The Crisis of the European Union in the Light of a Constitutionalization of International Law

Jürgen Habermas*

Abstract

The crisis of the European Union showcases the asymmetry between transnational capacities for political action and social as well as economic forces unleashed at the transnational level. But recovering the regulatory power of politics by way of increased supranational organization frequently arouses fears about the fate of national democracy and about the democratic sovereign, threatened to be dispossessed by executive powers operating independently at the global level. Against such political defeatism this contribution uses the example of the European Union to refute the underlying claim that a transnationalization of popular sovereignty cannot be achieved without lowering the level of democratic legitimation. It focuses on three components of every democratic polity – the association of free and equal legal persons, a bureaucratic organization for collective action, and civic solidarity as a medium of political integration – to argue that the new configuration they take at the European level does not in principle diminish the democratic legitimacy of the new transnational polity. The contribution continues to argue, however, that the sharing of sovereignty between the peoples and citizens of Europe needs to be better reflected in a symmetrical relationship between Council and Parliament while political leadership and the media must contribute to a greater sense of civil solidarity.

1 Why Europe is Now More than Ever a Constitutional Project

In the current crisis, one often hears people asking why we should still cling to the EU, not to mention the old aim of an 'ever closer Political Union', now that the original

motive of making wars in Europe impossible is exhausted. Certainly, there is more than one answer to this question. In what follows, I would like to develop a convincing new narrative from the perspective of a constitutionalization of international law[1] that follows Kant in pointing far beyond the *status quo* to a future cosmopolitan rule of law:[2] the European Union can be understood as an important step on the path towards a politically constituted world society.[3]

In the short term, the current crisis is monopolizing all of the attention. However, this should not lead political actors to forget the fundamental construction flaw of a monetary union without a corresponding political union, a flaw that can only be overcome in the longer term. The European Union lacks the competences to bring about the necessary harmonization of the national economies whose levels of competitiveness are drifting far apart. The repeatedly endorsed 'pact for Europe' merely confirms an old mistake: legally non-binding agreements concluded by the heads of government are either ineffectual or undemocratic and must therefore be replaced by an institutionalization of joint decisions with irreproachable democratic credentials.[4] The German government has become the catalyst of a Europe-wide erosion of solidarity because it has for too long shut its eyes to the only constructive resolution of the dilemma, one which even the conservative *Frankfurter Allgemeine Zeitung* now paraphrases with the laconic formula 'More Europe'. All of the governments concerned lack courage and are thrashing around helplessly in the dilemma between the imperatives of the major banks and the rating agencies, on the one side, and their fear of losing legitimacy among their own frustrated populations, on the other. Their panic-stricken incrementalism betrays the lack of a broader perspective.

Since the demise of embedded capitalism and since the globalized markets have left politics in their wake, the OECD countries have found it increasingly difficult to stimulate economic growth while at the same time ensuring a half-way just distribution of income and social security for the mass of the population. After the exchange rates

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[1]   Frowein, 'Konstitutionalisierung des Völkerrechts', in K. Dicke (ed.), *Völkerrecht und Internationales Recht in einem sich globalisierenden internationalen System* (2000), at 427. This perspective is especially well received by German jurisprudence, but it is for political reasons that it gains general relevance to date: cf. C. Franzius, F.C. Mayer, and J. Neyer (eds), *Strukturfragen der Europäischen Union* (2010), at 16.

[2]   On this interpretation of I. Kant, who saw the model of a federation of states only as a step towards further integration between nations, see Thiele, 'Von der Volkssouveränität zum Völkerstaatsrecht', in O. Eberle (ed.), *Transnationalisierung der Volkssouveränität* (2011), at 175, 179: '[t]he special treaty, which, for the sake of perpetual peace, transferred national sovereign rights to supra- or inter-national organs, would need to spring from a 'treaty among nations themselves' and not only from a treaty of factual sovereigns'.

[3]   I dealt with Kant's idea of cosmopolitan law repeatedly between 1995 and 2005: Habermas, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight', in J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (1998), at 165; Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in J. Habermas, *The Divided West* (2006), at 115; Habermas, 'A Political Constitution for the Pluralist World Society?', in J. Habermas, *Between Naturalism and Religion: Philosophical Essays* (2008), at 312.

