The Concept of the "Legislative" Act in the Constitutional Treaty

*By Alexander Türk**

A. Introduction

The constitutionalism[1] of the Community legal order as an evolutionary process of transforming an international organisation into a constitutional legal order has found its latest expression in the Treaty Establishing a Constitution for Europe.[2] This document evokes the language of the constitutional state when it refers to "this Constitution" in Article I-1 and expresses its gratitude to the "European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe." However, ambiguity is not far behind. The length of the document resembles a carefully drafted prenuptial agreement rather than a constitutional text. Moreover, the reference to the Constitution cannot disguise the fact that it has been adopted as an international treaty in the usual procedure of an Intergovernmental Conference and will have to be ratified by each and every Member State to enter into force.

The same ambiguity seems to exist in case of the new concept of a "legislative" act in Articles I-33 and I-34 of the Constitutional Treaty. The use of the concept of a legislative act and the reference to a "legislative procedure" in Article I-34(1) are reminiscent of the language of constitutional states. On the other hand, the notion of a "special" legislative procedure in Article I-34(2) arouses the suspicion that the same ambiguity surrounding the Constitutional Treaty will surround its more specific parts. In order to elucidate the concept of a legislative act under the Constitutional Treaty, this paper will assess the concept of legislation in the national constitutional systems in Section B. This assessment will then form the basis of section C, in which an analysis of the concept of legislative act in the

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[1] *See* JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 221 (1999).

[2] Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) (hereinafter: Constitutional Treaty or CT). Articles without references are those of the Constitutional Treaty.

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Constitutional Treaty will be undertaken. This section will also include a discussion of the consequences of the distinction between legislative and non-legislative acts, some of which are made explicit in the Constitutional Treaty. Other consequences could be expected to transfer from the existing case law of the ECJ under the EC Treaty.

B. The Concept of Legislation in National Constitutional Systems

It can be observed that national constitutional systems apply a dual notion of "legislation."[3] Where legislation is used in a formal sense, it refers to a legal act that is defined by formal criteria. In this case a written constitution or an unwritten constitutional principle determines the procedure to be followed and the institution authorised for the adoption of such a legislative act. In the classical tradition of the principle of the separation of powers, the authority to adopt such acts is in principle vested in parliament, as the institution directly elected by the people.[4] However, a legislative act in the formal sense cannot be characterised merely by its adoption through the directly elected body, but by the legislative procedure, in which the directly elected body has a central, but not exclusive, position. The co-operative nature of the act allows various institutions, with different interests and loyalties, to scrutinise and to influence its content. The complexity of the process, its consensus-oriented approach, and the participation of a broad spectrum of interests explain why a legal act adopted in accordance with such a procedure, regardless of its content, enjoys a high degree of legitimacy, even if ultimately the will of the majority prevails. This is reflected in the legal privileges a legislative act in the formal sense enjoys.

National constitutional systems also consider legislative acts as legally binding rules which are of general application. This is supplemental to the concept of legislation in the formal sense. The classical separation of powers doctrine would also suggest that legislative acts lay down legally binding rules of general application.[5] In this view, the authority to adopt acts of general application is vested exclusively in the legislative authority. The increasing need for law-making, and the complexity of this task, made it clear that not all acts of general

[3] For a detailed analysis of the British, French and German constitutions on the concept of legislation, *see* Alexander Türk, The Concept of Legislation in European Community Law (2004) (PhD thesis, University of London) in Part One.

[4] The reference to the directly elected institution is relevant for the qualification of acts adopted by institutions, other than parliament, that are directly elected. This is relevant to certain acts of the French President.

[5] *See* JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL 61-64 (1992).

applicability could be decided in the legislative procedure, but that a substantial part must be adopted by the executive. In order to preserve the law-making authority of parliament, executive law-making usually requires an authorisation in the legislative act. However, national constitutional systems acknowledge autonomous law-making by the executive even tough its extent might vary.

C. The Concept of a Legislative Act under the Constitutional Treaty

I. Legislation under the Constitutional Treaty

Article I-33 stipulates that European Laws and European Framework Laws are to be considered legislative acts. Article I-33 makes it immediately apparent that European Laws and European Framework Laws are based on existing legal instruments. The *European Law* is in substance a Regulation and the *European Framework Law* a Directive within the meaning of Article 249 ECT. The use of existing terms is also evidenced in the category of non-legislative acts, which comprise European Regulations[6] and European Decisions. Recommendations and opinions have also been retained.

