

# Multilevel Constitutionalism and the Crisis of Democracy in Europe

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Misconception of the EU is the reason for increasing scepticism – multilevel constitutionalism: conceptualising the EU as a matter of the citizens – critiques and the defence of multilevel constitutionalism – European treaties as a form of a new supranational social contract – embedded autonomy in a system of divided sovereignty – explaining and enhancing democratic legitimacy of the EU – the legitimising principles of additionality, of voluntariness and of open democracy – taking ownership of the EU and taking subsidiarity seriously – backing the European monetary policy by new competences for a common economic and fiscal policies – engaging in European policies as a way out of the crisis.

## INTRODUCTION

The European Union is in crisis. It is a financial crisis, it is a crisis of democracy, and it is a crisis of mind. Some people in some member states believe that the financial crisis is over. This is not the case in Greece, if I am not mistaken. People are suffering, the austerity policies imposed in exchange to new loans are breathtaking. While some finance ministers and the bankers speak of an end of the crisis, people might see this less optimistically. What is not over at all is the crisis of democracy and of mind.

Here is how I see it: People do not trust their governments. And even less do they seem to trust the European institutions, particularly those in charge of the financial crisis. As the European elections of May 2014 indicate, there is a strong move towards scepticism against the EU, if not an increasing trend to reject the

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idea of European integration in general. David Cameron was already speaking in his Bloomberg Speech of January 2013 about a withdrawal of the UK from the Union if the EU does not return to being merely a free trade area. That he employed this idea in the hope of winning the UK General Election in 2015 tells us a lot about minds in Britain. As to France, the self-declared anti-European extreme right party of Marine le Pen has won 32% of the French seats in the European Parliament. In Germany too, we have a new anti-Euro-party gaining ground, and in Greece – the cradle of Europe and democracy – the sympathy for the European Union is under particular stress.

What has all this to do with ‘multilevel constitutionalism’? I submit that multilevel constitutionalism is a valid theoretical concept for explaining the EU, and that understanding the EU as an example of multilevel constitutionalism can support the citizens taking ownership of their EU and, thus, serve as a remedy to the crisis of democracy and minds in Europe. To demonstrate this, let me, first, give you some reasons for why I believe that some current misconceptions of the EU and its constitutional architecture might be the source of an increasing distrust to the very idea of European integration and to the Union at large. I will, second, explain my citizen-based position by summarising the concept of multilevel constitutionalism and strive to defend it against certain reservations and criticisms with a view to, finally, developing some ideas on how the EU could overcome the crisis of democracy by taking seriously the citizens of the Union.

#### MISCONCEPTIONS OF THE EU AND ITS CONSTITUTIONAL ARCHITECTURE

People have difficulty understanding what the EU really is, and what it is made for. It is an abstract entity: we can neither see nor feel it. We do not even have a proper language to describe it. So we use terms of traditional political philosophy and constitutional law, which were developed for states. The EU is not a state. Misunderstandings necessarily result from this. Though we have some idea about what is meant by democracy, the rule of law, separation of powers, fundamental rights or federalism, these concepts too do not necessarily fit for the EU. The fact that their understanding varies from country to country means that a common translation for the EU is far from likely.

If most observers agree that the EU is not a (federal) state, there is less agreement on what it actually is. Is it an international organisation or a federation of sovereign states? The terminology developed by Georg Jellinek, in particular the categorical distinction between the federation of states (with no legal personality) and the federal state (having legal personality)<sup>1</sup> is difficult to apply to the EU.

<sup>1</sup>G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882) in particular p. 172-197 and p. 253-314.

The EU falls in between, with features or elements of both. Some people speak of an organisation *sui generis*, but even this open definition does not give us a hint of what the EU really is. Paul Kirchhof, and with him the German Federal Constitutional Court, created the term ‘Staatenverbund’, a sort of compound of states.<sup>2</sup> This is where we stand until today.

What is the problem with this term – a term which has received broad acceptance at least of governments, constitutional courts and the ‘conservative’ state-centred legal academia? The main problem is that it describes the EU as a creature of states, not of people. It uses the form of its establishment – international treaties – as determining its legal nature, including the claim that the member states remain sovereign states, and the ‘masters of the ’treaties’. So, the EU is a matter of the states, of abstract political bodies having established an even more abstract organisation for their purposes. The owners of the EU, in this view, are states rather than people, ie not the citizens.

Governments and even national constitutional courts might like to maintain this approach, for it preserves power. It is more convenient for them to govern without the people being involved. If states are recognised as the masters of the treaties, people are more easily encouraged to focus and limit their interest to national policies. Some constitutional courts interpret Union law as international law, as its applicability at the national level then depends on national law and is subject to their scrutiny. This allows the courts to feel powerful, if not sovereign, and to have the last word in each case of doubt.<sup>3</sup>

Brussels is often accused by political leaders, in national parliaments and in the public discourse, of being a threat to national political autonomy. It is seen as a separate, foreign power intruding in spheres of national autonomy and interfering with the democratic prerogatives of national parliaments. The principle of subsidiarity and what we call the ‘early warning system’, were thus introduced as a defence against the EU grabbing competences and power. Some members of national parliaments use constitutional courts for the same purpose: to fight against the beast and so gain popular support. And some courts happily admit such cases – though Article 263 TFEU clearly gives the European Court of Justice the power to judge upon *excès de pouvoir* – because it adds to their power.

If the member states are the ‘masters of the treaties’ and European policies are part of the external policies, why should people feel responsible as citizens of the Union

<sup>2</sup>BVerfGE 89, 155, *Maastricht*. See P. Kirchhof, ‘Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht’, 1 *Europarecht Beiheft* (1991) p. 11 at p. 18 ff.

<sup>3</sup>On the question of the last word see F.C. Mayer, *Kompetenzüberschreitung und Letztentscheidung*. Das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires-Akte in Mehrebenensystemen. Eine rechtsvergleichende Betrachtung von Konflikten zwischen Gerichten am Beispiel der EU und der USA (2000), <[www.whi-berlin.eu/mus150.pdf](http://www.whi-berlin.eu/mus150.pdf)>, visited 17 October 2015.

and participate in the political processes? People notice that European policies shape their conditions of work and life, in much the same way as national policies, but they are not involved with them. They are frustrated by not having a voice, feel as though they are governed by 'thirds', contrary to the ideas of self-government. So they condemn the Union for having a democratic deficit. Frustration regarding inefficiencies of European economic and foreign policies – areas where the EU has no or only limited competence – adds to their negative attitudes.

All this, I submit, is the result of false explanations and wrong conceptions of what the EU really is about. Multilevel constitutionalism offers a different perspective.

