European Constitutional Law Network-Series

Vol. 9

Papadopoulou/Pernice/Weiler (eds.)

Legitimacy Issues of the European Union in the Face of Crisis

Dimitris Tsatsos in memoriam

Nomos

European Constitutional Law Network-Series

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Law (WHI)

Vol. 9

Lina Papadopoulou/Ingolf Pernice
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2nd, unrevised edition

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Introduction: Legitimacy Issues of the European Union

Ingolf Pernice

The European Constitutional Law Network (ECLN) met in Thessaloniki (Greece) on the 19 and 20 May 2015 to discuss '*Legitimacy Issues of the European Union. Lessons from the Financial Crisis*'. Even today the financial crisis of the EU is not yet over – it is still hitting our polities, societies and markets. Economic growth is still at the bottom,[1] while the rates of "sovereign" debts[2] and unemployment, in particular of young people, remain unacceptable high.[3] Some indications of hope, however, that the bottom had been reached, and some signs that the situation was improving seemed to be visible at the time of the Thessaloniki conference. Unfortunately, these signs have meanwhile disappeared, and the problems of the Economic and Monetary Union continue to plague us, while the European Union is facing new challenges, from within as well as from without. The concept of legitimacy in the EU itself would deserve a special conference and far more study in the European context,[4] but given the need for con-

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1 According to Eurostat date the average was 1.9 % for the 28 Member States in 2016, see Eurosstat at: http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tec00115&plugin=1 (accessed 11 April 2017).

2 The rate for the EU 28 decreased from 2014 to 2015 from 86,7 % to 85 %, compared to 57,5 % in 2007 and 83,8 % in 2012, see: Eurostat at: http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=de&pcode=tsdde410 (accessed 11 April 2017).

3 For the youth unemployment rates, the highest were recorded in Greece (45.2 % in December 2016), Spain (41.5 %) and Italy (35.2 %). See Eurostat figures indicating a slight decrease, however, in the year from 2016 to 2017, at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics (accessed 11 April 2017): The EU-28 unemployment rate was 8.0 % in February 2017, down from 8.1 % in January 2017 and from 8.9 % in February 2016.

4 See, however, the stimulating ideas of Joseph H.H. Weiler, 'Europe in Crisis – on "political messianism", "legitimacy" and the "rule of law"', *Singapore Journal of Legal Studies* (2012), pp 248-68, at: http://law.nus.edu.sg/sjls/articles/SJLS-Dec-12-248.pdf (accessed 23 August 2016).

structive reform ideas in times of looming disintegration,[5] discussing legitimacy issues of the EU in context and from different perspectives proved extremely useful and stimulating.

Inside the EU, the most worrying new development is the British referendum on Brexit.[6] There may be many approaches to explaining the 'leave' outcome. Internal problems like the position of Scotland as well as constitutional questions may have given rise to doubts as to whether or not the notice under Article 50 TEU would be sent to Brussels. New developments show that it has been filed in March 2017. It is yet an open question, what the outcome of the negotiations on the agreement on the conditions of the exit will be, or whether after a period of time, negotiation and reflection, the notice may even be withdrawn. The Brexit-vote of 23 June 2016, at least, came as a surprise to British and other people in Europe, and it raises a number of questions regarding the present state of the European Union and its constitution.

One of these questions regards democratic legitimacy. It is coupled with the wide variety of difficulties the Union is actually facing: how to overcome the economic crisis in most of the southern countries, and the unacceptable level of unemployment that is about to destroy the future of a whole generation of young people in this part of Europe. Where is the solidarity among the member states and peoples as promised and hoped to govern our mutual relationships in the Union?[7] What are we, each of us citizens of the Union, ready to invest in our common future, founded in

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5 See already Lenz Jacobsen, 'There's No Plan B for Europe's Future', in: *Zeit Online* 9 July 2015 available at: http://www.zeit.de/politik/ausland/2015-07/european-union-integration-disintegration-crisis (accessed 29 August 2016). See also Georges Soros, 'Ver une disintegration de l'Europe', in: *Les Echos.fr* 26 June 2016, at: http://www.lesechos.fr/idees-debats/cercle/cercle-158357-le-brexit-et-lavenir-de-leurope-2009687.php (accessed 29 August 2016); Franz C. Mayer, 'Of Blind Men, Elephants and European Disintegration – What could and what should legal academics do against the "disintegration" of Europe?', in *Verfassungsblog* 26 March 2015, at: http://verfassungsblog.de/von-blinden-maennern-und-elefanten-was-kann-und-sollte-die-rechtswissenschaft-gegen-die-desintegration-europas-tun/ (accessed 29 August 2016).

6 See Paul Craig, Brexit. A Drama in Six Acts, *ELRev.* 41(2016) pp 447-468; Ingolf Pernice, European Constitutionalism and the National Constitutions of the Member States – Implications for Brexit, WHI-paper 1/2017, at: http://www.whi-berlin.eu/tl_files/WHI-Papers%20ab%202013/WHI-Paper_01_2017.pdf.

