

Resurrecting the Leviathan: ultimate authority and political theory in  
the constitutional conflicts of the European polity

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*Abstract*

*This paper analyzes the notion of sovereignty defined in terms of the ultimate authority within the European Union pursuant to the supremacy doctrine of the European Court of Justice. It excavates the normative prop for the post-Westphalian notion of ultimate authority in social contract theory and its evolution into constituent power which is then analyzed in the European context. The claims to ultimate authority of the European polity are then analyzed and a case for a European constituent power is then made. The constitutional conflicts within the polity are then considered in the light of the theory of constituent power. It then considers the immanent teleological principles of a constituent power as the basis for a discourse on the existence and nature of a European constituent power to justify the authority claims of the European Court of Justice.*

**Introduction**

Sovereignty as ultimate authority has traditionally been treated as definitive of the concept of sovereignty. The upshot of the post-Westphalian settlement resulted in *de facto* claims of *imperator* by the signatory states thereby undermining the title from the

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Holy Roman emperor and vicariously, the pope.<sup>1</sup> This resulted in a widespread fragmentation of sites of ultimate authority across the face of Europe, each of which claimed to enjoy the *plenitudo potestatis* within their individual realms. Thus, *rex in regno suo imperator est*,<sup>2</sup> became the regulative ideal of the post-Westphalian political landscape, the effect of which was a complete injunction on external interference.<sup>3</sup>

In legal terms – generally defined internally in terms of constitutional order - the ideal implied that the sovereign was the ‘endpoint’ of the legal system, and as such constituted the exclusive legislator on the territory. In the aftermath of the revolutions of the late 18<sup>th</sup> century, the discourse of the justification for sovereignty and law shifted to the idea of a *pouvoir constituant* and *pouvoir constitué*.

In the European context, the EU has staked a claim to ultimate authority, in its relations with the Member states, mainly through the doctrine of the supremacy of European law developed by its main judicial organ, the European Court of Justice (ECJ).<sup>4</sup> This claim, by necessity, challenges the similar claims made by the Member States who, unsurprisingly cling to the post-Westphalian ideal which they have more or less claimed since the peace of Westphalia, regardless of how it actually operates in practice.<sup>5</sup> This

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<sup>1</sup> See G. Buijs, “‘*Que les Latins appellent maiestatem*’: An Exploration into the Theological Background of the Concept of Sovereignty” in N. Walker (eds.), *Sovereignty in Transition*, (Oxford: Hart, 2003), esp. Pp. 237-243.

<sup>2</sup> The notion of the *imperator* as subsequently informing European politics, originated in the Roman Empire where it had specific military connotations. This subsequently evolved to mean the ultimate and final authority within the empire, a title originally claimed by Caesar Augustus. The title was subsequently co-opted by medieval jurists to describe the sovereign claims of the various kingdoms that emerged after the fall of the empire, perhaps the most paradigmatic of which was the Holy Roman emperor. After the Treaty of Westphalia it became more than a simple claim, it took on a higher order meaning as a founding constitutional principle of the new order of inter-state relations. See G. Buijs, “‘*Que les Latins appellent maiestatem*’: An Exploration into the Theological Background of the Concept of Sovereignty” in N. Walker (ed.), *Sovereignty in Transition*, (Oxford: Hart Publishing, 2003). 229-257.

<sup>3</sup> See S. Krasner, *Sovereignty, Organized Hypocrisy*, (Princeton: Princeton University Press, 1999).

<sup>4</sup> The seminal cases are Case 6/64, *Costa v. E.N.E.L.*, [1964] ECR 585, 593; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629; Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. And Others*, [1990] ECR I-2433.

<sup>5</sup> Of course the political landscape has changed considerably since 1648, with the rise and demise of different political entities, perhaps the most important being the emergence of modern Germany and Italy. Rather, the qualitative nature of the claim has remained more or less constant since then. In this respect, Keating notes that the only state to retain its 1648 borders is Portugal. See M. Keating, “Sovereignty and

claim and counter claim among the EU and its constituent member states, it is argued, has transformed approaches to the classic post-Westphalian model of sovereignty.

Crucially, the major difference between classic sovereignty claims and the issue of ultimate authority in the European Union is that the issue has been played out, not in the political arena, where in the past rival claims gave rise to the many European wars over the centuries, not least the thirty years war whose resolution elevated the concept to a constitutional principle, but rather in the legal arena where the *imperator* claim was made by a Court and reduced to a legal doctrine – the principle of the supremacy of Community law – and Courts emerged as the protagonists in the ongoing debate. Supremacy, or primacy, the legal fact of sovereignty, is thus presented as sovereignty's only face, which has the effect of suppressing rather than effacing the political dimension.

The corollary of this claim by the ECJ presupposes the existence of a European legal order which is supreme over national law and national conceptualizations of the common good.<sup>6</sup> This, in turn creates friction with the homologous claims made by the Member States which still conceive of themselves as being the plenipotentiary units in their respective domains. In legal terms, what these rival claims to sovereignty ultimately boils down to is who in the polity has the ultimate authority to decide on questions regarding the site of decision-making and the status of decision-makers in their respective spheres; in essence who decides who decides?<sup>7</sup> In the final analysis is it the European Court of Justice or national supreme and constitutional courts (and it will inevitably be courts given legalistic turn which this issue has undergone in the EU) will have the final word on the locus of power or sovereignty within European constitutional space.

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Plurinational Democracy: Problems in Political Science”, in N. Walker (ed.), *Sovereignty in Transition*, supra, p. 194.

<sup>6</sup> See for example, the *Simmenthal* and *Factortame* decisions *supra*.

<sup>7</sup> M. P. Maduro, “Where to look for Legitimacy” in E. O. Eriksen, J. E. Fossum, and A. J. Menendez, (eds.), *Constitution Making and Democracy*, ARENA Report No. 5 (2002) (Oslo: ARENA), pp. 91.

Against this backdrop, this paper will proceed in the following manner. It will firstly examine the conceptual roots of the normative aspect of ultimate authority in the political theory of contractualism. It will then examine the doctrine of supremacy and its implicit claim to ultimate authority in the light of the modern normative ideal of constituent power. It will conclude by examining the constitutional conflicts in the European polity in the light of these claims.

A. Ultimate Authority and the third order of the state – ‘After God, the king’ (and then the people...)

Is the ultimate authority in a polity political or legal? Does the political ‘might’ dissolve into legal ‘right’ on the institution of a polity? What constitutes the institution of a polity? Can courts ‘create’ an ultimate authority in establishing a polity or must a pre-institutionalized “political” exist prior to institution which authority claims speak to once the authority has been instituted?

The idea of ultimate authority begs these questions. Given that “the question of constituent power is a question about the location of ultimate normative authority in a particular order”,<sup>8</sup> what the ECJ did in establishing the supremacy of the law of the polity over that of national legal system, was presupposing its normative authority to do so, raising the question of the possibility of a European constituent power.