In contrast to the EC Treaty, which does not distinguish legal instruments in accordance with the procedure by which they were adopted, the Constitutional Treaty, without adding substantially new types of legal instruments, attempts a distinction of these instruments in legislative and non-legislative acts. Legislative acts are characterised by the procedure in which they are adopted. Article I-34(1) stipulates that legislative acts are adopted by the Council and the European Parliament, on a proposal by the Commission, in accordance with Article III-396, which replicates the existing co-decision procedure under Article 251 ECT. The principle of a different procedure as a distinguishing characteristic of legislative acts is, however, thrown into doubt by the provision of special legislative procedures under Article I-34(2). These procedures apply where specifically foreseen in the Constitutional Treaty. The special procedures provide for the adoption of legislative acts by the EP with the participation of the Council or by the Council with that of the EP. This of course raises the question whether the term "legislative" should be employed in these cases, in particular where the special legislative procedures are indistinguishable from those used for the adoption of European Regulations.

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[6] However, it should be noted that, quite confusingly, a European Regulation can be in substance a Directive or a Regulation within the meaning of Treaty Establishing the European Community, Art. 249, Nov. 10, 1997, 1997 O.J. (C340).

II. Justification for the use of Legislation

The distinction in the Constitutional Treaty between legislative acts as a category of legal acts and non-legislative acts sets it apart from the EC Treaty and raises the presumption that legislative acts under the Constitutional Treaty correspond to legislation in form as employed in the constitutional systems of its Member States. However, it is doubtful whether the Constitutional Treaty establishes a state. Though prepared by a "Convention", the Constitutional Treaty was adopted in the procedure provided for by the Treaty on European Union for the amendment of its provisions. Following an Intergovernmental Conference, the new Constitutional Treaty was signed by the Heads of State or Government and is currently the subject of ratification in all Member States in accordance with their constitutional provisions. Moreover, the Constitutional Treaty lacks certain characteristics of the state, such as competence over direct taxation. Finally, it could be argued that the Constitutional Treaty does not, and could not, alter the absence of a *demos* in a Union that is still characterised by its cultural and linguistic diversity.

If the Union's Constitutional Treaty does not produce a constitution corresponding to those of its Member States, the use of the term "legislation" as the hallmark of the constitutional systems of states, might then be at best misguided, at worst a deception. However, as in the case of the Community legal system, the Union's Constitutional Treaty might legitimately use the term "legislation" if the term could be used in a functionally equivalent way to that employed in states. The following analysis will therefore focus on the nature of the Union's competences, the institutions, and the procedures for the adoption of legislative acts.

1. The Union's Competences

Article I-11(1) provides, similar to Article 5 ECT, that the limits of the Union's competences are governed by the principle of conferral and that competences not conferred to the Union remain with the Member States. In a move to achieve "a better division and definition of competence in the European Union,"[7] the Constitutional Treaty establishes categories of competences in Article I-12. The Constitutional Treaty distinguishes between areas of exclusive competence; shared competence; co-ordination of economic and employment policies; the common foreign and security policy; and of supporting, coordinating or complementary action. This rationalisation of conferred competences is supported by the reinforced principles of subsidiarity and proportionality as limits on the exercise of Union competences.

[7] Laeken Declaration, Dec. 15, 2001, *available at*: http://www.europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

This competence order shows similarities with those of many federal states, all the more as the competences conferred on the Union remain as far-reaching, or even more so, as under the TEU. All the same, the nature of these competences would still be controversial. The new Constitution would presumably not alter the dictum of the *Bundesverfassungsgericht* (Federal Constitutional Court), which argued in its Maastricht decision that the Treaty on European Union established a "federation of States for the purpose of realising an ever closer union of the peoples of Europe (organised as States) and not a state based on the people of one European nation."[8] Additionally, the regulatory model[9] or the administrative model[10] of European integration would, in the absence of a European *demos*, deny that these competences are anything but delegated by the Member States. However, it seems a fallacy of these approaches to perceive the European *demos* in purely nation-state terms. It has been argued that "the *demos* that sustains the European integration project can be seen as constructive and multiple identity in that it is produced through the operation of the EU constitution, yet that production takes place on a base of a gradually transforming national identity."[11] Others have emphasised that the nation state still serves the important function of providing its nationals with a sense of belongingness, but that a European *demos* understood in civic terms would restrain "the in-reaching national-cultural demos."[12] This seems equally true for the Union under the Constitutional Treaty, which postulates the citizenship of the Union in Article I-10. If a European *demos* can therefore be constructed without recourse to state parameters, it should equally be possible to perceive the constitutional nature of the Union in non-statal terms.[13]

It can be argued that the nature of the Union rests on its systematic nature as a legal order.[14] Jurisprudential models, such as that of H.L.A Hart[15] or of trans-national

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[8] BVerfGE 89, 155 (para. 51).

