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The Future of European Democracy

By Claudio Franzius and Ulrich K. Preuß



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Commissioned and edited by the Heinrich Böll Foundation

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PREFACE

The EU debt crisis has clearly shown that the monetary union cannot be upheld without coordinated fiscal and economic policies. However, there is an additional hold-up, as further «top-down» integration driven by the political elites runs into growing opposition. Many citizens are under the impression that their voices, and those of their national parliaments, are being sidelined in favour of ever-greater centralisation – and that, in the process, democracy is being eroded. In the long term, it will not be possible for national governments to rule via decisions taken on a European level, as policies decreed by the European Council are not the result of public debate and transparent processes. Thus the debt crisis may easily trigger a crisis of EU legitimacy.

The response must be to strengthen European democracy, as the EU will not be able to gain legitimacy only by virtue of its economic qualities but will also have to prove that it can enable its citizens to participate in democracy. This requires greater participatory and oversight rights for the European Parliament and the national parliaments; more direct means for citizens to make their voices heard; and the development of European political parties and transnational ballots for European elections – only then will it be possible to create a truly European public. Competition between political alternatives is the cornerstone of and the driving force behind a vibrant democracy – in Europe as well as at the national levels. There has to be genuine political competition on issues regarding the future of Europe.

It is against this background that the Heinrich Böll Foundation commissioned a study on the future of European democracy. In it, constitutional experts Ulrich K. Preuß and Claudio Franzius highlight how Europe may achieve a vibrant democracy. It will require political spaces and institutions that enable controversial debate about European issues and that give citizens the chance to participate in political decisions.

The suggested reforms are based on the premise that the European Union is a blend between a confederation of states and a constitutional association and that its democratic legitimation is twofold: On the one hand, there is the European Council representing the national governments and thus the linkage to the nation states, on the other, the European Parliament and citizenship of the European Union that complements national citizenship. This makes it necessary to develop distinctive mechanisms to democratically legitimise the European Union. In doing this, a balance has to be struck between a national «us» and a communitarian «we» – a balance that expresses the essence of European solidarity.

The authors argue that the European Parliament should be strengthened by a right of initiative and that the heads of the European Commission should be elected

by Parliament in order to reflect the political balance of power. European elections should be held according to a unified European electoral law and with a transnational ballot. It will be equally important to improve the flow of information on European issues to national parliaments and to strengthen their say, as it is one of their principal tasks to exercise democratic control over their governments' European policies. As in practice, the opposition will mainly exert such control, it will be necessary to enhance minority rights within national parliaments, improve collaboration between parliaments, and strengthen their European committees.

European parties will play a crucial role in bringing about political competition within a pan-European political arena. To do that, their opportunities to act have to be extended, their rights enhanced, and their financial resources improved. For this, the authors propose a citizen-friendly model for the funding of political parties. National political parties should perceive their European party federations as networks with the aim to set up transnational ballots and to campaign on a European level.

The European Citizens' Initiative already in existence is an important means for citizens to exert direct influence, however it will need to be improved for it to apply to a wider range of issues and to become legally binding. In addition, the red tape that is presently part of a successful initiative will have to go. For a vibrant democracy to become reality, it is key that civil society has a greater say regarding political decisions. Non-profit organisations campaigning for human and citizens' rights and active on environmental and development issues will have to get a voice comparable to that of the business lobby that, at present, is a major player in Brussels. This will only be possible once the general public becomes part of the decision-making process at a much earlier stage than is presently the case. Here, digital media have the power to open up new avenues.

The study fleshes out a number of proposals to put the EU on a more stable and democratic footing. Many of these proposals could be realised within the framework of existing treaties, while others would require new compacts. A New European Convention, one that combines the establishment of a European stability and solidarity union with a reform of EU institutions, would offer the chance to bring together diverging national debates and thus create a truly European public.

Despite all the suggestions regarding the future of European democracy, we have to keep in mind that the European Union derives the greater part of its legitimacy from the democratic character of its member states, and so the future of European democracy will be intimately linked to the development of democracy in its member states. Consequently, there needs to be responsibility on a European level for the domestic welfare of the member states. If democracy is in danger in one member state, this will undermine the democratic credibility of the Union as a whole.

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I. Prologue

As Walter Hallstein, the first President of the European Commission, said in a visionary statement: The European Union is a community of law. When the heads of state and government met in 1957 to sign the Treaty of Rome, they met in the European country that originated what may be the most important source of European civilisation – Roman law. At the time, Europe was still suffering the after-effects of World War II, yet the location the key western European countries had chosen for a new political and moral beginning demonstrated that they wanted to affirm these roots and in this spirit make the revolutionary idea of a united Europe a reality – a Europe as a community of law.¹

This approach was to set the course in a truly political way – with the aim of overcoming the deep chasms that, in the first half of the century, had led to nationalistic extremes in Europe. Even those who today tend to view the European Union as an economic community should remember that integration is not apolitical, as even the vision of the internal market was informed by the possibility that it may, one day, develop into a political union. After World War II such a vision was repeatedly proclaimed and put to the test, yet it was only realised in a piecemeal fashion. Presently, the idea of European economic governance is linked to the unfulfilled wish for a caring Europe.² «Economic integration demands political integration» is the profoundly European credo of all those who do not believe that a purely national politics is able to tackle the challenges posed by the 21st century.

Since the Maastricht Treaty this has become ever clearer. However, the functions of the Union cannot be limited to a degree the citizens still find acceptable. Whenever it seems necessary to act on the European level, the governments will try to coordinate their policies in ways that ignore the rights of the European Parliament – as the decisions by the European Council on stabilising the common currency have shown once again.³

There are good reasons for the growing uncertainty whether European challenges can be met by common political action – it is not solely that citizens perceive European institutions as too far removed from their lives. One issue that causes uncertainty

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- 1 Walter Hallstein, *Die Europäische Gemeinschaft*, 5. ed., 1979, 51 et seq.
 - 2 Jacques Delors, *Wo steht Europa?*, Speech held on 28 January 2011 in Berlin available at <http://www.gruene-europa.de/cms/de-fault/dokbin/369/369042.rede_jacques_delors_im_wortlaut_deutsch@en.pdf>; Wolfgang Schäuble, *Für eine bessere Verfassung Europas*, *Frankfurter Allgemeine Zeitung*, 27 January 2011, 8; Fritz Scharpf, *The Asymmetry of the European Integration or why the EU cannot be a Social Market Economy*, KFG Working Paper 6/2009.
 - 3 For a critical assessment see Jürgen Habermas, *Ein Pakt für oder gegen Europa?*, *Süddeutsche Zeitung*, 7 April 2011, 11.

within political elites and beyond is whether decisions made on the European level enjoy a sufficient degree of legitimacy. For some time now, the EU has been exercising its own sovereignty – a sovereignty that can no longer be solely understood as deriving from its member states. Thus the Union *itself* needs democratic legitimation and procedures to safeguard the democratic nature of its sovereignty. It is a moot point whether this necessity for legitimation will lead to a political union and whether a democratic Europe will be a viable perspective. The quest for such a perspective may turn out to be in vain. One thing is certain though, today's Europe is no longer the Europe of its founders, and, as a consequence, it will take many projects large and small to reinvent it as a democratic venture – one that is alive and being lived.

However, it would be premature to claim that the EU's troubles stem from a lack of preconditions and a historical framework that had been present during the development of constitutional democracies. This holds true for two reasons:

First, the term «democracy» always implies a projected future – if not a utopia.⁴ And the fact that, historically, democracies have always taken the form of concrete nation states does not mean by implication that democratic processes have to be limited to states.

Second, democratic processes – that is the development of popular sovereignty – cannot only be described empirically but also in a normative way.⁵ This means we will have to investigate how a democratic Europe may be conceptualised. What should a European democracy be like – considering the continent's chequered past?⁶

We hold that the causes of Europe's «democracy issue» do not derive exclusively from European peculiarities. Europe is nothing but the precursor of international developments that, through cross-border interdependency in many spheres of life, namely the economy, politics, culture, science, and sports, have the effect of making states intimately interdependent and are eroding the possibility of taking autonomous decisions. Ever more often states are subject to effects, the causes of which lie outside their sphere of influence.⁷ Such situations may arise as a consequence of conscious decisions – for example accession to the European Union – or they may be the unforeseen consequences of international interdependencies and connections. The resulting regulatory functions are being exercised to an increasing degree by a growing number of international organisations that – as, for example, in the case of the World Bank, the International Monetary Fund (IMF), or the World Trade Organisation (WTO) – will develop and implement their own policies and agendas, something that frequently will have a direct impact on the lives of people in states that are members of such

4 See e.g. Claude Lefort, *Le temps présent – Écrits 1945-2005*, 2007, 461 et seq.

5 See Giovanni Sartori, *Demokratiethorie*, 1992, 17

6 Jürgen Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, in: id., *Die postnationale Konstellation*, 1998, 91 (155).

7 For this and the following argument see Robert A. Dahl, *A democratic dilemma: system effectiveness versus citizen participation*, in: *Political Science Quarterly*, vol. 109 (1994), 23 et seq.; id., *On Democracy*, 2000, 114 et seq.

organisations.⁸ Today, the centuries-old principle that, based on the precept of sovereignty, international orders is shaped and structured by the voluntary coordination of states is in the process of being eroded.

Above all, for state-based democracy these developments present a challenge that has yet to be mastered. Since the late 18th century the struggle of people for self-determination and democracy had been a battle fought within the confines of the nation state by those without rights against the privileged classes – and thus a vertical struggle posing «bottom» against «top.» The examples are numerous, be it the upwardly-mobile bourgeoisie battling feudalism in the first part of the 19th century; be it the struggles of wage earners, a rising class due to industrialisation and urbanisation, to gain their rights as citizens, and, especially during the second half of the 20th century, for a fair share of society's wealth. All of these struggles took place within the confines of the nation state, and all of them were about «greater democracy» and a new quality of democracy.

In today's world, however, in a situation characterised by global interdependence, conflicts surrounding democratic self-determination are undergoing a major change. Especially within the EU, the political and economic region where states are most intimately intertwined, the people in the member states are becoming more aware of the fact that today ever more often pointed to the fact that actors beyond their borders are substantially curtailing their freedom of choice. As a consequence, they increasingly get the impression that their right to self-determination, as embodied in the institutions of their state, has less and less import when it comes to questions that are of fundamental national importance, and that those they may hold accountable and possibly vote out of office have become intangible.

Let us be clear: The present conflicts surrounding democracy do have nothing in common with the traditional struggles of «us at the bottom» against «those at the top.» They are a side effect of international links and thus require answers different from the time-honoured responses to traditional democratic divisions. Here, two considerations are of importance: Firstly, that – at least as far as the EU is concerned – these linkages are *voluntary*; the decision was made based on expected benefits regarding one's economic, security, and strategic position.

Still, it would be wrong to claim that the right to democratic self-determination has been swapped for political and economic benefits. The reason is – and this leads to our second point – that conflicts within the EU regarding democracy are not caused by questions of sovereignty; their root cause is interdependence. They do not originate from a division of «us» against «them,» as the much-lamented loss of democratic self-determination in the member states is not caused by the suppression of self-determination by foreign rulers, but stems from voluntary, mutual limitations of the liberties of all member states. Limitations (self-)imposed on the liberty of each individual state

⁸ See Michael Zürn, Die Rückkehr der Demokratiefrage. Perspektiven demokratischen Regierens und die Rolle der Politikwissenschaft im 21. Jahrhundert, in: Blätter für deutsche und internationale Politik, 6/2011, 63 et seq.

are the precondition for all states to enjoy the freedom guaranteed through and within the Union. The basis of this union are not pre-political commonalities or political agreements between member states but institutions designed to bring the respective disparities into agreement – the most important among them being law. What Kant said in the late 18th century regarding a free republic of united individuals also holds true for the EU: «Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonised in reality with the voluntary actions of every other Person, according to a universal Law of Freedom.»⁹ This is the idea on which the construct of the EU is based – as a community under law composed of independent, free, and equal states.

Today however, it is as insufficient to run the EU as purely a community under law, as it would be for the member states to be constitutional states without democracy. Although it is not the compatibility of the voluntary actions of the peoples that makes it necessary to combine their respective democratic orders into a vibrant democracy on EU level, the freedom and the diversity of its citizens in Europe's «republic of states» requires just that. This will be the only way to prevent ordinary, inescapable conflicts that are the result of democratic interdependence from evolving into fully-fledged conflicts between «us» and «them.» This is the essence of European solidarity.¹⁰

To achieve this it will be important to, first, ascertain the democratic elements of the Lisbon Treaty. This will show that the EU's structure contains conflicting elements – something we will have to come to terms with. Nevertheless, to democratise European democracy does not necessarily lead to a United States of Europe. Germany's constitution, the *Grundgesetz*, is compatible to our demands and it encourages European ideas, as can be seen in Article 23. A reading of the German constitution that solely focuses on the elements that limit European integration is a misinterpretation. The strengthening of European democracy through European economic governance – governance controlled by parliament – would not require a new constitution for Germany (as defined in Article 146 of the *Grundgesetz*). Admittedly Germany's Federal Constitutional Court has brought this option into play in its ruling regarding the Lisbon Treaty, yet what we are looking into here is primarily the potential for greater European democracy – without passing the threshold towards a federal European state.

Such approaches must be the domain of political debate. It will be up to the citizens to decide whether, in order to enable a more thoroughgoing integration, they would be willing to enact a new constitution. As will be shown, the citizens are the pillars of the European project, inasmuch as their dual role as citizens of member states with deep historic roots and as EU citizens is indispensable. This also places the question of national constitutions within a European framework – and it has to be taken into consideration in any debate about a plebiscite on a new *Grundgesetz*.

9 Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, 1796, transl. by W. Hastie, Edinburgh, 1887, available at <<http://oll.libertyfund.org/title/359/55685/640642>>.

10 For a more detailed discussion see Hauke Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft*, 2002.

II. The Status Quo

To put the European Union into the hands of its member states and citizens is an experiment that, although it opens up many possibilities, may equally fail. This is not a new experience, yet the debt crisis and the war in Libya have given it new currency. Nevertheless, crises may only remind us of the fact that every process of integration will have to deal with problems and setbacks, and that there are no hard and fast rules of how to tackle them. Crises are a part of democracy, and it makes little sense to discuss them independently of domestic changes of democratic culture. This also holds true for Europe. European unity has become more complex – and this complexity includes the possibility and probability of crises.

We are seeing today that national governments do not always promote European solutions. However, as decisions on the EU level have far-reaching consequences, a purely domestic parliamentarisation of European policy is not a solution. Instead, we will have to focus on the question of how the unification of Europe may gain traction «from below» – and how it may be extricated from cross-party indifference. In order to broaden and politicise the debate, sufficiently clear alternatives to present approaches will have to be fleshed out.

Ultimately, the much-chided Treaty of Lisbon – which for some contains not enough and for others too much Europe – reflects society's divergent expectations. In this respect the Treaty offers a surprising amount of starting points for the development of democracy, a democracy that political actors and civil society will have to make vibrant.

1. Democratic Elements in the Lisbon Treaty

a. Developments regarding democracy

This is not the place to portray in detail the democratic evolution of the European Union. At the centre of our discussion will be the changing context of its exercise of rule. Here, we will have to bear in mind the ambivalent openness the multi-layered European system still presents regarding the autonomy of individuals.¹¹

In the early years of integration, under the auspices of the European Coal and Steel Community (ECSC) and the European Economic Community (EEC), the Union could have been described as a special purpose association for functional

11 This is different when the argument is about the «essence» of the Union. Although democratic requirements may not be defined without reference to specific forms of sovereignty, democracy is not limited to existing specific forms – it is contributing to their emergence.

integration¹² or as a regulatory state.¹³ At the time, the focus then was on the special role played by the European Commission as defined in the treaties. Over time, the Commission became more than just the secretariat of an international organisation, without however developing into a government in the traditional sense of the term.¹⁴ A limited number of tasks were shifted to the European level, yet political action was limited to processing the treaties. Responsibility for democratic decisions regarding the allocation of resources remained with the member states. Overall, it was the Commission's independence from political pressures that ensured that its legitimacy rested on expertise. Even today, the relative independence of certain EU institutions such as the European Central Bank is a characteristic of European integration. Such freedom from political influence can also be found on a national level, for example in the shape of independent regulatory bodies, whose non-partisanship is often seen as democratic.¹⁵

Nevertheless, the project of integration that flourished under the «community method» failed to answer some fundamental questions concerning its final form. In 1993, when the Maastricht Treaty came into effect, two competing interpretations of the new order came to the fore – against the background of what the democratic legitimation of this new entity might be. **On the one hand is the idea of an «association of states» (Staatenverbund),¹⁶ in which a council composed of the national executives safeguards the systematic relationship to the member states; on the other hand is the concept of a «multilevel constitutionalism,»¹⁷ in which national citizenship is being replaced by a citizenship of the Union and representation in the European Parliament.** The European Parliament, directly elected since 1979, has legislative functions, making it a powerful European institution. However, this parliamentarisation of a non-state organisation, a unique international situation, went along with the gradual upgrading of the European Council. The Council, created in 1974, initially lacked institutional status, yet, over time, it grew in importance – something that, viewed in terms of democracy, is ambivalent at best: The leading role played by the Council goes along with the absence of its legal accountability – a position that in certain early constitutional states was the sole privilege of the monarch.¹⁸

12 Hans-Peter Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, 196, 1055.

13 Giandomenico Majone, *The European Community as a Regulatory State*, in: *Academy of European Law* (ed.), *Collected Courses of the Academy of European Law 1994*, vol. V-1, 1996, 321.

14 Hallstein, *United Europe*, 1962, 21, calls the Commission a «motor, watchdog and an honest broker.»

15 Cf. Pierre Rosanvallon, *Demokratische Legitimität*, 2010, 94 et seq.

16 Bundesverfassungsgericht (German Federal Constitutional Court), *BVerfGE 89*, 155 Leitsatz 8. The, by and large, new term «Staatenverbund» (association of states) was coined by Paul Kirchhof.

17 Cf. Ingolf Pernice, *Multilevel Constitutionalism in Action*, in: *Columbia Journal of European Law*, vol. 15 (2009), 349 et seq.

18 Cf. Armin v. Bogdandy, *Europäische Prinzipienlehre*, in: id. (ed.), *Europäisches Verfassungsrecht*, 1. ed. 2003, 149 (169). Art. 13, 15 TEU place the Council within the political system. For a critical assessment cf. Jürgen Habermas, *Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts*, in: id., *Zur Verfassung Europas*, 2011, 39 (74).

Even so, the Maastricht Treaty (Treaty of the European Union, or TEU) already established some democratic principles. Article 6.1 of the TEU (old version)¹⁹ states that democracy constitutes a general principle of the Union as «common to the Member States.»²⁰ This European principle of democracy thus affirms that democracy in Europe relies on democratic structures in the member states. And this is the central message: For European primary legislation it does matter that the member states are functioning democracies, something further shown by Article 7 TEU that defines options for sanctions against member states that defy democratic principles. **Europe derives a large part of its democratic legitimation from the democracies of its member states. To uphold them has become a European objective.**

After EU enlargement to the east and south the Union became more complex. In this context, the fact that the EU has no central authority was often seen as a positive, as it made the Union non-hierarchical.²¹ Yet, this also means that the division of competencies, especially between Council, Commission, and Parliament, will be of great importance. Starting in 2001, during the drafting process for a European constitution, it became increasingly clear that the EU's structure necessitated clear rules. Here, the main focus became the strengthening of the role played by national parliaments, and they were granted specific rights regarding European legislation.²² It has become ever clearer that deficits of democracy do not just exist at the European level where Sector Councils, which will only take on specific tasks, obstruct legislation that aims to balance interests.²³ At a national level, democratic procedures are frequently obstructed, as European legislation is being discussed only within respective ministries and not in parliament. Out of concern that the application of the treaties may lead to a gradual erosion of democratic influence²⁴, Germany's Federal Constitutional Court has demanded that the country's Parliament take a high degree of responsibility for European integration.²⁵

19 Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>>

20 For an interpretation in terms of a liberal-democratic constitutionalism see: Armin v. Bogdandy, Grundprinzipien, in: id./Bast (eds.), Europäisches Verfassungsrecht, 2nd edition 2009, 13 (28).

21 See the seminal work by Joseph Weiler, The Constitution of Europe, 1999.

22 Art. 12 TEU states for example: «National Parliaments contribute actively to the good functioning of the Union: a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality...»

23 The Constitutional Convent had stipulated a Council of Ministers that could have taken on the complete range of political issues, however the subsequent Intergovernmental Conference vetoed this stipulation. The persistence of Sectoral Councils points to the limits of emancipation of European law from international law.