7 For some thoughts about solidarity in the EU see Ingolf Pernice, 'Solidarität in Europa. Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer

the values laid down in Article 2 TEU, a future of peace, liberty and wel-
fare in Europe and beyond? Nationalism and the belief in national
sovereignty has proven not to be the recipe. This deep historical insight,
based upon the experience of hundreds of years of war among European
peoples, is what drove Altiero Spinelli back in 1941, and Jean Monnet,
Walter Hallstein, Alcide de Gasperi and the other fathers of European Inte-
gration in the early 50's to design a new political arrangement beyond the
state, for shaping a better future for post-war generations. It produced
more than seventy years of peace among former competing nations and
enemies, a longer period of peace than we have ever had across this conti-
nent. It allowed the unification of post-war Europe and – what for many
Germans seemed to remain a hopeless dream – the reunification of Ger-
many. The latter was possible 'under the roof of Europe': integration in-
stead of the awkward insistence on national sovereignty. But the devil of
national sovereignty is not dead. Populists like Nigel Farage with his
UKIP in Britain and similar movements in other Member States like the
'Front National' of Marine Le Pen, prefer solving problems the way we
hoped to have left behind. Brexit might never happen, as we can read in an
article published by 'Deutsche Welle' on 15 August 2016.[8] So we may
still hope. Would it need a second referendum in Britain?[9] Would an
agreement under Article 50 TEU for being ratified by the EU need a refer-
endum in the other Member States, or a European-wide referendum – for
the status of all EU citizens being affected? What the 'leave' movement

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Union', in: Christian Calliess (ed), *Europäische Solidarität und nationale Identität
– Überlegungen im Kontext der Krise im Euroraum* (Tübingen, Mohr Siebeck,
2013) pp 25-56, also available as WHI-Paper 01/2013 at: http://www.whi-berlin.eu/
tl_files/documents/WHI-Paper%201-13-Solidarita%CC%88t.pdf (accessed 29
August 2016).

8   Bernd Rieger, 'Wait and see: Theresa May is in no hurry on Brexit', DW of 15 Au-
gust 2016: 'the Brexit will take longer than British voters imagined in the June ref-
erendum – and there's a good chance it will never happen. DW looks at key ques-
tions and answers.',http://www.dw.com/en/wait-and-see-theresa-may-is-in-no-hurr
y-on-brexit/a-19476195 (accessed 22 August 2016).

9   See Pavlos Eleftheriadis, 'A New Referendum is a Constitutional Requirement',
Oxford Business Law Blog, 4 July 2016, at: https://www.law.ox.ac.uk/business-law
-blog/blog/2016/07/new-referendum-constitutional-requirement (last accessed 27
August 2016).

celebrated as 'independence day',[10] if implemented, would mean is that Britain would leave the EU-framework, a framework that was understood by Jacques Delors and others to guarantee that Germany —even if unified — would never again become a threat to other European peoples. What the 'leavers' are celebrating as 'independence' is, in fact, the loss of Britain's voice in Europe and of any control it still has, through the EU system of mutual constitutional stabilisation[11], also on Germany.

At least in order to have the benefits of the internal market even after Brexit, i.e. like Norway or Switzerland, Britain would have to adapt to EU legislation without having a voice.[12] If this is what the 'leave' campaign was looking at, the underlying concept of sovereignty may be quite different from the traditional understanding of this term. Another open question of legitimacy concerns the constitutional requirements for a government to proceed under Article 50 TEU. Given the legal consequences, including the loss for the national citizens of their status as citizens of the Union and the loss, for the citizens of the other Member States, of their respective rights in the withdrawing Member State, the exit of one of the Member States is far from being just an act of 'foreign' policy. Notwithstanding the principle of voluntariness of membership,[13] the EU is not a golf club people join or leave without further ado. In the case of Britain, acting without

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10 See: BBC 24 June 2016: 'Nigel Farage says Leave win marks UK "independence day"', at: http://www.bbc.com/news/uk-politics-eu-referendum-36613238 (accessed 22 June 2016). For critical comments see: Independent Voices 24 June 2016: 'It's offensive to call Brexit an "Independence Day" – the EU wasn't an enslaving colonial power like Britain': 'Calling for a British Independence Day is wounding to all the nations that revolted and fought hard against British colonial rule. This kind of language is contributing to real incidents of xenophobia across the UK', at: http://www.independent.co.uk/voices/its-offensive-to-call-brexit-an-independence-day-the-eu-wasnt-a-colonial-power-enslaving-your-nation-a7104286.html (accessed 22 August 2016).

11 For the limits on national constitutional autonomy through the system of mutual constitutional stabilisation as provided for by the Treaties and, in particular, Articles 2 and 7 TEU see already Ingolf Pernice, 'Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung', in: Roland Bieber and Pierre Widmer (eds), *L'espace constitutionnel européen. Der Europäische Verfassungsraum. The European Constitutional Area* (Zürich, Schulthess, 1995) pp 225, 261-4.

