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The EU as a citizens’ joint venture

Multilevel constitutionalism and open democracy in Europe

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Introduction

The year 2014 is the fifth year of operation under the Treaty of Lisbon, and the Union thus reformed has gone through a difficult period. The financial crisis has led to an economic depression, but also to new trends of scepticism and even nationalism, both in the southern countries that were so dramatically affected by the crisis and the austerity policies imposed upon them and in the northern countries whose citizens have found it difficult to accept the demands of solidarity (Pernice 2013b: 25–56). With a view to the embarrassing results of the European elections, this seems to be reason enough for a re-theorization of Europe – a contemplation and explanation of what Europe is and what basically constitutes the European Union. Is it a Union of states alone, or is it a Union of citizens? Further developing the concept of ‘multilevel constitutionalism’, the present contribution seeks to raise awareness of the role of the citizen as the real source of power and legitimacy in the European Union.

A Union of states and citizens

In terms of political philosophy, the EU is commonly described as an international or supranational organization (Pollack 2005: 357–98; Risse-Kappen 1996: 53–80; Stone Sweet and Sandholz 1998: 1–26), an organization *sui generis*, if not a federal state (Mancini 1998: 29–42; Sack 2005: 67–98) or an unidentified beast – a *monstro simile* (Pufendorf 1994 [1667]: 198–9) impossible to define, eluding any attempt at description.¹ Some degree of common understanding is required to describe the type of venture the citizens of the European Union are engaging in ever more deeply as European politics become increasing relevant for their daily life.

However, this is not the place to rehash all the attempts to qualify or categorize this specific type of political organization that have failed to clarify what we observe taking shape step by step: a federation of states, a compound of states, an association of sovereign states (*Staatenverbund*)
or a supranational union (Wiener and Diez 2009). Most of these terms make reference to states. But is the European Union really only a matter of states? At least legally, ever since the very early case law of the European Court of Justice (ECJ) (ECJ case 26/62 – Van Gend & Loos 1963 ECR 1; case 4/64 – Costa/ENEL, 1964 ECR 585), individuals seem to play a significant role in the process of European integration. This role is hidden behind all the state-oriented concepts, but debates on the proper protection of fundamental rights, democratic legitimacy and the principles of subsidiarity and solidarity in the EU clearly demonstrate that this organization differs in nature from all other traditional forms of transnational cooperation.

**Multilevel constitutionalism**

Here is where the concept of ‘multilevel constitutionalism’ can serve a beneficial purpose. The term is not used to describe the European Union, nor is it intended to give this political system a categorial name. The issue is, rather, to develop an underlying concept for theorizing the European Union in a constitutional perspective. Since its inception, the concept of multilevel constitutionalism has undergone many attempts by various authors to determine its scope and interpret its meaning, receiving both acclaim and criticism (for a survey of both affirmative and critical assessments of the concept of multilevel constitutionalism, see Pernice 2009: 352). It is primarily the proponents of the traditional theory of the state (Staatslehre) who critically target the underlying functional concept of the constitution and its application or extension beyond the state (Kirchhof 2006: 768–76). Others (Bogdandy and Schill 2010: 702–7) view this as part of the federal tradition, but criticize its ‘uncertain attitude toward sovereignty’ (Walker 2003: 14). On an analytical note, the conceptual terminology (i.e. the use of ‘levels’ and ‘multilevel’) has been criticized as evoking a hierarchical structure or remaining ambiguous, which diminishes its descriptive value (Cananea 2010: 83–317). In this vein, the author further submits that the concept regretfully overemphasizes the vertical dimension (see, however, Pernice 2006).

In a recent publication, René Barents (2012: 159–83) has harshly criticized the four pivotal premises upon which the concept of multilevel constitutionalism rests (for a first reply, see Pernice 2013a): first, the ‘unity in substance’ thesis, which holds that the EU constitution and the national constitutions of the member states form a coherent and substantive whole; second, the ‘European citizenship’ thesis, which argues that the EU’s legitimacy can and must be traced back to the collective will of its citizens (voiced, mediated and executed through their respective national governments); third, the ‘autonomy’ thesis, which presents the EU’s legal order as autonomous with regard to the national legal orders, a concept that lies at the very heart of the idea of a non-hierarchical constitutional composite in a pluralistic setting; and, finally, the ‘divided sovereignty’ thesis, which states that the EU and the member states jointly bear and exercise sovereign public power. While some commentators (Mayer and Wendel 2012: 127) underscore and expound the fundamental link between multilevel constitutionalism and constitutional pluralism, others (Jestaedt 2004: 638, 662, 664), in the Kelsenian tradition of legal theory, question the possibility of a pluralistic framework in general. More specifically, Neil Walker properly distinguishes between ‘narrower’ and ‘wider’ notions of multilevel constitutionalism. As a ‘narrower’ concept, it focuses on the EU context and the vertical relationship between the Union and its member states (understood as non-hierarchical) as well as the latter’s horizontal relationships; in addition, it substitutes the concept of the constitution for the concept of the state, a notion that is more concerned with abstract quality (constitutionalism) than concrete entities and presents itself as centred on the citizens rather than the polity. This narrower notion, however, may well be (and, in fact, has been) explored in a ‘wider’ sense, as Walker does,
expanding multilevel constitutionalism beyond the confines of the EU setting to investigate the application of constitutional ideals, institutions and practices beyond the state at large (Pernice 2006b: 973–1005; Walker 2010: 143–68).