[9] *See* GIANDOMENICO MAJONE, REGULATING EUROPE (1996); Giandomenico Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 EUROPEAN LAW JOURNAL 319 (2002).

[10] P.L. Lindseth, *Democratic Legitimacy and the administrative Character of Supranationalism: the Example of the European Community*, 99 COLUMBIA LAW JOURNAL 628 (1999).

[11] AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 160 (2002).

[12] Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUROPEAN LAW JOURNAL 219, 256 (1995). On a discussion of multiple *demoi*, *see also* WEILER , *supra* note 2, at 344-348.

[13] Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN LAW REVIEW 1, 2 (1993); VERHOEVEN, *supra* note 11, at 122.

[14] *See* VERHOEVEN, *supra* note 11, at 124 in relation of the nature of the European Union.

societal constitutionalism,[16] suggest that an autonomous legal order can exist beyond the nation state and therefore also within the Union. Therefore, the nature of the Union's competences does not *a priori* exclude the characterisation of legal acts adopted on the basis of such competences as legislation in form. However, because not all legal acts based on the Constitutional Treaty can be considered legislation in form, it is necessary to establish which of those acts can be regarded as legislation in form due to their characteristics. To that end, it is necessary to examine the institutions involved in Union law-making and the procedures which these institutions must follow to adopt such acts.

2. The Union's Institutions

None of the Union's institutions can be considered as representative on its own, in the traditional sense of a national parliament, of a European *demos*.[17] This would mean that the Union's law-making process would not be able to generate legislation in form. However, the major flaw of such a conclusion is, again, its inability to perceive the Union and its law-making process in any other way than by reference to state parameters. The democratic legitimacy of the Union can be constructed on the basis of an alternative model, which proceeds from the nature of the Union as "supranational integration project."[18] It is "a dynamic and … relatively autonomous constitutional project, that … rests on a constructive and multiple notion of demos and … accommodates for a far-reaching differentiation while preserving constitutional unity."[19]

The Union has, as its constitutional core, its own set of values and objectives[20] which drive and determine the integration process. It is not characterised by the traditional view of national parliaments as representing the nation. Each institution

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[15] *See* MacCormick note 13; VERHOEVEN, *supra* note 11, at 296. See also Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUROPEAN LAW JOURNAL 259, 264 (1995) and Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUROPEAN LAW JOURNAL 225, 241-242 (1999).

[16] *See* the contributions in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges et al. eds., 2004).

[17] The possibility of constructing a European *demos* on the basis non-statal parameters, as outlined above, does not alleviate the concern on the limitation of a European public sphere. Therefore, and despite its enhanced role within the Union's legal order, the European Parliament cannot be considered as being equally representative as a national parliament.

[18] VERHOEVEN, *supra* note 11, at 362 in relation to the EU.

[19] *Id*. at 362.

[20] *See* Treaty Establishing the European Community, Arts. 2 and 3, Nov. 10, 1997, 1997 O.J. (C340).

represents a particular interest in the law-making process that allows the Union to form a system of functional representation. Despite its distinguishing features, similarities with the national system become apparent when bearing in mind that the legislative process in the nation state also comprises all constitutionally relevant institutions in a deliberative process of law-making. The functional equivalent of legislation in form at the Union level to that of national legislation exists, where the Union institutions participate in the law-making process in accordance with the specific function they represent in the Union.

The Commission can be identified as promotional broker[21] to ensure the incorporation of diverse interests in the law-making process toward the attainment of a common European interest.[22] The Council represents the interests of the Member States in the law-making process.[23] This does not only reflect the desire of the Member States as signatories of the Treaty to protect their interests, but is also required as most of the Union acts are applied by the national authorities and therefore directly or indirectly affect national law. The European Parliament (EP) represents the citizens of the Union in the law-making process[24] and is best placed to protect minority interests and to provide a public forum of communication.[25] On this basis, the following subsection will examine which of the Union's law-making procedures could be considered as legislation in form by allowing an equal representation of these interests, in the law-making process.

