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Wydawnictwo Naukowe Scholar Spółka z o.o.
ul. Krakowskie Przedmieście 62, 00-322 Warszawa
tel./fax 22 828 93 91, 22 826 59 21, 22 828 95 63
dział handlowy: jak wyżej w. 105, 108
e-mail: info@scholar.com.pl
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ARTICLES

*Wojciech Sadurski**

DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION: A DIAGNOSIS AND SOME MODEST PROPOSALS

Abstract

Debates and controversies about the democratic legitimacy of the EU have accompanied the Union from the very beginning. The "democratic paradox" of the EU exists because while committing itself to promote and scrutinize democracy in its member states, in candidate states, and in third states with whom it enters into contact, it does not display equivalent democratic features in its own functioning. Some commentators tried to define the problem out of existence; by pointing out that the EU is not a state-like polity, they argued that state-specific criteria of legitimacy, such as representative, participatory or deliberative democracy, do not apply. They postulated outcome-based or, at best, public reasons based, conceptions of legitimacy as applicable to the EU, and concluded that it satisfies those standards. But this argument is based on a non sequitur: from the statement that the EU is not a state (not even a quasi-federation or federation in statu nascendi) it does not follow that it should not be judged by the standards of democratic legitimacy.

The EU is a complex, untidy polity which amalgamates inter-governmental and supranational elements in its constitution, and therefore this article postulates a bifurcated approach to democratic legitimacy. In so far as the EU contains inter-governmental elements, indirect legitimacy is all that is required, i.e., democratic legitimacy of governments representing their respective states in the Council. The second face of the EU – its supranational character – calls for democratic legitimation of its institutions, in particular, in accordance with the promise contained in Art. 10 TEU, proclaimin representative democracy in the institutional setup of the EU. This requires changes to the electoral system of the EP in order to provide

* Wojciech Sadurski is Challis Professor of Jurisprudence at the University of Sydney School of Law, Australia and Professor at the University of Warsaw, Centre for Europe, Poland. My thanks to Margot Brassil for her excellent assistance and Martin Krygier for helpful suggestions.

incentives for a more trans-European electoral process; strengthening of the supervisory role of the EP over the Commission; the strengthening of the role of the EP with regard to legislation, and endowing it with the competence of legislative initiative. Overall, the idea is for the institutional setup to resemble a canonical model of separation of powers and inter-institutional accountability, with the EP in a dominant position. Additionally, the first gesture towards direct democracy in the EU, the European Citizens' Initiative, should be strengthened, both by upgrading the status of successful initiatives and by lowering thresholds and administrative requirements.

INTRODUCTION: AN END OF AN ERA

It is a commonplace that the pace and depth of economic integration within (what is now) the European Union has not been paralleled by an equivalent pace and depth of *political* integration, and that the traditional strategy of "functionalism"[1] has exhausted its potential. At the origin of the European political project, going back to the Coal and Steel Community ("ECSC") of 1951, was a thought that economic integration would force political rapprochement and then integration; that adding successive functions to the West (as it was then) European economic construction would compel creation of institutionalized, and consequently political, community. In contrast to a federalist political project, which starts with the bombastic idea of a brand new supranational polity (institutionally epitomized by the stillborn European Political Community proposed in 1952), and which was as unrealistic in the 1950s as it probably is now, the functionalist philosophy envisaged creation of a political union by stealth: political institutions were seen as an inevitable consequence triggered by economic unification rather than as parts of an overall design aimed at creating the United States of Europe. It was best expressed in the foundational document behind the setting up of the ECSC, the Shuman Declaration of 1950: "By pooling basic production and by instituting a new High Authority [the precursor to the European Commission], whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace."[2]

The functionalist strategy worked for several decades – and, among other things, had an undoubted advantage of promoting political unification without any dramatic challenges to deeply held views of European states' citizens about sovereignty, separate identity and pluralism in Europe. Incremental integration at the level of institutions was largely invisible to average citizens; how many eyebrows were raised by the ECJ decisions in *Van Gend en Loos*[3] and *Costa v. ENEL*[4] which proclaimed, respectively,

[1] Most scholars refer, in this context, to "neo-functionalism"; I will be using a more generic concept of "functionalism".

[2] Schuman Declaration, 9 May 1950, http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last accessed 29 October 2012).

[3] Case 26/62, *Van Gend en Loos* [1963] ECR 1.

[4] Case 6/64, *Costa v. ENEL* [1964] ECR 585.

direct effect of European norms and the supremacy of European law over national norms within the scope of application of the Treaties? There was no dancing (or rioting) on the streets, for sure. These were highly technocratic and arcane moves, and yet their import was tremendous. They fitted the functionalist logic perfectly well: once the common market has been decided, on purely economic grounds, certain political and legal consequences *had* to follow; the Community must have been endowed, or found to be endowed, with "real powers stemming from a limitation of sovereignty or a transfer of powers from the states" which "have limited their sovereign rights (…) and have thus created a body of law which binds both their nationals and themselves."[5] There was a sense of inevitability, automatism and strict economic determinism in this evolution, and yet it was accompanied by an apparent modesty, incrementalism and lack of any ideological conceit. The fact that most political integration of the EU was disguised in a legal costume, and effected by faceless judges rather than by politicians, provided a protective shield to the functionalist strategy – even if only by depriving it of transparency attached to political institution building.

These days are over. The last ten years or so have witnessed a gradual exhaustion and breakdown of the capacity of a functionalist strategy to foster political integration, and showed (to paraphrase a well-known Marxist formula) a growing contradiction between the ever-developing economic integration (with the monetary union in much of the EU being the epitome of the process so far) and the anachronistic political structure which failed to trace the economic developments. And as any canonical Marxist book reminds us, nothing good can come from such a contradiction between the "base" and the "superstructure". The constitutional debacle of 2001-2005[6] was perhaps the most dramatic evidence of the failure of the belief that a more advanced stage of trade and currency union would lead seamlessly and automatically to a higher level of political integration – this time, parroting a fully-fledged state constitution, with the anthem, the flag, the motto, the "ministers" and all that hubris. Considering that much of the reason behind the constitutional project was to enhance the legitimacy of the Union – the Laeken Declaration, which launched the process leading to the Convention on the Future of Europe, proclaimed that "[w]ithin the Union, the European institutions must be brought closer to its citizens",[7] that "[t]he Union needs to become more democratic, more transparent and more efficient,"[8] and that one of the questions for the Convention must be to consider "how we can increase the *democratic legitimacy* and transparency

[5] *Ibidem*, para. 593.

[6] Formally speaking, the beginning of the constitutional process can be seen in the Laeken European Council of 2001, when the decision to establish the Convention on the Future of Europe (later dubbed the Constitutional Convention) was taken; the process has ended (for now) with two unsuccessful referenda over the Constitutional Treaty, in France (May 2005) and the Netherlands (June 2005). Officially, the EU proclaimed "the constitutional concept" dead (or, rather, "abandoned") in 2007, see Presidency Conclusions, Brussels Council of the EU (21 June 2007).

[7] Laeken Declaration on the Future of the European Union, Annex to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/101 REV 1, Part I.

[8] *Ibidem*, Part II.

of the present institutions"[9] – the failure was spectacular. One lesson from this failure is that the EU can no longer enjoy the older, tacit "permissive consensus" but is in need of stronger, more active legitimating factors normally associated with democratic processes.[10] While the Treaty of Lisbon, signed in December 2007 and subsequently ratified by all Member States, retained many of institutional and legal devices proposed by the Constitutional Treaty, it also introduced a sort of schizophrenia whereby its perception by Brussels elite is in the constitutional register, but at the national level of member states it is perceived as just one successive variant of an inter-governmental treaty. The tension between these two perceptions may be seen as one of the persisting problems built into the EU as we know it today.

The Euro-zone crisis dating from late 2009 has shown that traditional state-based and inter-governmental remedies are ineffective in coping with problems which are, in their very nature, supranational and global. A common market has been created and a (partially) shared currency has been constructed without, however, building institutions capable of coordinating the economic policies of the member states at the EU level. The underlying reasons for the crisis of the Euro-zone are therefore political: the absence of adequate administrative and regulatory mechanisms to harmonize the vastly diverse national economies. In the apt words of Jürgen Habermas, "The financial crisis, which has developed into a crisis of the states, calls to mind the birth defect of an incomplete political union marooned in midstream."[11] Habermas added: "The financial, debt and euro crises occurring in rapid succession have revealed the flaw in the construction of a gigantic economic and currency area which lacks the necessary instruments to conduct a joint economic policy."[12]

Various immediate proposals arising out of the crisis, including President (as he was then) Sarkozy's idea of an "economic government" of the Euro-zone,[13] or a joint finance ministry for the Euro-zone, suggested by President of the European Central Bank, Jean-Claude Trichet,[14] suggest that *political* solutions must be found at a supranational level even though the governments tend to search for solutions of a technocratic nature, and not democratic or participatory designs. As Habermas further observed, "In this way, the heads of government would transform the European project into its opposite. The first transnational democracy would be transformed into an arrangement for exercising

[9] *Ibidem*, Part II (emphasis added).

[10] *See* C. Closa Montero, *Constitutional Prospects of European Citizenship and New Forms of Democracy*, in: G. Amato, H. Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne; Genesis and Destiny of the European Constitution*, Bruylant, Bruxelles: 2007, p. 1038.

[11] J. Habermas, *The Crisis of the European Union: A Response*, Polity Press, Cambridge: 2012, p. 121.

[12] *Ibidem*, p. 129.

[13] *See* Associated Press, *Sarkozy and Merkel propose economic government for Eurozone*, The Independent, 16 August 2011, http://www.independent.co.uk/news/world/europe/sarkozy-and-merkel-propose-euro-zone-government-2338388.html (last accessed 1 November 2012).

[14] See *Jean-Claude Trichet proposes common European Ministry of Finance*, Business Insider, 2 June 2011, http://articles.businessinsider.com/2011-06-02/markets/29998704_1_eurozone-european-central-bank-finance (last accessed 1 November 2012).

a kind of post-democratic, bureaucratic rule."[15] In general, European political elites are visibly coming to terms with the idea that the only way to cope with crises, such as the debt crisis of 2011-2012, is through stronger political unification and transfer of more competencies to the EU. In the words of one of the most powerful European politicians, "We need a political union. That means we have to give up further competencies to Europe, step by step, in an ongoing process."[16] These views are echoed by leading EU decision-makers who proclaim that, in order to fight the crisis, more powers have to be transferred to the EU, and they must be accompanied by "greater institutional integration."[17]

1. EU LEGITIMACY CONUNDRUMS

As Jiri Priban correctly observed: "The current state of the Union (…) persuasively illustrates that the process of economic integration does not automatically lead to supranational political integration and a constitutional momentum of state-building. It rather shows that political problems require political solutions which, within the EU institutional settings, cannot imitate processes, legitimation expectations and institutional frameworks of the modern nation state in its federal or confederative forms."[18] Functionalism has exhausted its capacity, and should be thrown into the dustbin of history. A further step in political integration within the EU, if it comes, will be a result of a deliberate, conscious political decision of European elites and citizens rather than a fortunate side effect of economic phenomena. Such an act of political will is necessary both for political integration and for democratization of the Union. These are, of course, two different matters: integration may but does not have to be of a democratic nature. And yet, for the Union to maintain (or acquire, depending on one's perspectives) a modicum of legitimacy, it must be democratic: democracy is "the only game in town" as far as the political legitimacy of a polity such as the EU is concerned. As Koen Lenaerts and Marlies Desomer noted a long time ago, "the notions legitimacy and democratic legitimacy must be considered as interchangeable" for the purpose of discussion the EU constitution making.[19]

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[15] Habermas, *supra* note 11, p. 52.

[16] German Chancellor Angela Merkel, cited in V. Pop, *EU referendum idea gains momentum in Germany*, EU Observer, 13 August 2012, http://euobserver.com/political/117213 (last accessed 1 November 2012).

[17] President of the European Commission Jose Manuel Barroso, cited in A. Rettman, *Barroso: UE Treaty needs to be renewed*, EU Observer, 3 September 2012, http://euobserver.com/institutional/117398 (last accessed 1 November 2012).

