Democracy in Europe
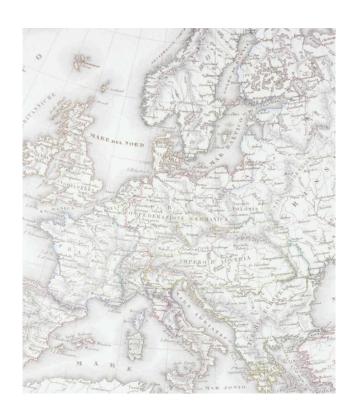
Why the Development of the European Union into a Transnational Democracy is Necessary and How it is Possible

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Abstract

Can the process of European unification lead to a form of democracy that is at once supranational and situated above the organizational level of a state? The supranational federation should be constructed in such a way that the heterarchical relationship between the member states and the federation remains intact. I find the basis for such an order in the idea of the EU constituted by a "doubled" sovereign – the European citizens and the European peoples (the states). In order to sustain such an order reforms of the existing European treaties are needed. It is necessary to eliminate the legitimation deficits of the European Union in a future Euro-Union – that is, a more closely integrated core Europe. The European Parliament would have to gain the right to take legislative initiatives, and the so-called "ordinary legislative procedure," which requires the approval of both chambers, would have to be extended to all policy fields.

Keywords

Introduction

The 20th anniversary of the agreement by which Norway is affiliated with the European Union remains somewhat in the shadow of the Bicentennial of the Constitution whose celebration takes pride of place in Norway this year.[1] However, through that first move towards a postnational future, Norwegian democracy is tightly wedded to the fate of democracy in the European Union, on which I will focus today. I will deal with the problems currently facing the Union with a view to a constitutional issue that is of importance far beyond Europe – namely the question of whether the democratic procedure, which up to now has been established only within the framework of nation-states, can be extended beyond national boundaries. In other words: Can the process of European unification lead to a form of democracy that is at once supranational and situated above the organizational level of a state?[2] Today, the issue of a supra-nationalization of democracy has become more urgent than ever, because the national democracies are becoming more and more entangled in problems arising out of the growing discrepancy between a *world society* that is becoming increasingly interdependent at the systemic level and a *world of states* that remains fragmented.[3]

The EU's democratic deficit

This problem is reflected within the European Union in a democratic deficit that has been recognized for decades.[4] Dieter Grimm, one of the best-known and theoretically most distinguished judges of the German Federal Constitutional Court (from 1987 to 1999), has recently presented a convincing summary of his view of the rather problematic state of the European Union

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[1] This is the Holberg Lecture held in Stavanger on 11 September 2014 to celebrate the ten-year anniversary of the Holberg Prize, which the author received in 2005. For more details on Norway's 2014 constitutional bicentenary and its EU affiliation, see: http://www.sv.uio.no/arena/english/people/aca/erikoer/blog/eu-norwegian-paradox.html.

[2] An informative overview of existing approaches to this development is provided by the two introductory articles by Lucio Levi and Claudia Kissling in Lucio Levi, Giovanni Finizio and Nicola Vallinoto (eds), *The Democratization of International Institutions: First International Democracy Report* (London: Routledge, 2014), 7-53.

[3] Hauke Brunkhorst, *Legitimationskrisen: Verfassungsprobleme der Weltgesellschaft* (Baden-Baden: Nomos, 2012); Brunkhorst (ed.), *Demokratie in der Weltgesellschaft* (Baden-Baden: Nomos, 2009); Claudio Franzius, *Recht und Politik in der Transnationalen Konstellation* (Frankfurt: Campus, 2014); Claudio Franzius and Ulrich K. Preuß, *Die Zukunft der europäischen Demokratie* (Baden-Baden: Nomos, 2012).

