

*“Nowhere is the new series of questions of sovereignty more urgently, vigorously and significantly joint than in the context of the European Union and its relationship with its constituent states”*

— Neil Walker, *Sovereignty in Transition*, vi.

### **The Constitutional failure of the EU**

Since the Constitutional Treaty of the EU failed in 2004 due to its rejection by the French and Dutch electorates, the EU has been thrown into a legitimation crisis. From a purely legal perspective, the rejection of the European Constitution is not necessarily a problem. In legal terms, it is possible to distinguish a democratically sanctioned constitution from legal “constitutionalism,” which, following Michelle Everson and Julia Eisner, can be defined as “a legal process of extrapolation of the values and institutions, which will determine the course of our joint European life [that] proceeds apace, untroubled by all failed political efforts to establish a European polity” (Everson and Eisner 2007:2-3). Although the lack of democratic support for the European Constitution manifested in the negative popular referenda in France and the Netherlands might not be a problem from the perspective of European lawyers and European legal constitutionalism, it does, however, constitute a political problem.

The tension between legal constitutionalism and the lack of a democratically sanctioned constitutional document makes one of the most fundamental political problems of the EU more pressing: the problem of sovereignty. The problem of sovereignty in the EU consists in a fundamental unclearness of where sovereignty resides within the union (regardless of whether sovereignty is understood in the Bodinian tradition as absolute power to command or in the Kelsenian tradition as competence of competencies). On the one hand, the fact that the founding documents of the EU remain only treaties signals that the EU is merely an international agreement among sovereign states. On the other hand, the supremacy of EU

laws to national laws as stated by the European Court of Justice (ECJ) signals that the EU enjoys some degree of supranational or quasi-federal sovereignty.

This antinomy is most clearly manifested in the Final Act of the Lisbon Treaty which, though it recognizes the EU as a treaty organization, still declares the primacy of EU laws: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."<sup>[1]</sup> In this way, although the Community law of the EU is merely an international agreement, it still overrides national laws in case of a dispute.

The question is how we can understand the political significance of the antinomy, which is engraved in both the constitutional failure of the EU and the legal response thereto in the Lisbon Treaty: how can we understand the antinomy between legal constitutionalism and political or democratic constitutionalism? How can we understand the curious phenomenon of sovereignty in the EU? In what way are the questions of democratic legitimacy, sovereignty and constitutionalism related to one another? What does the lack of democratic legitimacy, expressed in the rejection of the European Constitution, mean for sovereignty in the relationship between EU law and national law? How can we understand the political crisis of the constitutional failure of the EU?

### **Constitutionalism and political legitimacy**

In this essay I will take the first steps towards the development of an analytical model which will make it possible for me to answer these questions. The actual empirical juridico-political analysis of the EU and its constitutional failure lies, however, well outside the scope of this paper. The analytical model developed in this paper is grounded in the concept of constituent power: a concept that in all of its forms approaches the question of constitutions from the

perspective of the origins of the founding text and the authority on which it is based.

In contrast to the legal constitutionalism discussed by Everson and Eisner, within the framework of constituent power constitutionalism is understood as a political act of one or more constituencies, rather than as the legal procedures of constitutional lawyers. The point of departure in a constituent power analysis is that law and politics are closely wed with regard to constitutions, since the constitution as a legal text is understood as a product of a political action. In other words, a constituent power analysis of constitutional politics would strongly position itself against a Kelsenian analysis, which would identify legality and legitimacy. Within the framework of constituent power, legitimacy has its source in politics, and according to many of the most prominent thinkers of the constituent power, in democracy. In this way, the framework of constituent power allows for an analysis of the constitutional failure of the EU as a democratic legitimation crisis.

While legality and legitimacy, law and politics, cannot be denied as core elements of the framework of constituent power, the relationship between constituent power and sovereignty is more ambiguous. In this essay I will look at two democratic ideal types of the constituent power that differ drastically with respect to the question of sovereignty. The two models I will look at are based on the French and the American Revolutions and they correspond to two distinct political forms: the federation and the nation-state. As we shall see, whereas the French model of the constituent power is understood as sovereign, the American model of the constituent power is understood as a (temporary) suspension of sovereignty.

Though it is likely that neither of these ideal types apply to the constitutional process of the EU, it is my working hypothesis that these two models will be helpful, since the EU could be conceptualized as a hybrid, somewhere on the spectrum between the nation-state and the federation. In this way, the development of ideal types will provide me with a spectrum or a framework in which we can conceptualize and ask as to the fundamental problems regarding

the relationship between constitutional politics, sovereignty and democratic legitimacy with regard to the constitutional failure of the EU.