[18] J. Priban, *Desiring a Democratic European Polity: The European Union Between the Constitutional Failure and the Lisbon Treaty*, in: H.-J. Blanke & S. Mangiamelli (eds.), *The European Union after Lisbon*, Springer-Verlag, Berlin-Heidelberg: 2012, p. 72.

[19] K. Lenaerts & M. Desomer, *New Models of Constitution – Making in Europe: The Quest for Legitimacy*, 39 Common Market Law Review 1217 (2002), p. 1220, n. 15.

The latter assertion is, naturally, not uncontroversial. In the interminable discussions about the "democracy deficit" within the EU, there is an important school of thought which insists on non-democratic grounds for the EU's legitimacy. If democratic legitimacy is typical and required of a modern state, and the EU is not a state and emphatically does not aspire to statehood (as the argument goes), different standards of political legitimacy can be applied to the EU.[20] It is often argued that the EU can manage perfectly well with an output-based legitimacy only; legitimacy based on the goods it delivers to its stakeholders rather than on participation in decision-making, for instance. This is legitimacy based on "the need for greater attention, efficiency and expertise in areas where most citizens remain 'rationally ignorant' or non participatory."[21] If the EU is indeed exclusively, or predominantly, a problem-solving entity, then its legitimacy may be based on its efficiency in problem-solving and on reduction of the costs of decision-making, and its "justification" is not very different from that of a railway company or a university.

But there is much about the EU which upsets the picture of this entity as being based fundamentally on an instrumental rationality of efficient problem-solving. If the EU indeed was fundamentally such an enterprise, a number of developments would be incomprehensible or at least very hard to square with this paradigm. The moves aimed at deliberate construction of European identity, of the sense of a rights-based community, of democratic will formation, of political action going far beyond the common market, and – perhaps most significantly – the permanent drive to enlarge the Union, even in the face of improbable gains to the "older" members from embracing new, highly heterogeneous and not so prosperous member states (in the recent wave of Eastward enlargement, the population of the EU increased by more than a quarter but total GDP rose by barely 5 percent) – these phenomena hardly resonate with the idea of the EU as, first and foremost, an efficient problem-solver. The continuous deepening of the EU (and its predecessors') integration marks a transition from a concern with mainly technocratic issues, where expertise is the most salient and democratic legitimacy is rarely sought, to areas which become more and more politically contentious, such as internal and external security, health, education etc., where responsiveness of decisions to a distribution of preferences within the community (at the level at which those decisions are made) is usually demanded and expected. But even if this was an unconvincing argument (after all, a proponent of outcome legitimacy may simply argue that all these steps were errors of gigantic proportions), efficiency itself is an indeterminate standard, also in need of legitimation: whether delivering the goods is the dominant source of a political organization's legitimacy is in itself a subject of legitimate contestation. More importantly still, standards of efficiency are parasitic upon the *goals* of a given institution: in the case of a railroad company or (more controversially) a university, these

[20] *See* G. Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4(1) European Law Journal 5 (1998), pp. 7-8.

[21] A. Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 Journal of Common Market Studies 603 (2002), p. 614 (italics removed).

are relatively settled. But in the case of a large polity with multiple goals and aims, and with an ongoing fundamental disagreement about its "real" goals (as the debates about the EU's *finalité* testify) – no such standard can be confidently ascertained.[22] Is it to provide prosperity for the Europeans, or prosperity and peace, or also the safeguarding of democracy and human rights, or perhaps also, as Jürgen Habermas and Jacques Derrida famously postulated,[23] to provide a counterforce to US military hegemony, or still something else? Each new goal, or each alteration of the mix of goals, will yield different criteria for "output legitimacy".

It is important to emphasize what argument against output legitimacy I am *not* making. Eric Eriksen argues that efficiency-based legitimation is inadequate to the EU because it presupposes an intergovernmental organization, and the EU is much more than that. As Eriksen says, such efficiency is easily found in intergovernmental organizations based on consensus decision-making: "The veto power of all participants makes for legitimation itself, as parties will not consent to decisions that are contrary to their interests. Only decisions that no one will find unprofitable, or that will make no party worse off – Pareto-optimal solutions, will be produced."[24] But, since the EU has gone well past this decision mode, Erikson argues that efficiency-based legitimacy is inadequate. While I agree with the conclusion, I do not think that Eriksen's argument is correct because it tacitly presupposes that in an international organization the only conceivable actors whose utility counts are *states*. There is no conceptual link between positing an efficiency-based legitimacy standard and deciding about *who* counts for the purpose of a legitimacy calculus (what is the constituency of legitimacy, so to speak). We may still deal with a traditional, intergovernmental international organization (with veto power etc.) and at the same time posit that its legitimacy will be judged by the efficiency in solving problems for the individual *citizens* of member states. So the reasons for a rejection of the exclusive reliance on efficiency in legitimating the EU must be found elsewhere – not in the fact that its decision-making modes have surpassed the traditional intergovernmental paradigm, but rather in the facts that the EU has demonstrated, in its developments: real concerns for much more than the efficiency of problem-solving, and also that efficiency itself, in the case of multi-purpose entity such as the EU, is an unstable and indeterminate notion.

But, perhaps more importantly, the argument against exclusive reliance on output legitimacy is this: in a large polity, one important condition of efficiency of authoritative or distribution-affecting institutions is that those who are affected by these decisions *trust* them: that we, the citizens, respect those institutions, deem them valuable and trustworthy, and they are credible in our eyes. More often than not, perhaps with a few

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[22] *See similarly*, J. Thomassen & H. Schmitt, *Democracy and Legitimacy in the European Union* (manuscript 2004, on file with the author).

[23] J. Habermas and J. Derrida, *February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe*, 10 Constellations 291 (2003).

[24] E. O. Eriksen, *The Unfinished Democratization of Europe*, Oxford University Press, Oxford: 2009, p. 64 (italics removed).

exceptions (banks? industrial firms? courts? armed forces?), a degree of accountability and responsiveness is needed for this trust and credibility. We must be confident not only that these institutions are transparent and sensitive to our preferences, but also that we are capable of affecting changes (including changes in personnel) if we find them wanting. We must also be confident that that there is a sufficient institutional guarantee for allowing or even encouraging criticism, dissent, or alternative viewpoints within those institutions, to render such changes feasible and not prohibitively costly. These guarantees have the shape of democratic principles, of whatever form, depending on the type of institution to which they apply. But the regime as a whole, rather than an individual institution taken in separation from others, must have sufficient democratic pedigree in order to generate a degree of trust which makes efficiency of the regime as a whole feasible. Hence, output-legitimacy, when applied to a broad regime such as the EU system, has functional connections with input-legitimacy of a democratic character.[25] Habermas makes a *functional* and not only a normative statement when he asserts that "[t]oday the process of European unification, which was conducted above the heads of the population from the very beginning, has reached an impasse because it cannot proceed further without being switched from the established administrative mode to one involving increased popular participation."[26]

There has been a moderate version of input legitimacy for the EU proposed, as a version of deliberative democracy, where legitimacy relies on the sort of arguments that can be made to justify public decisions to its stakeholders. Jürgen Neyer, for one, launched an elegant justice-based argument relying on the conception of "the right to justification" which postulates that we have "a human right to demand and receive justification from all those individuals or organizations which restrict our freedom."[27] On this basis, Neyer envisions a legitimate EU if it guarantees individual right to freedom and "safeguard that any restriction of that freedom is subjected to good reasons."[28] Institutional correlates of such freedom include: transparency in decision-making procedures, permanent public access to all institutions with legislative competence, full scrutiny of the EU institutions by the media, and control by national parliaments over their governments' actions in the EU institutions.[29] Leaving aside the last requirement (which, as will be argued below, constitutes one half of the democratic legitimacy institutional design in the EU), one may observe that the conception is not sufficient to uphold the burden of legitimating the EU in the eyes of its citizens. The fact that an institution takes its decisions on the basis of public reasons – that it conforms to the requirement of justifying its decisions to its stakeholders – may be a necessary but not

[25] For a similar argument, see A. Føllesdal, *The Legitimacy Deficits of the European Union*, 14 Journal of Political Philosophy 441 (2006), pp. 459-61.

[26] Habermas, *supra* note 11, p. 132.

[27] J. Neyer, *Justice, Not Democracy: Legitimacy in the European Union*, 48 Journal of Common Market Studies 903 (2010), p. 908.

[28] *Ibidem,* p. 917.

[29] *Ibidem*.

a sufficient ground for its legitimacy, except in some specific cases; namely, institutions such as arbitrators or courts (including constitutional courts) acquire legitimacy by virtue of deliberation and reliance on the right reasons, but this cannot apply to a large polity across the board. When a citizen asks herself why the polity can claim her compliance with its authoritative directives, an answer that these directives are based on the right reasons – in the sense, that they can be properly justified to the citizen – is often not enough.[30] At best, it can show that these decisions are reasonable. But not all reasonable decisions are legitimate in the sense that we should comply with them; the citizen must know that she is, in a political sense, a co-author of these decisions, that – in conjunction with others – she has authorized these decisions. In a large community, with varied preferences, interests and ideologies, we have good reasons to comply with the coercive or distributive decisions when they are sensitive to choices people make, and thus to a distribution of preferences, interests and values across the community.[31] Reason-giving is normally thought sufficient (or at least, central) in the case of institutions such as courts when sensitivity to the actual spread of views is not expected from decision-makers, but a court cannot be an exemplar of political legitimacy in the entire polity; rather, it is a special case where the legitimacy of decisions (and, consequently, an institution) is derived from the paradigm of an impartial, reasonable arbiter.[32] When a regime such as the EU engages in a massive chain of decisions which have direct consequences for the entire classes of citizens in a wide range of areas, a "right to justification" is much too weak a basis for assessing legitimacy compliance. For one thing, criteria of what reasons for decisions are *right* becomes much more contested and controversial, and many citizens are likely to remain dissatisfied with the "reasons" presented to them in implementation of their "right to justification". For another thing, in a large number of political and economic decisions the main ingredient of "rightness" of a decision is the mere fact of it being sensitive to the distribution of interest, preferences and values throughout the society. This, obviously, can be assured only though traditional democratic means of participation and representation.

[30] As Montero put it: "whilst deliberative democracy may complement traditional democratic mechanisms, it may not substitute them", Closa Montero, *supra* note 10, p. 1041. *See also* R. E. Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn*, Oxford University Press, Oxford: 2008): "Inevitably (…) deliberative democracy can only supplement rather than supplant the institutional apparatus of representative democracy as we know it. (…) Deliberative democrats need to figure out how to fit their particular contribution to existing institutions of representative democracy, just as practitioners of democratic politics have to figure out how to incorporate deliberative insights" (pp. 7-8).

[31] Ronald Dworkin defines "choice sensitive issues" as those "whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community", R. Dworkin, *Sovereign Virtue*, Harvard University Press, Cambridge Mass.: 2000, p. 204. Of course, in the democratic system that Dworkin endorses not all issues are choice-sensitive, and Dworkin emphasizes that the second-order decision about which issue is choice-sensitive and which is not is in itself choice-insensitive (pp. 204-205). However, all that matters here is that at least *some* important issues subject to collective authoritative decisions in a democracy are choice sensitive.

[32] *See* M. Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, Chicago: 1981, pp. 1-64.

