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Abstract

In this paper, I explore in a systematic manner the different components of the democratic legitimacy of the Union from the standpoint of deliberative democratic theory. Contrary to standard accounts, I claim that the question must be disaggregated, given that the Union has not only several democratic deficits, but also some democratic surpluses. On the one hand, the Union was created to tackle the democratic deficit of nation-states, and has been partially successful in mending the mismatch between the scope of application of their legal systems and the geographical reach of the consequences of legal decisions. Moreover, the European legal order is based on a synthetic constitutional law, which reflects the common constitutional traditions of the member states, which lend democratic legitimacy to the whole European legal order. On the other hand, the lack of a democratically written and ratified constitution is a central part of the democratic challenge of the Union. But equally important is the structural bias in favour of certain material legal results, which stems from the interplay of the division of competences between the Union and its member states and the plurality of law-making procedures, some of which multiply veto points at the cost of rendering decision-making rather improbable. Special attention is paid through the paper to the democratic implications of the structural features of European constitutional law for new member states.

Keywords

Constitutional Change – Deliberative Democracy – European Law – European Public Space – Legal Culture – Legitimacy – National Autonomy – Normative Political Theory – Participation

Introduction

Debates about whether the institutional structure and decision-making processes of the European Union (EU) are democratic enough as to ensure its powers are exercised legitimately have been the bread and butter of European studies since the late nineteen seventies.[1] This article engages in earnest with such discussions by disaggregating what is usually said to be *the* problem (the "democratic deficit" of the Union) into its *concrete* components (which will be referred to here as the democratic pluses and shortcomings of the Union). In doing so, the sources of the EU's democratic legitimacy are systematically exposed and criticized.

The structure of the article is as follows: The first section is devoted to laying the cards on the table concerning the democratic standards applied in the text. In the second section, I reconstruct systematically the basic foundations of the EU's democratic legitimacy. In concrete terms, I call the attention of the reader to four claims. Firstly, that a key driving force of the process of European integration has been the aim of overcoming the structural democratic shortcomings of the European nation-state system. This has been translated into legal-constitutional language in most European fundamental laws drafted in the post-war period, where we find "opening" clauses authorising and mandating some form of supranational integration to create the conditions under which the democratic principle could be realised beyond the nation-state. Secondly, I stress the fact that the core, "deep" ingredient of European constitutional law is the common constitutional law of the Member States, referred to in the jargon of the European Court of Justice as the "constitutional traditions of the Member States". Thirdly, I argue that the manifold processes of ordinary law-making in the Union can be reduced to two models, which structurally ensure a modicum of democratic legitimacy of the acts being approved. Fourthly, I show that the elaboration of European implementiation norms is a further source of democratic legitimacy. By considering these four claims, I reach the conclusion that examining the foundations of the EU's democratic legitimacy can help us understand why accession to the Union is not merely a unidirectional process (by means of which European law is imposed upon new Member States) but, at least potentially, reciprocal. In the third section, I consider the key democratic shortcomings of the institutional structure and decision-making processes of the Union. Once again, I proceed by means of disaggregation, analysing separately constitution-building and ordinary law-making. Regarding the former, I conclude that the democratic legitimacy created by the common constitutional traditions is necessarily eroded over time in the absence of explicit constitution-making power at the European level. The last section contains the overall conclusion.

[1] It is true that the question has been posed in one way or the other since the Schuman Plan was rendered public. See for example Berthold Rittberger, *Building Europe's Parliament: Democratic Representation Beyond the Nation State*, Oxford: Oxford University Press, 2005. But the very term "democratic deficit", and perhaps more importantly, the array of questions usually associated with it, only got consolidated in the academic and public debate in the mid- and late seventies, precisely around the time of the first democratic elections of MEPs. The troubled ratification process of the Maastricht Treaty further fuelled the debate.