12 See already Paul Craig, 'Brexit: A Drama in Six Acts', *ELRev.* (2016) pp 447, 456.

13 This is – apart from additionality and open democracy – one of the three fundamental principles of European integration: see Ingolf Pernice, 'The EU – A Citi-

express parliamentary authorisation would have been difficult to reconcile with the sovereignty of the British Parliament,[14] and so was the decision of the UK Supreme Court of 24 January 2017 in the *Miller*-case.[15] Last but not least, if in accordance with the principle of subsidiarity, the EU is made to achieve, for the benefit of the citizens, what a single Member State cannot achieve, does Brexit not result in a loss of sovereignty for the UK instead of regaining sovereignty, as the Brexiters pretend to pursue?[16]

The present disintegration movements and increasing nationalism in several Member States may have different causes and explanations, yet they seem to be nourished by a feeling, among people, that European politics made in Brussels are not 'our' politics, not a matter of the citizens of the Union. But who, if not 'we, the people' —or in our case, the Union's citizens— should have ownership of European politics? This points to our attitude towards the EU and, thus, the question of legitimacy.

Among the challenges from without, first of all the crises of Ukraine and Syria raise questions about the institutional setting and efficiency of

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zens' Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe', in: José M Magone (ed), *Routledge Handbook of European Politics* (Routledge 2015) pp 184-201.

14 For some thoughts thus far see Ingolf Pernice, 'Brexit im Europäischen Verfassungsverbund', in: *Verfassungblog on matters constitutional*, 27 June 2016, at: http://verfassungsblog.de/author/ingolf-pernice/ (accessed 14 August 2106). The new British Prime Minister, Theresa May, seems to have accepted, meanwhile, that the notice under Article 50 TEU cannot be given without authorization by an Act of Parliament, as she has announced the "A Great Repeal Bill to get rid of the European Communities Act – introduced in the next Parliamentary session" in her speech to the Conservative Party Conference 2016, October 2, 2016, at https://www.youtube.com/watch?v=OuH3zgz_1xQ, for the text of the speech see: The Independent, 5.10.16: Theresa May's keynote speech at Tory conference in full, http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html.

15 Judgment of 24 January 2017 of the Supreme Court at: https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf; see already the High Court judgment of 3 November 2016,R (Miller) -v- Secretary of State for Exiting the European Union at: https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/. Meanwhile, the UK has triggered the procedure under Article 50 TEU.

16 In this vein see Ingolf Pernice, European Constitutionalism and the National Constitutions of the Member States. Implications of Brexit, WHI-Pater 01/2017, at: http://www.whi-berlin.eu/tl_files/WHI-Papers%20ab%202013/WHI-Paper_01_2017.pdf.

the CFSP. Secondly, not only refugees from Africa, but also from Afghanistan and, even more drastically, from Syria, challenge the unity of, and the (remaining) solidarity within the European Union: an unexpected and —for too long— largely underestimated threat. The refugee crisis and diverging views among the Member States on the integration of immigrants are becoming a new factor of disintegration in Europe. The right of free movement and the openness of the internal borders has been under pressure since the openness of the external borders of the EU was tested successfully by refugees from third countries: people under political or economic pressure having been misled by trafficking gangs. Our citizens expect the Union to quickly find adequate solutions, based upon our common values as well as on the powers that have been conferred to the Union under Articles 67-80 TFEU. This concerns output legitimacy. The capacity to act effectively, and to agree rapidly on urgent measures in times of need is a condition for the continuing support of the European Union by its citizens. Failure to act in common according to the provisions of the Treaties, necessarily affects legitimacy. It is a challenge to the legitimacy of the Union system as a whole.

The contributions to the present volume, presented and discussed at the ECLN-conferences in New York (October 2012)[17] and Thessaloniki (May 2015)[18], cannot cover all these issues, and particularly not the more recent events. The primary background and focus of the Thessaloniki conference were the financial crisis and the measures taken to avoid the bankruptcy of Member States, European policies that hit Greece in particular. This topic is delicate, for there are no 'real' competences of the EU for economic and fiscal policies. Deficits and failures are thus attributed to a creature without real powers: Articles 119-121 TFEU repeatedly talk about 'the close coordination of Member States' economic policies', the fact that Member States are bound to 'conduct *their* economic policies with a view to contributing to the achievement of the objectives of the Union', or to 'regard *their* economic policies as a matter of common concern…'. Only the monetary policies are a matter of —exclusive— competence of the Union.

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17 ECLN Conference New York 2012: '*Retheorizing European Integration and its Public Space'*, New York University School of Law, October 11-12, 2012, at: http://www.ecln.net/new-york-2012.html. (accessed 21 April 2017).
18 ECLN Conference Thessaloniki 2015: ‚Challenging the Legitimacy of Europe. Makedonia Palace Hotel, May 21-22, 2015, at: http://www.ecln.net/thessaloniki-2015.html (accessed 21 April 2017).

