovereign, a significant risk of violence and, ultimately, war. Today such a view might not be taken all that seriously since the EU states have been at peace ever since the end of the Second World War, without having created a European Leviathan. At the time of the creation of the EC, however, this was certainly not an assumption that could be taken for granted. Indeed, with a historical perspective on Europe's blood-soaked past the blank dismissal of Hobbes' caution for future conflict resulting from the absence of a social contract might seem overly cheerful.

Proceeding with the Hobbesian logic a cogent argument against the constitutional character of the EU would be that it, in its current shape, altogether lacks a social contract comparable to that of the Member States. Since the Treaties have not set up a European sovereign nor provided the EU with its own means of enforcement necessary to enforce its rules it is fairly clear that there is no Hobbesian contract. A social contract that stops short of instituting an absolute sovereign will, according to Hobbes be at best ineffectual and at worst outright dangerous. More precisely this argument could be re-phrased as stating that the Member States are better at securing the values enshrined in the social contract than the EU is and that consequently member state law will prevail over EC-law. It is presumably this ultimate constitutional argument that explains the famous argument from the British House of Lords in the *Salomon Exchange* case concerning the relationship between British law and international law

"If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's Treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties..."<sup>55</sup>

Sovereignty is the essence of the Hobbesian social contract and it is clear that the EU does not qualify on this point. Since there is no Hobbesian social contract in the EU, it is clear that resorting to the Hobbesian contract theory would not be a viable option for explaining the constitutional legitimacy of the EU.

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<sup>55</sup> *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116 at 143.

A Lockean approach might seem more intuitively attractive. European citizens do not necessarily fear armed conflict or other hostile action in every instant, particularly not from the other European states that are pluralistic democracies with a developed sense of the rule of law. It is well known that all Member States of the EC (and later on the EU) subscribed to the same set of fundamental values, e.g. democracy, rule of law and a free market economy coupled with basic social protection for the individuals. The main problem however was that these values were fundamentally reserved to the citizens of the respective state. As other citizens were concerned the extension of these rights was more akin to concession and goodwill than of constitutional right (that is unless the individual assimilated herself in the other European state and gave up the constitutional relationship with the former state).

Put in Lockean terms: the absence of a common judge and legislators will lead to collectively sub-optimal results in the sense that this absence opens up the possibility of arbitrary discrimination between European individuals on the sole ground of their nationality, such discrimination leading both to sub-optimal economic output and to diminished individual autonomy as individuals are exposed to the arbitrary will of other individuals or groups associated with those individuals and who happen to call themselves the people of another state.

### **3.3 *The Legitimacy of the European Social Contract***

#### **3.3.1 The Preliminaries**

The last step in the contractarian model concerns the legitimacy of political authority and the principles of justice. This step focuses on the content of the contract. As was pointed out at the start, the claim that the EC is a constitutional legal order originates with the ECJ. It is not until the adoption in 2004 of the Treaty Establishing a Constitution for Europe that we find this formulation in the treaties (and then coupled with the term “Treaty” in order to reflect the slightly schizophrenic character of the EU). The inquiry into the constitutional legitimacy will therefore focus on the arguments put forward by the ECJ. These arguments must in turn be understood against the general background of the Treaties.

The treaties were no doubt intended to address the problems that Europe had suffered as a consequence of an over-dosis of state sovereignty before the Second World War. The preamble to the EC- Treaty is well supplied with statements to this effect, the most famous being without doubt the resolve to “lay the foundations of an ever closer Union among the peoples of Europe”. Other statements suggestive of state of nature are the resolve to “eliminate the barriers which divide Europe” and “to preserve and strengthen peace and liberty”. As was mentioned before the creation of the EU forms part of a larger picture to emerge after the end of the war, a picture where the deep structure of law was moving towards more Lockean values than before the war. The treaties were thus designed to reduce the disadvantages of the European state of nature although this might, by the contracting states, have been more readily seen as the Hobbesian version than the Lockean one. Nevertheless, it remains clear that the Member States by creating the European Community choose to enter into a new legal relationship based on binding legal documents and provided with a

remarkable institutional framework with a court of law as the arbiter as to the interpretation of the Treaty.