[4]   Habermas, 'Ein Pakt für oder gegen Europa?', *Süddeutsche Zeitung,* 7 Apr. 2011, at 11.

were allowed to float freely, this structural problem was temporarily defused at the cost of accepting rising inflation. Once the costs of this strategy became unsustainable, governments resorted to financing increasing portions of their budgets through credit. The financial crisis that has been continuing since 2008 has put this mechanism of incurring public debt on the backs of future generations also out of service. For the time being it remains unclear how harsh austerity policies imposed from above, which are in any case difficult to push through domestically, can be reconciled with a tolerable level of social security in the long run. The revolts by young people are a portent of the threat to social peace.

Still, the imbalance between the imperatives of the market and the regulatory power of politics has been identified as the real challenge under these conditions. In the Eurozone, the vague prospect of an 'economic government' is supposed to revitalize the long since hollowed-out stability pact. The models of a special kind of 'executive federalism'[5] currently in circulation reflect the reluctance of the political elites to replace the established mode of pursuing the European project behind closed doors with the shirt-sleeved mode of a noisy, argumentative conflict of opinions in the public arena. Given the unprecedented gravity of the problems, one would expect the politicians to lay the European cards on the table without further delay and to take the initiative in explaining the relationship between the short-term costs and true benefits, and thus the historical importance, of the European project to the public. In order to do so, they would have to overcome their fear of opinion polls and rely on the persuasive power of good arguments. They must not curry favour with the populism to which their own obfuscations of a complex and unpopular topic have given rise.

Politics seems to be holding its breath and dodging the key issues at the threshold leading from the economic to the political unification of Europe. Why this panic-stricken paralysis? From a perspective rooted in the 19th century, the well-known 'no demos' thesis suggests itself: there is no European people; therefore a Political Union that deserves the name is built on sand.[6] To this interpretation I would like to contrast another: The enduring *political* fragmentation in the world and in Europe is in contradiction with the *systemic* integration of a multicultural world society and is blocking progress in the process of legally civilizing violence between states and societies.[7] Carl Schmitt observed this civilizing trend with suspicion and described it as a dissolution of the 'substance' of the 'political'. He conceived of this substance as the vital capacity of the state to assert itself, something to which no normative barriers should be set. On Schmitt's interpretation, this substance was still able to manifest itself at the beginning of the modern era in the struggle of sovereign states against external and

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[5]   S. Oeter uses the same term 'Federalism and Democracy' with a different meaning: see Oeter, 'Federalism and Democracy', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2009), at 55.

[6]   As an example cf. H. Lübbe, *Abschied vom Superstaat. Vereinigte Staaten von Europa wird es nicht geben* (1994).

[7]   N. Elias, *The Civilizing Process* (trans. E. Jephcott, 1994), develops the concept of 'civilizing' above all in view of the growth of psychological capabilities of self-control in the course of social modernization.

internal enemies. It was only with the constitutional revolutions of the 18th century that it began to disintegrate – initially within the state.[8]

The constitutional state transforms private citizens into democratic national citizens; it rejects the notion of internal enemies and regards its adversaries, even when they are terrorists, exclusively as criminals. Only the relations of the sovereign state to its external environment have so far been 'spared' the normative fetters of legal domestication.[9] One need not share Carl Schmitt's evaluation in order to appreciate the descriptive force of his diagnosis which becomes apparent when we raise the concept of the 'political' out of the fog of a mystifying counter-enlightenment and boil it down to the core meaning of the formative power of constitutional authorities.

In the field of international relations, it was only after the collapse of the League of Nations and the end of World War II – with the foundation of the United Nations and the start of European unification – that a serious taming of warlike states set in, a juridification that goes beyond the ambivalent and tentative restrictions placed on state sovereignty by classical international law. These trends, which have accelerated since the end of the Cold War, mark the continuation of a civilizing process that must be described under two complementary aspects. The immediate objective of the domestication of violence between states is to pacify relations between states; however, by curbing the anarchic competition for power and promoting cooperation, this pacification also makes it possible to establish new supranational procedures and institutions for political negotiation and decision-making. For it is only through new transnational capacities for political action that the *social and economic* forces unleashed at the transnational level can be tamed, i.e., the systemic pressures reaching across national borders, today above all those of the global banking sector.[10]

For a long time, the dense network of supranational organizations has aroused fears that the connection between civil rights and democracy assured by the nation-state is being dissolved and that the democratic sovereign is being dispossessed by executive powers operating independently at the global level.[11] Underlying this unease is a mixture of two different issues. One is the well-founded empirical issue of the economic dynamics within world society that have been exacerbating a democratic deficit for decades; it will not be possible to address this issue in a brief presentation.[12] However, I would like to use the example of the European Union to refute a proposition that today provides the main support for political defeatism, namely, the claim that a

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[8]   C. Schmitt, *The Concept of the Political* (1996).