So from now on I will sidestep the output-legitimacy issue (or, more precisely, the *exclusive* reliance on output in ascertaining legitimacy of the EU) as well as deliberative-democracy solutions, and assume that in the modern world, in advanced and pluralistic societies such as in Europe, any large *authoritative* polity, in order to be legitimate, must be democratic.[33] This may not be *sufficient* for its legitimacy (output legitimacy will play an important role to a different degree in different organizations and institutions), but it is a *necessary* condition. In those authoritative large systems which have the powers to impose certain legal duties directly upon individuals, and/or which are capable of taking effective decisions about distribution of resources on a large scale – democracy is a condition of legitimacy. This is also the case of the EU. To quote Erikson again: "democracy (however understood) is the only morally sound principle for the legitimation of political domination. The EU needs legitimation and this can be accomplished only through institutionalizing democratic rights and procedures through which the addressees of the laws can exert influence and put decision-makers to account."[34] Any attempt to minimize the salience of democratic legitimacy vis-à-vis the EU while maintaining the proper democratic creed with regard to nation states may reveal either a misunderstanding of a fundamentally *political* nature of the EU (with its huge coercive and large-scale distributive powers) or a weak attachment to the principles of democracy *tout court*, including at the state level; a benign despot, even if perfectly effective, is not even presumptively legitimate, under contemporary intuitions about political legitimacy.[35] EU may be effective (under any adopted criteria of effectiveness) in reaching its goals (whatever they may be), but in order to be legitimate, it must be democratic. Which is not to presuppose or imply that the EU is a state or a state-like polity; from the assertion that the EU is not a state it does not follow that input-legitimacy, characteristic of, *among other things*, states, is wholly inappropriate or unnecessary for the EU.[36] Such a non-sequitur has to be resisted: input legitimacy

[33] Perhaps at this point it is necessary to state, in case it is not obvious, that in this article I am dealing only with (what may be termed) "normative" legitimacy, as opposed to "empirical" legitimacy, measured by the actual degree of compliance and trust by the constituency of an authority. It is true that, as Bart Szewczyk notes, "the E.U. does not actually face a legitimacy crisis, which would imply an impending risk of systemic disobedience, collapse, or overthrow", and that, "[i]n addition to compliance, there is no organized distrust of the E.U.'s legitimacy through secessionist efforts on the part of member states or other organized groups within the E.U.", B. M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 Columbia Journal of European Law 151 (2011), p. 169. But when I write about legitimacy deficit or legitimacy crisis, I have in mind a clash of EU's legitimacy with a plausible normative theory of legitimacy rather than actual perceptions and/or behaviour by individuals or member states. For more on the distinction between empirical and normative legitimacy, see W. Sadurski, *Constitutional Courts in Transition Processes: Legitimacy and Democratization*, Sydney Law Research Paper No. 11/53, http://ssrn.com/abstract=1919363 (last accessed 1 November 2012), pp. 2-6.

[34] *See* Eriksen, *supra* note 24, p. 6.

[35] *See* Szewczyk, *supra* note 33, p. 193. For more on the role of democratic process in supporting legitimacy of law, *see* W. Sadurski, *Equality and Legitimacy*, Oxford University Press, Oxford: 2008, pp. 9-12.

[36] *See similarly*, P. Craig, *Integration, Democracy, and Legitimacy*, in: P. Craig & G. de Burca (eds.), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford: 2011, p. 39.

has its proper place in a number of other sites than the states (consider the calls for democracy in universities, etc).

2. THE DEMOCRATIC PARADOX IN THE EU

The fundamental paradox consists of the fact that, on the one hand, the EU declares *and practices* the commitment to democracy in its member states, as well as in candidate states and, to some extent, in the non-member states when it deals with them, and on the other hand, it displays a radical "democracy deficit" in its own institutional structure and practices.

The commitment of the EU to democracy, as one of its foundational principles, is emphatic and forceful. Since the Treaty of Amsterdam, democracy has been listed as one of the foundational values of the EU; in the Lisbon Treaty commitment to the "value" and "principle" of democracy is mentioned right at the outset in the Preamble,[37] and democracy is listed as one of the values on which the Union is founded.[38] Good democratic credentials have long been established as one of the necessary conditions of accession to the EU: Art. 49 of the Treaty restricts the eligibility to join the EU to those European states which "respect the values referred to in Article 2", which include democracy. Political conditionality goes back to the so-called Copenhagen criteria of 1993 which established, as the political conditions for new entrants, the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."[39] In the most recent wave of enlargement, which ended with the admission of eight post-communist Central and East European states and Cyprus and Malta, in 2004 and 2007, these criteria were applied by the Commission when it started evaluating the progress of all candidates from 1997, in annual reports which included sections entitled "Democracy and the rule of law", with subsections on the parliament, the executive, the judicial system, and anti-corruption measures. This scrutiny had real bite when, at the start of the monitoring cycle, the Commission determined that while some countries had already fulfilled the democracy criteria, others were only on their way to meeting those criteria (Bulgaria, Romania, Lithuania and Latvia) and one had not met this condition at the time (Slovakia) and was, temporarily, excluded from accession negotiations.[40] But even though, overall, candidate states in that sequence of accession negotiations kept receiving reasonably high "grades" from the Commission for their democratic practices, Commission Reports included some specific critical observations on matters such as the over-use of legislation through executive ordinances,[41] the inadequate parliamentary representation of

[37] Consolidated version of the Treaty of the European Union, Preamble, recitals 2, 4 and 7.

[38] Art. 2 TEU.

[39] European Council, Presidency Conclusions, Copenhagen 21-22 June 1993.

[40] More in W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford University Press, Oxford: 2012, pp. 148-149.

[41] *See ibidem*, p. 171.

minorities,[42] the malfunctioning of certain parliamentary committees,[43] or inadequate staffing of parliamentary administration.[44] Largely, the role of political conditionality has been quite significant in improving democratic practices in candidate states, though experts and scholars disagree about the precise degree to which conditionality, compared to internal factors, had a positive impact on democratization.[45]

Also in the Union's external action, the Treaty mandates the Union to advance democracy "in the wider world", as one of those principles which "have inspired its own creation";[46] hence, Prometheanism about democracy in the world is entrenched as a Treaty philosophy. The force of this democratic Prometheanism is underscored by the very title of one of the older documents by the Commission: Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries.[47] The Union runs a broad international democratization and human rights programme known as the European Instrument for Democracy and Human Rights (EIDHR) which proclaims that, among other things, it "support[s] groups or individuals within civil society defending democracy."[48]

Further, the EU has at its disposal, in its Treaty, a mechanism for imposing sanctions on a state that falls short of democratic standards (Art. 7 TEU). The Treaty of Amsterdam introduced sanctioning measures, further expanded under the Nice Treaty, also preventive measures in cases when there is a serious and persistent breach or a clear risk of a serious breach, respectively, of the values of the Union (now referred to in Art. 2) which include democracy.[49] The preventive mechanism (Art. 7.1) may lead to a "determination" by the Council that such risk to the values (inter alia of democracy) exists, while the sanctioning procedure (Art. 7.2) may lead to a suspension of the voting rights of a misbehaving member state – though early in the process of deliberation about introducing such provisions, even the possibility of expulsion was considered.[50]

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[42] *Ibidem*, p. 171, n. 86.

[43] *Ibidem*, p. 171, n. 85.

[44] *Ibidem*, p. 171, n. 87.

[45] For more on political conditionality *see ibidem*, pp. 148-155; *see also* G. Pop-Eleches, *Between Historical Legacies and the Promise of Western Integration: Democratic Conditionality after Communism*, 21 East European Politics and Societies 142 (2007); F. Schimmelfennig, S. Engert and H. Knobel, *The Impact of EU Political Conditionality*, in: F. Schimmelfennig & U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe*, Cornell University Press, Ithaca: 2005; H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe*, Palgrave Macmillan, Basingstoke: 2006; G. Pridham, *The EU's Political Conditionality and Post-Accession Tendencies: Comparisons from Slovakia and Latvia*, 46 Journal of Common Market Studies 365 (2008); B. M.J. Szewczyk, *Enlargement and Legitimacy of the European Union*, 30 Polish Yearbook of International Law 131 (2010), pp. 146-158.

[46] Art. 21.1 TEU.

[47] Commission Communication of 23 May 1995, COM (1995) 216.

[48] European Instrument for Democracy and Human Rights http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm (last accessed 1 November 2012).

[49] For a detailed account of the origins of Art. 7 mechanism, *see* W. Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 Columbia Journal of European Law 385 (2010).

[50] *Ibidem*, p. 391.

And while no such measures have been so far imposed, they are a distinctive possibility, and they are occasionally mentioned by European decision-makers. For example, when Hungary's Orban government came to power in April 2010 and introduced a number of questionable constitutional and legal measures, including those which were asserted to restrict media freedom, in its response to the developments the Commission implicitly raised the possibility of applying Art. 7.[51] (Such a possibility was also flagged in the academic commentary regarding these developments).[52] Subsequently, a similar threat was addressed by the EU towards Romania. When, in mid-2012, as part of the political struggle between Prime Minister Victor Ponta with President Traian Basescu, the Prime Minister ignored the rulings of the constitutional court and fired the ombudsman – with the aim of removing the legal obstacles on the road to impeachment of the President, the EU Commission reacted strongly, again raising the spectre of Art. 7. Justice Commissioner Viviane Reading has been reported as mentioning the possibility of using Art. 7 if the annual report on Romania's anti-corruption measures fails to bring about concrete changes.[53]

So, the EU has a strong position on democracy, both in its member states, and elsewhere in the world. On the other hand, when it comes to the internal functioning of the Union itself, it falls short of even minimal standards of democracy, as generally established with regard to states. And, one might add, the practice falls short of *rhetoric* when it comes to the question of democracy at the level of the EU itself; the Preamble to the Treaty of Lisbon refers to the desire "to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them";[54] in addition, there is a bold claim that "[t]he functioning of the Union shall be founded on representative democracy",[55] and that European citizens "have the right to participate in the democratic life of the Union."[56] But the fundamental institutional architecture of the EU does not parallel, even in approximation, any known mode of separation of powers or checks and balances. The only representative body of a parliamentary kind (the European Parliament has been elected through direct universal suffrage since 1979) is relatively weak and has only an ancillary role in legislation, being incapable of initiating legislation. Law-making is divided between the technocratic (Commission) and the inter-governmental (Council) and parliamentary (EP) bodies. Key decisions (in the

[51] For a description of this episode, see Sadurski, *supra* note 40, pp. 158-159.

[52] See my blog entry: *Rescue Package for Fundamental Rights; A Comment by Wojciech Sadurski*, Verfassungsblog, 24 February 2012, http://verfassungsblog.de/rescue-package-fundamental-rights-comments-wojciech-sadurski/ (last accessed 1 November 2012).

[53] H. Mahony, *Romania: Will strong words be enough*?, EU Observer, 18 July 2012, http://euobserver.com/political/117006 (last accessed 1 November 2012).

[54] Preamble of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing European Community, Consolidated version of the Treaty on European Union, O.J. C 115/15 (9 May 2008).

[55] Art. 10.1 TEU.

[56] Art. 10.3.

Council) are taken as a result of behind-the-scenes political negotiations and horse-trading with very little transparency and accountability. The most important body (the Council) has no direct democratic mandate, and even its indirect mandate (through the mandate of governments participating in the Council) is defective considering that any country can be outvoted in a system of a qualified majority rule which now is a default mode of voting, used unless the Treaty stipulates to the contrary,[57] in an increased number of areas under the Lisbon Treaty.[58]

So it looks like a huge paradox: an organization *so* devoted to the democracy in its member states is *so* non-democratic itself. Or is it?

Only partly. To be more precise: only to the extent that we can consider the EU through the prism of statehood: as a quasi-state, quasi-federation, etc. If we think of the EU in the statehood register, the paradox (or the hypocrisy) noted above is indeed striking. This is where "federalists" and defenders of state sovereignty, ironically, meet. Federalists treat the Union as a flawed federation and deplore its distance from a fully-fledged United States of Europe.[59] In their perspective, lack of democracy in the institutional architecture of the EU is a fundamental defect, and something to be repaired as soon as possible. On the other hand, the state-sovereigntists deplore the (alleged) moves of the EU towards a federal model, and by showing that it is not (and/or cannot be) democratic because true democracy can be built (as their argument goes) only in a nation-state, they condemn any moves for further political integration. The evaluative vectors of both these positions are opposite but they both converge in the diagnosis of the EU as a failed, imperfect, quasi-federation. While the former demand more democracy because the EU is for them a quasi-federation, the latter reject the EU's aspiration to becoming more federal because it can never be truly democratic.