### 3.3.2 The Main Motives for the Constitutional Character According to the ECJ

The first question to examine is the reasoning of the ECJ that led to the conclusion that the EC had emancipated itself from its undisputed *genesis* in public international law and acquired the status of a new legal order. This conclusion was drawn early, 1962 and 1963, in the history of the Community and has not been altered in its essence since then. Most lawyers will readily recognize the cases and I will not bore the reader by giving all the details of the cases. The purpose here is only to examine whether the main reasons given by the Court are coherent with a Lockean social contract argument.<sup>56</sup> Put in other words: Even if the ECJ does not, like the American founding fathers did in the declaration of independence, copy Locke's argument literally, there are good reasons for saying that the argument rhymes with Locke.

The ECJ set out its famous arguments for the "new legal order" of the EC in the seminal *van Gend en Loos* case.<sup>57</sup> One could summarise the argument of the Court as follows: The Treaty provisions could not be understood without an inquiry into its "spirit, the general scheme and the wording of [its] provisions". The objective of the Treaty implied that the Treaty did not limit itself to creating mutual obligations between the states but also created rights and obligations for *individuals* which become part of their legal heritage. The Treaties were adopted in legal form and created institutions with state powers. The treaties furthermore made reference to individuals in the preamble and the nationals of the Member States were called upon to collaborate in the functioning of the Community through the European Parliament and the Economic and Social Committee. (p 12 of the judgment). As a consequence, the Court held that, provided some other conditions are met, rights laid down in the Treaty can have *direct effect* in the Member States. The important constitutional point is that the effect of EC-law follows directly from the Treaty and not from the Member State's internal provisions. Direct effect is in this sense incompatible with the traditional view of the relationship between domestic law and international law since the traditional position is that the internal effects of international law are ultimately determined by the state's constitutional provisions.<sup>58</sup>

In the likewise seminal case the *Costa v ENEL*, the ECJ held that the terms and spirit of the Treaty were accepted by the states on a basis of reciprocity and

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56 This is not the same as stating that the members of the ECJ actually thought they were giving effect to a Lockean social contract theory. The purpose is to assess whether the arguments put forward by the ECJ could be expressed in Lockean terms, i.e. as reasoning coherent with the basic principles of constitutionalism.

57 26/62, *van Gend en Loos*, ECR [1963] 1.

58 *Cf. inter alia*, E. Denza, *The Relationship between international and national law*, in ed. M.D. Evans, *International Law*, Oxford University Press, 2006, p. 428. This very argument was also put forward in the *van Gend en Loos* case by the Dutch, German and Belgian governments (p 6-8 of the judgment) and was supported by the Advocate General but not by the Court.

that the executive force of the treaties could not vary between the Member States without giving rise to discrimination between the European individuals and that the Treaty, as an independent source of law, could not be overridden without being deprived of its character as Community law and without the legal basis of the Community itself being called into question (p 593f). The conclusion from this reasoning was that EC-law had supremacy over Member State law, even in the case where the Member State law concerned was of constitutional character, something which runs entirely counter to the traditional view on the relationship between international and domestic law.

A further paramount step in the development of the constitutional character of the EU was the introduction of protection of fundamental rights of the individual as a part of the general principles of European Community law.<sup>59</sup> Reading a bill of rights into EC law was a very significant step in the constitutionalisation of the Treaties since it placed a hitherto unprecedented, emphasis on the position of the individual in the EC legal order.<sup>60</sup> The Courts finding that fundamental rights were protected as rights under EC law, rather than as rights of this or that *Member State* legal order, can be seen as a necessary counterbalance to the principle of supremacy of EC law in relation to national law. If violations, by Community institutions, of fundamental rights of the individual could no longer be checked by national constitutional provisions an alternative protection under Community law would have to be found for the EC to enjoy constitutional legitimacy. To paraphrase Voltaire's famous remark on the Deity, one could say that if constitutional rights protection did not exist in EC law before, one would have to invent it.

It is clear from this cursory glance that the Court has given an unprecedented importance to the position of the individual in international law and the rule of law in its reasoning on why EC-law constitutes a new legal order. The treaties are concluded in legal form and create rights for individuals (although they were concluded by states). This is said to be because of the "spirit and general scheme" and the objectives of the treaty, i.e. because of its moral *purpose*. The purpose of a legal order concerns its deep structure (in the sense employed by Tuori) of the law. Considering the emphasis placed on the rights of the European individual conferred by their common law (the Treaties), the equality of these individuals in regard to these rights and the fact that the ECJ is charged with upholding these rights one can reasonably assert that the reasoning of the ECJ is quite Lockean in nature.

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59 The ECJ embarked on this path in a string of cases in the 1960-ies and 1970-ies starting with the case 29/69, *Stauder*, ECR [1969] 419. The idea was further clarified in the seminal case *Internationale Handelsgesellschaft* where the Court held that "... respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community", 11/70, ECR [1970] 1125 at 1134, § 4. A fuller account of the issue is given in T. Tridimas, *The General Principles of EC Law*, Oxford University Press, 1999, p. 202-243.