24 See Dieter Grimm, Souveränität – Herkunft und Zukunft eines Schlüsselbegriffs, 2009, 123.

25 German Federal Constitutional Court (Bundesverfassungsgericht): BVerfGE 123, 267, recital 236 et seq. and the Integrationsverantwortungsgesetz, 22 September 2009, BGBl 2009 I 3022.

The Treaty of Lisbon represents a substantial further development in regards to democratic principles.²⁶ However, although sectoral «columns» were abolished and the EU has been established as a single legal entity, democracy as a whole still derives from an overlap of discrete structures. Although democratic processes may still be rooted to a substantial degree in the member states, they point beyond the legitimation of the respective national systems, as the democratic quality of domestic procedures has become essential for the legitimation of the European body politic. This, however, does not fully meet their respective needs for self-legitimation.²⁷

This is the reason why, in the course of integration, the EU's need for having discrete mechanisms of democratic legitimation has persistently grown.

Once European treaties have been ratified at the national level, it is difficult to further influence the resulting sovereignty of the Union. As the treaties present nothing but a framework and their fleshing out requires political accountability, democratic legitimation can only be achieved, if the people affected are allowed to have their say on how the treaties should be implemented. The approaches currently provided by the Lisbon Treaty confirm such a pluralistic model of legitimation. Specifically, the EU's primary legislation names transparency and participation as sources of democratic legitimation, which is either absent from national constitutions, or regarded as a subset of the rule of law and fundamental rights.²⁸ For the overall structure, this points to a substantial albeit, until now, hardly exhausted potential for innovation. Compared to national constitutions, European law allows treating issues of democracy in a much more differentiated manner, in a way that opens up scope for experiments – something we will look into at a later point.

b. The codification of the two-tier structure of legitimacy

Article 2 of the Treaty of Lisbon postulates «foundational» values of the Union. In addition to human dignity and freedom, democracy is named as a value «common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.» In regards to the Union's legislation, the relationship hinted at here on how democratic processes complement and are connected to each other is one of a two-tiered structure of legitimacy. Article 10.2 TEU states:

26 For a general overview: Franz C. Mayer, *Die Rückkehr der Europäischen Verfassung?*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 67 (2007), 1141 et. seq.; Paul Craig, *The Treaty of Lisbon: Process, architecture and substance*, in: *European Law Review*, vol. 33 (2008), 137 et seq.; Benjamin Angel/Florence Chaltiel, *Quelle Europe après le traité de Lisbonne?* 2008.

27 On the safeguarding of democratic procedures as regards changes to the treaties, exemplified by the Czech ratification of the Lisbon Treaty cf. Isabelle Ley, *Brünn betreibt die Parlamentarisierung des Primärrechts*, in: *Juristen-Zeitung* 2010, 165 (170/71).

28 Cf. Gertrude Lübke-Wolff, *Europäisches und nationales Verfassungsrecht*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Bd. 60 (2001), 246 (280/81), where the author states that not only governing but also the generation of democratic legitimation «has become so complex a business that it cannot be achieved without a division of labour.»

«Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.»

This is the key to understanding European democracy. The Union's structure of legitimacy is two-tiered: One tier connects the Union's citizens to the European Parliament, the other tier connects them, via the Council and the European Council, to the national parliaments. These two tiers do not run side by side but are interconnected. European democracy is rather like a system of checks and balances, characterised by this very interlinkage.²⁹ As a matter of fact, the institutions do not enjoy equal powers, as demonstrated by the fact that not all Union legislation has to go before Parliament. Nevertheless, the model shows that the Council and the European Parliament are well able to bestow legitimacy – provided a decision is reached following formal legislative procedures. At a later point, this remarkable finding will be discussed in more detail.

c. Strengthening participatory democracy

The Treaty of Lisbon also defines the participation of citizens as a component of democracy. This will certainly create issues regarding the principle of political equality, and when the approach to participation is fleshed out it will be important to prevent well-organised groups from dominating the process. The Lisbon Treaty does not regard representation and participation to have equal value. Unlike in the Constitutional Treaty³⁰, Articles 10 and 11 of the TEU are not titled 'the fundamental principles of representative / participatory democracy.' In essence, however, this does not imply a substantial weakening of these principles.³¹

The Treaty defines equality (Article 9 TEU), representation (Article 10 TEU), and participation (Article 11 TEU) as fundamental democratic principles. This means that the Treaty of Lisbon does not regard the Union as an entity without precedence, that is, one to which principles developed to legitimise state sovereignty will not apply. Still, it is clear that such principles may not be applied to non-state organisations one-to-one, yet what adaptations might be necessary remains unclear.³²

Among legal scholars there is a long-standing tendency to deny the democratic character of participatory rights of individuals and groups because for them the democratic principle is limited to elections. Others, though, argue that a strength-

29 Thus the tier leading to the member states may be perceived of as obstructing the development of a parliamentary system and, in turn, this avenue may be seen as a threat to the democracies of the member states. However, European democracy may not be viewed as a zero-sum game, in which one side's loss is the other one's gain. Also, the assumption that there is a relationship of mutual compensation – meaning one tier absorbs the deficiencies of the other – falls short: Cf. Lübke-Wolff, *Verfassungsrecht* (FN 28), 255.

30 Article I-47 of the TCE adopted the wording chosen by the Convention.

31 The official version does not have headers for its provisions.

32 Lübke-Wolff, *Verfassungsrecht* (FN 28), 262, describes this graphically as the „rotten core» of what she calls the «principle of non-transferability» – that is, a normative standard is rejected as soon as an object it is supposed to apply to will not yield to it.

ening of participatory rights represents the ultimate goal of European democracy.³³ That European democracy may not be exclusively limited to regular elections is made clear by Article 10.3 TEU: «Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.» This does away with an emphatic address to a collective and stresses the importance of improving participation in democratic processes through greater transparency. Accordingly, citizens may demand more dialogue and greater accountability. In this, European constitutional law goes beyond what is provided for by most national constitutions, and it offers the possibility to democratise European integration.

As the European order relies on interlinked sovereignty, neither the principle of political equality nor that of representation can be realised without creating tensions. In acknowledging the model of participatory democracy, the Treaty develops new forms of legitimacy. Article 11.1-3 TEU states:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent»

The Treaty of Lisbon contains a remarkable potential for democratic innovation, as it links representation with participation.³⁴ By demonstrating that the sphere for democratic participation can be widened, the Treaty shows that there are no institutional pressures demanding that the Union develop a parliamentary system based on those of one of its member states.³⁵ Instead of focusing on a federal system, one that has always presented theories of democracy with great challenges, it seems to be tempting to focus on the capability of individuals to influence fundamental European policy decisions. This will only succeed, if, according to the model of interconnected orders, mechanisms are put in place on both tiers that will ensure that European sovereignty enjoys an appropriate level of legitimacy.³⁶

33 See Peter M. Huber, *Demokratie ohne Volk oder Demokratie der Völker*, in: Drexl (ed.), *Europäische Demokratie*, 1999, 27 (34, 39 et seq., 55).

34 Claudio Franzius, *Europäisches Verfassungsrechtsdenken*, 2010, 100/01.

35 In this vein Philipp Dann, *Die politischen Organe*, in: v. Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd edition 2009, 335 (356/57).

36 It would be preferable to term this a «continuum of legitimacy,» as it encompasses the state, European, and international levels, thus connecting people subject to sovereignty in a widely segmented global society.

d. The European Citizens' Initiative

The Union's political system can only promote parliamentarisation using a two-pronged approach, yet European policy is to a great extent the domain of national governments – so European democracy can not only be strengthened in ways that are based on the powerful ideal of representation present in modern constitutional states. This includes forms of direct democracy.³⁷ By means of the European Citizens' Initiative (ECI), participatory democracy, which has already been tested on the local and national levels, can now become a reality on the transnational level, too. This opens up the possibility to create a real participatory democracy – one that actively involves the citizens – with the result that this process would no longer be solely based on the Commission consulting with civil society.³⁸ The provision suggested by the Convention has survived the collapse of the Constitutional Treaty. Article 11.4 TEU states:

«Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.»

The aim of the ECI is to develop a grassroots approach to politics. This may have the effect that institutions of the Union that, thus far, had been perceived as being elitist, lose their present orientation towards a few powerful lobby organisations.

Admittedly, it is only permissible to have an ECI on a single, specific issue, meaning, it is not an instrument for comprehensive policy changes. *Nevertheless, as the initiative has to be promoted by citizens from «a significant number of Member States,» it will be possible to launch transnational debates on European issues – creating a much broader public for European affairs.*

In contrast to the generally useless right to petition the European Parliament³⁹, the European Citizens' Initiative is directed at the Commission. The formal right to initiate legislation still rests with the Commission – although it is involved in a decision-making process with other, consensus-based EU institutions – and it is effectively not accountable,⁴⁰ and thus unable to take on a political leadership role. Other than the

³⁷ See cf. Joseph Weiler, *The European Union belongs to its Citizens*, in: *European Law Review* 2 (1997), 150 et seq.; Andreas Gross, *The Design of Direct Democracy – A Basis of Assessing Sub-Optimal Procedures of Citizen Lawmaking*, in: Kaufmann/Waters (eds.), *Direct Democracy in Europe*, 2004, 123 et seq.

³⁸ Cf. Andreas Maurer/Stephan Vogel, *Die Europäische Bürgerinitiative*, 2009, 11, following Stijn Smismans, *The Constitutional Labelling of the 'democratic life of the EU'. Representative and Participatory Democracy*, in: Dobson/Follesdal (eds.), *Political Theory and the European Constitution*, 2004, 122 (136).

³⁹ Art. 24.2, 227 TFEU.

⁴⁰ Because of the heterogeneity of interests in the European Parliament it is highly unlikely that the two-thirds majority needed to vote out the Commission will ever be reached.

Commission's agenda setting that is always directed by the political elites, the ECI will give citizens the chance to push issues that are usually disregarded.⁴¹

It is important that the European Citizens' Initiative does not become an instrument to obstruct policy but a useful tool for shaping it. Here, the Unions' citizens will be given the opportunity to team up across borders and influence European legislation through specific proposals. How far this will go will depend on the question whether the Commission can be legally coerced into passing certain decisions into law.⁴² However, the issue whether an ECI will be legally binding should not be overemphasised, as it will be very hard for the Commission to ignore the pressure generated by a transnational citizens' initiative.

The ECI is limited as to subject matter. An initiative has to address an issue that falls under the Union's and Commission's purview. This means, for example, that withdrawal from the Union (Article 50 TEU) may not be the subject of an initiative. Neither will it be possible to demand that the Commission open infringement procedures against a member state, as the initiative is aimed at legislation, not litigation.⁴³ Generally, it should be noted that this new, rather modest instrument is a citizens' initiative, not a referendum. It will be left to the Commission to review whether an initiative is legitimate; the responsibility to monitor the validity of signatures collected rests with the member states.⁴⁴ Once the Commission receives a citizens' initiative, it will have to publish it on its website, review the initiative, comment on it within four months, explain how it plans to proceed and why, inform the organisers of the initiative as well as the European Parliament, and forward it to the Council.⁴⁵ It is unclear, however, should an initiative be rejected, whether the organisers, will have any recourse to appeal such a decision.⁴⁶

Other technicalities are resolved in the Regulation of the European Parliament and of the Council on the citizens' initiative dated 16 February 2011.⁴⁷ The signatories will have to come from at least a quarter of the member states, and the respective number of signatures required will be calculated according to the respective populations.⁴⁸ While the quorum of a quarter of member states is justified to make

41 According to Maurer/Vogel, *Die Europäische Bürgerinitiative* (FN 38), 11, the European Citizens' Initiative is a minority right, and it is not to be expected that large sections of the population will get involved. It remains to be seen whether this turns out to be true.

42 Thus far, the German Federal Constitutional Court seems to negate this, *Bundesverfassungsgericht, BVerfGE 123, 267 (377 et seq.)*.

43 Regarding the limitations regarding subject matter cf. Annette Guckelberger, *Die Europäische Bürgerinitiative*, in: *Die Öffentliche Verwaltung* 2010, 745 (752).

44 Which is why there is no Europe-wide rule on how to prove one's eligibility. Germany, for example, does not require that an ID card number be listed.

45 Article 11 of the Regulation (EU) No. 211/2011 of the European Parliament and of the Council, 16 February 2011, on the citizens' initiative.

46 Article 263.4 TFEU lays down strict conditions for a right to appeal. Decisions by the European Court of Justice indicate that such hurdles will be hard to overcome.

47 Regulation (EU) No. 211/2011 of the European Parliament and of the Council, 16 February 2011, on the citizens' initiative, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:065:0001:0022:EN:PDF>>.

48 The minimum number of signatures required ranges from 3,750 in Malta to 74,250 in Germany.

sure that the common good is observed, there is no reason why in each member state the criteria for eligibility differ regarding voting age. Citizenship of the Union is not dependent on age. It would thus be desirable to have a uniform minimum age of 16.

Experience will show whether the European Citizen's Initiative can become a functioning form of direct democracy. A beginning has been made. And although it may not be a masterstroke, there is no reason to rashly dismiss the whole enterprise.

2. The Debate in the Political Science and Legal Communities on the Development and Deficits of European Democracy

Since the Treaty of Lisbon it has become sufficiently clear that the member states alone cannot meet the need to democratise EU integration. There is far-reaching agreement that a «supranational community exercising its own sovereignty will have far-reaching consequences for the citizens to whom it applies (...) and that, in a democratic age, that requires democratic structures».⁴⁹ According to Ernst-Wolfgang Bockenförde, the fact that the Union «is a community of nations and nation states» does not absolve it from the task to «establish and extend forms and mechanisms that convey to the peoples of Europe the experience that the way European institutions are acting – and European politics itself – is not something remote and alien to them; they will have to be part of their own affairs, of the things they help set up and control.»⁵⁰

The description of the problem is clear, yet it is completely unclear how a type of democracy that goes beyond traditional forms of sovereignty may be achieved.⁵¹ Irrespective of the major controversies surrounding a liberal, communitarian, or republican model of democracy⁵², the scientific debate is characterised by two major approaches. On the one hand, there is a collectivist-substantive understanding of democracy as expressed in the «no demos» theory (see section a below), on the other there is an individualist, human rights model of democracy mainly proposed in the context of international law (see section b below). Both theories are shaping the debate, yet in our context they have little to offer. Concepts of popular sovereignty or of a «Schicksalsgemeinschaft» (community of fate) do not apply to the EU, as it lacks a collective subject that political sovereignty could essentially relate to. Nevertheless, this may not be taken to mean that democracy that goes beyond the state can only be guided by human rights. This ideal-typical juxtaposition of the two models is intended to point towards patterns that fall between the two extremes – something we call «vibrant democracy» (see section c below).

49 Ernst-Wolfgang Bockenförde, *Welchen Weg geht Europa?*, in: id., *Staat, Nation, Europa*, 1999, 68 (89).

50 Bockenförde, *ibid.*, 91.

51 See Claudio Franzius, *Gewährleistung im Recht*, 2009, 304 et seq.

52 See for example Jürgen Habermas, *Drei normative Modelle von Demokratie*, in: id., *Die Einbeziehung des Anderen*, 2nd edition 1997, 277 et seq.

a. The «no demos» theory – a collectivist understanding of democracy

As the US expert on European law, Eric Stein, once aptly put it, in the context of European integration, the question of democracy is «no love at the first sight.»⁵³ The EU, built out of the ashes of a continent laid to waste by an inhuman regime, is not the product of a people that took a first revolutionary step towards self-legislation, as postulated by the traditions of democracy and constitutional theory in an effort to explain sovereignty.⁵⁴ The Union will not be able to rid itself of this stigma, not even by adopting democratic structures. Following this interpretation, only the member states as the «masters of the treaties» have the right to shape democratic self-determination by setting out norms for democratic accountability and by institutionalising a democratic polity.

Collectivist models of democracy, that is models based on a greater subject such as a «people» or a «nation,» enhance this view with its focus on the originators by injecting it with a substantialised meaning of democracy. A merely formal notion of democracy, one limited to a set of institutions and mechanisms or the mere forms and methods of decision-making, is seen as lacking in content. A material understanding of democracy, on the other hand, does not only aim to provide institutions and mechanisms, it also demands a much higher level of quality within the political process.⁵⁵ The consequence is that a political public not only takes centre stage, the social, cultural, historic, or ethnic – so to speak, the pre-political – requisites for an «adequate» capacity for democracy gain prominence too. This view distances itself from Kant's dictum, that even a people composed of devils could build a state, if only they had reason.

Such a point of view relates democracy with the state or a national population (Staatsvolk) – which would not present a problem, were it not for the fact that this functional relationship is conceived of as indissoluble. Democracy, it is being argued, develops within the delimited territory of the state that, according to Böckenförde's famous dictum, subsists on premises it is unable to safeguard. In the statist tradition, the collectivist notion of popular sovereignty is being fused with that of state sovereignty in an essentialist excess of assumed conditions for democratic sovereignty that are thus not amenable to political control. This is the case, for example, with something rarely questioned in the German tradition – the Grundkonsens, that

53 Eric Stein, *International Integration and Democracy: No Love at First Sight*, in: *American Journal of International Law*, vol. 95 (2001), 489 et seq.

54 Ulrich K. Preuß, *Der Begriff der Verfassung und ihre Beziehung zur Politik*, in: id. (ed.), *Zum Begriff der Verfassung*, 1994, 7 et seq.; Günter Frankenberg, *Die Rückkehr des Vertrages*, in: Wingert/Günther (eds.), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, 2001, 507 (509 et seq.); Christoph Möllers, *Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung*, in: v. Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd edition 2009, 227 (230 et seq.).

55 For an able juxtaposition of the two basic positions see Uwe Volkmann, *Die zwei Begriffe der Demokratie – Von der Übertragbarkeit staatsbezogener Demokratievorstellungen in überstaatliche Räume*, in: Hofmann/Naumann (eds.), *Europäische Demokratie in guter Verfassung?*, 2010, 14 et seq.

is, a fundamental agreement prior to political strife and without which political strife could not be controlled within the boundaries set by democratic mechanisms.⁵⁶

If the subject needed to legitimise democratic sovereignty is perceived to be a national population united as political entity, a non-derivative, yet democratically legitimate sovereignty «beyond» the state becomes a conceptual impossibility.⁵⁷

b. Democracy beyond the state: An individualistic view of democracy

The counterpart to a collectivistic view of democracy is an interpretation based on individualism.⁵⁸ Here, the idealised myth of «the people» is being replaced by the notion of individual citizens autonomously participating in a democratic polity.⁵⁹ To realise this within the cultural spheres of individual member states is relatively simple – although it may turn out to be rather difficult to deduce a political order from

56 For a critical position see Günter Frankenberg, Tocquevilles Frage: Zur Rolle der Verfassung im Prozess der Integration, in: Schuppert/Bumke (eds.), Bundesverfassungsgericht und gesellschaftlicher Grundkonsens, 2000, 31 et seq.; Horst Dreier, Integration durch Verfassung? Rudolf Smend und die Grundrechtsdemokratie, in: Festschrift Hans-Peter Schneider, 2008, 70 (93 et. seq.); Stefan Kadelbach, Grundrechtedemokratie als Vorbild?, in: Franzius/Mayer/Neyer (eds.), Strukturfragen der Europäischen Union, 2010, 259 (268/69).

57 A weaker version claims that while a European people does «not yet» exist, the possibility that such a people may emerge cannot be denied. In its ruling on the Lisbon Treaty, Germany's Federal Constitutional Court, on the other hand, to take a rather more rigid position and, without referring to the lack of a national population, argues that a constitutional order based on democracy does play a similar role – and thus contends that despite European integration a core of democratic self-determination must be preserved within the nation state. This can be viewed as a rejection of the more recent concepts according to which a centre of democratic legitimation cannot be determined – something not without consequences for what needs legitimising. Others interpret the courts' ruling differently, namely as a version of the principle of subsidiarity applied to the theory of democracy, which means decisions should be taken at the lowest level possible. However, defining «political primary spaces of sovereign statehood» would elevate the principle of subsidiarity to the level of national constitutional law, thereby excluding it from current political debate. Cf. Gabriele Britz, Vom kulturellen Vorbehalt zum Kulturvorbehalt in der bundesverfassungsgerichtlichen Demokratietheorie des Lissabon-Urteils?, in: Hatje/Terhechte (eds.), Grundgesetz und europäische Integration, Europarecht, Beiheft 1 (2010), 151 et seq. (156/57, 162/63, 168/69).