The two models of the constituent power discussed in this essay can be extracted from the writings of the two most important 20<sup>th</sup> century theorists of the constituent power: Hannah Arendt and Carl Schmitt. Three significant reasons can be given for a comparison of specifically Arendt and Schmitt in relation to the construction of ideal types of constituent power in the context of an analysis of the relationship between constitutional politics, sovereignty and democratic legitimacy. Firstly, Arendt and Schmitt are both democratic thinkers of the constituent power (though in very different ways), which will allow me to perform an analysis of EU constitutionalism from the perspective of democratic legitimacy. Secondly, Schmitt and Arendt fundamentally disagree upon the relationship between democratic legitimacy and the question of sovereignty, which will allow me to question the relationship between sovereignty and constitutional politics. Thirdly, both Schmitt and Arendt are “groundless” thinkers of the constituent power in that neither of them accepts transcendental foundations as grounds for political legitimacy in general and constitutional legitimacy in particular, which allows for a modern and non-metaphysical perspective on constitutional politics more appropriate for a secular institutional framework like the EU.

The concept of constituent power is, in the theories of both Schmitt and Arendt, a not unproblematic and maybe not fully resolved response to the problems endemic to the origin and political legitimacy (or authority) of constitutional orders. The problem inherent to constitutions is that, in contrast to ordinary law, a constitution is caught in a vicious circle with respect to its origins and its authority:

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

ultimately derive their authority (Arendt 2006:175-6).

The problem is twofold: (1) if the source of legitimacy for ordinary law is the constitution, what is the source of legitimacy of the constitution? (2) If the “founding fathers” of a constitution themselves are unconstitutional, since no law exists to sanction their actions, from where do they derive their authority? The answer given to both of these problems in Arendt’s theory as well as in Schmitt’s is the constituent power of the people.

Though both Arendt and Schmitt seek to give a “democratic” or “popular” answer to the dual problem of constitutional beginnings, they strongly disagree on what that entails. This disagreement, I believe, is tied up with the relationship between constituent power, sovereignty and political form. Following Schmitt and the French model, the source of legitimacy for the constitution and the source of authority of the constitutional actors is the popular sovereignty of the constituent power. What is important to note here is that the constituent power also could be an expression of monarchical sovereignty, i.e., the will of the king, which, following Schmitt, would not qualitatively change the constituent power. Popular sovereignty is for Schmitt nothing but the people’s appropriation of monarchical sovereignty. Arendt agrees with this diagnosis, but contrary to Schmitt she does not endorse this notion of popular sovereignty. For this reason Arendt attempts to formulate a theory of the constituent power that goes beyond popular sovereignty: a non-sovereign notion of the power of the people which she finds manifest in the American Revolution.

On the basis of this disagreement Schmitt and Arendt come to favour two different political forms respectively: the nation-state (exemplified by France) and the federation (exemplified by the US). Interestingly enough, Schmitt and Arendt agree (at least partly) that the political form of the nation-state is the strongest manifestation of sovereignty, and that the political form of the federation (at least temporarily) transgresses sovereignty. Further, the main reason that Schmitt favours the nation-state and Arendt favours the federation is exactly this

relationship between political form and sovereignty. Where Arendt argues that the nation-state “is built on quick-sand” and doomed to collapse because it is founded on the unchecked and fluctuating sovereign will of the nation, whereas the federation succeeds in checking power without destroying it, Schmitt argues that the federation is merely a transitory form exactly because the question of where sovereignty is vested is left open. For this reason the federation is destined either to devolve back into a nation-state or to be consolidated into a federal-state like the US we know today.

### **Two models of constituent power**

The French model of the constituent power deserves its name because in the theories of both Arendt and Schmitt it is mainly based on the French Revolution and the writings of Emmanuel Sieyès, who, in *What is the Third Estate?*, famously made the distinction between constituent power (*pouvoir constituant*) and constituted power (*pouvoir constitué*). The constituent power (embodied by the French nation and represented by the Third Estate) is Sieyès’ solution to the dual problem of the unconstitutionality of new constitutional beginnings. The constituent power, Sieyès famously argues, is the source of all constituted power, and for this reason, the will of the nation has the legitimate power to overtrump all constituted power. Thus, according to Sieyès, the will of the nation is always law: “The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law” (Sieyès 2006:136).

It is on the basis of Sieyès’ understanding of the national will as the origin and authority of the constitution that Schmitt develops his theory of the constituent power: “The [constituent power],[2]” Schmitt writes, “is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence” (Schmitt 2008:125). This dense sentence contains almost the entirety of Schmitt’s theory of the constituent power. It requires some unpacking, however, to be comprehensible.