3. The Union's Legislative Procedures

In contrast to the EC Treaty, the Constitutional Treaty designates in Article I-34 specific procedures as legislative. Article I-34(1) provides that European laws and European framework laws are adopted in accordance with the ordinary legislative procedure set forth in Article III-396. However, the Constitutional Treaty specifies that also other procedures shall be considered as legislative. Article I-34(2) stipulates that where the Constitution so states, European laws and European framework laws shall be adopted in special legislative procedures by the European Parliament with the participation of the Council or by the Council with the

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[21] Dietrich Rometsch & Wolfgang Wessels, *The Commission and the Council of the Union*, *in* THE EUROPEAN COMMISSION 213, 220 (Geoffrey Edwards & David Spence eds., 1997).

[22] *See* Treaty Establishing the European Community, Art. 26, Nov. 10, 1997, 1997 O.J. (C340).

[23] *See* Treaty Establishing the European Community, Art. 23, Nov. 10, 1997, 1997 O.J. (C340).

[24] *See* Treaty Establishing the European Community, Art. 20, Nov. 10, 1997, 1997 O.J. (C340).

[25] In the narrow sense that the EP provides a forum in which the arguments for and against legal acts are voiced, even though it might fail in the wider sense of providing a public sphere.

participation of the European Parliament. On the basis of the model of functional representation, the following subsection will assess whether these procedures can be regarded as leading to the adoption of legislation in form.

a) Ordinary Legislative Procedure as Legislation in Form

The ordinary legislative procedure in Article III-396 is a replication of the current co-decision procedure of Article 251 ECT. Article I-34(1) makes it clear that under the procedure legislative acts are adopted jointly by the European Parliament and the Council on a proposal of the Commission. The procedure thereby constitutes the basis for a joint effort by the EP and the Council, as both institutions need to reach agreement for the adoption of a legislative act. The ordinary legislative procedure allows the EP to protect minority interests that are otherwise not represented in the law-making process. In addition, the increased cooperation between the institutions will contribute to an intensive exchange of views,[26] which provides the EP with all necessary information to fulfil its function as a public forum. At first reading, the act will be adopted if the Council accepts all the amendments proposed by the EP.[27] This means that the adopted act reflects the discussion in the parliamentary committee and the plenary, where the proposals and the amendments are discussed in public. Moreover, the EP's Rules of Procedure make it possible for Council to appear before the EP's committees and to comment on draft amendments before the committee proceeds to a final vote. Where it adopts a common position, the Council, and the Commission, must comment on the common position.[28] The Council fulfils this obligation in writing.[29] Moreover Rule 76(2) of the Rules of Procedure of the EP makes it possible for the Council to present its common position to the committee responsible. Thereby the written communication can be supplemented by oral explanations. This shows that the EP is in full possession of the arguments before the Council and can, on this basis, provide a public forum for discussion on the issues before it. Where the Council does not accept the EP's amendments, the conciliation committee must be convened. Though the conciliation committee meets behind closed doors, the joint text, which might result from the conciliation committee, will be discussed in the EP in public. The presentation of these arguments in public reflects the spectrum of

[26] RICHARD CORBETT ET AL., THE EUROPEAN PARLIAMENT 197 (2003).

[27] Until 2002, this happened in 25% of all co-decision procedures, *see id.*, at 186.

[28] *See* Article 251(2). *See also* Article 9(1)(a) of the Council's Rules of Procedure 2004, which provides for a publication of the results of votes, the explanation of votes and statements in the Council minutes and the items in those minutes in relation to the adoption of a common position.

[29] *See also* Rule 74 of the EP's Rules of Procedure.

the discussion and justifies the procedure to be considered as legislative. [30] It can therefore be concluded that the ordinary legislative procedure should be considered as legislative procedure, as it allows an equal representation and consideration of the relevant interests in the Union by the respective institutions. The EP is also in an adequate position to fulfil its public forum function in this procedure.

b) Special Procedures as Legislation in Form

The special legislative procedures to which Article I-34(2) refers are contained in Part III of the Constitutional Treaty. A survey of these procedures allows a classification into three different procedures. Where the Council adopts acts with the participation of the EP, the procedures require either the consultation[31] of the EP or its consent.[32] Where the European Parliament adopts acts with the participation of the Council, the procedures call for the consent of Council.[33] This raises the question which of those procedures should be regarded on the basis of the model of functional representation as legislative and which as regulatory.