60 Cf. F. Mancini, *The Making of a Constitution for Europe*, p. 595-614 at p. 608ff.

### 3.3.3 Solving the Problem of the European State of Nature

Even if the main problem of the European state of nature was accepted, one could still question the legitimacy of the ECJ for solving the problem of the state of nature on its own initiative, i.e. that moving from the state of nature to a political community is not something for a court to decide. The answer to this question depends on which solutions that one deems available to the inhabitants of the state of nature or, for that matter, on the conditions of the state of nature itself. There cannot, of course, be any question of all European individuals actually making contracts with all of their fellow Europeans (which could at any rate not bind the persons who subsequently came into the European picture).<sup>61</sup> It could be held that the conditions in the European state of nature, i.e. where individuals already find themselves in political society in respect to some (but not all) European individuals make such a second contract virtually impossible to achieve.

The argument would be that the power of tradition (and, one could add, collectivist ideology like nationalism) in Europe, where some states can boast of a history stretching more than a millennium in time, constitutes a very high (perhaps even insurmountable) practical barrier for political community beyond the nation state<sup>62</sup> The reason for this is the straightforward mechanism of the “prisoner’s dilemma” – as long as there is no contract it will not be rational, from the perspective of the individuals making up one Member State, to recognize the direct effect and supremacy of EC-law without assurance that the other concerned individuals will do the same, i.e. it will not be rational to relinquish the right to be judge in one’s own case as long as others retain that right. State sovereignty is thus a major part of the problem of the European state of nature.<sup>63</sup> To elaborate a bit on this point it could be pointed out that most, if not all, constitutions are supposed to prohibit the destruction of the political society that it constitutes in the sense that the sovereignty of the state cannot be alienated according to the constitution itself. The reason is that the constitution

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61 This sort of argument was levelled against early contractarian theory in general already by Sir Robert Filmer (Locke’s contemporary adversary), *The Anarchy of a Limited or Mixed Monarchy*, in Sir Robert Filmer, Patriarcha and other Writings, Cambridge University Press, 1991 [1648] p. 142.

62 Locke himself employed this argument: “People are not so easily got out of their old Forms, as some are apt to suggest. They are hardly to be prevailed with to amend the acknowledg’d Faults in the Frame they have been accustom’d to. And if there be any Original defects, or adventitious ones introduced by time, or corruption; ‘tis not an easie thing to get them changed, even when all the World sees there is an opportunity for it.”, *Two Treatises of Government*, p. 414, § 223.

63 As was argued by Alexander Hamilton in the debate preceding the adoption of the American constitution: “... there is, in the nature of sovereign power, an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain it or direct its operations. From this spirit it happens, that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common center.”, *The Federalist no 15*, in A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, Everyman’s Library, 1992 [1787-1788], p. 72.

functions as the ultimate source of power in the system that it regulates. The constitution therefore contains limits (of customary law at any rate) as to which competencies that can be given up or, more properly, *delegated* to international institutions. The creation of a European independent legal order that embraces citizens and states alike and that enjoys supremacy in relation to Member State constitutional law is therefore, strictly speaking, a legal impossibility since it would be contrary to the constitutions that enabled the Member States to conclude the treaties.<sup>64</sup> The slightly odd situation is then that the Member States being quite aware of the problems of the European state of nature and setting up an organisation with clear contractarian objectives are legally precluded from conferring constitutional authority on this organisation. On such a view it could be argued that the system of international law, being the only legal way open, is incapable of achieving the objective of the social contract, namely the quitting of the (European) state of nature.

If the barrier to quitting the state of nature is, because of the reasons referred to above, held to be too high, one could at this stage introduce an “external solution” to the problem faced in the state of nature by introducing an element that is not available within the model.<sup>65</sup> If the model in question is the system of international law, the introduction of a constitutional court (i.e. a court that operates with constitutional principles of law rather than international ones) enables the transition from the state of nature to a civil (political) community. The premises for this argument are that the Treaties reasonably express an inclination towards a closer union among the peoples of Europe and that they constitute binding law. Furthermore it is well known, both as a general principle of international law and now according to article 27 of the Vienna Convention on the Law of Treaties, that no state can plead internal circumstances in order to justify a violation of the obligations assumed under international law.