### THE CONCEPT OF MULTILEVEL CONSTITUTIONALISM

Take the perspective of a citizen of a democratic member state. Conceptualise the European Union as a creature not of states, but of the citizens acting through, and represented by, their national governments in the name and on behalf of the citizens. This is how I understand democratic states. Treaties, negotiated by governments implementing the will of the people, are ratified with the authorisation of national parliaments representing the people, if not directly after a referendum. Specific 'integration-clauses' in our national constitutions allow that, contrary to normal international agreements, institutions are established and powers are conferred on these institutions by the EU treaties. They open up the nation-state to a common, supranational legislative, executive and judicial authority acting with direct effect upon the rights and duties of the individual. And as people are directly affected, it was felt that there was a need to protect fundamental rights, similar and equivalent to the protection individuals are used to having against the national public authority. This is why we have, since the Treaty of Lisbon, the Charter of Fundamental Rights which is legally binding and part of the Union's primary – or as I would say, constitutional – law.

As I have elaborated more deeply in other pieces of work, my proposition is to view and explain the EU from the 'bottom up', from the perspective of the citizen. By regarding the EU treaties in this way, citizens 'constitute' this European Union and so define themselves as 'citizens of the Union'. They thus give themselves a common new political and legal status, in addition to their political status as citizens of their respective member states. The citizens are the 'masters of the 'treaties', just as they are the masters of their national constitutions through their status as national citizens. In the process of making and developing the EU treaties, national governments and other institutions are tools or instruments in a constitution-making process: they make the constitution of a supranational Union that is based upon, and complementary to, the national constitutions.

The term 'multilevel' constitutionalism seems to imply a hierarchy. But the supranational as an additional constitutional level is not hierarchically higher or

lower than the national constitution, but juxtaposed in a pluralist sense. European constitutional law is not separate from, but based upon, the national constitutions; European and national constitutional law are in many ways interwoven and interdependent; they form one system of law, a unity in substance producing, ideally, one legal solution in each particular case.

This systemic unity is reflected in three sets of principles governing the constitutional architecture of the EU, unknown in international law contexts, but common to federal systems:

- 1 With regard to the distribution of powers, the principle of conferral (Article 5(2) TEU and Article 7 TFEU) guided by the principle of subsidiarity in a broad sense ensures a limited and balanced attribution of competences to the EU (see the system established by Articles 2 to 6 TFEU), while the exercise of the powers conferred to the EU is governed by the principles of subsidiarity in a more specific sense and under the control of the national parliaments, and of proportionality (Article 5 TEU).
- 2 With regard to the relationship between Union law and national law, the former precedes the latter where there is conflict between the two. National administrations, by implementing European legislation (Articles 4(3) TEU and 291(1) TFEU), and national judges, by ensuring effective legal protection in the fields covered by Union law (Article 19(1) subparagraph 2 TEU), act as European agents bound by the principle of primacy in all cases as required by the principles of uniform application of Union law, effectiveness and equality before the law.
- 3 To further ensure the functioning of the system, there are specific constitutional safeguards: the provision on common values and general principles of law (Article 2 TEU), the principle of permeability between the two constitutional levels<sup>4</sup> and, in particular, specific provision for the effective protection of fundamental rights at both levels, where Union law is applied (Article 6(1) TEU and Article 51 Charter of Fundamental Rights).

All these provisions make sense if understood as a way of people organising public authority at national and supranational level, instituted with different powers, for acting in their common interest, respectively, for different purposes as their common ‘agents and trustees’.<sup>5</sup> Consequently, the European Union can be

<sup>4</sup> See M. Wendel, *Permeabilität im Europäischen Verfassungsrecht* (Mohr-Siebeck 2011).

<sup>5</sup> See, for the underlying idea, J. Madison, ‘The Influence of the State and Federal Governments Compared’, in A. Hamilton et al., 46 *The Federalist Papers* (1787/88): ‘The federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes’.

understood – in legal terms – as a composed constitutional system founded in the will of the citizens in their capacity and status as both citizens of their respective member states and citizens of the Union. These citizens are the owners of the Union – in legal and political terms – and apart from the citizens, there is no source of legitimacy for the policies implemented by the respective institutions at each level.<sup>6</sup> The recognition of the direct effect of provisions of the treaties as well as of EU directives in the case law of the European Court of Justice, since the judgment in *Van Gend & Loos*,<sup>7</sup> and the development of the rights derived from the treaties from individual rights of market citizenship to civic rights of Union citizenship since the Treaty of Maastricht, allow citizens to also play a fundamental role in safeguarding European law as ‘guardians of the ’treaties’.<sup>8</sup>

Recognition of the ultimately political democratic status and responsibility of the citizens of the Union<sup>9</sup> can be found in the provisions on the double representation of the citizens, directly in the European Parliament and indirectly in the European Council and the Council, whose members are accountable, as Article 10(2) TEU specifies, ‘either to their national parliaments, or to their citizens’. Recognition can also be found in Article 11 TEU on the participation of citizens and civil society in the EU political process and, in particular, on the citizen’s initiative. Finally, it is more than symbolic that Article 14 TEU on the European Parliament specifies that it is ‘composed by representatives of the Union’s citizens’, and not as in earlier times, by representatives of the peoples of the member states.<sup>10</sup>

## CONCEPTUAL RESERVATIONS AND CRITIQUES

The concept of multilevel constitutionalism as a guide for better understanding the European Union has found some acceptance in literature, but it has not remained

<sup>6</sup> On this line of thought see also A. von Bogdandy, ‘Grundprinzipien’, in A. von Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge* (Springer 2009) p. 13 at p. 64; see also J. Habermas, *The Crisis of the European Union. A Response* (Polity 2012) p. 36-37.

<sup>7</sup> ECJ 5 February 1963, Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

<sup>8</sup> See C. Calliess and M. Hartmann, *Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit* (Mohr Siebeck 2014) p. 33 ff. and p. 47.

<sup>9</sup> A similar line of thought seems to be seen in the proposal of J. Hoeksma, ‘The Identity of the European Union,’ *Peace Palace Library Blog*, 24 October 2014, <[www.peacepalacelibrary.nl/2014/10/the-identity-of-the-european-union/](http://www.peacepalacelibrary.nl/2014/10/the-identity-of-the-european-union/)>, visited 16 October 2015, describing the EU as a ‘union of citizens and member states which functions as a common democracy’.