The understanding of the constituent power as a will makes Schmitt's theory a clear manifestation of the legal voluntarist or decisionist tradition, which, in contrast to natural law and positive law, founds the authority of the law on neither nature, reason nor a basic norm, but rather on the will of the sovereign (people). In this way, Schmitt does not distinguish between power and authority: if the people have the power to authorize themselves to act as the constituent power, then their decision will be legitimate. The origin of the constitution is thus not a basic norm but a command of the sovereign people: "in contrast to mere norms, the word 'will' denotes an actually existing power as the origin of a command. The will is existentially present; its power or authority lies in its being" (Schmitt 2008:64). In this way, Schmitt argues, "The Weimar Constitution is valid because the German people gave itself a constitution" (Schmitt 2008:65).

It is important to note here that the will is of a political nature because it shows that Schmitt's conception of the political lies at the heart of his theory of the constituent power: "The theory of the people's [constituent power] presupposes the conscious willing of political existence, therefore, a nation" (Schmitt 2008:127). The political unity of the people, which for Schmitt is another word for the state (Schmitt 2008:59 and Schmitt 2007:19-20), is therefore the condition for the existence of (and not the product of!) the constituent power (Schmitt 2008:75). The precondition for the existence of the constituent power is thus the friend and enemy distinction that is the defining character of the political unity of the people (Schmitt 2007:29-30). The existential distinction between friends and enemies is thus the foundation for the unitary political will which is the constituent power.

On Schmitt's view, the decision of the constituent power does not pertain to the constitution of a people or the constitution of a state ("the social contract"), but to the constitution of "the type and form" of the pre-existing political unity of the people. The decision of the constituent power is the decision upon a specific political form, e.g., democracy, monarchy, aristocracy and so on: "Fundamentally new forms can be introduced without the state ceasing to exist, more specifically, without the political unity of the people ending" (Schmitt 2008:75-76). In this way the constituent power decides on the concrete manner of existence

that characterizes the political unity (Schmitt 2008:59). The validity of the social contract, Schmitt argues, is its mere existence and thereby “its right to self-preservation” (Schmitt 2008:76).

It is important to note that Schmitt distinguishes between constitution and constitutional laws. The constitution is not the sum of the constitutional laws (Schmitt 2008:75). The constitution consists in the fundamental political decision on the political form of the state. In this way, the fundamental decision of democracy is encapsulated in the preamble to the Weimar Constitution: “the German people provided itself with a constitution” and “State authority derives from the people” and “The German Reich is a republic” (Schmitt 2008:77-78). These clauses are “more” than norms, statutes or constitutional laws: “They are, specifically, the concrete political decision providing the German people’s form of political existence and thus constitute the fundamental prerequisite for all subsequent norms, even those involving constitutional laws” (Ibid.).

This concrete political decision, which determines the type and form of the political existence of the people, is made as a one-sided decision of the sovereign will of the people. This decision is not made through representation (as in the case of Sieyès: the third estate as the extraordinary representatives of the nation) or under any other legal or institutional constraints (Schmitt 2008:128). The will of the constituent power is always in the state of nature and the people’s political self-determination is therefore made in a direct and unmediated manner (Schmitt 2008:131). The people can therefore say “yes or no” to the fundamental question of their political existence: “Monarchy or republic? Constitutional monarchy or the dictatorship of councils?” (Schmitt 2008:83). This decision is not necessarily reached through a referendum (a constituted form) but through the direct expression of consent or disapproval of the physically assembled people, i.e., through *acclamation* (Ibid.).

The constituent power therefore never deliberates or seeks compromises: it always has to be



a fundamental negation or affirmation. If not, the constitution will be a dubious decision that never could provide stability and political legitimacy: “Inside every political unity there can be only one bearer of the [constituent power]” (Schmitt 2008:105). The acclamation of the sovereign people is the very core of Schmitt’s understanding of democratic legitimacy (Schmitt 2008:136).

Whereas the French model of the constituent power according to Schmitt embodies a strong, stable, and realistic political foundation because of its clear and uncompromised manifestation of popular sovereignty, Arendt sees the French model as “built on quicksand” (Arendt 2006:154). The interesting aspect of this disagreement is that the virtue of the French model according to Schmitt (sovereignty) is the French Revolution’s most serious vice according to Arendt.<sup>[3]</sup> According to Arendt, the French model of the constituent power is nothing but a bad disguise of tyranny.

