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A Theoretical and Doctrinal Sketch

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I. Introduction

The study of principles is a well established way of legal scholarship striving for autonomy and searching for a disciplinary proprium behind the multifariousness of norms and judgments.[2] Hence, there is no dearth of exquisite commentaries, monographs and handbooks on principles of EU law.[3] This article seeks to further the understanding of the European legal discourse on principles as such, illuminating its dimensions, foundations and functions (II.). Further it analyses the diffuse use of the term 'principle' in Union law. With reference to a political act, the codification of Article 6(1) EU by the Amsterdam Treaty, it then defines as *founding principles* those norms of primary law which, in view of the need to legitimise the exercise of any public authority, determine the general legitimatory foundations of the Union (III). Finally, the viability of a comprehensive doctrine of principles for Union law *and* Community law will be debated (IV.).

II. Theoretical Issues Regarding the Union's Founding Principles

1. Founding Principles and Constitutional Scholarship

This article understands European *primary* law as *constitutional* law. Applying the category of *constitutional law* to European primary law certainly needs to be justified, not least because of the failure of the Treaty establishing a Constitution for Europe. As a scholarly concept, however, it does not require the blessing of politics, and the European Council cannot authoritatively decide whether the treaties on which the Union rests are of a "constitutional character".[4] In addition, what the European Council makes out as a "constitutional concept" is hardly relevant from the perspective of legal research. According to the Council's conclusions

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[2] On this programme I Kant, *Kritik der reinen Vernunft* (2nd ed 1787 = Edition B) 355 *et seq*, esp 358.

[3] See within the extensive literature the still prominent perspective of *common or general* principles U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (2000); X Groussot, *General Principles of Community Law* (2006); T Tridimas, *The General Principles of EU Law* (2006); R Gosalbo Bono, 'The Development of General Principles of Law at National and Community Level', in R Schulze and U Seif (eds), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* (2003), 99; already from the perspective of *constitutional* principles B Beutler, in H von der Groeben and J Schwarze (eds), *Kommentar zum EU-/EG-Vertrag* (2003), Art 6 EU; C Calliess, in *id* and M Ruffert (eds), *EUV/EGV* (2007), Art 6 EU; M Hilf and F Schorkopf, Art 6 EU as well as I Pernice and F Mayer, nach Art 6 EU, both in E Grabitz and M Hilf, *Das Recht der EU* (looseleaf, last update May 2008); S Mangiameli (ed), *L'ordinamento Europeo: I principi dell'Unione* (2006); J Molinier (ed), *Les principes fondateurs de l'Union européenne* (2005); H Bauer and C Calliess (eds), *SIPE 4: Constitutional Principles in Europe* (2008).

[4] "The TEU and the Treaty on the Functioning of the Union will not have a constitutional character", European Council, 21/22 June 2007, Presidency Conclusions (11177/1/07 REV 1), Annex I: IGC Mandate, para. 3, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/94932.pdf (29 January 2009). On the differences between the Treaty establishing a Constitution for Europe of 2004 and the Lisbon Treaty G de Burca, 'General Report', in: HF Koeck and MM Karollus (eds.), *Preparing the European Union for the Future, FIDE XXIII Congress Linz 2008* (2008), 385, 391 et seq.

the constitutional concept of the constitutional treaty "consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution'"[5]. In this view neither Germany (*basic law*, ger. *Grundgesetz*) nor Austria would have a constitution.[6] Furthermore, no relevant actor challenges the jurisprudence of the ECJ[7] that conceives the EC-Treaty as a "constitutional charter".[8]

Approaches in legal scholarship like the constitutional law approach must be assessed on the basis of scholarly arguments. Certainly, the constitutional law approach demands supportive elements in its object of investigation. These are not in short supply. The primary law justifies the exercise of public power, it legitimizes acts of the Union, it creates a citizenship, it grants fundamental rights, and it regulates the relationship between legal orders, between public power and the economy, and between law and politics. Numerous common elements of EU primary law and national constitutions emerge in a functional comparison. Yet, not only the functions but also the "semantics" support a constitutional law approach: the Treaty of Amsterdam provides in Art. 6 (1) EU the key concepts of constitutional discourse: freedom, democracy, rule of law, protection of fundamental rights. Correspondingly, the constitutional *semantics* of the ECJ has just made a big step with the terms *constitutional principle* and *constitutional guarantee*.[9]

The constitutional interpretation is an *academic postulate* which is to be judged by its analytical, constructive, and normative merits. Thus the task of a doctrine of European founding principles is also to prove the usefulness of the constitutionalist approach. The thesis is that primary law's constitutional character[10] manifests itself especially clearly in the founding principles. Their academic development as *constitutional* principles generates insight since this perspective leads to the relevant questions, knowledge and discourses. The conception of primary law as constitutional law defines it as the framework for political struggle, thematises foundations, aims at self-assurance, mediates between societal and legal discourses.[11]

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[5] *Ibid*., para. 1; according to the German government this would include the symbols and the denomination "European law", Denkschrift der Bundesregierung zum Vertrag von Lissabon vom 13. Dezember 2007 [Memoir of the Federal Government concerning the Treaty of Lisbon of 13 December 2007], cited after *Bundesrat Drucksache* 928/07, 133, 134.

[6] On the more than one hundred Austrian federal constitutional laws E Wiederin, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Österreich', in A von Bogdandy *et al* (eds), *Handbuch Ius Publicum Europaeum* (2007) vol I, § 7, paras 44 *et seq*.

[7] ECJ, Case 294/83, Les Verts/Parlament, Slg. 1986, 1339, para 23; *Agreement relating to the creation of the European Economic Area I* [1991] ECR I-6079, para 21.

[8] Similarly M Dougan, 'The Treaty of Lisbon 2007', (2008) 45 *CMLRev* 617, 698.

[9] ECJ, Cases C-402/05 P and C-415/05 P, *Kadi v Council* [2008] ECR I-0000, para 285, 290.

[10] Opinion 1/91, above n 7, para 21.

[11] P Dann, 'Überlegungen zu einer Methodik des europäischen Verfassungsrechts', in Y Becker *et al* (eds), *Die Europäische Verfassung – Verfassungen in Europa* (2005), 161 at 167.

At the same time, this approach pursues a strategic academic objective. The development of European constitutional law into a sub-discipline demands a specific *focus*,[12] just as the development of European law[13] and then European Community law[14] into sub-disciplines did before. The treatment of primary law as constitutional law should bring about a new quality of understanding and exposition and promote the overcoming of understandings like "law of integration" or "single market law".[15] For a doctrine of principles not only observes, it is part of the process of constitutionalisation. This leads to the next point.