58 In its more recent rulings Germany's Federal Constitutional Court has indicated the notion that democracy must be predicated on the relative homogeneity, that is, pre-political attachment, of the national population, may be abandoned. At least in some of the arguments for its Lisbon Treaty decision, the court has replaced «the people» with «human beings,» thus viewing the realm of experience no longer as part of a process of communitisation but as individual perceptions of public matters. Investigating the conditions for a «sound» democracy, the court has held that for the citizens, democracy means not to be subject to a political authority they cannot elude, and which they are, at least theoretically, unable to affect in a personal and factual way. Cf. Bundesverfassungsgericht (German Federal Constitutional Court, BVerfGE 123, 267 recital 211.

59 See Anne Peters, Elemente einer Theorie der Verfassung Europas, 2001, 657 et seq.; Ingolf Pernice, Nationales und europäisches Verfassungsrecht, in: Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer, vol. 60 (2001), 148 (160 et seq.); v. Bogdandy, Grundprinzipien (FN 18), p.64/65.

individual freedoms. Nevertheless, it is an important starting point, as further investigations⁶⁰ may bring up the topic of the operating conditions necessary for such a polity, which, in a way similar to public discourse, are no longer a precondition but a task of the political process.⁶¹

This normatively ambitious concept of democracy, one that, so to speak, peeks behind the institutional curtain, is closely related to a notion that views the state as its citizens' communal way of life. This concept is not, however, without its critics in regards to possibilities of democratisation that go beyond the state. Already the sense of the American «We the People» does not correspond to Hegel's concept of *Volksgeist* (national character), as it refers to a multitude of individuals with divergent, if not contrary interests, values, hopes, and expectations. The subject of legitimation of this collective «we» relies on the assumption that free and equal people will give one another mutual recognition. However, even this position is still quite far removed from the stated alternative, that is, from the individualistic, human rights-based model of democracy.⁶²

In whatever way the dichotomy is being expressed – whether in weak or strong terms, republican, emphatic, or sceptical terms, or terms that stress greater controls for those in power – for the European debate in the fields of political science and law it will be of importance to what degree a notion of democracy based on collectivism and statism, one derived from the idea of people becoming a nation, can be replaced by an individualistic concept of democracy that puts the individual at the centre of the democratic principle.⁶³

Once this happens, democracy will gain a political impetus that can be guided in the direction of types of political self-determination other than those of the nation

60 For example the diagnosis that «the public perception of topics and of political leaders remains, to a very considerable degree, connected to national, linguistic, historic, and cultural patterns of identification,» cf. Bundesverfassungsgericht (German Federal Constitutional Court), BVerfGE 123, 267 recital 251.

61 The court does not state this in so many words, yet the oblique reference to Jürgen Habermas (BVerfGE, 123, 267 recital 249, 251, 272), and not, as was the case with the Maastricht verdict, to Hermann Heller (BVerfGE 89, 155, 186) seems to point in such a direction.

62 In its ruling on the Lisbon Treaty the German Federal Constitutional Court demonstrated that such a model may be incorporated into an introspective, rather specific point of view. The court did take up both strands and juxtaposed them, cf. Matthias Kottmann/Christian Wohlfahrt, *Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 69 (2009), 443 (444/45). For a vivid account of the reactions to the Lisbon ruling see Franz C. Mayer, *Rashomon in Karlsruhe*, in: *Neue Juristische Wochenschrift* 2010, 714. Some information concerning the easily misunderstood tone of the Lisbon verdict can be found in the conversation between the court's president, Andreas Voßkuhle, and the President of the Bundestag, Norbert Lammert, available at <http://www.bundestag.de/dokumente/textarchiv/2011/36525489_kw46_w_forum/index.html>. General information about the Bundesverfassungsgericht in: Matthias Jestaedt/Oliver Lepsius/Christoph Möllers/Christoph Schönberger, *Das entgrenzte Gericht*, 2011.

63 Cf. Armin v. Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme*, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 63 (2003), 853 (858).

state. Generally democracy is regarded as unsuitable for political systems that extend beyond the nation state. It is already difficult enough to answer the question as to what degree such an ambitious concept of self-determination will be able to support the interweaving of decision-making between the member state and the EU as a whole. However, the impossibility to interpret European democracy as a form of popular sovereignty does not necessarily mean that the self-determination of individuals is the only way out. It is true that the EU, though an entity created by states, is focused on individuals, yet this alone is not sufficient for turning towards the individualistic model. While this model may provide a good explanation for why the European Parliament is elected by EU citizens, it is insufficient as an explanation for the totality of its pluralistic structures. For an individualistic interpretation of democracy to trace the manifold interlacements and devolutions of sovereignty back to the individual citizen presents the conundrum that it may well succeed in describing the European level, yet it undermines the notion of collective self-determination at the state level. The crucial problem is that the levels cannot be decoupled into individuals on the one side and popular sovereignty on the other. Once democracy is defined as based on human rights-based forms of self-determination, as is the case with Articles 10 and 11 TEU, all particular and national forms of democracy will become implausible. Political self-determination cannot be realised through transnational participation alone – it has to unfold its critical potential by making the multi-layered interconnection of European sovereignty as such amenable to democratisation.⁶⁴ Achieving this will most likely only be possible through a diverse continuum of legitimation, one that does not try to segment the state and supra state levels into neatly discrete spheres.

This would make the state no longer the exclusive reference point for democratic self-determination.⁶⁵ The once popular assumption that popular sovereignty refers to state sovereignty does not offer any answers, as demonstrated by the constitutional make-up of the federal German state, where the individual states within the federation, while democratic, are not sovereign in relation to the federal state.⁶⁶ The German states have their own parliaments elected by the people of the respective states, but still they are not sovereign. In view of this, it is the more surprising that hardly any

64 And this without painting oneself into a corner, as happened to the Second Senate of the Constitutional Court, when it defined European democracy as centred on the state and directed towards the creation of a federal Europe. This approach leads nowhere.

65 Although this is argued in Josef Isensee, *Abschied der Demokratie vom Demos*, in: *Festschrift Paul Mikat*, 1989, 705. Reasons why the nation state will not abdicate in the face of globalisation but create a multitude of orders are given by Saskia Sassen, *Territory, Authority, Rights. From Medieval to Global Assemblages*, 2006.

66 Cf. Alexander Hanebeck, *Der demokratische Bundesstaat des Grundgesetzes*, 2004, 271 seq. Regarding the relationship between federalism and democracy see Stephan Smith, *Konfliktlösung im demokratischen Bundesstaat*, 2010, 56 et seq.

efforts have been made to apply the experiences of federal member states to the European level.⁶⁷

The conceptual uncoupling of democracy and state, however, will not be able to hide the fact that within states democracy often meets conditions that are very hospitable to its development. A constitutional nation state is credited with the ability of making majority decisions even on controversial issues, and that without creating a situation in which the minority feels oppressed. While this does not necessarily require a republican understanding of democracy, it points to a problem often ignored in liberal accounts with their focus on political institutions, namely, that to adapt supranational democracy to a world of nomads would void an important aspect of democracy – its ability to provide «support through closeness.»⁶⁸ **Today, as decisions made by states will ever more often affect those beyond its borders, the democratic connection between actions and those acted upon is being weakened – and this is where the problem lies.**⁶⁹

c. The middle ground: Vibrant democracy

Faced with the contradictions presented by the polar opposition of a collectivist and an individualist understanding of democracy, the task has to be to find a middle of the ground approach that may can straddle the line between the sovereign-centred and the cosmopolitan camps. The EU, at least, has fundamental democratic structures in place, only that they are in need of new life. In its ruling on the Lisbon Treaty, Germany's Federal Constitutional Court pointed out that democracy is not limited to formal principles or the structural integration of interest groups but relies above all on the existence of a viable public opinion.⁷⁰ The Lisbon ruling thus addresses the topos of a vibrant democracy, although in reference to the responsibilities of the Union's institutions and the precept that they exercise their rights in a considerate way.

In sum, that supranational institutions have to be democratised – yet without voiding national mechanisms of their democratic «substance.»⁷¹ It is not to be expected that the supranational level will be able to accomplish the things that

67 In more detail, Stefan Oeter, *Föderalismus und Demokratie*, in: v. Bogdandy/Bast (eds.), *Europäisches Verfassungsrecht*, 2nd edition 2009, 73 (85 et seq.); id., *Die Europäische Union zwischen organisierter Verantwortungslosigkeit und föderaler Konkordanzdemokratie*, in: Brunkhorst (ed.), *Demokratie in der Weltgesellschaft*, 2009, 405 et seq. The German Federal Constitutional Court almost completely ignores the experience of German federalism, cf. BVerfGE 123, 267 (404); for a critical assessment Christoph Schönberger, *Bundeslehre und Europäische Union*, in: Franzius/Mayer/Neyer (eds.), *Strukturfragen* (FN 58), 87 (90).

68 Franzius, *Europäisches Verfassungsrechtsdenken* (FN 34), 97. Regarding closeness as an element of a «living» community see Rosanvallon, *Demokratische Legitimität* (FN 15), 228/29, 256.

69 In international law unilateralism is frowned upon, and it is not clear whether it has been overcome within the European Union. In any case, many fear a return of the (German) nation state, see Habermas, *Ein Pakt für oder gegen Europa?*, *Süddeutsche Zeitung*, 7 April 2011, 11.

70 Bundesverfassungsgericht, BVerfGE 123, 267 recital 250.

71 Bundesverfassungsgericht, BVerfGE 123, 267 recital 351.

increasingly seem to elude the nation states. It will not be possible to reproduce a set-up similar to that of the 19th century nation state.⁷² The same is true regarding a general political public, something one will not be able to find on the European level in ways familiar from the nation state. It is misguided to expect that, in this respect, some sort of «sounding board» will develop, especially, as today, even within nation states, the civil-societal public is frequently greatly fragmented.⁷³ Thus the state-based principle of democracy, although «Europeanised» in form, has to be understood not as a boundary but as a mandate to frame the decision-making processes within the state in such a way that all those affected by sovereign decisions of the state's institutions may participate in them. A human-rights approach to the constitutional principle of democracy, one guided by the precept of «open» statehood, demands that not only nationals but also that all of the Union's citizens participate.

We still must remain aware of how ambivalent these overlaps are. The context of legitimation is becoming increasingly complex, making it more difficult to realise the democratic principles of accountability and responsibility. To simply increase the say of national parliaments on European policy will be insufficient, and with plebiscites alone it will not be possible to turn the Union's complex structures into a vibrant democracy. Here, a unitary model of legitimation, one that solely relies on the election of political representatives by the citizens, will have to give way to a pluralistic model, one that, in the relevant processes, involves everyone affected by policy decisions, including other civil-society actors. Appropriately the Constitutional Treaty uses the phrase «the democratic life in the European Union,» thus pointing out that it is of great importance that Europe's constitution be transparent.⁷⁴ Only once European politics reaches an adequate level of visibility, will the public be able to exert its influence.

A vibrant democracy requires forums for debates on European politics. It is less about developing consensual politics, rather conflicts will have to take place within an institutional framework in order for social groups to argue them out and turn them into reality.⁷⁵ In no other way will it be possible to communalise them.⁷⁶ A vibrant democracy will invigorate the competition between political alternatives and presents a way for finding multiple paths of how citizens may not only participate in political decisions but also make them their own.⁷⁷

72 For a critical analysis of the «theory of recurrence» see Rainer Wahl, *Der einzelne in der Welt jenseits des Staates*, in: *Der Staat*, vol. 40 (2001), 45 (51/52, 70); another insightful investigation is to be found in Rainer Wahl, *Erklären staatstheoretische Leitbegriffe die Europäische Union?* in: *Juristen-Zeitung* 2005, 916 et seq.

73 For an overview see Claudio Franzius/Ulrich K. Preuß (eds.), *Europäische Öffentlichkeit*, 2004.

74 Article 11.1 and 11.2 TEU, Article 296.2 TFEU.

75 Thus Hauke Brunkhorst, *Unbezähmbare Öffentlichkeit: Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung*, in: *Leviathan*, vol. 35 (2007), 12 et seq.; id., *Europa zwischen Ende und Anfang der Demokratie*, in: Franzius/Mayer/Neyer (eds.), *Strukturfragen* (FN 56), 181 (198 et seq.).

76 In this vein Anne Peters, in: *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer*, vol. 62 (2003), 210 referring to Armin v. Bogdandy, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, ibd., 157 (172/73, 185/86).

77 Cf. Rosanvallon, *Demokratische Legitimität* (FN 15), 271 et seq.

In this respect, our vision of a vibrant democracy draws on the concept of an associative democracy, as realised in negotiations between the representatives of collective interests.⁷⁸ In addition, the debate surrounding governance may contribute to this, although, all too often, it tends to ignore questions of power, defers normative claims, and confuses efficiency with legitimacy.

Paraphrasing Claude Lefort, in a democracy the seat of power may, out of necessity, remain vacant. At any rate, we have to proceed very cautiously with normative notions of democracy; otherwise they will constrict the space needed for democratic hopes and concerns to become a reality.⁷⁹ Though there are many signs that the balance between institutions will continue to evolve – with intra-governmental negotiations as well as with elements of consensus.⁸⁰ But from the perspective of the theory of democracy one cannot discount the option of other organisational forms coming to the fore that are not limited to but include efforts to create a federal Europe. Whether it would be possible to achieve this with a new constitution and the support of a constituent power remains up in the air – as is the case with the question, if a United States of Europe⁸¹ could be a project that is not only federally but also democratically sound. It is highly unlikely that the political elites will be able to answer this question.⁸²

In all of this, the formal procedures will be less important than actual experience. This is especially true for existing multi-level democracy, as here decisions by member states are made within a supranational framework, a fact that will make it difficult to return to a system of intergovernmental negotiations.⁸³ To welcome changes to the communal method – changes that weaken European institutions such as Commission and Parliament – as transnational efforts to bring about greater democracy, is a rather suspect interpretation. State-based interests, especially those represented by

78 To name just one example, Philippe Schmitter, *Interest, Association and Intermediation in a Reformed Post-Liberal Democracy*, in: Streeck (ed.), *Staat und Verbände*, 1994, 161 et seq. Our vision of a living democracy is not similarly focused on groups and organisations.

79 Concerning the question whether it is possible to define a point where one could apply a definite democratic criterion, see Brun-Otto Bryde, *Das Demokratieprinzip des Grundgesetzes als Optimierungsaufgabe*, in: Redaktion *Kritische Justiz* (ed.), *Demokratie und Grundgesetz*, 2000, 59 (67 et seq.). In the theory of democracy, codifying a specific concept of democracy is thus always fraught with problems.

80 Cf. Dann, *Politische Organe* (FN 35), 382/83; Oeter, *Föderalismus und Demokratie* (FN 67), 103/04.

81 Cf. Guy Verhofstadt, *The United States of Europe*, 2006.

82 In this respect the otherwise rather ambivalent decision by Germany's Federal Constitutional Court concerning the Lisbon Treaty may contain an important message. We also agree with Peter Graf Kielmannsegg, *Soll von Demokratie noch die Rede sein?*, *Frankfurter Allgemeine Zeitung*, 8 July 2011, 35.

83 The meaning of the «neue Unionsmethode» (new way of the Union) mentioned by Chancellor Angela Merkel in her speech in Bruges (2 November 2010) is obscure. The speech is available at <<http://www.bundesregierung.de/Content/DE/Rede/2010/11/2010-11-02-merkel-bruegge.html>>. For comments see Delors, *Wo steht Europa?* (FN 2); Sylvie Goulard, *Mehr als eine Finanzkrise: eine Perspektive aus dem europäischen Parlament*, speech held in Berlin, 8 February 2011, available at <<http://www.slidesha-re.net/SpinelliGroup/humboldtredede08022011-sylviegoulardde-1>>. Habermas is apprehensive that this may lead to a gradual loss of democracy, see Habermas, *Ein Pakt für oder gegen Europa?*, *Süddeutsche Zeitung*, 7 April 2011, 11.

governments, will remain as much a reality, as will the further erosion of the paradigm of sovereignty.

III. Proposals for Developing European Democracy

Strengthening European democracy at the expense of the democracies of the member states is impossible. One cannot be achieved without the other.

The debt crisis in the eurozone has clearly shown that the Union lacks oversight and control mechanisms, and it has also thrown into relief the growing power of the European Council - whose decisions may affect national budgets in an unequal manner. The vast redistribution efforts and the aim, out of necessity, to harmonise such policies pertaining to the areas of labour and social affairs that are relevant to competition and that, thus far, had fallen under the purview of member states, necessitates the consent of the national peoples that legitimate its rulers. The structure of legitimation makes this unavoidable, yet the legitimacy thus accorded is limited. The reason is not so much that a broadly based debate regarding the relevant policy options is lacking. The debt crisis debate is – at least in Germany – mostly premised on national interests that, it is assumed, have to be defended against European demands. In this context, it is of serious concern that the actions heads of states decide on behind closed doors, do not follow the designated procedures and legal requirements. In addition, governments engage in hazardous brinkmanship, frequently and emphatically justifying their decisions with the necessity to save Europe, yet, out of fear of populist movements in their own countries, are only willing to answer for their actions in a national context.

This problem was recently described by Jürgen Habermas,⁸⁴ who argues that, as the European Union has thus far solely been sustained by the political elites, we are faced with a «dangerous asymmetry between the democratic participation of national peoples regarding the gains made for them by their governments in Brussels which is perceived as remote, and the indifference, if not apathy of the Union's citizens regarding the decisions made by their parliament in Strasbourg.»

Habermas continues to argue that, while on the European level in future the peoples of the member states will still be playing an important role as guarantors of civic freedoms and as co-legislators, it will be crucial for people to become much more aware of decisions taken by European institutions. The greater this awareness and the more the media does to raise it, the more will the Union's citizens be trying to apply their democratic rights in order to influence negotiations between the heads of states. This may be an overly optimistic hope following in the tradition of the old logic of integration – one that has repeatedly come up against the limits of people's supranational solidarity. Nevertheless, those limits are not written in stone. According

⁸⁴ Habermas, Die Krise der Europäischen Union (FN 18), 78.

to Habermas, solidarity is beginning to uncouple itself from a purely national outlook and, albeit «to a lesser degree,» will have to become transnational.⁸⁵ This shows that the aim is not a linear expansion of democratic «conditions» but rather the expansion of the space in which civil society can communicate; such a space can only be created once there is a «reciprocal opening up of national publics.» It will not be possible to decree this by law, although the conditions necessary to enable the Union's citizens «to actually participate in a shared, transnational political process» can be helped along by political measures.

So that such a process can be shaped in democratic ways, it will be necessary to raise the consciousness of the European Union as a political community. It is precisely in this respect that the Union is ahead of the international community, as it is hard to imagine that, concerning the latter, a political subject similar to Union citizenship may emerge.⁸⁶ Therefore we will further outline the political dimension of European integration in three contexts (1) that can lead to specific demands for strengthening European democracy (2). The present crisis should be seen as a chance to further develop the EU into a project of Europe's citizens (3).

1. Contexts

a. Politics and law

According to traditional views democracy is predicated on the state.⁸⁷ However, this does not preclude the institutionalisation of democratic decision-making processes on a European level. **The European Union, as a federal entity, will not have to become a state in order to develop more democratic structures.**

The constitutional perspective with its negative interpretation of the Union as an incomplete federal state will only become problematic if it is used to conclude that the Union has only a limited ability to become a democracy. The federal, not necessarily state-centred experience demonstrates that tiered «multi-level orders» can offer institutional possibilities for egalitarian participation on a variety of levels.⁸⁸

Often this will require that decision-making processes be politicised. The transnational and overlapping decision-making process makes it difficult to designate responsibilities. However, it must be understood that there were good reasons to design the EU as a community under law in order to diminish the dangers of political obstruction by member states. Yet, equally good reasons exist to assume that the polit-

⁸⁵ Habermas, *ibid.*, 62.

⁸⁶ A world republic aside, this may only be achieved by means of an individualistic concept of democracy. For the view (not shared by us) that democracy is an individual human right see Thomas Groß, *Postnationale Demokratie – Gibt es ein Menschenrecht auf transnationale Selbstbestimmung?*, in: *Rechtswissenschaft 2011*, 125 (138 et seq.)

⁸⁷ Uwe Volkmann, *Setzt Demokratie den Staat voraus?*, in: *Archiv des öffentlichen Rechts*, vol. 127 (2002), 575.