Setting the standard: Deliberative democracy as the European theory of democracy

Why the legitimacy of the European Union has to be assessed against normative democratic theory

§1. A basic premise of this article is that the European Union can only exercise its powers legitimately if its institutional structure and decision-making processes are sufficiently democratic, that is, if they ensure European citizens a sufficient degree of participation and influence. What this entails is rendered more concrete by advocating deliberative democratic theory as the proper normative standard against which to assess the Union (which I do in the second part of this section) and by considering the democratic pluses and minuses of the complex institutional setup and decision-making process of the Union (which I do in sections II and III). However, before getting into specifics, is necessary to clear the ground of alternative accounts of the legitimacy of the Union. Many scholars sustain that the fact that the Union is undemocratic, or at least not democratic in the same way as its constituent Member States are, does not prompt the conclusion that it is illegitimate. There are two main variants of this argument.

§2. The first variant relies on the flat denial of the relation between legitimacy and democracy. It is only natural to reject that the legitimacy of the European Union should be assessed by reference to democratic standards if one denies that that there is or should be a link between legitimacy and the democratic steering of public power. Indeed, many political theories are non-democratic, as they claim that critical normative standards have little or nothing to do with democracy.[2] There are typically two main strategies to deny that democracy is a prerequisite for legitimacy. The first is to define legitimacy in substantive, non-procedural terms, with reference to a thick ethical conception. When applied to the EU, this entails that its legitimacy would depend on the extent to which its existence and functioning contributed to the realisation of the concrete substantive ideal according to which legitimacy is defined. This is not a very frequently used strategy, perhaps with the exception of ordoliberal and liberalist understandings of the Union, according to which European integration is properly characterised as the institutional means to ensure the realisation of liberty, i.e. private (economic) autonomy.[3] The full realisation of the four economic freedoms famously enshrined in the Treaties, not political or socio-economic rights, are according to this conception the key litmus test of European legitimacy. The second strategy is to define legitimacy in procedural, but non-democratic terms. As is well-known, there has indeed existed many non-democratic procedural conceptions of legitimacy throughout history (basically all authoritarian political conceptions fit into

[2] Cf. for example Albert Hirschman, *The Rhetoric of Reaction*, Cambridge: Harvard University Press, 1991 and Stephen Holmes, *The Anatomy of Anti-liberalism*, Cambridge: Harvard University Press, 1993.

[3] On ordo-liberalism in general, see the superb anthology edited by Alan Peacock and Hans Willgerodt, *Germany's Social Market Economy: Origins and Evolution*, Basingstoke: MacMillan, 1989. On ordo-liberalism and the European Union, perhaps the key author is Ernst Jachim Mestmaecker. See his 'On the Legitimacy of European Law', 58 (1994) *Rabels Zeitschrift*, pp. 615-35; 'De la Communauté économique à l'Union économique et monétaire', 1 (1995) *Revue des Affaires Européennes* pp 111-121. A nuanced defense of ordo-liberalism in Cristoph Engel, 'Imposed liberty and its limits: the EC Treaty as an economic constitution for the Member States' in Talia Einhorn (ed.), *Spontaneous order, organisation of the law. Roads to a European Civil Society. Liber Amicorum Ernst-Joachim Mestmaecker*, The Hague: The Asser Press, 2003, pp. 429-37, available at http://www.coll.mpg.de/e_90.html.

this category, whether justified on the grounds of divine rights or the charisma of the leader).[4] Concerning the EU, the most articulated conception of this kind is the one associated with the "governance" paradigm, when understood as a full-fledged alternative to representative government.[5] In such a view, democratic representation is claimed to be as old-fashioned as sovereign nation-states in the brave new world of economic globalisation and technological change, which has reduced the capacities of states steered by classical democratic will formation to govern.[6] The complexity of problems in post-modern societies, and the sheer rate at which decisions are taken, call for new ways of ensuring legitimacy. These transcend inclusive participation in favour of "smarter" formulae, which require us to go beyond full inclusiveness mediated through political representation (usually based on socio-economic cleavages) and instead favour the "selective participation" of interests, stakeholders and non-governmental organisations, usually referred to as civil society (in a rather paradoxical use of the term, I cannot avoid adding).[7] Interest groups and non-governmental organisations, not political parties, must be the agents through which complexity be managed and coherent policies formed. Such governance mechanisms could become "the new grammar of law", and one must assume that this would be fully equivalent to "the new grammar of legitimate law".[8]

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[4] Quite obviously still fresh in our collective memories. After all, Carl Schmitt was perhaps the last "great" theorist of such conceptions, well before his conversion into Hitler's crown-jurist. See, among others, *Dictatorship (1921); Political Theology*, Cambridge: The MIT Press, 1985 (originally published in 1922); *The Crisis of Parliamentary Democracy*, Cambridge: The MIT Press, 1985 (originally published in 1923); *Roman Catholicism and Political Form,* Westport: Greenwood Press, 1996 (originally published in 1923); *The Concept of the Political*, Chicago: University of Chicago, 1996 (originally published in 1927 and 1936).