A tripartite critique of the French model of the constituent power, corresponding to a triple manifestation of sovereignty pertaining to the French model, can be extracted from Arendt’s writings on constituent power. Firstly, the French model is sovereign with regard to the subject of the constituent power (the singular will of the nation). The notion of the sovereign will of the nation as the subject of the constituent power and the source of authority of the law, Arendt argues, is dangerous and unstable because a will, if anything but a legal fiction, will be ever changing (Ibid.). A sovereign will, therefore, can never provide any form of endurance or stability in a political realm: public opinion blows with the wind. Whereas France as one of the oldest nations has persisted, French constitutional stability has been very low: since 1791 France has had seventeen constitutions.

Secondly, the French model is sovereign with regard to the constitutional act (decision or command). The idea of the constitutional act as a one-sided decision or command of the people as a unitary actor reduces constitutional politics to an anti-political manifestation of

despotism or tyranny. The idea that a command is the source of authority of the law makes it impossible to distinguish between authority, power, and violence (Arendt 2006:173). In this way, according to Arendt, the legitimacy which Schmitt imagines can be nothing but a manifestation of the fluctuating balance of who controls the monopoly of violence. Historically speaking this means that legitimacy is nothing but a manifestation of the power of the decision-maker(s): the Pope, the Prince or the People.

Thirdly, the French model is sovereign with regard to the source of legitimacy (the fusion of power and authority). On the basis of Arendt's writings, one must conclude that each of these sovereign aspects makes the political success of the French model of the constituent power dubious. The lack of distinction between power and authority is tyrannical because it simultaneously makes law powerful and power legitimate no matter its form and content (Arendt 2006:147). In this way, the command of the constituent power (no matter whose) always constitutes a legitimate foundation for the law (no matter its content) independently of how it is expressed (no matter how) as long as it is a unitary action, that is, as long as it is sovereign. Following Arendt, there is in this case no qualitative distinction between the power of one and the power of the many: it is only a question of who yields political power, the question of who decides.

The American Revolution can, according to Arendt, provide us with a more promising model for the constituent power. Whereas the French model is a manifestation of sovereignty and presupposes the political unity of the nation-state, the American model is post-sovereign and is manifested in the political form of federations. Arendt distinguishes the American model from the triple structure of sovereignty pertaining to the French model: the subject of the constituent power, the constitutional act and the source of constitutional legitimacy. The American model is understood by Arendt not as a sovereign command of the unitary will of the people, but rather as a contract or a mutual agreement amongst a plurality of human actors aiming towards the constitution of public freedom. While the French model has its origins in political theology and the political philosophy of Sieyès, the American model has its intellectual origins in the Roman republican tradition and the political philosophy of

Montesquieu.

According to Arendt, the subject of the constituent power in the American model is post-sovereign because, in contrast to the French model, it is not manifested in the unitary will of the people as a single agent but, instead, in the plural power of the people. Following Arendt, the very condition of politics is plurality: a plurality that will disappear the moment the “manyness” of the people is reduced to a unitary will. This plurality was manifested in the American Revolution in the institutional plurality of town halls and of states (Arendt 2006:172-173). Whereas the subject of the constituent power in the French model is manifested in the unitary will of the people, the subjects of the constituent power in the American model are the people(s) as organized multitude(s).

Therefore, the subjects of the constituent power in the American model do not act in ‘the state of nature’, but rather in a public sphere that institutionally incorporates some amount of division of powers (which, following Arendt, entails multiple sources of power and not merely the separation of power into the three branches of government) (Arendt 2006:142-3). Following Montesquieu, Arendt argues, the public sphere is conditioned on the existence of checks and balances, which cannot be secured through law, but only through the existence of multiple power sources. A genuine division of power is not possible within the nation-state because the state, in Weberian terms, enjoys the monopoly of violence. The American model is therefore manifested in the political form of the federation.

Since the subject of the constituent power in the American model is plural, the constitutional act is not a command but a mutual agreement, a compromise or a contract. The constitutional act can therefore not be understood as mere acclamation: it requires some amount of public deliberation and common action, that is, of Arendtian politics. The constitutional act, Arendt argues, consists in common deliberations and mutual pledges (Arendt 2006:206). The constitutional act is thus a manifestation of Arendtian politics as the

praxis of political freedom.