Developing the citizen’s perspective

On the basis of ‘multilevel constitutionalism’, the present proposition is to submit and further develop a comprehensive understanding of the progressive construction of the Union as a divided power system – or, better, as a process of ‘constituting’ the EU multilevel structure in the original sense of the term ‘constitution’, a word derived from the Latin constitutere, meaning ‘putting together, constructing, establishing’, and giving this process a name.

Who are the authors and actors in this process? Who is at the origin of the EU? And who is able – and has the legitimacy – to drive this process forward? In terms of multilevel constitutionalism, the answer is: ideally the citizens alone, the citizens of the EU member states acting through their national governments, thereby – directly by referendum or indirectly via representation in their parliaments – effectuating the Treaties establishing the European Union. Could there be anybody else in any democratic system equipped to do this?

To be absolutely clear: in modern democracies, nothing ‘earthly divine’ (Buchwalter 2008: 495–509) or absolute remains in the state. Given the interdependence of states in the age of globalization (or in the ‘postnational constellation’, as Habermas [2001: 58 et seq.] puts it), there is similarly no room left for ideas such as absolutism of states or sovereignty. If there is any sovereignty at all, it is the sovereignty of the people. ‘People’ here does not refer to an abstract entity, a Volk or nation; rather, it has a political meaning as the individuals who have decided to unite and constitute themselves as the subjects of a legitimate power by organizing themselves in the form of a political community that we typically call a ‘state’ and assuming citizenship in the resulting body. The instrument used to accomplish this is the constitution of that state.

We should consider the process of the constituting of Europe in the same fashion. The same people, citizens of their respective member states, through their national governments and parliaments, have commonly agreed upon treaties by means of which they have constituted the EU as a supranational political entity to serve their common purposes and interests through common institutions acting on their common behalf. Thus, these citizens of the member states are mutually granting each other a new additional identity by establishing through the EU Treaties a complementary legal status: citizenship in the European Union.

The constitution of the European Union and its further development can therefore be called a citizens’ joint venture (Pernice 1999: 727; 2001: 166–8).²

Here, emphasis is placed on the citizens as the true authors and owners of the EU, no less than they are authors and owners of their respective national legal-political orders. Both the member states and the EU are serving the citizens’ interests, according to the competences conferred to each level of action. In this regard, reference can be made to the famous description of the federal system provided by James Madison in the ‘Federalist No. 46’:

The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.

(Hamilton et al. 1787/88: No. 46)

Article 10 of the Treaty of European Union (TEU), which sets out the principle of representative democracy in the Union, refers to the dual character of legitimacy, underlining
its two different strands of accountability: to the European Parliament and to the national parliaments – or to the citizens directly. The provisions on democratic principles in the Treaty clearly indicate that the citizens are the source of legitimacy: Article 9 TEU requires the Union to ‘observe the principle of equality of its citizens’, Article 10(4) TEU acknowledges the role of political parties at the Union level to ‘contribute to . . . expressing the will of citizens of the Union’ and Article 11 TEU defines the participatory rights of citizens, including the citizens’ initiative. Conceptualizing the European Union from the citizens’ perspective allows us to detect and correct certain misunderstandings underlying arguments that question the democratic legitimacy (regarding the alleged democratic deficit of the EU, see, for instance, Moravcsik 2002) and even the desirability of the Union as such:

1 The conferral of competences upon the European Union will progressively extract powers from national parliaments, to the point that general elections at the national level will become meaningless.

2 Further European integration will place the national sovereignty of member states at risk, as the national parliaments and their governments will be compelled to implement policies in concreto, occasionally even without their prior consent.

3 Democracy and collective political self-determination are endangered in the member states due to the remoteness of European institutions from the citizens and a lack of democratic accountability at the European level.

If we understand the citizens to be the source of any legitimate attribution and exercise of public authority in a political system, answers to these challenges can be summarized by three principles: the principle of additionality, the principle of voluntary participation and the principle of open democracy. The first principle concerns powers and shared sovereignty, the second is about exercising sovereignty and the third focuses on legitimacy. All three address (from their respective perspective) the issue of the ‘democratic deficit’ in the Union. These principles shall first be explained before some conclusions are drawn regarding the upcoming reform of the EU.

**Powers: the principle of additionality**

To illustrate what is meant by this principle, the metaphor of a troubled apartment house may help. Having experienced several conflicts among the families living in the house, some tenants felt the need to convene regularly to discuss and resolve issues of common interest. However, there was no room big enough for such a meeting. So the tenants came up with the idea of constructing a meeting room in an upper floor for these purposes. The room and the meetings would be open to all the other families to join, subject to their acceptance of common rules. The joint venture proved to be successful. The tenants found that it was beneficial for each of them when issues were commonly discussed and decided under their established rules. This immediate success encouraged other families to join.