The post-Westphalian arrangement resulted in a substantial change in the discourse of the legitimacy of authority which had, until that point, a strong theological character where the sovereign received their mandate from God through his representative on

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<sup>8</sup> D. Dyzenhaus, “The Politics of the Question of Constituent Power” in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007), p. 143.

earth, the Pope.<sup>9</sup> This shift in thinking about authority was more or less contemporaneous with the emergence of particular theories of the nature and status of power and sovereignty through the theories of theories of sovereignty and authority of Jean Bodin and Thomas Hobbes.<sup>10</sup>

The contractualist account of ultimate authority, initiated by Hobbes,<sup>11</sup> provided a key foundation for this secularizing shift. In this respect, contract theory provided that given that sovereign was instituted through a covenant, a pact with the people over who he ruled, the power of the sovereign was absolute and as such, the sovereign had no power to alienate his power in breach of the covenant; there was to be no agency under the social contract.<sup>12</sup> This idea stood in sharp contrast to the pre-Westphalian medieval system where authority was scattered across diverse sites both spiritual and temporal. This powerful idea set the foundations for the internal arrangements of the emerging nation state and also for external inter-state relationships providing the basic grammar of international law.

The legitimation of authority through the notion of 'surrendered self-governance' in contract theory, was further developed by John Locke who insisted on the residual right of revolution of the contractors where the power they contracted to the sovereign was

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<sup>9</sup> See G. Buijs, *supra*. Carl Schmitt is one of the main modern proponents of the idea that the enlightenment ideals are simply secularized theological concepts. See his *Political Theology* [1922], (Chicago, IL: University of Chicago Press, 2005).

<sup>10</sup> As Van Creveld notes, "In a world where God is no longer capable of providing a consensual basis for political life, Bodin wanted to endow the sovereign with His qualities and put him in His place, at any rate on earth and as pertained to a certain well-defined territory." M. Van Creveld, *The Rise and Decline of the State*, (Cambridge: Cambridge University Press, 1999), 177. In this regard Neil MacCormick notes the temporal coincidence between the topography of the European political landscape and the rise of the normative theory of sovereignty. See N. MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999), p. 123-124.

<sup>11</sup> See Q. Skinner, "The State" in T. Ball, J. Farr and R. Hanson, (eds.), *Political Innovation and Conceptual Change*, (Cambridge: Cambridge University Press, 1989), p. 116-121.

<sup>12</sup> "[t]he Sovereign, in every Commonwealth, is the absolute Representative of all the subjects; and therefore no other, can be Representative of any part of them, but so far forth, as he shall give leave", T. Hobbes, *Leviathan*, R. Tuck (ed.), (Cambridge: Cambridge University Press, 1997), 156. However, the absoluteness of the sovereign in this ways is tempered, not by other sovereigns but by the "unwritten Law of Nature", *Ibid.* 156. This law contains particular normative goods such as "Equity, Justice, Gratitude, and other morall Vertues on these depending, in the condition of meer Nature", p. 185.

abused<sup>13</sup> which in turn, inspired the U.S. and French revolutionaries, particularly the Abbé de Sieyès and Thomas Paine<sup>14</sup> who refined the idea into what has become known in modern constitutionalism as the *pouvoir constituant*, the constituent power that underpins and initiates the particular arrangement or ‘contract’ by which a polity governs itself.<sup>15</sup> Thus, in modernity the idea of the constituent power as providing the normative justification for the ultimate authority within the polity be it king, parliament or constitution, compatible as it is both with the idea of contractualism and the post-Westphalian settlement has become one of the most enduring and powerful political concepts in modernity as the basis for a principle of political organization and constitutes the foundation of both modern constitutional and democratic practices. However, notwithstanding its status as a political ideal *par excellence*, its essence remains obscure.

*Qu’est-ce que le pouvoir constituant?*

The idea of the constituent power in the 21<sup>st</sup> century is as deeply contested a concept as the idea of constitutionalism and democracy themselves.<sup>16</sup> The essence of the disagreement on the idea of constituent power can be expressed in terms of two opposing theses relating to the paradox of constitutionalism. On the one hand, representing a Kelsenian approach to constituent power is the notion that the constituent power, being the founding power of a polity, ceases to exist once the polity has been constituted and is essentially consumed by the institutions of the polity (the assimilation

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<sup>13</sup> “For since it can never be supposed to be the Will of Society, that the Legislative should have a Power to destroy that, which every one designs to secure, by entering into Society, and for which the People submitted themselves to the Legislators of their own making; whenever the Legislators endeavour to take away, and destroy the Property of the People, or reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence”. J. Locke, *Two treatises of Government*, P. Laslett (ed.) (Cambridge: CUP, 1988), 413.

<sup>14</sup> Sieyès, E. J., *What is the Third Estate?* [1789], M. Blondel trans., (London: Pall Mall Press, 1963) and T. Paine, *The Rights of Man, Common Sense and other Political Writings I*, M. Philip (ed.), (Oxford: Oxford University Press, 1995).

<sup>15</sup> For a recent treatment of the notion of the constituent power and its role in modern constitutionalism see M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007).

<sup>16</sup> See N. Walker, “Post-Constituent Constitutionalism? The Case of the European Union” in M. Loughlin and N. Walker (eds). *The Paradox of Constitutionalism, Ibid.* 248-249.

thesis), whereas on the other hand, the Schmittian account of constituent power holds that there is a permanent dualism between constituent power and constituted power, that the constituent power precedes and is supreme over the constituted power which the constituent power comes to the fore in the state of exception (the dualist thesis).<sup>17</sup>

The constituent power, unlike a *demos*, is an *institutional concept* and, accordingly the identification of the constituent power of a polity is made by *the institutional structure which the constituent power legitimates*. *There cannot be a constituent power without a constituted power as it is the constituted power which gives the constituent power its expression and status as constituent power*. Thus, the dualist thesis is rejected as it is submitted, it constitutes a form of political essentialism.<sup>18</sup>

Thus, the creation of a constituent power in the people corresponds to the recognition of the people *qua* constituent power by the institutional framework *ex post*. In this sense, the concept of constituent power operates according to a *logic of attribution*.<sup>19</sup> If the constituent power only ever becomes the constituent power *after* the political act which makes it so, then this designation can only ever be made by the constituted power which owes its genealogy to the constituent power.<sup>20</sup> Even if the sovereign is the constituent subject, who “determines the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety”<sup>21</sup>, this determination always occurs as an *a posteriori* designation by the structure itself. Thus, it

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<sup>17</sup> According to Schmitt, “the concrete existence of the politically unified people is prior to every norm”. C. Schmitt, *Verfassungslehre* [1928] (Berlin: Duncker & Humboldt, 1993), 121 as cited by Hans Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood” in M. Loughlin and N. Walker, above, p. 9. See also David Dyzenhaus’s contribution to the same volume.