[4] Erik Oddvar Eriksen and John Erik Fossum (eds), *Democracy in the European Union* (London: Routledge, 2000); Mario Telò, *The Democratization of the European Union*, in L. Levi, G. Finizio, N. Vallinoto (2014), 145-57.

that is shared by many experts.[5] He identifies three causes of the increasing distance separating the decision-making processes of the EU-authorities from the political will-formation of European citizens in their respective national arenas. The democratic will of European citizens has almost zero impact because European "policies" are uncoupled from "politics":

Grimm sees the first cause as residing in the fact that a particular pattern of policies was raised to the level of constitutional law and thereby immunized against the usual process of political change. While over decades the concrete substance of international treaties have implicitly obtained constitutional status, mainly through the judgments of the European Court of Justice, the direct actionability of basic economic freedoms as subjective rights has removed decisions over alternative economic policies for the most part from the democratic process. This fact had major consequences as neoliberal economic policies were implemented across the globe. As a result, the negative integration of different national societies through market freedoms took priority over a positive integration which is accomplished politically through the will-formation of citizens themselves.[6]

The second cause is the unpolitical way of a policy-making at the European level that proceeds independently of democratic influence. This self-immunization of "Brussels" vis-à-vis the national public spheres is a consequence of an interplay between institutions which are free from any legitimation pressure, as in the case of the European Court of Justice and the Commission, whose decisions are not sufficiently legitimized, as in the case of the European Council and the Council of Ministers. National elections alone cannot authorize representatives of different governments to participate in decisions over other nations as a whole. Heteronomy becomes unavoidable when the body of citizens who elect representatives and legitimize their decisions does not coincide with the range of citizens who are affected by these decisions. This asymmetry is an additional incentive for the governments to decouple their Brussels policies from the will-formation of their national electorates.

As a third cause of the existing democratic deficit Grimm identifies the remoteness of the European Parliament from the citizens whose interests it is

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[5] "Die Stärke der EU liegt in einer klugen Begrenzung" [The strength of the EU lies in prudent limitation] (*Frankfurter Allgemeine Zeitung*, 11 August 2014, p. 11).

[6] Grimm ibid: "Parliaments (would) no longer be needed for the production of the common market […] Commission and ECJ could take this task in hand themselves […] The prohibition of distortive state aid would be extended from private companies to public institutions providing essential services and would promote privatization, regardless of the motives for the public provision of services." See also Fritz W. Scharpf, "Monetary Union, Fiscal Crisis and the Preemption of Democracy," *Zeitschrift für Staats- und Europawissenschaften* 2 (2011): 163-98.

supposed to represent. According to Grimm, strengthening the Parliament, though in itself a necessary measure, cannot solve the problem as long as the communication networks necessary to connect the citizens and the MEPs are lacking. What is lacking in the first place is moreover a European electoral law with European political parties that field pan-European lists of candidates. European parties have to organize and conduct election campaigns that are recognizably different in themes and personnel from national elections. As it happens, this lack of differentiation between party leaderships at the European and the national levels also explains the conflicts that have emerged in the recent election of the Commission President. (The equal participation of the Council and the Parliament in this election [under Article 15.7 TEU] would require a prior compromise between two organizationally independent partners already at the stage of nominating candidates.)

Dieter Grimm regards this third deficit as so serious that his cogent analysis surprisingly leads to a defensive recommendation. According to his "democracy-balance," granting the European Parliament more competences would even worsen the existing democratic deficits because of the lack of the necessary prerequisites mentioned.[7] However, this recommendation is implausible since it is based on the assumption that the status quo could be frozen. This expectation is not only at odds with the dynamics of economic globalization that increasingly restricts the freedom of action of individual nation-states. The unsustainability of the status quo becomes especially apparent once we extend the perspective of the legal expert beyond his field. After all, the process of European unification got under way for specific political reasons and goals. Today one recognizes with a certain amazement that the political goals which the domestication of national sovereignty was intended to promote have pointed a way to solving problems that have become more and more pressing in the meantime. The high-minded *finalité* that was regarded as optional at the time has become a practical necessity that may not be disregarded without facing painful sanctions.

The need for deeper democratic integration

I would like to mention four of these pressing political challenges to which European politics must respond with deeper democratic integration.[8] They concern (a) the imbalance in power relations that has developed within the Union, (b) the threat to the political culture in many countries of our post-

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[7] Grimm, ibid.: "That's why the democracy balance sheet would result in the EU being weaker after full parliamentarization than before."

[8] On the following list of objectives, see Claus Offe, *Europe Entrapped* (Cambridge: Polity Press, 2014).

imperialist Europe, (c) the disintegration of the achievements of the welfare state, and (d) Europe's failure to live up to its role in world politics.