We could further develop this metaphor to mirror the European Union. What it suggests is that there are matters of importance for the peoples of the member states of the European Union that can be solved in common, at a supranational level, more effectively than by each state individually. *Supra* – that is, the meeting on the upper floor – does not necessitate hierarchy, although we are talking about a multilevel structure. Peaceful coexistence in Europe was the first focus of European integration, as countries had proven themselves incapable of ensuring this on their own. Other issues followed.
Matters beyond national reach and democratic self-determination

The principle of additionality means that the supranational structure adds to the member states and their respective power. The European Union was designed to address challenges that the individual member states could not handle on their own. In effect, the powers conferred upon the EU are not powers that the member states previously possessed; rather, they represent new competences added to those of the member states in the form of collective action through common institutions. States would not give away their power voluntarily. Instead, their citizens, by common agreement, have found it useful to establish new institutions with powers that are additional to those of their member states. If it is true that in democratic societies people confer powers upon institutions by means of their constitutions, the origin of the new powers conferred to the European Union cannot be states, but instead only citizens. The citizens of the European member states, through the European Treaties, have constituted and further developed a new instrument, in addition and complementary to their respective nation-states, in order to attain the objectives the several states in isolation were themselves unable to achieve.

Would people or politicians accept the idea that certain issues will be decided

• at the regional level, when they can be dealt with efficiently by local authorities;
• or at the national level, when they can easily be settled by regional authorities;
• or at the European level, when member states could take care of them as effectively as the EU?

Clearly, the answer must be: no, they would not. This refusal reflects the desire to ensure that decisions are taken as closely as possible to those affected by them. It is a question of optimizing democratic self-determination, cognizant of the differences in responsiveness of the various levels of authority. The relative influence of each citizen on what is finally decided diminishes as the number of participants increases. Thus, if democracy signifies self-determination, the level of relative self-determination decreases with the increase in the size of the group – that is, with the level of political organization: local, regional, national, European.

On the other hand, matters decided on a level of authority that is closer to the citizen may well engender profound external effects, impacting citizens in other polities who did not have a say in the matter, such that a democratic chasm gapes open, as Jürgen Neyer recently explained:

Under conditions of interdependence, and in the absence of a supranational regulatory body, all democratic nation-states suffer from the structural problem that the policies of one nation impinge on the policies of others, with no country having the ability to systematically internalize these repercussions.

(Neyer 2012: 4 et seq.)

This relates to the complementary nature of the EU system of dual legitimacy as the flip side of the principle of additionality. At the Union level, the structural democratic deficit emerging at the member state level can be addressed and at least partially remedied as other constituencies gain a voice in the decision-making process in order to internalize pertinent negative externalities, such that the EU is best understood as a corrective mechanism enhancing the democratic legitimacy of governance in Europe as a whole (Neyer 2012: 68–70).
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The democratic meaning of the principle of subsidiarity

The principle of subsidiarity reflects this fundamental insight. In conjunction with the principle of proportionality in Article 5(4) TEU, it is not only a criterion for the legitimate use of competences conferred upon the Union (Article 5(3) TEU), but also the guiding principle of the architecture of competences within the European Union (on the idea of subsidiarity in the constitutional context of the EU, see Pernice 1996d). This is what citizens as the authors of the Treaties (should) consider when deciding upon the conferral of powers to the Union. This principle has been included in the integration clauses of national constitutions, such as Article 23(1) of the German Basic Law; it corresponds to the principle stated in Article 1(2) TEU that ‘decisions are taken as closely as possible to the citizen’ (for a comprehensive and comparative legal analysis of integration clauses of both the member states and the EU, see Wendel 2011: 144 et seq., 525 et seq.).

Thus, from the perspective of the citizens, the principle of subsidiarity can be understood as a general rule ensuring the highest possible degree of political self-determination in a multilevel political system (Barber 2005: 305–25). If, as the German Federal Constitutional Court (GFCC) recognized in the Lisbon Judgement, democratic self-determination is related to human dignity (GFCC 2009: para. 211), it therefore obtains a prestigious position among the founding values of the European Union enshrined in Article 2 TEU and in Article 1 of the EU Charter of Fundamental Rights (for a comparative legal analysis of the two conceptions of human dignity pursuant to Art. 1 of the Basic Law and Art. 1 of the EU Charter, see Schwarz 2011).

Sovereignty lost – or new powers gained?

If the principle of subsidiarity is faithfully applied, the claim that member states or national parliaments have lost and continue to lose their powers is ill founded. Clearly, the ban on barriers to trade, the prohibition of discrimination on grounds of nationality, the requirement to respect the common principles and values of the Union and many other rules agreed upon in the Treaties restrain political options at the national level and even the constitutional autonomy of the member states. In turn, however, citizens gain freedoms and rights they never had before and that a member state could not grant individually. This benefit could not be secured and the Union could not function properly without functioning national democratic institutions, administrative bodies and judiciaries based upon the rule of law implementing and ensuring the proper application of European law. All this means that national authorities are now subject to new constraints and loyalty obligations, and that they have – at least in part – altered their function (Hufeld 2011: 118, 121–3). This, however, does not necessarily take away powers from national institutions. It is the flip side of the newly established possibility of actively participating in collective decision-making that reaches far beyond national borders, an increasingly important opportunity to effectively extend rights and secure adequate living conditions to all European citizens in the age of globalization.