<sup>18</sup> The German academy is particularly guilty in this respect. As representative of this approach, see D. Grimm, “Does Europe Need a Constitution?”, 1 (1995) *European Law Journal*, 282-302 and D. Grimm, “Integration through Constitution” (2005) 3 *ICON* 191.

<sup>19</sup> This attributional nature of sovereignty was extensively considered by Kelsen in his *Pure Theory of Law*, [1960] M. Knight trans. (Berkeley, CZ: University of California Press, 1970), 297.

<sup>20</sup> In this words of one author, “there can be no “people” prior to the imputation of a will to them” to which we can add “by the *pouvoir constitué*”. See E. Christodoulidis, “The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse” (2001) 11 *Kings College Law Journal* 130.

<sup>21</sup> A. Kalyvas, “Popular Sovereignty, Democracy and the Constituent Power” (2005) 12 *Constellations*, 223 at 226.

is always a retrospective notion which speaks to a “past which has never been a present”.<sup>22</sup> This is because, as Arendt clearly notes,

Those who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out to achieve. The vicious circle in legislating is present not in ordinary lawmaking, but in laying down the fundamental law, the law of the land or the constitution, which from then on, is supposed to incarnate the ‘higher law’ from which all laws ultimately derive their authorship.<sup>23</sup>

Hobbes recognized the institutional nature of the constituent power in arguing that the commonwealth is instituted by a “multitude” which, once instituted “are derived all the Rights, and Facultyes of him, or them, on whom the Sovereigne Power is conferred by the consent of *the People* assembled”<sup>24</sup> which constitutes “more than Consent, or Concord; it is are all Unities of them all, in one and the same Person, made by Covenant of every man with every man.”<sup>25</sup> Moreover, if the commonwealth is dissolved, the people “return to the confusion of a disunited Multitude”.<sup>26</sup>

Following this institutional attributive logic, the constituent power must always be a *pre-supposition* or an *assumption* rather than an empirically identifiable concept. In this way it becomes a historical postulate rather than an ontological reality. Thus, the constituent power, is present only through its designation as such and is therefore representational.<sup>27</sup> As such there is no direct access to the constituent power, it is only accessible by way of its representations in the form of *ex post* designations.<sup>28</sup> Thus, following the institutional logic of the constituted power, the identification of the constituent power as ‘the people’ as derived from a heterogenous multitude is essentially

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<sup>22</sup> M. Merleau-Ponty, *Phenomenology of Perception* [1945] C. Smith, trans. (London: Routledge, 1989), 242 cited in H. Lindahl, “Towards and Ontology of Collective Selfhood” in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism*, *supra*, 19.

<sup>23</sup> H. Arendt, *On Revolution*, (London/New York: Penguin Books, 1990), 183-4.

<sup>24</sup> Hobbes, *Leviathan*, p. 121.

<sup>25</sup> *Leviathan*, 120.

<sup>26</sup> *Leviathan*, 122.

<sup>27</sup> H. Lindahl, “Sovereignty and Representation in the European Union” in N. Walker (ed.), *Sovereignty in Transition*, p. 98.

<sup>28</sup> *Ibid.*

a form of *reification*.<sup>29</sup> The quasi-mythical nature of the constituent power was recognized by Hobbes who co-opted the myth of the biblical sea-monster, the Leviathan, to describe the result of the exercise of constituent power.<sup>30</sup>

This idea is borne out by the fact that there is simply no stipulative empirical criteria by which one can classify the constituent power independently of the constituted power. For example, the revolutionary events in 18<sup>th</sup> century France and the U.S were not replicated in many modern European nations which nevertheless cannot be said to lack a constituent power.

The designation of the constituent power by the post-constituted institutional arrangement takes the form of a *speech act*, an utterance with performative force which retrospectively creates in a normative sense, the constituent power.<sup>31</sup> This speech act can only be made outside of the constituent power itself. As Claude Lefort notes:

The fact that [a polity] is organized as one despite (or because of) its multiple divisions and that it is organized as the same in all its multiple dimensions implies a reference to a place from where it can be seen, read and named. This symbolic pole proves to be power, even before we examine it in its empirical determinations ...; power makes a gesture towards an *outside (un dehors)*, whence [a polity] defines itself. Whatever its form, [power] always refers to the same enigma: that of an internal-external articulation, a division which institutions a common space.<sup>32</sup>

The “*dehors*” is the institutionalized polity which is looking externally to its pre-existence. The unity of the constituent power can only ever be seen as a unity from a perspective beyond the constituent power; institutionalized polity.

As a speech act or claim, its status relates to its “internationalization” by social agents, as constituting the constitutive theory of the *praxis* of the acceptance of authority.

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<sup>29</sup> H. Lindahl, “Sovereignty and Representation in the European Union”, pp. 95.

<sup>30</sup> See D. Dyzenhaus, “The Politics of the Question of Constituent Power” in Loughlin & Walker, *supra* 138-139.

<sup>31</sup> For a similar approach to the broader concept of sovereignty see W. G. Werner and J. H. De Wilde, “The Endurance of Sovereignty” (2001) 7 *European Journal of International Relations* 283-313 and N. Walker, “Late Sovereignty in the European Union” in N. Walker (ed.), *Sovereignty in Transition*, p. 3-33.

<sup>32</sup> C. Lefort, *Democracy and Political Theory*, D. Macey trans. (Cambridge: Polity Press, 1988), 225 as cited by Lindahl, “Sovereignty and Representation in the EU” pp. 97.

B. Ultimate Authority in the European polity: the (im)possibility of a European constituent Power

By introducing the supremacy of the law of the Treaties over national law, including national constitutional provisions, the European Court of Justice made a claim that the institutional structure was to be considered the ultimate authority in the European polity.<sup>33</sup> This position consolidated the Court's claim to sovereignty which it had begun by establishing the special nature of the polity's legal system and the direct effect of its legal provisions on the territories of the member states in specific circumstances.<sup>34</sup> In the seminal decision of *Costa v. E.N.E.L.*, the court found that:

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Moreover:

The stemming from the Treaty, an independent source of law, could not, because of its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.

This claim to the ultimate normative authority in the polity necessarily raised the question of the exercise of a constituent power<sup>35</sup> which would be credited as having created this institutional normative authority and therefore legitimizing it. Clearly in this decision the Court was alluding to something beyond the simple text of the Treaties to justify the supremacy doctrine which raises the question of a European constituent power.

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<sup>33</sup> See the *Costa v. ENEL*, *Simmenthal* and *Factortame* decisions above.