[9]   This is the context in which C. Schmitt continues his life-long polemics against all attempts legally to sanction wars of aggression: C. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (1938).

[10] D. Held and A. McGrew, *Governing Globalization: Power, Authority and Global Governance* (2002).

[11] Compare the criticism by Maus, 'Menschenrechte und Ermächtigungsnormen internationaler Politik oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie', in H. Brunkhorst, W.R. Köhler, and M. Lutz-Bachmann (eds), *Recht auf Menschenrechte* (2003), at 276; Maus, 'Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik', in P. Niesen and B. Herborth (eds), *Anarchie der kommunikativen Freiheit* (2007), at 350.

[12] M. Zürn and M. Ecker-Ehrhard (eds), *Die Politisierung der Weltgesellschaft* (2011); also D. Held and A. McGrew (eds), *The Global Transfsormation Reader* (2000).

transnationalization of popular sovereignty cannot be accomplished without lowering the level of legitimation.[13]

Every democratic polity involves three components: the horizontal association of free and equal legal persons, a bureaucratic organization for collective action, and civic solidarity as a medium of political integration. Although these components achieve perfect congruence only in the context of the nation-state, they can enter into a new configuration at the European level that does not diminish the democratic legitimacy of the new transnational polity. The two striking innovations consist in the fact that the Member States, who retain their monopoly on the legitimate use of force, subordinate themselves to supranational law (2) and share their sovereignty with the citizenry of the Union as a whole (3). However, the original sharing of sovereignty between the peoples of Europe and the citizens of the European Union would also have to be transformed into a symmetrical division of competences between Council and Parliament and an equally symmetrical accountability of the Commission to Council and Parliament (4). In conclusion, I will return to the problem of how civic solidarity can be extended (5).

2 First Innovation: The Subordination of the Nation-states under Supranational Law

Before we can become clear about what would be needed in order to render legitimate political decisions at the European level, we must appreciate the democratic character of the form that the European Union has already assumed as a result of the Treaty of Lisbon.[14] For this purpose, I distinguish three building blocks that must be embodied in every democratic community:[15]

– the association of legal persons who come together in a defined geographical space to form an association of free and equal citizens by granting each other rights that guarantee everyone equal private and civic autonomy;
– the distribution of legal capacities within an organization that secures the decision-making power of the association of citizens by administrative means and allows for collective action; and
– civic solidarity as the medium of integration within and across state borders which is a necessary condition for joint political will-formation, and hence for both the communicative generation of democratic power and the legitimation of the exercise of public authority.[16]

[13] Von Bogdandy, 'The European Lesson for International Democracy – The Significance of Articles 9–12 EU Treaty for International Organizations', in this vol.; Oeter, *supra* note 5.

[14] Pernice, 'Verfassungsverbund', in Franzius, Mayer, and Neyer (eds), *supra* note 1, at 102–119.

[15] Brunkhorst, 'A Polity without a State? European Constitutionalism between Evolution and Revolution', in E.O. Erikson, J.E. Fossum, and A.J. Menendez (eds), *Developing a Constitution for Europe* (2004); Brunkhorst, 'State and Constitution – A Reply to Scheuerman', 15 *Constellations* (2008) 493.

[16] The three components are building blocks of a political system. They relate to:
  - the constitution of a community of legal persons,

From the perspective of the legal system, the first two components are usually addressed in the parts of the constitution dealing with fundamental rights and the organization of legal capacities, whereas the third component refers to the 'people' as a functional requirement of the democratic process – that is, in the first instance, to the political-cultural conditions for appropriate communication processes in the political public sphere.