The procedure in which the EP is merely consulted is indistinguishable from procedures under the Constitutional Treaty that lead to the adoption of European regulations,[34] i.e. non-legislative acts in the meaning of Article I-33(1)(4). It is therefore difficult to see on what grounds such procedures should be regarded as legislative. Under the existing consultation procedure in the EC Treaty, the EP often has, even considering its possibility of delaying matters, little influence over the outcome of the act adopted. What is more, it is doubtful that the EP can perform its public forum function in the consultation procedure. Under the existing regime, the Commission defends its proposal in the parliamentary committee responsible[35] and

[30] It should be emphasised that a distinction has to be made between the deliberations on the one hand and the discussion in the parliamentary committees or in plenary on the other hand. It is not argued that the discussions that takes place in public in these *fora* reflect in their entirety the deliberations which take place informally between the EP and the Council, or the deals that are struck behind closed doors or in the corridors between the political groups. At public display are the arguments for and against a proposed act.

[31] Arts. III-125(2), III-126, III-127, III-157(3), III-171, III-176(2), III-184(13), III-185(6), III-210(3), III-234(2), III-251(3), III-256(3), III-269(3), III-275(3), III-277, III-393 sentence 4, III-424 sentence 1 CT.

[32] Arts. III-124(1), III-129, III-223(2), III-274(1), III-330 CT.

[33] Arts. III-390(2), III-333 sentence 3, III-335(4) CT.

[34] Art. III-163 CT.

[35] CORBETT ET AL., *supra* note 26, 119.

in plenary. This allows a discussion in committee and plenary on the Commission's proposal. Moreover, the Commission undertook to comment in plenary on all amendments and to justify its opposition to any amendments proposed. In addition, it has been willing to modify its proposals in the light of the EP's amendments. Furthermore, the EP has to be re-consulted in case of significant changes to the proposal.[36] In contrast, the Council's presence in the EP is much more limited. At the parliamentary committee stage, a representative of the Council's secretariat might be present; and at times someone from the Presidency is present.[37] This means that the major player in the procedure, the Council, is not involved in the discussions at the committee stage. Also, at the plenary stage, though the Presidency is represented, it rarely engages in the discussion. Moreover, the fact that the Council sometimes *de facto*[38] decided on the proposal before it has received the EP's opinion, reflects the limited influence of the EP and that the discussions in plenary do not adequately reflect the legal text to be adopted. The Council is not forced to defend its decision and therefore need not to engage in a debate with the EP. The objection is not so much that the deliberations are not public, but that the presentation of the arguments for and against the act is only offered from the EP's point of view, which is not even binding on the Council. The Commission cannot adequately reflect the views of the Council either. Due to the limited impact by the EP and the consequent limitations on the public display of arguments, it is not possible to consider the consultation procedure as a legislative procedure. Consequently the procedures under the Constitutional Treaty which allow the Council to adopt acts after a consultation of the EP cannot be regarded as legislative.

The procedure, in which the consent of the EP is required before the Council can adopt an act, is similar to the assent procedure under the EC Treaty. Introduced by the Single European Act and extended by the Maastricht and Amsterdam Treaties, the assent procedure requires the explicit approval of the EP before the Council can adopt the act. Even though the EP can withhold its assent for an indefinite period of time, it cannot submit amendments.[39] This, nevertheless, gives the EP sufficient influence, as its assent can only be gained by accommodating its view. The assent procedure takes place in one single reading in the EP, which seems sufficient to provide a public forum for a discussion on the merits of the act. In that respect, the

[36] *See* Case C-388/92, European Parliament v. Council, 1994 E.C.R. I-2067.

[37] CORBETT ET AL., *supra* note 26, 119.

[38] These are decisions "in principle" or "subject to Parliament's opinion," *see* CORBETT ET AL., *supra* note 26, 176.

[39] *See* CORBETT ET AL., *supra* note 26, at 199.

assent procedure can be distinguished from the consultation procedure, as it reflects the act in its final version. It is therefore justified to qualify the procedure, in which the consent of the EP is required by the Constitutional Treaty, as legislative. Similarly, the procedure in which the consent of the Council is mandatory before the EP can adopt the act should be regarded as legislative.