While EU institutions do play an active role in the coordination of these policies, and are given responsibilities regarding their implementation regardless of the constitutional asymmetry of the construction of the Economic and Monetary Union, the measures taken to deal with the crisis ultimately remain the responsibility of the national governments, which are accountable only to their respective parliaments and peoples. To qualify this as 'executive federalism' enhancing the democratic deficit of the EU,[19] sounds like a euphemism, for there is little in place of what 'federalism' would require. Nevertheless, legitimacy is rightly questioned in an arrangement that mainly places power over national budgets and fiscal policies in the hands of executives sitting behind closed doors and taking decisions without direct parliamentary control. Parliaments at both levels need to be given more direct control of the budgetary policies of the Union and the European framework and guidance established for the Member States' economic, fiscal and social policies.[20]

The present volume consists of an introduction, fifteen substantive chapters and an epilogue. It offers an analysis of EU legitimacy issues, ranging from more theoretical fundamentals to concrete policy recommendations. The issues are studied against the background of the financial crisis since 2009 and the attempts made by national governments and the European Union to avoid a financial disaster in Greece and other countries, and the breakdown of the Euro-system. As constitutional law and courts not only set the general framework of political action but also determine the concrete limits that should be respected by governments and parliaments, the role of the judges and the legitimacy of their contributions take a central place in the discussion. This includes some reflection on the fundamental rights of the citizens and new instruments available for enhancing participative democracy and legitimacy in a 'digital Europe'.

I. Part One of the present volume is devoted to the search for '*Appropriate Concepts: Legitimacy and European Democracy*'.

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19 Jürgen Habermas, *The Crisis of the European Union* (Cambridge, Polity Press, 2012) 12, 52, with solutions developed on pp 119-32.
20 See Ingolf Pernice, 'Financial Crisis, National Parliaments and EMU Reform', in: Davor Jancic & Damian Chalmers (eds), *Resilience or Resignation: National Parliaments and the EU* (Oxford, Oxford University Press, 2017), p 115-139. With important observations on the difficulties and perspectives of setting up better interparliamentary cooperation in the EU see Ian Cooper, The Emerging Order of Interparliamentary Cooperation in the Post-Lisbon EU, in: ibid., p. 227-246.

George Gerapetritis develops a theoretical background of deliberative democracy and explains that in a multilevel system deliberative democracy ought to be developed not only as a conceptual instrument of political philosophy but mostly as a set of applied constitutional mechanisms to supplement existing institutional safeguards in order to fulfil its potential as a factor of constitutional legitimacy.

Lina Papadopoulou more specifically questions the existing attempts to construct democratic legitimacy in the European Union as a 'double legitimacy'. With a view to the status and role the Treaties are reserving for the citizens of the Union she proposes that the suitable 'democratic' legitimacy in the present historical and political phase is rather a triple one, based on states, peoples and citizens alike.

Giacinto della Cananea adopts a more practical perspective on legitimacy and claims that the most important condition for enhanced democratic legitimacy in the EU is based upon an old and broadly recognised principle: 'no taxation without representation', which should be reversed into '*no representation without taxation*'. He explains why European taxes are a necessary element of democratic legitimacy and argues that more attention for duties, particularly in the fiscal domain, can be matched with a renewed attention for public goods, such as infrastructures for European society.

In the final chapter of the first part Tom Eijsbouts suggests a new understanding of the sources of democratic legitimacy. He argues for a better construction of the notions (plural) of 'people', 'peoples' etc. in EU law, and so fights against populist simplifications attracted to a singular and fundamental legal notion of People in general. He distinguishes two distinct meanings of people: that of the 'original' people, founder of the constitution, and that of the 'electoral' people, which functions inside the constitution, e.g. as the electorate; with an emphasis on the essential plurality of the notion of 'people', he thus strives to 'debunk' the *no demos*-thesis of the German Federal Constitutional Court and others.

II. *Looking at the Economic Measures and European Courts in Times of Crisis.* Part Two of the volume is devoted to the causes of and remedies to the financial crisis, with a particular focus on the role of the judges as part of the system established for the management of the financial crisis in Europe.

Mattias Kumm presents a thorough analysis of the causes of the financial crisis and their current misinterpretations. He suggests that the central cause of the crisis in Europe is not an undisciplined spending by profligate

states, but the asymmetric structural symbiosis between states and banks. For him the reforms undertaken in recent years gesture in the right direction but often remain ineffectual or cosmetic at best. He sees the public costs of bank bailouts as genuinely European risks, for which it would be appropriate to hold the European Union as a whole accountable. This money should be paid, he argues, by genuinely European funds, raised by European taxes or levies. To some extent, this conclusion supports the more general claim of Giacinto della Cananea for European taxation as a condition of legitimacy.

George Karavokyris gives a fascinating analysis of how the constitutionality of the austerity measures in Greece and their conventionality in the framework of the European Convention of Human Rights were mainly decided through the test of the standards of necessity and proportionality; given the great flexibility and judicial restraint proper to this approach, he demonstrates that the limited —judicial— claim of authority of the courts lies in an epistemic and political matter of competence.