A constitutional system designed for a multilevel political entity

Thus, the proposal is to understand the European Union as a political entity that is not separate from the member states but instead comprises them, an organization that is composed of the member states and the supranational institutions. The constitution of the Union, consequently, does not challenge the national constitutions; rather, it is based upon and can be considered a
complementary part of them. It is a sort of extension, adding new capacities for action of common interest to the benefit of the citizens – even overcoming democratic deficits at the national level. This is why citizenship in the Union can be said to be ‘additional to national citizenship’, as Articles 9 TEU and 20(1) TFEU emphasize. Clearly, this does not mean that Europe’s citizens are schizophrenic. Rather, to paraphrase Goethe, two souls are dwelling in their chests, as a second legal status has been added to the status that citizens of the member states already had (Habermas 2012: 28–36).

Union citizenship reflects a specific belonging or constitutional relationship to the European Union and its institutions. It means ownership of and adherence to the Union, in the same sense that national citizenship is the expression of ownership of and adherence to the respective member state, the component and basis of the Union.

**Participation: the principle of voluntariness**

The preceding argument has shown that it would be difficult to understand European integration as posing a real threat to sovereignty. In fact, the opposite is true: from the perspective of the citizens, it is an expression of their voluntary and sovereign decision that creates new opportunities for self-determination at the supranational level. The principle of voluntariness applies to both membership in the Union and the implementation of its legislation.

**Membership in the European Union**

No country or people is forced to accede to the Union, nor were any of the original member states forced to participate in this joint venture. Likewise, none of the existing member states is legally bound to stay. The new provisions of Article 50 TEU introduced by the Treaty of Lisbon make this voluntary nature explicit by stating the option for unilateral withdrawal from the Union – an option unknown to federal states. Politically, though, any withdrawal of a member state would be contrary to the idea of European integration and the common objective ‘of creating an ever closer union among the peoples of Europe’ (Art. 1(2) TEU). It is particularly difficult to imagine Germany withdrawing from the Union, for historical and political reasons, in particular due to its existential interest in being embedded in a political union that offers its citizens a hospitable environment, an enduring peace, economic and social welfare, and the opportunity to maintain influence at the global level.

**Implementation and the rule of law**

Membership in the European Union is thus a voluntary decision taken by the people of each member state, beginning with a state’s accession and extending to its continued membership. However, the ‘principle of voluntariness’ has a broader meaning that gives the European Union a unique character, distinct from any other model of political organization. The Union is founded upon the binding force of law instead of physical coercion. There is no European army, nor does the EU dispose of troops or deploy police forces to enforce obligations under the Treaties or secondary legislation. It is based on the rule of law only, as well as the common consensus that the Union serves the common interest of all its citizens best when the commonly established rules are observed. Union law is not imposed from the outside, but rather built into the national systems as it works ‘from the inside’ through the national authorities that enforce it.
**Voluntariness and disobedience**

Voluntariness includes the option of disobedience and exit. However, empirical evidence has shown that the system, based upon the rule of law, generally functions well. It is by conviction and the force of law, not by physical coercion or the threat of force, that member states (including their judges and administrative bodies) obey the law of the Union and give it preference even over national constitutional law. The worst cases of disobedience seen thus far arose in an area in which the ‘Community Method’ (including the jurisdiction of the Court of Justice of the European Union, CJEU) does not apply: economic and fiscal policies. Under the Treaties, these policies still remain ‘Member States’ economic policies’ (Art. 119(1) of Treaty on the Functioning of the European Union [TFEU]). The damage done by breaches of fiscal discipline under the Treaty – in particular by France and Germany, unfortunately followed by others – cannot yet be measured. From a legal point of view, the present crisis must be attributed not to the absence of physical enforcement of the rules, but rather to an unrealistic trust in cooperation among states and the lack of effective mechanisms for judicial decisions identifying breaches of law and requiring correction.

**Limits of primacy and the role of the courts in a pluralist system**

The rule of law and the characteristic of the European Union as a union based upon the rule of law instead of physical force are often what convince prospective member states and their citizens to join the EU as a civilized political entity. This implies limits to submission, as even obedience to Union law remains voluntary. In concreto, as national constitutional courts have already made clear, cases may arise where a Union measure clearly violates the national identity of a member state as described in Article 4(2) TEU (ECJ 2009), is evidently ultra vires (Article 5(2) TEU) or otherwise violates the substance of the fundamental rights of the individual (Article 6 TEU) to an extent that the values common to the Union and its member states (Article 2 TEU) are called into question, thereby threatening the very basis of the EU legal order. For a national court to deny the application of such a measure to the citizens of a member state is not in contradiction with the principles of primacy and direct effect, as established by the ECJ, but rather the expression of a common responsibility typical of a non-hierarchical, pluralist system such as the EU (Mayer and Wendel 2012: 105–27; Pernice 2014a; Walker 2002: 317–59). Safeguarding respect for these common values – in particular human dignity and the fundamental rights of the individual – is a shared responsibility of European and national authorities, specifically the CJEU and the national constitutional courts, for the benefit of the citizens of the Union (Pernice 2006; Voßkuhle 2010a: 108; 2010b: 175–98).