(a) The first goal of unification, the one that was explicitly pursued from the beginning, was to secure peace *within* Europe while simultaneously integrating the German nation after the defeat of its criminal regime. Because both of these objectives have in fact been achieved (even under the aggravating and at the same time lucky conditions of German reunification), the shift in power that has occurred in recent years is threatening to undermine the relations of trust among member states. In the course of the crisis management of the past years, Germany's demographic and economic dominance within the Union, and especially within the Eurozone, has led it to take on a leadership role which is in part urged upon it but mainly inspires fear, and which it is now using, albeit tacitly, in its own national interest.[9] As a result, Germany is again becoming trapped in the dilemma associated with the "semi-hegemonic status" that it had assumed since 1871 and was able to overcome only after two world wars, thanks to European unification. Today Germany itself must have the greatest interest in leading the EU beyond a stage of development in which it is both possible and necessary for a leading power to take pioneering initiatives.

(b) Going beyond this one-sided goal of rehabilitating a member of the family of nations which had become conspicuous, European integration also involved the hope that the countries involved would both keep tabs on and encourage each other in overcoming fatal mentalities and dispositions. Until 1989, the historical traces of mass crimes, imperialism and oppression, nationalism and war, were still present. The echo of the good intentions can easily be read out of the preambles and declaratory articles of the various European documents. Through joint efforts, a liberal political culture was supposed to preclude a relapse into "bad habits."[10] Now this hope in a "self-paternalist civilizing process" (C. Offe) is being denied by reinvigorated anti-Semitism, right-wing populism, and even racism, which in some places reach into government circles, as the example of Hungary shows. To be sure, growing social inequality has led to a radicalization of political mentalities everywhere. But the general trend towards xenophobia and nationalism caused by economic uncertainty and growing cultural pluralism has acquired explosive force within the European Union, and especially within the Eurozone. The fact that fears of social decline and prejudices have been channeled both against the "monster" Brussels and against the respective European neighboring peoples cannot be explained solely in terms of the course taken by the banking and sovereign debt crisis either. It was less the crisis itself than its interpretation

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[9] Cerstin Gammelin and Raimund Löw, *Europas Strippenzieher* (Berlin: Econ, 2014).

[10] Claus Offe, "Is there, or can there be, a 'European Society'?" in John Keane (ed.) *Civil Society: Berlin Perspectives* (New York: Berghahn Books, 2006), 169-88.

that played an aggravating role. The pattern and the level of development of *national* economies provided the explanation for the "guilt" and "innocence" of whole nations. This type of crisis interpretation directed attention first to collectives and diverted it away from the fact that the winners and losers of the crisis in the different countries belonged to the same social classes.[11] The only way out of this relapse into a nationalist division of Europe is to continue the integration process in a democratic direction.

(c) The creation of the common economic zone and a single currency was associated, in addition, with the promise of increased prosperity for all. In fact, for decades the populations perceived the European project as a positive-sum game and embraced it. In the course of neoliberal economic globalization, however, this idea of a social Europe has perceptibly failed, with the reasons for the failure residing in Europe itself. In most OECD societies the social gap between classes and generations, between the employed and the unemployed, and between the educated elites and the poorly educated, has deepened, while at the same time the tensions between ethnic groups, between majority cultures and minorities, and between locals and migrants, have increased. But these conflict potentials need not have discharged in resistance against European unification as such. This emotion spread only in the course of a crisis politics that has divided Europe because of its palpable, indeed glaring social injustice. However, a shift to solidarity-based policies for mastering the continuing crisis will not be possible without transferring additional sovereignty rights to the European level, which in turn requires an institutional reform that strengthens the European Parliament.[12]

(d) Another political goal – namely, that Europe should acquire a global political profile of its own – may have only gradually dawned upon Europeans at the time of the bipolar world order while living under the nuclear shield of the United States. Since the end of this incubation period, however, the idea that the Union should play an independent role in international affairs and world politics has taken shape, even if not with equal impact in all EU member states. According to this idea, Europe, in a division of labor with the military power of the United States, should speak out as a civilizing voice of post-heroic societies in support of the enforcement of international law and of securing an international peace order and should throw the soft power of bargaining and skillful diplomacy into the balance. This idea has not taken root, as is shown by the unilateral national initiatives of single member states since 9/11. But given the conflicts over Ukraine at its own front door and in view of the current wildfires in Syria, Iraq and Israel,

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[11] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, trans. Patrick Camiller (London: Verso, 2014).