A certain amount of flexibility and judicial restraint also seems to qualify the European Court of Justice (ECJ), which had to decide upon the referral made by the German Federal Constitutional Court (GFCC). This court submitted its view that the OMT program of the European Central Bank was unconstitutional and clearly violated the European Treaties. Jean-Victor Louis presents a profound analysis of the preliminary ruling in which the ECJ stated that with certain conditions the OMT program was in conformity with EU law. As the GFCC has meanwhile given its final judgment on the case —in accordance with the ruling of the ECJ, though with great emphasis on strict conditions for the implementation of the program— Louis concludes that quite diverse logics were confronted here but in the end a realistic and conciliatory solution was adopted. National constitutional identity has played a particular role in the referral of the OMT question to the ECJ by the GFCC.

Against this background Jirí Zemanek gives an analysis of these terms from a comparative perspective. He argues that any constitutional change should respect certain basic limits defined by a common core of European constitutionalism. This is an important condition for legitimacy. Within the multilevel constitutional system of the EU national constitutional identities do not suggest, in his view, an anti-thesis to the Union constitutional foundations rather they are specific emanations intensifying a common constitutional core. He also argues that the ECJ should contribute to the convergence of material cores within the Member States´ constitutions

based on shared values, ultimately amounting to a European constitutional identity.

Part Two concludes with another perspective on the developments particularly in Greece: in the light of the Greek constitutional jurisprudence Antonis Manitakis observes a surprising resilience of the constitution itself. The resilience of the *Greek constitutional order* to the shock waves of the 'crisis', he finds, coincides with, and is manifested in, the equally striking *ability* of this constitutional order to *adapt* to both the multiple demands of the *European integration process* and the 'real' coercive forces of the globalised market economy. The case law does not rely on an exception from constitutional imperatives dictated by emergency but, as he concludes, creates a new constitutional normality which, compared with the past, is characterised by a greater regulatory 'plasticity or flexibility'.

III. *Citizens, Rights and New Techniques for Enhancing Legitimacy* is the title of Part Three of the present volume focussing human rights, citizenship and legitimacy by digitisation.

Ana Maria Guerra Martins discusses the very important opinion of the ECJ on the European Union's accession to the European Convention on Human Rights (ECHR). Her analysis of the opinion contrasts other critiques and looks for a stimulating theoretical perspective. Her question is whether an adequate constitutional theory, which includes the multilevel protection of fundamental rights in Europe as one among other factors of legitimacy, could have led the Court to other conclusions. On an understanding of multilevel constitutionalism 'in which the different components —EU law, national laws and ECHR law— need to work together towards a major objective, namely a higher level of protection of fundamental rights', she concludes that the outcome of the ECJ's analysis would have been different. In her opinion, only the respect for the principles of cooperative judicial dialogue, of sincere cooperation and of mutual trust between all players makes it possible to avoid jurisdictional conflicts and to reinforce the protection and enforcement of fundamental rights in Europe with a view to enhancing legitimacy of the EU.

An analysis of a very specific jurisprudence of the Court by Anna-Maria Konsta concerns the notion of the citizen of the Union and the right to care as a citizenship right. She suggests that a broader interpretation of the concept of 'care' in accordance with the notion of social family, which is connected to bonds of affection among its members, regardless of their gender, could lead to the proper institutionalisation of an autonomous right to care and, at least from the gender perspective, to a more adequate con-

cept of citizenship: a 'new era in reconceiving family relations and law' as a matter of legitimacy.

A particular perspective on the citizen's ownership and participation in the political processes of the EU is taken by Ingolf Pernice who explores the potential of the internet serving as an instrument for enhancing legitimacy at European level. Using the concepts of input-, output- and throughput-legitimacy, he explains how two separately existing discourses of digitisation (digital agenda and e-government) and of legitimacy (democratic procedures and accountability) in the Union can be merged so to allow for ensuring more transparency of, and citizen's participation in the exercise of public authority in the EU. The internet could bring the institutions closer to the citizen, enhance deliberative and participatory democracy and, thus, help overcoming legitimacy deficits in a digital Europe.

IV. Practical proposals for enhancing legitimacy in Europe and some fundamental thoughts on EU democracy are developed in Part Four titled: *Re-organising Legitimacy in the European Union: Reform Perspectives.*

Federico Fabbrini follows a rather institutional path for addressing the legitimacy problem of the EU. In his view, the lack of transparency and accountability in the Union's decision-making processes is due to an opaque functioning of the Council. His proposal is to revise the EU Treaties, by explicitly making the European Council, rather than the Council of Ministers, the EU upper legislative house. Both, the dual nature of the Union and the allocation of legislative and executive responsibilities in the EU would thus be made clearer to the citizen.

Miguel Poires Maduro observes that the future governance of the EU must be based upon a revised justification of the project of European integration, a justification that focuses on the democratic and social challenges faced by the States and the EU value in responding to them. The EU is not a challenge to national democracy but, instead, an entity offering renewed possibilities for democracy and social justice where States can no longer offer them. With a democratic explanation for the crisis and the Union's failure to successfully address it to date, he demonstrates why the existing model based upon the Stability Compact and instruments of financial solidarity and debt mutualisation cannot function. Financial solidarity in the EU must be detached from transfers between states and related, instead, to the wealth generated by the process of European economic integration. He therefore argues in favour of a EU budget capable of providing the Union with the necessary financial muscle to address and prevent future crises. In

addition, the EU would need to change the nature of its policies so as to improve the way in which the institutions 'communicate' with citizens and increase their capacity to induce real systemic reforms in the States.