⁸⁸ Christoph Möllers, *Expressive versus repräsentative Demokratie*, in Kreide/Niederberger (eds.), *Transnationale Verrechtlichung*, 2008, 160 (178).

ical is no longer exclusively rooted in the state. Increasingly, critics say that the Union is characterised by too many rules and regulations and by a lack of politics. This may well be true, however, some attempts to redress this imbalance may easily undermine certain legal standards.⁸⁹

Reactions to the debt crisis have shown that there is some justification for both of these concerns. The EU lacks sufficiently political decision-making processes that involve its citizens, as well as certain legal formalities – and securing the latter, something political scientists like to ignore, is a fundamental political democratic concern. The question of how to combine politics and law in Europe is not easy to answer, and this is not the place to attempt it.⁹⁰ If the Union wants to preserve its ability to act by assuming some of the responsibilities of the member states – and this without infringing civic autonomy – it will require the citizens of one state along with those of the other affected states to participate in supranational legislation in a democratic manner.⁹¹ Such a democratic juridification of the European polity can be justified on the basis of Union citizenship – a position that can be reinforced – though very carefully – using constitutional points.⁹²

The European Union does not have a structural lack of democracy that cannot be remedied. However, it would be highly dangerous to avoid the issue of European democracy through frippery such as doubting the Union's democratisation just because one would like to preserve the identity conferred by nation states.

Only once European politics has become more democratic will it be possible to transfer further responsibilities to the Union, possibly in the shape of increased collaboration.⁹³ If, on the other hand, the practice to negotiate EU politics between national executives is sustained, this will not only have a negative effect on the democracies of the member states but it will also hamper the Union's current mechanisms. As recently noted by Habermas, the demand to extend the ability for political action beyond national boundaries will extend the normative import of democracy itself.

How to delimit the boundaries, carefully guarded by the member states, of what is often called «identity,» is not so much a constitutional question but rather a political question, as in the question of how to interpret and implement the two-tiered structure of legitimation as set out in the Lisbon Treaty.⁹⁴ What we are dealing with

89 Christian Joerges, *Integration durch Entrechtlichung?*, in: Schuppert/Zürn (eds.), *Governance in einer sich wandelnden Welt*, PVS-Sonderheft 41/2008, 213.

90 Cf. Franzius/Mayer/Neyer, in: id. (eds.), *Strukturfragen* (FN 56), 13 (15 et seq.); Stefan Oeter, *Verkoppelung von Recht und Politik im europäischen Verfassungsdenken*, *ibid.*, 67 et seq.

91 Habermas, *Die Krise der Europäischen Union* (FN 19), 54 (and footnote 69).

92 From a constitutionalist perspective primary law is seen less as a juridification of international relations and more as a policy framework with the aim to allow for a politicisation of the Union, thus v. Bogdandy/Bast, in: *ibid.* (eds.), *Europäisches Verfassungsrecht* (FN 20), 1.

93 Cf. Daniel Thym, *Variable Geometrie in der Europäischen Union*, in: Kadelbach (ed.), *60 Jahre Integration in Europa*, 2011, 117 et seq.

94 Stefan Kadelbach, *Bedingungen einer demokratischen Europäischen Union / Ein deutscher Standpunkt*, in: *Europäische Grundrechte-Zeitschrift* 2006, 384 (385). The author qualifies his position with the statement that it is valid as long as «national parliaments have a sufficient say and parliament's rights of participation develop along with integration.»

is a mutually complimentary, composite body politic whose legitimation has to be improved on both sides. The subject of legitimation does not, of necessity, have to take the form of a state; a possible alternative is for it to take the form of an accord between national and Union citizens to distribute responsibilities as demanded by specific issues – and thus to legitimise the sovereignty of the Union.

b. Organisation and the public

The question of how to improve the organisational context to guarantee a more effective interplay of the different tiers of legitimation is first and foremost political in nature. Here, the European Parliament's lack of a right of initiative presents a certain weakness. Although due legislative process demands that no law be passed without the consent of the European Parliament, this still does not mean that the parliament representing the interests of the Union's citizens is yet on equal footing with other EU institutions. The Lisbon Treaty leaves the manner in which this may be achieved up to the member states, and the degree to which national parliaments have to participate varies widely. In this respect, the responsibilities of the German Parliament are notable, even though it hardly ever attempts to fulfil them.⁹⁵

One problem with this interconnection is that, according to the Lisbon Treaty, the Union's agency is much greater regarding «negative integration,» that is, the reduction of national barriers to trade, than it is regarding «positive integration,» as in measures to regulate markets in the public interest. This asymmetry was already to be found in the initial European treaties, as shown by the fact that the Union's competition policy has a constitutional basis (which is not the case in most member states), while the question of how to deal with the social consequences is left to the member states. This means that deregulation and regulation are institutionally discrete – which cannot be explained through legitimation theory. The division between a purely formal legitimation of the Common Market and a substantive legitimation of adjustments to market effects based on the member states does not make a lot of sense considering today's many mutual dependencies. If freedoms are to be extended beyond national borders, the Union will need a solid political base for the powers necessary for redistribution policies. Admittedly, European democracy does not possess a privileged political locus, yet the institutional necessity to pool responsibilities does point towards the European Parliament as the place where decisions on distributional issues can be and have to be answered for. There needs to be an explanation why the European Parliament is still being denied such a role and why this privilege should be left to the Council of Ministers or the European Council.

⁹⁵ Christian Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon*, 2010, 273, 277 et seq. calls the «Integrationsverantwortungsgesetz» (IntVG, law about the responsibilities regarding integration) «an exercise in pretty legalese» that is rarely applied.

Nevertheless, it is also a political question how the Commission, as Europe's executive, can be more closely linked to the popular vote.⁹⁶ Within the Union neither a presidential nor a parliamentary system of government will be easy to achieve. As the member states have a multitude of systems of government, we should not try to project our «own» system onto the Union, as this would cause constant disappointment and back the notion that the Union is nothing but a deficient entity. Current law already prescribes a greater role for the EU's popular vote, something still to be accomplished through closer ties between Commission and Parliament. Thus far, the Union's citizens have no say when it comes to choosing the Commission members. A transnational ballot and a European list of top candidates might be a means to change that, provided the outcome of elections could really shape fundamental European policies. As long as European citizens see that their vote has no influence whatsoever on the Commission, and that the Commission is not accountable to the voters, the executives of the member states will continue to run European politics – and in the process they will be projecting their national agendas onto the European level. The EU, however, is not an international organisation, it is, according to current treaties, a Union between states and citizens, thus deriving its legitimacy from the people – only that this legitimacy has yet to become a reality with the people in their dual role as national and European citizens.

Consequently, the question of creating the conditions so that democracy is rule not only for the people but rule by the people is also a political one.⁹⁷ At the level of the Union we can no longer refer to sovereign peoples but will have to put the Union's citizens front and centre – something that goes beyond semantics but implies a substantial shift regarding the European Parliament as a representative assembly and those it represents⁹⁸: It is no longer possible to claim that the Union has no people, that is, no greater collective subject. This in turn means that our understanding of a political public, meaning the «basis for society to shape its opinions and political will,»⁹⁹ will have to change. There is no lack of controversial European topics or of cross-border debate, and no shortage of press reports on European issues. Frequently our notion of what constitutes the public is shaped by the idea that expressions of political will have to be shaped by uniform processes – something that even within nation states is often no longer the case. The lack of a common language, too, is no obstacle, as demonstrated by a number of multilingual states.

In brief, in order to open up national publics towards one another it is necessary to no longer perceive of the things able to sustain common action – and thus legitimisation – as unitary processes: «In order to achieve such a transnationalisation of existing

⁹⁶ Regarding the «intergovernmentalisation» of the Commission see Jean Paul Jacqué, *Der Vertrag von Lissabon – neues Gleichgewicht oder institutionelles Sammelsurium?*, in: *integration* 2010, 103 (109).

⁹⁷ Following Article 2 of the French Constitution, albeit without the collectivist emphasis on one people.

⁹⁸ Gerkrath, *Bedingungen einer demokratischen Europäischen Union / Ein französischer Standpunkt*, in: *Europäische Grundrechte-Zeitschrift* 2006, 371 (376 et seq.).

⁹⁹ Kadelbach, *Bedingungen einer demokratischen Europäischen Union* (FN 94), 387.

national publics we are not in need of other media; what is needed is media that act differently. They will have not only to present existing European topics but also, simultaneously, to report on the political statements and controversies these same issues are bringing forth in other member states.»¹⁰⁰

There is neither a lack of media nor of institutions; both exist, at least rudimentarily. However, the political controversies will have to be linked to the accountability of the decision-makers. **Part of the problem is that European elections have very little influence on the Commission and the Council of Ministers.**¹⁰¹ **Consequently the Union is not so much suffering from lack of a public but from a lack of accountability.** This leads us back to «the question, whether direct parliamentary accountability of Council and Commission can be brought about? This is not dependent on factors similar to natural laws, it is a political question, and whether a genuine, exclusively European people exists or not has little to do with the answer (...). The creation and development of a European discourse can be shaped by creating powers to make decisions, possibilities to participate, transparency, and mechanisms».¹⁰²

Here is one way that can improve the quality of democratic decision-making. Still, it is only one approach to improve the framework of European democracy. The European polity can only become a project of its citizens, once the levels on which decisions are being made are more interwoven.. An unconditional primacy in the sense of a «hegemony» of either the European or the national level is foreign to the constitutional association that is the EU.¹⁰³ Therefore the Union has to come to terms with a situation that will generate conflict. Of course a Europe bound to certain constitutional principles¹⁰⁴ has a number of mechanisms for dealing with conflict. Compared to international relations Europe has a number of well-developed strategies that have stood the test of time, yet their basic difference in relation to the political systems of the member states persists. This derives from the peculiar character of the Union as neither merely international organisation nor federal state. The interdependency of levels results in a split sovereignty – and this situation ought not be overcome, as it not only presents no threat but is also an important guarantee for the fundamental autonomy of the member states. The citizens are sustaining the European project as citizens of the Union and as citizens of their own country, which leads to differing views of what constitutes justice, as «something that may be considered part of the common good in one country will, when viewed from a European level, count as a specific interest limited to one country alone and may thus come *into conflict*

100 Habermas, Krise der Europäischen Union (FN 19), 77/78.

101 Kadelbach, Bedingungen einer demokratischen Europäischen Union (FN 94), 387.

102 Kadelbach, *ibid.*

103 Here, the decision by Spain's Tribunal Constitucional with its distinction between political «supremacia» (supremacy) and functional «primacia» (primacy) is instructive, see Tribunal Constitucional, statement DTC 1/2004, 13 December 2004, in: *Europarecht* 2005, 339 (343 et seq.); concerning the primacy of European law see Franzius, *Europäisches Verfassungsrechtsdenken* (FN 34), 38 et seq.

104 Concerning a «constitutionalisation» without a formal constitution see Sergio Dellavalle, *Constitutionalism beyond the Constitution: The Treaty of Lisbon in the Light of Post-National Public Law*, Jean Monnet Working Paper 03/09.

with more general interests the same person is supposed to support as a citizen of the Union.»¹⁰⁵

It is these latent conflicts between levels and roles that cannot be resolved in a general way in favour of one side or the other, at least not without damaging the constitutional order of the European Union. This is key to understanding what constitutes a vibrant democracy involves, a democracy that must reconcile special interests. As it will not be possible to achieve this in a substantial way via European values or a collective identity, but only via the Union's citizens with their subjective rights as individuals, their role is the one that must be strengthened. To this extent democracy can be attributed to individuals with the same legal status.

Nevertheless, as European democracy should not be allowed to be reduced to a collection of individual interests – shedding its republican heritage in the process – the collective will remain an important source or broker of legitimacy. This manifests itself institutionally in the Council, as well as in the national parliaments via their integration into the European order.

In sum, this maintains a certain affinity, preventing democracy from becoming even more depoliticised. Not only are we dealing with different levels whose interconnection prevents alienation from the European project, but we also witness how new forms of public debate come about, forms that hardly fit the dichotomy between representation and participation.¹⁰⁶

It is important that comparatively vague forms of civil society involvement also get a say – only thus will it be possible to create an engaged general public that is not purely limited to elections.¹⁰⁷ According to Pierre Rosanvallon, the still important «democracy of identification» will have to be complemented by a «democracy of appropriation»¹⁰⁸, one that through new mechanisms and political activities enables a continuous involvement with government policy – something that could result in a form of democratic sovereignty in which the subjects would be the real sovereigns. This does not mean that the national will be privileged or the local individual idealised. What counts are not abstract paradigms but a lived experience of appropriation.

c. Adapting to a changed framework

This section discusses a seemingly technical point – the adaptation of secondary law to primary law as codified in the Lisbon Treaty. This treaty forms a constitutional basis; yet other secondary laws do not always conform to it and are frequently obsolete. Although it is usually difficult to deduce from constitutional law the obligation that existing laws will have to be changed or new laws passed, the Treaty's regulations regarding the principle of democracy will likely have to be supplemented by other regulations – otherwise they will remain nothing but empty promises. There

105 Habermas, *Die Krise der Europäischen Union* (FN 18), 68 (emphasis added).

106 Concerning the meaning of responsiveness see Hans Vorländer, *Spiel ohne Bürger*, *Frankfurter Allgemeine Zeitung*, 12 July 2011, 8.

107 See Rosanvallon, *Demokratische Legitimität* (FN 15), 228/29, 256.

108 Rosanvallon, *ibid.*, 272/73.

are many instances where current standard procedures no longer comply with the intentions of the Treaty. While in recent years legislation of member states had to be adapted to ensure ratification of the Treaty, the current question is what legal changes will be necessary to implement the Treaty at the EU level. This concerns, for example, electoral and party law as well new instruments like the European Citizens' Initiative.

The Lisbon Treaty is here seen as a watershed. Obviously, over time, there will be further changes to European treaties. European primary law is always nothing but a snapshot in time and, although constitutions certainly do stabilise political orders, they should not be viewed as inflexible and beyond the scope of politics. The problem with the European treaties is not an excess but a lack of flexibility. What interests us is the constructive approach suggested by Articles 10 and following of the TEU, as they lack any solemn invocation of a unitary collective, that is, of a focused political space. These provisions can be understood as a rejection of efforts to fuse individual or state-based wills into one. This rejection of a holistic amalgamation, however, does not imply that components of the democratic process can be isolated in order to lower the barriers for legitimation. Democracy, according to the Treaty, is not limited to participation, it is also representation as an expression of indirect democracy. Nevertheless, this would be incomplete without elements of direct democracy such as the European Citizens' Initiative, and without the national parliaments (although their role as guardians of subsidiarity should not be overrated). Still, the Lisbon Treaty safeguards the role of national parliaments within the framework of European democracy.

Democratic rule cannot just be reduced to the existence of parliaments. This is already true of national parliaments – although their representative function is changing.¹⁰⁹ And it is even truer of the European Parliament that, in many ways, differs from national legislatures.

The Lisbon Treaty calls attention to precisely the changes Rosanvallon has described as a «decentring of democracies.»¹¹⁰ For the longest time it had seemed as if «the collective will could only take shape and become sovereign within a central space oriented towards elections.»¹¹¹ The transition from monarchy to republican popular sovereignty had done little to change this construction – it just turned, so to speak, sovereignty upside down. Constitutions, at least, added an element of reflexivity, thus creating a legal framework for the politicisation of law.¹¹² Rosanvallon argues that in regard to national democracies the erstwhile rationale of greater concentration is being replaced by «a rationale of propagation, diversification, and differentiation. In future, commonality, equality, and representation will take the form of diversification and interaction.» As far as national democracies are concerned, some schools

109 Linden, *ibid.*, N 3.

110 Concerning the «decentring» of democracy see Rosanvallon, *Demokratische Legitimität* (FN 15), 7 et seq., 78 et seq., 271 et seq. Alexander Graser, in *Gemeinschaften ohne Grenzen?*, 2008, 161 et seq., 297 et seq. calls this «a deconcentration of legal affiliations.»

111 Rosanvallon, *ibid.*, 271.

112 See Dieter Grimm, *Politik und Recht*, in: *id.*, *Die Verfassung und die Politik*, 2001, 13 et seq.; concerning the concept of a constitution see Franzius, *Europäisches Verfassungsrechtsdenken* (FN 34), 12 et seq.

of thought may still find this disconcerting, for European democracy, however, it is constitutive.

What does it mean? The first and foremost meaning is that there is no longer the one parliament that stands at the centre of democracy. What we have today is a multi-level parliamentary system. This also means that it is no longer possible to derive the conditions necessary for democratisation from just one giant entity of legitimation, something comparable to «the people» in national democracies. Political demands to strengthen European democracy will thus have to contribute to a meaningful inter-linking of levels, one that goes along with the two-tiered structure of legitimation.

2. Political Demands

a. Electoral law

We have already mentioned the dangerous asymmetry that exists between the democratic participation of peoples in relation to the actions of their governments and the widespread indifference of the Union's citizens when it comes to European elections. Voter turnout has been shrinking from 63% in 1979 to 43 per cent in 2009, while, at the same time, the responsibilities of the European Parliament have continuously increased. If the representative function of the European Parliament is to be based not on the national peoples but on the citizens of the Union as the electorate, then electoral law has to discard the idea that it is the Union's peoples that are represented in the European Parliament and instead the focus will have to be increasingly on the citizens of the EU.¹¹³

(1) A consistent electoral law

Until now, European election campaigns have been dominated by national issues – with the result that, again and again, the Union's citizens have used the elections as a protest vote against their national governments. Of course it is a valid question whether it will be possible to clearly distinguish national from European issues, and whether the voters will be able to cast their vote with a European perspective in mind. Nevertheless, the current election system that is still based on a 1976 law favours a national perspective on European elections, as the Union's citizens may only vote for political parties from their home countries. Consequently, MEPs have little reason to put European concerns first.

The elections are held according to national electoral regulations that differ between member states. Although there is proportional representation, and thus a certain degree of standardisation, the specifics still vary widely. These differences can no longer be justified citing national structures and traditions, and they are inadequate considering the far-reaching responsibilities of the European Parliament. **In order to increase the direct legitimation of political action, we do need a European**

113 See Article 9 TEU. For a comment cf. Matthias Ruffert, in: Calliess/Ruffert (eds.), EUV/AEUV, 4. ed. 2011, Art. 9 recital 1 et seq.

electoral law. Only once election campaigns have become European in character, will it be possible to have truly European political parties that, following Article 10.4 TEU, are able to express a European political consciousness and the will of the people. If nothing else, the principle that elections have to be fair and equal demands a consistent electoral law.

As for the right to vote: it is unacceptable that different member states set different minimum ages for voting. Citizenship of the Union is not tied to age requirements, and it would be desirable to have a consistent minimum voting age of 16.

(2) Transnational ballots

We think that a transnational ballot is of great importance. Thus far, it has proved impossible to achieve this, as there is the danger that such a reform may sever the connection between voters and national or regional political arenas that may be important in making Europe an actual, lived political experience. As MEPs are no longer representatives of their respective nations (Article 189 EEC) but represent the citizens of the Union (Article 14.2 TEU), it is no longer convincing to make the case that the states should enjoy special privileges. A welcome initiative is MEP Andrew Duff's reform proposal under which a transnational ballot should not take the place of a national ballot but complement it, allowing each European political party, for the time being, to field 25 candidates. These candidates running on a European ballot have to be from at least a third of member states, and their composition has to meet certain criteria regarding nationality and gender.¹¹⁴

According to Duff's proposal, the Union's citizens would have two votes, one for a national ballot, and one for a transnational one. The votes cast for the transnational representatives would then be proportionally assigned to 25 seats in parliament. This means, in case a European political party gains 20% of the European vote, it would win five seats. This would lead to an increase in the number of MEPs, as the 25 new seats cannot be deducted from the existing 751 (Article 14.2 TEU). This reform, which would also require a European electoral commission, could only be realised through an amendment to the Treaty. Here, for the first time, the European Parliament, whose Constitutional Committee has accepted the proposal, could use the new right granted by the Lisbon Treaty to initiate procedures for an amendment to the Treaty. Notwithstanding the likely difficulties to gain a majority in favour of this proposal in the European Parliament, the member states should also throw their weight behind this important bill.