III. Substantive Limitations

Article I-33 has limited the typology of legislative acts to European laws and European framework laws. European laws are defined as acts of general application,[40] binding in their entirety and directly applicable in all Member States. European framework laws are binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Both legislative acts are therefore modelled on the existing legal instruments of regulation (European laws) and directive (European framework laws) as set forth in Article 249 ECT. The recourse in the Constitutional Treaty to existing legal instruments will also entail continuity in their legal treatment.

This more restrictive approach, which seems to exclude the adoption of legislative acts of individual application, is surprising when compared with the approach taken in national constitutional law, where legislative acts are defined by the procedure through which they are adopted and usually do not contain any limitations as to their addressees. However, this approach corresponds to the rationale on which the characterisation of legislation in substance is based: legislation should be adopted in general and abstract terms to ensure the equal treatment of those subjected to its rules.[41] It should therefore not be drafted with the intention of dealing with the particular situation of, and with exclusive application to, specific individuals. European laws therefore combine the notion of legislation in form, due to the procedure by which the act is adopted, and that of legislation in substance.

IV. Scope of Legislative Acts

Article I-33(1) provides that to exercise the Union's competences the institutions shall use the legal instruments offered in this provision in accordance with Part III. This means that the institutions cannot adopt legislative acts as a matter of course, but only where the provisions in Part III so dictate. A closer scrutiny of those

[40] For a discussion of the concept, *see* Türk, *supra* note 3, at 89-198.

[41] *Id.*

enabling provisions of Part III reveals that many competences are not exercised by use of legislative acts, but rather that they provide for the adoption of European regulations by the Council,[42] the Commission[43] and the European Central Bank.[44] Article I-33(1)(4) states that a European regulation is a non-legislative act of general application which can be adopted for the implementation of the Constitution. In accordance with the definition in Article I-33(1)(4), a European regulation can correspond to either what is now a regulation or what is a directive under Article 249 ECT. In substantive terms European Regulations are therefore indistinguishable from European laws and European framework laws.

The reservation by the Constitutional Treaty of European regulations to certain areas does not seem to follow any particular logic, but seems to be driven by the desire of Member States to remove certain areas from the ambit of legislative acts. Even though this leaves the Constitutional Treaty with a considerable "legislative gap", the approach of reserving certain areas to the adoption of European regulations seems preferable to the technique of camouflaging certain European laws and European framework laws as legislative acts, when they are merely regulatory acts. For it remains unclear why in some instances the Constitutional Treaty has opted for a European law adopted by the Council in the consultation procedure[45] and in other instances for a European Regulation adopted in exactly the same procedure.[46]

V. Legal Consequences of the Concept

The relevance of identifying legal instruments which can be characterised as legislation due to the procedure by which they were adopted lies in the legal consequences which follow from such a finding. It is submitted that the finding, that the Union's institutions adopt legislation in form, must find its legal expression in the effects which the Constitutional Treaty attaches to such acts. First, the position of legislative acts in form is highlighted in the legal systems of the Member

[42] Arts. III-130(3), III-151(5), III-159, III-160(2), III-163, III-167(3)(e), III-169, III-183(2), III-184(13), III-186(2), III-187(4), III-190(3), III-198(3), III-201(2), III-212(2), III-230(2), III-231(3), III-232(2), III-240(3), III-253, III-260, III-263, III-266(3), III-400(1) and (2), III-424(1), III-433 CT.

[43] Arts. III-165, III-166(3) and III-168(4) CT.

[44] Art. III-190(1) CT.

[45] *See*, supra note 32.

[46] *See, e.g.,* Art. III-163 CT.

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States by their specific form, as *loi*, *Gesetz*, or Act of Parliament. In contrast to the EC Treaty, which currently does not make such a distinction in Article 249 ECT, the Constitutional Treaty in Articles I-33 and I-34 enables the identification of legislative acts by their specific form as European Laws and European Framework Laws. However, it has been shown above that such a label is not justified for legal instruments that are adopted in the consultation procedure.