[12] Jürgen Habermas, *The Lure of Technocracy*, trans. Ciaran Cronin (Cambridge: Polity Press, forthcoming).

this more or less idealistic goal seems to be turning into a current political necessity. Like these conflicts, the new types of rebellions in North Africa and Southeast Asia, as well as the murderous militias in sub-Saharan Africa, are bringing home to us that Europe must learn to speak with one voice in matters of foreign and security policy. It must act in purposeful and coordinated ways, but without sacrificing its humanitarian self-image in the process.

Crisis-induced empowerment of the executive

The pressures to act weighing on the Union as a whole have been aggravated in the Eurozone by the special problems of a monetary union operating under suboptimal conditions.[13] Here the executive, as always in times of crisis, felt compelled to empower itself. In an alliance with the Commission and the European Central Bank, the national governments assembled in the Eurogroup of the European Council have extended their scope for action at the cost of their national parliaments, and as a result have greatly exacerbated the existing shortfall in legitimacy.[14] The European Parliament did not benefit from the increase in competences enjoyed by the EU bodies as a result of the reform measures of recent years – the Fiscal Compact, the European Stability Mechanism (ESM) and the so-called Six Pack – even when it participated in the legislative process. These measures were necessary to stabilize government budgets in the short term; but the continuing trend towards growing imbalances between the national economies can be halted in the long run only within the framework of a Union with a common fiscal, economic and social policy.[15] The then unavoidable transfers across national borders can be democratically legitimized only if the EU is extended into a political union at least in core Europe.[16]

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[13] Henrik Enderlein, *Nationale Wirtschaftspolitik in der europäischen Währungsunion* (Frankfurt am Main: Campus, 2014); Fritz W. Scharpf, "The Costs of Non-Disintegration: The Case of the European Monetary Union," in Annegret Eppler and Henrik Scheller (eds), *Zur Konzeptionalisierung europäischer Desintegration: Zug– und Gegenkräfte im europäischen Integrationsprozess* (Baden-Baden: Nomos, 2013), 165-84; Scharpf, "Die Finanzkrise als Krise der ökonomischen und rechtlichen Überintegration," in Claudio Franzius, Franz C. Mayer and Jürgen Neyer (eds), *Grenzen der europäischen Integration* (Baden-Baden: Nomos, 2014), 51-60.

[14] Annegret Eppler and Henrik Scheller, "Einleitung," in Eppler and Scheller (eds), *Zur Konzeptionalisierung europäischer Desintegration*, 11-44; Enderlein, "Das erste Opfer der Krise ist die Demokratie: Wirtschaftspolitik und ihre Legitimation in der Finanzmarktkrise 2008-2013," *Politische Vierteljahresschrift* 54 (4) (2013): 714-39.

[15] Enderlein, "Solidarität in der Europäischen Union – Die ökonomische Perspektive," in Christian Callies (ed.), *Europäische Solidarität und nationale Identität* (Tübingen: Mohr & Siebeck, 2013).

[16] According to my impression, Claus Offe, *Europe Entrapped* (2014), develops the best summary analysis of the crisis.

Most observers and almost all politicians throw up their hands at this point at the latest, because opinion polls indicate that such a change in policy, and especially a corresponding institutional reform, are unpopular in all of the countries involved. The supporting arguments are all of a defensive kind and hence are not particularly suited to political mobilization.[17] Today a "strong Europe" lacks the motivating power of those offensive, emancipatory goals that at one time animated the European constitutional movements. On the other hand, the observation based on the opinion polls that certain goals and policies are "not implementable" is valid in the first place only under the conditions of the status quo. And in our case, among these conditions is the fact that the political elites have avoided turning European issues into topics of national public spheres for half a century. As a result, the outcome of persistent, trenchant, adequately informed and encompassing public controversies over the currently relevant alternatives for action, were they to be conducted, would be completely open. Dieter Grimm rightly calls for "Europeanizing" the European elections. Defeatist election forecasts are cheap as long as public discourses and shirtsleeves campaigns are not even being conducted – for example, on the question of whether the short-term disadvantages of solidarity of the so-called "donor countries" with the "recipient countries" do not "pay off" for the donor countries in the medium and the long term.