<sup>10</sup> On these constitutional shifts brought about by the Treaty of Lisbon see in more detail: I. Pernice, ‘The Treaty of Lisbon. Multilevel Constitutionalism in Action’, 15 *Columbia Journal of European Law* (2009) p. 349 at p.354-359, available also as *WHI-Paper 02/09*, <[www.whi-berlin.de/documents/whi-paper0209.pdf](http://www.whi-berlin.de/documents/whi-paper0209.pdf)>, visited 17 October 2015.



without criticism either.<sup>11</sup> In German scholarship, it was primarily Mattias Jestaedt who qualified the term ‘Verfassungsverbund’ [constitutional compound] as being an oxymoron.<sup>12</sup> Basically following this argument, in the English-speaking literature, René Barents has undertaken to explain why ‘the multilevel theory is a fallacy’.<sup>13</sup> Neither can understand how there could be a unity of two separate legal orders, each claiming autonomy. Jestaedt takes a Kelsenian theoretical position and sees no way to reconcile the thesis of unity of the two legal orders if there is not a common ‘Grundnorm’ [basic norm] in the Kelsenian sense.<sup>14</sup> In the same line of thought, Barents takes a pluralist view for the two autonomous legal orders that he sees ‘competing’ with each-other, but denies the possibility of unity.<sup>15</sup> While I have already dealt with the arguments of Jestaedt at another place and will resist repeating my reply to him,<sup>16</sup> in order to pave the way to further developing my citizen-based perspective of constitutionalism beyond the state and, in particular, in the EU, I shall briefly discuss the four key points of critique developed by René Barents:<sup>17</sup> unity in substance; the concept of a European social contract; the autonomy thesis and the concept of divided sovereignty.

#### *‘Unity in substance’ in the citizen’s perspective*

I have proposed multilevel constitutionalism as a normative theory for better understanding the EU as a new mode of political self-organisation of the people in Europe empowering themselves to meet in common, through supranational institutions, challenges that the individual states on their own are unable to deal with effectively. This means that the process of European political integration can

<sup>11</sup> For an overview on the reception of the concept see Pernice, *supra* n. 10, p. 352-353.

<sup>12</sup> M. Jestaedt, ‘Der Europäische Verfassungsverbund – Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation’, in R. Krause et al. (eds.), *Recht der Wirtschaft und der Arbeit in Europa. Gedächtnisschrift für W. Blomeyer* (Duncker & Humblot 2004) p. 638; also in C. Calliess (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht* (Mohr Siebeck 2007) p. 93-127.

<sup>13</sup> R. Barents, ‘The Fallacy of European Multilevel Constitutionalism’, in M. Avbelj and J. Komárek, (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) p. 153.

<sup>14</sup> Jestaedt, *supra* n. 12, p. 111-127.

<sup>15</sup> Barents, *supra* n. 13, p. 178-179.

<sup>16</sup> I. Pernice, ‘Theorie und Praxis des Europäischen Verfassungsverbundes’, in C. Calliess (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht* (Mohr Siebeck 2007) p. 61-92, also available as WHI-Paper 08/08, < [www.whi-berlin.eu/documents/whi-paper0808.pdf](http://www.whi-berlin.eu/documents/whi-paper0808.pdf) >, visited 17 October 2015.

<sup>17</sup> See, as a first step, I. Pernice, ‘La Liga Constitucional Europea puesta a prueba’, in J. Alguacil González-Aurioles and I. Gutiérrez Gutiérrez (eds.), *Constitución: Norma Y Realidad. Teoría constitucional para Antonio López Pina* (Marcial Pons 2014) p. 209 at p. 223-235.

be reconstructed as a constitutional process from the early 1950s, involving both the national and the European constitutional level. EU primary law thus is understood as set of constitutional laws, complementary to each of the national constitutions, built upon them and modifying in part their reach, substance and meaning.<sup>18</sup>

Barents suggests that after the failure of the Treaty establishing a Constitution for Europe in 2006, what he calls the ‘de-constitutionalisation’ in the framework of the Lisbon Treaty should have resulted in a ‘modification of the multilevel theory’.<sup>19</sup> But this shows a misunderstanding both of the theoretical concept and of the constitutional leap made by the Treaty of Lisbon. Multilevel constitutionalism was developed in the late 1990s, long before the Constitutional Treaty or the Treaty of Lisbon were in sight.<sup>20</sup> The work of the Constitutional Convention laying down a Draft Treaty on the Constitution of Europe, was an attempt to give the constitutional nature of the primary law of the EU a more explicit and systematic expression. It was rejected for a number of reasons. In substance, however, the Lisbon Treaty that finally came into effect instead not only gives better ground for a constitutional reading of the EU primary law, but also confirms the pluralist concept of autonomous but interdependent legal orders, forming together one composed constitutional system in the service of the citizens.<sup>21</sup>

Barents, basing his critique on a rather formal reading, considers the ‘unity in substance thesis’ an absurdity, as it suggests that the twenty-eight national constitutions and the Union constitutional order are understood to form this unity.<sup>22</sup> Yet, from the perspective of the individual citizen, only one

<sup>18</sup> For the case of Greece see L. Papadopoulou, ‘Die implizite Änderung der griechischen Verfassung durch das EU-Recht’, 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) p. 141 in particular at p. 143-144. For Germany see the decision of the German Constitutional Court BVerfG, 19.7.2011, 1 BvR 1916/09, <[www.bverfg.de/entscheidungen/rs20110719\\_1bvr191609.html](http://www.bverfg.de/entscheidungen/rs20110719_1bvr191609.html)>, visited 17 October 2015, giving Article 19(3) of the Basic Law a reading that allows, *contra legem*, in order to comply with EU law of non-discrimination, legal persons of other member states to be treated as national legal persons with a view to the protection of fundamental rights.

<sup>19</sup> Barents, *supra* n. 13, p. 158.

<sup>20</sup> See I. Pernice, ‘Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and “Multilevel Constitutionalism”’, in E. Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998* (Nomos 1998) p. 40, reprinted in Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed.), 1 *Grundfragen der europäischen Verfassungsentwicklung, Forum Constitutionis Europae* (Nomos 2000) p. 11.

<sup>21</sup> For a deeper development of the impact of the signature and failure of the Constitutional Treaty and the salvage of its substance by the Treaty of Lisbon see Pernice, *supra* n.10, p. 349.

<sup>22</sup> Barents, *supra* n. 13, p. 160.



relevant national constitution and the European law, applicable side by side in each member state, are of relevance.<sup>23</sup> Unity does not mean identity,<sup>24</sup> for the European legal order is necessarily distinct from, while complementary to, each of the diverse national constitutions. So, unity does not exclude diversity in source, contents and design of the two components of the system, nor does it exclude national constitutional identity as granted under Article 4(2) TEU. The opposite is true. From a sociological perspective, identity may grow and become more defined when distinguishing itself from other identities under a common concept. The European context might even promote a process of formation of national identities, also in a legal sense. In the EU, however, national constitutional identities have a 'European dimension'.<sup>25</sup> It would be a misapprehension grounded in post-colonial nation-building processes by European elites to suppose that ethical diversity, and thus a broad spectrum of differing basic constitutional decisions, constitutes an obstacle for unity.<sup>26</sup> The phrase 'United in diversity', when it was selected as the motto for the European Union, not only represented the feeling of Europeans, but it was popular also in heterogeneous countries such as South Africa and Indonesia. Thus, there is neither the need nor the will in the EU to form a unity of twenty-eight identical national constitutions. With a view to ensuring vertical and horizontal coherence, nevertheless, Articles 2 and 7 TEU are a safeguard for a certain degree of homogeneity of all the components of the European constitution as required for the proper functioning of the system. Together with corresponding provisions in national constitutions, such as Article 23(1) of the German Basic Law, these basic requirements represent some sort of 'system of mutual stabilisation'.<sup>27</sup> In addition, the judicial dialogue, both

<sup>23</sup> This also covers the point made by Barents, *supra* n. 13, p. 162, that not all member states take part in all domains, e.g. not in the EMU. The proposition made at this place, that by virtue of Protocol no. 30, the Charter of Fundamental Rights is exempted from the jurisdiction of from the jurisdiction of the ECJ and national courts in the UK and Poland is questionable (see I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) p. 235 at p. 244-249) and in any event not relevant here for the same reasons.