[5] Governance is quite obviously an overstretched term, with as many meanings as users of the term (a collection of the main acceptations of the term, and of basic bibliography, can be found at http://www.valt.helsinki.fi/vol/laitos/intersektioportaali/governance/Keywords.htm). Indeed, it is widely used as more encompassing and neutral term than government, which does not rule out normative implications. But the most "radical" advocates of governance mechanisms understand them as a full alternative to democratic law-making as understood in a representative democracy.

[6] See for example Günther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in Christian Joerges, Inger-Johanne Sand and Günther Teubner (eds.), *Transnational governance and constitutionalism*, Oxford: Hart, 2004, pp. 3-28.

[7] The ultimate articulation of the "governance" paradigm in the European Union is the Commission's White Paper on European governance, COM (2001) 428 final, OJ C 287, of 12.10.2001, pp. 1-29, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf. A comprehensive critical analysis can be found in the symposium edited by Christian Joerges, Yves Meny and Joseph Weiler (eds.), *Mountain or Molehill? A critical appraisal of the Commission's White Paper on Governance*, available at http://www.jeanmonnetprogram.org/papers/01/010601.html. A poignant (and to the point) criticism in Philipp Allott, 'European governance and the rebranding of democracy', 27 (2002) *European Law Review*, pp. 60-71; see especially page 60. Key concepts in the governance paradigm are those of representative democracy (associated with government structures, and generally said in need of being reinvented) and participatory democracy (associated with governance, and regarded as very promising). This characterisation underlies the chapter on democracy inserted in the Draft (and now defunct) Constitutional Treaty. See Title VI of the First Part of the Constitutional Treaty, "The democratic life of the Union". On the overcoming of "representative democracy" in a "radically" new context, see the well-crafted (and terribly ambivalent) proposal of Patrizia Nanz and Jans Steffek, 'Global governance, participation and the public sphere', 39 (2004) *Government and Opposition*, pp. 311-35. A criticism of the assumption of radical "novelty" in Cristoph Möllers, 'European governance: meaning and value of a concept', 43 (2006) *Common Market Law Review*, pp. 313-36.

[8] Perhaps the finest exposition of such a line of thought is to be found in the writings of once a rather paradigmatic advocate of deliberative democracy á-la Habermas, Oliver Gerstenberg. See his 'The denationalization of the very idea of democratic constitutionalism", 14 (2001) *Ratio Juris*, pp. 298-325; 'Expanding the Constitution Beyond the Case of Euro-Constitutionalism', 8 (2002) *European Law Journal*,

§3. The decoupling of legitimacy and democracy may well require deep thinking and result in complex, convoluted and aesthetically impressive theories, but they are untenable both as normative and reconstructive theories. Explaining in detail why this is so would go beyond the object of this paper. Suffice it to say that they do not only run against the identity of the EU and its Member States as proclaimed in their fundamental laws (the constitutional identity argument), but more critically, they are at odds with the actual political practice and discourse into which European citizens engage daily (the constitutional practice). Decoupling the two terms therefore remains implausible. To start with the constitutional identity argument, it is an established principle that gaining membership status, and keeping this status, is conditional upon the country having an institutional setup and decision-making structure that ensures the coupling of legitimacy and democratic legitimacy.[9] The EU is, and has always been, a Union of democratic Member States, which also proclaims to aspire to the democratic exercise of its powers.[10] Under such circumstances, to deny that the legitimacy of the EU has anything to do with democratic legitimacy (that it can be a matter of realising economic freedoms *only*, or that it would be dependent exclusively on new governance structures) is at odds with the normative expectations enshrined in national and European constitutional law. These are widely perceived as the very critical parameters for determining whether Treaty reforms or secondary legislation are to be regarded as constitutional, both in a European and in a national sense. Obviously, the proclaimed democratic identity of a political system is no guarantee that it will actually be the embodiment of such an identity. One thing is to raise a claim; to live up to it is another matter. However, when such formal claims are raised in so many fundamental laws, and when they seem *prima facie* to have an impact on how other laws are enacted, this clearly casts doubts on the soundness of fully decoupling legitimacy and democratic legitimacy. In addition, it is not only the case that the Union and its Member States claim to adhere to democratic normative standards, and invite citizens to judge them accordingly; it can also be observed that there is a widespread practice of criticising these polities against democratic standards, even though there is no agreement or even reflection on what such standards should be. The very fact that citizens once and again protest against the undemocratic character of EU law, and that this has consequences in terms of concrete political decisions (recently and spectacularly the negative vote of the decisive majorities in the French and Dutch referenda of 2005; but perhaps even more interestingly in daily practices), is evidence of the fact that constitutional practice assumes that there is a link between legitimacy and democracy. It could be argued (and I will indeed argue in the third section of this paper) that the Union is far from