2. Three Functions of a Legal Doctrine of Principles

Legal doctrines of principles are in general part of discourses internal to law, ie operations of the legal system. Such scholarship differs from approaches analysing the legal material from a social science perspective which for instance trace the factual constraints or motives affecting the law. A principles-oriented scholarship does not claim to prove causalities.[16] It does not deal with empirical *causes*, but with argumentative *reasons*; *causes* and *reasons* relate to different cognitive interests and structures of argumentation.

Rather, there are correlations with legal philosophy which nowadays often argues based on principles.[17] The relationship between the principles discourse in legal philosophy and in legal doctrine is as blurred as it is complicated. The difference cannot lie in the principles as such: they always include democracy, the rule of law, fundamental rights, etc. One difference is that a philosophical discourse on principles can proceed deductively, whereas a legal discourse on principles has to be linked to the positive legal material made up of legal provisions and judicial decisions; it is hermeneutical and refers to the law in force. A procedural difference lies in the fact that a juridical conception of principles will eventually have to assert itself in judicial proceedings. Moreover: important as it is that the principles constructed by legal scholarship reflect their possible philosophical bases, it is as essential that, in pluralistic societies, the legal principles keep their distance to philosophical and

[12] A separate journal exists since 2005, the European Constitutional Law Review. Compare further the approach in international law S Kadelbach and T Kleinlein, 'International Law a Constitution for Mankind? An Attempt at a Re-appraisal with the Analysis of Constitutional Principles', (2007) 50 *German Yearbook of International Law* 303.
[13] H Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl', (1951–1952) 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1 at 23 *et seq*.
[14] HP Ipsen, *Europäisches Gemeinschaftsrecht* (1972) 4 *et seq*.
[15] F Snyder, 'General Course on Constitutional Law of the European Union', in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (1998) vol VI, 41 at 47 *et seq*; S Douglas-Scott, *Constitutional Law of the European Union* (2002).
[16] Broader the sociological term whereby principles encompass empiric, causal and normative axioms, SD Krasner, 'Structural Causes and Regime Consequences', (1982) 36 *International Organization* 185 at 186.
[17] Framing the discourse J Rawls, *A Theory of Justice* (revised ed 1999, first ed 1972) 52; R Dworkin, *Taking Rights Seriously* (1977) 22 *et seq*; J Habermas, *Between Facts and Norms* (reprint 2008) 132, 168 *et seq* and 197.

ideological discourses in order to remain potential projection screens for similar, but factually divergent constructs. Philosophical considerations are inappropriate in court judgments.

a. Doctrinal Constructivism and its Limits

A first doctrinal thrust of constitutional scholarship aims at identifying the principles inherent in the positive legal material, thus to organise the latter and to further the coherence of the constitutional material on this basis.[18] Coherence is "weaker than the analytic truth secured by logical deduction but stronger than mere freedom from contradiction".[19] The criterion of coherence demands a modeling which is sometimes described, with somewhat essentialistic enthusiasm, as a "grand structural plan".[20] The ECJ makes use of this approach in important decisions when it refers to the "spirit"[21] or the "nature"[22] of the Treaties. The Supreme Court of Canada has formulated this understanding in an exemplary fashion:

> "The constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution … . Those principles must inform our overall appreciation of the constitutional rights and obligations … ."[23]

Certainly, the assumption of a "grand structural plan" is as problematic from an epistemological and argumentative viewpoint as are statements on the "spirit" or "nature" of a legal order. Nevertheless, the truth is that an idea of the whole is indispensable,[24] and this contribution aims at conveying such an idea via a synopsis of founding principles. The respective role of legal scholarship can be labeled *doctrinal constructivism*.[25]

Given the scepticism towards doctrine in the Anglo-Saxon world, this approach shall be briefly sketched. Initially, i.e. in the late 19th and early 20th century, the agenda of *doctrinal constructivism* aimed primarily at structuring the law using autonomous concepts, following

[18] Dann, above n 11, 183 *et seq*.
[19] Habermas, above n 17, 211.
[20] GF Schuppert and C Bumke, *Die Konstitutionalisierung der Rechtsordnung* (2000) 28 at 39; concerning "guiding visions" U Volkmann, 'Verfassungsrecht zwischen normativem Anspruch und politischer Wirklichkeit', (2008) 67 *Veröffentlichungen der Vereinigung der Deutscher Staatsrechtslehrer* 57 at 67 *et seq*.
[21] Case 26/62, *van Gend en Loos* [1963] ECR 1 at 13; Case 294/83, *Les Verts v Parliament* [1986] ECR 1339, para 25.
[22] Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357, para 35.
[23] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), to question 1; akin *Entscheidungen des Bundesverfassungsgerichts* 34, 269 at 287 (*Soraya*).
[24] In more detail F Müller and R Christensen, *Juristische Methodik: Bd. II Europarecht* (2007) paras 349 *et seq*.
[25] In more detail A von Bogdandy, 'Wissenschaft vom Verfassungsrecht: Vergleich', in: *id et al* (eds), *Handbuch Ius Publicum Europaeum* (2008) vol II, § 39.

the legal-conceptual (*begriffsjuristisch*) stream of Friedrich Savigny's historical school of law. The positive legal material is being transcended, not by way of political, historical, or philosophical reflection, but through structure-giving concepts such as *state*, *sovereignty*, or *individual rights in public law*, which are conceived of as *specifically legal* and, thus, autonomous, which as a consequence fall under the exclusive competence of legal scholarship. The highest scientific goal of the doctrinal construction is to reconstruct and represent both public and private law as complexes of systematically coordinated concepts. At the heart of these efforts lies the creation of an autonomous area of discourse and argumentation, a sort of middle level between natural law, which is primarily within the competence of philosophy and theology, and the concrete provisions of positive law, which are in the direct grasp of politics and the courts.[26] In the course of the formation of substantive constitutional law and of the post-positivistic development of the original programme, constitutional principles have increasingly assumed the role of these autonomous concepts.[27]

For the programme of a holistic legal scholarship, i.e. a "system" or an "overarching conception", founding principles in European law are of particular importance, since a legal-conceptual approach has hardly developed beyond an organising exegesis of the ECJ, not least due to the sometimes tumultuous development of primary law. Nevertheless, the founding principles did not play this role from the beginning on: In the beginning of the integration, the Treaties' objectives were at the center of efforts to develop an "overarching conception".[28] In the course of the multiplication of these objectives this approach however lost its persuasiveness, which is confirmed by the envisaged abolition of the specific goals of Articles 2 *et seq* EC by the Lisbon Treaty (Article 3 TEU-Lis). A principle-oriented approach seems a useful alternative.