Only at the national level do these three components come together in a *congruent* fashion, be it in the form of a unitary or a federal state. Here governmental authority is programmed through the democratic process and channelled in the grammar of general laws in such a way that the citizens can exercise their authority through legislative, executive, and judicial bodies. The citizens of a democratic political community not only subject themselves to the law simply as a matter of fact because the state threatens sanctions; but they are also able to accept the law as 'right' or legitimate because it was enacted through a democratic procedure. Bringing the exercise of political authority under the sway of democratic legislation amounts to *civilizing violence* insofar as the executive elected by the people must follow the law even though it commands the means for the legitimate use of force. But whereas here, at the national level, the institutions that make and enforce the law are organs of the same state, in the European Union law is made and enforced at different levels. At first sight, the arrangement seems to be similar to the one in federal states. In the multilevel system of the Federal Republic of Germany, federal law also trumps state law, even though the governments of the states (or *Länder*) retain control over the police (yet not over the federal army). But there is a decisive difference between a federal nation-state and the European multilevel system.

In the European Union, a priority of European law over the law of the Member States has become firmly established, even though the organs of the Union, unlike the legislative bodies of a federal state, do not enjoy the kind of *final* decision-making authority expressed, among other things, in the authority to make changes to the constitution.[17] Even if the Member States no longer regard themselves as the sole 'masters of the treaties', they have to give their unanimous consent to any regular revision of the treaty. This arrangement shifts the balance in the relationship between the sanctioning power of the state and the law. In exercising its legislative and judicial competences, the European Union binds the Member States, as the bodies who must implement its decisions, without having control over their sanctioning powers. Thus, the national monopolists over the use of legitimate force allow themselves to be used to carry out European law that must be 'implemented' at the national level.

-   the authorization to collective action, and
-   the shared horizon of a lifeworld where a collective will can be formed in a communicative way. This does not, however, imply a bias for exclusively *action-theoretical* political analysis. The political public communicates in the language of the law (circulating society-wide) with all other *functional systems* of society about the organization of the state.

17   C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (2010), at 84–85, 352–354.

But how should the priority of European law be understood? If the Union is not authorized to make final decisions and lacks what German jurisprudence once called '*Kompetenz-Kompetenz*', the subordination of national law under Union law cannot be explained in terms of the conventional hierarchical relationship between federal and state law or between constitutional law and secondary law. Claudio Franzius speaks instead of a functionally justified 'primacy of application',[18] and Armin von Bogdandy of the 'efficacy' of European law that 'obliges the member states to realize the regulatory objective of a norm of Community law'.[19] But how can a 'primacy of application' be justified with reference to the autonomy of Community law if this level of law cannot claim a 'primacy of validity' over the national legal systems? Even the Federal Constitutional Court in its decisions on the Maastricht Treaty and the Lisbon Treaty only insists on a *presumption* of validity of the national constitutions *vis-à-vis* European legislation. In interpreting the European treaties, the national courts are not authorized (contrary to what the Federal Constitutional Court in Karlsruhe claims[20]) to control the limits of the transfer of national sovereign rights to the European level; but they are authorized to guard the inviolability of those national constitutional principles that are constitutive for democracy and the rule of law in the individual Member States. The conflicts between the courts at the two levels[21] reflect a complementary dependence and interconnection between national constitutions and Community law that has inspired Ingolf Pernice to describe the Union as a '*Verfassungsverbund*' (alliance of (national) constitutions).[22] From the perspective of a *rationally reconstructed* constitution-building process, the subordination under European law can be understood as a result of the fact that two different subjects were involved from the very beginning – the European peoples and the European citizens – and cooperated in bringing about a supranational political community.

But before explaining this second innovation let me first touch on some implications of the first innovation. When the political community of European citizens detaches itself from the organizational cores of the Member States,[23] all three components of a constitution enter into a new constellation. Whereas the Member States retain their monopoly over the means for the legitimate use of force and transfer sovereign rights to the Union through a limited conferral of particular powers one by one, the latter can rely only on a relatively weak organizational component. Contrary to the

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[18] C. Franzius, *Europäisches Verfassungsrechtsdenken* (2010), at 42.

[19] Von Bogdandy, 'Founding Principles', in von Bogdandy and Bast (eds), *supra* note 5, at 29.

[20] Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea', 10 *German LJ* (2009) 1201; Halberstam and Möllers, 'The German Constitutional Court says "Ja zu Deutschland"', 10 *German LJ* (2009) 1241.