<sup>34</sup> Initiated in the seminal *Van Gend en Loos* decision. Case 26/62, [1963] ECR 1.

<sup>35</sup> Dyzenhaus, "The Politics of the Question of Constituent Power" *supra*, p. 143.

In considering the notion of a European constituent power, I will address two particular issues. Firstly, the very possibility of a European constituent power will be considered and subsequently the nature of such a putative constituent power will be examined.

For some, the very idea of a European constituent power is utterly preposterous given that any authority the polity has is a *derivative* authority derived from the member states who still remain the final arbiters of what happens on their territory.<sup>36</sup> Thus, discussion of a European constituent power is a “quixotic tilting at windmills”<sup>37</sup> which cannot and should not even attempt to replicate the ideals of political community achieved at the level of the nation state.

On this view, the establishment of the doctrine of supremacy by the ECJ is a mere functional tool to ensure that states comply with the provisions of the Treaty, a device which was developed in the context of the weak enforcement mechanism of the provisions of the treaty and the notoriously poor compliance record of states with ‘external’ legal systems such as international law.<sup>38</sup> As such, it cannot have a ‘thick’ normative base comparable to the constituent power which underpins the authority of national constitutions. Whatever justification for such authority exists, it comes nowhere near to ‘trumping’ the supreme normative authority of national constituent power.

This denial of the possibility of a European Constituent power, it is submitted is a form of “originalism or ... a metaphysics of presence”.<sup>39</sup> In holding to the idea of a parallel realm of the ‘purely’ political, this position is essentially a form of the dualist thesis outlined above. It fails to capture the institutional nature of a constituent power

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<sup>36</sup> See Grimm, *supra*.

<sup>37</sup> Walker, “Post-Constituent Constitutionalism? The Case of the European Union” in Loughlin and Walker, *The Paradox of Constitutionalism*, pp.259.

<sup>38</sup> See for example, T. Schilling, “The Autonomy of the Community Legal Order: An Analysis of Possible Foundations” (1996), 17 *Harvard International Law Journal*, 389.

<sup>39</sup> Lindahl, “Sovereignty and Representation in the EU”, *supra*, pp. 96-97.

operating according to a logic of attribution. Were one to attempt to conceptualize a European constituent power, the designation of any putative constituent power of a European polity would also be an *ex post*, attributive designation. As such then, were one to entertain the possibility of the existence of a European Constituent power, the actors which are *ex post* designated the constituent power, could not have conceived of themselves as being the constituent power.

Thus, considering the passage from the *Costa* decision, it can be convincingly argued that the Court of Justice in this case performed a speech act by attributing to the Member States the status of the constituent power of the polity. In creating the Community system, the Court retrospectively designated the status of constituent power to the Member states. This designation of the Member States as the constituent power represents an act of sovereignty, and act of seizing the initiative and creating a constituent power from the creation of the (then) community system.<sup>40</sup>

As such, and given the representational nature of the constituent power, the speech act doesn't refer to the current empirical reality of the Member states as individual sovereign member states under international law but as a non-empirical representative concept in the same way that "the people" is an abstract concept and not the empirical collectivity of individuals present within a Member State's borders at a particular moment.

As no one individual in the Hobbesian commonwealth could claim to be the constituent power, so no one Member state *qua* independent sovereign state could claim to be the constituent power of the European polity because it cannot represent the "Unitie of them all, in one and the same Person",<sup>41</sup> which could only be represented in the constituted power of the European polity. The Court, in its capacity as institutionalized speech actor of the constituted power, was external to the constituent

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<sup>40</sup> *Ibid.*, p. 111- 112.

<sup>41</sup> Hobbes, *Leviathan*, 120.

power itself and became a product of its exercise. This external reference point (from the perspective of the constituent power), within the institutionalized polity was the only viewpoint from where the individual member states *qua* constituent power could be “seen, read and named” as a unity and not as sovereign independent states under international law.

Moreover, along with designating a European constituent power in establishing the supremacy of European law, the Court also established the constitutive ideal which the regulative ideal of law purports to embody; the common good.<sup>42</sup> This common good, is contained in the objectives of the Treaty, the central part of which is the establishment and functioning of an internal market.

Thus, in the *Van Gend en Loos* the Court explicitly provided that the community constituted a new order, “the subjects of which comprise ...*Member States [and] their nationals.*”<sup>43</sup> In this sense the beneficiaries of a European common good are both the states and the nationals of the units which constitute the European Constituent power.<sup>44</sup> Like the constituent power, the common good is determined and designated by the constituted power. Moreover, the reference to a European peoples, particularly in the preamble to the Rome Treaty, notwithstanding the usage of the plural relates to a *normative unity* which is indicative of the constituent power.<sup>45</sup>

In sum, given the institutional nature of the notion of a constituent power and the *ex post* attribution of a political act as the constituent power through a speech act, there is no theoretical barrier to a European constituent power, indeed, it would seem that the Court’s activity in *inter alia*, establishing the supremacy of European law is

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<sup>42</sup> On the notions of constitutive and regulative ideals, see H. Lindahl and B. Van Roermund, “Law without a State?: On Representing the Common Market” in Z. Bankowski and A. Scott (eds.), *The European Union and its Legal Order: The Legal Theory of European Integration*, (Oxford: Blackwell, 2000), 1-16.

<sup>43</sup> *Van Gend en Loos*, *supra*, p. 12-13.

<sup>44</sup> This notion was subsequently bolstered by political actors with the establishment of European citizenship in the Treaty of Maastricht. See Articles 17-22 ECT, O. J. C 325/46, 24.12.2002.

<sup>45</sup> See Lindahl, “Sovereignty and Representation in the EU”, p. 102.

paradigmatic the designating act of constituent power. In this sense, “[p]ositively expressed, the Community Treaty is, from the point of view of the structure of an act of collective self-determination, as much (or as little) a constitution as that of a nation state.”<sup>46</sup>

However, as noted above, the assertion of a European constituent power does not imply the assimilation or subsumption of the Member State into a European federal state. The national units of the Member States, as part of the European constituent power, still remain independent units with their own conceptions of the constituent power. This has inevitably resulted in contested claims about ultimate authority within the EU constitutional space and will be considered in the next section.

### C. Supremacy, constituent power and constitutional conflict

Arguably, the nation state has been the closest entity in history to actually realizing ultimate authority in theory in practice and it is this trait which in many ways has state the concept of state apart from any of its predecessors.<sup>47</sup> In claiming the supremacy of European law, it was clear that the Court was referring to the ultimate authority claims of the nation state.

Thus, as noted above, acceptance of the claim by the Court, a belief that the claim is authentic, is an essential aspect of the concept. In this way the notion of a European constituent power, as the normative justification for the doctrine of the supremacy of European law has to be ‘sold’ to those whom the constituent power putatively represents. As one commentator notes, “to put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it.”<sup>48</sup>

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<sup>46</sup> *Ibid.*, p. 110.