Exactly because the EU's electoral law is no longer based on the states or their peoples but on the citizens in their role as citizens of the European Union, the member states should not try to shirk their responsibility to create a consistent electoral law, as this would reveal calls to strengthen a European public to be nothing but empty gestures. For this to succeed it will be important to win the support of national polit-

114 Proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976, INI 2009/2134, available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0176&language=EN#title1>>.

ical parties who will have to realise that without European parties their future success will be limited. Only once voters recognise that the representatives they elect are accountable to them, will there be a chance they elect candidates from other member states but their own, thus throwing open the door for a further democratisation of the Union. The argument that this would adversely affect the smaller member states is not valid. Why should the citizens refuse to take a transnational approach? For European elections their nationality is of secondary importance. It would also have to be accepted that, the MEPs elected on a transnational ballot would most likely have greater influence than those with purely national support. The argument, not to be dismissed off-hand, that this would result in a two-tier parliament can be rebutted by the fact that European politics has always been a struggle between national and European interests, something that suggests that mixed forms of representation should be developed and put to the test. Only through greater direct legitimation will the Parliament be able to shape the politics of the Union. Giving the citizens of the EU a second vote for transnational candidates can create the political preconditions for this. The notion that only the elites themselves can mend the elitist project the European Union is frequently perceived as, is a fallacy.¹¹⁵

(3) Electoral reform through national debates

It seems to be imperative to promote postal and electronic ballots. Although, at first glance, this seems to be nothing but a measure to make voting more convenient, it will also increase turnout and the quality of the vote. The vote, often cast in a booth and under pressure of time, will be replaced by a vote cast after due consideration – a time period that may be used to gather more information or discuss political options with others.¹¹⁶

Once voting from home has reached a certain level, further measures to increase the quality of the vote may be introduced. For example, voters could be given a number of votes to be cast for different candidates on a ballot (what is known as panachage). An additional possibility would be the option of a «none of the above» (NOTA) vote – something preferable to abstention.¹¹⁷

Split mandates, on the other hand, may pose a greater challenge. There are good reasons to give political parties the option to field not just one but two people for a single mandate, especially if they represent different genders, generations, ethnic, religious, or professional backgrounds, etc. As to be determined prior to the election, one of the two would, as first among equals, get paid for the full mandate, and his or her deputy would receive half the allowance. Split mandates would make it possible to involve people in politics who are not willing to give up their professional careers, thus increasing the diversity among parliamentarians and bridging the gap between

115 Concerning democracy as a true option that does not have to represent the danger of decline and disintegration see: Herfried Münkler, *Alle Macht dem Zentrum*, *Der Spiegel* 27, 4 July 2011, 108/09.

116 Schmitter/Trechsel, *Green Paper on the Future of Democracy in Europe ...*, 93/94; Smith, *Beyond the Ballot. Democratic Innovations from around the World*, 2005, 19 et seq.

117 Schmitter/Trechsel, *Green Paper*, *ibid*, 67/68.

the often distant world of professional politics and ordinary citizens.¹¹⁸ Whether, on the European level, this is a viable alternative remains to be seen. With Europe's large constituencies such an option might make it even more difficult for parliamentarians to establish personal relationships with their electorate.

A further option would be to raise the bar for repeated re-election. In order to mitigate the tendency in politics that entrenched hierarchies and structures prevail, the majority needed by a candidate wanting to run for re-election after two terms in office, could be raised. This could mean, for example, that a candidate who, the last time around, won his or her mandate with 36% of the vote, would now require at least 38% – and 40% for the following elections. If the vote is not direct but for a ballot the same rule would apply to the ranking on the ballot paper. Such variable quorums would strengthen the ties between representatives and those they represent much more than would a rotation of candidates.¹¹⁹

The introduction of compulsory voting is also under consideration. Thus far, this is often rejected with the argument that the freedom to vote also has to include the negative freedom not to vote. This comparison with the negative dimensions of civil rights and liberties – that is the right not to exercise a certain constitutional liberty – is misguided. The freedom to vote is a right connected to people's status as citizens, that is, it also implies certain duties towards the body politic. Consequently, the rationale of democracy would not be defied if the citizens had the duty to vote – especially as this would lead to greater equality regarding representation. Nevertheless, some very serious objections have to be taken into account.¹²⁰ Although most of them seem to be rather practical in nature, it is probably still not advisable to introduce compulsory voting for European elections.¹²¹

Holding simultaneous European and national elections may be another reform to consider. If it is true that «on the European level citizens will have to make political decisions simultaneously and in equal part as citizens of the Union and of a nation»¹²² then this could be realised by holding respective elections simultaneously. A similar model is used in the United States where every two years elections are being held not only for the House of Representatives but also for one third of the seats in the Senate. In Germany, too, state elections are sometimes held on the same day as federal elections. There, the results are not encouraging, though, as experience has shown that in such cases voters will base their overall decision frequently on what contest they consider to be more important.

And there are other caveats: If, following the US model, a part of the Union's citizens would, simultaneously with national elections, vote for their representatives in the European Parliament, the latter would become nothing but a federal assembly – it would be pushed into a veto position and obstruct political developments.

118 Schmitter/Trechsel, *ibid.*, 69.

119 *Ibid.*, 84.

120 See the list of arguments in favour and against in Smith (FN 116), 23/24.

121 See the extensive empirical analysis by Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, in: *American Political Science Review*, vol. 91 (1997), 1 et seq.

122 Habermas, *Die Krise der Europäischen Union* (FN 18), 69 (emphasis added).

If, on the other hand, all citizens of the Union would vote at the same time, national elections would be downgraded to the rank of regional elections. The national parliaments of the EU's member states cannot be compared to the US Senate or the German state parliaments, as the EU's member states are not part of a federation – nor do they aspire to be.

Within a union, especially one whose citizens are simultaneously citizens of their nations, it presents a problem to hold elections at divergent points in time. A considerable part of the Union's population does not care very greatly about European elections – which makes the demand to push for «real parliamentarisation» appear naïve. The issue of simultaneous elections can only be resolved in conjunction with the member states, and it would encroach upon their autonomy to decide on the date of elections as well as the length of the parliament's term in office (not to mention the issue of a possible dissolution of parliament). Which is why we do not support the idea of holding national and European elections simultaneously.

b. European political parties

An electoral law that is more European in nature would boost the position of European political parties. Such parties are necessary if a European political consciousness is to emerge – with the aim, as stated in the Treaty of Lisbon, to «contribute to forming European political awareness and to expressing the will of citizens of the Union» (Article 10.4 TEU). In order to make the Union more democratic, ties between European and national political parties need to be loosened, and European parties should be enabled to become more than just offshoots of the political parties of the member states.

(1) A party statute for European political parties

Currently, the Union's political parties are nothing but umbrella organisations of national parties. Their legal status is that of non-governmental organisations, mostly registered in Brussels. As a consequence, they are unable to function as real political parties and are almost wholly reliant on national political parties and their infrastructure.¹²³ The lack of real European political parties is unsatisfactory.

The first European party that is more than just an umbrella organisation and that allows for individual membership is the European Green Party (EGP). Starting with the European elections in 2004, it began to organise coherent European campaigns based on a single party platform. In 2009, the Irish citizens' initiative *Libertas* was recognised as the first transnational party without the membership of national parties. *Libertas* led a campaign against the ratification of the Lisbon Treaty and, as MEPs from seven member countries joined, it fulfilled the criteria for formal recognition and was eligible for European party financing. However, that same year the party lost its status after the defection of some of its MPs, and later it disbanded entirely. There

123 See Jo Leinen, *Europäische Parteien: Aufbruch in eine neue demokratische Union?*, in: *Integration* 3/2006, 279 (231).

are also a number of transnational groups fighting for greater European democracy that lack the status of party, for example the Newropeans founded by French activist Franck Biancheri.¹²⁴

As the Lisbon Treaty has transformed the European Union into a legal entity, the political parties should also get European legal status. A resolution by the European Parliament to reorganise political parties and their financing seems to point in that direction.¹²⁵ Nevertheless, it will be necessary to draw a much clearer line between recognising a European political party and its right to receive party financing. A statute for political parties should not be primarily approached from the angle of financing – transnational parties will need to have democratic structures and transparent mechanisms for selecting their candidates. This is presently by no means the case in all European countries.

A statute that would be drafted by the Commission should set out clear rules for European political parties. Such parties should also allow for individual membership without national parties acting as intermediaries. The hurdles for recognising political parties must not be too high, as otherwise present structures that favour established parties would be further perpetuated. The argument that a cross-border party structure would contravene against primary law, as it would exclude regional parties such as Germany's CSU or groups of eurosceptics who, on principle, are unwilling to engage in transnational collaboration, do miss the point. European aspirations are not sufficient to turn an association that is active on a national level into a European political party.¹²⁶ Article 10.4 TEU does not address the question of party financing but outlines a functioning party political system with the aim of enabling political sovereignty in Europe. Of necessity, this approach has to be transnational.

The aspect of party political financing has to be dealt with separately. Presently, the idea is not to grant funds to every party but only to such parties with at least one representative in the European Parliament. This hurdle will curtail the possibilities of smaller movements to actively campaign on a European level, and it thus obstructs a vibrant democracy, one that has to be open for eurosceptic movements too – provided they are democratic in nature. In order for the member states, the Commission, and the Council to implement such reforms, it will be necessary to find a solution that is not too costly.

A statute for European political parties will not solve the fundamental question of how the party political system should develop. We have already pointed out that there are good reasons to be wary of the traditional forms of competitive democracy, and in the Council member states balk at their prerogatives being potentially curtailed. But this attitude will hurt their own democracies, as it prevents national parliaments from exerting sufficient control. In this respect, it would be good to have greater political

124 See <<http://www.newropeans.eu>>.

125 Application of Regulation 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding, 6 April 2011, INI/2010/2201.

126 Martin Nettesheim, in: Grabitz/Hilf/id. (eds.), *Das Recht der Europäischen Union*, 43 ed. 2011, Article 10 recital 48; Ruffert, in: Calliess/id. (eds.), *EUV/AEU*, 4 ed. 2011, Article 10 recital 20; for a different opinion see Peter M. Huber, in: Streinz (ed.), *EUV/EGV*, Article 191 EGV recital 17.

competition between parties. On the level where important political decisions are being made, competition between European political parties that represent alternative approaches to European policies is crucial. This could help to bridge the perilous gap that has opened up between the normative claims of the treaties and the actual dominance of national special interests.

A historical perspective on the European party political system shows that the parties have become ever more similar in character. Today, collaboration should thus be easier. The Lisbon Treaty has changed the political setting once again. In Article 10.1 TEU the principle of representative democracy is outlined, and Article 10.4 TEU stresses the role of political parties in integration. The Charter of Fundamental Rights of the European Union incorporates this, stating that full suffrage, as in the active and passive right to vote, is a fundamental right (Article 39 CFREU). The role of the political parties is defined as having to express the will of the Union's citizens (Article 12.2 CFREU). Here, two things are remarkable: European primary law does not refer to European parties, calling them 'parties on the European level' instead. The Charter of Fundamental Rights, on the other hand, places political parties on par with civil rights and liberties, specifically in the section regarding the freedoms of assembly and association. This goes to show that European political parties cannot be thought of as completely independent from national political parties, yet neither are they limited to just providing candidates for European elections. If we also consider the political foundations in Europe, the possibilities the political parties and foundations have to mediate between the different levels have to be reinforced.

Without a better position for the parties and foundations, both of which should be granted common legal and fiscal status, it will be difficult to develop a European democracy that is in touch with the people. According to a report by the European Parliament, a European party statute could support the creation of a transnational public space of free and equal citizens in the sense of a «discursive civic space, where politically connected citizens are free to develop common democratic 'grounds' in order to pursue their chosen political goals. Strengthening European political parties is a means of enhancing participatory governance in the EU and finally strengthening democracy».¹²⁷

If European political parties were recognised as legal entities, they would become more similar in structure – an important precondition for a transnational ballot. In the process, the hurdles for being recognised as a European party should be lowered. The present provision¹²⁸ is too narrow, demanding that a party be represented by MEPs or

127 Report on the application of Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding (2010/2201(INI)), available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0062+0+DOC+XML+V0//EN>>.

128 See Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2004:EN:HTML>>. This was amended by an act of the European Parliament and Council dating 18 December 2007, available at <<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1021322&t=f&l=en>>.

national MPs from at least a quarter of member states, or that it garnered at least three percent of the vote in the last election in each of these member states. We need more openness in this respect – otherwise the party political scene will remain a private club for established groups only. A vibrant democracy needs a diversity of parties, and attempts to achieve this should not be knocked down at every turn claiming it is necessary, at all cost, to have provisions that guarantee the functioning of the parliament.

However, there are more profound objections from a different area. Could one not interpret the current limits of a consistent European party political and electoral system in a more positive manner? As we have shown, it is all too optimistic to suppose that the current transnational cooperation of political parties may be transformed through the creation of European parties into a competitive parliamentary democracy, Westminster style. Against the background of the necessary interdependency of institutional levels, realising this will be a very tall order.¹²⁹

Although the Union must be made more political, the question remains of how to reconcile this with accountability in the national spheres. The aim should be to improve the teamwork with national parties and, at the same time, turn European parties into more of a network.¹³⁰ This approach is supported by the Union's multi-level system in which European and national tiers are closely interlinked.

One advantage of this perspective is that it becomes easier to identify the multitude of actors involved. Already today, the European political parties – along with the European political foundations and the parliamentary groups in the European Parliament, as well as national parties, foundations, and civil society groups – play an important role in that they support interaction between the various levels. These transnational, albeit not supranational, interconnections go to show, that much, yet not all, will depend on the organisational and functional consolidation of political parties. Our concept of a vibrant democracy demands that more spontaneous expressions of political will should be allowed to play a greater role; in this regard modern media can have an important function. If the aim is to reduce some of the technocratic idiosyncrasies of the Union, civil society mechanisms are needed that will go beyond what the national parties (who will not just develop into European parties) can provide in terms of representation and legitimation.

This does not mean, however, that the levels will not be able to reinforce one another. Yet, as long as European parties have little influence on the allocation of positions and the selection of candidates for the European Parliament, nor on the work of other European institutions such as Council and Commission, the parties on the European level will be hardly able to function as a cogwheel between social and political systems. To improve this situation it will be necessary, in a coordinated effort

129 Regarding the options of how to develop the political parties see Simon Hix, *Parteien, Wahlen und Demokratie in der EU*, in: Jachtenfuchs/Kohler-Koch (eds.), *Europäische Integration*, 2003, 151.

130 Cf. Selen Ayirtman/Christine Pütz, *Die Europaparteien als transnationale Netzwerke: ihr Beitrag zum Entstehen einer europäischen Öffentlichkeit*, in: Knodt/Finke (eds.), *Europäische Zivilgesellschaft. Konzepte, Akteure, Strategien*, 2005, 389.

with national parties, to make the European parties more visible and raise their influence on the selection of the President of the European Commission and, although indirectly, give them a greater say concerning the fundamental political outlook of the Commission.

(2) Citizen-friendly party political financing

It is of fundamental importance to develop ways of party political financing that consider ordinary people's interests. Political parties receive funds from a number of sources; in Germany the most important are membership fees, donations, and state funding. Donations (from either natural or legal persons) can be fraught with problems as they may bolster plutocratic tendencies. This danger ought to be averted through party political financing by the state. Nevertheless, from a democratic perspective, this too can be questionable, as it will likely divorce the parties from their popular base. While German law limits the share state funding may have of a political party's finances to 50%, European parties may derive up to 85% of their budget from Union funds.¹³¹ The top limit for donations is currently €15,000 but there are plans to raise this limit to €25,000 as part of a reform of the party political system.¹³²

Even so, according to current law, political parties may already transfer up to 25% of their annual income to next year's budget, and they may accumulate, over a number of years, a financial reserve of up to 100% of their average annual revenue. This provides European parties with some flexibility for financing their election campaigns. It is however illegal to use those funds to finance national parties or candidates.¹³³ The most important limitation is that only political parties with at least one MEP are eligible for funding. This is cause for concern, as smaller political groupings make the Union's democracy more vibrant, yet, as discussed above, this will have to be accepted.

A look at the current debate surrounding a reform of the party political system and financing reveals that the Union seems to be unable to bridge the gap between the (new) citizen-centred semantics and the (old) logic of integration. The conclusions in a report by the special rapporteur of the European Parliament's Constitutional Committee read: «We need a space, a European space, of acting political parties that brings citizens to the core of the Union and helps them in their everyday lives.»¹³⁴ Noticeable is the – possibly unconscious – paternalistic attitude towards the Union's citizens, something they rightfully resent. Nevertheless there are suggestions origi-

131 Article 10.2 regulation (EG) 2004/2003, 4 November 2003. For a critical assessment see Herbert v. Arnim, *Die neue EU-Parteienfinanzierung*, in: *Neue Juristische Wochenschrift* 2005, 247 (250).

132 Cf. Report by the Constitutional Committee, 18 March 2011 concerning a resolution of the European Parliament, INI 2010/2201, No. 17; *EurActiv* 7 April 2011, *Bald neuer Status für europäische Parteien?*, available at <<http://www.euractiv.de/druck-version/artikel/bald-neuer-status-fr-europaische-parteien-004628>>.

133 Article 7 regulation (EG) 2004/2003, 4 November 2003.

134 Report on the application of Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding (2010/2201(INI)), available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2011-62&language=EN>>.

nating from reform debates in member states, which may be applied to the Union – for example the use of vouchers. *Although the amount of party political financing is dependent on the number of votes won, a system of party financing through vouchers may be able to better realise the intents of the citizens.* The system would work as follows: Each eligible voter would receive not only a ballot but also a voucher, and he or she could give this voucher to one or more parties – independent of who they voted for. A further option is to abstain from using this «financial vote.» The consequence would be that parties would not only have to win votes but also financial contributions, and this would give citizens additional influence on politics.¹³⁵

The reversal of the old democratic slogan «no taxation without representation» could result in a model of party political financing similar to that of civil society organisations. Numerous social initiatives depend on state benefits. Whether such benefits are being granted is never quite certain and sometimes depends on criteria that are all but transparent. One alternative would be to raise a «democracy tax» of, for example, 100 euros from each citizen and in turn give them a voucher that they may donate to a civil society organisation of their choice, provided it is a recognised non-profit. Compared to the existing model of receiving tax deductions for donations towards charitable causes, the new model would make donations more democratic. While this would not neutralise the influence exerted by the wealthy and their lobbies, it would provide a certain kind of offset.

c. Elements of direct democracy

The institutions of the Union and its member states do not solely sustain vibrant democracy. The EU is an association whose citizens not only enjoy democratic representation but who also have the right to become active themselves and try to exert a direct influence on EU policy. Here, the European Citizens' Initiative is an especially important tool. When fleshing out forms of participation it will be important to ensure that the political processes are designed in a way that does not exclusively favour well-organised groups. The principles of equal opportunity, intergenerational and gender equity demand that smaller groups and minority views will also have the right to participate and to get a fair hearing.

If, in this area, major breakthroughs are not to be expected, and if European democracy will rather «muddle through» than seek systematic progress, then many small steps will have to be attempted. Aside from transnational ballots and a European party political statute the European Citizens' Initiative (ECI) is the most promising effort in this field.

(1) Possible fields for an ECI

As is always the case with forms of direct democracy, much depends on how the provisions are elaborated. Here, regulation No. 211/2011 of the European Parlia-

¹³⁵ Schmitter/Trechsel, Green Paper (FN 116), 88/89.

ment and Council dated 16 February 2011 created the initial framework.¹³⁶ The ECI supports a pluralistic model of legitimation, one that points beyond the unproductive dichotomy of representation and participation. Depending on the degree to which the ECI will become a part of civil society, it may be possible to widen the scope of political issues that are subject to public debate – and this is exactly what a vibrant democracy requires. Compared to initiatives in member states, the quorum of one million citizens is relatively low (about 0.2% of the Union’s population). The European Parliament succeeded in lowering the minimum number of member states that take part to a quarter, that is to seven.¹³⁷ It is also important that signatures can be collected online using free open source software provided by the Commission,¹³⁸ and that the member states will have to provide adequate web space. The latter aspect may, however, present a legal loophole and hamper actual implementation.

Theoretically, the ECI could be a sizable step forward, as it is the first transnational instrument for citizens’ participation worldwide. In order to prevent the ECI from being used in contravention of European treaties or by extremist groups, it has to be submitted by a committee of at least seven citizens from seven member states. The Commission will then register eligible initiatives on its website, and only once this has happened, does collecting signatures begin according to provisos drawn up by the member states. Requirements demanded by some member states – especially that a valid ID card number is to accompany each signature – makes the procedure problematic, especially in regards to privacy. An evaluation of early initiatives will have to show whether it would not be of advantage to centralise the whole procedure and put the Commission in charge. The whole process should come without red tape, and the current regulation with its convoluted language is not very helpful in this respect. Whether the ECI becomes a success will depend on three factors:

It is up to the commission to review whether an ECI runs counter to the values of the Union (Article 2 TEU), whether it is evidently improper, dubious, or discriminatory, and also whether it falls outside the authority of the Commission, that is, to make suggestion for Union laws that may help to implement the treaties.¹³⁹ The admissibility of an issue depends on whether it falls within the responsibilities of the Union. When it comes to a nuclear power phase-out this is rather doubtful, as the Union’s authority on energy policy does not encompass the aspect of the types of energy generation employed. A European financial transaction tax, on the other hand, presents no such problems and could certainly be the subject of an ECI.