<sup>24</sup> See the critique of Barents, *supra* n. 13, p. 161, with reference made to my piece, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited', 36 *Common Market Law Review* (1999) p. 703 at p. 712; when I wrote 'the result seems to be a monist approach' this was not meant, as shown by the explanations given, to adopt all implications that the traditional distinction between monism and dualism would imply.

<sup>25</sup> See A. Ingold, 'Die verfassungsrechtliche Identität der Bundesrepublik Deutschland. Karriere – Konzept – Kritik', 140 *Archiv des öffentlichen Rechts* (2015) p. 1 at p. 27; see also I. Pernice, 'Der Schutz nationaler Identität in der Europäischen Union', 136 *Archiv des öffentlichen Rechts* (2011) p. 185 at p. 210-211.

<sup>26</sup> See J. Knörr, 62 *Aus Politik und Zeitgeschichte*, (11-12/2012) p. 16 at p. 17.

<sup>27</sup> I. Pernice, 'Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung', in R. Bieber and P. Widmer (eds.), *L'espace constitutionnel*

vertically and horizontally, connects the courts into a European judicial network.<sup>28</sup>

Unity in substance does not necessarily imply a monist approach in the traditional sense;<sup>29</sup> it rather means that two separate but permeable autonomous legal orders are interconnected by rules that exclude situations in which two conflicting legal answers are found to be applicable to a single legal problem. The system thus produces one legal solution for the citizen, in each case, and this is what the rule of law requires. The EU constitution can thus be conceptualised as one integrated system, composed of national and European constitutional components established by, and applicable to the citizens of the Union.

### *The concept of a social contract*

Accordingly, multilevel constitutionalism conceptualises the composed European constitution as a system based upon the will of the citizens. It assumes a double political identity, national and European, of each citizen. Democratic legitimacy is understood as being rooted in the will of the peoples of the member states having agreed to share a common citizenship related to the Union as an additional political community established by the European treaties. The concept of a European social contract is used to underline the contractual quality of the broadly consensus-based legitimacy of the supranational public authority so established.<sup>30</sup>

*européen. Der Europäische Verfassungsraum. The European Constitutional Area* (Schulthess 1995) p. 225 at p. 262-263; see also I. Pernice, 'Europäisches und nationales Verfassungsrecht', 60 *Veröffentlichungen der Vereinigung der Deutsche Staatsrechtslehrer* (2001) p. 149 at p. 186: 'System wechselseitiger Verfassungstabilisierung', which contains more references.

<sup>28</sup> See A. Voßkuhle, 'Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 6 *EuConst* (2010) p. 175. For the horizontal implications of each judgment of national constitutional and other courts see I. Pernice, 'La Rete Europea di Costituzionalità, Der Europäische Verfassungsverbund und die Netzwerktheorie', 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010) p. 51, also available as *WHI-Paper 01/2010*, <[www.whi-berlin.eu/documents/whi-paper0110.pdf](http://www.whi-berlin.eu/documents/whi-paper0110.pdf)>, visited 17 October 2015.

<sup>29</sup> So suggests Barents, *supra* n. 13, p. 159. Barents mistakenly suggests (at n. 40) that the pluralist approach is 'explicitly denied' in I. Pernice, *Das Verhältnis europäischer Gerichte zu nationalen Gerichten im Europäischen Verfassungsverbund*, (De Gruyter 2006) p. 54. The text clearly accepts a pluralist approach in a formal sense, while in substance a number of provisions in the treaties set limits and ensure homogeneity, coherence and interaction. For a more elaborated analysis see F.C. Mayer and M. Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism. Querelle Allemande or Querelle d'Allemand?', in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) p. 127 at p. 132-140.

<sup>30</sup> See Pernice 2001, *supra* n. 27, p. 171; for more detail see I. Pernice et al., 'Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism', 12 *King's Law Journal* (2001), p. 60 at p. 68-69, also available as *WHI-Paper 11/2001*, <[www.whi-berlin.eu/documents/whi-paper1101.pdf](http://www.whi-berlin.eu/documents/whi-paper1101.pdf)>, visited 17 October 2015.

Barents criticises this concept as being a fiction and a ‘matter of democratic ideology’; he understands the negative referendums in France and in the Netherlands as demonstrating the opposite: ‘The will of the citizens is not to have a common European will’, he says.<sup>31</sup> Whatever might have been the reasons for people in these two countries to vote against the Constitutional Treaty, the conclusion drawn from the result is questionable. Since the ratification of the EEC Treaty, national parliaments representing their respective peoples and, in some cases, the citizens directly by referendum, have voted in favour of the treaties, their successive amendments or the accession of their country to the Union. If we assume that the member states are democratic, it is far from ‘wishful thinking’, to assume that at least a majority of the citizens of the European Union support this common project.<sup>32</sup> The treaties do not create a European super-state but, instead, establish a supranational public authority that is complementary to that of the member states. This is the answer to Barents’ question as to ‘why the organisation of public power at the Union level is substantially different from that at the national level’.<sup>33</sup>

Barents refers to the ‘old wisdom’ or question, whether one ‘can serve two masters’.<sup>34</sup> Yet, both the EU and the member states are democratically organised polities; they are not ‘masters’ in any sense, but they are both democratically legitimated and controlled instruments of the citizens for pursuing their common public interests. People in Europe are mature citizens, not subjects of the Crown or of any other body exercising uncontrolled power. Once we accept that not the states but ultimately the citizens are the ‘masters of the treaties’, the democratic idea of ‘self-rule’ also applies to the Union.

Christoph Möllers also opines that Rousseau is misinterpreted where the concept of a ‘social contract’ is used with regard to the EU. He stresses that the historical situation is quite different and that the EU treaties have not been concluded by the citizens but by states; representation through the states, he stresses, is not possible for a contract if it is to be a social contract.<sup>35</sup> True, the historical background is different, and a social contract establishing new legitimate public authority is a matter of individuals, not of public bodies. But this is exactly my proposition: the citizens, not the states, are the relevant actors. Governments and parliaments are only the instruments through which the process for coming to an agreement is organised. Citizens have chosen – as laid down in the integration

<sup>31</sup> Barents, *supra* n. 13, p. 166-169 and p. 174.