It is clear why one *would* be attracted to a (quasi-)federal template of conceptualizing the EU, either in a federalist or in a sovereigntists version of the argument. If one has a dichotomous view: "either international organizations or states", then it is obvious why one would be tempted to look at the EU as a sort of federation.[60] Emphatically, the EU is not a "mere" international organization, at least of a classical kind. It has much broader and pervasive competences than "regular" international organizations; its decision-making process is now based on majority vote and not consensus; it affects the legal status of individuals in member states directly; its law has supremacy over national law and has direct effect; it possesses a common currency (in much of its territory) and common citizenship (even if parasitic upon and derivative from state-based citizenship);

[57] Art. 16.3 TEU.

[58] As Bart Szewczyk puts it with precision: "there is a legitimacy problem when the E.U. Council, which is not elected by European citizens in European-wide elections (and thus undemocratic from an E.U. perspective), can impose its collective will on democratically elected national governments and their constituent national democracies through Qualified-Majority Voting…" (Szewczyk, *supra* note 33, p. 155).

[59] *See* G. F. Mancini, *Europe: The Case for Statehood*, 4(1) European Law Journal 29 (1998).

[60] For a particularly sophisticated defence of this approach, *see* R. Schütze, *On 'Federal' Ground: The European Union as an (Inter)national Phenomenon*, 46 Common Market Law Review 1069 (2009).

its member states surrender the right to conclude international treaties in the areas that belong to exclusive competences of the EU, etc. There is also a human resources factor: the EU has generated a large class of staff with par excellence supranational commitments and loyalties, what Neil Walker has aptly termed "the way in which a significant concentration of personnel across the various supranational institutions – in particular the Commission, as official keepers of the generic EU interest, but also the Council, Parliament and Courts – has created an unparalleled intensity of transnational administrative self-consciousness."[61] (There is anecdotal evidence that, in the Eurocrats' politically correct speech, the country of one's origins is described as "the country I know the best"). Even if for each, or most, of these factors there may be found some functional equivalents in the universe of contemporary international organizations,[62] the cumulative effect is such that the EU has far transcended the paradigmatic international organizations as we know them. So*, to the degree that*, based on the cumulative effect of these features of the EU which distinguish it from an organization and make it resemble a state, albeit a non-national state, the point about its democratic deficit, and consequently about the paradox of preaching about democracy to its member states but not implementing it in its own functioning, is well taken.

But – and it is a very big "but", and also the main point of this article – in some very important respects EU is *not* a federal state in the making. Although, as just noted, it is not a classical international organization, it is *not* marching on the continuum from an international organization to a federal state. If anything, it is the converse of federation in at least one quite fundamental respect: while typically federations encompass uniformity at a "macro" level while at the same time promoting, or at least tolerating, diversity at a "micro" level, in the EU it is the other way round: there is full diversity at a "macro" level, with growing integration of laws and policies at the "micro" level. By "macro" level, for these purposes, I have in mind principally the structure of government and the main patterns of exercising authority. Note that in all federations there is very little diversity when it comes to the structure of government of particular units of federation, and they normally mimic the federal governmental design. Take the United States. As Rubin and Feeley note: "There is one state (Nebraska) with a unicameral legislature, one state (Hawaii) with a unitary finance system, and one state (Minnesota) that refers to the Democratic and Republican Parties by funny names, but that is the limit of variation. (…) If some American state were to establish a monarchy or adopt Communism, national institutions, in particular the United States Marine Corps, would respond quickly, and the Supreme Court would approve that response."[63] This is, generally speaking, the case of all other federations, and the scope for diversity is

[61] N. Walker, *The Place of European Law*, in: G. de Búrca & J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge: 2012, p. 81.

[62] For a powerful demonstration of this point, *see* B. de Witte, *The European Union as an International Legal Experiment*, in: de Búrca & Weiler, *supra* note 61, pp. 19-56.

[63] E. L. Rubin & M. Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA Law Review 903 (1994), pp. 922-23 (footnotes omitted).

relatively narrow – certainly much narrower than in the EU. In contrast, in federations there is great diversity at the "micro" level, for instance as far as the educational policy, taxation, environmental protection, health care, consumer protection, labour relations, etc. are concerned. Of course, the domain of state competences (or competences of units of federation which may be called provinces, states, etc) varies from country to country, but the general pattern is of increasing the sphere of diversity on the matters which directly concern individuals at their local or regional level and which do not engage great political choices of national significance. In fact, much of the *raison d'être* of federations is to promote diversity at the level of component units of the state.[64]

The EU reverses this pattern. There is a wide and unrestricted diversity at the level of systems of government. Among member states of the EU there are monarchies and republics, unitary and federal states, states with robust judicial review and with strong parliamentary supremacy, presidential and parliamentary republics; two-party systems in a "first past the post" electoral model and multi-party systems within PR electoral design; countries with an established state religion and with a high wall of separation between the state and churches, etc. Importantly, there is no evolution towards uniformization of these designs – and not even the slightest aspiration to move the EU in that direction. In fact, respect for distinct fundamental constitutional structures of member states is explicitly written into the Lisbon Treaty,[65] which has taken up and concretized a treaty provision present in the EU law since the Treaty of Maastricht: that the EU is obliged to respect national identities of member states. This idea of "constitutional identity of member states", antithetical to classical federal thinking (one may talk about "states' rights" but whoever heard about separate and diverse "constitutional identities" of states or provinces or *Länder* in a federation?), interestingly, has been asserted both by courts in member states and, to a degree, by the ECJ, and so has become a matter of a firm consensus throughout the EU. At the level of member states, one can mention the Italian doctrine of "*controlimiti*" – an idea that there are certain national constitutional values (ascertained, naturally, by the *Corte costituzionale*) that cannot be changed or annulled by EU law,[66] or the German Federal Constitutional Court which proclaimed, in its Treaty of Lisbon judgment, that "the Act [of Parliament] approving an international agreement (…) must (…) be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union (…) to violate the Member States' constitutional identity, *which is not*

[64] "The point of granting partial independence (…) and thus the point of federalism, is to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems", *Ibidem,* p. 912 (footnote omitted). *See also* D. J. Elazar, *Exploring Federalism*, University of Alabama Press 1987, pp. 90-91: "the existence of federalism allowed the development of a variety of forms of pluralism side by side within the same civil society."

[65] "The Union shall respect the equality of member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." (Art. 4.2 TEU)

[66] *See* G. Guzzetta & F. S. Marini, *Diritto pubblico Italiano ed Europeo* (3rd ed.), G. Giappichelli Editore, Torino: 2011, p. 66.

open to integration (…)".[67] It also asserted that "the values codified in Article 2 Lisbon TEU (…) may in the case of a conflict of laws not claim primacy over the constitutional identity of the Member States…".[68] At the same time, the European Court of Justice acknowledged that member states have significant latitude in identifying specific legal consequences of their fundamental constitutional choices (such as republican form of government) which need not be a matter of consensus throughout the EU.[69] In a recent book two EU law scholars note that, certainly after the Eastward enlargement, and then after the Lisbon Treaty, "[t]he ECJ (…) seems increasingly committed to work on a self-restriction of the principle of EU primacy when it comes to the protection of identity-based constitutional dimensions of one or more Member States."[70]

So, a principle of wide and stable diversity at the "macro" level of the EU is well established. But there is a growing trend of integration and uniformization (which are two different phenomena but I will lump them together for the purposes of this stylized account) at the level of "micro" policies and laws: in common agricultural policy and structural funding and development aid, competition policy, risk regulation in the areas of environmental and product standards, environment, industrial policy, working conditions, scientific and technological research and development, etc. The EU centralizes many of the functions that federal states devolve to smaller units, and lacks many of the characteristics which federal states reserve for the federation as a whole. The EU does not have – and is not moving towards having – attributes of a typically federal state such as a police force, army, criminal justice and punishment systems, or high-cost infrastructure creation and maintenance (has anyone heard of plans for EU flagship airlines?).

This is, in my view, the most emphatic case against describing the EU as a quasi-federation, or as an embryonic federation. But there are more arguments, not just about the *substance* of allocation of competences between the centre and the constituent entities, but also about more formal and legal characteristics of the EU. Its most fundamental characteristic, related to the "*pouvoir constituant*" in the EU, is the fact that member

[67] BVerfG, 2 BvE 2/08 Judgment of 30 June 2009, para. 239, emphasis added; official English translation at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (last accessed 1 November 2012).

[68] *Ibidem*, para. 332.

[69] *See* Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, judgment of 22 December 2010. In this interesting decision, the Court established that the principle of free movement and residence enjoyed by citizens of the Union permits the Austrian authorities to refuse to recognise all the elements of the surname of an Austrian national because that surname includes a title of nobility which is not permitted under Austrian constitutional law. The Court explained that "it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State …" (para. 91), and, immediately after this maxim, observed that "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic" (para. 92).

[70] G. Martinico & O. Pollicino, *The Interaction between Europe's Legal Systems*, Edward Elgar, Cheltenham: 2012, p. 193.

states are, are remain to be, the masters of the constitutive legal foundations of the Union. Those foundations have the form of international treaties which rely upon a consensus of all members, and more importantly, which require unanimity for any change or a new treaty. So the model of a "constitutional change" within the EU is symptomatic of an international organization and not of a federal state where the will of constituent entities can be normally overcome in the constitutional amendment process (thanks to the design of constitutional amendments conditional upon a qualified majority and not unanimity of the entities making up the federation). In the EU, member states remain therefore, in the deepest and most fundamental sense, the "masters" of the Treaties, in a way in which no constituent entity in any federation may be meaningfully considered to be a "master" of a federal constitution. It is the process of typically intergovernmental treaty change (plus the case law of the Court of Justice) which has been the engine of the successive steps of political and legal unification within the EU: "Since the 1960s, revisions of the so-called 'founding treaties' have, together with accession treaties, gradually become the main instrument for the legal deepening and widening of European integration."[71] So while, in *substance*, the EU has far exceeded a typical sphere of competences for an international organization, in the *procedures* of conferring those new competences on the Union it has largely respected the authorship of the member states over the Union's constitution (a small-c constitution, one should add).[72] This model of unanimity-based control by member states over the powers and character of the Union has been further *strengthened* by the prerogative, introduced by the Lisbon Treaty, of any member to withdraw from the Union,[73] an unusual feature for any federation where such a step would be normally considered not as an exercise of a "right of exit" but as an unconstitutional secession.[74] In this way, with the Lisbon Treaty, the legal structure of the Union evolved *away from,* rather than towards, a federal model.

Furthermore, the structure of "judicial review" (to use the concept broadly) of federal competences characteristic of contemporary federations, has no equivalent in the EU. Normally, in federations the final adjudication about the precise distribution of competences between the federation and the constituent entities belongs to *federal* judicial bodies.[75] This has led some constitutional scholars to ruminate about an alleged

[71] De Witte, *supra* note 62, p. 22.

[72] That applied also to the (now defunct) capital-C Constitution: "the adoption of a European Constitution was seen by all the leading actors (…) as involving (…) a *revision* in accordance with the procedure of Article 48 EU treaty, rather than the creation *ex nihilo* of a new legal edifice: a replacement of the existing treaties that kept in existence the European Union as an organization", de Witte, *ibidem*, p. 31 (emphasis in original). And the Constitutional treaty itself envisaged that all important future amendments would again be made by a unanimously ratified amending treaty "rather than by a decision of the European Union organs, as would befit a federal state", *ibidem*, p. 33 (footnote omitted).

[73] Art. 50 TEU.

[74] An exception was Soviet "federalism". According to successive constitutions of the USSR (of 1924, 1936 and 1977) republics or comprising the Soviet Union retained the right to secede. But, of course, just as constitutionalism in the USSR was sham, so was any claim of federalism.