With a very deep and forward-looking analysis of the developments in the EU Joseph Weiler, finally, describes the current circumstances as "a loss of *heimat*". He explains the long-term processes in the EU as a "depletion of legitimacy resources of Europe and the Union" and uses Brexit and the current responses to it as "a prism to examine the reaction to the crisis". So he develops some ideas on how "to arrest the decline and even possible demise" of the EU. It starts with reminding the "nobel side" of patriotism, that is part of "the republican form of democracy", an appeal to the civic responsibility of each citizen for the politics of his homeland – taking ownership– as I understand, not only of one's state but also of the EU. Valéry Giscard d'Estaing, in his great Humboldt-Speech on Europe, 2006, has explained patriotism by two sources: "fierté et appartenance" (pride and belonging), the latter arising from an emotional pulse ("pulsation affective") encompassing both, that we belong to Europe and that Europe belongs to us.[21] Losing this belonging means losing *heimat*. Also the emphasis only on rights, the mistake that we understand ourselves as a "rights generation" contributes to this loss; and so does the insistence upon human dignity as uniqueness only, leaving aside that as humans we are also social beings, that we are part of a collective and have duties. For Weiler, the current concepts of (input-, output- and telos-) legitimacy are "exhausted, inoperable in the current European circumstance", and democracy "still feels like a foreign implant": it was not part of the "original DNA of European Integration", and the "collabse" of all the legitimacy resources of the EU comes in a moment when the Union would need them all. Finally, the loss of leadership in the EU is explained as another – "fear inducing" – loss of *heimat*. Weiler uses the response to Brexit as an illustration for this. His proposal is to look for a status of the UK as comfortable as possible, "even perhaps a form of Associate Membership". This could result in a win-win situation.

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21 Valéri Giscard d'Estaing, Peut-on créer un patriotisme europeén? Speech of 9 November 2006, in: Ingolf Pernice (ed.), Europa-Visionen (Berliner Wissenschafts-Verlag, 2007), p. 199, 202, also available at: https://plone.rewi.hu-berlin.de/de/lf/oe/whi/humboldt-reden-zu-europa/archiv-humboldt-reden/reden/hre-giscard-destaing.pdf (accessed 11 April 2017).

In the present introduction it is not possible to give more than a faint idea of the richness and thoroughness of the contributions made at the conference. Its only purpose is to whet the reader's appetite to go through the following chapters and develop his/her own views and initiatives for enhancing the legitimacy of the EU. They may be encouraged to develop their own – critical – views by the comments made by Joseph H.H. Weiler on a number of contributions in his "Dialogical Epilogue" concluding the volume, and on the reactions and explanations of the authors of the contributions. This dialogue is an attempt to giving more life to the debate of one of the most crucial problems of the European Union. It shall contribute to an open deliberative process of critical thinking and creativity on the financial crisis, on Brexit and on a reform of the EU with a view to find a solution which is overdue if the process of integration is to be driven forward in a way acceptable to those who are the real owners of the Union: the citizens.

The Thessaloniki conference would not have been possible without the generous support of the Friedrich-Ebert-Foundation and Christos Katsioulis, the head of the Foundation's office in Athens. We also owe a lot to the friendly support of the Goethe Institute in Thessaloniki, represented by Mr. Peter Panes and Aris Kalogiros, for regaling the participants with a most enjoyable Greek working dinner. And we are extremely grateful to the Jean Monnet Chair for Constitutional Law and Culture of the Law School of the Aristotle University of Thessaloniki for generous support both with human resources and funding and, in particular, to Professor Lina Papadopoulou and her team who made this conference happen —and an unforgettable event for all those attending.

The conference was organised *in memoriam Dimitris Tsatsos*, and this volume is dedicated to the *Dimitris Tsatsos*, founding member of the ECLN whose personality unforgettably combined the best of Greek culture and unlimited devotion to —and creative political and legal thinking for— our common project, which is the European Union.

Berlin, 11 April 2017   *Ingolf Pernice*

**Part One
Looking for appropriate concepts:
Legitimacy and European Democracy**

1 Deliberative Democracy
Within and beyond the State

George Gerapetritis

Abstract

Deliberative democracy provides the framework for a new vision of constitutional legitimacy as a response to the shortcomings of conventional sources of formal legitimacy and accountability. This deficit has become broader and deeper due to the augmented powers conferred on, or assumed by, supranational entities, especially the European Union, and the vertical and horizontal interplay between various institutional actors both at national and at international level. In order to realise its potential as a factor of constitutional legitimacy, deliberative democracy ought to be developed not only as a conceptual instrument of political philosophy but mostly as a set of applied constitutional mechanisms to supplement existing institutional safeguards. The paper examines both the theoretical background and the constitutional implementation of deliberative democracy.