On the other hand, the institutional framework of the Union is geared to the cohesion and stability of a highly fragmented political community, and hence precisely to avoiding such campaigns. The aim of this design is not conflict resolution and a European-wide generalization of interests, but consensual decision-making based on carefully bracketing possible conflicts. Part of this conflict-avoidance arrangement is the sidelining of the Parliament and the above-mentioned decoupling of political decisions from the national public spheres. While conflicts between the states are negotiated in the Council, the European citizens lack an arena in which they can even recognize their shared *social* interests across national boundaries and transform them into *political* conflicts. Therefore, a stimulus for changing this situation can hardly be expected to come from the operation of the institutions, even though it is urgently needed in view of the pressing problems: "Rather than bracketing social and political conflict (as the Union has done so far), the EU will need to foster and channel social and political conflict, so as to [...] mediate between

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[17] Even the goals with which the European project, assuming that it is not doomed to failure after all, could be justified as a decisive step along the path to a post-national world order – in addition to securing international peace and human rights policy, the taming of unbridled global capitalism – are defensive in nature.

different conceptions of the 'common good' and the way of life that can be sustained in Europe."[18]

Many observers (including, I suspect, Dieter Grimm) do not think that such considerations of changes in institutional design are relevant because they look for the cause of the stagnation of the unification process in a completely different place. In fact, there is a lack of mutual trust that citizens of different nations would have to show each other as a precondition for their willingness to adopt a common perspective when making political decisions on shared federal issues. Thus the salient objection to expanding the EU into a supranational democracy is phrased in terms of "there is no European nation." However, the observed lack of mutual trust supports this "no demos" thesis only if we misinterpret this lack in a substantialist sense. Let me offer a quick historical remark by way of clarification. In European states that emerged from national unification movements a national consciousness was fostered, indeed produced, by schools, the military, national historiography and the press. It became superimposed on older dynastic and religious ties, as well as regional forms of life and loyalties. We should not confuse this older, informal solidarity that conventionally develops in families and pre-political communities with *legally constituted civic* solidarity. I want to point out that nationalism brews a baleful mixture of these two, historically different forms of solidarity.

Political mobilization and solidarity

No nation, if we understand the word in its modern sense, arose without political mobilization of the masses. Nations are composed of citizens and form political communities that did not develop spontaneously, but were instead legally constructed. Contrary to the ethnonational ideologies that would like to suppress this fact, the *political level* of civic integration here acquires an entirely independent weight compared to the informal layers of *sociocultural* integration. Unlike the organic solidarity among neighbors in a village or the loyalty to a territorial lord, which rests on existing forms of *social integration*, national consciousness, including the ascriptive characteristics

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[18] Marc Dawson and Floris de Witte, "From Balance to Conflict: A New Constitution for the EU" (Hertie School of Governance, Berlin, Ms. 2014, p. 17). As examples of the social conflicts that are decided in advance at the European level but are played down in public, the authors cite: "monetary policy is geared towards 'price stability' instead of 'full employment', energy policy focusses on competiveness and energy security instead of democratic access, non-discrimination policy fosters labour market success over dignity at the workplace, the Court's interpretation of Article 125 TFEU entails that financial assistance must be based on conditionality instead of solidarity, the excessive deficit procedure prefers austerity over Keynesian solutions, and the free movement provisions themselves already express a very particular understanding of the interaction between state and market" (p. 19).

attributed to it retrospectively, is the result of an organized form of *political integration*. In our countries, the mass of the population was mobilized over the course of the nineteenth century and was included step by step in political will-formation.