<sup>47</sup> See M. van Creveld, *The Rise and Decline of the State*, *supra*.

<sup>48</sup> K. Alter, “The European Court’s Political Power” (1996) 19 *West European Politics* 458, 459.

In terms of the acceptance of normative justification for the claim of ultimate authority through the acceptance of the supremacy doctrine, the crucial actors are national courts and the mechanism to signal such acceptance is the preliminary reference procedure contained in Art. 234 EC.<sup>49</sup> In this sense, national judicial bodies had to share the ECJ's designation of a European Constituent power legitimizing the supremacy doctrine.

It would, perhaps, be facile to assert that the case of *Brunner v. The Treaty on European Union*<sup>50</sup> decided by the German Federal Constitutional Court (GFCC) was the turning point in the tacit acceptance of a European constituent power, but it was certainly probably the most salient consideration of the idea.<sup>51</sup> In the case, the court explicitly stated that the polity, in its current form did not, and could not, have a constituent power due its lack of a *demos*<sup>52</sup> which has in turn been criticized for the essentialist approach to constituent power considered above.<sup>53</sup> Notwithstanding this particular critique of the judgment, the Court did, however, launch a discourse on the ontology and development of a European constituent power, which had hitherto existed, to a greater or lesser extent only at the European level.<sup>54</sup> Thus the Court found that:

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<sup>49</sup> The relevant part of Article 234 provides that “[w]here such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.” O. J. C 325/128 24.12.2002.

<sup>50</sup> [1994] 1 C.M.L.R. 57.

<sup>51</sup> The Court had, along with others, questioned the ability of EU to controvert constitutional provision, for example, those protecting human rights. See the ‘Solange’ decisions; [1974] 2 C.M.L.R 540 and [1987] 3 C.M.L.R 225. Moreover, various national courts have followed suit. For recent examples see the decisions on the European Arrest Warrant, see J. Komarek, “European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony”, *Jean Monnet Working Paper*, 10/05.

<sup>52</sup> *Brunner v. The European Union Treaty*, para. 41. For commentary see J. Weiler, “Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastricht Decision” *European Law Journal* 1:3 (1995), 219-258.

<sup>53</sup> On this see Lindahl, “Sovereignty and Representation in the EU”, *supra*.

<sup>54</sup> Of course, the issue of supremacy had been raised in several cases before various national courts. However, these particular decisions tended to be resolved using legalistic arguments regarding the particular constitutional arrangements. See for example the reasoning by the House of Lords in the Factortame decision cited above who used a legalistic argument based on the principle of estoppel for allowing for the supremacy of European law: “If the supremacy within the European Community of

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. That also entails that the decision-making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood, and therefore that the citizen entitled to vote can communicate in his own language with the Sovereign authority to which he is subject. Such factual conditions, *in so far as they do not yet exist, can develop in the course of time within the institutional framework of the European Union.* Such development depends to no small extent on there being a process for imparting the objectives of the Community institutions and the effects of their decisions to the individual nations ... What is decisive is that the democratic bases of the European Union are built-up in step with integration, and that as integration proceeds a thriving democracy is also maintained in the member-States.<sup>55</sup>

Implicit in this concern with democracy at the EU level, is the possibility of a European constituent power which would underpin the powers exercised by the EU. The Court found that the conditions for such a complete assimilation of national constituent power by a European constituent power were not yet ripe. However, this did open up between the European Court of Justice and national courts with respect to the nature and dimensions of a putative European constituent power which would underpin the European legal system which would proceed on in an ethic of constitutional pluralism.<sup>56</sup>

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Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community." *Factortame Ltd. V. Secretary of State for Transport* (No. 2) [1991] 1 AC 603, per Lord Bridge, 658. Rather, what the German Federal Constitutional Court did in this decision was to specifically address the non-legal aspects of the supremacy of European law in terms of the demos and a European constituent power.

<sup>55</sup> Brunner *Supra*, para. 41-43. *Emphasis Added.*

<sup>56</sup> See N. MacCormick, *Questioning Sovereignty*, *supra*. See also, See also N. Walker, "The Idea of Constitutional Pluralism" (2002) *Modern Law Review* 65: 3, 317; C. Richmond, "Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law" (1997) 16 *Law and Philosophy* 377; M. Kumm, "Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice" (1999) 36 *Common Market Law Review*, 351 and "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", (2005) 11:3 *European Law Journal* 262-307; M. Maduro,

There are three basic elements to the constitutional pluralist discourse in the European polity.<sup>57</sup> The first is that the hierarchical claims of the ECJ through the supremacy doctrine must be rejected as not constituting an adequate explanatory account of the current distribution of power (including ultimate authority) in the European constitutional space. Secondly, the pluralists argue for the mutual respect and recognition of the various authoritative sites in Europe – both national and supranational. Finally, the pluralist discourse presupposes an epistemic dimension which insists upon the incommensurability of the claims of the various sites of authorities in Europe and that.<sup>58</sup>

It is only possible to identify the different sites as different units if we already acknowledge that the underlying symbolic work involved in representing each of these sites as units – and so also as *unities* – requires a different way of knowing and ordering, a different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unit(ies) continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claims can be reconciled.

In this way, the pluralist discourse rejects the supremacy doctrine of the Court and its claims to authority as being too hierarchical and offending the epistemic pluralism prevalent in modern Europe. On this view, the implications of the supremacy doctrine, that the national judiciary should instigate legal “revolutions”<sup>59</sup> in their own constitutional systems resulting in a new constitutional settlement with EU law at the apex of the hierarchy of norms of this new settlement is categorically impossible, not just from a practical point of view but also from an epistemic point of view.

In the following section I propose to examine constitutional pluralism in terms of the discourse of a European constituent power.

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“Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in N. Walker (ed.), *Sovereignty in Transition*, pp. 501-537.

<sup>57</sup> See Walker, “The Idea of Constitutional Pluralism”, *supra*, pp. 337-338.

<sup>58</sup> Walker *Ibid*, pp. 338. For a lucid illustration of this epistemic pluralism see C. Richmond, and Maduro’s “alien” who is attempting to do just what epistemic pluralists claim is impossible, *supra*.

<sup>59</sup> D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin: Round Hall/Sweet and Maxwell, 1997) as cited by N. MacCormick, *Questioning Sovereignty*, pp. 110.