The doctrinal constructivist endeavor appears to be particularly pressing with regard to European primary law. Its qualification as "constitutional chaos" is its probably best-known description.[29] Of course the Treaty of Lisbon achieves a certain degree of systematisation, but it does not render futile academic efforts. Moreover, this principle-oriented scholarship does not only deal with primary law. The process of constitutionalisation requires that the

[26] JH von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (1848, reprint 1990) 29, thus justifies the uselessness of jurisprudence as a science.
[27] From the perspective of classic positivism, this is of course a story of decline, concisely N Luhmann, *Das Recht der Gesellschaft* (1993) 521 *et seq*. Further concretion is achieved through so-called "legal artefacts", typical for instance subjective rights or property; in detail U Mager, *Einrichtungsgarantien* (2003) in particular 21 *et seq* and 98 *et seq*. They are quite independent from positive law; however they can hardly be found in the law of the European Union. This demonstrates the operational weakness of the doctrine of European Union law.
[28] CF Ophüls, 'Die Europäischen Gemeinschaftsverträge als Planverfassungen', in JH Kaiser (ed), *Planung I* (1965), 229 at 233; Ipsen, above n 14, 128 *et seq*.
[29] D Curtin, 'The Constitutional Structure of the Union', (1993) 30 *CML Rev* 17 at 67; the term was coined by J Habermas, *Die neue Unübersichtlichkeit* (1985).

constitution "permeate" all legal relationships.[30] A respective constitutional arrangement of the secondary law material demands a doctrinal constructivism for which, as the national examples show, constitutional principles and in particular single fundamental rights are indispensable. Numerous secondary law instruments downright call for this as they are to be interpreted in the light of founding principles, especially single fundamental rights, according to their recitals. Accordingly, the ECJ uses the conformity with primary law as a method of interpretation.[31] The Charter of Fundamental Rights confirms this constitutionalisation, conveying a constitutional dimension to numerous interests.

All this requires a sustainable concept of doctrinal constructivism. A doctrinal construct can only propose *one* and not *the* system of positive law. In the past, a *system* was often crypto-idealistically believed to be inherent in the law and was sometimes *dogmatically* advanced as the single truth. This academic programme has been characterised as undemocratic or elitist;[32] this criticism needs to be accommodated. In the light of this criticism, contemporary endeavors should be directed towards the more humble goal of proposing means to arrange the legal material and develop the law. Hardly any legal scholar still maintains today that doctrinal constructs reflect a pre-stabilised logical unity of the primary law or the *one* philosophy of integration of the treaties. In particular, a constitutional doctrine must furthermore be aware of the danger of over-determining the political process. An awareness for the limits of the academic claim to truth is especially necessary for constructions based on principles, due to the openness of the stock of principles in general, to the semantic openness of single principles, to the openness of which principle prevails in cases of conflict.[33] Similarly reduced are the expectations as to what a system can concretely accomplish in the operation of the law. A doctrine of principles as the result of doctrinal construction can moreover not be identical with legal practice. This is no insufficiency but rather proof of the critical content of a doctrinal construction. The project of a critical legal scholarship can also be pursued with doctrinal instruments.

b. The Role of Legal Doctrine for Legal Practice

In the above-quoted statement by the Supreme Court of Canada, principles not only generate insight through order but also supply arguments for a creative application of the law. This practical orientation is also a feature of *doctrines* of principles, legal scholarship

[30] Early GFW Hegel, *Rechtsphilosophie* (1821, ed Moldenhauer and Michel from 1970) § 274.
[31] Case C-314/89, *Rau* [1991] ECR I-1647, para 17; Case C-98/91, *Herbrink* [1994] ECR I-223, para 9; Cases C-465/00, C-138/01 and C-139/01, *ORF* [2003] ECR I-4989, para 68; Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras 61 *et seq*, 104 *et seq*.
[32] Exemplary H Kelsen, *Vom Wesen und Wert der Demokratie* (2nd reprint of the 2nd ed of 1929, 1981) 23; *id*, *Der soziologische und der juristische Staatsbegriff* (2nd reprint of the 2nd ed of 1928, 1981); M Everson, 'Is it just me, or is there an Elephant in the Room?', (2007) 13 *ELJ* 136; J Murkens, 'The Future of Staatsrecht', (2007) 70 *MLR* 731.
[33] Concerning discourses of application see K Günther, *Der Sinn für Angemessenheit* (1988) 300.

being a primarily practical (social) science according to the prevailing opinion. Principles have diverse functions in the application of the law.

Oftentimes, principles increase the number of arguments which can be employed to debate the legality of a certain act. In this function, they can be described as *legal principles* which transcend *structural principles*. By enlarging the argumentative budget of the legal profession, principles strengthen its autonomy vis-à-vis the legislative political institutions. This happens mostly via a principle-oriented interpretation of a relevant norm, be it of primary or secondary law.[34] By employing principles, the onus of demonstration is often placed on the person arguing against the principle.[35] Sometimes however, the ECJ makes things too easy: by simply characterizing a provision as a principle it sometimes attempts to justify its wide interpretation and the narrow interpretation of a contradictory norm.[36] This is not convincing methodically, further arguments are necessary.[37] At times, a principle even becomes a legality standard of its own.[38] A doctrine of principles must examine the relevant patterns of argumentation and develop general aspects and new understandings. The wide range of application of principles and their validity in different legal orders for instance allows for the generalization of innovative local strategies to concretize principles. Yet at the same time, legal scholarship should highlight the costs of such an autonomization, for example in light of the principle of democracy.

Finally, it should be noted that a legal doctrine of principles can usually *not* fulfill one function: to delimit right and wrong in a concrete case. This already results from the general vagueness of principles; the conflict usually arising when different principles are applied to concrete facts is another reason. The solution to a conflict of principles cannot be determined either scientifically or legally, it can only be structured.

[34] Concerning the principle-orientated interpretation of primary law Cases C-402/05 P and C-415/05 P, above n 9, para 303; further Case C-50/00 P, *Union de Pequeños Agricultores v Council* [2002] ECR I-6677, para 44; Case C-354/04, *Gestoras Pro Amnistía et al v Council* [2007] ECR I-1579, paras 51 *et seq*; Case C-355/04, *Segi et al v Council* [2007] ECR I-1657, paras 51 *et seq*; concerning the principle-orientated interpretation of secondary law, Case C-540/03, *Parliament v Council* [2006] ECR I-5769, paras 70 *et seq*; Case C-305/05, *Ordre des barreaux francophones et germanophone* [2007] ECR I-5305, para 28.