I. Introduction

Deliberative democracy constitutes the most contemporary and most intense form of the debate on democracy. David Held considered it as a new (ninth) version of democracy in the 3rd edition of his authoritative *Models of Democracy*.[1] As a term, it first appeared in Joseph Bessett's work in 1980[2] and was expanded in his later works.[3] Distinguished scholars world-

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1 D Held, *Models of Democracy*, 3rd edn (Cambridge/Malden, Polity Press, 2006) 231-58.
2 J Bessett, 'Deliberative Democracy: The Majority Principle in Republican Government' in L Goldwin and D Shambra (eds), *How Democratic is the Constitution?* (Washington DC, American Enterprise Institute, 1980).
3 J Bessett, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago, University of Chicago Press, 1994).

wide have ever since elaborated upon the theme, such as Joshua Cohen, Claus Offe and Ulrich Preuss, James Fishkin, Jon Elster, John Dryzek, Philip Petit and James Bohman. Further, fundamental aspects of deliberativism in democratic decision-making have been treated by leading figures of political philosophy, such as Jürgen Habermas, John Rawls, James Madison, Karl Marx and Plato himself. In his seminal contribution, bridging ancient Athens with contemporary representative democracy, Habermas set out the idea of the public sphere as a (virtual) community where people gather together as a public, articulating the needs of society and generating opinions and arguments that guide the state in a rational discourse in which all participate on an equal basis. Accordingly, in a state of 'ideal speech situation', everyone should be allowed to take part in a discourse, to introduce and question any assertion whatever and to express their attitudes, desires and needs; on the other hand, no one should be prevented, by internal or external coercion, from exercising the above rights.[4]

As of the 1990s there has been a deliberative turn, which stands for a wider reflection on the qualities of deliberative democracy as a response to the inherent deficiencies of democracy, mostly from the standpoint of political science and philosophy. This turn culminated in the 2000s with a further shift from a purely theoretical assessment of political behaviour to an implied constitutional demand for further deliberative techniques within the framework of constitutional legitimacy. Thus, deliberativism has developed as a condition for state legitimacy, political justice and equality. In Rawls' view, a liberal political conception of justice and a reasonably just constitutional democracy must ensure sufficient all-purpose means to enable everyone to make intelligent and effective use of their freedoms. This requires a basic structure preventing social and economic inequalities from becoming excessive: 'The guaranteed constitutional liberties taken alone are properly criticized as purely formal. By themselves, without … [the

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4 J Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, 5. Auflage (Darmstadt/Neuwied, Hermann Luchterhand Verlag, 1962) 176-85; translated into English by Th Burger with the assistance of F Lawrence under the title *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Boston MA, Massachusetts Institute of Technology, 1989).

means to use the freedoms] they are an impoverished form of liberalism – indeed not liberalism at all but libertarianism'.[5]

II. Definition of 'deliberative democracy'

Although there are significant conceptual varieties of the doctrine, deliberative democracy stands for the process of opinion convergence through wide and equal participation and the reasoned and elaborate exchange of arguments so as to produce legitimate outcomes, i.e. ethical and justifiable grounds for regular obedience to power. Accordingly, no judgment can claim correctness and validity unless it constitutes the product of a deliberative process that makes it justified and reasoned. Therefore, deliberativism does not need to establish a single pattern of reason that ought to dominate the deliberative process. Although participants must be in a position to properly assess the evidence provided in the context of interplay and fair play procedures, by placing emphasis on the future political community interest, a fact-regarding, future-regarding and others-regarding process of reasoning, as Offe and Preuss suggest,[6] there is no manual of reason. According to deliberative theory, when the decision-making process employs the required conditions precedent, the outcome is bound to be reasoned, without the need to have recourse to setting a standard of reason in order to assess the outcome itself. By way of contrast, if no deliberative process is followed, the outcome may still be, as a matter of coincidence, reasonable, or even optimal, but it cannot be reasoned. It is, in that view, the deliberative process that will adduce reason and not the opposite. In that abstract sense, the deliberative process resembles Rawls' 'pure procedural justice' (as opposed to perfect and imperfect procedural justice), in which if there is a correct or fair procedure, the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.[7]

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5 J Rawls, *The Law of Peoples with the Idea of Public Reason Revisited* (Cambridge MA, Harvard University Press, 1999) 49.
6 C Offe and U Preuss, 'Democracy Institutions and Moral Resources' in D Held (ed), *Political Theory Today* (Cambridge, Polity, 1991) 156-57.
7 J Rawls, *A Theory of Justice* (Cambridge MA, Harvard University Press, 1971) 118-41.

Deliberation semantically surpasses both reflection and dialogue. It surpasses reflection, which is a solipsistic exercise, by involving at least two people or deliberative bodies or entities; one person, irrespective of the level of his/her intelligence, is not in a position to enter into a deliberative process of argumentation and exchange.[8] It also surpasses dialogue, in that it emphasises not only the procedural mechanics of speech-making, to which dialogue is basically restricted, but also the scope of participation (the maximum possible of all stakeholders) and the actual outcome of the deliberative process, i.e. the achievement of an optimum result for the political community. It essentially stresses the importance of public discourse, beyond the conventional static concepts of constitutional pluralism and civil multi-culturalism, which are founded merely upon the idea of participation and tolerance and call for more elaborate and more legitimate techniques of decision-making.