*The ontology of constitutional Pluralism: the exposure of the Constituent Power – a battle of speech acts*

With respect to the origins of authority of a legal system or polity, the “machine runs itself”<sup>60</sup> in the sense that it is not a quotidian concern of the constituted power. The examination of the origins of the constituent power constitute, as Carl Schmitt observed, the exceptional case.<sup>61</sup> Rather than constituting the rise of the constituent power as the dualist thesis insists, rather it is in such moments of (exceptional) high constitutional politics that the constituent power is *exposed* and (*re*)*examined* by the Court; even re-designated as the legitimating variable of the constituted power. Thus, in such ‘exceptional’ moments, such as the consideration of the overtly political nature of the normative justification of sovereignty in the *Brunner* decision, what really occurs is that the Court is called upon to examine the origins of the legal system and therefore the constituent power of the polity. In this sense, on examining the exposed constituent power, the designation could be amended, redefined or even designate the constituent power for the first time (at least by the authoritative dictate of a Court).

In this way, the exception relates to the speech act made by the judiciary in designating the constituent power of the polity. This only occurs when the ultimate authority of the polity is questioned and the constituent power exposed in rare cases such as the challenge posed by the supremacy doctrine developed by the European Court of Justice.<sup>62</sup> The nature of the speech acts in retrospectively designating the constituent power is of utmost performative force which “manifests itself in the capacity to create

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<sup>60</sup> C. Schmitt, *Political Theology*, p. 48.

<sup>61</sup> The connection between the sovereign and the exception is closely tied up with the work of Carl Schmitt which is brought into relief by the opening of his work on sovereignty; “Sovereign is he who decides on the exception”. C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* [1922], trans. G. Schwab, (Chicago: University of Chicago Press, 2005), p. 5.

<sup>62</sup> In fact in many ways this illustrates the novelty of the whole process of European integration in forcing what have previously be perceived as ‘settled’ polities, to excavate the foundations of their existence.

and shift the normative boundaries of a polity”.<sup>63</sup> It is an utterly political act.<sup>64</sup> When supreme Courts deal with the exposure of the constituent power in situations of constitutional conflict, and make a (re)designation of its provenance and nature, they embrace an “ineradicable moment of performativity”. In so doing they “seize the initiative”<sup>65</sup> and determine the constituent power as an *act of sovereignty* which instituted the polity.<sup>66</sup>

Thus, in constitutional conflicts as they occur in the European polity between supreme courts, what is at stake is a *discourse of competing speech acts*, competing acts of sovereignty over the nature, location and status of the constituent power which gave rise to their respective polities.

*Principled Collision: telos and the rules of the game*

The constituent power is not irrelevant, an accident or some mythical fable similar to folk tales but is the “result of an actual deed which brought it into being.”<sup>67</sup> It constitutes a human act but its *designation as a constituent power* is the result of a speech act.

If the discourse of supremacy and sovereignty in the EU constitutional space relates to the revelation of the constituent powers underpinning the various systems, further examination of the *essence* of constituent power is required in order to allow such discourse to take place.

The human acts which gave rise to the constituted power be they the handiwork of banal committees of lawyers or the heroic deeds of inspirational revolutionaries,

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<sup>63</sup> Lindahl, “Sovereignty and Representation”, p. 111.

<sup>64</sup> In this sense Lindahl recalls Arendt’s idea that action is the fundamental feature of political life. *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* 110-112. On the institution of ultimate authority by seizing the initiative, Dyzenhaus notes that this is even to be found in Hobbes. Dyzenhaus, *supra*, p. 138-143. Thus, in the (little known) review and conclusion to *Leviathan*, Hobbes admits that “there is scarce a Common-wealth in the world, whose beginnings can in conscience be justified”. *Leviathan*, p. 486. Thus, Hobbes recognizes that all authority, if one goes back far enough, came about as the result of a power grab. This has interesting implications for the normative theories of polities and demos which will be considered in the concluding charter.

<sup>67</sup> A. Kalyvas, “Popular Sovereignty, Democracy and the Constituent Power” (2005) 12 *Constellations* 223, 233.

constitute a “very special, real, and visible”<sup>68</sup> form of power. This power is not raw power or brute force but has a *telos* of its own; that of constituting the higher laws of a political community. The constituent power can be differentiated from other forms of naked power by its intrinsic drive to establish order, to create legality, and not simply exercise power for its own sake. Therefore the constituent power does have juridical significance in its ultimate destiny is to fulfill the idea of law. It is the *telos* of the constituent power which is of juridical significance for the *ex post* constituted power. These constraints constitute principle-type restraints which are immanent in the concept of constituent power and as such restrict the radical freedom usually associated with raw power. Another way to view this idea is that the constituent power is like the “voltage” of law; it is the potentiality of law rather than law itself in the same way that the unit of a ‘volt’ in electricity is the potential for electric energy rather than the energy itself.

These immanent principles of constituent power are exposed when the constituent power is exposed in situations of constitutional conflict such as those occurring within the European polity. These principles channel and guide the constituent power to its ends of legality and act as a form of self-limitation on the free exercise of power. They prevent the constituent power from losing sight of that which it has to accomplish in order to avoid the arbitrary and inconsequential exercise of power or a perpetual state of revolution.<sup>69</sup> This does not imply that the constituent power is restricted or constrained by external restraints but rather that it obeys an “inner, principled logic”.<sup>70</sup> Hannah Arendt provided a number of candidate principles immanent in the constituent power which included honour, glory, distinction, excellence, the love of equality and justice,<sup>71</sup> which conflated with Habermas’s work on the procedural

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<sup>68</sup> *Ibid.*

<sup>69</sup> Kalyvas, 235, citing Arendt.

<sup>70</sup> *Ibid.*, n. 83 pp 244.

<sup>71</sup> Kalyvas, pp. 235.

presuppositions of constitution making can provide a context within which the judicial discourse of a European constituent power can take place.<sup>72</sup>

In considering the immanent principles of the constituent power, Kalyvas stresses the idea of the coming together to found and establish, the joint enterprise of foundation, inherent in the etymology of the word “*constituere*”.<sup>73</sup> Applying this notion to the European Constituent power, it speaks to the *joint designation of the European Constituent power by all the interpretative sites engaged in constitutional conflict*. This simply mirrors the fact that European constitutionalism was developed both by the institutions of the European polity as well as those of the national Member states, particularly Courts.<sup>74</sup> In this sense, all the interpretative sites form part of the designation of the European constituent power and as such can perceive the political act of constitution also as one of *self-constitution*.<sup>75</sup> This creates the link between a European constituent power and national polities *qua* constituent power.<sup>76</sup> In considering this constituent power all the speech actors involved decide “which legal rights and higher laws they must *mutually concede to each other*”<sup>77</sup> in order to constitute the (European) polity. This requires mutual accommodation and adjustment towards each other’s positions. This mutual accommodation is driven by the teleology of arriving at a constituted power, at mutually constituting a polity. Thus, in designating the nature of the constituent power through its teleological principles, each of the actors are conscious of their role and aim; a European constituted power. In taking part in the designation process, the parties

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<sup>72</sup> For a similar exercise, albeit outside the context of the constituent power, Miguel Maduro has developed principles of “contrapunctual law” to govern the constitutional conflicts within the polity and Mattius Kumm has designed conflict rules to deal with the same situation. See. M. Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in N. Walker (ed.) *supra*, 501-537, at 524-531 and M. Kumm, “The Jurisprudence of Constitutional Conflict”, *supra*.