The source of constitutional authority in the American model, Arendt argues, does not rest upon a fusion of power and authority as in the French model. It is, however, an open question whether Arendt succeeds in separating power and authority. The superiority of the American model to the French model, Arendt argues, consists in the authority being derived not from the power of the people, but rather from the performance of constituent power encapsulated in the constitution as a written document (Arendt 2006:196). Constitutional politics does according to Arendt carry an immanent principle which can provide a non-sovereign foundation for the constitution: “The way the beginner starts whatever he intends to do,” Arendt writes, “lays down the law of action for those who have joined him in order to partake in the enterprise and to bring about its accomplishment. As such, the principle inspires the deeds that are to follow and remains apparent as long as the action lasts” (Arendt 2006:205). This principle is that of political freedom manifested and secured through common deliberations and mutual promises (Ibid.).

These characteristics are in general in Arendt’s writings characteristics of politics as the praxis of political power or freedom. For this reason it is debatable whether Arendt ultimately succeeds in deriving power and authority from different origins. The important point is, however, that, contrary to Schmitt, Arendt argues that the authority of constitutional politics—if it is to be an adequate and successful source of political legitimacy—relates not merely to a *who* (the subject of the constituent power), but also to a *how* (the act of constitutional politics) and a *what* (the content of the constitution).

The last substantive criterion (the *what*) does not refer to a principle of natural law but to a principle of amendment rules. In other words, Arendt argues, if constitutional politics is to be successful, the constitution as a constituted form has to keep the constituent power alive. The true source of authority of the constitution, following Arendt, is thus not the constitution

as a written document, but the permanent immanence of the constituent power, which persists in the possibility of amendments. In this way, Arendt strives to overcome the rigid distinction of the French model between constituted power and constituent power. In the American model the constituent power comes to be extended into the constituted power as constitutional amendment rules and in this way the source of authority is not left as a dormant force in the state of nature. The permanence of the political realm and the constituent power, instead of being opposites as in the French model, become wed to one another in the principle: "preservation through augmentation" (Arendt 2006:194).

Whereas Arendt understands in this way the American model as the most successful form of constituent power because it overcomes sovereignty, Schmitt, in obvious contrast thereto, understands the federal form of constituent power as nothing but a transitory form exactly because the question of sovereignty is left open. The federation is, following Schmitt, a peculiar political form, because it lies in the middle of the spectrum between a confederation, i.e., an international treaty that does not deprive its members of their sovereignty, and a federal state (Schmitt 2008:383-5).

The federation is the political form describing a union of states, which have a constitution but not a state. According to Schmitt, the constituent power of the federal form is clearly distinct from the French model of constituent power because it is a contract between the member-states of the federation. This contract changes the member-states' constitutions without abolishing their national sovereignty (Schmitt 2008:384). Historically, this political form could be applied to e.g. the German Federation of 1815-1871, the United States of 1787-1865 and possibly also to the present day EU.

The aim of the federation is, according to Schmitt, self-preservation. This entails that all federations unconditionally guarantee the political existence of each of the members of the federation, even if this is not stated explicitly (Schmitt 2008: 386). Internally, self-

preservation signifies a necessary pacification. Internal peace is essential within the federation; a war between two member-states would signal the end of the federation (Schmitt 2008:386-7). Furthermore, in the name of the common interest in self-preservation and security, the federation has the right of supervision and, if necessary, intervention with regard to maintenance, preservation and security (Ibid.) Externally, the federation protects all the member-states against foreign invasion: "Every federation can wage war as such and has a *jus belli*. There is *no federation without the possibility of a federation war*" (Schmitt 2008:387). This does not mean however that the individual members of the federation are totally deprived of their *jus belli*; "it follows from the nature of the political existence of the individual members that a right to self-help and to war is only being given up insofar as it is conditioned by membership in the federation" (Schmitt 2008:388).

The inevitable political failure of the American model is inscribed in a fundamental antinomy regarding sovereignty, which pertains to the political form of a federation of democratic states. This antinomy persists between the political existence of the federation and the political existence of the member-states, which have to coexist under a federal constitution (Schmitt 2008:388). The federation is conditioned on this coexistence: neither the member-states nor the federation are to be subordinated to the other part: "the federation exists only in this existential connection and in this balance" (Ibid.). The essence of the federation resides in this "dualism of political existence." If the existential balance of this dualism is not kept intact, the federation will dissolve either into individual sovereign states or into one federal sovereign state (Schmitt 2008: 389).

The problem of this dual existence is practically best illustrated by the problem of secession. On the one hand, the federation is founded as a permanent order that entails a continual renunciation of the right to secession. On the other hand, the federation is a contract of independent politically existing states that must have the continual right to decide upon the status of this contract themselves, also with respect to the annullability of this contract, i.e., the right to secession (Schmitt 2008:392). In this way, the federation is existentially conditioned both on the member-states' continual right to secession and the renunciation of

this right.