**Mutual constitutional stabilization**

This respect and the shared responsibility of the courts at both levels ensures it can be understood as a condition for the citizens of each of the member states to agree upon the common exercise of sovereign rights by Union institutions at a supranational level and to accept the binding force of their actions. Article 23(1) of the Basic Law clearly expresses this conditionality with regard to the operation of European Union institutions as a basic requirement for German participation. However, it reflects also the conditions for accession and continued membership to the Union. Article 2 TEU summarizes the common values, Article 49(1) TEU states that only a European state that respects the values referred to in Article 2 TEU ‘and is committed to promoting them’ may be accepted as a new member state, and Articles 7 TEU and 354
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TFEU set up a procedure of supervision and sanctioning in cases of ‘serious and persistent breach by a Member State of the values referred to in Article 2’ (see also Chapter 1). Respect for these values is not only a condition for the proper functioning of the Union; the corresponding provisions at national and European levels also play an important role in the protection of the rights of individuals. They form a system of mutual constitutional stabilization (Pernice 1995: 225–64) established by the citizens of the member states with a view to ensuring the respect of their fundamental rights, in parallel with the European Convention of Human Rights, for all cases in which a member state might fail to observe its duties towards the individual.

Voluntariness and national sovereignty

The principle of voluntariness is thus supported by a vested interest of the citizens, as the state may be enjoined to protect these rights and values in the case of a serious violation. Arguing that this represents a threat to national sovereignty would mean that the state is sovereign, not the people. The same holds for other provisions on powers conferred to the Union for purposes beyond the reach of national authority. These provisions may subject national authority to rules and limits, but it would be a misconception of democratic sovereignty if such constraints resulting from the common exercise of sovereign rights by supranational institutions were understood as a limit on the self-determination of the citizens in each of the member states. In fact, the opposite is true.

Legitimacy: the principle of open democracy

Democracy means collective self-government: those who are affected by the actions of the public authority must have equal rights to participate in the process of determining its policies in order to accept them as legitimate. Practice has illustrated many ways in which democracy can be organized, but one common denominator seems to be that the system ought to be self-referential, insofar as democracy seems to be equivalent to popular sovereignty (Grimm 2010: 35–41). Democratic legitimacy, or the recognition and acceptance of decisions by those affected by them, thus depends on the perception that the decisions are in some way one’s own choice, a concept related to the Rousseauean ideal of self-authorship. As there are varying views and interests in each society, the decisions taken by a majority are accepted as legitimate, but only when the competent institutions observe certain conditions, procedures and fundamental rights guaranteed in the constitution.

The democratic deficit and special EU standards of democracy

All this seems to be the case for the European Union as much as it applies – ideally – in the member states. Nevertheless, there is a general complaint that the EU suffers from a democratic deficit. People seem to feel that Brussels is ‘remote’ or unresponsive, that people do not have any influence on politics in Brussels and that nobody can be held accountable for the decisions taken there (Weiler 2013: 111, 116). Public opinion on the issue is still split among member states – there is no common language and basically no European-wide public sphere (Grimm 1995: 590).

On the other hand, it is important to note that this political analysis is not reflected in the legal analysis of the German Federal Constitutional Court. The Court has accepted that the EU system of governance meets the requirements of democracy, at least those laid down in the German Basic Law. However, this view is based upon the assumption that democratic legitimacy
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for European policies ultimately relies upon the national parliaments, as the European Parliament is not considered sufficiently democratic to assume this role; rather, it plays a supplementary part. The reason for this statement is the institution’s lack of equality resulting from the principle of degressive proportionality (Article 14(2) TEU). The weight of a vote of a citizen of Malta or Cyprus counts 12 times as much as that of a German citizen. As long as legitimacy can be considered to be derived from the national parliaments, however, and as long as the Union is not a federal state to which the criteria traditionally applicable to states would apply, the GFCC does not see any reason to consider the EU to be undemocratic (GFCC 2009: paras. 263–72, 278–97; for the circularity of the argument, see Halberstam and Möllers 2009: 1241 et seq.).

This judgement effectively claims that the European Parliament would not be a democratic body capable of providing legitimacy to the Union’s policies. The GFCC has confirmed its critical attitude in its judgement on the 5 per cent threshold for parties competing in federal German elections (GFCC 2011: para. 118). However, the Court’s denial of the parliamentary quality of this institution has been widely criticized (Schönberger 2009: 535–58; Thym 2009: 559–68).

This is not the place for further comment on the jurisprudence regarding the specific democratic powers of the European Parliament (Nettesheim 2010: 119). As correctly stated by the German Constitutional Court, the European Union is not a state (GFCC 2009: para. 277). Consequently, European legislation and policies may follow functionally equivalent democratic principles that correspond to its specific structure. Democracy within the member states would not be affected, because even if the principles applied at the European level did not meet the standards for national policies, it is not possible to argue a democratic deficit as long as the purposes of the decisions taken could not effectively be achieved at the national level.