[75] *See* de Witte, *supra* note 62, p. 45.

lack of impartiality whereby an umpire of federal-state relationship is part of the federal branch,[76] but this institutional design is a logical consequence of the principle of the primacy of federal law over the law of constituent units. But in the EU, notwithstanding the principle of primacy of EU law (within a precisely confined area of EU competences), "inconsistencies between national law and EU law will come to light through litigation before member State courts and will have to be solved by them possibly, but only possibly, with the preliminary guidance of the [European] Court of Justice."[77] And such decisions of State courts cannot be appealed against to the ECJ – which is in contrast with a procedure available in any "standard" federation. Indeed, in federal states there is also a second order primacy: the principle of primacy itself has its source in the federal law and is interpreted authoritatively by federal bodies. In the EU, it is the other way around; the principle of authority of the EU law is rooted in the national constitutions, and is subject to such interpretation and limitations as provided by national constitutions and construed by national constitutional courts. A dominant view among constitutional courts of EU member states is that a national constitution has primacy before the EU law, and that the national constitutional courts, and not the ECJ, are the ultimate guardians of the distribution of powers between the EU and their state.[78] This is based, among other things, on a deeper principle that the level of rights and liberties guaranteed at the national level (of which the national courts are guarantors) must serve as a standard of scrutiny of European law when it is applied at the national level. In all these ways, member states remain masters of the Union and of the distribution of competences within the Union, in contrast to a typical federal design.

So, while the EU is more than an international organization, it is not a quasi-federal entity; not even an entity *on the route towards* federation. Its institutional make-up is a reflection of its hard-to-classify, *sui generis* character: it combines, in a complex architecture of interlocking institutions, elements which are inter-governmental (the Council), technocratic/supranational (the Commission), representative (the EP) and judicial (the ECJ). These elements are positioned towards each other in a way which resembles neither a traditional separation of powers in a tripartite fashion *à*

[76] "The [Supreme] Court proclaims itself as the arbiter of clashes between state and national regulatory authority when it itself is a part of the national government. This looks dangerously like the court acting as judge in its own case, and this danger is surely at its greatest when the Court strikes down a state statute for conflicting with (…) a national statute enacted by Congress", M. Shapiro, *Some Lessons for the Success of Constitutional Courts: Lessons from the U.S. Experience*, in: W. Sadurski (ed.), *Constitutional Justice, East and West*, Kluwer Law International, The Hague: 2002, p. 46 (footnote omitted).

[77] De Witte, *supra* note 62, pp. 45-46. As Bruno de Witte notes, the exception is when the ECJ can directly examine the inconsistency of a national norm with a Community norm only in the framework of an infringement action brought by the European Commission, where the ECJ can make the Union law prevail, "just like any international court will give precedence to international law over the domestic laws of the states parties to a dispute", *ibidem*, p. 45.

[78] For an account of this doctrine, especially as articulated by constitutional courts of Central and Eastern Europe, *see* W. Sadurski, *'Solange, Chapter 3': Constitutional Courts in Central Europe – Democracy – European Union*, 14 European Law Journal 1 (2008).

la Montesquieu (most strikingly, the legislative power is divided into the power of initiation, held by the Commission, and the power of final decision, held by the Council and the EP),[79] nor a checks and balances model, *à la* the US Constitution. This combination, with each element belonging to a different logic, makes up a community which is less than a federation (*vide* the role of governments which retain their role as masters of the entire entity) but also much more than an organization (e.g. seen in the role of the technocratic Commission, of a representative Parliament, directly elected by EU citizens, and the crucial role of the Court of Justice in policing the supremacy of the EU law). All this coheres (if that is a proper word in the context of the EU) into a "Community method", unique among the supranational entities.

3. INDIRECT LEGITIMACY OF THE EU

In so far (and only in so far) as the "Community method" incorporates intergovernmental mechanisms and institutions, the democratic legitimacy of the EU as a whole hinges crucially on the democratic legitimacy of state (governmental) institutions when they participate in policy and law-making at the EU level. When state governments have a central role in the formation of law at the Union level, their democratic legitimacy translates directly into democratic legitimacy of the Union as a whole.[80] Democratic legitimacy crucially boils down to the connection between an individual citizen and the functioning (and the outcome) of a political institution. It is a matter of authorship in the collective institutional decisions: if the legitimacy of the governmental positions expressed in the Council is weak – if it cannot boast of democratically obtained support from the citizens in the government's relevant jurisdiction – then, as far as citizens are concerned, the legitimacy of the Council decision will be weak. In contrast, if the government enjoys democratically obtained support for its position, then citizens will have reasons to be satisfied about the legitimacy of the Council's final position.

[79] Under the Treaty of Lisbon, enshrined in Art 289 TFEU, the "ordinary legislative procedure" involves both the Council and the Parliament as joint legislators in a symmetrical manner; there are also cases of special legislative procedures where it is the EP which adopts an act with the participation (in the form of the "consent") of the Council, or the other way round: the Council with the participation (the "consent" or "consultation") of the EP. In the latter cases, the powers of the EP are quite limited: when the consent is needed, the EP can effectively "veto" a proposal but cannot amend it; when the "consultation" is needed, which is more common, "a bare requirement to consult the European Parliament is all that is required. The Council is not bound to adopt the Parliament's opinion", P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials* (5th ed.), Oxford University Press, Oxford: 2011, p. 130. There are thirty-three articles of both the TEU and TFEU that provide for a special legislative procedure with the Council as the dominant actor, *see ibidem*, p. 130, n. 64.

[80] On the notion of "global legitimacy for the Union as a whole" in contrast to "a set of partial constituencies of support for the application of particular legitimacy approaches to specific sectors", *see* C. Lord & P. Magnette, *E Pluribus Unum? Creative Disagreement about Legitimacy in the EU*, 42 Journal of Common Market Studies 183 (2004), p. 190.

So, in order to enquire into the democratic legitimacy of the EU we must investigate the democratic legitimacy of governments of member states when they participate in the Council. A key aspect of the latter legitimacy is a matter of parliamentary control over the government's position: the better the control, the higher the legitimacy of the governmental position in the Council, and consequently, of the Union, as far as the citizens of *that* country are concerned. This, as is well known, was one of the central points of the famous (or infamous, depending on one's evaluation,[81] and they differed widely in the EU legal scholarship) judgment of the German Constitutional Court, of 30 June 2009, on the ratification of the Lisbon Treaty.[82] One of the outcomes of the judgment was to annul the legislation accompanying the proposed ratification (significantly, the accompanying legislation was entitled the Act Extending and Strengthening the Rights of the *Bundestag* and the *Bundesrat* in European Union Matters) on the basis that the German Parliament's powers had not been properly specified and strengthened. At stake was, among other things, the parliamentary involvement in the so-called flexibility procedures for the simplified amendments of European Treaties: these mechanisms were interpreted by the Court as "Treaty revisions for the purpose of German constitutional law, therefore requiring national parliamentary approval before the government consents at European level."[83] The Court also imposed upon the government a requirement to obtain prior approval from the Parliament before consenting in the Council to the so-called *passerelle* clause [bridging clause], which basically allows the Council to move from unanimity to qualified majority voting in those areas where unanimity is still required. In a similar vein, the Court imposed upon the German representative in the Council a requirement of legislative approval for using the so-called "emergency brake" (the procedure applicable to certain proposals regarding criminal law and social security, which allows any Council member to suspend consideration of the proposed measure and refer the matter to the European Council).[84] Further, with regard to EU missions with military means (under Art. 43(2) TEU), the German representative in the Council is obliged, under the Court-

[81] For some impassioned critiques of the judgment, see *inter alia* D. Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 Common Market Law Review 1795 (2009) (deploring the fact that the judgment "may perpetuate the Union's democratic deficit following the Court's deconstruction of the European Parliament", p. 1821); D. Halberstam & C. Möllers: *The German Constitutional Court says 'Ja zu Deutschland!'*, 10 German Law Journal 1241 (2009) (concluding that "the entire decision seems rather like a performative utterance in which the Court underlines its own importance in a strange combination of rhetoric and verbosity", p. 1257); J. Baquero Cruz, *An Area of Darkness: Three Conceptions of the Relationship Between European Union Law and State Constitutional Law*, in: N. Walker, J. Shaw & S. Tierney (eds.), *Europe's Constitutional Mosaic*, Hart Publishing, Oxford: 2011, pp. 54-55 (stating that "in the world [the judgment] represents everything is seen through the peculiar lens of German constitutional law, which becomes the beginning and the end of an axiomatic and ultimately, in spite of all its turns, rather simple circular reasoning", p. 54).

[82] BVerfG, 2 BvE/08 of 30 June 2009.

[83] Thym, *supra* note 81, p. 1802 (footnote omitted).

[84] For discussion, see Halberstam & Möllers, *supra* note 81, pp. 1243-44.

imposed rule, to deny approval to any decision that would violate the constitutionally prescribed necessity of parliamentary approval of any defence action. All in all, it was observed that "[t]he judgment underlines the importance of democratic legitimization in the further process of integration, and therefore calls for a strengthening of the role of the legislature (…) with regard to important decisions taken within the Council."[85] (The accompanying legislation was duly changed by German Parliament, opening the way to the ratification of the Lisbon Treaty by Germany).

Among EU member states there is a variety of institutional measures of parliamentary control over governmental positions in the EU, but there seems to be a general awareness that the most effective way parliaments may affect EU law and policy-making is through controlling their respective governments, as a consequence of the fact that it is the government which directly represents the state in the EU law-making (especially in the Council of Ministers). Remedial action to offset the inevitable weakening of parliaments' role, resulting from the transfer of competencies from the national to the EU level, has been taken by a number of member states. For example, the German, Finnish, Portuguese, Austrian, Swedish, French, Belgian, Czech and Slovak constitutions were all amended to ensure a degree of parliamentary participation in EU affairs. In Denmark, the executive is rigidly controlled by the opinion of parliament: the Folketing (Danish parliament) exercises its control over the government's positions in European affairs by outlining in advance what positions can be taken and which are beyond the representative's mandate. This function is performed by Folketing's European Affairs Committee to which a relevant minister must present in person his or her proposed position, and must obtain support by majority of the Committee. This applies also to the amendments to approved positions: if such amendments are made necessary by the negotiations in Brussels, or if the relevant minister for whatever other reasons wants to go beyond the authorization already obtained – he or she must seek an approval for an amended position.[86] This is, however, the only example in Europe of such a strong parliamentary role, although one has to add that the status of the European Affairs Committee in the Parliament of Slovakia comes close to this arrangement. Under the Constitutional Act of 24 June 2004, the Slovakian government is obliged to submit to the parliament all drafts of EU legal acts and to inform the parliament about all issues concerning membership of Slovakia in the Union; the parliament, in turn, can endorse or even change the government's position on draft EU legal acts. In practice, it has never happened so far.[87] Generally, scholars in Europe observe that parliamentarians are not very interested in European affairs; further, the lack of any clear party split along pro/anti-EU lines has meant that, except in the cases of extraordinary crises, there is

[85] Editorial Comments, *Karlsruhe has spoken: 'Yes to the Lisbon Treaty, but* (…), 46 Common Market Law Review 1023 (2009), p. 1029.

[86] For a detailed description, *see* S.Z. von Dosenrode, *Danish EU-Policy Making*, in: H. Branner & M. Kelstrup (eds.), *Denmark's Policy Towards Europe After 1945: History, Theory and Options*, Odense University Press, Odense: 2000.

[87] *See* Sadurski, *supra* note 40, pp. 176-178.

unlikely to be any strong criticism of the government by parliament for not having respected the views of the latter on EU matters.[88]

Another way of enhancing democratic legitimacy of the EU through the injection of state-based democratic legitimacy, but this time without an intermediary of national governments, is by involving national parliaments in EU law-making more directly. There have been some attempts of that kind within the EU, and since the Amsterdam Treaty there has also been formal recognition at the Treaty level of the right of national parliaments to be engaged in the EU law-making process (the engagement already foreshadowed earlier, by a declaration attached to Maastricht Treaty[89] was followed by a more formal protocol adopted at Amsterdam,[90] and again, by a Declaration annexed to the treaty of Nice).[91] The Protocol on the role of the national parliaments attached to the Treaty of Amsterdam provided for an exchange of information between the European institutions and the national parliaments; the Commission was mandated to send all its consultation documents to the parliaments, and the legislative documents could also be forwarded to parliaments by the national governments. This tendency has been consolidated by the Treaty of Lisbon, which announced that the national parliaments "contribute actively to the good functioning of the Union" (Art. 12 TEU) and under which the national parliaments have been equipped with a power of control over the legislative proposals made by the Commission before they are subject to adoption by the European Parliament and the Council of Ministers.