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pp. 172-92; and (together with Charles Sabel), 'Directly-Deliberative Polyarchy: An institutional ideal for Europe', in Christian Joerges and Renaud Dehousse (eds.), *Good governance in Europe's integrated Market*, Oxford: Oxford University Press, available in its entirety at http://www2.law.columbia.edu/sabel/papers/gerst-sabel1029.doc; and (together with Grainne de Búrca), 'The denationalization of constitutional law', 47 (2006) *Harvard International Law Journal*, pp. 243-62. This leads Gerstenberg to claim that judgments such as *Centros* (which broadly expanded the scope of freedom of establishment, putting at peril basic preconditions of national welfare provision) are to be regarded as promising in democratic terms (in *Expanding the Constitution*, p. 190) or to find that the Union has a rudimentary welfare system thanks to the interpretation of free movement of workers against discriminatory "closure" of national welfare systems (in *The denationalization…*, pp. 258-9).

[9] See Articles 48 and 7 of the Treaty of European Union; before the Maastricht Treaty, this requirement was written into the founding Treaties of the Communities, although in a less explicit form.

[10] On this question, I refer to my 'Chartering Europe', 40 (2002) *Journal of Common Market Studies*, pp. 471-90, especially at pp. 480-4.

being true to such a proclaimed ideal. That, however, does not entail that its legitimacy can be established in isolation from democratic legitimacy.

§4. The link between the democratic exercise of European power and the legitimacy of the EU is not severed, but is "downsized", if the Union is depicted as a derivative entity, an agent which borrows its legitimacy from that of its principal, and thus is in no need of direct democratic legitimation.

The most straightforward version of this claim is closely associated with the international and *specialized* form of the EU, and sustains that the derivative democratic legitimacy of the Union stems from the core role assigned to national governments in the constitution- and law-making processes of the EU (the intergovernmental agent conception). In this view, the Union is said to be an intergovernmental organisation to which Member States have delegated a limited number of competences for functional reasons. Economic, social and technological changes have undermined the governing capacities of sovereign nation-states in concrete spheres or policy fields, thus the drive to integrate beyond the nation-state. However, those areas where state capacities are overstretched are precisely the areas "of modern democratic governance that tend to involve less direct political participation".[11] The bread and butter of electoral politics (tax, social policy, defence, the funding of public services) are said to be still firmly in the hands of Member States.[12] Moreover, those states remain the key locus of sovereignty; consequently, national institutional representatives are the main agents taking decisions, while the Union is a creature and an instrument of the Member States. Contrary to what ordoliberals and governance theorists proclaim, the intergovernmental agent conception affirms that the legitimacy of the Union is first and foremost a democratic legitimacy, although a derivative one. In concrete terms, the legitimacy of the Union derives from the continuous consent of states to membership (which they can end *unilaterally*) and from the key role that the will of each Member State plays in the formation of the will of the Union, both in constitutional and ordinary decision-making processes. That is, European democratic legitimacy does not stem from *direct* democratic participation of European citizens in European decision-making processes, but from the fact that the wills aggregated through such processes are themselves the result of democratic decision-making procedures *at the national level*. In addition, the functional capacities of the Union (marginally) supplement its derivative