As intimated above, this is guaranteed by the principle of subsidiarity. If the principle of subsidiarity is systematically applied, the matters that are decided at the European level are only those that cannot (or cannot effectively) be dealt with at the member state level. If a matter is beyond the scope of national measures – and dealing with such issues is precisely what the EU was established to do – other rules for democratic legitimacy must be accepted if non-action is not the desired outcome.

**Enhancing democracy in the European Union**

The question is therefore how to organize the institutional framework and the decision-making processes at the Union level in order to meet the fundamental democratic requirement of self-government to the greatest possible extent.

To determine the requirements of democracy at the Union level, multilevel constitutionalism comes into play again, and again it seems appropriate to take the perspective of the citizens. If they have chosen not to copy the model of a federal or centralized state in the organization of their common interests at the European level, instead establishing a new kind of supranational structure of public authority based upon, complementary to and – for the implementation of its policies – dependent upon their national institutions, then democratic processes for European policies cannot be conceptualized in isolation from national democratic processes. Rather, in some way, these processes are a part of the operations of the Union, and their extension towards a supranational convergence and integration finally leads to the expression of a European political will. The complexity of such processes cannot be overlooked, in particular where the logic of democratic equality – one person, one vote – must be balanced against the logic of federal diversity and the national identity of the member states. Both the equality of the member states
guaranteed under Article 4(2) TEU and the equality of the citizens guaranteed under Article 9 TEU are mutually restrictive in a Union of citizens and states. As long as the states are considered to be a primary factor and the structural basis of the European Union – and there is no reason to depart from this assumption – innovative ways must be found to ensure that the virtues of democratic principles are manifested in practice.

Taking citizens seriously: democratic empowerment in the EU

At this juncture, it is time to return to what has been said above with regard to dual citizenship in the constitutional architecture of the Union. Each person is both a national citizen and a citizen of the Union, a subject of his or her state and a subject of the Union. This duality of political status and identity manifests itself in the dual path for democratic legitimacy and control defined in Article 10 TEU: the citizens of the Union are represented in the European Parliament and – as national citizens – ‘in the Council by their national governments, themselves democratically accountable either to their national Parliaments, or to their citizens’ (Article 10(2) subpara. 2 TEU). Read together with Article 11 TEU (dealing with participative democracy in the Union), this provision underscores that the Union is not (only) a matter of states and governments, but clearly and above all a matter of the citizens. A closer examination of the details of these provisions would seem to be warranted.

First, it is important to note that Article 10(3) TEU guarantees citizens the ‘right to participate in the democratic life of the Union’. This provision also requires that decisions of the Union ‘shall be taken as openly and as closely as possible to the citizen’, in the democratic spirit of the subsidiarity principle and responsive governance. These are fundamental conditions for the effective participation of citizens at the European level and, thus, for their right to control European policies in general in two ways: by means of their national parliaments (to which their governments are accountable), and directly through the European Parliament (to which the European Commission is accountable).

Second, openness in the political process means transparency in the sense of Article 15 TFEU, as underlined by the fundamental right of access to documents in Article 42 of the EU Charter of Fundamental Rights. However, it also includes the idea that the opinions of the citizens will be heard and taken seriously, which is further spelled out in Article 11 TEU. This provision not only establishes the citizens’ initiative (para. 4) but, more importantly, it also sets out the general obligation of the institutions of the Union to ‘give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of the Union’ (para. 1), as well as to ‘maintain an open, transparent and regular dialogue with representative associations and civil society’ (para. 2).

Openness and closeness: the potential for citizen participation

The democratic potential of these provisions has yet to be explored. They were designed to permit and encourage citizens to engage in public discourse, to increase awareness of policies developed by the Union’s institutions and to thereby facilitate substantial impact on these policies. They offer opportunities for individuals to participate in the policy process, to make their personal views known and ultimately to make a difference. If, as already quoted from Article 10(3) TEU, ‘decisions shall be taken as openly and as closely as possible to the citizens’, the Treaty thus not only enshrines the principle of open democracy but also, as intimated above, the principle of subsidiarity as a democratic principle. However, in this chapter on the democratic principles of the Union, closeness may be understood in another sense as well: where people have full access
to information, where decision-making is a transparent process and people have a real say – could we not conclude that they may feel close to, or even part of, the political process? Read in conjunction with the provision on the equality of citizens of the Union (Article 9 TEU), this open democracy in the Union could even qualify as the basic requirement that the German Constitutional Court found to be lacking in the composition of the European Parliament.

Except for Sweden, where freedom of information, transparency and access to official documents have been constitutionally recognized since 1766, the EU’s acknowledgement of these rights seems to be a step ahead of its member states and, arguably, countries worldwide. The idea is not a new one: the statement ‘Information is the currency of democracy’ is attributed to Thomas Jefferson. As early as 1990, with its Directive 90/313 on the freedom of access to information on the environment (OJEC 1990: 56–8), the European Union introduced provisions on open access at that point unknown in many member states. At the Earth Summit in 1992, this concept was adopted worldwide, upon a European initiative, in Principle 10 of the Rio Declaration and was later concretized as pillar one of the Aarhus Convention of 1998.