[35] Instructive Case C-361/01 P, *Kik v HABM* [2003] ECR I-8283, para 82, where the ECJ rejects a principle; on this FC Mayer, 'Europäisches Sprachenverfassungsrecht', (2005) 44 *Der Staat* 367 at 394; this article at the same time demonstrates how legal principles can be generated by legal scholarship.

[36] Eg the principle of a common market: Case 7/61, *Commission v Italy* [1961] ECR 317 at 329; Case 113/80, *Commission v Ireland* [1981] ECR 1625, para 7.

[37] K Larenz and C-W Canaris, *Methodenlehre der Rechtswissenschaft* (1995) 175 *et seq*; convincing Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, EC Measures Concerning Meat and Meat Products (Hormones), para. 104.

[38] In detail Tridimas, above n 3, 29 *et seq*.

c. Maintenance and Development of a "Legal Infrastructure"

The constructive and the practical element converge in a function of doctrinal constructivism which can be labeled as "maintenance of the law as social infrastructure". First of all, this refers to the creation and safeguarding of legal transparency,[39] which is of particular importance in the Union's fragmented legal order. Furthermore, the "infrastructure maintenance" function of legal scholarship is not static but demands participation in the development of the law to keep it in line with changing social relationships, interests and beliefs. In this respect, principles can fulfil the function of "gateways" through which the legal order is attached to the broader public discourse. This attachment is of particular importance for the Union's primary law given the ponderousness of the procedure of Article 48 EU. For this reason too, doctrinal work should not be restricted to the analysis of the positive law but also aim at its propositive development.

Constitutional principles enable an internal critique of the positive law, the pronouncement of which is a core function of constitutional law scholarship and which aims at the development of the positive law, be it via the jurisprudential or the political process. They promote the transparency of legal argumentation, are gateways for new convictions and interests, can be agents of universal reason against local rationalities. This criticism differs from general political criticism since it is phrased in legal terms, is closely connected to the previous operation of the law and can thus be absorbed by the law more easily. Title I of the EU Treaty in its current as well as in the Lisbon version calls for such a critique due to its manifesto character.

3. Perspectives of Legal and Integration Policy

Principles enable an autonomous legal discourse, strengthen the autonomy of courts vis-à-vis politics and allow for an internal development of the law which circumvents Article 48 EU: Is this acceptable in light of the principle of democracy? The answer to this question has to distinguish between jurisprudence and legal scholarship. For the latter, it needs to be kept in mind that doctrinal constructions are no source of law but are only of propositive nature. Moreover, legal scholarship can invoke academic freedom.[40] And thus far Max Weber's insight that only a conceptualized and thus rationalized legal order can adequately structure social and political processes in complex societies has not been refuted. From this follows a functional legitimization of this academic approach.[41] Nevertheless, legal scholarship should not be blind to the possible consequences of its constructions. Particular attention needs to

[39] Schuppert and Bumke, above n 20, 40.
[40] Compared to the German Basic Law (*Grundgesetz*), its protection on the European level is not as far-reaching, J-C Galloux, in L Burgorgue-Larsen *et al* (eds), *Traité établissant une Constitution pour l'Europe* (2005) vol II, Art II-73 para 12.
[41] M Weber, *Wirtschaft und Gesellschaft* (1972) 825 *et seq*.

be paid to the *problematique* of the development of the law through judicial practice, courts being the most important addressees of doctrinal constructivism.

Regarding the use of principles by courts, it needs to be noted that all contemporary law is *positive law*. Positivity implies the domain of politically responsible bodies:[42] The law is made by the legislator or is – in common law systems or other cases of judicial development of the law – under his responsibility; the legislature can correct a legal situation resulting from judicial development of the law.[43] The judicial development of a body of law which can only be modified by the legislator under qualified requirements is thus critical and a standard topic of constitutional scholarship.[44] However, it is generally recognized that some judicial development of the law flows from and is justified by the assignment given to courts to adjudicate; it is mostly its limits which are being debated.[45] Accordingly, the ECJ outlines its competence to develop the law with respect to the treaty amendment procedure.[46]

Another argument for the legal conceptualization of political and social conflicts as conflicts of principles is that this may lead to their channelling and perhaps even rationalization. Moreover, principles can play a supporting role for democratic discourses.[47] In addition, a judicial decision which employs the balancing of principles is more intelligible for most citizens than a "legal-technical" reasoning phrased in hermetic language which obscures the valuations of the court. To devise legal controversies as conflicts of principles allows for a politicisation which should be welcomed in light of the principle of democracy, since it promotes the public discourse on judicial decisions.

Principles such as primacy and direct effect form the key to the constitutionalisation of the Community law.[48] If the discussion on founding and constitutional principles is nevertheless a rather recent phenomenon, this is to be explained by the history of integration. The path to integration has not been constitutional, but rather functional. The objectives were determined by the Treaties with sufficient clarity, allowing the European discourse to unfold in a

[42] E-W Böckenförde, 'Demokratie als Verfassungsprinzip', in *id* (ed), *Staat, Verfassung, Demokratie* (1991), 289 at 322.
[43] Concerning common law P Atiyah and R Summers, *Form and Substance in Anglo-American Law* (1991) 141 *et seq*.
[44] A Bickel, *The Least Dangerous Branch* (1962); comparative U Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Misstrauen* (1998); on the ECJ from an internal perspective K-D Borchardt, 'Richterrecht durch den Gerichtshof der Europäischen Gemeinschaften', in A Randelzhofer *et al* (eds), *Gedächtnisschrift für Professor Dr. Eberhard Grabitz* (1995), 29.
[45] On judicial development of the law by the ECJ see *Entscheidungen des Bundesverfassungsgerichts* 75, 223 at 243.
[46] However exactly in those cases where the denial of a proposed judicial development of the law seemed to suit the court well, Opinion 2/94, *EMRK* [1996] ECR I-1759, para 30 and Case C-50/00 P, above n 34, para 44; Case C-263/02 P, *Commission v Jégo-Quéré* [2004] ECR I-3425, para 36.
[47] L Siedentop, *Democracy in Europe* (2000) 100.
[48] Classical E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', (1981) 75 *AJIL* 1.

pragmatic and administrative manner, unburdened by politic-ethical arguments.[49] This orientation decisively influenced the jurisprudential construction. The federal conception failed to gain a larger following in legal scholarship; economic law approaches and administrative law approaches were – at least in Germany – much more successful. The ECJ only slowly developed principles limiting the power of the Community.[50] As late as 1986, Pierre Pescatore ascertained that although the principles of proportionality, good administration, legal certainty, the protection of fundamental rights or defence rights existed, they amounted to "peu de chose", "où on peut mettre tout et son contraire".[51] This was to change profoundly. Due to the single market programme and the Maastricht Treaty, the debate about European founding and constitutional principles unfolded quickly.[52] It resulted in Article 6 of the Amsterdam Treaty of 1997 which forms the most important positive basis of European founding principles.