Second, legislative acts are granted a limited hierarchical supremacy over other legal instruments. The adoption of delegated European regulations under Article I-36 and of European implementing regulations, or decisions under Article I-37, requires the conferral of such powers in a legislative act. This also means that implementing acts may not exceed their legislative authorisation and may not be contrary to the provisions of legislative acts. However, legislative acts only enjoy such hierarchical superiority in the area in which they can be validly adopted. As the institutions can only use legislative instruments where the Constitutional Treaty so provides, legislative acts cannot take precedence outside their area of competence. It is doubtful whether the application of legislative acts can be extended by reference to Article II-112 of the Constitutional Treaty, which provides that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by the law". It would be inconceivable that the reference to law includes only legislative acts, but not non-legislative acts adopted on the basis of the Constitutional Treaty.[47] All the same, the link between legislative acts and fundamental rights protection is considered essential in many constitutional systems and its limited realisation in the Constitutional Treaty has to be regretted.[48]

Third, most constitutional systems require legislative acts to contain a certain minimum amount of detail to avoid the adoption of essential matters in non-legislative procedures. Even though the Court has consistently required that in the Community legal order the "basic elements of the matter to be dealt with"[49] have to be contained in the basic act, it has not enforced this requirement with great rigour.[50] The Constitutional Treaty in Article I-36(1)(2)(2) makes it clear that the

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[47] *See* Armin von Bogdandy & Jürgen Bast, *La Loi Europeénne: Promise and Pretence*, *in* THE EU CONSTITUTION: THE BEST WAY FORWARD? (Deirdre Curtin et al., eds.) (forthcoming, 2005).

[48] *Id.*

[49] Case 25/70, Einfuhrstelle v. Köster, 1970 E.C.R. 1161, para. 6. *See also* Case C-240/90, Germany v. Commission, 1992 E.C.R. I-5383, para. 36, and Case C-104/97P, Atlanta and Others v. Council and Commission, 1999 E.C.R. I-6983, para. 76.

[50] *See* Alexander Türk, *The Role of the Court of Justice*, *in* DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC 217, 224-227 (Mads Andenas & Alexander Türk eds., 2000).

essential elements of an area shall be reserved for legislative acts and cannot be the subject of a delegation of power. The Constitutional Treaty also imposes stricter requirements for the delegation to the Commission of the power to supplement or amend certain non-essential elements of legislative acts.[51] Article I-36(1)(2)(1) stresses that the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative act. On the other hand, less stringent conditions are demanded for the conferral of other implementing powers.[52]

Fourth, the relevance of legislation also has to be considered for the solution of certain legal issues in the decision-making process, in particular for the right of individuals to participate in the decision-making process. The legislative procedure has been characterised in this section as being based on a functional representation of the relevant interests. The participation of individuals would upset this institutional balance.[53] Conversely, acts that cannot be regarded as legislation in form cannot claim the same functional representation of interests in the procedure by which they are adopted. The participation of individuals, which are specifically affected by such acts, even if they are based on the Constitutional Treaty, should therefore not be denied.[54]

Fifth, in the field of general principles of law, the concept of legislation will be relevant for the margin of review the Union's judiciary can exercise. It is submitted that the deference of the Court of Justice[55] to the political institutions, to which the Community Courts currently allot a generous portion of discretion in the exercise of their powers,[56] would continue to be justified in relation to legislation in form due to its specific procedural characteristics.

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[51] *See* Art. I-36 CT.

[52] *See* Art. I-37 CT.

[53] However, *see* Arts. I-46(1) and (2) CT..

[54] *See* Case C-104/97P, Atlanta AG and Others v. Council and Commission, 1999 E.C.R. I-6983, paras. 37 and 38 and Joined Cases C-48/90 and C-66/90, Netherlands and Others v. Commission, 1992 ECR I-565, in which the Court seemed to have accepted a right to be heard, where the individuals are directly and individually concerned.

[55] The term Court of Justice is used in the meaning of Article I-29(1) CT.

[56] The application of such marginal review is not entirely consistent. On the link between the nature of the act and the margin of review of the Community Courts, *see* on fundamental rights: PAUL CRAIG & GRÁINNE DEBÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 323 (2003). On proportionality: *see* Francis Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, *in* THE PRINCIPLE OF PROPORTIONALITY, 20 (Evelyn Ellis, ed., 1999); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EC LAW 89-123 (1999); Gráinne DeBúrca, *The Principle of Proportionality and its Application in EC Law*, 13 YEARBOOK OF EUROPEAN LAW 105, 111 (1993); on equality: TRIDIMAS (above), at 57.