<sup>32</sup> Interestingly, Barents, *supra* n. 13, p. 173, accepts that ‘all Treaties concluded by democratic states represent the will of the citizens’.

<sup>33</sup> This question was put by Barents, *supra* n. 13, p. 168.

<sup>34</sup> Barents, *supra* n. 13, p. 169.

<sup>35</sup> C. Möllers, *Staat als Argument*, (C.H. Beck 2011) p. XLVIII. See also Barents, *supra* n. 13, p. 172: ‘outright distortion of Rousseau’s philosophy’.

clauses of the respective national constitutions – to use the office of their governments to negotiate, and of their parliaments to control and ratify the treaties, if the ratification is not authorised directly by referendum. The constitutional framework of the EU, thus, is not established by a third party,<sup>36</sup> it is not imposed by forces foreign to the citizens but relies on some kind of general agreement and broad consensus among the citizens concerned.<sup>37</sup> If it is not a contract literally signed by 500 million people – the population of the EU – this has never happened for a constitution, it can nevertheless be attributed to them, ‘as if...’ they had agreed to it. There is no other subject of legitimacy in political systems than the citizens: the state has no legitimacy in its own; it is an abstract entity and somewhat instrumental for its citizens. Granted, the text of Article 1 TEU seems to point to a more state-oriented approach;<sup>38</sup> what is more important, however, is to see who each government or parliament, in the absence of a referendum, is acting for and to whom their action is attributable: the citizens of each Member State acting through their representatives with the aim of establishing common institutions, common powers and decision-making and, accordingly, a common legal and political status: citizenship of the Union.

The reference, made by the first Article of the Constitutional Treaty, to the will of the citizens, was left out of the Lisbon Treaty. The reason for this was to avoid the impression that there was a European people at the origin of a European state. The European Council of 20 July 2007 had agreed in its mandate for the Intergovernmental Conference negotiating the Treaty of Lisbon that ‘the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”, is abandoned’.<sup>39</sup> This does not mean, however, that the constitutional concept as developed in doctrine and accepted by the Court of Justice was questioned in general. It was only the specific concept, as described in the given phrase. All symbolism typical for constitutions of a state, consequently, was renounced too. The Intergovernmental Conference returned to the form of a treaty amending the EU treaties, thus, contrary to a formal constitution, a reference to the will of the citizens was rightly held inappropriate. Yet this does not mean to deny that the EU treaties are ultimately rooted in the will of the peoples of the member states.

<sup>36</sup>This is what Dieter Grimm suggests, with a view to distinguish the European Treaties, concluded by states, from national constitutions made by the people (*see* for this D. Grimm, ‘Does Europe need a Constitution?’, 1 *ELJ* (1995) p. 282 at p. 290). In my view, this distinction cannot be made in substance, for the people are what the state represents.

<sup>37</sup>*See also* Pernice et al., *supra* n. 30, p. 68 ff.

<sup>38</sup>For this argument *see* Barents, *supra* n. 13, p. 173-174.

<sup>39</sup>Annex I to the Presidency Conclusions of the European Council 11177/1/07 REV 1 of 20 July 2007, <[data.consilium.europa.eu/doc/document/ST-11177-2007-REV-1/en/pdf](http://data.consilium.europa.eu/doc/document/ST-11177-2007-REV-1/en/pdf)>, visited 17 October 2015.

*Autonomy and primacy in the EU constitutional system*

Barents understands multilevel constitutionalism as a monist approach, if there is unity in substance based upon the principle of primacy. To assume the autonomy of both legal orders composing the system, in contrast, and to talk about pluralism, would be in contradiction to the unity thesis.<sup>40</sup> I have already explained that the concept of multilevel constitutionalism is not monist in the traditional sense. As we talk about the architecture of a new kind of composed system, the concepts and terminologies of past centuries may not be helpful.

There is neither pure unity nor pure autonomy. As conflicts between a European rule and a national rule can occur, an accommodation for the conflict is needed. Barents understands that the 'multilevel theory' anchors the priority of the Union level in the common will of the citizens, calling this a 'democratic fiction'.<sup>41</sup> This is not meant, however. As the EU legal system cannot hermetically be isolated from the national legal orders and vice versa, so that conflicts do arise in particular cases, the EU rule must be given precedence in cases of conflict as a matter of the principle of equality before the law (Article 9 TEU, Article 20 Charter of Fundamental Rights). It is rather a question of the rule of law and of systemic logic than a question of democracy and political choice. In some way also effectiveness, the '*effet utile*', plays a role. Clearly, the authors of the treaties envisaged a Union that is functioning effectively. Contrary to a federal state, however, primacy in EU law does not mean that a superior federal rule invalidates the inferior rule of the states. It only means that in case of conflict the national rule is inapplicable.<sup>42</sup>

Giving effect to Union law includes respecting the principle of primacy and, as part of it, the duty to interpret national law consistently with EU law. Barents sees a contradiction with the concept of primacy of application [Anwendungsvorrang] as opposed to primacy of validity [Geltungsvorrang].<sup>43</sup> The duty of interpretation of national law consistent with EU law, however, is rooted rather in the principles of sincere cooperation and loyalty of the national bodies (Article 4(3) TEU), than in primacy. Within the limits of interpretation of national law it requires that national law is construed so as to give effect to the relevant European rule and to avoid conflicts with European law. Autonomy, thus, does not exclude normative interdependence, mutual respect and influence but only intrusion: European institutions may not invalidate national law, and national bodies may not invalidate European law. Both legal orders have their own sources of law and their

<sup>40</sup> Barents, *supra* n. 13, p. 175-176.

<sup>41</sup> Barents, *supra* n. 13, p. 177.

<sup>42</sup> See most clearly ECJ 22 October 1998, Case C-10/97, *Ministero delle Finanze v IN.CO.GE. '90 Srl et al.*, para. 21.