Deliberative democracy can take two different forms. First, it can take the form of an internal, deliberative decision-making process. In this respect, deliberative democracy sets out deliberative rules of procedural propriety for any multi-member decision-making body, either institutional, such as a constitutional assembly, parliament, cabinet or court, or non-institutional, such as a family assembly (internal deliberativism). Second, it can take the form of an external deliberative technique that assists and substantiates the decision-making process. Thus, in order for a deciding body to take a decision it might establish various consultative deliberative techniques, such as deliberative assemblies, polls and referenda. In turn, these collective bodies must themselves abide by the standards of deliberative decision-making (external deliberativism).

Deliberativism applies both to direct democracy and to representative democracy. Contrary to the Athenian ideals of direct democracy through the continuing expression of the will of the people, representative democracy places emphasis predominantly on a predetermined public process that guarantees the free and equal expression of competing social and political values, as a form of societal conflict resolution based on reason. Therefore, deliberativism, requiring both wide participation and deliberative procedures, might equally be compatible with either type of democracy. Accordingly, in direct democracy the participation test is by definition

8 I Shapiro, 'Optimal Deliberation?' (2002) 10 *Journal of Political Philosophy* 196, 196-97.

satisfied and it remains for the deliberation test to be tested, whereas in representative democracy both the participation and the deliberation tests ought to be satisfied.

In the same way, deliberativism applies equally to procedural and instrumental democracy.[9] Procedural democracy values political participation for its own sake as a fundamental mode of self-realisation, thus restricted to guaranteeing global participation in periodic elections and the free expression of all citizens. Procedural democracy focuses on the actual significance of the process of political participation in the election of representatives and, at a later stage, on the one-off mandate granted to them through the constitutional process of election. In this case, deliberativism serves as an additional tool to ease the potentially adverse effects of both the majoritarian nature of democratic processes and the defects of the instant (as opposed to on-going) expression of a people's will. Instrumental democracy has tended to become a means for protecting citizens from authoritarian choices, thus going over and beyond mere elections and majority rule and broadly embracing the salient notion of the rule of law. Instrumental democracy aspires to safeguard the rights of citizens on an on-going basis and to prevent potential arbitrariness on the part of the rulers. Accordingly, deliberativism operates so as to define at any given time the limits of government as a form of reflective civil attitude towards political choices that may be motivated by the government's own interests or do not, at the end of the day, serve the interests of the political community. In the light of the above, deliberative democracy aspires to bring together the two seemingly antithetical poles of procedural and instrumental democracy by cherry-picking the best qualities of both models. From the first it enhances the quality of procedural propriety as a means to produce legitimate results; from the second it enhances the quality of good cause as a way of producing reasoned results.

Since no single reasonableness test exists, it is of no avail to consider whether it should be a judicial- or political-like decision-making process, which eventually turns to the discussion on legal and political constitutionalism respectively. Although, admittedly, there is a different perspective and scope in each debate, as there is in any other forum (professional, family etc.), the standards of deliberativism remain the same. The deliberative process is not more akin to a judicial decision-making context be-

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9 D Held, *Models of Democracy* (n 1) 231.

cause the latter needs to adhere more to a deductive pattern of reasoning. For the tools of reasoning, irrespective of how flexible or strict they are, remain outside the necessary components of the deliberative process. A political entity aspires to make the optimum decisions for the benefit of the political society it represents by using its discretion within the boundaries of the law and the constitution, whereas a judicial organ is mandated to apply the law and the constitution so as better to serve the spirit and letter of the rule, which in turn is supposed to advance the welfare of the political community. In both cases, however, the deliberative process can equally apply and, if so, the outcome will be deemed reasoned and, therefore, legitimate.

III. *Purpose of deliberative democracy*

Deliberative democracy serves a threefold purpose in the decision-making process: the dogmatic purpose of legitimacy, the instrumental purpose of participation and the substantive purpose of reason.

The *dogmatic* purpose of legitimacy suggests that deliberativism serves to invest with legitimacy the decisions taken by authorities (the dogmatic purpose). This is particularly the case when the deciding entities do not enjoy a satisfactory level of legitimacy or need their legitimacy to be updated or upgraded. The underlying idea is that, as John Dryzek, Professor in Social and Political Theory at the Australian National University and a great proponent of deliberative democracy, sees it, the outcomes are legitimate to the extent that they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question.[10] In this, deliberativism purports to bridge the potential gap between legality and legitimacy. A decision may well conform to the law in its traditional sense of a system of legality, but might lack legitimacy either because it comes from an authority without or with only limited legitimacy (the organic factor), such as might be the case of an expert committee established by the executive or the legislature to settle a difficult technical issue, or because it runs contrary to the people's will or reason, such as might be

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10 JS Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, Oxford University Press, 2000) 651.