With the introduction of the principles of direct effect and supremacy and a court with compulsory jurisdiction the law of the EC was transformed from being a law *between* the Member States to a law that is common *within* all these Member States. The steps taken by the ECJ meant that there now is a common law and a common judge, the central components of the Lockean social contract, available to the European citizens.

The notion of a political community, established by a court on the basis of binding legal instruments, as a constitutive element of the social contract is admittedly a fairly weak rationale as far as the ideal contract theory is concerned but surely no weaker than the foundations upon which most of the present European states rest. A constitution may of course be enacted according to a previous constitution with perfect democratic anchorage and in these cases formal and material legitimacy may be said to coincide. Nevertheless, in every constitutional order there is at some point in the past a constitution (the original constitution) that depends on a *moral* authority that is external to the legal

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64 The British scholar T.C. Hartley argues that this precludes the possibility of any “real” sovereignty on part of the EC in the relation to the Member States, *Constitutional Problems of the European Union*, Hart Publishing, 1999, p. 160-162.

65 Cf. J.S. Kraus, *The Limits of Hobbesian Contractarianism*, p. 16f.

system and where its authors had no authority under a previous constitution since they were, to phrase the problem in contractarian terms, in the state of nature.<sup>66</sup> Such an original constitution will thus depend on the moral authority of its authors for its own moral legitimacy. A European court of law set up in a legally binding document charged with the task of upholding the objectives of the Treaties and the rule of law can hardly be deemed to be a sinister deliverer of a constitutional legal order when compared to other such authors.

### **3.4 *The Contract and the Democratic Deficit***

The next question is what sort of civil society that results from the social contract outlined above. Once again it might be instructive to turn to the Lockean model for some guidance. The introduction of the principles of direct effect and supremacy (and later on the principle of pre-emption certainly transformed the legal landscape of the European citizens but did not in itself establish any new (political) institutions for the Community. Put different, the Community was stuck with a system designed for public international law but that would now operate with principles of constitutional law. Just as the ECJ could be said to constitute the catalyst for making the EC a constitutional legal order, it could, for the very same reasons, be said to be the creator of the problem widely known as the “democratic deficit” of the EC.

The democratic deficit can, in a simplified form, be described as the problem that results when competencies are taken away from the hands of the Member States and are instead given to the Community institutions. The deficit is more precisely found in the fact that the exercise of state power can, in the Member States, ultimately be controlled by a democratically elected parliament, the members of which will have to face the music in the next election if voters are not happy with their decisions. No such mechanism exists in the EC and, because of the doctrines of direct effect and supremacy, a national parliament is unable to rectify the situation on their own.

The democratic deficit is clearly concerned with the Lockean notion of *trust*, i.e. the possibility to “kick out the scoundrels” when we (right or wrong) no longer believe they should be in power. Lockean political theory requires assent not only in joining the political society (i.e. when entering the social contract) but also in framing its constitution of the legislative power (what Locke refers to as the “first and fundamental positive law”<sup>67</sup>) and in assessing whether government, when established, is still legitimate.<sup>68</sup> A Lockean social contract theory thus requires a direct political relationship between the rulers and the people which in principle rules out indirect legitimacy of the kind that characterizes all of the EC-institutions with the exception of the European

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66 Cf. J. Raz, *On the Authority and Interpretation of Constitutions*, in ed. Larry Alexander, *Constitutionalism – Philosophical Foundations*, Cambridge University Press, 1998, p. 158-160.

67 J. Locke, *Two Treatises of Government*, p. 355, § 134.

68 Cf. D.A.J Richards, *Foundations of American Constitutionalism*, Oxford University Press, 1989, p. 88.

Parliament. As Locke himself puts it, the grant given in the social contract is one to “make laws, and not legislators”<sup>69</sup>.

The importance of a direct relationship between the citizens and the legislator is not only a formality in Lockean political theory. The agreement that establishes the common legislator and judge is the very essence of the Lockean contract and it is thus no coincidence that Lockean theory places a strong emphasis on the legislator as

“...the Soul that gives Form, Life, and Unity to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy, and Connexion.”<sup>70</sup>

The Lockean legislator thus holds a crucial position for the moral relationship between the participating individuals. The legislative is the forum where controversies concerning the more precise content of the Law of Nature is to be decided and it is thus important that it is an accountable and representative assembly that is diverse, as society itself, guided by a spirit of deliberation and open mindedness, rather than factionalism and prejudice, thus mirroring our own reasoning and aspiration to self-government.<sup>71</sup> In the same spirit, it has also been observed by the German Constitutional Court that