<sup>43</sup> Barents, *supra* n. 13, p. 178.



own and separate provisions for judicial review and invalidation.<sup>44</sup> What the rule of primacy ensures, however, is that – in spite of the multilevel structure of the system, as explained – there is one legal answer only for each legal problem.<sup>45</sup>

### *Divided sovereignty revisited*

Sovereignty seems to be an important argument in the discourse on European constitutionalism,<sup>46</sup> and the use of this term for the defence of the autonomy of the national legal order is widespread. The German Constitutional Court has used it abundantly in its judgment on the Treaty of Lisbon,<sup>47</sup> though the Basic Law does not mention it. If the concept is used at all in describing the EU, however, in terms of multilevel constitutionalism, sovereignty – or its exercise – it is understood to be divided or shared among the national and the European level. The idea is not new, indeed, as divided sovereignty is a concept of American origin, as Barents rightly reminds us. And it was used also in the German debate on the theory of federalism in the early 20th century, namely by Georg Waitz and Robert von Mohl.<sup>48</sup> Barents posits that ‘this concept relates to the ultimate source of power in a polity’: talking about dividing it would make it ‘obsolete or at least inappropriate for theoretical purposes’.<sup>49</sup>

Whatever the problem with dividing sovereignty might be, in practice sovereignty does not seem to be absolute. So the 1874 Constitution of Switzerland guarantees in Article 3 the sovereignty of the cantons ‘insofar as

<sup>44</sup> See more in detail Pernice, *supra* n. 29, p. 54.

<sup>45</sup> The Court has recently affirmed the principle of autonomy in ECJ 18 December 2014, in Opinion 2/13 – ECHR, though it seems to be necessary to understand the principle as ‘embedded autonomy’ so to take account of the responsibility of the national constitutional courts to cooperate in ensuring the respect of the rule of law and the limits of EU powers, see I. Pernice, *Autonomy of the European Legal Order – Fifty Years after Van Gend & Loos*, in: Antonio Tizzano, Juliane Kokott und Sacha Prechal (eds.), *50ème Anniversaire de l’arrêt 50th anniversary of the judgment in Van Gend en Loos, 1963-2013, Actes du Colloque Luxembourg, 13 mai 2013 – conference proceedings Luxembourg, 13 May 2013* (2014) p. 55.

<sup>46</sup> Generally questioning the usefulness of the concept of sovereignty, however, see Sir K. Schiemann, ‘Sovereignty: an unhelpful shibboleth’, in U. Becker et al. (eds.) *Verfassung und Verwaltung in Europa, Festschrift für Jürgen Schwarze zum 70. geburtstag* (Nomos 2014), p. 234-243; N. Walker (ed.) *Sovereignty in Transition* (Hart 2003).

<sup>47</sup> BVerfGE 123, 267, *Lissabon*, also available at: < [www.servat.unibe.ch/dfr/bv123267.html](http://www.servat.unibe.ch/dfr/bv123267.html) >, visited 17 October 2015.

<sup>48</sup> G. Waitz, *Grundzüge der Politik* (Homann 1862) p. 153 ff.; R. von Mohl, *Encyclopädie der Staatswissenschaften* (Laupp 1872) p. 367. For an overview see E. Wiederin, *Bundesrecht und Landesrecht* (Springer 1995) p. 3 ff.; in more modern times the theory was re-animated by T. Fleiner, *Allgemeine Staatslehre* (Springer 1980) p. 324 ff., p. 417.

<sup>49</sup> Barents, *supra* n. 13, p. 180-181.

their sovereignty is not limited by the Federal Constitution'. The text of the Swiss Constitution of 1999 was slightly modified into: 'The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution'; this is interpreted as a case of divided sovereignty.<sup>50</sup> As Dieter Grimm shows, sovereignty was not always undividable; only the work of Jean Bodin gave the term this meaning.<sup>51</sup> Barents quotes Calhoun saying: 'To divide it is to destroy it'.<sup>52</sup> Perhaps this is what should be done, at least in constitutional law and theory.<sup>53</sup>

Sovereignty has no specific legal meaning, if it is assimilated with the political self-determination of people in a delimited territory. This seems to be the line followed by the German Constitutional Court in its judgment on the Treaty of Lisbon.<sup>54</sup> Yet, given the increasing interconnectedness of economies, borderless communication and information, asymmetries of security threats and globalisation, democratic self-determination cannot be achieved by states individually. Sovereignty, and similarly people's sovereignty, is a concept for past centuries. The 'external' effects of national policies<sup>55</sup> require revisiting old concepts and developing new approaches.<sup>56</sup> With the interdependence of states in a globalised system, external sovereignty becomes questionable. The EU is a laboratory for exploring new ways to ensure democratic self-determination by common institutions for common problems. Where Barents quotes Carl Schmitt, with his definition: 'Sovereign is he who decides on the exception',<sup>57</sup> the most one can learn from this famous saying is that sovereignty has nothing to do with law. What remains is the conclusion that instead of using the term sovereignty in European law, it may be preferable to more modestly talk about sovereign rights and explain the sharing of powers between the states and the Union as a tool of the citizens to achieve their objectives effectively at the appropriate level according to the principle of subsidiarity.

<sup>50</sup> T. Fleiner and L.R. Basta Fleiner, *Allgemeine Staatslehre, Über die konstitutionelle Demokratie in einer multikulturellen globalisierten Welt* (Springer 2004) p. 451 ff, p. 562 ff.

<sup>51</sup> D. Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press 2009) p. 16-20, p. 25.

<sup>52</sup> Barents, *supra* n. 13, p. 179.

<sup>53</sup> See also Schiemann, *supra* n. 46.

<sup>54</sup> BVerfGE 123, 267, *Lissabon*, para. 224; on this see also Mayer and Wendel, *supra* n. 29, p. 144.

<sup>55</sup> See M. Poires Maduro, 'Three Claims of Constitutional Pluralism', in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) p. 76 ff., p. 79. For further developments see I. Pernice, 'Solidarität in Europa. Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union', in C. Calliess (ed.), *Europäische Solidarität und nationale Identität - Überlegungen im Kontext der Krise im Euroraum* (Mohr Siebeck 2013).

<sup>56</sup> See C. Joerges, 'Integration durch Entrechtlichung?', in G.F. Schuppert and M. Zürn (eds.), *Governance in einer sich wandelnden Welt* (Springer 2008) p. 213 at p. 224 ff.

<sup>57</sup> Barents, *supra* n. 13, p. 181.

## ENHANCING DEMOCRATIC LEGITIMACY IN EUROPE

To assess and enhance democratic legitimacy of the EU and its policies, it is not sufficient to compare the Union's institutional structure and legislative processes with those of a member state, including electoral systems and provisions on transparency and accountability, opportunities of participation and active involvement of citizens and civil society. As already said, the Union is not a state and constitutional concepts for states are not necessarily applicable to the European Union. In the light of multilevel constitutionalism the EU differs from a state, though it exercises public authority and, therefore, needs legitimisation by those who are subject to this authority. It is an instrument, complementary to the states and built upon them, for the citizens to meet challenges beyond the reach of sovereign state policies. Striving for democracy in the EU following simply a state model would be adapting it to a state. The better option seems to be to respect and even enhance the specificities of the Union and organise democratic legitimacy at its level in an adapted and efficient way.

Three structural principles of the European Union have to be taken into account, and four commands need to be heeded for enhancing the democratic legitimacy of European policies.