Lastly, the role of a doctrine of principles in promoting a common understanding of the Union among its citizens and the formation of a European background consensus on the operation of the European institutions shall be pointed out. Certainly, a doctrine of principles developed by legal scholarship cannot directly trigger the creation of an identity for broad parts of the population.[53] Yet it can be understood as a part of a public discourse through which the European citizenry ascertains the foundations of its polity.

In this discourse on the politics of integration, principles can assume an ideological function. A depiction of the Union in the light of principles certainly has such a potential.[54] The Treaty of Lisbon is problematic in this respect as it presents the founding principles of the EU as "values" and thus as an expression of the ethical convictions of the Union citizens (Article 2 TEU-Lis). A legal doctrine of principles should be based on a better foundation than sociological assumptions regarding normative dispositions of the Union citizens and should indicate the difference between law and ethics in light of the freedom principle.[55] Value discourses can easily acquire a paternalistic dimension.

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[49] On the different formations of discourses see Habermas, above n 17, 159 *et seq*.
[50] P Pescatore, *Le droit de l'intégration* (1972) 70 *et seq*; H Lecheler, *Der Europäische Gerichtshof und die allgemeinen Rechtsgrundsätze* (1971).
[51] P Pescatore, 'Les principes généraux du droit en tant que source du droit communautaire' in *id* (ed), *Études de droit communautaire européen 1962–2007* (2008), 691.
[52] JA Frowein, 'Die Herausbildung europäischer Verfassungsprinzipien', in A Kaufmann *et al* (eds), *Rechtsstaat und Menschenwürde* (1988), 149; J Gerkrath, *L'emergence d'un droit constitutional pour l'Europe* (1997) 183 *et seq*; JHH Weiler, 'European Neo-Constitutionalism', (1996) 44 *Political Studies* 517.
[53] F Snyder, 'Editorial: Dimensions and Precipitates of EU Constitutional Law', (2002) 8 *ELJ* 315.
[54] K Lenaerts, **'**In the Union We Trust', (2004) 41 *CML Rev* 317.
[55] E Denninger, 'Freiheitsordnung – Wertordnung – Pflichtordnung', in *id* (ed), *Der gebändigte Leviathan* (1990), 143 at 149. Illuminating the comparison with the US debate concerning *rights theory* versus *moral conventionalism*; on this P Brest, 'The Fundamental Rights Controversy', (1981) 90 *YLJ* 1063.

III. Constitutional Principles and Founding Principles

1. Principles in European Law

The authors of the Treaties[56] like the term *principle*: It is employed remarkably frequently in most language versions. The English and the French version of the EU Treaty currently use it 22 times, those of the EC Treaty 48 times, according to the Treaty of Lisbon even 98 times altogether. The Charter of Fundamental Rights employs *principle* 14 times in its English and French version. The context in which this term is used ranges from the principle of democracy (Article 6 EU) to the principles of national social security systems (Article 137(4) EC); some principles are even to be laid down by the Council (Article 202 EC). In the German version, the word *principle* appears far less frequently, only three times in the EU Treaty and four times in the EC Treaty, mostly in connection with the subsidiarity principle. This atrophy of principles in the German version is due to the fact that instead of the English *principle* or the French *principe*, the German word *Grundsatz* is being used; this also holds true for the German version of the Charter of Fundamental Rights.

The use of the word *principle* in the treaty text has attributive character. The treaty maker thus assigns enhanced significance to the relevant element or even to whole provisions and provides orientation to the reader in a text which is difficult to penetrate. At the same time, a *principle* usually lays down *general* requirements, eg in Article 6(1) EU or 71(2) EC. The notion characterised as *principle* shall make statements on a *whole*, insofar having a reflexive connotation. Furthermore, the treaty maker often identifies as *principles* elements of a provision with a rather vague content, as even the principles for single topics such as those of Article 174(2) EC or 274 EC show.

In his influential theory, Alexy distinguishes between principles and rules and characterises the former as being optimisation commands which are subject to balancing.[57] This may be the reason why the Legal Service of the Council identifies the primacy of Community law in the German version as a "fundamental pillar" in order to render it immune to balancing, whereas the English version uses the term "cornerstone principle".[58] However, the categorical differentiation between rules and principles underlying this theory is not altogether convincing and will not be used in this contribution to characterise principles.[59]

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[56] The term *authors of the Treaties* characterizes the Member States as a collective under Art 48 EU. On the term "founding authority of the Community": Case T-28/03, *Holcim v Commission* [2005] ECR II-1357, para 34; Case T-172/98, *Salamander et al v Parliament and Council* [2000] ECR II-2487, para 75.

[57] In detail R Alexy, *Theorie der Grundrechte* (2006) 75 *et seq*.

[58] European Council, Opinion of the Legal Service, Council Doc 11197/07, on this further F Mayer, 'Die Rückkehr der Europäischen Verfassung?', (2007) 67 *Zeitschrift für ausländisches öffetnliches Recht und Völkerrecht* 1141 at 1153; concerning primacy als a principle M Niedobitek, 'Der Vorrang des Unionsrechts', in *id* and J Zemánek (eds), *Continuing the European Constitutional Debate* (2008), 63 at 65 *et seq*.

[59] A Jakab, 'Prinzipien', [2006] *Rechtstheorie* 37.

The qualification as principle as such does *not* trigger specific legal consequences. This can be demonstrated especially clearly by comparing Articles 23 and 52(5) of the EU Charter of Fundamental Rights. The equality imperative of Article 23 of the Charter is an enforceable principle of Community law.[60] Article 52(5) of the Charter on the other hand explicitly distinguishes between enforceable rights and principles. The presumption of a missing overarching conception of the authors of the Treaty is confirmed by the rather fortuitous assignment of attributes such as *guiding* (Article 4(3) EC), *existing* (Article 47(2) EC), *basic* (Article 67(5) EC), *uniform* (Article 133(1) EC), *fundamental* (Article 137(4) EC), *general* (Article 288(2) EC) or *essential* (Article 2 of the Protocol on the Financial Consequences of the Expiry of the Treaty Establishing the European Coal and Steel Community and on the Research Fund for Coal and Steel). One has to analyse individually for every single use of the word *principle* what legal consequences are attached to the norm, especially with regard to legal remedies and judicial review.[61]

The word *principle* not only denotes a term of positive EU law but also of jurisprudential analysis. As explained in II 2, it is indispensable for the fulfilment of the tasks of legal scholarship. Nevertheless it is debated what exactly a "principle" is; behind the term stand competing concepts of law.[62] This is rightly so since the definition of a jurisprudential term is not about truth but about expediency in view of the scientific objective. This brings us to the founding principles.