136 Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:065:0001:0022:EN:PDF>>. For an overview see Steffani Sift/Matthias Gauger/Anneke Hudalla, *Die Europäische Bürgerinitiative*, available at <<http://www.greens-efa.eu/fileadmin/dam/Documents/Publications/2011-03-15%20ECI%20Broschuere%20fin%20for%20internet.pdf>>.

137 Article 7.1 regulation (EU) 211/2011, 16 February 2011.

138 Article 6 regulation (EU) 211/2011, 16 February 2011.

139 Article 4.2.b, regulation (EU) 211/2011, 16 February 2011.

This is one of the main issues with the European Citizens' Initiative in its current form: Many of the issues that interest Europe's citizens are, under current treaties, beyond the scope of an ECI. The present precept that the ECI be limited by the treaties should thus be reconsidered and the Union should also allow such initiatives that can only be realised through an amendment to the treaties. The Commission should declare only initiatives that clearly violate constitutional principles inadmissible and give clear reasons for its decision.

The political parties have the possibility to support ECIs, and it would be up to them to help activists find the right wording and form – or to mobilise against initiatives that they consider to be potentially dangerous. One potential danger zone could be ECIs on the right to asylum. Yet, although the Union has responsibilities in this area, certain limits exist as defined by fundamental and human rights. The danger that right-wing activists may try to exploit the ECI is limited by the fundamental values of the Union.

(2) Binding effect of ECIs

It would be preferable for successful ECIs to be legally binding, that is, the Commission would have to react by drafting a law. Without such an obligation the ECI will do little to increase the influence of citizens on European policy. If the ECI is nothing but a non-binding proposal, which the use of the word «invited» does suggest, then it would not have been necessary to make the initiative part of the Treaty in the first place – as every citizen already has the right to submit recommendations to the Commission.¹⁴⁰ The ECI is obviously more than the right to petition the Commission, as shown by the fact that only in duly substantiated cases may the Commission refuse to act upon it by drawing up a law.¹⁴¹ As far as timeline and contents are concerned the Commission does have some discretionary powers, for example concerning the question on whether to draft a new law or amend an existing one.

It will be especially important to make the procedures binding, as the ECI aims to stimulate greater public as well as institutional debate on European issues. As long as it is uncertain whether an ECI is binding, and with no mechanisms for referendums, each successful Citizens' Initiative must at the very least receive a public hearing.¹⁴² Here, the Commission will have to realise that such a hearing must be organised by the appropriate committee and may not be delegated – as some in the Commission seem to think – to the Committee on Petitions. The Commission will have to accept that the ECI is not a petition but rather a new instrument of direct democracy and that it has to be dealt with differently than, for example, mass petitioning – that is, responding in writing is not appropriate.

The ECI was created against the background of debates on the question whether referendums on the Constitutional Treaty may increase legitimacy. Obviously, the ECI is not a referendum. Nevertheless, the genesis of the ECI and its position within the

¹⁴⁰ Nettesheim, in: Grabitz/Hilf/id. (eds.), *Das Recht der Europäischen Union*, 43.ed. 2011, Article 11, recital 27.

¹⁴¹ Cf. Ruffert, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 4.ed. 2011, § 11, recital 19.

¹⁴² See Article 11 regulation (EU) 211/2011, 16 February 2011.

Treaty demand that it be treated differently from a petition. If the Commission wants to meet its own standards and be open to the concerns of the Union's citizens, it has to make sure that the ECI does become a vibrant, functioning forum for exactly these concerns.

(3) *Legal protection*

As the Commission has, thus far, shown great reluctance towards the ECI, a further issue is how lodging an appeal will be possible, should the Commission reject an initiative. This concerns two cases, one, the initial review of an initiative and, two, inaction by the Commission following a successful ECI. In the first case, it will be difficult to gain legal protection, and it would be advisable to guarantee the right to have an initiative registered; in the second case, there is controversy surrounding the question whether inactivity by the Commission is sufficient ground for filing a lawsuit at the European Court of Justice.¹⁴³ As the European Parliament has the right to sue the Commission in similar cases, this should also apply to the ECI. We are confident that the European Court, which in many instances has been at the forefront of strengthening the rights of the Union's citizens, will recognise and defend the rights of the initiative.

d. A democratic public

This leads to the often-discussed topic of a European public, one of the most convoluted questions when it comes to making European integration more democratic. The ECI is one means of institutionalising a culture of debate – and thus creating a public. A democratic public, understood as a link between society and officialdom, is less a given and more of an offer – yet an offer for what exactly is not always clear.

In constitutional and state theory the public sphere has a broad range of aspects: Even the people (*populus*) cannot be understood as just a homogenous unit but has to be defined in terms of a pluralistic public. The common good (*salus publica*), a further component of the public in a pluralistic polity, can also not be taken for granted, as it is the result of conflict, debate, and strife. It is only possible to define the common good through mechanisms defined in the constitution. Within this framework the public sphere is at the core of such communicative processes that help form a public opinion and will.¹⁴⁴ Thus the public, from being a civic forum, is transformed into the source of democratic legitimation and sovereignty.¹⁴⁵ Within this space social freedom may

143 For a negative conclusion see Ruffert, in: Calliess/Ruffert (eds.), *EUV/AEUV*, Article 11, recital 19 («unsatisfactory from a constitutional point of view»); for a neutral position see Nettesheim, Grabitz/Hilf/id. (eds.), *Das Recht der Europäischen Union*, Article 11, recital 28.

144 For an overview see Alfred Rinke, *Geschichte und Valenz des Öffentlichen*, in: Winter (ed.), *Das Öffentliche heute*, 2000, 7 (34 et seq.); Ulrich K. Preuß, *Transformation des europäischen Nationalstaates – Chance für die Herausbildung einer Europäischen Öffentlichkeit?*, in: Franzius/id. (eds.), *Europäische Öffentlichkeit*, 2004, 44 (48 et seq.).

145 For a seminal analysis see Jürgen Habermas, *Strukturwandel der Öffentlichkeit*, 1969. Concerning the relationship to individual freedom see Axel Honneth, *Das Recht der Freiheit*, 2011, 470 et seq.

be realised as «democratic morality» – as Axel Honneth, following in the footsteps of Hegel, has tried to elaborate.¹⁴⁶

We usually think of states as polities with one collective public, a public that functions as a sounding board for all political questions and is thus able to create or stabilise social unity. For the EU this was also considered an option, and, in the past, this has led to efforts to promote European media and other institutions that were perceived as being discrete from other, purely national publics. Such a perspective made a European public appear to be, above all, a deficient being, and little more came out of it than the ARTE television channel. The aim of these endeavours was to transcend segmented national publics.

This holistic perspective has been replaced by more sophisticated concepts.¹⁴⁷ Today, the aim is not to create one all embracing «super-public,» rather there are efforts to connect national publics with one another. Above all, a European public will have to be a transnational public. To promote it by opening up and interconnecting numerous national publics could help to counter the tendency to exclude others – a phenomenon that can be observed in national polities based on one coherent public.

A democratic public is not necessarily predicated on the state; the state, however, may be an important means of bringing it about. As a consequence, better conditions for the emergence of a European public do not imply that the EU will turn into a state. It is anyhow impossible to create by decree the public that is supposed to produce the spaces for debate needed to legitimise democratic sovereignty. The emergence of such forms and spaces can however be promoted. **This includes financial support for non-profit organisations and associations under transparent criteria, yet it has to run deeper: Europe will have to become a fixture of all national curricula.**

Only strategies which take their cues from common historical and cultural traits in what remains of European heterogeneity will succeed in the long term. This is an opportunity to understand the limits of this cultural common ground given our linguistically fragmented public, and a chance to develop social policies that link segments of the public that share specific needs and concerns.

We have to assume that despite all of Europe's commonalities compared to the rest of the world, EU citizens still have a variety of attitudes and perceptions still towards the Union.¹⁴⁸ Still, one can use, empirically as well as normatively, the term 'democratic public.' As long as a state-based, unified public is considered the gold standard, it will be easy to dismiss a European public as lacking in quality. We have to take into account, however, that the public may not only be defined as the opposite of the executive world of the secret and arcane but also allows for a comparative interpre-

146 Honneth, *Das Recht der Freiheit*, 2011. Europe is not mentioned in this reconstruction, and the final analysis is mostly negative (621). However, it is precisely the European condensation of political communication that could provide a basis for a transnational dissolution of boundaries – the absence of which critical commentators tend to bemoan.

147 See Claudio Franzius, *Europäische Öffentlichkeit und europäische Verfassung*, in: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, vol. 86 (2003), 325 et seq.

148 For an overview see Daniel Gaxie/Nicolas Hubé/Marine de Lassalle/Jay Rowell (eds.), *Das Europa der Europäer. Über die Wahrnehmungen eines politischen Raums*, 2011.

tation. This means there can be weaker and stronger publics, yet these qualities cannot be derived from the amount of responsibility residing on the European level. Neither does the transfer of responsibilities to the European level create relevant publics, nor does inaction by the EU mean that relevant publics do not exist – something plainly shown during the debt crisis. The argument that the Union’s institutions are lacking responsibilities does not exonerate European governments from their duty to account for their decisions with a transnational public in view – a public that has already begun to take over Europe’s streets and squares.

In other words, the politicisation of the Union will create publics, yet these publics, in turn, are able to initiate and correct policies. Such interaction, although frequently issue-based, is what we mean when discussing vibrant democracy.

We have to ask ourselves whether current uprisings in European states hit especially hard by the debt crisis, such as Greece, are still expressions of a purely national or of an already European public – a public that fights against being disenfranchised. To a considerable degree the hesitant policies of some states seems to cause protests in others, thus giving public controversies a European hue – insofar as they refer to democratic responsibilities for the debt crisis that transcend national boundaries. There is a growing awareness that the decision on how much solidarity is appropriate ought not to be left to governments alone, and this issue of democracy may, in the end, strengthen European democracy – even if the anger is initially directed at national governments. Governments alone should not decide Europe’s fate; increasingly citizens are taking over in their fight against the loss of rights of democratic participation.¹⁴⁹

This example goes to show that the debt crisis may lead us to reconsider the transnational foundations of the European project, help us overcome the often-lamented political apathy, and result in a political culture characterised by civic engagement. Obviously, the revolt of civil society often has its roots in fear and sometimes in poverty, yet, instead of resigning and giving up all hope, the public is becoming politically self-aware – which in Portugal, and this is a first in EU history, led to the fall of a government.

One major focus for strengthening European democracy has to be the media, whose influence and power in modern democracies is often discussed, and this focus has to be not only on content but also on technology. The reason the media does not stimulate debate on Europe may be related among other things to the fact that Europe is no longer viewed undisputedly as a project with a real future. Today, what once seemed successful and vibrant appears old-fashioned and mired in technical detail. On the other hand, we can also detect a lack of public debate in many member states, including in Germany. So we must ask the question whether we are making demands

149 See some important contributions in: Hauke Brunkhorst, *Zwischen transnationalen Klassenherrschaft und egalitärer Konstitutionalisierung, Europas zweite Chance*, in: Joerges/Mahlmann/Preuß (eds.), «Schmerzliche Erfahrungen der Vergangenheit» und der Prozess der Konstitutionalisierung Europas, 2008, 95 et seq.; regarding the re-emergence of the political: Alexandra Kemmerer, *À la recherche de l’individu. Zwischen Sozialabbau und Selbstbestimmung liegt die Zukunft Europas in seinen Bürgern*, *ibid.*, 115 et seq.

on a European public that, today, not even the publics in the individual member states are able to fulfil? A public can be defined as European if the same issues are being simultaneously discussed in a similar guise in different countries.¹⁵⁰ An example is the debate about food security in the wake of the BSE scandal. Once the number of European policy issues is on the rise, and once media from different countries refer to each other in their reporting, then we are well on our way towards Europeanisation.¹⁵¹ Nevertheless, there is no question that we still have a long path ahead of us.

The exchange of points, messages, and emotions and their distribution to a mass audience will always depend on the medium. Today, the role played in the 19th century by newspapers and magazines and in the 20th century by radio and television has been supplanted by a variety of new communication technologies, with the consequences still hard to gauge. In this respect, the internet is of utmost importance, with recent events having shown that even revolutions can be organised using Facebook. These new media should not be overregulated, as this could limit their potential to bring about a structural transformation of the public sphere. Only with a minimum of regulation will the new media be able to become an important part in overhauling the role the public plays within democracies – especially as publics are increasingly losing their territorial roots. Still, the gatekeeper role of search engines such as Google is questionable, and we should constantly demand equal web access for all.

We would like to conclude this section with two demands:

(1) *Net neutrality*

Web-based publics spawn web communities. **Therefore net neutrality is a democratic imperative.** The European Union is well advised not to regard the web as a primarily economic phenomenon. Protecting the investments of internet service providers is not the priority; preserving the democratic character of the web is.

(2) *A public framework for mass media*

A public framework for mass media will remain a necessity, and media such as radio and TV will have to remain free from regulation, be it constitutional or based on competition law.¹⁵² A Europe that subjects the media to the unfettered laws of the market will fail its democratic mission.

150 See Klaus Eder/Cathleen Kanntner, Transnationale Resonanzstrukturen in Europa. Eine Kritik der Rede vom Öffentlichkeitsdefizit, in: Bach (ed.), Die Europäisierung nationaler Gesellschaften, special issue no. 40, Kölner Zeitschrift für Soziologie und Sozialforschung, 2000, 306 et seq.; Thomas Risse, Auf dem Weg zu einer europäischen Kommunikationsgemeinschaft: Theoretische Überlegungen und empirische Evidenz, in: Franzius/Preuß (eds.), Europäische Öffentlichkeit, 2004, 139 et seq.

151 See Barbara Pfetsch/Annett Heft, Europäische Öffentlichkeit – Entwicklung transnationaler Medienkommunikation, Aus Parlament und Zeitgeschichte 23-24 (2009), 36 et seq.

152 For details see Cass Sunstein, Das Fernsehen und die Öffentlichkeit, in: Wingert/Günther (eds.), Die Öffentlichkeit der Vernunft, 2001, 678 et seq.; for a more general treatment: Jürgen Habermas, Medien, Märkte und Konsumenten – Die seriöse Presse als Rückgrat der politischen Öffentlichkeit, in: id., Ach Europa, 2008, 131 et seq.

e. Strengthening European Institutions

Although the constitutional debate has, for the time being, answered the fundamental institutional questions, the current debate surrounding the European Stability Mechanism (ESM) and the Fiscal Treaty seems to indicate that these issues will re-emerge. As this example has proved, governments of member states will, if need be, try to search and push for solutions that lie beyond what is permissible under the Union's legislative mechanisms. As mentioned above, it could be that no other option exists because of the existing division of powers. Nevertheless, it has to be kept in mind that, if the Union's institutions are insufficiently involved, this will also damage the democracies of the member states.

Blame for endangering democracy has to be put at the doorstep of the member states who, during the debt crisis, jeopardised their own democracies by striking intergovernmental agreements that they justified in their parliaments with a (global) emergency, but did not account for towards the Union's citizens as a whole OR did not take responsibility for towards the Union's citizens as a whole. As long as compacts are being struck, that is, as long as decisions are being made in the Council, European governance will remain weak. With MEP Sylvie Goulard one has to ask what «will happen, if others increasingly have the feeling that they are under the dictat of 'Berlin' or 'Karlsruhe'».¹⁵³ The governments did not even try to achieve greater political integration that could lead to a common European economic policy, and it is far from clear what the European economic government proposed by Angela Merkel and Nicolas Sarkozy is supposed to look like. Makeshift economic experiments that are nothing more than a reaction to Greece's debt crisis do nothing to solve a crisis that goes much deeper than temporary financial straits. National governments that refuse to subject their far-reaching decisions to democratic control and refuse to create a European Monetary Fund controlled by parliament are giving populism a new lease of life.

It is possible that political solutions are being avoided as the end of the public debate on a European constitution has put paid to institutional reform.¹⁵⁴ Nevertheless, there is no shortage of unheeded reminders that without commitment to a political union the euro will likely fail. This may appear overly dramatic, yet it is true that to abandon the idea of greater European integration – a notion that will result in the gradual communitisation of core sovereign policy areas – can easily pave the way for a process of uncontrolled renationalisation. To take this to heart must mean greater democracy, something that will have to result in improving the links between the different institutional levels.

Let us thus, once more, refer to Habermas, one of the most determined pioneers of the European idea:¹⁵⁵ If the European Union is to permit European citizens judge and decide simultaneously and with equal weight as citizens of the Union and of their nation, then this will require always and with equal weight including the European

153 Goulard, *Mehr als eine Finanzkrise: eine Perspektive aus dem Europäischen Parlament* (FN 85), 9.

154 According to Joschka Fischer, *Der Weg ins Desaster*, *Süddeutsche Zeitung*, 21 June 2011, 2.

155 Habermas, *Die Krise der Europäischen Union* (FN 18), 62 et seq.

Parliament in the European decision-making process. The creation of a European finance ministry, a demand by the former President of the European Central Bank, Jean-Claude Trichet, will not suffice. While it is one thing to centralise decision-making powers, it is quite another to connect with the political will of those affected. It would be disastrous if the independent monetary policy were flanked by a finance policy only insufficiently controlled by Parliament.¹⁵⁶ An increase of the Commission's power – and this is what a finance or economy ministry would mean – poses the question of democratic accountability. The expectation that the Commission could play a leading political role similar to that of national governments will run into barriers put up by the structure of Union itself – and these obstacles will be very hard to overcome.

What we are trying to point out here is that stronger European institutions do not have to pose a danger for democracy. Quite the contrary, the lack of powerful supranational institutions will, when faced with problems that cross borders, most likely have the effect that policies will never be realised – not even when they enjoy majority support. While it is true that the very existence of European institutions as such does not guarantee that good, democratically legitimate decisions are being made, the European system is fairly open towards demands for greater representation, transparency, and accountability. If we add to this the growing resistance against an all too simplistic reasoning that claims that Europeanisation is unavoidably driven by globalisation, the trouble with democracy seems to be not the unravelling of the nation state but the lack of adequate politicisation of European institutions.¹⁵⁷

Purported practical constraints have to be replaced by an open debate about political alternatives. As is currently the case with the European debt crisis, where it is hard to predict what consequences failing to stabilise the weaker states will have for the domestic economies, uncertainty demands that decision-making on the EU level become more democratic. The suggestion to include a mechanism for stabilisation in Article 136 TFEU is thus not the solution¹⁵⁸ but only more of what caused the problem in the first place. The time has come to convene a European economic assembly that, other than the European Council, would have to hold meetings open to

156 This is what demands to leave the eurozone invoke, see Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy* (May 2011). LEQS Paper No. 36, available at <<http://ssrn.com/abstract=1852316>>. For a different opinion see Henrik Enderlein, *Mehr Mut zum Euro!*, in Guérot/Hénard (eds.), *Was denkt Deutschland?*, 2011, 26 et seq.; *ibid.*, *Integration versus Legitimation: Der Euro*, in: Franzius/Mayer/Neyer (eds.), *Grenzen der europäischen Integration* (to be published).

157 Cf. Michael Zürn/Matthias Ecker-Ehrhardt (eds.), *Die Politisierung der Weltpolitik*, 2011; *id.*, *Das Bundesverfassungsgericht und die Politisierung der Europäischen Union*, in: Franzius/Mayer/Neyer (eds.), *Strukturfragen* (FN 56), 46 et seq. More about the alternative model according to which the nation state is unravelling and being destabilised (a hypothesis we do not support) see Achim Hurrelmann et al. (eds.), *Zerfasert der Nationalstaat? Die Internationalisierung politischer Verantwortung*, 2009.

158 For an analysis see Daniel Thym, *Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle*, in: *Europäische Zeitschrift für Wirtschaftsrecht* 2011, 167 et seq.

the public, making suggestions of how to achieve an economic union part of a greater public debate.¹⁵⁹

(1) A greater say for the Parliament in European decisions

The imbalance of power in favour of the executive – the Council – presents a problem for democracy. Unlike the US Senate that is elected directly, the Council is not a second chamber and it receives legitimacy indirectly. This system can only be justified based on our interlinked approach we have already mentioned, as the representatives of national governments have not been elected for their role in the Council, though they contribute their experience at a national level to the European legislative process. This means that somewhere in transit to Brussels ministers change from national executives to European legislators (a function they share with the European Parliament).

While this division is fundamental it still has scope for improvement. This is denied by those who hold that legitimation derives above all from the member states, and who challenge the equilibrium between the citizens as, on the one hand, citizens of the Union and, on the other, citizens of their respective nations.

Although it is no panacea to confer greater powers onto the European Parliament, one must remember that the sometimes rigorous constitutional limits on greater democratic self-empowerment legitimise the dominant role of the Council.