[11] Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 (2002) *Journal of Common Market Studies*, pp. 603-24, at p. 606. Moravcsik accepts that there is a "democratic deficit" in terms of how the relationship between executive powers and citizens are structured if one compares to the Union to an ideal normative model (this is the way one should perhaps interpret his claim that the "democratic deficit" of the Union "may be a fundamental source of its success" (518); cf. 'Preferences and Power in the European Community: A Liberal Intergovernmental Approach', 31 (1993) *Journal of Common Market Studies*, pp. 473-524, p. 518. Executive dominance and its implications are abundantly described in *The Choice of Europe*, Ithaca: Cornell University Press, 1998). However, he denies that this amounts to a "real" democratic deficit for two reasons. Firstly, the Union has two major sources of democratic legitimacy which resist comparison with those of nation-states, namely direct accountability via elections to the European Parliament, and indirect accountability via national elections (*In Defence,* pp. 611-3). Secondly, any democratic theory sensible to "empirical evidence" from political science should take into account that not all questions are to be decided democratically, and most powers of the Union fall precisely under such category, *In Defence,* pp. 607-9, 611.

[12] Ibidem, pp. 607-609, 611.

democratic legitimacy with output legitimacy, which stems marginally from the capacity to ensure governing capabilities and actual outcomes which contribute to the realisation of the constitutional goals of the Member States and primarily from their contribution to "resolve incomplete contracting problems".[13] This characterisation of European legitimacy is at the core of one of the dominant theoretical paradigms from which European integration is explained and reconstructed (liberal intergovernmentalism) and keeps on playing a key role in the theorising of the relationships between Union and national legal orders, as advocated by leading constitutional courts and constitutional lawyers.[14]

The other main avenue through which European democratic legitimacy is downsized proceeds in similar, but one may say inverse, terms, as it claims that the derivative democratic legitimacy of the Union stems from the fact that it is a supranational administrative agent bound by the constitutional mandate established in national democratic decision-making process (the supranational agent conception).[15] The Union is conceived as a supranational regulatory agency in charge of implementing the basic normative goals defined in the Treaties.[16] The key legitimacy variables are the plurality of national democratic decisions setting up and defining the mandate of the Union, and its fidelity in discharging such democratically mandated tasks, and in observing the concrete legal procedures through which it is ordered to act. Thus, the characterisation of the Union as a supranational agency presupposes a higher track of democratic decision-making at the national level (which remains sovereign to take decisions in all issues bar those delegated to the agent), and the isolation of a precisely defined scope of competences regarding which legitimacy would be tested by reference to technical knowledge and regulatory achievements, not to the democratically representative character of the actors and the wide participation of all those affected.[17] The *technocratic* and *administrative* components of the EU's legitimacy come to the fore to the extent that legitimacy is dependent upon the technical expertise that the Union can pool, and which allows the efficient pursuit of the goals assigned to it, thus improving the quality of the European general will.[18] The ultimate advocate of this conception is Giandomenico Majone, who has had an enormous impact not only in scholarly circles, but also in the "rouages" of European integration, and more precisely, within the European Commission.[19] Such a conception is also at work in the definition of the European Central Bank as an independent international organisation, given an independent mandate which is fully politics-proof.[20]

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[13] Moravcisk, *Choice*, *supra*, fn. 11, pp. 67-76 and 485-7 and *In Defence, supra*, fn. 11, p. 614.

[14] Perhaps the best description and critique in Mattias Kumm 'Who is the Final Arbiter of Constitutionality in Europe', 36 (1999) *Common Market Law Review*, pp. 351-86 and 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 (2005) *European Law Journal*, pp. 262-307.

[15] Key texts are Giandomenico Majone, *Regulating Europe*, London: Routledge, 1996; 'Europe's "Democratic Deficit": The Question of Standards', 4 (1998) *European Law Journal*, pp. 5-28; *Dilemmas of European Integration*, Oxford: Oxford University Press, 2005.

[16] Majone, *Democratic Deficit*, *supra*, fn. 15, pp. 16ff.

[17] Ibidem, p. 21.

[18] Ibidem, p. 23.