2. The Union's Founding Principles and Their Constitutional Character

This contribution uses *founding principle* as a term of legal scholarship in order to identify and interpret, in the tradition of constitutionalism, those norms of primary law having a normative founding function for the whole of the Union's legal order; they determine the relevant legitimatory foundations in view of the need to justify the exercise of public authority.[63] In this respect, this understanding links up with the above-mentioned concept of principles in primary law: principles are special legal norms relating to the whole of a legal order. *Founding* principles as a sub-category express an overarching normative frame of reference for all primary law, indeed for the whole of the Union's legal order. This substantive conception of founding principles does not capture all norms or elements of norms labelled

[60] Settled case-law; cf Cases 117/76 and 16/77, *Ruckdeschel* [1977] ECR 1753, para 7.
[61] In detail C Hilson, 'Rights and Principles in EU Law', (2008) 15 *MJ* 193 at 215.
[62] Fundamental Dworkin, above n 17, 24 *et seq*; Alexy, above n 57, 72 *et seq*; on the debate R Guastini, *Distinguendo: Studi di teoria e metateoria del diritto* (1996) 115 *et seq*; ML Fernandez Esteban, *The Rule of Law in the European Constitution* (1999) 39 et seq; M Koskenniemi, 'General Principles', in *id* (ed), *Sources of International Law* (2000), 359.
[63] On the term *principe fondateur* Molinier, above n 3, 24; similar Dworkin, above n 17, 22.

principle in the Treaties or by the ECJ, but only a few provisions which are also called *founding principles* or *structuring principles* in national constitutions.[64]

It is useful to understand the *founding* principles as *constitutional* principles and to deal with them accordingly.[65] The Union became a political Union in the 1990s. After long debates, in 1997 the authors of the Treaty founded the Union on "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" and thus on the core programme of liberal-democratic constitutionalism. This implies a decision for constitutional semantics which is now to be elaborated by constitutional doctrine.[66] The normative content of the indicative mode "is founded" in Article 6(1) EU and corresponds to that of the indicative mode "is" in Article 20(1) of the German Basic Law (*Grundgesetz*).[67]

A comparison with Article F of the EU Treaty in its Maastricht version illustrates the significance of the political decision of 1997. Article F is still formulated entirely from a limiting perspective underlying Article 6(2) EU right until today: Article 6(2) EU commits the Union to general principles of law which have no constitutive but only a *restrictive* function.[68] In 1997 the treaty maker then laid down the normative core contents on which the EU is *founded* in Article 6(1) EU. In this respect, the constitutional content of Article 6(1) EU exceeds by far the constitutional dimension of the Maastricht Treaty. Now not only a restrictive, but also a constitutive European constitutionalism has found its recognition in positive law. The legal approach pursued here with its substantive notion of what a founding principle is spells out the political decision voiced in the Amsterdam Treaty that a European political Union is to be founded on the postulates of liberal-democratic constitutionalism.

Founding principles are thus the principles laid down in Article 6(1) EU as well as the other principles located in Title I EU regarding the allocation of competences, loyal cooperation and structural compatibility. This approach is confirmed by Title I TEU-Lis with regard to the founding principles of the federal relationship between the Union and its Member States. Other principles of primary law do not belong to these overarching founding principles but serve to concretise them and thus derive constitutional content from them.

The tenets laid down in Article 2 TEU-Lis, although denoted as "values", are to be understood as legal norms and principles, as founding principles. Usually, principles are distinguished from values, the latter being fundamental ethical convictions whereas the

[64] In more detail H Dreier, in *id* (ed), *Grundgesetz-Kommentar* (2006) vol II, Art 20 (Einführung), paras 5, 8; F Reimer, *Verfassungsprinzipien* (2001) 26 *et seq*.
[65] The ECJ too speaks of constitutional principles of the EC Treaty: Cases C-402/05 P and C-415/05 P, above n 34, para 285. Cf on this the reflections in the introduction.
[66] Beutler, in von der Groeben and Schwarze (eds), above n 3, para 1; P Cruz Villalón, *La constitución inédita* (2004) 73, 143; HW Rengeling and P Szczekalla, *Grundrechte in der Europäischen Union* (2004) paras 92 *et seq*.
[67] Art 6(1) EU is slowly becoming operative; on the principle-orientated interpretation of primary law see Cases C-402/05 P and C-415/05 P, above n 34, para 303.
[68] Molinier, above n 3, 29; cf the principles discussed by Tridimas and Groussot (both above n 3).

former are legal norms. Since the "values" of Article 2 TEU-Lis have been agreed upon in the procedure of Article 48 EU and produce legal consequences (eg Articles 3(1), 7, 49 TEU-Lis), they are legal norms, and since they are overarching and constitutive, they are founding principles.[69] The use of the term "value" in Article 2 TEU-Lis instead of "principle", the obscure normative function of the second sentence of this article as well as the differences between the diverse formulations of the posited values[70] illustrate the remaining uncertainties concerning the identification of European founding principles.

Due to its analytical nature, the qualification of a norm as founding principle does not mean that other understandings would be excluded. There are formidable analyses of the same principles e.g. as administrative principles.[71] The constitutional and the administrative approach overlap with regard to supranational public law. One may ask why this study legally qualifies the founding principles as constitutional principles, but does not *designate* them as such. Firstly, this is in line with the judicature: Until recently, the ECJ has used the term *constitutional principle* only for constitutional norms of the Member States.[72] In the Kadi decision, the term *constitutional principle* figures prominently also with regard to Community law,[73] underlining the innovative force of this judgment. More common so far however is the denomination as *founding principle*.[74] But most of all, to employ the wide term of *constitutional principle* for the principles presented here as founding principles would challenge the constitutional character of other principles of primary law, something which is not the aim of this contribution.