<sup>73</sup> Kalyvas, pp. 235.

<sup>74</sup> See on this M. Maduro, *We the Court*, (Oxford: Hart, 1998), Chapter 1.

<sup>75</sup> See Habermas, *Between Facts and Norms*, pp. 289. This notion is similar to Maduro’s principle of pluralism, “Contrapunctual Law”, 526-527.

<sup>76</sup> Maduro, “Contrapunctual Law”, 517.

<sup>77</sup> Kalyvas, p. 236. *Emphasis Added*.

Can rely only on the process itself and its implicit presuppositions, such as symmetry, autonomy, equality, mutuality, disagreement, discussion, and inclusiveness. They are all involved in the same activity of establishing new juridical foundations despite the fact that they may disagree on many other substantive issues. They have, therefore, to rely on the reciprocal process itself if they want to institute an inclusive constitution that will appeal to all the participants.<sup>78</sup>

Given this particular situation, two immutable principles emerge from the nature of the constituent power; equality and reciprocity. These principles will then feature as part of the constituted power. They are, in the constituent power, vague, amorphous, unthematized, in a sense, “incompletely theorized”<sup>79</sup> which must be given a more refined content in the activity of the polity. Thus, as amorphous principles of a European constituent power it is sufficient that each of the parties agrees upon and internalizes the teleological principles and abides by them. They will be particularized subsequently in determining the limits of incursion of the European constituent power upon the rival contestation of the national constituent power but *always within the context of the telos of a European constituent power*. The “higher laws” of constitutional conflict being then established by the participants, the content of the particular substantive issues at stake can then be given content through individual discussions between the parties respecting the basic rules of engagement.

Thus, when the European Constituent power is exposed in situations of constitutional conflict, these principles also surface and the supreme court dialogue or discussion proceeds on the basis of these principles.<sup>80</sup> In this sense, we can see how European constitutionalism does have a ‘law beyond law’ which provides the basis of engagement on the ongoing process of the interpretation and establishment of the European constituted power.

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<sup>78</sup> *Ibid.*

<sup>79</sup> Maduro, “Contrapunctual Law” 525.

<sup>80</sup> In this sense they are not to be seen as a “developmental framework, which would approach the politics of foundations in terms of the gradual evolution of a fundamental norm”. Kalyvas, FN, 83, 243.

When considering constitutional conflicts, *all* the participants involved must be conscious of the aim of the exercise, the designation of the European Constituent power which has as its drive, its destiny, the establishment of a European legal order. Thus, national courts should be cognizant of their role in the designation with the view to the establishment of the order.

In the discursive practices of the European constituent power, the ECJ constitutes a coordinator, as every discussion requires a chairperson, every counterpoint a *basso continuo*.<sup>81</sup> In the application of these principles to the constitutional conflicts in the European polity, the European Court of Justice has the important role of facilitator and coordinator. It provides guidance to courts regarding situations where the European constituent power is exposed. As such, it enjoys the status of *primus inter pares*, as it has an important coordinating function in the development of the constitution. However, such a position does not imply dominance or hierarchy, or perhaps more importantly, subsumption, and in developing the discourse of constitutional conflict it should exercise prudence.<sup>82</sup> This is because the European Court of Justice, as an instrument of the constituted power cannot transgress its limits and overstep the exercise of authority pursuant to the constituent power.<sup>83</sup>

Thus, the discourse which is based on these principles represents an ongoing refinement of the substantive nature of the European constitution. In this sense the precise content of the constitutional settlement is thrashed out through the discourse between the speech actors predicated on the principles emerging from the European

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<sup>81</sup> See Maduro, "Contrapunctual Law", who conceptualizes the engagement between the European Court and national courts as analogous to the musical style of counterpoint where different musical melodies are harmonized but where there is no hierarchy. It is the submission that even in the musical style of counterpoint that the *basso continuo* provides the base and point of reference for each individual melody.

<sup>82</sup> On the role of prudence in the exercise of sovereignty M. Loughlin, *The Idea of Public Law*, (Oxford: Oxford University Press, 2003).

<sup>83</sup> On the transgression of the limits of the sovereign in Hobbes, see Dyzenhaus (2007), 138-143.

constituent power. The development of a fundamental rights jurisprudence after conversations between the ECJ and the GFCC is a case in point.<sup>84</sup>

*Existential Irrelevance: the praxis of constituent power*

Having addressed the theoretical concerns which arise from the ultimate authority claims made by the European polity, and away from the high constitutional politics of the exception, it could be argued that a reasonably ‘thick’ idea of a European constituent power informs the *praxis* of agents in the European constitutional space.

Firstly, there has never been a naked challenge to the ECJ’s ultimate authority which has succeeded and resulted in a retreat of the doctrine by the Court.<sup>85</sup> The challenges to authority, such as they have been in recent years, to a large extent can be seen as “shots over the bows”<sup>86</sup> which do not necessarily undermine Member states recognition of the European polity’s claim to ultimate authority.<sup>87</sup> Moreover, de Burca speaks of the “residual and [even] *dormant*”<sup>88</sup> nature of the claims by national courts resulting in a change in the traditional understandings of sovereignty in terms of ultimate authority. This approach sees cases such as *Brunner* and its ilk, less as an attack on the foundations of the European constitutional structure and more of a communicative device used by Courts to signal a particular state of affairs, a form of communicative action based on principles close to those highlighted above which do not have an immediate impact in the case at hand.<sup>89</sup> In this way, Karen Alter draws analogies with the U.S., where the

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<sup>84</sup> Case 11/70, *International Handelsgesellschaft v. Einfuhr und Vorratstelle fur Getreide und Futtermittel*, [1970] ECR 1125. For an overview see P. Craig and G. De Burca, *EU Law*, (Oxford: Oxford University Press, 2003), Chapter 8.

<sup>85</sup> It is not clear the extent to which such a challenge would necessitate withdrawal from the polity by a Member State. The insertion of the primacy clause into the Constitutional Treaty is a testament to the endurance and success of the doctrine and the Court’s claim even if it was subsequently dropped in the reformulated ‘mini-treaty’. See *LeMonde*, 24.06.2007.

<sup>86</sup> G. de Burca, “Sovereignty and the supremacy doctrine of the European Court of Justice” in N. Walker, *Sovereignty in Transition*, p. 455.

<sup>87</sup> As noted, the *Brunner* decision in fact opened up a discursive space where the notion of a European constituent power could emerge.