In addition to Art. 12 TEU, Protocol no. 1 on the role of national parliaments establishes a procedure whereby the Commission informs national parliaments about its proposals, and the parliaments have eight weeks to react before the legislative process begins. Protocol no. 2 on the application of the principles of subsidiarity and proportionality provides for the "yellow card" and "orange card" procedures: under the former, if a third of national parliaments consider there to be a breach of the subsidiarity principle, a given draft legislation needs to be reviewed; under the latter procedure, if more than a half of national parliaments find a breach of the subsidiarity principle, this opinion is then conveyed to the European Parliament and to the Council, and a special majority is required in the Council in order for the measure to be adopted.

While some scholars draw very sanguine conclusions by applauding "the multi-level parliamentary complex", and suggest that "the providence of the parliamentary principle and of representative democracy as such in Europe does not merely reflect the power and operations of the EP, but also the complex manner in which it is connected

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[88] *See* E. Carpano, *La transformation des régimes parlementaires: des réalités dans les Etats membres aux perspectives ouvertes par la Constitution pour l'Europe*, in: J. Ziller (ed.), *L'Europeanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe – The Europeanisation of Constitutional Law in the Light of the Constitution of Europe,* L'Harmattan, 2003, p. 165.

[89] Declaration No. 13.

[90] Protocol on the role of national parliaments in the European Union.

[91] The role of national parliaments was one of four issues highlighted in the Declaration No. 23 on the future of the Union.

and shored up in national parliaments",[92] the degree of empowerment of national parliaments made possible by these rules and procedures must not be overstated. To start with, scrutiny under the subsidiarity principle is different from, and narrower than, a general scrutiny on merits: it resembles a "jurisdictional" rather than a substantive scrutiny. In addition, no precise definition of "subsidiarity" is provided by these Protocols. (Though, one should be careful not to fall into belief that subsidiarity scrutiny, because it is not "substantive", is in some way "objective" and unambiguous. There may even be disagreement on subsidiarity between two chambers of the same parliament, as evident in scrutiny by the Polish parliament of the draft directive on conditions of entry and residence of third-country nationals, when the upper chamber found a breach while the lower did not).[93] Second, it has been observed that there is a lack of clarity about the procedure in the later stages of negotiations when the draft legislation, with the negative opinion by some national parliaments attached, enters the crucial decision-making process in the Parliament and in the Council.[94] The experience of the first year (2010) of using the "yellow" and "orange" card procedures shows that out of 24 scrutiny procedures initiated in this period, less than 60 percent were completed within the 8-week period by national parliaments, which seems to indicate that the 8-week deadline is unrealistically short.[95] On the other hand, extending this deadline might paralyse the EU legislative process. Third, it is very difficult to envisage a degree of coordination across Europe, which would result in one-fourth or one-third of all the chambers voicing their objections to a particular proposal on the basis of the subsidiarity principle.

Still, the consequences for national parliaments may be significant. As a report published in September 2010 concluded: "The already observable trend of increasing communication between the Commission and national parliaments (200 opinions of national parliaments sent to the Commission in 2008 and 250 in 2009) might suggest a growing awareness in some of the national parliaments about the possibilities of influencing the EU decision-making process at an earlier stage."[96] The wider use of these instruments may create a new dynamic between parliaments and governments in member states. A Polish expert observed that as a result of the use of these instruments

[92] Eriksen, *supra* note 24, p. 224.

[93] *See* P. M. Kaczynski, *Paper Tigers Or Sleeping Beauties? National Parliaments in the Post-Lisbon European Political System*, Centre for European Policy Studies Special Report (January 2011), http://www.ceps.eu/book/paper-tigers-or-sleeping-beauties-national-parliaments-post-lisbon-european-political-system (last accessed 1 November 2012), p. 13.

[94] For this observation, see Joint Study by Centre for European Policy Studies (CEPS), Royal Institute for International Relations (EGMONT) and European Policy Centre (EPC), *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (September 2010) (*Joint Study*), http://www.epc.eu/documents/uploads/pub_1150_epc_egmont_ceps_-_treaty_of_lisbon.pdf (last accessed 1 November 2012), p. 113.

[95] Kaczynski, *supra* note 93, pp. 11-13. Incidentally, the same study shows that none of the draft laws subject to subsidiary control by the date of the report (1 February 2011) have generated enough reasoned opinions to initiate any of the "cards" procedures.

[96] Joint Study, *supra* note 94, pp. 117-118.

"[t]here [will] be less room for political anti-Brussels accusations, as *politically* the national parliaments [will] now be co-responsible for the European legislation, not only in the *ex post* transposition phase, but also in the drafting of the original laws."[97] Overall, the very existence of such possibilities, even regardless of how effectively they are being used, may serve as a useful argumentative tool "to rebut the claim that the development of the European Union is necessarily inimical to the powers of national parliaments."[98]

4. DIRECT LEGITIMACY OF THE EU

So far this article focused on one aspect of democratic legitimacy of the EU: the aspect which is linked to the inter-governmental (and inter-state) mechanisms of the EU. It assumed that, in so far as the states maintain their separate identity in the EU, and remain in a way "masters" and "owners" of the entity, with the Community method incorporating, among other things, classical inter-governmental devices (best reflected in the functioning of the Council), the way to enhance democratic legitimacy of the Union is through enhancing democratic legitimacy of the governments participating in the Union decisions, and increasing the participation of national parliaments (the democratic legitimacy of which may be taken for granted for the purposes of this argument) in Union decision-making. But this is only one part of the story about democratic legitimacy of the Union. The Union is *not only* an international organization: it is also "a polity in its own right with direct links to the citizens",[99] and consequently the community method incorporates not only inter-governmental devices and procedures. The Union, as a whole, is a rather untidy combination of inter-governmental, supranational, technocratic, parliamentary and judicial institutions and procedures. And as far as it goes beyond the international organization paradigm, the enhancement of democratic legitimacy must proceed by routes other than enhancing states' legitimacy and national parliaments' involvement in the Union. As Giandomenico Majone put it, "even if it is true that the democratic character of the Member States is sufficient to legitimate the intergovernmental component of the Union, such indirect legitimation cannot provide an adequate normative foundation for its supranational component."[100] Many scholars put forward a thesis that since the EU is not a state, it should not be measured by legitimacy standards coined with regard to a state.[101] But this is a non sequitur: it is true

[97] Kaczynski, *supra* note 93, p. 14, emphasis in original,

[98] W. Sleath, *The Role of National Parliaments in European Affairs*, in: Amato et al., *supra* note 10, p. 563.

[99] Eriksen, *supra* note 24, p. 2 (italics omitted).

[100] Majone, *supra* note 20, p. 12.

[101] Among very numerous sources which may be cited to illustrate this proposition, for one of the best recent articulations see Neyer, *supra* note 27; *see also similarly* T. Ward, *The European Union: A Crisis of Legitimacy?*, 9 European Way 115 (2010).

that the EU is not a state (not even an embryonic one) with the classical prerogatives of a modern state (including, most importantly, the power to tax, the power to enforce its norms by means of coercion, and the real or asserted capacity to defend the territory against foreign threats) but it does not follow that state-centred criteria of legitimacy cannot be applied to it *if* it is a large political entity, with comprehensive competencies, and can establish norms which apply directly to individuals and firms, and which can be effectively enforced (even if enforcement needs to occur mainly through the channels of member states). If the latter criteria are also displayed by nation states, and justify, inter alia, a demand for democratic legitimation, then absence of statehood of the EU cannot argue against requiring democratic legitimation from the EU. As Eriksen states, "the political system of domination already in place at the European level requires and aspires to direct legitimation – from the citizens themselves; and not only indirect – derived from the member states. This can be achieved only by making EU into a democratic polity."[102] Or, to put it more bluntly, in so far as the Union's institutional architecture resembles statehood (though not federalism, for reasons mentioned earlier), enhancing its democratic legitimacy must proceed through the routes typical of enhancement of democratic legitimacy of the states. This may be called a *direct* democratic legitimation of the Union, in contrast to the indirect legitimation considered so far.[103]

A general template for such a legitimation is provided by the traditional, tripartite separation of powers, with the supremacy of the legislature and the accountability of the executive controlled by the representative and electorally responsive parliament. The current EU institutional architecture is a far cry from that model, and the best way of considering enhancement of direct democratic legitimacy of the union is by applying that template to it. There are several reforms which may be (and have been) demanded and considered, going some way towards making the EU more like a democratic statehood based on a tripartite separation of powers.

First, strategically central is the electoral legitimacy and accountability of the European Parliament (EP). After all, Art. 10 of the TEU states the EU shall be founded on representative democracy, and preserves the right of citizens to be directly represented at EU level in the European Parliament. But this is, at best, a promise, and only to a small degree fulfilled. It may be observed, and deplored, that the EP's electoral system has not been changed since 1999, and that it has been left far behind by major institutional changes of the Union that have happened since, such as the treaties of Nice and Lisbon, which dramatically increased the powers of the Union, and the historical enlargement of the Union of 2004 and 2007, which increased the number of states from 15 to 27 and the population of the Union from 381 million to 494 million. What is badly needed is a high degree of "transnationalization of the elections

[102] Eriksen, *supra* note 24, pp. 6-7.

[103] For a sustained argument that the EU, even though a non-state entity, should be legitimated by similar standards to those that apply to state legitimacy, *see* C. Lord & D. Beetham, *Legitimizing the EU: Is there a 'Post-parliamentary Basis' for its Legitimation?*, 39 Journal of Common Market Studies 443 (2001).

to the European Parliament."[104] The current electoral system is anachronistic and fails to generate a sense of commitment to and identification with the Parliament by the voter citizens of the EU. The low voter turnout may be one result of, among other things, this obsolete system.[105] As Andrew Moravcik characterized it, although about a decade ago, the EP elections "are decentralized, apathetic affairs, in which a relatively small number of voters select among national parties on the basis of national issues."[106] There are several points to this statement. The very fact that EP election campaigns are largely run on national issues (something which, incidentally, should not necessarily be taken for granted as obvious or persisting)[107] need not be such a bad thing; after all, in par excellence federal systems, elections in constituent entities also are often a reflection of national party political battles. And what are often termed "European" issues are frequently *national* issues, as far as they concern the further transfer of sovereignty from the national to European level, or a national attitude to further enlargement of the EU.[108] Even if the EP elections really are a sum of national elections, nevertheless, it was observed that "the aggregation of the outcomes of national processes still leads to a reasonable congruence between the European electorate and the European Parliament", so "the parties in the European Parliament appear to function relatively effectively as representatives."[109] Next, it can be argued that low turnout is a sort of exercise of accountability for the Parliament: voters can express, in that way, their dissatisfaction with the inferior political powers of the EP (a point discussed below). One of the main problems of the system is that the method of selecting MEPs does not favour cross-border and pan-European political parties' involvement in the EP elections: there is no common election based on common European electoral law, and the electoral campaigns are largely run on national agendas. One proposal, which gained some fame in EU circles, was made by MEP for East of England Andrew Duff, who recommended creating an EU wide constituency from which 25 extra MEPs will be elected. Those MEPs for the pan-European constituency would be politically accountable both to the

[104] Habermas, *supra* note 11, p. 43.

[105] It may be noted that the anachronistic nature of MEP elections has caused some perceptive observers, including the former UK Foreign Secretary Jack Straw, to argue for a virtual abandonment of the idea of a directly elected EP and return to an earlier design whereby the EP was composed of representatives of the national parliaments (*see e.g.*, P. Wintour, *European parliament should be abolished, says Jack Straw*, The Guardian, 21 February 2012, http://www.guardian.co.uk/world/2012/feb/21/european-parliament-abolish-jack-straw (last accessed 1 November 2012)). But that would be a real abdication of an attempt to improve input-legitimacy of the EU.

[106] Moravcsik, *supra* note 21, p. 604.