In Union law, it has to be distinguished between principles, in particular founding principles, and objectives. The Union "is founded" on principles (Article 6(1) EU), and principles limit the actions of the Member States and the Union. Objectives on the other hand stipulate the intended effects in social reality. The conjunction of objectives and principles as for example in Article 3(1) EU-Lis does not undermine this distinction. The separation of objectives of integration and constitutional principles is also suggested by the shortcomings of the functionalist approach to European integration.[75]

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[69] On the difficulty related to the concept of "values" see above, II 3.
[70] Compare the third recital of the preamble to the EU Treaty and Art 6(1) EU with Art 2 TEU-Lis and the second recital to the preamble to the EU Charter for Fundamental Rights.
[71] G della Cananea, 'Il diritto amministrativo europeo e i suoi principi fondamentali', in *id* (ed), *Diritto amministrativo europeo* (2006), 1 at 17 *et seq*.
[72] Case C-36/02, *Omega* [2004] ECR I-9609, para 12; Case C-49/07, *MOTOE* [2008] ECR I-0000, para 12. Occasionally, an attorney general uses this term for the law of the EU, AG Kokott in Cases C-387/02, 391/02 and 403/02, *Berlusconi* [2005] ECR I-3565, no 163.
[73] Cases C-402/05 P and C-415/05 P, above n 934, para 285.
[74] Cases C-46/93 and C-48/93, *Brasserie du pêcheur* [1996] ECR I-1029, para 27; Case C-255/02, *Hailfax* [2006] ECR I-1609, para 92; Case C-438/05, *International Transport Workers' Federation* [2007] ECR I-10779, para 68; Case C-162/07, *Ampliscientifica* [2008] ECR I-0000, para 25.
[75] See above, II 3.

3. Principles of Public International Law

International public law scholarship operates with the term "constitutional principle", too,[76] and the question arises whether general principles of public international law or principles of individual treaties, in particular the UN Charter, the Human Rights Covenants or the WTO Agreement, must be included in an analysis of the Union's founding principles. Article 3(5) TEU-Lis can be understood in this sense, and already now international treaties stand above the derived law according to Article 300(7) EC; this also applies to general principles of international law.[77]

However, a closer analysis of the jurisprudence shows that norms of international law, with the exception of the provisions of the ECHR,[78] do not play a decisive role for the exercise of public authority by the Union; consequently, they will not be addressed in this contribution. This basic decision is already expressed in the *Costa/E.N.E.L* Judgment: While the *van Gend* Judgment characterised the Community law as "a new legal order of international law", ever since *Costa* the ECJ only speaks of a "new legal order" *tout court*.[79] The prevailing understanding of European constitutionalism does not conceive of it as a sub-category of an overarching international constitutionalism.[80]

IV. Uniform Founding Principles in View of Heterogeneous Primary Law

1. Establishing Unity of Principle

The principles set forth in Title I EU are valid for the whole of Union law, i.e. the European Union Treaty and the Community Treaties. Although this will be unquestionable under Article 2 TEU-Lis, it is doubted under current law in particular with reference to the so-called "pillar structure" of the Treaties (EC-Treaty, Title V and Title VI EU). In fact, Titles V and VI of the EU Treaty do not correspond in every respect to the so-called community method including supranationality, direct effect and comprehensive European judicial review. The special rules are an expression of important compromises in the context of the treaty-making process which need to be taken seriously by legal scholarship. According to some scholars however, the European Union does not even exercise public authority. They maintain that "in reality", the Member States and not the Union's organs operate under Title V and VI EU. Accordingly, a categorical differentiation would have to be made between Community law and the law of the Union. Acts of the Council under Title V and VI EU, for instance a framework decision,

[76] Kadelbach and Kleinlein, above n 12.
[77] Case C-162/96, *Racke* [1998] ECR I-3655, paras 45–51.
[78] Note the refusal of direct effect concerning the UN Convention on the Law of the Sea in Case C-308/06, *Intertanko* [2008] ECR I-0000, paras 42 *et seq.*
[79] Recent Cases Rs. C-402/05 P and C-415/05 P, above n 9, para 316.
[80] J d'Aspremont and F Dopagne, 'Two Constitutionalisms in Europe', (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*.

would not be acts of the EU, but an international agreement between the Member States.[81] An overarching doctrine of principles would thus be rather nugatory.[82]

There are however good reasons for conceiving the Union as one body of public authority and the law of the EU Treaty and that of the Community Treaties as a single legal order, delimiting it from the legal orders of the Member States on the one hand and from international law on the other hand. First of all, the organisational fusion shall be pointed out: Since 1994, it has always been the Council of the European Union who is named as the legislative organ in the legal acts under Title V and VI EU, never the Member States. Moreover, this unity has been explicitly mandated for the founding principle of fundamental rights protection (Article 46(d) EU)[83] and can furthermore be based on provisions such as Article 1 or 48 *et seq*. EU.[84] Seen in this light, it is only consistent that the ECJ expands the scope of Community law principles to cover legal acts under Titles V and VI EU.[85]

The assumption of legal unity of the Union law can also be justified through the principle of coherence which itself is based on the principle of equality. It constitutes the vanishing point for academic system- and thus unity-building and enables a critique inherent to the law of diverging logics of regulation and lines of jurisprudence. It finds its positive foundations in the equality principle (Article 20 of the Charter) and provisions such as Articles 3(1) EU, 225(2) and (3) EC.

2. Limits of a Unitarian Approach

Coherence is no principle with general primacy; there may be good reasons for divergence.[86] Assuming the legal unity of the Union's legal order does not amount to maintaining that the positive constitutional law or even the jurisprudence relating to it form a harmonious whole. The assumption of a legal order of the Union which includes Community law as its main part thus does not deny the fact that a number of legal instruments of Community law cannot be applied at all or only with restrictions under Titles V and VI EU. The general assertion is that Community law principles can be applied if this is compatible with the specific rules of the EU

[81] A Haratsch, C König and M Pechstein, *Europarecht* (2006) paras 79, 83; in this direction also *Entscheidungen des Bundesverfassungsgerichts* 113, 273 at 301.
[82] M Pechtsein, in R Streinz (ed), *EUV/EGV* (2003), Art 6 EU para 2 *et seq*.
[83] Concerning the uniformity of standards Case C-303/05, *Advocaten voor de Wereld* (European Arrest Warrant) [2007] ECR I-3633, para 45.
[84] In detail A von Bogdandy, 'The Legal Case for Unity', (1999) 36 *CML Rev* 887; similar H-J Blanke, in Calliess and Ruffert (eds), above n 3, Art 3 EU paras 1, 3; C Stumpf, in J Schwarze (ed), *EU-Kommentar* (2008), Art 3 EU para 1.
[85] In more detail K Lenaerts and T Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law', in S Prechal and B van Roermund (eds), *The Coherence of EU Law* (2008), 495; T Giegerich, 'Verschmelzung der drei Säulen der EU durch europäisches Richterrecht', (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1. However, the ECJ occasionally describes EU and EC law as "integrated but separate legal orders": Cases C-402/05 P and C-415/05 P, above n 34, para 202.
[86] In detail F Chirico and P Larouche, 'Conceptual Divergence, Functionalism, and the Economics of Convergence', in Prechal and van Roermund (eds). above n 85, 463.