[21] The Spanish Constitutional Court solves this conflict at the semantic level with the help of the concepts of *primacía* of European and *supremacía* of national law: cf. Franzius, *supra* note 18, at 47.

[22] Pernice, 'Europäisches und nationales Verfassungsrecht', 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* (2001) 149.

[23] Calliess, *supra* note 17, at 73, speaks of a 'material conception of the constitution that detaches the concept of the constitution from the state'.

popular image of the 'Brussels monster',[24] the European Commission is composed of a comparatively limited bureaucracy that leaves the implementation of Union law to the Member States. And because the Union does not have a state-like character, the citizens of the Union do not enjoy the status of *state* citizens in the strict sense either. The expectation nevertheless exists that the increasing mutual trust between the European peoples will give rise to a transnational, if at the same time only attenuated, form of civic solidarity among the individual citizens of the Union.

3 Second Innovation: The Sovereignty Originally Shared between the EU Citizens and the European Peoples

The negative assertion that the Union can be defined neither as a confederation of states (*Staatenbund*) nor as a federal state (*Bundesstaat*) is not sufficient to answer the central question of the correct constitutional concept for this new kind of transnational federal polity. The prominent status that the Treaty of Lisbon accords the European Council and the Council of Ministers reflects the historical role of the Member States as the initiators and driving forces of European unification. In contrast to various national constitutions in the 18th and 19th centuries, the constitution of the Union is the work of political elites. Whereas revolutionary citizens once united to overthrow old regimes, this time it was the states, i.e., collective actors, that used the instrument of international treaties to join forces with the aim of co-operating in limited policy fields. Over the course of the unification process, however, the balance has shifted dramatically within the organizational structure in favour of the European citizens.[25] The international organization has been transformed into a Political Union of indefinite duration. With the introduction of European citizenship, with the explicit reference to a European public interest and common weal, and with the recognition of the Union as an autonomous legal personality, the treaties have become the foundation of a political community with a constitution of its own.

Theoretically speaking, we can reconstruct the development of the treaties in retrospect as though the historically more or less contingent outcome had been the intended result of a regular constitutional convention. In the process, a question arises that James Madison already confronted in 1787 during the foundation of the United States: can a federation of member states with democratic constitutions satisfy the conditions of democratic legitimation without the national level being clearly subordinated to the federal level, as it is in a federal state?[26]

In order to answer this question of legitimation, the constituting powers must be correctly identified. Article 1(1) of the Treaty Establishing a Constitution for Europe

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[24] H.M. Enzensberger, *Sanftes Monster Brüssel* (2011).

[25] For the 5 stages in the development of the EU compare the contribution of Bast, 'Europäische Gesetzgebung, fünf Stationen in der Verfassungsentwicklung der Europäischen Union', in Franzius, Mayer, and Nyer (eds), *supra* note 1, at 173–180.

[26] B. Bailyn, *The Debate on the Constitution, Part Two* (1993), at 26–32.

refers to both subjects, the 'citizens' and the 'states' of Europe.[27] Even though this constitution drawn up by a convention in 2004 was never adopted, the Lisbon Treaty currently in effect supports the thesis that sovereignty is 'shared' between citizens and states[28] for the simple reason that the Parliament is involved when changes are made to the Constitutional Treaty and is a body on a par with the Council of Ministers within the 'ordinary legislative procedure'. However, an important qualification must be made to the splitting of the constituent subject into 'citizens' and 'states'. Citizens are involved on both sides within the higher-level political community – directly in their role as Union citizens, and indirectly in their role as citizens of the Member States.[29] It is therefore more consistent to recognize, not the Member States themselves, but their peoples as the other constituting subject.[30]

Thus it is the wrong question to ask whether we should recognize in these constituting subjects 'originally' the citizens of the founding states who then *empower* themselves as Union citizens through the constitution-founding process, as James Madison thought,[31] or whether in them we encounter the future Union citizens *directly*. The choice between these unhappy alternatives would again give rise to a prejudice in favour of ascribing final decision-making authority to either the Union or its Member States. If we want to avoid falling back on the alternative between confederation of states and federal state, it is advisable to introduce *the same* persons (or their representatives) as constituting subjects in two different roles, namely, in the roles of the (future) citizens of both the Union and one of its Member States. In exercising this personal union, they must already become aware during the constitution-building process that, as citizens, they will have to adopt a different justice perspective on each of the two legitimation tracks running through Parliament and Council, respectively, and balance them off against each other – namely, the perspective of a European citizen and that of a member of a particular nation.