Access to information successfully became binding law for the European institutions under the ‘transparency’ regulation 1049/2001 (OJEU 2001; Regulation (EC): 43–8). It was also recognized as a general principle by the Council of Europe Convention on Access to Official Documents of 2011 (Council of Europe 2009), as well as (at the international level) by the international Open Government Declaration of 2011 (Open Government Initiative 2011). Moreover, it finally made its way into German law in the Freedom of Information Act of 2006 (Bundesgesetzblatt 2005).

**Freedom of information and the internet: open democracy in Europe**

This remarkable revitalization of an old concept, substituting the *arcana imperii* with principles of open democracy, has caused a real ‘change of paradigm’, at least in Germany (Schoch 2012: 23, 24). From their origins in the EU, the principles of freedom of information and transparency are now widely recognized as essential requirements of democracy (Calliess and Ruffert 2011: Art. 1, No 75 et seq.), and their recognition seems to have had an impact on the relationship between citizens and public authorities as well as on the concept of the state in general (Pernice 2014b).

For the European Union, the adoption of the principles of open democracy went hand in hand with the extensive use of the opportunities offered by the internet. Thanks to these technologies, an active information policy and enhanced public dialogue have been established for legislative proposals and even in processes of a constitutional nature involving civil society and all interested citizens, as practised for the first time on the ‘futurum’ website of the European Constitutional Convention from 2001 to 2004. An increasing amount of information on the activities of the EU institutions is being published online, including the prospective publication of all relevant documents concerning legislative processes though the ‘PreLex’ website (PreLex 2014). The new Regulation 211/2011 on the European Citizens’ Initiative (OJEU 2011), adopted under Article 11(2) TEU, provides for the electronic collection of signatures through software offered free of charge by the Commission (for practical information, see ECI 2014).

There is a potential for new political influence and increased active participation of citizens in European policies, both through national channels and directly in an open dialogue with the Union institutions. In light of these circumstances, and to the extent that these new opportunities for involvement are being taken advantage of, it hardly seems credible that democracy and political self-determination in the member states are endangered due to the remoteness of European institutions from EU citizens and the absence of democratic accountability at the European level.
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Conclusions: for a more democratic European Union

A constitutional system designed to incorporate a multilevel structure, the principles of additionality, voluntariness and open democracy, and the assumption of the multiple political identity of its citizens – is this sufficient to describe the European Union as a democratic organization of public authority? (On the following discussion, see the more exhaustive study in Pernice et al. 2012.)

Joseph Weiler (2013: 25) recently pointed out to the European Parliament that EU democracy is a democracy without people, given the institution’s lack of representation and lack of accountability. Representation requires a real political choice, among not only potential representatives but also political programmes for the electorate. Accountability means that if there is a real failure of a policy at the EU level there must be somebody identifiable to take responsibility. The democratic right of EU citizens ‘to throw the scoundrels out’ is thus not well developed (Weiler 2013: 116). If citizens are not given this option for a bad government, why would they have a reason to participate in European elections? Is the European Union democratic? This question cannot be dealt with exhaustively here, except for some aspects.

Does the inequality of the votes of citizens in various member states preclude the idea that the European Parliament is a democratically elected body that provides (in accordance with Article 10(2) TEU, as one pillar of democratic representation in a system of dual legitimacy) European policies with democractic legitimacy? Jürgen Neyer (2012: 6) suggests that the Union is built ‘on the principle of difference, not of equality, among citizens’ and that it is ‘not undemocratic by mistake and it is not a democracy in the making’, but, ‘rather, it is a deliberately different entity that intentionally violates one of the constituting principles of democracy’. For Neyer, ‘the concept of democracy emphasizes attributes of a polity that are irreconcilable with supranationalism’ (Neyer 2012: 56).

Although the tension with the democratic principle in classical terms seems to be clear, it is questionable whether it can or should be abandoned in a supranational setting like the EU. This would be contrary to the conditions set for the participation of Germany in the development of the European Union in Article 23(1) of the Constitution. The question is then whether the inequality of the weight of votes under the principle of degressive proportionality is not perhaps compensated by the additional power that the larger groups of deputies representing the more populous member states in the European Parliament can actually exercise. In light of the reservations expressed with regard to the unequal weight of votes from small and large member states, it would therefore be a task for political scientists to determine the real power structure within the European Parliament in relation to the principle of degressive proportionality. If national representation plays any role in the intraparliamentary processes, what does it mean to have only 6 Members of Parliament from one member state with regard to its representation in the diverse committees, in contrast to 96 Members from Germany spread over all the committees? The members of the German group – if national groups are a valid criterion at all – have strong political influence and good chances of being elected to leading positions in all of the committees. Despite the fact that each German MEP represents about one million citizens rather than – like a MEP from Malta – one-tenth of this number or less, to what extent, under such conditions, does Germany’s greater group power (if it is admitted and exercised) outweigh in real terms the country’s smaller relative representation and therefore enhance the influence of each German citizen?