Treaty. Although the Treaty of Lisbon offers considerable progress regarding systematisation and reduces this fragmentation,[87] it does not overcome it, as the Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom illustrates.[88]

Even under the premise of a uniform *validity* of the founding principles, the question arises whether this corresponds to a uniform *meaning* in the various areas of Union law. For instance, the dual structure for democratic legitimation through the Council and Parliament only exists under the competences of the EC Treaty, and judicial review by the ECJ, paramount for the rule of law principle, is limited or even precluded in important domains.

This gives rise to doubts about the usefulness of an overarching doctrine of principles. It might even nurture the suspicion that a doctrine of principles is not the product of scholarly insight, but rather a policy instrument for more integration and federalism. Yet these doubts and suspicions are unfounded. As the principles set forth in Article 6 EU (Article 2 TEU-Lis) apply to all areas of Union law, an overarching doctrine of principles built thereupon encompassing the entire primary law is a logical consequence. Article 6 EU essentially requires its own expansion into a general doctrine of principles.[89] Article 6(1) EU declares that the Union is "founded" on these principles; this contains an ambitious normative programme. The EU Treaty can therefore even be interpreted as a constitution stipulating criteria for the detection of deficits and guidelines to overcome them.[90]

An overarching doctrine of principles is thus possible. This basic objection being defeated, it might nevertheless appear problematic, in view of the fragmentation within primary law, to determine which provisions may be understood as concretising abstract principles. Theoretically, both the co-decision procedure under Article 251 EC as well as the Council's autonomous decision-making competence under the requirement of unanimity can be understood as realisations of the principle of democracy. This contribution however maintains that the supranational standard case, also called the *Community method*,[91] can justifiably be used for the development of a doctrine of Union principles. The Treaty of Lisbon confirms this thesis with the introduction of an "ordinary legislative procedure" in Article 289 TFEU.[92] In general it is to be expected that under the Treaty of Lisbon, the founding

[87] R Streinz *et al*, *Der Vertrag von Lissabon zur Reform der EU* (2008) 33 *et seq*.
[88] Suggestions to deal with this situation by M Dougan, above n 8, 665 *et seq*; it is not that exceptional, A Hanebeck, 'Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber', (2002) 41 *Der Staat* 429.
[89] A similar concern can be found in Art 23(1) German Basic Law which secures the structural integrity.
[90] A von Bogdandy, 'The Prospect of a European Republic', (2005) 42 *CML Rev* 913 at 934 *et seq*.
[91] Thus labelled in the Treaty establishing a Constitution for Europe; on this C Calliess, in *id* and M Ruffert (eds), *Verfassung der Europäischen Union* (2006), Art I-1 VVE paras 47 *et seq*; on the community method see J Bast, 'Einheit und Differenzierung der Europäischen Verfassung', in Becker (ed), above n 11, 34 at 52 *et seq*.
[92] In this direction Case C-133/06, *Parliament v Council* [2008] ECR I-0000, para 63; concerning the new differentiation between parliamentary (co-) legislation and bare law-making; pathbreaking

principles of Article 2 TEU-Lis will be concretised in light of the enunciations of the EU Treaty, and that diverging rules in the TFEU will be treated as exceptions. In particular in its Lisbon version, the EU Treaty contains elements of a manifesto-constitution which is executed by the Treaty on the Functioning of the European Union only inchoately. The legal treatment of the resulting tensions should be guided by principles, even more so as specific rules are hardly available. The further constitutionalisation of Europe demands the normative illumination of the new EU Treaty, especially of its Titles I and II, and the development of hermeneutic and legal-political strategies for its implementation.

An understanding in the tradition of European constitutionalism as advocated here will strive to expand the idea underlying the EU Treaty in its Lisbon version of a representative constitution with separation of powers and fundamental rights protection to all areas and protocols. It will however *not* strive to expand the competences of the Union at the expense of the Member States or to override specific rules. An overarching doctrine of principles must not downplay sectoral rules which follow different rationales. To do otherwise would infringe upon an important founding principle: Article 6(3) EU in conjunction with Article 48 EU clearly shows that the essential constitutional dynamics are to remain under the control of the respective national parliaments.[93] An argumentation based on principles uncoupled from the concrete provisions of the Treaties would misunderstand essential elements of the Union's constitutional law: The EU Constitution is a constitution of details; this corresponds to the heterogeneity of its political and social basis.[94] The plethora of details expresses this diversity, but also the Member States' mistrust and desire for control.

K Lenaerts, see for instance: Sénat et Chambre des représentants de Belgique (eds), *Les finalités de l'Union européenne* (2001), 14 at 15.

[93] Opinion 2/94, above n 46, para 10 *et seq*; Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

[94] JC Piris, *The Constitution for Europe* (2006) 59. This certainly does not exclude streamlining and abstractions at many points, B de Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?', in M Cremona and *id* (eds), *EU Foreign Relations Law* (2008), 3 at 7.

V. Outlook

This article has attempted to show that the principles of Art 6(1) EU can be understood as constitutional principles and that a constitutional legal discourse based thereon is viable both from a theoretical and a technical legal point of view. It further confirms understanding and approaching ethical, political or economic conflicts as conflicts of principles, as this can serve to further one's insight and help to solve such conflicts.[95] However, it must be noted that legal principles cannot provide scientific solutions for such conflicts. This however does not rule out principle-based *proposals* for solutions by the scholars who, owing to their systematic appreciation and their being unencumbered by the pressures of practice, have a specific role in the respective legal discourses.

[95] In the tradition of the critical legal studies such approach is suspected as Ideology, on this: G Frankenberg, 'Der Ernst im Recht', [1978] *Kritische Justiz* 281; *Id*, 'Partisanen der Rechtskritik', in S Buckel *et al* (eds), *Neue Theorien des Rechts* (2006), 97; D Kennedy, *Critique of Adjudication* (2003); *Id*, 'The Structure of Blackstone's Commentaries', (1979) 28 *Buffalo L. Rev.* 209; RM Unger, 'The Critical Legal Studies Movement', (1983) 96 *Harv. L. Rev.* 563.