What counts as a public interest orientation within a particular nation state changes at the European level into a particularistic generalization of interests confined to one's own people, and that may well come into conflict with the generalization of interests expected from EU citizens. In this way, both the role aspects of the constituting subjects acquire an institutional meaning for the constituted political community: at the European level, the citizens should be able to form judgements and make political decisions simultaneously and on an equal footing both as EU citizens and as members of a particular nation belonging to the EU.

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[27] 'Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.'

[28] Calliess, *supra* note 17, at 71.

[29] Here I follow a suggestion by Peter Niesen.

[30] Von Bogdandy, *supra* note 19, at 48–49.

[31] In a similar sense Pernice, *supra* note 14, maintains that citizens of the Member States originally confer powers on the European Union (at 106). From this he concludes 'that European citizenship is … the status, which citizens of the member states by founding the European constitution have given to themselves' (at 108).

4 What Follows from the Division of the Constituting Powers for the Legitimate Construction of the Union?

The expression 'shared sovereignty' is ambiguous. The sovereignty of the people – i.e., the 'power' that is 'derived from the people' – branches and spreads, from the beginning, *within* every democratically constituted political community into the communication-flows of the legislature, the executive, and the judiciary. 'The people' as such cannot act. But a different and peculiar kind of 'shared' sovereignty is involved in the original case of first bringing a constitution about. The division of the constituting power divides popular sovereignty *at the origin* of a political community that is going to be constituted, and not only at the source of the already constituted political community. Although this division explains why the European Union shares with federal states the character of a multilevel system, the EU must not be understood as a kind of *imperfect* federal republic. In federal states, the division of competences can also be traced back to a limited case-by-case authorization of the federal organs by the member states. But as long as the citizens of a national state operate *alone* as the constituting subject of that state, they not only lay down the primacy of federal law but also reserve the responsibility for making constitutional changes either for themselves (through national referenda) or for the legislative federal organs.[32]

The conception of 'originally shared' popular sovereignty I am advocating precludes the possibility of such a supreme constitutional authority at the European level. Although the constituting subjects are willing in their role as members of the (future) member states to transfer the sovereign rights of their already constituted states in part, and only one by one, to the new polity, they do this with a reservation that goes far beyond the familiar guarantee of the continued existence of the component states (as we know from the constitutions of federal states). Instead, through their participation in the founding process, the European peoples ensure that their respective states are maintained within the federal polity *in their freedom-guaranteeing function* of a constitutional state. The partially preserved sovereignty of the Member States finds expression both in the ordinary revision procedure laid down by the Treaty on European Union (TEU) Article 48 that calls for *unanimity*, and in the guarantee of the right of withdrawal (TEU Article 50), according to which every Member State is free to *regain* its sovereignty.

In my opinion, these deviations from the familiar pattern of legitimation do not betray a democratic deficit as long as the two constituting powers, i.e., the EU citizens and the European peoples, are recognized as equal partners in all legislative functions. As democratic states marked by the rule of law, nation states are not only mediating actors on the long historical path towards civilizing the violence at the

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[32] This also holds for the Swiss federal Constitution of 1998 even if, according to the Preamble and Art.1(1), the Swiss Confederation is founded simultaneously by the 'Swiss People and the Cantons'. This is so because the federal organs enjoy precisely the prerogatives that characterize the *Kompetenz-Kompetenz* of a federal state (Arts 180–186).

core of political power; as vital embodiments of 'existent justice' (Hegel) they also represent *lasting* achievements. Therefore, the citizens of the Union are justified in having an interest in their respective nation states *continuing* to perform their proven role as *guarantors of law and freedom* also in their role as Member States. The nation states are more than just the embodiment of national cultures that are worth preserving; they *vouch* for a level of justice and freedom that citizens rightly want to see preserved.