[107] A study of 2004 EPO elections found that there were signs of a substantial degree of Europeanization of national debates, *see* C. De Vreese, H. Boomgaarden, S. Banducci and H. Semetko, *Light at the End of the Tunnel: Towards a European Public Sphere?*, in: J. J. A. Thomassen (ed.), *The Legitimacy of the European Union after Enlargement*, Oxford University Press, Oxford: 2009, p. 63.

[108] *See similarly*, J. Thomassen *The Legitimacy of the European Union after Enlargement*, in: Thomassen (ed.), *supra* note 107, p. 12.

[109] P. Mair & J. Thomassen, *Political representation and government in the European Union*, 17 Journal of European Public Policy 20 (2010), p. 30.

European political parties and to the electorate (much like any other MEPs).[110] This proposal resonates with the idea of creating incentives – including financial ones – for creation of truly transnational European parties. These parties would then put forward their candidates for the Commission President.[111]

But the improvement of the ways of generating the composition of the EP cannot be the only method of improving the democratic legitimacy of the Union; a weak and powerless Parliament, even with perfect input legitimacy, will do little to improve the democratic legitimacy of the Union as a whole. It is not a legislative agenda-setter (the Commission being the sole authoritative initiator of legislative proposals), and its legislative powers are at best those of a "co-legislator" (now technically participating in an "ordinary" legislative procedure under Art. 294 TFEU, enshrined between the Council and the EP and applicable to nearly all EU legislation). So, *second*, the position of the EP within the institutional system of the EU must be strengthened, and in particular, it must have a stronger connection with, and supremacy over, the Commission. As a preliminary matter, it will be important to make the composition and the policy of the Commission reflect the outcome of the elections to the EP. Currently, the EP elections "do not determine the political colour of the Union, how it is to be governed, for they do not affect the composition of the Commission, nor, of course, of the Council of Ministers. Therefore, they do little to help determine the policies followed by the Union (…)."[112] The most radical step in this direction would be to endow the Parliament with the exclusive competence of electing the Commissioners. Under the present system, the EP approves the President of the Commission, who has been nominated by the Heads of Government, and if the nomination is accepted, it must also approve the College of Commissioners nominated by the President of the Commission and the heads of Government (Art. 17.1 TEU). But to what extent the outcome of elections of the EP are reflected in the appointment of the President of the Commission, and then in the composition of the Commission, is a matter of Council discretion. The TEU now formally requires the EP elections to be "taken into account" by the European Council when proposing a candidate for the President of the Commission – but "taking into account" is a vague notion, and does not impose any strict constraint upon the European Council. In fact, the Parliament has little choice but to approve the candidate proposed by the European Council. However, the events of the nomination of José Manuel Barroso to his first term of office (and even more so, to his second term) have

[110] Details of these proposals are available at http://andrewduff.eu/en/page/electoralreformep accessed 1 November 2012, and also in Duff's article: A. Duff, *Why do MEPs fear electoral reform?*, EU Observer, 14 March 2012, http://euobserver.com/opinion/115596 (last accessed 1 November 2012).

[111] H. Mahony, *New rules to boost profile of European political parties*, EU Observer, 12 September 2012 http://euobserver.com/political/117517 (last accessed 1 November 2012). A similar proposal was recently put forward also by European Commission President José Manuel Barroso, *see* B. Fox, *Barroso envisages 'federation of nation states*, EU Observer, 13 September 2012, http://euobserver.com/news/117526 (last accessed 1 November 2012).

[112] V. Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A Federal Trust Report, January 2007, p. 7.

shown increasing influence of the Parliament over the nomination, reflected in the firm insistence by the EPP/ED Group, which became the leading group after the 10-13 June 2004 EP elections, that its candidate should become the President of the Commission.[113] Nevertheless, the nomination of the candidate for Presidency of the Commission has always been an outcome of political battles and coalition building in the European Council, evident in the circumstances in which Barroso's predecessors were elected: Jacques Delors was chosen following a Franco-British disagreement over Claude Cheysson, Jacques Santer was a compromise after Britain vetoed Jean-Luc Dehaene (known for his federalist views), and Romano Prodi was backed by a coalition of thirteen states against the Franco-German preference for Guy Verhofstadt.[114] So the question is now whether, starting with the Barroso nomination in 2004, the pattern of election of the President of the Commission will be reversed and Art. 17.7 will be interpreted as imposing upon the Council a strict requirement to nominate the President from the largest parliamentary grouping. If so, the Parliament will more closely resemble a democratic state Parliament: an executive-generating body. If the outcome of the election will matter more for the composition and the policy profile of the Commission, it may be an important incentive for generation of political will at a European level and a step towards creation of a pan-European demos, simply because the voters would have more incentive in turning to the elections, and would see the outcome of the election as much more relevant in shaping the policy of the central body of the EU, namely the Commission.[115]

This is a moderate step; a more radical step would be for voters to directly elect the President of the Commission in pan-European elections. Such a proposal was made recently – more than once – by German Finance Minister Wolfgang Schäuble.[116] In this scenario before the next EP elections political parties would enter their top candidate who, in the event of an electoral victory, would be accepted by the leaders of national governments as Commission President. This would mean that the EP elections would be at the same time focused on a search for a good candidate for the Commission Presidency, and obviously

[113] *See* T. Beukers, *The Barroso Drama Enhancing Parliamentary Control Over the European Commission and the Member States*, 2(1) European Constitutional Law Review 21 (2006), p. 22.

[114] S. Hix, *What's wrong with the EU and how to fix it*, Polity, Cambridge: 2008, p. 56.

[115] Another proposal, aimed at what he called "parliamentarisation of the Commission", was made in 2010 by the EP President at the time, Jerzy Buzek, who suggested in a lecture at the Humboldt University in Berlin that member states should be persuaded to "increasingly put their candidates for a seat in the Commission on the European election lists, where they could occupy first place". This would make commissioners "visible" for EU citizens and give them a "democratic mandate" and as a result, "The Commission would have stronger democratic legitimacy", H. Mahony, *EP president wants future EU commissioners directly elected*, EU Observer, 23 March 2010, http://euobserver.com/news/29742 (last accessed 1 November 2012).

[116] K. Haimerl, *Germany's Schäuble calls for directly-elected EU president*, Euractiv, 18 May 2012, http://www.euractiv.com/future-eu/germanys-schaeuble-calls-directl-news-512823 (last accessed 1 November 2012). For the full text of the speech see http://www.bundesfinanzministerium.de/Content/EN/Reden/2012/2012-05-17-karlspreis.html (last accessed 1 November 2012).

only politicians with transnational appeal would have a chance of being nominated by their parties. The second step would involve a Europe-wide election campaign, with the candidates successful in the party race engaging in a campaign promoting their policies and themselves. A vote for a particular party in the EP elections would be at the same time a vote for this party's (or rather, the European grouping to which this party belongs) candidate for the office of President of the Commission.[117] An even more radical step – clearly requiring a major change of the treaties – would be to elect the President of the Commission in direct elections, thus sidestepping the EP electoral process, or even combining two presidential offices; the President of the Commission and the President of the Council, to create one 'EU President', and to have such an EU President elected in pan-EU elections held on the same day in all member states.[118]

Third, not only should the electoral outcome inform the make-up of the Commission but also, during the Parliament's and the Commission's terms, the controlling function of the EP over the Commission must be strengthened. In particular, the principle of individual responsibility of particular Commissioners should be introduced and enforced. It is important that, in exercising its oversight of the Commission, the EP should have the power of control (including of expressing no confidence) over individual Commissioners, not only to censure the Commission as a whole, which is the current system (Art. 17 TEU and Art. 234 TFEU). This "all or nothing power" prevents effective control of the Commission, as the EP rarely takes issue with the Commission as a whole (as was the case of the Santer Commission which resigned in 1998 *en bloc* as a result of allegations of corruption against individual commissioners), but rather with particular portfolios. The words of a scholar written just after Maastricht Treaty, in relation to legitimacy-related problems with its ratification, are as valid now as they were then: "In order to overcome the problems of legitimacy, today's EU needs to be endowed with a more transparent structure of political accountability, based on the classic executive-legislative model found in most European states."[119]

Fourth, in the long term it is impossible, if we are concerned with direct input legitimacy of the EU, to maintain the Commission as the sole authorized initiator of legislation; nowhere else in the democratic world does a group of unelected officials hold the exclusive power of legislative initiative.[120] This is the pinnacle of the "Community

[117] For a similar proposal, *see also* J. Croon and M. Poiares Maduro, *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, Global Governance Programme: Policy Brief 3 (2012), pp. 1-7, http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/05/PB_Euro_web.pdf (last accessed 1 November 2012). The report of the meeting of the Global Governance Programme held at the European University Institute in Florence on 10 May 2012 argued that the next elections to the EP should be transformed into an electoral competition for the presidency of the European Commission.

[118] *See* A. Rettman, *Ministers call for stronger EU and foreign policy chief*, EU Observer, 18 September 2012, http://euobserver.com/institutional/117581 (last accessed 1 November 2012).

[119] K. Featherstone, *Jean Monnet and the 'Democratic Deficit' in the European Union*, 32 Journal of Common Market Studies 149 (1994), p. 151.

[120] J.-P. Bonde, *The European Union's Democratic Deficit: How to Fix It*, 17 Brown Journal of World Affairs 147 (2011), p. 147.

method", and it has a certain logic within the inter-governmental dimension of the EU,[121] but in so far as the EU becomes a supranational entity and we try to make it resemble a democratic polity based on a tripartite division of powers, an idea that the only directly elected body has no say in the legislative initiative is untenable. Not only is the Parliament unable to initiate legislation; moreover, it has no right to access documents dealing with the early legislative process, and depends heavily on lobbyists and informal contacts for any information regarding the preliminary legislative proposals.[122] Featherstone is right: "By almost any measure, the Commission fails the test of democratic legitimacy."[123] In defence of the role of the Commission, Majone argued that "the Commission's monopoly on legislative proposals is a mechanism for linking more closely the Council and the EP to European law"[124] – but this is question-begging, for reasons put forward in a moment. Majone explains this point in the following way: "the Commission's right of legislative initiative (…) is best understood as a way of ensuring that EC policies are directed towards the advancement of the general interests of the Community (as defined by the Treaties) as opposed to national and sectoral interests."[125] This is because, Majone claims, the Commission is better placed than other European institutions to take into account the general interests of the Community, as other institutions tend to be moved by sectoral, short-term, and national self-interests.[126] There are several points which can be made about this statement. For one thing, the article by Majone was published in 1998, when as he observed, the EP was "not yet institutionally suited to take into account the general interests of the Community in its legislative proposals"[127] – but since then, there has been important institutional growth and evolution in the EP, including a strengthening of its legislative role. Second, these sorts of assessments have an unfortunate consequence of becoming self-fulfilling prophecies, or self-perpetuating phenomena: if the Parliament does not obtain more competences, it will stay at a level of weak institutional development, and develop strategies to cope with its inferior position. Third, Majone may underestimate the strength of the impact of interest groups and sectoral or national self-interests upon the Commission itself. And fourth, the attribution of legislative initiative to the EP does not necessarily mean the removal of the power of initiative from the Commission: all it will lose is the initiative *monopoly* and not the power of initiative per se. The EP

[121] It is worth reminding ourselves that the Commission was a direct progeny of the of the ECSC's High Authority – a body which was aptly described by Paul Reuter (one of the Founding Fathers of the European Communities) as a last-resort solution that was conceived to "solve the problem of how to create a Europe without Europeans", quoted in E. Zoller, *The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union*, 12 Indiana Journal of Global Legal Studies 391 (2005), p. 398.

[122] Bonde, *supra* note 120, pp. 149-151.

[123] Featherstone, *supra* note 119, p. 162.

[124] Majone, *supra* note 20, p. 8.

[125] *Ibidem*, p. 23.