“Democracy, if it is not to remain a merely formal principle of accountability, is dependent on the presence of certain pre-legal conditions such as a continuous free debate between opposing social forces, interests and ideas, in which political goals also become clarified and change course and out of which comes a public opinion which forms the beginnings of political intentions.”<sup>72</sup>

The German Constitutional Court concluded that these conditions are not present in the EU although it is not impossible that they might arise some day in the future. It is fairly clear that the institutions of the EU have some way to go before they can aspire to meet the requirements of the Lockean legislative or the conditions identified by the German Constitutional Court. Lawmaking in the Council, the principal institution with legislative powers, is in its present form to no small degree a forum for political trading between the Member States and its has been strikingly described as “...an intergovernmental roundtable often characterised by all the warmth of a love match in a snake pit.”<sup>73</sup> The EU in its present form fails to fulfill the second stage of the Lockean social contract. The democratic deficit is an inescapable reality of the EU and there is little hope of

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69 J. Locke, *Two Treatises of Government*, p. 363, § 141.

70 J. Locke, *Two Treatises of Government*, p. 407, § 212.

71 See further J. Waldron, *The Dignity of Legislation*, Cambridge University Press, 1999, p. 63-91, particularly p. 87.

72 2 BvR 2134/92 & 2159/92, Brunner v. European Union Treaty, reported in *Common Market Law Reports* [1994] 1, p. 87, § 41 (English translation).

73 F. Mancini, *The Making of a Constitution for Europe*, *Common Market Law Review* [1989] p. 595-614 at p. 598.

immediate improvement since enhanced democracy at the EU level is still by many perceived as a threat to democracy (in this regard often a synonym for sovereignty) in the Member States.

### **3.5 *The Community within the Community***

A pessimistic reading of the problem of the democratic deficit would be that the creation of the ECJ is something akin to the political monstrosity that Pufendorf held the German Empire to be – something which is neither a state nor a confederation of states. And, even worse, might this creation be something that actually harms democracy, the only legitimate form of government in the present Western world. If this is so, it would most certainly be a devastating blow against the constitutional legitimacy of the EC.

The slightly more optimistic reply to the criticism of the democratic deficit could take two related approaches. Firstly, one could argue that a formal conception of democracy that equates this concept with parliamentary (majority) rule is too narrow and that democracy must be understood to include a powerful protection of the moral rights of the individual, particularly when seen in the light of the development of rights protection in both international and constitutional law since the Second World War. It could be argued, along the lines of Rawls, that the major social institutions reflect a basic conception of social justice agreed upon by the members in the original position.<sup>74</sup> These institutions are instrumental for securing the two principles of justice, namely that of equal political liberty and of a just social and economic system that benefits the least advantaged. A European legal order with its own institutions offering equal justice under the same law, i.e. without any distinctions in regard to nationality, for all Europeans is a necessary component of a European social contract based on the Rawlsian rational agreement between equals concerned to legally establish the greatest equal liberty between them.<sup>75</sup>

Secondly, one could argue that the question of democracy should be seen, from a citizen's point of view, in a holistic manner taking into account both democracy at Member State level and EU level. This would be a more constitutional reading of the principles of subsidiarity (article 5.2 EC-treaty) and loyalty (article 10 EC-treaty) according to the principle of cooperative federalism.<sup>76</sup> The essence of this principle is that the governmental agencies of the two (or more) levels are to be seen as forming a whole with regard to the citizens.<sup>77</sup> The question would then not be whether the EU is fully democratic,

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74 Cf. J. Rawls, *A Theory of Justice*, p. 4f and 47-52.

75 Cf. J. Rawls, *A Theory of Justice*, p. 210. As regards the second principle it is worth to recall that one of the main tasks of the EC is to promote social and economic cohesion of the EC and this is, according to article 158 of the EC-treaty, in particular aimed at "...reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas".

76 Cf. *Europe – The Impossible Status Quo*, ed. Renaud Dehousse, Macmillan Press, 1997, p. 68 and José Palacio González, *The Principle of Subsidiarity*, *European Law Review* [1995] p. 355-370 at p. 358.

77 This idea was prominent in the framing of the American federal constitution and was articulated by James Madison in the following manner: "The federal and State Governments

because it is obviously not, but whether it is, together with the Member State, *adequately* democratic.<sup>78</sup> This latter argument also, like the German Constitutional Court pointed out, takes into consideration that the EU is not a static political society but one that is under development. Even if it is clear that the EU does not qualify as a fully democratic polity it would be equally misleading to say that it has no constitutional standing at all.