'Originally shared' sovereignty provides a standard for the legitimation requirements of a political commonwealth beyond the nation state. It not only justifies deviations from the model of a federal state, but also reveals the democratic deficits of the EU treaties currently in force. Today we face the challenge of recovering at the level of political powers and legislative competences the equal standing and symmetrical relation that we ascribe to European peoples and EU citizens when we rationally reconstruct their roles in the founding process of the European Union. This requires that equal legislative powers be given to the Council and the Parliament in all relevant political fields. Also inconsistent is the peculiar floating position of the Commission, for which certain essential rights of initiative are reserved. Instead, the Commission, in contrast to the familiar federal government, should be dependent equally on Parliament *and* Council and be answerable to both of them. Most importantly, the European Council is an anomaly. It is a governing body that lays down policy guidelines but is authorized neither to legislate nor to issue directives to the Commission.

There is a strange contrast between the political power concentrated in the European Council and the fact that its resolutions lack legal force. A legally free-floating body equipped with the strong indirect legitimation of elected heads of government wields considerable extraconstitutional power (even though it has to pass its resolutions unanimously).[33] The Lisbon Treaty was supposed to confer enhanced decision-making power on the EU through the formal incorporation of the European Council into its institutional structure; but it pays a high price for this in the form of the lack of legitimacy of resolutions that have far-reaching implications. This has become apparent since the 2008 financial crisis in the momentous decisions of the Council to establish fiscal 'rescue parachutes' and new modes of coordination among the Member State governments.

5 The European Union must Decide between Executive Federalism and Transnational Democracy

So far we have addressed two of the three components of democratic constitutions that enter into a new constellation at the European level. Once a constitutional community extends beyond the boundaries of a single state, the third component, i.e., solidarity among citizens who are willing to support each other, should expand to keep pace with it. The body of EU citizens as a whole can share sovereignty effectively with the

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[33]   Von Bogdandy, *supra* note 19, at 34; similarly Franzius, *supra* note 18, at 58.

peoples of the Member States, who continue to enjoy a monopoly on the legitimate use of force, only if civic solidarity undergoes a transformation as well. According to the scenario I propose, an extended, though also more abstract and hence comparatively less resilient, civic solidarity will have to include the members of each of the other European peoples. Only in that case would the EU citizens who elect and control the Parliament in Strasbourg be able to participate in a joint process of democratic will-formation reaching across national borders.[34] To be sure, the liberalization of values, an increasing willingness to include strangers, and a corresponding transformation of collective identities can at best be stimulated through legal-administrative means. Nevertheless, there is a circular, either mutually reinforcing or mutually inhibiting, interaction between political processes and constitutional norms, on the one side, and the networking of shared political and cultural attitudes and convictions, on the other side. Old loyalties fade, new loyalties develop, traditions change and nations, like all other comparable referents, are not natural givens either.

A measure of the *relative* weights attached to loyalties, and thus of stronger identification with one social unit rather than another, is the willingness to make sacrifices based on long-term relations of reciprocity. With the abolition of universal conscription, the test case of war, and hence the *absolute* claim to sacrifice one's life for the well-being of the nation, has luckily lost its force. But the long shadow cast by nationalism still obscures the present. The supranational expansion of civic solidarity depends on learning processes that can be stimulated by the perception of economic and political necessities, as the current crisis leads us to hope. For the cunning of economic reason has in the meantime at least initiated communication across national borders; but this can condense into a communicative *network* only as the national public spheres *open* themselves *to each other*. The transnationalization of the existing national publics does not require any different news media, but instead a different practice on the part of the existing media. They must not only thematize and address European issues as such, but must at the same time report on the political positions and controversies evoked by the same topics in other Member States.

A dangerous asymmetry has developed because to date the European Union has been sustained and monopolized only by political elites – an asymmetry between the democratic participation of the *peoples* in what their governments obtain for them on the subjectively remote Brussels stage and the indifference, even apathy, of the *citizens of the Union* regarding the decisions of their parliament in Strasbourg. However, this observation does not justify substantializing 'the people' or 'the nation'. The caricature of national macrosubjects shutting themselves off from each other and blocking any cross-border democratic will-formation has become the preserve of right-wing populism. After half a century of labour immigration, even the European peoples, given their growing ethnic, linguistic, and religious pluralism, can no longer be

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[34]   Habermas, 'Is the Development of a European Identity Necessary, and is it Possible?', in Habermas, *The Divided West, supra* note 3, at 67.

conceived as culturally homogenous entities.[35] Moreover, the Internet is making all frontiers porous. Within the vast territories of our nation states, the floating horizon of a shared political lifeworld spanning large spaces and complex relations *always* had to be generated and maintained by mass media, and it had to acquire substance through the abstract flows of ideas circulating through the communication networks of civil society.