[126] *Ibidem.*

[127] *Ibidem*.

will never be fully considered as a "real" parliament for the European citizens, as those whom they elect cannot decide the agenda, and can only react to the proposals made by an independent technocratic body – independent, that is, "from the member States, from the governments, and from the people."[128]

The *fifth*, and the last proposal put forward here concerns the only instrument of direct democracy within the EU. The Lisbon Treaty, echoing earlier regulation in the project of the Constitutional Treaty,[129] introduced the European Citizens' Initiative (ECI)[130] which was the culmination of discussions and proposals that go back to the late 1980s. Starting in 1988, the EP adopted a number of resolutions that called for finding ways of consulting European citizens directly, and to allow the popular will to express itself by some forms of referenda.[131] In 1996, two member states (Austria and Italy) proposed to the IGC the inclusion of a popular legislative initiative (suggesting

[128] Zoller, *supra* note 121, p. 397. Zoller's article is the most sustained critique in the literature on the subject of the Commission's monopoly on legislative initiative, and this observation nicely summarizes the tenor of her article: "So long as the EU Parliament is deprived of the right to initiate legislation, th[e European] general will is certain to remain silent, and European laws will be the exclusive province of leaders and elites …" (p. 407). Though her remarks applied to the Draft Treaty establishing a Constitution for Europe, they still maintain validity today. A proposal to endow the EP with the power of initiating legislation was recently made by German Finance Minister Wolfgang Schäuble, *see* K. Haimerl*, Germany's Schäuble calls for directly-elected EU president*, Euractiv, 18 May 2012, http://www.euractiv.com/future-eu/germanys-schaeuble-calls-directl-news-512823 (last accessed 1 November 2012). Also a recent "Future of Europe report", adopted by 11 foreign ministers from Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and on 18 September 2012 after a meeting in Warsaw, stated that the EP should be able to initiate EU law, see "Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain" 17 September 2012, outlined in A. Rettman, *Ministers call for stronger EU and foreign policy chief*, EU Observer, 18 September 2012, http://euobserver.com/institutional/117581 (last accessed 1 November 2012).

[129] Art. I-47.4 of the Treaty establishing a Constitution for Europe (subsequently not ratified).

[130] Art. 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 procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union". Art. 24 TFEU reads: "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come". The Regulation was adopted in February 2011, Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative.

[131] *See* JO C 187/231; EP (1988). Resolution on ways of consulting European citizens about the EU. Brussels: JO C 187/231. In December 1993, the Public Liberty and Domestic Affairs Commission of the European Parliament expressed its support for the introduction of a "European legislative referendum", EP institutional commission. DOC A2-0332/88, as well as the possibility of citizens' ballots on "Community decisions", EP Commission. DOC A3-0031/94.

a threshold of ten per cent of European voters).[132] As Bruno Kaufmann notes, this was the result not only of the will to democratize decision-making within the EU, but also of the tendency to submit major national decisions about the EU to popular votes; Kaufmann observes that since 1972 more than fifty popular votes on European integration have taken place in Europe.[133]

But is the ECI, as currently designed, likely to democratize the Union itself? There are different views on the matter: some commentators are optimistic, claiming that it can become "the next big thing" in the history of democracy,[134] while others are much more sceptical, saying that it "does not dramatically change the democratic nature of the European Union and it does not bring the Union and its decision-making closer to the citizens."[135] To start with, the ECI is constructed not as a decision-making instrument: it is neither a referendum nor can it trigger a binding referendum;[136] at best, it can be seen as an agenda-setting device.[137] This not a small thing, but it already suggests basic limits on the impact that it may have upon democratic legitimacy of the EU: unless the successful initiatives produce some legal obligations on the Commission, they are unlikely to reduce the legitimacy deficit. If anything, a successful initiative which then is disregarded by the Commission may increase the frustration of the participants and deepen their sense of legitimacy deficit within the Union. The present design does not place any positive obligations upon the Commission in response to successful initiatives (it may decide to take no action), and the Commission is likely to be adamant about preserving its monopoly on legislative initiative; as Johannes Pichler melancholically notes, "If the Commission is entitled by the Treaties and by the Constitution [*sic*] to ignore calls even from the Parliament or the Council, why should it react to small minorities?"[138] Speculation that "it seems likely that the political pressure on the Commission to be responsive will be strong"[139] is something which is yet to be tested, and for the moment remains just that – speculation. So while, politically speaking, the very process of raising an initiative may be a useful communicative and mobilizing

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[132] *See* Closa Montero, *supra* note 10, p. 1049, n. 23.

[133] B. Kaufmann, *Transnational Babystep: The European Citizens' Initiative*, in: M. Setälä & T. Schiller, (eds.), *Citizens' Initiatives in Europe: Procedures and Consequences of Agenda-setting by Citizens*, Palgrave Macmillan, London: 2012, p. 233.

[134] *Ibidem*, p. 240.

[135] A. H. Kammel, *Bridging the Gap: the European Citizens' Initiative and its Consequences for Democracy within the European Union*, in: J. W. Pichler and B. Kaufmann (eds.), *The Next Big Thing: Making Europe ready for the Citizens' Initiative*, Intersentia, NWV, Neuer Wissenschaftlicher Verlag, Wien: 2011, p. 55.

[136] Commenting on the model of initiative contained in the draft Constitutional treaty (subsequently taken up by the Treaty of Lisbon), P. Magnette had observed: "*on est loin des initiatives populaires de type suisse ou américain*", P. Magnette, *Vers un changement de 'régime politique'?*, in: Amato, Bribosia & de Witte (eds.), *supra* note 10, p. 1069.

[137] B. Kaufmann and J. W. Pichler, *Editorial: It's the practice, stupid!*, in: Pichler & Kaufmann (eds.), *supra* note 135, p. 10.

[138] J. W. Pichler, T*he EU Commissions Draft Proposal on the European Citizens' Initiative – A First Balance*, in: Pichler and Kaufmann (eds.), *supra* note 135, p. 18.

[139] Craig & de Burca, *supra* note 79, p. 849.

instrument on a transnational scale, legally speaking, the ECI is little more than a petition to the Commission, which is allowed "to deny any legal effect to the explicit will of more than one million citizens."[140]

Further, there are a number of obstacles placed upon the initiative that are not understandable. To start with, the threshold of 1 million signatures combined within the minimum of seven countries,[141] with a minimum number of signatories required in each of the member states,[142] ranging from 4,500 to 74,250 depending on the size of the country,[143] is deeply unrealistic, and may be overcome only on the rarest occasions.[144] In fact, the hurdles are placed so high that, with all the costs and administrative resources involved, they are likely to be successfully overcome only by very powerful, established organizations.[145] The same applies to the time limit of one year for completing a petition process. Especially considering the weak legal status of a successful initiative, it is incomprehensible why such obstacles have been placed on its use. As Kaufmann realistically observed: "The whole complex process (…) means that it will be pretty difficult indeed for citizens across Europe merely to get started with an initiative."[146] One may therefore suggest the revision of the ECI regulation by lowering the threshold, say to 100,000 signatures in 2-3 states.

But this is not to say that a purely cynical view of the ECI, as meaningless window-dressing, is justified. Quite apart from its agenda-setting implications, the very possibility of the ECI provides NGOs, opinion leaders and social movements with an opportunity of engaging in a coordinated communicative action related to EU laws and policies. The process of preparing the initiative proposal may promote the transnational public discourse on European affairs and therefore the ECI could become "a truly extraordinary communication tool."[147]

CONCLUSIONS

As Sergio Fabbrini observed recently, "The management of the euro crisis (…) show[s] that an intergovernmental EU cannot satisfy the basis requirements of effectiveness

[140] A. Auer, *European Citizens' Initiative*, 1 European Constitutional Law Review 79 (2005), p. 83.

[141] Art. 2(1) and Art. 7(1), Regulation 211 (2011).

[142] Art. 7(2) and Annex I of the Regulation 211 (2011).

[143] *See* http://ec.europa.eu/citizens-initiative/public/signatories (last accessed 7 April 2013).

[144] At the time of the writing the current draft of this article (early April 2013), there are fourteen "open initiatives" with deadlines for collection of necessary number of supporters ranging between 1 November 2013 and 28 January 2014, http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing (last accessed 7 April 2013).

[145] M. Bühler, *ECI – An Initiative for Citizens in the EU*", in: Pichler & Kaufmann (eds.), *supra* note 135, p. 48.

[146] Kaufmann, *supra* note 133, p. 239.

[147] A.-M. Sigmund, *Towards a supportive infrastructure*, in: Pichler & Kaufmann (eds.), *supra* note 135, p. 79.

and legitimacy."[148] In this article, I have focused on the latter requirement, though the two are intimately interconnected. Debates and controversies about democratic legitimacy of the EU have of course accompanied the Union from the very beginning. Some commentators tried to define the problem out of existence; by pointing out that the EU is not a state-like polity, they argued that state-specific criteria of legitimacy, such as representative, participatory or deliberative democracy, do not apply. They postulated outcome-based or, at best, public reasons based, conceptions of legitimacy as applicable to the EU, and concluded that it satisfies those standards. But this argument is based on a non sequitur: from the statement that the EU is not a state (not even a quasi-federation or federation *in statu nascendi*) it does not follow that it should not be judged by the standards of democratic legitimacy. There is no reason to accept that such standards apply only to fully-fledged states in the modern world, in which we accept that large organizations with coercive and distributive powers should be sensitive to preferences, values and interests of those whom they control, and that this sensitivity is best implemented by democratic mechanisms. So there is no escape from scrutinizing legitimacy of the EU by democratic standards.

Hence, a huge "democratic paradox" of the EU: while committing itself to promote and scrutinize democracy in its member states, in candidate states, and in third states with whom it enters into contact, it does not display equivalent democratic features in its own functioning. EU officials and representatives – the President of the Council, President of the Commission, High Representative for Foreign Affairs and Security Policy etc. – may travel the world and lecture about the supreme virtues of democracy, having themselves not been appointed in a fully democratic way, and not having to be accountable to their constituency in a way in which is expected and required in a democracy. Striking democratic imperfections in the EU institutional system, even with the positive corrections introduced by the Treaty of Lisbon, are in stark contrast with the Treaty promise that the EU shall be founded on representative democracy and preservation of the right of citizens to be directly represented at EU level (Art. 10 TEU).

But the EU is a complex, untidy polity which amalgamates inter-governmental and supranational elements in its constitution; hence, the bifurcated approach to democratic legitimacy postulated in this article. In so far as the EU contains inter-governmental elements – best exemplified by the powers of the Council – indirect legitimacy is all that is required, i.e., democratic legitimacy of governments representing their respective states in the Council. National parliamentary control over the position of the member state in the Council and direct involvement of national parliaments in the EU law-making, if effectively managed, satisfy the conditions of indirect legitimacy. The burden is then shifted to the democratic mechanisms within member states, as far as those states participate in the EU.

[148] S. Fabbrini, *After the Euro crisis: The President of Europe*, EuropEos Commentary No. 12, 1 June 2012, http://www.ceps.be/book/after-euro-crisis-president-europe-new-paradigm-increasing-legitimacy-and-effectiveness-eu (last accessed 1 November 2012), p. 4.

The second face of the EU – its supranational character – calls for democratic legitimation of its institutions, in particular, in accordance with the promise contained in Art. 10 TEU, proclaiming representative democracy in the institutional setup of the EU, and the right of EU citizens to be directly represented in the EP. This requires changes to the electoral system of the EP in order to provide incentives for a more trans-European electoral process; strengthening of the supervisory role of the EP over the Commission, in particular the power of electing the Commission and exercising accountability with respect to individual Commissioners; the strengthening of the role of the EP with regard to legislation, and endowing it with the (non-exclusive) competence of legislative initiative. Overall, the idea is for the institutional setup to resemble a canonical model of separation of powers and inter-institutional accountability, with the EP in a dominant position. Additionally, the first gesture towards direct democracy in the EU, the ECI, should be strengthened, both by upgrading the status of successful initiatives and by lowering thresholds and administrative requirements.

The EU is undergoing a crisis these days, with the institutional structure clearly inadequate to solve pan-European problems with currency and debt. Ironically, perhaps the time of crisis may be a good moment to place at the centre of the agenda of the EU debates, the matter of its democratic legitimacy. The institutional setup of the EU – its constitution – will most probably be changed, but the change may either be of a managerial-technocratic character or of a democratic-participatory nature. This article outlined some modest steps which should be taken if the latter scenario is to be demanded by European societies. As it should be.