Sixth, the concept of legislation is also relevant under Protocol 1, Article 2, which obliges the Union institutions to forward to the national parliaments draft legislative acts[57] originating from these institutions or Member States. This allows national parliaments to scrutinise such acts as to their compatibility with the principle of subsidiarity in accordance with the procedure laid down in Protocol 2. In addition Article 2 of Protocol 2 obliges the Commission to consult widely before proposing legislative acts.

Finally, the concept of legislation is also relevant in the field of judicial review. Article III-365(4) of the draft Constitution has taken into account the dichotomy between legislative acts and non-legislative acts by allowing private parties to challenge legislative acts only under the strict test of direct and individual concern, while at the same time relaxing the conditions for challenges to regulatory acts. It is submitted that the concept of regulatory act, which is not referred to elsewhere in the Constitutional Treaty, should be understood as a non-legislative act of general application. The view that regulatory acts should include any legal act of general application[58] is difficult to reconcile with the new nomenclature used in the Constitutional Treaty, which carefully distinguishes between legislative and non-legislative acts. However, a privileged position for Union acts seems justified only for those legislative acts that correspond to the notion of legislation in form, as discussed above. In accordance with the right to an effective remedy,[59] the concept of "regulatory" act has to be interpreted widely and should therefore also include those legislative acts that cannot be considered as legislation in form.

D. Conclusion

The Constitutional Treaty has not created a state, but operates within its provisions the vocabulary of the constitutional state. Its use of the language of the constitutional state is therefore to be regarded at best as ambitious, at worst as misguided. On the other hand, the language of the administrative state that pervades the Community legal system would have also been inadequate for a legal system that began to constitutionalise itself long before the Constitutional Treaty was adopted. The dilemma for the Constitutional Treaty to find language suitable for its nature is compounded by the fact that it attempts to combine areas that have

[57] The definition in Article 2 of Protocol 1 and equally in Article 2 of Protocol 2 of a draft legislative act refers to proposals or initiatives that lead to the adoption of European legislative acts, a term that encompasses European laws and European Framework laws in accordance with Article I-33(1) CT.

[58] *See* von Bogdandy & Bast, *supra* note 47.

[59] Art. II-107 CT. *See also* the discussion in Case C-50/00P, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677 (opinion of AG Jacobs).

seen a different pace of integration. This fate is also shared by the concept most central to the constitutional state, that of legislation. It is not surprising that the Constitutional Treaty is not able to deliver on the expectations it raises in that respect. The Union is not a state which is based on the representation of its people in a parliament that makes the law. Instead, it constitutes an autonomous constitutional system, which is based on the principle of functional representation. It has been argued in this paper that this does not exclude the use of the concept of legislation within the Constitutional Treaty, merely that its foundations are not to be found in a representative parliament, but rather in the fact that the law-making process reflects the representation of the interests of the Union, its Member States and its citizens. This, it has been argued, has been realised in the ordinary legislative procedure and in the special procedure where either the Council or the EP must consent to the adoption of a legislative act. On the other hand, such considerations exclude the use of legislation for acts adopted in the special legislative procedure during which the EP is merely consulted and which cannot be distinguished from the many provisions that provide for the adoption of European regulations.

The diversity of areas in which the Union exercises its competences and the intention of Member States to limit the participation of the EP in certain areas to consultation, made it inevitable that the concept of legislation can create unity only to a limited extent. The Constitutional Treaty falls short of unity in this respect, as the concept of legislation cannot be legitimately employed for areas where the EP is merely consulted and is not used in the numerous areas, as where the Council adopts European regulations for no other reason than that to limit the role of the EP. Moreover, this also means that in various areas fundamental rights can still be limited by non-legislative acts, thereby failing to establish a link between Part II of the Constitutional Treaty and the concept of legislation. This also has as a consequence that legislative acts can only exercise their hierarchical supremacy over regulatory acts within their area of competence.

All the same, even though the definition of legislative acts is not entirely convincing and their exclusion in certain areas of Union law is regrettable, the distinction between legislative and non-legislative acts serves an important function. Legislative acts due to their special procedural characteristics ought to enjoy certain privileges, which come to the fore in the decision-making process and in relation to judicial review. The concept of legislation does fulfil a useful role, however, only if it is considered to be merely borrowed by the Constitutional Treaty from the constitutional state for the purposes of trans-national European governance and does not purport to serve as tool in a constitutional state.