The fundamental problem of the federation can be stated as follows: if an existential conflict arises between the federation and the member-states, who decides? The problem is that the federation is predicated on the existential balance between the two parties' equal right, and if a decision is made, the federation will dissolve because *either* national *or* federal sovereignty is declared supreme. For this reason, the existence of the federation is conditional on a perpetual openness of the question of sovereignty, that is, the existence of the federation is predicated on an existential exclusion of internal conflict in the federation (Schmitt 2008:395). It is important to note here that existential balance between two political entities, according to Schmitt, does not entail a "division of sovereignty": the question of who decides is merely left open.

The only possible resolution to this antinomy, according to Schmitt, lies in an existential and substantial homogeneity among all members of the federation, which will ensure that the antinomy is resolved by making certain that internal conflict is existentially excluded (in this way, the closure of the question of sovereignty is precluded) (Schmitt 2008:395). This substantial homogeneity is primarily derived from national similarity of the member-states' populations (independently of what it is manifested in: language, history, religion, culture etc.) (Schmitt 2008:392).

This criterion of homogeneity pertains, according to Schmitt, not merely to the federation as a political form but to democracy in general. In a national democracy, like the French, the presupposition of democracy is a substantial equality of a people, meaning a national homogeneity: "democratic equality is essentially *similarity*, in particular similarity among the people" (Schmitt 2008:261, 263).

Democracy is defined by Schmitt—both as a state form, a governmental form and a legislative form—as the identity of ruler and ruled (Schmitt 2008:264). Identity as the key term of democracy has at least three meanings for Schmitt: (a) the identity of a homogenous people (national identity), (b) the identity of politically unified people (political identity) and (c) the self-identity of a physically present people as in contrast to representation (presence identity). Democracy rests in this identity because if the identity is strong enough there will be no difference between the opinion of one and the opinion of another: there will be one sovereign will of the people. It is this will that has the power or authority to constitute a state as a democracy: the homogenous sovereign will of the national people is the subject of the constituent power.

Since both democracies and federations rest on substantial homogeneity, it is necessary that the national homogeneity converges with the federal homogeneity in a federation of democratic states (Schmitt 2008:404). For this reason, Schmitt argues “it is part of the natural development of democracy that the homogenous unity of the people extends beyond the political boundaries of member states and eliminates the transitional condition of the coexistence of the federation and the politically independent member states, and replaces it with a complete unity” (Schmitt 2008:404).

In this way, the principle of homogeneity that led to the resolution of the antinomies of the federation—the antinomies which again, if not resolved, would lead to the dissolution of the federation because of the closure of the question of sovereignty—has, in the case of democratically constituted states, a path dependency, which stirs the federation directly toward its transition into a federal state. On the other hand, if the homogeneity is not strong enough, the antinomies of the federation will lead to a collapse of the federation into sovereign states.

For this reason, the legitimacy of a federation, in Weberian terms (the sociological criteria



leading the population to accept the political system), will lead (a) to the transition of the federation into a federal state if they are fulfilled and (b) to the dissolution of the federation into nation-states if they are not fulfilled. The non-statist form of the federation is therefore, according to Schmitt's theory, merely a transition from one form of statehood to another form of statehood.

The inevitable result is the end of the federation: either the federation is dissolved into individual states or the individual states give up their independent existence to the federal state (Schmitt 2008:389). The American model and the dual structure of sovereignty which pertains to the federation is therefore, Schmitt argues in contrast to Arendt, not very likely to be a political success because it more often than not will merely be a political transition to statehood.

### Constitutional success and failure

On the basis of the above discussion of the French and the American models of the constituent power, the following table can be constructed which would apply to both Arendt's and Schmitt's writings on the French and the American models of constituent power:

|  | Political form   | Sovereign                   | Constitutional act    | Constitutional subject  |
|--|------------------|-----------------------------|-----------------------|-------------------------|
| <b>The French Model of the constituent power</b>   | The nation-state | Sovereign                   | Decision or command   | The people as singular  |
| <b>The American Model of the constituent power</b> | The federation   | Post-sovereign or undecided | Contract or agreement | The people(s) as plural |

*Table 1: The French and the American Model of the constituent power*

What is interesting about these models, apart from the fact that Schmitt and Arendt have a similar understanding of the relationship between constitutional politics, political form and sovereignty, is their completely opposite judgement of the two models on the basis of the same parameter: political success and stability. According to Arendt, the French model is doomed to fail because of its foundation in the political theology of a sovereign national will: "it is as though the nation-state, so much older than the revolutions, had defeated the revolution in Europe even before it had made its appearance" (Arendt 2006:14). On the other hand, according to Schmitt, the American model is merely a transitory model predicated on the lack of existential conflicts among the member states. This political possibility rarely has a long endurance because, in concrete political terms, it is preconditioned on an existential homogeneity between all the member-states; an existential homogeneity that, moreover, cannot be so strong that the federation will transition into a federal state.