<sup>88</sup> de Burca, “Sovereignty and the supremacy doctrine”, p. 455. *Emphasis Added*.

<sup>89</sup> For this position see K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, (Oxford, OUP, 2001).

supreme court employed a similar device in its decision-making process. Thus, in the seminal *Marbury v. Madison* decision, Alter claims that “Marshall .. knew that his ruling would be ignored. He asserted the right of the Supreme Court practise judicial review, but refrained from exercising this review in the case at hand.”<sup>90</sup> Thus, even if the high constitutional politics reveals a rather ‘thin’ European constituent power, the actual practice of actors may reflect a thicker conception.

Moreover, as noted above, the supremacy issue has generally only arisen in the reasonably exceptional context of the ratification of new Treaties or the amendment of older ones, or in the case of the European Arrest Warrant, the exercise of newer competences to regulate in newer areas which have not been the subject of much (or in some cases any) previous regulation.<sup>91</sup> In this sense, in event of the inevitable exposure of the constituent power which such a case presents, with the attendant possibility of its mutation or transformation in through discourse, it is important to reaffirm the *status quo* in terms of the constituent power of the designating institution for any such discourse to take place.

Thus, in many ways exceptional moments of the exposure of the European constituent power, as ‘high constitutional politics’, are, to many, an existential irrelevance; the fetish of legal theorists and Schmittian political theorists who dwell on the existential moments of crisis as if this related to the normal state of the polity. Such fetishists raise the constitutional conflicts into “metaphysical principles ... as if marital quarrels were seen not as an unavoidable aspect of living together, but as its very basis”.<sup>92</sup>

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<sup>90</sup> *Ibid*, pp. 19.

<sup>91</sup> On the European Arrest Warrant see the judgments of the German Federal Constitutional Court, the Polish Constitutional Tribunal and the Cypriot Supreme Court. The Warrant itself was the subject of a preliminary ruling on the grounds of having a wrong legal basis which was dismissed in by the Court. See Case C-303/05, *Advocated voor de Wereld*, Judgment of 3 May 2007. For comment see J. Komarek, “European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony”, *Jean Monnet Working Paper*, 10/05.

<sup>92</sup> F. R. Ankersmit, *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford: Stanford University Press, 1996), 127.

Thus, arguably, for the large majority of courts the fault lines of the constituent power are not visible. In their quotidian encounters with European law, under the Art. 234 procedure, in an act of recognition of the supremacy of European law, they essentially 'by-pass' the constitutional court and go directly to the ECJ under the preliminary reference procedure.<sup>93</sup> H. L. A. Hart described an analogous situation in South Africa in the 1950s where rival sites of authority claimed the ultimate authority:

It may be that, over certain constitutional issues and only over those, there is a division among the judiciary ... [in south Africa a special court] heard ... appeals and reversed the judgements of the ordinary courts; in turn, the ordinary courts declared the legislature creating the special courts invalid and their judgements as a legal nullity. Had this process not been stopped ... we should have had an endless oscillation between two views of the competence of the legislature and so of the criteria of valid law. The normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system's rule of recognition, would have been suspended. *Yet the great mass of legal operations not touching on this constitutional issue would go on as before ...* the expression 'the same legal system' is too broad and elastic to permit unified official consensus on *all* the original criteria of legal validity to be a necessary condition of the legal system remaining 'the same'. All we could do would be to describe the situation as we have done and not it as a substandard, abnormal case containing within it the threat that the legal system will dissolve.<sup>94</sup>

This *praxis* based approach argues that is that the 'standoffs' between the ECJ and national constitutional courts and the grandstanding on either side is more akin to a scuffle on the sidelines,<sup>95</sup> and the day-to-day life of the polity reflect the recognition of a thick constituent power.

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<sup>93</sup> In this vein, Alter (2001) notes the liberty of lower national courts to circumvent their higher courts by referring directly to the ECJ in a situation she likens to a parental battle. Alter (2001), pp. 49. Elsewhere, Weiler has argued that this empowerment of lower courts and the relative freeing from superior courts in their national legal system is an explanatory factor of the success of EU law embedding itself in national legal systems. Weiler, *The Constitution of Europe*, (Cambridge, CUP, 1999), pp. 197.

<sup>94</sup> Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1994), pp. 122-123. *Emphasis Added.*

<sup>95</sup> In this respect Walker notes that " ... while these cases may be the most spectacular, they are merely the tip of the relational iceberg of constitutional pluralism. There are many other contexts of interaction between sties where the overlap of jurisdiction, interests and aspirations provides scope for competition and co-operation and where other mechanisms and practices of communication hold sway .... The

Moreover, as noted above, the issue of ultimate authority and constituent power has largely taken place in the judicial sphere in which political actors have been largely uninvolved.<sup>96</sup> No political actor has reacted to 'losing' a legislative battle in Brussels by specifically legislating against this decision at the national level.<sup>97</sup> In fact it would appear that the only time that political actors really addressed the primacy of EU law was during the promulgation of the Constitutional Treaty where it was contained in a Article of the Treaty and also during the negotiations during the Berlin summit for a 'mini-Treaty' where the idea to include a reference to the primacy of European law was dropped.<sup>98</sup>

#### D. Conclusion

In this chapter I attempted to explore the normative justification for the ultimate authority in the notion of constituent power. This constituent power precedes and legitimates the polity as a community giving the constituted power to themselves. In examining this concept I argued that this concept does (has to) operate according to a logic of attribution as collective self-determination always "... excludes a We says 'we'."<sup>99</sup> In this sense, it is a representational concept and does not correspond to an empirical reality. It is an ontological assumption. Conceptualizing the constituent power in this way, it was subsequently argued, opens the possibility for a European constituent power which underpins the European polity. If the constituent power is about seizing the initiative in a retrospective speech act, then the supremacy doctrine is probably the most salient of a number of doctrines from the court which does just this. However, this particular constituent power co-exists rather than replaces the national constituent power.

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relations between sites are often structured only very indirectly by authoritative legal rules." Walker, "Late Sovereignty in the European Union", pp. 29.

<sup>96</sup> Kumm, "The Jurisprudence of Constitutional Conflict", pp. 280.

<sup>97</sup> *Ibid.* This apathy is largely due to the perception that MS are part of the ultimate authority through the make up of its legislative organs, particularly the Council. This fact in a sense is a striking illustration of Weiler's application of 'exit and voice' to the European polity. See Weiler, *The Constitution of Europe*.

<sup>98</sup> See *LeMonde*, 24.06.2007.

<sup>99</sup> Lindahl, "Sovereignty and Representation in the EU", 110.

Moreover, the European constituent power has been developed in conjunction with the Member states in an ongoing discourse between European and national courts. This discourse, it was argued, is shaped by the principles immanent in the idea of constituent power which form the basis for the development of an increasing thick notion of a European constituent power.