In contemporary democracies, a comparatively high level of political inclusion has been achieved; we have to keep this political level in mind if we want to explain the lack of mutual trust between the national populations. I assume that, in an open dispute over the goals of European unification, the motives for attachment to one's own national state and the distrust of a European superstate would be clarified and that in the course of such a debate *two motives* would be *clearly differentiated from each other*. The lack of trust that we observe at present between European nations is not primarily an expression of xenophobic self-isolation against foreign nations, but instead reflects in the first place the insistence of self-conscious citizens on the *normative achievements* of their respective nation-states. In Europe's welfare-state democracies there is a widespread conviction among self-conscious citizens that they owe the fragile resource of free and relatively equitable and socially secure living conditions to the institutions of their states. They have a well-founded interest in "their" nation-states remaining guarantors of these achievements and in not being exposed to the risk of intrusions and encroachments by an unfamiliar supranational polity.

This is why I think that the lack of a "European people" is not an insurmountable obstacle to joint political decision-making in Europe. Indeed, translingual citizenship uniting such a wide variety of different language communities is a novelty. For this we need a *European* public sphere; however, that does not mean a *new* one. Rather, the already existing infrastructure of the existing national public spheres is sufficient for Europe-wide communication. National arenas only have to be opened up to each other. And the existing national media are sufficient, too, provided that they perform a complex task of translation: they must learn to report also on the discussions being conducted in each other's countries about the issues of common concern to all citizens of the Union.[19] Then the trust among citizens that currently exists in the form of a nationally limited civic solidarity can develop into the even more abstract form of trust that reaches across national borders.[20] The "no demos" thesis obscures a factor that we must take seriously – namely the conviction

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[19] Habermas, "Political Communication in Media Society: Does Democracy still have an Epistemic Dimension?," in *Europe – The Faltering Project*, trans. Ciaran Cronin (Cambridge: Polity Press, 2009), 181-3.

[20] Drawing on Ulrich K. Preuß ("Europa als politische Gemeinschaft," in Gunnar Folke Schuppert, Ingolf Pernice and Ulrich Haltern (eds), *Europawissenschaft* [Baden-Baden: Nomos, 2005], 459ff.), Claudio Franzius ("Europäisches Vertrauen? Eine Skizze," *Humboldt Forum Recht, Aufsätze* 12 (2010): 159-76) develops the concept of a "transaction-we in the sense of a we of others" for supranational federations.

that the *normative achievements* of the democratic state are worth preserving. This self-assertion of a democratic civil society is something different from the reactive clinging to naturalized characteristics of ethnonational origin that lend support to right-wing populism.

Interestingly, democratic self-assertion is not only an empirical motive, but also a justifying reason that, under the given conditions, speaks *for* the attempt to realize a supranational democracy. It is not as if democracies confined within nation-states could preserve their democratic substance, as though they were unaffected by involvement in the systemic dynamics of a global society – at any rate not in Europe.

The legal issues of the required reform of the existing constitutional treaties have been widely discussed by experts.[21] I want to address this question from the perspective of democratic theory with a view to those competing objectives that arise from the two well-founded interests of European citizens we have just discussed: on the one hand, they have an interest in forming a supranational polity capable of acting effectively in a democratically legitimate way to solve the problems currently weighing upon the European peoples; on the other hand, they want to embark on this transnationalization of democracy only subject to the proviso that their nation-states, in their role as future member states, remain *guarantors of the level of justice and freedom already achieved*. In the supranational polity, the higher political level should not be able to overwhelm the lower one. The issue of ultimate decision-making authority should not be resolved through *hierarchization*, as is the case in federal states. The supranational federation should instead be constructed in such a way that the heterarchical relationship between the member states and the federation remains intact.

A double sovereign of European citizens and peoples

To solve this problem, I propose a thought experiment. Let us imagine a democratically developed European Union *as if* its constitution had been brought into existence by a double sovereign.[22] The constituting authority is to

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[21] From the copious literature, the following can be cited: John Erik Fossum and Agustín José Menéndez (eds), *The Constitution's Gift* (Plymouth UK: Rowman & Littlefield, 2011); the Spinelli Group, around MEPs Elmar Brok, Daniel Cohn-Bendit, Sylvie Goulard, Jo Leinen and Guy Verhofstadt, have worked their noteworthy reform proposals into a cogent, condensed version of the existing treaties: The Spinelli Group, Bertelsmann Stiftung, *A Fundamental Law of the European Union* (2013).