How can we make sense of this diametrically opposed judgement of the political success and stability of the two models of the constituent power? One possible answer can be given on the basis of the difference between Arendt's and Schmitt's understandings of what political success and stability consists in. This question is only raised indirectly by the two authors. It seems however that where Schmitt fundamentally is most concerned with political success and stability with regard to *security*, Arendt is primarily concerned with political stability understood as the stability of the institutional framework of the public sphere as space of political *freedom*.

At the heart of the disagreement on the political success of the two constitutional models lies one of the oldest discussions of political theory: what is the end of a political union? Why should a group of people constitute themselves as a political community? In relation to the discussion of the constituent power, this question could be rephrased as: what is the ultimate meaning of constitutional politics? The answers given by Arendt and Schmitt respectively are freedom and security.

What is interesting in the comparison of Schmitt and Arendt is that they both conceive of the constitutional act as tautological: following Schmitt and the French model of the constituent power, the constitutional act of the sovereign will of the people aims at securing its own sovereignty. The constitution is the self-preservation of the power pertaining to the subject of the constituent power: the sovereign people constitute themselves as sovereign. The ultimate source of legitimacy for this action is therefore also the ultimate aim of the action: self-preservation. In this way, Schmitt operates with four existential values, which he borrows from Spinoza: *existence* (the friend and enemy distinction), *integrity* (the unification of the people in a nation), *security* (the self-preservation of the nation), and *constitution* (the decision of the question of sovereignty) (Schmitt 2008:76).

In this way, the sovereign political unity of the people manifested in the nation-state exists in order to preserve itself. This is Schmitt's understanding of a groundless foundation for political legitimacy. Political success and stability consists in the absence of internal strife and the persistence of the state. Constitutional and institutional continuity is therefore not necessarily a parameter of political success and stability: following Schmitt's theory, it does not seem to be problematic that France has had seventeen constitutions in a little more than two hundred years. As long as the decisions of sovereignty are strong and clear, Schmitt does not seem to argue either for or against their constant reappearance. What matters in politics is the will to self-preservation: "If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear" (Schmitt 2007:53).

Following Arendt and the American model of the constituent power, the people as an organized multitude exercise political freedom in order to constitute a public sphere for political freedom. Constitutional politics is the exercise of public freedom in order to institutionalize public freedom. In contrast to Schmitt, not security but public freedom is the defining characteristic of politics on Arendt's view. Whereas Schmittian politics is defined on

the basis of the external relations of the political community (the friend and enemy distinction), the Arendtian notion of politics is defined on the basis of the relations internal to the political community. Whereas the Schmittian notion of politics is predicated on the existence of a state, the Arendtian notion of politics is predicated on the existence of a public sphere. Political success and stability in the Arendtian theory can therefore not be measured on the basis of the persistence of a nation-state, but only on the institutional persistence of a public sphere of political freedom.

## **Conclusion**

In light of the American and the French models of constituent power, the pivotal question which ought to be raised in relation to the constitutional failure of the EU and the ensuing legitimation crisis seems to be whether the successful establishment of democratic constitutional legitimacy is conditioned on the existence of a federal state. From the perspective of Arendt's and Schmitt's writings on the constituent power, two opposing answers are given based on two rivaling notions of the ultimate meaning of constitutional politics: freedom and security.

Following Arendt, the nation-state as a political form seems to preclude the possibility of the establishment of a public sphere because of the state's monopoly of violence. Political freedom is for Arendt conditioned on checks and balances institutionally established by a genuine division of power between several political entities. The establishment of constitutional legitimacy as political freedom is therefore not preconditioned on the existence of a federal state, quite the contrary. A similar hopeful argument for a "transnational" constituent power in Europe has recently been made by Habermas.[4] The hope is that the division of sovereignty between the member-states and the federal level will create a fertile ground for democracy.