A look at the responsibilities of the different institutions reveals that, especially in the sensitive area of economic policy, the rights of the European Parliament are rather limited. The coordination of national policies by the Council as envisaged in the euro rescue policy is supposed to be supervised by national parliaments only. However, thus far, national parliaments are without delegations in Brussels, nor does a eurozone parliament exist. What level of accountability a proposed European economic government may have remains unclear. It has to be a sign of danger when the Council makes all decisions on economic and social policy – without preliminary European debate and without any parliamentary oversight. In this respect the responsibilities of the European Parliament have to be extended. If we assume that the eurozone, too, has split sovereignty, then democratic legitimation may not be limited to the national level, it also needs to be rooted on the European level.

Europe should neither be the exclusive business of national executives in the Council, nor that of an «independent» Commission. In order to give decisions a stronger base in Parliament, it will not be necessary to create new institutions – processes are intricate enough already. It is each parliament's very own business to «catch up» with its respective executive and make it accountable towards its citizens.

159 The German Green Party made a somewhat similar proposal, see Bundesdelegiertenkonferenz von Bündnis 90/Die Grünen, 25 June 2011, Berlin, Resolution: Die Krise gemeinsam überwinden. Das Europäische Projekt nicht aufs Spiel setzen, available at <http://www.gruene-partei.de/cms/default/dok/383/383968.die_krise_gemeinsam_ueber-winden_das_euro.htm>.

(2) Greater rights for the European Parliament

This does not automatically imply that the European Parliament should get the legislative right of initiative as well as the formal right to nominate the President of the European Commission. In many areas the Parliament is self-confidently trying to assert its participation in formulating policy, for example through inter-institutional agreements.¹⁶⁰ This concerns its participation in international treaties or in the implementation of acts according to Article 291 TFEU. Nevertheless, although the Parliament will become more involved in areas such as domestic and justice policy in the future – areas that used to be the domain of negotiations between governments – it has thus far not succeeded in extending its influence to encompass long-term policy goals. Here, as in the area of crisis management, the European Council is the Parliament's main adversary.

Many of the member states also are confronted with an executive that frequently dominate political processes. De facto, it has been the case for some time that laws rarely originate in parliament anymore but that ministerial departments draft them. Still, it is important that the minority in parliament does have a right of initiative. The phenomenon that parliaments have to defend their rights against an overbearing administration is not limited to the European level. However, against the background of the EU's multi-level democracy, the efforts of Parliament to catch up there with the executive will be at least partly frustrated, as until now the transfer of responsibilities to Brussels has not been accompanied by a re-parliamentarisation of European politics. Each time the European Parliament can only react to the actions of Commission and Council. A parliamentarisation of European politics could thus be understood as a reaction to the decreasing influence of national parliaments. Yet, such compensation has to remain incomplete, as the European Parliament will not be able – or only with a considerable delay – to reinvigorate what has been lost through integration. Does this mean it should receive the right of initiative? Could this be more than just a formal right? And is it politically necessary in order to preserve democracy?

The objections are not solely practical in nature. If this happened, the Council, too, would demand a right of initiative – and as a consequence turning the Commission into nothing more than a secretariat. Our demand of equal political weight for the European Parliament does not of necessity mean that it has to have equal rights – because the theory of offsets presented here does not add up completely.¹⁶¹ The problem is not that structural deficits are unavoidable, nor is it the lack of a collective. Other reasons can also be misleading: The frequent warning that this will result in political obstruction (something tellingly argued by national governments) does little to explain the problem, as experience has shown that it is usually member states who block action in the Council, not the Parliament. The fact that a parliamentary corrective is needed was demonstrated by events surrounding the SWIFT banking agree-

160 See Daniela Kietz/Nicolai von Ondarza, *Das neue Selbstbewußtsein des Europäischen Parlaments*, SWP-Aktuell 57, July 2010.

161 See Andreas Maurer, *Mehrebenendemokratie und Mehrebenenparlamentarismus: Das Europäische Parlament und die nationalen Parlamente nach Lissabon*, in: Kadelbach (ed.), *Europäische Integration und parlamentarische Demokratie*, 2009, 19 (21, 32/33, 49, 56).

ment between the United States and the EU. The Council and Commission accepted the agreement with the aim to give the US access to data on European airline travelers, and only after vociferous opposition in Parliament (which actually had no formal say in the matter) was it shelved. It was one of the greatest moments of the European Parliament, and improves it can get involved in foreign policy and defend citizens' civil rights against Council and Commission.

This wariness has different reasons. The responsibilities of the European Parliament have grown considerably. Its rights to participate in decisions have been extended from 45 to 84 (although the number of procedures it is excluded from stands at a high 112). The number of policy areas does not necessarily count but rather the quality of decisions Parliament is involved in. Regardless of the importance of a policy area it has to be noted that Parliament's involvement always concerns «specific authorisations» – and thus very specific areas of policy. This does not mean that its role will not further grow, and some day it may even extend to important policy areas such as taxes and the environment. Nevertheless, the European Parliament lacks more general responsibilities, that is, it lacks the ability to take over the political leadership of the Union.¹⁶² This boundary has its roots in the non-hierarchical nature of the Union's constitution – and this is why the European multi-level parliamentary system cannot be compared to that of a state.¹⁶³

This fact should be neither over- nor underestimated. One of its consequences is that, within the array of EU institutions, the European Parliament is a reactive player that has to close its ranks to a lesser or greater degree against Council and Commission. Also because of the sectoral nature of EU politics the committees are becoming more important as places where MEPs use their expertise to exert influence. As there is no institutional hierarchy between executive and Parliament, the latter can act rather independently and with a considerable controlling influence. The right of oversight but also to take the initiative can be used to influence the drafting of policies; this comes at a high price, however, as Parliament's participation is focused on legislative and non-legislative issues – and not on the concerns of the Union's citizens. In addition, the Union lacks a unified government rooted in Parliament and, consequently, the citizens of the Union find it hard to grasp what they are voting for.

Possible areas of reform include:

1. A right of initiative for the European Parliament

Following our previous points, it will not be easy to decide if the monopoly of the Commission to draft legislative acts (Article 17.2 TEU) should be abolished and a formal right of initiative introduced for Parliament. Clearly, more political initiatives should originate in Parliament. If the aim is to raise the profile of the Parliament, its role in the drafting of legislative acts and concerning other initiatives should be increased.¹⁶⁴

162 Maurer, *Mehrebenenparlamentarismus*, *ibid*, 53/54.

163 Thus Maurer, *Mehrebenenparlamentarismus*, *ibid*, 51/52.

164 The fact that the Treaty does not generally bar such a right of initiative is demonstrated by Article 190.4 EEC.

Nevertheless, this would entail Parliament moving «closer» to the Commission, which in turn could try to «instrumentalise» it against the member states in the Council. But the Commission should remain the key institution responsible for the horizontal and vertical interlinking of levels vis-à-vis the member states.

If it became dependent on Parliament, it could no longer fulfil its representative function, and it would have to be scaled down, something opposed by the smaller member states that, via a seat on the Commission, are hoping to exert their influence on the Union. This notion should not be so easily dismissed, since the efficiency of European policy should not be played off against the democratic interests of member states.

The weighty consequences a formal right of initiative for the European Parliament would have on the EU's institutional structure (although it would likely have to be shared with the Council) require careful consideration. A more political EU will make it necessary that conflicts within the Union are being reflected and discussed in Parliament as well – and such a politicisation will demand greater powers. **We thus demand that the European Parliament receives the formal right of initiative.**

2. Nominating the head of the Commission

A different matter is the right to nominate the President of the Commission. It is a long-standing demand that Parliament have this right. The Lisbon Treaty stipulates that while the results of European elections have to be considered, however the right to choose the President of the Commission is the Council's alone (Article 17.7 TEU). To accord this right to Parliament would be more than just symbolic, as this would give European elections much greater weight.

Whether the member states would subscribe to such an amendment to the Treaty is a different question. The same is true for the proposal that the President of the Commission be elected directly by the citizens of Europe. This proposal would create the possibility for an elegant institutional reform, that is, making the President of the Commission also President of the Council.¹⁶⁵ On the other hand, this would weaken the role of the European Parliament.

A further possibility would be to tether the Commission to Parliament and extend its right of initiative. As a consequence, Parliament would become less of an institution of oversight and more of a forum for deliberation – it would, however, also become more dependent on the Commission. The current practice of nominating the President of the Commission by the (most powerful) member states, is certainly the worst possible solution. **As the law stands, it is already possible for Parliament to nominate the President of the Commission. To us it appears important to push this practice, as otherwise the nomination process will remain subject to the non-transparent dealings of the European Council.**

165 Cf. Philipp Dann, Grenzziehungen in der Mehrebenendemokratie, in: Franzius/Mayer/Neyer (eds.), Grenzen der europäischen Integration (FN 156).

A reform of the internal structure of the institutions will also be necessary. This is all the more important as committees without formal procedural rules are involved in making many decisions.

3. Greater rights for European parliamentarians

The rights of MEPs, party political groups, and committees within Parliament are laid out in the Parliamentary Rules of Procedure, but not only there. However, the Union's constitutional law, even though many provisions have so far only been insufficiently applied, will remain limited in its ability to assert itself. Frequently, secondary law is more important, for example regarding the distribution of seats between member states, a question that is not part of primary law but, according to Article 14.2 TEU, is regulated by a resolution. Greater rights for MEPs and party political groups will have to be conferred in consideration of the far-reaching change in the Parliament's structure and function, that is, from an oversight body to legislature and representative body – and this without sidelining the Council. It has to be kept in mind that, on the European level, the internal structures are far less hierarchical, and that the European Parliament acts as part of a network alongside two other main actors, the Commission and the Council.¹⁶⁶

The lack of a coherent electoral law is a major flaw (according to Article 223.1 TFEU this would require the assent of all member states), yet there are other serious issues, too, for example that a MEP can be stripped of their mandate according to rules established by national laws.¹⁶⁷ Although neither Parliament nor the European courts have the ability to create a law for European parliamentarians, democratic principles demand that the Parliament and its committees are granted sweeping authority to investigate such cases. In the absence of that, the member states would be able to exert pressure on their MEPs via national legislation. The European principle of democracy limits what actions member states can take to suspend MEPs, for example in applying criminal law.¹⁶⁸ **The European Parliament would be well advised to do everything possible to limit measures by member states aimed at manipulating its composition.** For constitutional reasons, if nothing else, Parliament may not become a willing tool of the member states. A European parliamentary law is worth fighting for.

4. Greater rights for the party political groups

The party political groups will also have to be strengthened. They are a part of Parliament with discrete rights, and according to Article 30.2 of the Parliamentary Rules of Procedure a group must have MEPs from at least one-fifth of member states. As far as finances, organisation, and politics are concerned, the party political groups are

166 Winfried Kluth, in: Calliess/Ruffert (eds.), EUV/AEUV, 4 ed. 2011, Article 14, recital 50. Even more apt is the term «network,» if we consider the overall structure of the Union and its member states, see Karl-Heinz Ladeur, Europa kann nur als Netzwerk, nicht als Superstaat gedacht werden, in: Franzius/Mayer/Neyer (eds.), Strukturfragen (FN 56), 119 et seq.

167 See ECJ, case T-353/00 Le Pen, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000TJ0353:EN:HTML>>.

168 For details: Martin Nettesheim, in: Juristen-Zeitung 2003, 952 (954/55).

independent and can thus not be considered the same entity as Parliament, nor may Parliament be held accountable for their actions. **The party political groups should be accorded the right of action at the European Court of Justice, and their independence from national parties has to increase.** This is important as the party political groups are more than an assembly of national political interests, they will have to raise their European profile.

5. Greater minority rights for independent parliamentarians

There should be no obligation to vote in accordance with a party line or to join a party political group. The rights of MEPs outside the groups have to be increased, for example when it comes to seats on committees. In this respect the Parliamentary Rules of Procedure are sketchy.¹⁶⁹ They will have to be amended especially as regards the relationship between parliamentary majority, minority, and individual MPs. **The institutional rights are not just the expression of powers of control and sanction given to Parliament as a whole, secondary law also has to protect minority rights, otherwise a vibrant democracy will not unfold within the European Parliament.** For example, the rule that a Committee of Inquiry can be, but does not have to be formed once the quorum necessary is reached has to be amended to make this mandatory.

6. Greater rights for the committees

Finally, the rights of the committees have to be strengthened, too as they are at the core of EU parliamentary work. **The committees should have greater authority to make decisions – although the plenary must have the right to renegotiate.** Currently there are 20 standing committees whose responsibilities are set out in the Parliamentary Rules of Procedure. In addition, there can be temporary committees whose purpose will be defined in the resolutions establishing them. Grounded in primary law are the Committees of Inquiry (Article 226 TFEU). If substantial work is being done in the committees, membership ought not to be dependent on belonging to a party political group. Here, the rules governing the «proportionality of the distribution of committee seats» (Rules of Procedure of the European Parliament, rule 186) have to be reviewed. According to rule 103 of the EP's Rules of Procedure the committees meet in public. In case a meeting is to be held in camera reasons must be provided. This exception should be subject to a separate, specific rule.

(3) Public meetings of all committees and the creation of a General Legislative Council

The internal structure of the Council is also of importance, and here the principle of public meetings should also be extended to the meetings of the Committee of Permanent Representatives (COREPER) that prepare the meetings of the Council. According to the Lisbon Treaty, only the Council in its legislative function has to meet in public (Article 16.8 TEU), and Article 8 of the Council's Rules of Procedure specifies that

¹⁶⁹ See Ulrich Böttger, Die Rechtsstellung des Abgeordneten des Europäischen Parlaments, in: *Europarecht* 2002, 898 et seq.

meetings on non-legislative acts, too, shall be public. This increases the accountability of the Council.

Every discussion about the European Parliament makes it easy to forget that Parliament is not the centre of European democracy but only part of the Union's greater structure. Its democratic elements should not let us forget the shortcomings of the Council of Ministers with its «council configurations» (that is, sectoral councils). In its draft for a European Constitution the European Convention included a hierarchical structure of the Council, with a General Legislative Council that was to have had the final say on legislation.¹⁷⁰ This passage was struck out during the subsequent conference of governments. From the perspective of member states, whose executives are part of the Council (where their decisions are bound by instruction), this may be understandable, if only for strategic reasons. But from the perspective of a more democratic Union the absence of a General Legislative Council and the persistence of numerous council configurations presents a serious problem, as this makes it impossible to balance the numerous and often conflicting sectoral interests. The issue is exacerbated if the position prevails that the European Parliament may not play such a counterbalancing role¹⁷¹ (we argue the opposite). The present structure of the Council with its lack of coordination and with different council configurations pursuing conflicting interests frequently results in inconsistent and incomprehensible decisions and, accordingly, should be reformed.¹⁷²

The principle of organising the Council according to political portfolios is missing from the Lisbon Treaty. There is a new structure in charge of general affairs (General Affairs Council, or GAC) that is supposed to improve the coordination of the Council and assist in preparing and following up on meetings,¹⁷³ however this configuration does not have a more important role than other parts of the Council. Each individual structure still possesses a full set of Council rights, meaning, each entity can make decisions that should actually be a part of the portfolio of another entity. The council configurations can even pass decisions that its members, according to national law, are not authorised to make. De facto, the Committee of Permanent Representatives (COREPER) will try to coordinate most proceedings. COREPER is an auxiliary institution of the Council composed of the heads of mission from the EU member states. Each legislative act or motion has to pass COREPER where efforts will be made to come to an understanding. If this succeeds, the question concerned, for example legislation by the Commission, will be passed by the Council without further debate (Article 19.1, Rules of Procedure of the European Council).

This goes to show that the Council is not a democratic institution per se. Although it may be indispensable as part of Europe's multi-level democracy, the Council is first and foremost a federal executive whose decisions are mostly made by bureaucrats

170 See Article I-23 of the Draft Constitution of the European Union by the European Convention, CONV 850/03.

171 Thus the German Federal Constitutional Court, see BVerfGE 123, 267, recital 280.

172 Nettesheim, in: Grabitz/Hilf/id. (eds.), *Das Recht der Europäischen Union*, 4 ed 2011, Article 10, recital 31; Oeter, *Föderalismus und Demokratie* (FN 67), 110.

173 Article 16.6 TEU.

and behind closed doors. This secretive preparatory work is characterised by cooperation and consensus, instead of hierarchies and conflict. This creates coherence but imposes a structural limit on the possibility to make the Union more democratic. Talks held by the General Council for the purpose of orientation and talks concerning important issues of the Union are supposed to be public, a measure that aims to provide national parliaments with greater control over the voting behaviour of Council members – yet there is little effort by national governments to achieve transparency in the Council, and there is even less transparency in the European Council itself. The basic democratic tenet – to achieve a balance between different areas of policy – has to be achieved through different institutions. It is extremely important for the overall structure of the Union to achieve collective legitimation via the democracies of the member states, and it is also easy to decry the idea of transferring the state-based model of democracy to the Union. But the only possibility to construct a «convincing relationship» between the different strands of legitimation¹⁷⁴ consists in transferring to the European Parliament greater powers of control and policy design, thus creating a representative form of basic legitimation that has to be complemented by elements of participative democracy.

f. Strengthening national institutions

It is not solely because of Union's former and present logic of development that it will not be possible to construct a system of government that falls into the traditional mould, there are normative reasons as well. These are reasons that we have shown are less based on the diversity of the member states' political systems but more on the democratic gains to be won, if all sovereign institutions develop in ways mindful of the interests of their citizens. In this respect, the principle of subsidiarity – as applied to the execution of authority – is rooted in democracy.¹⁷⁵

This concerns above all the national parliaments that, in regards to European democracy, should not be solely seen as troublemakers. The proposed European Stability Mechanism (ESM), which would form an executive structure parallel to the treaties, is a case in point. Although, under the ESM, the European Parliament is supposed to receive some information and decision rights, the overall mechanism will be outside of the EU's institutional structures. **The main burden to exert democratic control will thus rest with the national parliaments whose information and decision rights have to be safeguarded by the governments.** If, for example, the German government, out of fear that the German Constitutional Court may thwart its efforts, promotes an intergovernmental solution, it will have to respect the increased rights of the German Parliament in EU matters. Especially during the debt crisis these rights have taken on an important legitimating function. The Constitutional Court has

¹⁷⁴ Matthias Ruffert, Schüsselfragen der Europäischen Verfassung, in: *Europarecht* 2004, 165 (180).

¹⁷⁵ Article 10.3 (TEU) states that «Decisions shall be taken as openly and as closely as possible to the citizen.» This identifies the principles of federal structure and of subsidiarity as «possessing democratic values,» see Nettessheim, in: Grabitz/Hilf/id. (eds.), *Das Recht der Europäischen Union*, 43 ed. 2011, Article 10, recital 32.

accorded parliament important responsibilities concerning integration, and there is a danger that the German government, through active disinformation, is trying to undermine these rights.¹⁷⁶

It would be wrong to ascribe to national parliaments a fundamentally disruptive role regarding European issues. While it is true that European policy causes a substantial quandary regarding democracy on a national level as well, it is also becoming increasingly clear that, in spite of public debate, national parliaments often lack the fundamental means necessary for shaping policy decisions.¹⁷⁷ On the other hand, on some issues it has to be noted that national parliaments are not always aware of all the possibilities at their disposal.¹⁷⁸

We do not subscribe to the conclusion that legitimate governing within the Union is not tied to parliamentary democracy¹⁷⁹, or that there is no problem with democracy but that other standards apply – for example equity.¹⁸⁰ We will have to abandon the dichotomy proposed by all those theoretical and practical approaches that are trying to play off one level against another. A vibrant democracy ought not to overrate the national level as a stronghold of democracy, nor should it overlook its qualities. If we take the interlinked levels into account, Europe has a multi-layered parliamentary system that does not allow for a generalised answer to the question of which level takes precedence. On the one hand, the role of national parliaments depends on the responsibilities of the European Parliament – they become greater the less the European Parliament takes part in a political process. On the other hand, even if the European Parliament were to be seen as equal to the European Council, European policy would still require the support of the national legislatures that,¹⁸¹ unlike in a federal state, are not reduced to something comparable to a subordinate state parliament.

The Lisbon Treaty has accorded national parliaments increased rights of participation and control¹⁸², – in «exchange» for their shrinking scope of action. Thus a strengthening of national parliaments through national law goes hand in hand with their strengthening by European law.

176 See Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (FN 95), 253 et seq.; Claudio Franzius, *Vom Nationalstaat zum Mitgliedstaat und wieder zurück?*, *Leviathan* 38 (2010), 429 (434/35).

177 Vivian A. Schmidt, *Democracy in Europe*, 2006; Lübke-Wolff, *Verfassungsrecht* (FN 28), 265 et seq.

178 The German Parliament, for example, simply missed the opportunity to shape legislation for the European Arrest Warrant in such a way that it would have conformed to German constitutional requirements, see German Federal Constitutional Court, *BVerfGE* 113, 273.