[22] I introduced the idea of a form of popular sovereignty split at the root in Jürgen Habermas, *The Crisis of the European Union: A Response*, trans. Ciaran Cronin (Cambridge: Polity Press, 2012), 28-53. Cf. Peter Niesen, Von verfassunggebender Gewalt zu konstituierender Autorität: ein Grundbegriff für die Internationale Politische Theorie (Ms. 2014). Critical: Erik

be composed of the entire citizenry of Europe, on the one hand, and of the different peoples of the participating nation states, on the other. Already during the constitution-framing process, the one side should be able to address the other side with the aim of achieving a balance between the interests mentioned. In that case, the *heterarchical relationship* between *European citizens* and *European peoples* would structure the founding process itself. The competition over interests between the two constitution-founding subjects would then be reflected at the level of the constituted polity in procedures – for example, the election of the president of the Commission – that require agreements between legislative bodies with equal rights (the European Parliament and the Council).

What changes in the classical concept of popular sovereignty with this doubling of the constituting powers is not the *collective* nature of peoples that are already organized as states; for national governments, through which alone these peoples are able to act, also operate at the democratic behest of their *individual* citizens. What is new in this scenario is that the "higher-level" sovereign can no longer decide in a really sovereign manner. For the "leveling up" of the *European citizens* by the addition of the *European peoples* indicates that the sovereign must have already committed itself from the outset to recognizing the historical achievements of a level of justice embodied in the nation-states. "Higher-level" or "shared" sovereignty means that the constituting authority, in founding a supranational polity, sacrifices part of its sovereignty in order to conserve the revolutionary constitutional achievements of the past. In their role as members of their respective nation-states, the citizens (or their representatives), as we would like to assume, insisted that the democratic-constitutional substance of "their" states should continue to exist intact in the future Union.

If one asks from this perspective of a "doubled" sovereign which further reforms of the existing European treaties are necessary in order to eliminate the existing legitimation deficits of the European Union in a future Euro-Union – that is, a more closely integrated core Europe – then the base line for an answer is obvious. The European Parliament would have to gain the right to take legislative initiatives, and the so-called "ordinary legislative procedure," which requires the approval of both chambers, would have to be extended to all policy fields. In addition, the European Council – thus the assembly of heads of government who to this day enjoy a semi-constitutional status – would have to be incorporated into the Council of Ministers. Finally, the Commission would have to assume the functions of a government *answerable equally* to Council and Parliament. With this transformation of the Union into a supranational polity satisfying democratic standards, the

principles of the equality of states and of the equality of citizens would be accorded equal consideration. The democratic will of the two constitution-framing subjects would be reflected both in the symmetrical participation of the two "chambers" in the legislative process and in the symmetrical status of Parliament and Council with respect to the executive branch.

Such a federalized, but supranational Union would also deviate markedly from the federal model. Interestingly enough, current EU law includes a range of important provisions that, on the assumption of a sovereignty shared by European citizens and peoples, can be understood as legitimate deviations from the model of the federal state:

- the principle of limited conferral of powers, which ensures that European institutions do not acquire ultimate decision-making authority;
- the right of member states to leave the Union, where the qualifications governing the exit process throw an interesting light on how the original sovereignty of the acceding state had been "divided," but not completely "forfeited";
- the ordinary legislative procedure in which Council and Parliament are involved on a par;
- the equal participation of European Council and Parliament in the election of the president of the Commission;
- the right of review to which the national constitutional courts lay claim in order to prevent European law falling below the level of democratic and legal expectations achieved in the member states;
- the primacy of European law over the national legal systems that is justified only in functional terms and not in terms of the general priority of federal over national competencies;
- strong competences of the member states in implementing European decisions, which ensure that the supranational polity does not assume the character of a state;
- the decentralized monopoly over the use of legitimate force, which remains with the member states;
- the principle of subsidiarity that serves to maintain the organizational structure of the member states and protect national ways of life.

These principles and provisions can be understood from a reconstructive perspective as a logical expression of democratic will-formation in a constituent assembly that has a complex composition in the sense outlined. To this extent, the European Treaties already prefigure an at once federally and democratically constituted supranational polity.