*Structural principles of the Union*

Three principles characterise the European Union<sup>58</sup>:

- Regarding powers, it is the principle of additionality.
- Regarding participation, it is the principle of voluntariness.
- Regarding legitimacy, it is the principle of open democracy.

*Additionality*

Additionality means that decisions are taken at the EU-level only on such measures that cannot at all, or at least cannot effectively, be taken by individual member states. Both the attribution of competences and their exercise at the EU level are governed by the principle of subsidiarity. If taken seriously, subsidiarity is the key to democracy in a multi-levelled setting, since it excludes the possibility of action being taken at EU level if the goals can be reached by national measures. Member states are functioning democracies, and the degree of relative political influence of the individual – and the degree of self-determination at this level – is

<sup>58</sup>I. Pernice, 'The EU as a citizens' joint venture. Multilevel constitutionalism and open democracy in Europe', in J. M. Magone (ed.), *Routledge Handbook of European Politics* (Routledge 2014) p. 184 at p. 187-195.

necessarily higher than at EU level with a population of 500 million. In turn, in matters where the states cannot act effectively, nothing of their powers is lost, no opportunity of democratic self-determination is given away, when such power to act is conferred on the EU institutions. On the contrary, people can have their challenges dealt with and problems solved, which in earlier times they could not – at least, not peacefully or without interfering with the sovereignty of other states. This is, of course, at the cost of accepting the procedures agreed within the European treaties, including the majority rule. Yet, it was a voluntary choice of all member states, made in the name of their citizens, and we should assume that this constitutional agreement was for a good purpose and to the benefit of all. From the perspective of the individual, the EU is thus a gain in efficient self-determination

### *Voluntariness*

Voluntariness means that the EU offers opportunities for the peoples of its member states. After accession to the Union there is the force of law and the obligations resulting from the treaties. But there is no power whatsoever for physical coercion to participate. Article 50 TEU even allows withdrawal from the EU. Member States continue to hold the monopoly on physical coercion. According to Article 4(3) TEU their job is to give full effect to EU law, if necessary by physical constraint, if EU law so requires. A member state may refuse to implement its obligations, but this is at the expense of continued benefits from a functioning EU in a longer perspective. What really counts is that the EU has no police nor army to enforce decisions. It is trust in the observance of the law, including the rule of law – not of man or force – and the equality of all before the law that carries the Union: voluntary participation and respect for the law as determined in an open and democratic process.

### *Open democracy*

Open democracy is what our policies for overcoming the crisis of democracy and mind in Europe have to focus on. What do I mean and what needs to be done with a view to enhancing democratic legitimacy and accountability in the EU?

### *Four commands for enhanced democratic legitimacy*

There are, basically, four commands to consider. First, we – the Union citizens – must take ownership of the EU. Second, we have to take subsidiarity seriously. Third, large parts of the economic and fiscal policies of the member states need to become European policies. And fourth, we the citizens of the Union have to use all opportunities to engage.

*Taking ownership of the EU*

Ownership means to resist the idea that the member states are the masters of the treaties. The latter tends to decouple EU policies from the citizens. Taking ownership means that the citizens are the owners of the EU, that the EU is one of our instruments for shaping our future. Taking ownership means realising that there is no 'other', ultimately responsible for what the EU is meant to do and what it finally does and achieves; no other than us, the citizens. Is the Union a union of states, or is it a union of citizens? This makes a substantial difference. Democracy in the EU can only exist if citizens accept the EU as their vehicle for specific purposes. Understanding it as a union of states, we risk losing sight of the fact that it affects us, directly; it would be 'others' – states – who shape our future, and the only way of giving some limited and very indirect legitimacy to its policies would be to democratically organise the formation of the will of the states that determine the policies of the Union.

Given the provisions in the Treaties on double legitimacy (Article 10 TEU) it seems safe to accept that the EU is a Union of states and citizens.<sup>59</sup> Indeed the provisions in the Treaties on the political rights of the citizens (Articles 10(3) and 11 TEU and 20 TFEU) and their representation in the European Parliament (Article 14(2) TEU), show that citizens play a role not only in their states but also in the EU. These civil rights give citizens a political status related to the EU; they become members of an emerging European public sphere, as a structural element of a common identity of European citizens.<sup>60</sup> Thus, they can take ownership of the Union by realising that they are responsible both ways. First, in exercising their democratic rights internally with regard to the EU policies of their respective governments – this European dimension of national elections is fundamental if national parliaments are considered to be a source of legitimacy for the policies at the Union level, but it is still rarely understood to be of relevance to the reality of political practice. Second, citizens take ownership and are responsible for European politics directly in European elections and other forms of participation offered by the treaties. Thus, democracy on an EU level can be understood as an exercise of participative power not only by 'the people' of each member state as a collective, but also by every single citizen acting in two ways: as a national and as a Union citizen.<sup>61</sup>

<sup>59</sup>In this sense see also Habermas, *supra* n. 6, p. 35-37. See also Pernice, *supra* n. 58, p. 194.

<sup>60</sup>See on European Union citizenship as a precondition for European publicity, Calliess and Hartmann, *supra* n. 8, p. 132-145, 151; for the provisions and internet-related new conditions of 'open democracy', enhancing citizens ownership and participation in the EU see also Pernice, *supra* n. 58, p. 192-195.

<sup>61</sup>See also Calliess and Hartmann *supra* n. 8, p. 85. This is the very basis of my concept of 'Verfassungsverbund' (see Pernice 1995, *supra* n. 27, p. 261-262, and in more detail see Pernice 2001, *supra* n. 27, p. 166-167) or 'multilevel constitutionalism' (see above).



*Taking subsidiarity seriously*

Decisions on what the EU should be responsible for and how it should carry out its duties are political decisions. Consequently, they are part of the political processes at both levels. Ultimately, they are a matter for each citizen – both as a national and a Union citizen – to stand for. Becoming aware of this political responsibility of each individual citizen and of the democratic decision to confer powers to, and later to exercise them at the European level only under the conditions of subsidiarity, would avoid unnecessary abstract debates on the tasks and the justification of the EU. It would also help democracy to function better, given that the democratic legitimacy of European politics largely depends on this awareness and the understanding that functioning democratic processes of which citizens are part – both within national political systems and of the European system – are the foundation for the proper functioning of the EU.

*Giving the EU responsibilities for economic and fiscal policies*

Democracy is a matter of the citizens, not of established governments. So, it is difficult to believe that our governments, on their own initiative, would strive for more democratic control, be it at the national level or the Union. The solutions found, provisionally, for managing the financial crisis – the Six-Pack, the Two-Pack including the European Semester,<sup>62</sup> the Fiscal Treaty, the debt brake and the European Stability Mechanism – give the governments more control. They enhance what is called executive federalism in Europe.<sup>63</sup> In matters of highest impact for the conditions of the citizens' daily life – economic, budget and re-distributional policies – we see the national parliaments under new constraints and regulatory control, exercised by the European Commission and the ministers of finance in the Council. In emergency situations, this may be justified; from a medium- and long-term perspective, however, it is contrary to the democratic principles referred to in Article 2 TEU, and it is inappropriate as a remedy to the structural deficits of the Economic and Monetary Union.