Expressed in Lockean contractarian terms the European citizens have, with the constitutionalisation of the Treaties, formed the political *community* that Locke identifies as the half way house between the state of nature and the Commonwealth. As pointed out before the community is a political body that has still to frame its government. It is not unreasonable to assume that the members of the community could, like in the EC, have a common judge and a common law but still lack a common legislative satisfying all the requirements that Locke formulated for this supreme political and moral institution. An important consequence of this Lockean constitutional embryo is that the community cannot be dissolved in any other way than by mutual consent.

It is important to stress in this context that the community is a *political* body and not primarily a cultural or ethnic one since the participants in the contract do not undergo any significant change by entering into the contract. Put differently; cultural or ethnic issues are politically irrelevant. The purpose of creating the community can never be the creation of a European “people” in the strong cultural sense. This view is also the most consonant with the famous statement in the preamble of the EC-treaty concerning the objective of an ever closer union among the *peoples* of Europe through the new European Community.

It could be held to be justifiable for a court to facilitate the rise of the Community but it is hardly for a court to frame the government. A court can certainly, like the ECJ has done on several occasions, in particular with regard to the internal market, press the political institutions to take action but it cannot create adequate political institutions on its own. As members of the ECJ have pointed out, the further development towards a fully democratic European commonwealth is for the political bodies to decide.<sup>79</sup>

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are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.” *The Federalist no 46*, p. 240 compared with J. Rakove, *Original Meanings*, p. 199f.

78 As pointed out by Neil MacCormick in *Questioning Sovereignty*, p. 148.

79 As argued by the former member of the ECJ Federico Mancini in *The Making of a Constitution for Europe*, *Common Market Law Review* [1989], p. 613.

## 4 Conclusion

The rationale for construing the constitutional legitimacy of the EC along the Lockean social contract principles is that this would be the most consonant with the deep structure of both international and constitutional law in Europe. The basic contractarian principles, in their Lockean version, are commonplace in constitutional theory today and they are particularly well suited for tackling the constitutional enigmas that the EU has given rise to. Accepting the Lockean premise that the state only borrows its rights from the individuals and that it can never have further powers than what is necessary for its purpose makes it easier to accommodate the notion of two parallel constitutional orders sharing similar purposes. A court that, by strengthening the moral rights of the individuals and the rule of law, takes this important step could certainly be said to act in a Lockean spirit.

The values underpinning the Community – universalism (sometimes referred to as supranationalism), individualism and commitment to the rights of the individual protected under the rule of law – are such as to make the Community the heir to the basic values of the Enlightenment and its dominant constitutional theory, that of the social contract.<sup>80</sup> The Community therefore reconnects us with the very roots of our own constitutional theory and can be seen as an important development of contemporary constitutional law.

The development of a constitutional legal order in parallel to the previous states also reflects another central feature of the contract theory. The state, which was the result of the first wave of social contract theory, has now changed significantly and is no longer the sole political entity with direct relations to the individual. The reason for the contract has undergone an important change and this is reflected in the new institutional architecture in Europe. The consequence of this change is that, as it has been eloquently formulated by some scholars engaged in the question of European constitutional theory, Europe does not need a new constitution as much as it needs a new form of constitutionalism.<sup>81</sup> To this I would like to add that it also needs to take a fresh look at the philosophical foundations of our constitutional theory, in particular to the social contract, if it is to bridge the current tension between a European constitution and national constitutions.

It is true that the European Union is not as of yet a fully democratic entity but it would be wrong to assume that a democratic Europe means a sovereign European state led by an omnipotent European Parliament. The Lockean social contract once again provides the elements for a more federal like Europe structured according to the principle of subsidiarity, something akin to MacCormick's idea of post-sovereignty, meaning that the sovereign Member States do not necessarily have to be replaced by a sovereign European Union.

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80 Cf. J.H.H. Weiler, *The Constitution of Europe*, p. 252.

81 M. Poiares Maduro, *We the Court – The European Court of Justice & the European Economic Constitution*, Hart Publishing, 1998, p. 175 and J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, *European Law Journal* [1995], p. 220.

When such steps are taken it might be said that the transition from state of nature to civil society to commonwealth, via the community, is complete. Then it can be said that our social contract has been re-written but that the values that have motivated it in the first place are secured in a new institutional setting.<sup>82</sup>

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<sup>82</sup> Cf. F. Mancini, *Europe – The Case for Statehood*, *European Law Journal* [1998] p. 29-42 at p. 40.