A European federation as a transnational democracy

Let us assume that a reformed Union could be reconstructed as if it were the outcome of the constitution-building process of a "double" sovereign. What justifies us in calling such a federation, which falls short of the federal model, a transnational "democracy"? With the doubling of the constituting powers, the democratic legitimation of the constituted polity shifts from the level of the constitution-building process to the *meta-level of justifying the peculiar composition of the constituent authority* itself. What counts as a legitimizing reason at this meta-level are the assumptions mentioned: first, the citizens of a future European Union taken as a whole are willing to share equal rights with the peoples of the future member states; and second, the peoples of the future member states are willing to participate on the condition that, in the supranational political community to be established, the integrity of their states in their role as guarantors of the historically achieved levels of freedom and justice is assured. The willingness on both sides to accept these terms does not fall from the sky – neither the concession made by the future European citizens to *restrict* their sovereignty in favor of the involvement of European peoples, nor the reservation that the latter make by *insisting* on the normative substance of their respective national states.

From the perspective of democratic theory, the agreement by the two sides to cooperate in founding a constitution opens up a *new dimension*. Historically speaking, such an agreement, which Europeans must reach with themselves, is always the outcome of a painful learning process. Such a process, one which precedes the actual process of constitution-making, is reminiscent of the controversy leading up to the foundation of the United States as recorded in the Federalist Papers. However, this discussion had a different outcome: at the end of a long path beset by conflict, one which even led through a civil war, stood the first democratically legitimized federal state. We are currently engaged in a discussion in the European Union that is similar in some respects. To judge by the course of our present discussion, it does not seem possible to resolve the tension-laden relationship between the two subjects – the citizens of the separate states and the future citizens of the Union – in favor of a hierarchical arrangement. The most we can expect is to throw light on two competing objectives that the respective proponents regard as non-negotiable. The formation of a supranational federation, but one situated above the organizational level of a state is de facto advanced farther than people are aware of; now, under the pressure of problems in the banking and sovereign debt crisis, the key issue is how the legally produced realities can gain a foothold in the consciousness of citizens in order to *continue* the project with the two conflicting goals: the supranational polity that is empowered by further competencies to act in relevant policy fields should, on the one hand, be allowed to exercise its jurisdiction only in democratically legitimate ways,

without, on the other hand, depriving the member states of the measure of autonomy that enables them to oversee for *themselves* the conservation of the normative substance that our national democracies already historically embody.

The best possible outcome of this discussion is that the citizens harmonize their two allegiances when they push ahead with the integration process *as if they had participated* in the constitution-building process from the outset *as equal subjects* in the dual role as future citizens of the Union and as current national citizens. If this shared intention of all parties could be qualified, *in turn*, as the result of a process of democratic opinion- and will-formation, then the last remaining gap in in our scenario of democratic legitimation would be closed. From the viewpoint of political theory, this "higher-level" constitution-building process differs from all preceding ones in the sense that the informal discussions that usually precede the formal constitution-building processes, but which have to be recuperated in our case, now acquire an additional *legitimizing function*.

Following in the footsteps of the two constitutional revolutions of the late eighteenth century, many more constitutional states have been founded right up to the present day. All of these constitutional foundations can be understood (at the requisite level of abstraction) as replications of the two original founding acts in Philadelphia and Paris. As is now apparent, the creation of a supranational democracy, by contrast, cannot be understood on the same model of a *two-stage* process according to which a constituting of the state powers underlies the political procedures within the constituted polity. A more suitable model here is instead a *three-stage* one in which the existence of democratically constituted nation-states is already presupposed. With the citizens who want to defend the historical outcome of previous constitutional revolutions, a subject comes into play that now empowers itself to serve as *another* constituting authority.

Unlike the case of the revolutionary popular sovereign, this is of course *not a case of self-empowerment in the strict sense*. The self-empowerment of the national citizens to engage – once again, so to speak – in constitution-building at a higher level depends on the consent of a classical popular sovereign, which now comes on the scene in the guise of the totality of European citizens and must be willing to *divide* its constituent authority. With the prior constitution of a higher-level sovereignty itself – hence, with the agreement between the two designated constitution-building subjects – the classical picture of a constituting and a constituted level is supplemented by a further dimension that once again underlies the actual constitution-building process.

Translated by Ciaran Cronin

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