Following Schmitt, the establishment of constitutional legitimacy in a non-statist federation is doomed to fail for the simple reason that if legitimacy is created in a federation, the political union will become so close that the outcome will be the constitutionalization of a federal state. If, on the other hand, legitimacy is not successful, the federation will collapse into nation-states again. Hence, the non-statist federation is only a transitional moment between different forms of democratic statehood. The establishment of constitutional legitimacy is in this light understood on the basis of whether the internal difference between federation members is smaller than the perception of a political exterior. Ultimately, this means whether the feeling of friendship internal to Europe is stronger than hostility between states in Europe: are we more or as much Europeans as we are Danish, French, English, Dutch etc.?

The fundamental question regarding federalism and democracy in the case of the EU seems to be: is it possible to bind the European peoples together by something other than national homogeneity (something which in the case of the EU is not given and seems hard to construct with all the cultural and linguistic differences between the countries)? The motto of the EU—“united in diversity”—seems in light of this discussion to be one of the core problems of the union: what can unite the peoples and states of Europe in their diversity? What can create a strong foundation for democratic legitimacy in the EU?

The constitutionalization of the EU can be understood as an attempt to create a stronger foundation for legitimacy in Weberian terms: mutual promises and pledges as a manifestation of Arendtian politics is a possible way of creating political legitimacy from the bottom up. The outcome seems however to have been in complete opposition to this intension. The rejection of the TCE by two of the original founding members of the European Coal and Steel Community, France and the Netherlands, has caused a legitimation crisis for the EU.

The question is what this crisis signals? Does the legitimation crisis of the EU signal an

imminent “Schmittian” closure of the question of sovereignty which will require either a transition of the EU into a federal state or a rollback of the EU into the original nation-states? Does Europe stand at the crossroad of an ultimatum between the United States of Europe and the end of the European project? If the latter, the question is, what is to be done? Is Europe so internally divided that it cannot make up for its current democratic legitimation deficit? Or is it possible to create the necessary conditions (whatever they are) for a federation of democratic states in Europe?

These questions are of course empirical and can therefore not be established by mere speculations. What can be established theoretically is however that the EU can function as an interesting test-case for the relationship between democracy and the state-form. The EU appears along these lines as an experiment on whether democracy is possible in political communities beyond the state and moreover under which conditions it is possible for heterogeneous peoples to unite in their diversity.

In light of the present rise of nationalism within the EU—most significantly in France, Hungary, and the Netherlands—constitutionalism seems to have failed in the EU both in the Arendtian and the Schmittian sense. The common public sphere of all European countries with a vision of a future for Europe seems to be shrinking. The democratic body of the EU, the European Parliament, appears, for example, to become increasingly dominated by nationalist parties.<sup>[5]</sup> If this trend continues, this indeed suggests a grim future for the European project. The constitutional failure seems to suggest that democracy and constitutional politics have parted ways in the EU. If that is the case, the constitutional crisis is a serious problem for the future of democracy in the EU.

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[1] See Lisbon Treaty, Final Act, 17. Declaration concerning primacy: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0231:0271:EN:PDF> p. 306/256

[2] The translator has chosen to translate “verfassungsgebende Gewalt” with constitution-making power instead of constituent power. The two words can be used interchangeably but for simplicity’s sake I consistently refer to the term as constituent power.

[3] Arendt’s critique of the French Revolution is manifold. Two of the main reasons for the failure of the French Revolution given by Arendt are the predicament of poverty in France and the break with the absolute monarchy which came to legitimize the French terror to such an extent that crime and virtue no longer could be distinguished: any crime in the name of the people would be legitimate (Arendt 2006:54-58, 82, 148, 173). Arendt’s critique of the French Revolution does however transcend these two historical specific conditions of the late 18<sup>th</sup> century in France. If the French model is understood as an ideal type (equivalent to Schmitt’s conception of the constituent power), a general critique can be extracted from Arendt’s discussion: The critique of the sovereign model of the constituent power.

[4] Jürgen Habermas: *The Crisis of the European Union—A Response*. Malden and Cambridge: Polity Press. 2012.

[5] In a number of countries, recent opinion polls suggest that right-wing nationalist parties will become the biggest parties in the upcoming 2014 election. See for example France: <http://www.parismatch.com/Actu/Politique/Sondage-elections-europeennes-en-temps-reel-Euro-olling-Ifop/intention>, the UK: [http://cdn.yougov.com/cumulus\\_uploads/document/rabu8qa9d0/YG-Archive-Pol-Sunday-Time](http://cdn.yougov.com/cumulus_uploads/document/rabu8qa9d0/YG-Archive-Pol-Sunday-Time)

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s-results-140502.pdf, and the Netherlands (in Dutch):

<http://www.tns-nipo.com/nieuws/persberichten/d66-leidt-landelijk,-pvv-in-europa/> [accessed  
May 4, 2014].