179 Thus Markus Jachtenfuchs, *Die EU – ein Gebilde sui generis?*, in: Wolf (ed.), *Projekt Europa im Übergang? Probleme, Modelle und Strategien des Regierens in der EU*, 1997, 23.

180 Thus Jürgen Neyer, *Justice, Not Democracy. Legitimacy in the European Union*, in: *Journal of Common Market Studies* 48 (2010, 903; id., *Die halbierte Gerechtigkeit in der Europäischen Union*, in: *Leviathan* 2007, 30.

181 Cf. Christian Calliess, in: id./Ruffert (eds.), *EUV/AEUV*, 4 ed. 2011, Article 12, recital 67/68.

182 For an analysis see: Annette Elisabeth Töller, *Die Rolle der nationalen Parlamente im europäischen Rechtsetzungsprozess. Probleme und Potentiale des Ländervergleichs*, in: Kadellbach (ed.), *Europäische Integration und parlamentarische Demokratie*, 2009, 75 (83 et seq.).

(1) Strengthening the participatory rights of national parliaments

We have to distinguish between parliaments' rights of information and control, on the one hand and, on the other, parliamentary reservation rights. The latter imply a more or less powerful mandate concerning decisions to be made by the government. Although the increase of rights of information and oversight is a welcome development, a government which is too closely connected to the will of parliament can be problematic, as it will lose its freedom to negotiate in the Council. The government may try to instrumentalise its parliament by claiming that its obstruction in the Council is not its own fault, as it is unable to act independently. Wherever such reservation rights of national parliaments exist, they should be used with great restraint.

National parliaments and many of their MPs find it difficult to fulfil their new oversight role of European policy. In this respect, we have to remember that the powerful role accorded to national parliaments by the Lisbon Treaty does not sit well with the constitutions of all member states. In France, for example, the introduction of parliament's right to issue a rebuke or even sue the national governments on grounds of subsidiarity, put in question the dominance of the executive, necessitating an amendment to France's constitution without which the Lisbon Treaty could not have been ratified.¹⁸³ This shows that, domestically too, the power shift caused by the greater autonomy of national parliaments in relation to «their» governments has to be accommodated. **National parliaments are trying to compensate for their shrinking influence, which is caused by integration, by developing direct informational links to European institutions. In this way, and as they no longer rely on their governments' «go-between» services, national parliaments are becoming autonomous actors on the European stage.**¹⁸⁴ National parliaments are now to receive all relevant European documents. Germany plans to manage the expected information overkill with a rule stipulating that information need only be distributed if a party political group or at least 5% of MPs demand this.

Besides, the extent to which the representatives of national governments are subject to parliamentary oversight – something that varies considerably from member state to member state – remains a central question of European democracy, which the respective national constitutions have to resolve. If national parliaments want to fulfil their responsibilities for integration, they will have to try to close the gaps that result from the all but comprehensive provisions of Union law.

In some important areas national parliaments have been granted new participatory rights on the European level while they are still excluded from others. Article 12

183 Conseil Constitutionnel, Decision No. 2007/560 DC, 20 December 2007, recitals 28 et seq. and the subsequent amendment to the French constitution, Article 88-1.2.

184 This can be understood as a «system shift.» No longer does the Union's constitutional law solely address the member states but also the national parliaments as part of their institutions, see Sven Hölscheidt, in: Grabitz/Hilf/Nettesheim (eds.), *Das Recht der Europäischen Union*, 43 ed. 2011, Article 12, recital 2.

TEU provides a seemingly haphazard list of such areas.¹⁸⁵ On the one hand, information and participatory rights are mostly restricted to legislation, while, on the other, they do not extend to the critically important areas of economic and fiscal policy. For example, national parliaments do not have to be informed about fundamental economic policies the Council adopts (Article 121 TFEU). Only in part do the European Parliament's rights to control, participate, and approve compensate for such limitations. The probable reason is that, in the Constitutional Convention, the representatives of the national parliaments were solely focused on subsidiarity controls, thus overlooking that **an effective protection of the democratic rights of the different level in member states is less likely to be achieved by setting oneself apart from Europe, and that the approach more likely to succeed is to divide institutional responsibilities between different actors at the Union level.**

It is doubtful whether subsidiarity controls can be a tool to strengthen European democracy.¹⁸⁶ The jury is still out if such measures are apt, not only to prevent certain measures but also to safeguard participation in their design. In Germany, at least, the right to take legal action against infringements of the principle of subsidiarity is recognised as a minority right.¹⁸⁷

The contribution the courts have made to democracy is, from a theoretical point of view, not unproblematic and should not be blindly adopted by the Union. The strategy to make the Commission directly accountable to national parliaments presents difficulties, and while concerns that the Commission with its limited accountability may neglect the interests of the citizens are understandable, the attempt to rein it in by means of subsidiarity controls is flawed.

An improved integration of national parliaments in European political processes has to be more than symbolic.¹⁸⁸ Whether the greater say of national parliaments will lead to political debates with a greater focus on European issues remains to be seen, but we would welcome this. Achieving it would require greater capacities to process information, as well as organisational structures that allow national parliaments to build networks between one another. A point of debate is the question whether for issues that affect the budgetary rights of national parliaments a dedicated committee on the European level will be needed, enabling them to quickly coordinate necessary

185 (a) information rights, (b) overseeing the principle of subsidiarity, (c) participatory rights in the areas of freedom, security, and justice, (d) participatory rights for the revision of the treaties (e) information rights concerning accession, (f) participatory rights for interparliamentary cooperation.

186 However, this is asserted by Calliess, *Die neue Europäische Union* (FN 95), 194 et seq.

187 For a critical assessment see Robert Uerpman-Witzack/Andrea Edenharter, *Subsidiaritätsklage als parlamentarisches Minderheitenrecht?*, in: *Europarecht* 2009, 313. § 12 of Germany's Law on the Responsibility for Integration obliges the German Parliament to take such legal action should a quarter of MPs demand it. However, should a quarter of MPs be opposed to such legal action, their opinion has to be included in the complaint as well.

188 There is a wide variety of opinions on this which are by and large too optimistic: Calliess, in: *id./Ruffert* (eds.), *EUV/AEUV*, 4 ed. 2011, Article 12, recital 22; for a too pessimistic assessment see Hölscheidt, in: *Grabitz/Hilf/Nettesheim* (eds.), *Das Recht der Europäischen Union*, Article 12, recital 4, etc.

actions. In this respect, the current debate on the ESM has pointed to the need for further institutional reform.

(2) Strengthening parliamentary minority rights

The character of national parliaments varies from state to state,¹⁸⁹ and a willingness to actively participate in European politics is not the rule. The degree of control exerted concerning the actions of one's own government in the Council also varies considerably, while in political systems where the government is supported by a parliamentary majority, the onus to do so lies with the parliamentary opposition. It is thus important to strengthen the rights of minorities in parliament. **In order to strengthen European democracy it will be necessary to enable national parliaments to exert effective control over national governments and, regarding the Council, to act in a way that will bolster the position of the European Parliament.** The access to information has to be a matter of course, otherwise national parliaments will be unable to fulfil their role within the Union's legitimisation structure. The parliaments' right to information may not be negated by the governments' concerns about secrecy. Even if the parliaments receive information, it is all but certain that they will be able to process it. Europe's national parliaments are still in very different positions regarding the control of their governments – and this diversity does not always have positive consequences.

(3) Strengthening interparliamentary cooperation

There is also debate about creating a new interparliamentary body modelled on the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC). Questions to be answered do not only concern the structure and rights of such a new organisation but also whether it will be able to promote the responsibilities of national parliaments at the Union level while helping to reduce anti-European sentiments. Whether such a new body could be organised in ways that would not further complicate the already intricate European procedures is doubtful.¹⁹⁰ However, the measures to keep the European debt crisis at bay have shown once again that we need greater – and faster – coordination between national parliaments. Every effort to create a structure parallel to EU institutions with the aim of stabilising the euro would be fraught with problems.

Without question, the national parliaments should be better connected to the institutions of the Union. Long before new legislation is passed they have to get involved in the process, and for this a modest office in Brussels is insufficient. Frequently, national parliaments do not make use of their rights to participate, and there is a growing gap between actual rights and factual participation. The answer is not to create even more institutions, and grant ever more rights – as these can also be used to do nothing but obstruct European policymaking. What has to change is parliamentary cultures, meaning **important offices should not be staffed according to**

¹⁸⁹ Töller, *Rolle der nationalen Parlamente* (FN 182), 83 et seq.

¹⁹⁰ About the renewed interest in a European People's Congress see Giscard d'Estaing, *Europe needs a people's congress*, available at <www.euractiv.com/en/future-eu/giscard-europe-needs-peoples-congress-interview-506083>.

criteria unconnected to Europe. Here Germany – whose parliament, if compared to its Constitutional Court, seems to have a much slighter presence on the European stage – has some considerable catching up to do.

(4) Strengthening the European committees in national parliaments

One place where national institutions ought to be strengthened are the European committees of national parliaments. In Germany, this committee has constitutional status (Article 45, Grundgesetz).¹⁹¹ It is where the general direction of European policy is discussed, though there is no debate about specific legislation – something the sectoral committees, in turn, rarely attempt. Still, we should not attempt to abolish the cross-sectoral character of this committee, as European legislation will have to be implemented by a range of ministries. A «super committee,» one that would act as a parliament in miniature, is not a viable solution. National responsibilities for European affairs should not be centralised, as this would entail the danger that other actors who affect European policy ignore the consequences of their supposedly purely national decisions.

Consequently, it will not make sense to create a Ministry of European Affairs either. Although such a ministry may be able to challenge the powers a national government wields in Europe, the example of the French Ministry for Europe shows that such a professionalisation of European policy is hardly able to contest the leadership exerted by the head of state. A better option may be to follow the German model and create government departments that mirror the EU's institutional structure. **If we want to increase the political visibility of Europe, it is not advisable to create an independent Ministry of European Affairs, nor should we accept the stealthy increase of powers accruing to the heads of government.**

g. Strengthening participatory rights

It is a well-known fact that democracy consists of more than providing the right institutions, responsibilities, and mechanisms.¹⁹² Democracy forms the core around which further strategies to democratise European policies need to be clustered. Rightly so, Article 11 TEU has augmented the meaning of democracy by adding associative, deliberative, and participative elements. In this respect, the Commission's White Paper on European Governance, published in 2001, has been influential, as it stresses that good governance must rely on the principles of openness, participation, responsibility, efficiency, and coherence.¹⁹³ Although demands for greater participation of

191 Article 45 of the Grundgesetz states: «The Bundestag shall appoint a Committee on the Affairs of the European Union. It may authorise the committee to exercise the rights of the Bundestag under Article 23 vis-à-vis the Federal Government. It may also empower it to exercise the rights granted to the Bundestag under the contractual foundations of the European Union.»

192 Nettesheim, in Grabitz/Hilf/id. (eds.), *Das Recht der Europäischen Union*, 43 ed. 2011, Article 11, recital 1.

193 European Commission: *European Governance. A White Paper*, Brussels 2001, available at <http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf>.

those affected by policy decisions could be easily used to justify an individualistic interpretation of democracy (as suggested by Article 9, TEU), a radical turn towards this model, especially one based on lowering the representative requirements of legitimation, has to be rejected. All efforts to counter the empirical difficulties of realising collective volition by lowering normative thresholds – and thus replacing representation with participation – should be met with the utmost caution.

However, this in turn does not imply that in a representative democracy participatory rights should be rather narrowly circumscribed. In this respect, European democracy can point to some of its innovations such as, for example, the increased participation of citizens, consultations with parties concerned, and dialogue with representative associations and civil society (Article 11, TEU). Here, the Union's constitutional law frames a clear mission in the hope that, in this way, the citizens can be won over to the European project. This rarely results in actual obligations for the Union's institutions, for example when the Commission has to consult associations during the legislative process. Other than that very few explicit participatory rights can be derived from Europe's constitutional documents, bar the ones named in Articles 39 to 46 of the Charter of Fundamental Rights. Of special importance is the right of access to documents, as defined in Article 42, that goes far beyond many national regulations. In this area, too, it is up to the political institutions to specify the details, and the European Parliament should do everything to prevent this right from being undermined by legislation.

Through the increased participation of citizens an effort is being made to create a 'sphere of communication' often absent from European politics, one that cannot be brought about through elections or representation in parliament. Participatory democracy aims to involve the citizens in politics, and this is defined as «taking part, sharing, contributing, and having a deep commitment to the fortunes of a community.»¹⁹⁴ While representation is predicated on distance, participation stresses proximity.¹⁹⁵

If, however, in order to bring Europe closer to its citizens, special interests are increasingly becoming part of the political process, the Commission's technocratic view of legitimation can easily make Europe appear more remote to its citizens – that is, unless efforts are being made to curb the influence of powerful interest groups and secure equal participatory rights for all citizens.

Consequently, we suggest that three aspects should receive special attention:

(1) Greater consultation with civil society and non-governmental organisations

When it comes to the participation of citizens, associations hold a privileged position. Since 1996 the Commission has been aiming to increase dialogue with European citizens while also consulting national authorities and social organisations, in order to achieve a «comprehensive dialogue,» the actual result has been mainly communication with associations. This is not only because of the wish to have well-structured

¹⁹⁴ Manfred Schmidt, *Demokratiethorie*, 4 ed. 2008, 236.

¹⁹⁵ Rosanvallon, *Demokratische Legitimität* (FN 15), 210 et seq.

consultations but also due to the fact that the Commission wants to ensure that its decisions will be supported by powerful interest groups.

In contrast, the citizens themselves will only be consulted via organised civil society groups, something that elevates the standing of non-governmental organisations (NGOs) and other groups. It is not clear why certain organisations seem to have greater influence than others, or whether the Commission actually gives certain types of groups preferential treatment – which would be a problem. One reason might be that the Commission has a special kind of understanding of civil society, one that stresses certain functions not fulfilled by traditional associations or lobby groups. If we define civil society¹⁹⁶ as a social space situated between the state sector and the private sector, as well as an area based on interactions, that is, an area whose role it is to facilitate, communicate, and control, then **social movements¹⁹⁷ should be accorded considerably more attention and support, as they are characterised less by their organisational and assertive powers, and more by their willingness to take on responsibility for European concerns.**

(2) Putting non-profit organisations on an equal footing

The Commission's current practice seems to indicate a disparity. Non-profit organisations and associations active in the fields of human rights, development policy, and the environment receive less attention than others. Among the roughly 3,500 interest groups currently registered in Brussels, over three quarters represent the interests of employers and businesses. The influence of such lobby groups on the Commission and other European institutions far outweighs that of non-profit organisations active in the areas of health or education. This will not do justice to the relative importance of these policy areas, nor is it in accordance with the principle of equal participation as set out in the Lisbon Treaty. This points to a structural asymmetry based on sectoral policies that, within one sector, are unable to offset competing interests one against the other. To reform this through greater and more equitable participation would mean to systematically privilege weaker groups, yet such an approach is in conflict with constitutionally defined principles of equality. **Equitable participation will only be possible through procedural rules that avert discrimination.**¹⁹⁸

(3) Public participation early on

This leads us to the fundamental question of how to deal with lobbyism within the EU. The Commission's approach to the imbalance between different interest groups is too lax. Groups active for commercial interests may be important for European integration, yet they present a problem for greater democratisation. However, it is

196 For different conceptions of civil society see Dieter Gosewinkel, *Zivilgesellschaft – eine Erschließung des Themas von seinen Grenzen her*, WZB Discussion Paper 2003.

197 See Jean L. Cohen/Andrew Arato, *Civil Society and Political Theory*, 1992, 492 et seq.; Ansgar Klein, *Der Diskurs der Zivilgesellschaft. Politische Hintergründe und demokratietheoretische Folgerungen*, 2001, 144 et seq.

198 For a more detailed treatment see Oliver Mross, *Bürgerbeteiligung am Rechtsetzungsprozess in der Europäischen Union*, 2010, 253 et seq.

not helpful to demonise lobbyists or, in this respect, to talk about a «re-feudalisation» of sovereignty. If political volition is to spring from the centre of society – and in cases, where this can only be achieved in limited ways via intermediate institutions such as political parties – it will be vital to mediate between competing and diverse social interests based on the activities of foundations, charities, or associations. This, however, requires control on the proximity of the Commission to certain associations, as otherwise the extension of participatory rights and mechanisms will run into major problems.

The Commission addresses this issue in its Transparency Policy, albeit in an unsatisfactory way. Neither is there sufficient information to enable the public to control the numerous «participations,» nor is its code of conduct regarding lobbyists adequate. Existing mechanisms make it possible to keep tabs on whether rules are being followed, and yet, once again, the factor of time does play an important role: **If participation is meant to achieve more than just legitimise solutions already on the table, that is, if it is meant to enable involvement in the actual design of policies, then participation will have to begin at an early stage.**

Green and White Papers on legislation can play such a role. Nevertheless, the actual consultation processes pursued by the Commission could be accused of being corporatist. Bargaining for involvement to suggest to Europe's citizens that they actually participate in decisions is often perceived as patronising, that is, as a kind of «enlightened absolutism.»¹⁹⁹ This situation could be mended by the European Citizens' Initiative or through participatory initiatives of the member states. It will certainly also remain a task of the national democracies to extend participation, as only thus an actual vibrant democracy will be able to unfold in practice.

3. Bidding Farewell to Doomsday Projections

Public debate on how to stabilise the «weaker» member states is a good thing, yet doomsday projections have to be treated with caution. Much of what we perceive of as a crisis only appears so, if seen backlit against the screen of an ideal world. This is not meant to imply that the European Union does not have its share of crises. Nevertheless, not every problem is a fully-fledged crisis, and sometimes it is nothing more than the expression of democratic processes with all the accompanying difficulties.

Institutional solutions thought necessary to democratise the European Union ought not to be based on a supposedly solid sense of community spirit, yet they have to be able to create just such a spirit.²⁰⁰ This paradox has to be confronted, and we will not be able to escape it by referring to the legitimation the Union receives from the member states. The processes set in motion on the European level do narrow the scope citizens have for political action within their nation states. So while from a European perspective national parliaments are an important mediating factor that can steer integration, they are overstretched by the burden of legitimation on their

¹⁹⁹ See Ruffert, in: Calliess/Ruffert (eds.), EUV/AEUV, 4 ed. 2011, Article 11, recital 12.

²⁰⁰ Michael Zürn, *Regieren jenseits des Nationalstaates*, 1998, 240.

shoulders. National parliaments are faced with the paradox that, while they are forced to rubber-stamp motions their governments say have been imposed upon them by circumstance, their quest for legitimation beyond the state will send them back to the state and its institutions.²⁰¹

As we have seen, this challenge can only be met in two ways: Either we relinquish the notion that the Union needs social legitimation, thus turning this deficiency into a limit of European integration; or we lower our sights on the condition that a state requires a pre-political consensus (although this criterion is not always convincing, even when applied to the nation state). Finding such a consensus will be difficult for the European Union, as it would level the diverse cultural and historical differences that characterise Europe. This «boundary» defines the fundamental dynamics of the European project: It is not states, it is peoples that are being united – and this can only happen with the assent of the citizens who do have a legitimate interest in preserving their home countries.

This does not mean that, relative to the European process of globalisation, the democracies of the member states are «citadels.» The question of legitimation is not only posed at the European level, it is also frequently asked in the member states as well. In Germany, for example, it has long been apparent that the relationship between the federal government and the states is ambiguous, yet this is being accepted without demur. We thus have to avoid the tendency to idealise the democratic systems of the nation states, as they tend to project onto the Union developments that even for the nations of the 19th century (that have become a thing of the past – and for good reason, too) could only be postulated in terms of a self-referential sovereignty. The challenge to link European politics to the will of its citizens and to extend rights of participation in order to heighten legitimation also remains a challenge for the democratic systems of the member states.

201 Volkmann, Setzt die Demokratie den Staat voraus? (FN 87), 589.

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The EU debt crisis has clearly shown that the monetary union cannot be upheld without coordinated fiscal and economic policies. But many citizens are under the impression that their voices, and those of their national parliaments, are being sidelined in favour of ever-greater centralisation – and that, in the process, democracy is being eroded. Thus the debt crisis may easily trigger a crisis of EU legitimacy. It is against this background that the Heinrich Böll Foundation com-

missioned a study on the future of European democracy. In it, constitutional experts Ulrich K. Preuß and Claudio Franzini highlight how Europe may achieve a vibrant democracy. It will require political spaces and institutions that enable controversial debate about European issues and that give citizens the chance to participate in political decisions.

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