In short, a common currency needs to be backed by the convergence of the participating economies. Granting the member states autonomy in their economic and fiscal policies is in contradiction to their general duty to ensure convergence

<sup>62</sup> Specifically on this see A. Hatje, 'Auf dem Weg zu einer Europäischen Wirtschaftsregierung: Das Europäische Semester als Instrument wirtschaftspolitischer Koordination in der EU', in U. Becker et al. (eds.), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014) p. 594, expressing specific concerns with regard to democratic legitimacy (at. p. 614-615).

<sup>63</sup> For the term 'Exekutivföderalismus' as a characteristic of the EU all together see P. Dann, *Parlamente im Exekutiv-Föderalismus* (Springer 2004). With regard to the crisis management since 2009 see Habermas, *supra* n. 6, p. 52-53; with proposals to enhance democratic control see C. Franzius, 'Demokratisierung der Europäischen Union', *Europarecht* (2013) p. 655 at p. 660-668.

through the coordination mechanism of Articles 119 to 121 TFEU and the obligations and discipline under Articles 123 to 126 TFEU. It was the Community method that made the EU a success as an instrument for preserving peace among the member states and for increasing welfare. Integration did what the cooperation of sovereign states, over centuries, could not achieve. Why should this be different in political matters as important as economic and fiscal policies? In these important matters, *a fortiori*, the same principle of integration should apply precisely because they are so important.

What follows is that, to the extent necessary for backing the common currency, economic, fiscal and re-distributional policies need to be decided at the European level, with procedures that ensure the principles of subsidiarity as well as democratic accountability and participation.<sup>64</sup> Subsidiarity not only ensures that decisions are taken as closely as possible to the citizen (Article 1 (2) TEU) and therefore is in itself an imperative of democracy, but it is primarily a subject of political rather than legal discourse. Striving for better democratic accountability and participation, particularly in the areas of economic and fiscal policies, is key for stabilising the Euro and the EU at large.

### *Engage in European politics*

Governments will not take the necessary steps if citizens do not engage and take ownership of the EU and responsibility for its future at national and at European level. A new movement is needed, bottom-up, claiming reforms by giving national parliaments and the European Parliament control over economic and budgetary policies. They are not only a 'matter of common concern', as Article 121(1) TFEU puts it, but common policies.

This call may provoke the question: does the constitutional setting for democratic decision-making in the EU provide for the necessary instruments and procedures to ensure democratic accountability and participation as required for policies as salient for the individual as economic, budget and, hence, re-distributional policies? My answer is yes. However, given the provisions of the Treaties on representative and participatory democracy (Articles 10 and 11 TEU), on the active role of the national parliaments (Article 12 TEU), on transparency and access to information (Article 15 TFEU) the 'democratic potential' of the EU is far from being fully used. The more EU policies are understood as relevant to the daily life of citizens, the more citizens will use the two channels of participation and control at their disposal, directly through the European Parliament and indirectly through their respective national parliaments. The internet presents

<sup>64</sup> See for more details: I. Pernice et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe* (Nomos 2012).

previously unknown opportunities of information and active participation and so better enables people and civil society to assume their democratic rights and responsibilities.<sup>65</sup>

Most recently, public campaigns on the internet led the European Parliament to refuse its consent to the Anti-Counterfeiting Trade Agreement and so brought the agreement to fail. This example shows that engagement even of a few activists can make a difference.<sup>66</sup> The European Commission has made transparent the relevant text of the free trade agreement with Canada and on this basis launched a public consultation on investment protection in the Transatlantic Trade and Investment Partnership. It has collected thousands of important comments and critiques to be considered in the coming rounds of negotiations with the US.<sup>67</sup> In addition, campaigns and even a European Citizens' Initiative<sup>68</sup> against free trade agreements such as the Comprehensive Economic and Trade Agreement or the Transatlantic Trade and Investment Partnership have started, and it is likely that they will have an effect on how the future transatlantic relationship will be shaped.

Engaging in the discussion on the reform of the treaties with a view to making the EU ready for a sustainable common currency based upon common economic and fiscal policies, as far as necessary, should be the next step. The EU and its future are in the hands of the citizens of the member states acting in their capacity as the citizens of the Union.

## CONCLUSION

Multilevel constitutionalism is about the role of the individual in shaping the constitutional architecture of multilevel political systems like the EU. It places the citizen in the centre, while the member states' constitutions remain the basis of the construction and member states play an important role in the functioning of the system. But it cannot function democratically if the citizens remain unaware of their crucial role. Democracy is not a gift, but an opportunity.

Thus, a change in people's minds is a condition for overcoming the crisis of democracy in Europe. This crisis is basically rooted not in the EU but within the

<sup>65</sup> See also Pernice, *supra* n. 58, p. 194-197.

<sup>66</sup> The question may be raised, however, whether it is 'democratic' if two or three million protesters out of 500 million people in the EU produce such an effect.

<sup>67</sup> See K. De Gucht, *Democracy, Equality, and Investment Protection In European Trade Policy* (Lecture in the Forum Constitutionis Europae (FCE) 2014) at the Humboldt University of Berlin, <[www.whi-berlin.eu/fce-2014.html](http://www.whi-berlin.eu/fce-2014.html)>, visited 17 October 2015, p. 7.

<sup>68</sup> See e.g. Attac's call for a self-organised initiative after the application for a formal one was rejected by the Commission, <[www.attac.de/ebi](http://www.attac.de/ebi)>, visited 17 October 2015. It has been decided, by a consortium of initiatives 'Stop TTIP', to bring the case to the ECJ under Art. 263 TFEU, see <[www.ttip-unfairhandelbar.de/start/ebi/](http://www.ttip-unfairhandelbar.de/start/ebi/)>, visited 17 October 2015.

member states.<sup>69</sup> Taking ownership of the EU, taking subsidiarity seriously, and engaging not only in the discussion on the reform of the Treaties but also in real European politics would allow citizens of the Union to overcome the crisis of democracy. Therefore, a change of mind and perception will result in a change in the 'masters of the treaties' and of the actual European policies, from states to active and responsible citizens. With citizens taking themselves seriously, taking people seriously will not remain an empty phrase.



<sup>69</sup> See I. Pernice, 'Domestic courts, constitutional constraints and European democracy: What solution for the crisis?', in M. Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) p. 297 at p. 303; for the background of the argument: J. Neyer, *The Justification of Europe. A Political Theory of Supranational Integration* (Oxford University Press 2012) p. 4.