The point that resonates in these arguments is that the European Union is unique, and so is its interpretation and implementation of democracy. The real functioning of its political processes needs far more study. As is evident, transparency, openness and participative elements

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play a more important role in the Union than in the member states. These principles must also be taken into account when considering apparent deficiencies in equal voting and imbalances in parliamentary powers. The need for these attributes is different from what democracy requires at the national level; the lack of coercive powers at the EU level, the principle of implementation by national authorities and the decisive role of the national governments in the legislative processes are guarantees of effective control over the exercise of public authority by national institutions, the legitimacy of which is not at stake. There is a very effective vertical separation of powers ensuring that individual freedoms are not at risk. What the German Federal Constitutional Court understands as ‘overfederalisation’ (GFCC 2009: paras. 290, 292) may amount to a necessary safeguard for the citizens of smaller member states in the multilevel system of governance that is the European Union.

To improve representation and accountability, however, a first step towards a solution can be seen in the merger of the office of the President of the European Council with that of the President of the European Commission. Such a double-hatted President is not excluded under the terms of the existing Treaties; Article 15(6), subpara. 3 TEU was expressly formulated with an open wording to allow for this merger of functions. Such a President would have an important political role; in particular, the officeholder’s election and political control by the European Parliament would enhance the position’s political accountability and provide the European Union with a more political and personal face (Pernice 2003: 57–84; see also my proposals in Pernice 2003 and in Beneyto and Pernice 2004).

If political parties at the European level nominate their respective candidates for this office, in combination with a specific political programme, the citizens of the Union might be incentivized by this choice to participate in elections. Political party groups have actually made this happen for the first time with the European elections of 2014, although a double-hatted President of the European Council is not yet in sight. The top candidate of the party-group that won the elections was elected as the president of the Commission. He will necessarily be accountable to the electorate for the policies of the Commission.

However, such a development would not amount to a system of parliamentary democracy with a government elected by and dependent on a majority (coalition?) in the European Parliament. The present division of powers among the European institutions does not permit the President – even a ‘double-hatted’ President – to implement policies without compromises in cases in which the majority of the member states’ governments do not have the same political couleur. It would, nevertheless, provide this President greater visibility and political weight, thus enhancing the accountability and legitimacy of Union policies.

Complementary and more participatory forms of open democracy based upon the effective involvement of the citizens of the Union taking ownership of their European ‘joint venture’, as envisaged by the provisions of Article 11 TEU, are key for strengthening democracy in the European Union and will become an important additional pillar of the democratic system. On the basis of an ‘informed’, open, public debate over diverse political programmes presented in the electoral campaigns for European elections, the citizens of the Union would be given real political choices and their votes could have greater impact, both on the policies of the Union and on the democratic legitimacy of these policies.

Notes

1 ‘Supranational federalism’, the term used by Bogdandy (1999), seems to most aptly describe the form the Union has taken, although this term has not (yet) received the acceptance it deserves (English version: Bogdandy 2000: 27 et seq.). See also Koslowski (2001) and the contributions in Nicolaidis and Howse (2001).
In reference to Jacques Delors, see also Limbach (2012): ‘Jacques Delors hat die europäische Integration als ein “kollektives Abenteuer” bezeichnet. Das Beiwort “kollektiv” zielt nicht nur auf die Eliten, sondern schließt die Bürger mit ein. Der Begriff “Abenteuer” hat weniger das Spielerische als vielmehr das Experimentelle im Sinn und weist auf die Ungewissheit des Ausgangs hin.’

The Latin term *supra* may also convey the meaning of ‘beyond’, ‘transcendent’ or ‘over and above’.

Neyer (2012: 4) states outright that ‘Europe’s democratic deficit originates first of all in the Member States, not in its supranational layer’.

With special regard to the ESM; for the author, even the modification of Article 136 TFEU and the establishment of the ESM have had an impact on national constitutions.

This option is mentioned, however, in the final paragraph of the judgement of the German Constitutional Court on 12 September 2012 regarding the binding nature of the Fiscal Compact (GFCC 2012, BVerfG, 2 BvR 1390/12 – ESM, para. 319), available at http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012.html.

Since 2010, Hungary under the leadership of Victor Orbán has made many legal reforms that affect the country’s parliament, media, judiciary, constitutional court and data protection authority. Various European actors have criticized this development, perceiving threats of a serious breach of the founding principles of the Union. The European Commission finally initiated several infringement procedures under Art. 258 TFEU but rejected any activation of Art. 7 TEU. For more details, see Coman (2013) and Scheppele (2013).

Democratic political processes at the national level are the basis for the legitimacy of representation in the European Parliament and the Council; respect for the rule of law at the national level is a condition for proper implementation of Union law and the exercise by individuals of the rights conferred to them under the Treaties as well as secondary legislation.

Rio Declaration on Environment and Development (1992), Principle 10: ‘Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available’ (UNDP 1992).

A similar development started much earlier in the United States, starting with the Freedom of Information Act (online of 1966 (for an application, see http://www.state.gov/m/a/ips/) and continuing with the new Open Government Initiative of the Obama administration that began in 2009 with the Memorandum on Transparency and Open Government; for further developments, see http://www.whitehouse.gov/open/about.

**Bibliography**


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