To be sure, such a process can only gain a secure foothold on the basis of a shared political culture, however fluid it may be. But the more the national populations realize, *and the media help them to realize*, how deeply the decisions of the European Union pervade their everyday lives, the more interested they will become in making use of their democratic rights as citizens of the Union. This *impact factor* has become palpable during the euro crisis. A reluctant European Council is being forced to take decisions that may have patently unequal impacts on the budgets of the Member States. As of 9 May 2009, the European Council, with its decisions on rescue packages and possible debt restructurings and with its declarations of intent to bring about harmonization in all fields of relevance for competition (economic, fiscal, the labour market, and social policies), has passed a threshold. Problems of distributive justice arise beyond this threshold, for, with the transition from 'negative' to 'positive' integration, the balance shifts from output to input legitimation.[36] Thus the logic of this development would also imply that national citizens who *have* to accept the redistribution of burdens across national borders would also *want* to exercise democratic influence in their role as European citizens over what their heads of government negotiate or agree upon in a legal grey area.

Instead of this, the governments are engaging in delaying tactics and the populations are being led by populist sentiment to reject the European project as such. This self-destructive behaviour can be explained by the fact that the political elites and the media are reluctant to draw reasonable conclusions from the constitutional project. Under the pressure of the financial markets, the awareness has spread that an essential economic precondition for the constitutional project was neglected when the euro was introduced. Analysts are in agreement that the European Union can withstand the financial speculation only if it acquires the necessary political steering capacities to work towards a convergence of the Member States' economic and social development in the medium term at least in core Europe, i.e., among the members of the European monetary zone.[37] All of those involved are aware that this level of 'enhanced cooperation' is impossible within the framework of the existing treaties. The conclusion that a joint 'economic government' is necessary, with which even the German federal government is now reconciling itself, would mean that European policies for promoting

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[35] Eder, 'Europäische Öffentlichkeit und multiple Identitäten – das Ende des Volksbegriffs?', in C. Franzius and U.K. Preuß (eds), *Europäische Öffentlichkeit* (2004), at 61.

[36] F.W. Scharpf, *Regieren in Europa: Effektiv und Demokratisch?* (trans. C. Schmid, 1999).

[37] On the legal possibilities of an internal differentiation within the EU see Thym, 'Variable Geometrie in der Europäischen Union', in S. Kadelbach (ed.), *Variable Geometrien jenseits der EU, 60 Jahre Integration in Europa* (2011), at 117.

the competitiveness of all economies in the euro zone would extend far beyond the financial sector and affect national budgets as a whole, thus intervening deeply in the budgetary privilege of national parliaments. This long overdue reform is only possible by transferring further competences from the Member States to the Union if existing law is not to be flagrantly violated.

Angela Merkel and Nicolas Sarkozy appear to have settled some sort of compromise between German economic liberalism and French etatism with a completely different intent. If I am not mistaken, they want to extend the executive federalism, which is implicit in the Treaty of Lisbon, into an outright intergovernmental rule by the European Council. Such a regime would make it possible to transfer the imperatives of the markets to the national budgets without proper democratic legitimation. This would involve using threats of sanctions and pressure on disempowered national parliaments to enforce non-transparent and informal agreements. In this way, the heads of government would transform the European project into its opposite. The first transnational democracy would become an especially effective, because disguised, arrangement for exercising a kind of post-democratic rule.

The alternative is to pursue the democratic legal domestication of the European Union further in a consistent way. A Europe-wide civic solidarity cannot emerge if social inequalities between the Member States become permanent structural features along the fault lines separating poor from rich nations. The Union must guarantee what the constitution of the German Federal Republic calls the 'uniformity of living standards' (Article 106(3)). This 'uniformity' refers only to a range of variation in *social* living conditions that is still acceptable from the perspective of distributive justice, not to the levelling of *cultural* differences. Rather, a political integration backed by social welfare is necessary if the national diversity and the incomparable cultural wealth of the biotope 'old Europe' is to enjoy any protection against levelling in the midst of a rapidly progressing globalization.