[19] Explicitly acknowledging the influence, Jerome Vignon, 'The Idea of a Good European Governance', paper presented at the Annual ARENA Conference, Oslo, March 2002, available at http://www.arena.uio.no/events/Conference2002/documents/Vignon.doc.

[20] Chiara Zilioli and Martin Selmayr, 'The European Central Bank: an Independent Specialized

§5. The characterisation of the democratic legitimacy of the Union as derivative and/or circumscribed to the delegation of regulatory powers to institutions capable of gathering expert knowledge is deeply problematic for two main reasons. In structural terms, the European Union not only claims to be a full-blown political community, but more to the point, European decisions have direct effects on citizens, and in actual constitutional practice, they are given preference over national decisions, bar from when they come into conflict with core national constitutional norms, on account of the widely observed principle of the supremacy of Union law.[21] In substantive terms, the powers being exerted by the Union extend to virtually all subjects and questions. Firstly, the number and relevance of the areas in which European Union law directly affects citizens is so high that derivate democratic legitimacy no longer suffices. Secondly, common decision-making processes convey limited derivative democratic legitimacy, because autonomous decision-making power is cashed in for veto rights, and veto rights only. Once the Union has exerted law-making powers in one subject areas, Member States lose the capacity to introduce changes unilaterally. They are stuck in the joint decision-making process. Even if the status quo is by far inferior to most alternatives which can be conceived, no change can be introduced in the absence of agreement among the Member States. If they get trapped into the status quo, this may undermine the legitimacy of the existing common norms (as this prevents reflexive change). Thirdly, and perhaps even more importantly, the direct impact of Union powers is further increased by the structural limits it sets on national decision-making; all national norms, including constitutional norms, may be reviewed against the European canon of constitutionality. Consider tax powers. It is usually claimed that European integration has only marginally affected the sovereign powers of the Member States because the Union collects an insignificant amount of taxes (basically customs duties and agricultural duties; and it does so through national tax agents acting as European agents, and charging a hefty 25 per cent commission). This claim misses the fact that the horizontal effect of the four economic freedoms, and especially freedom of movement of persons, freedom of establishment and the free movement of capital, has been transformed into standards of constitutional review by the European Court of Justice. Moreover, close to fifty per cent of all taxes collected in the Union have their basic normative framework established in Community directives or regulations.[22]

These structural and substantial features of the Union entail that the effects of European decision-making are as direct and important to the daily lives of citizens as to require nothing short of direct, not derivative and technocratic, democratic legitimacy.

Organization of Community Law', 37 (2000) *Common Market Law Review*, pp. 591-644. and 'The Constitutional status of the European Central Bank', 44 (2007) *Common Market Law Review*, pp. 355-399. Their argument constituted the backbone of the plea of the Central Bank in case 11/00, *Olaf*, but was rejected by the court in its judgment of 10 July, [2003] ECR I-7147.

[21] It has become almost redundant to indicate that the principle was first enunciated in the judgment of case 6/64, *Costa v. Enel* [1964] ECR 585. For the evolution and contours of the principle, see Karen Alter, *Establishing the Supremacy of European Law*, Oxford: Oxford University Press, 2001.

[22] See Agustín José Menéndez, 'The purse of the polity' in Erik Oddvar Eriksen, *Making the European Polity*, London: Routledge, 2005, pp. 187-213.

Deliberative democratic theory as the best democratic theory

§6. In the previous section I defended the claim that the legitimacy of the EU must be based on democracy. Now it is time to show why the proper democratic theory to be applied to the Union is deliberative democratic theory. To do that, I describe the key components of deliberative democratic theory: the central role assigned to communicative action as the basis for normative legitimacy and its complex characterization of democratic legitimacy, with special reference to the disaggregation of the principle of such legitimacy. Deliberative democracy should not be characterized as an alternative to classical representative democracy, but instead as the most consistent democratic theory within which the representation mechanisms characteristic of modern parliamentary democracy can be defended and upheld.

The key role of arguments

§7. Crucially, deliberative democracy is characterised by the key legitimating role played by *arguments* and *reasons*. It sustains that democratic will-formation can only take place legitimately if it is preceded by, and coupled with *deliberation*.[23]

The central role of reasons and arguments in deliberative democracy leads to the conclusion that the legitimacy of laws is crucially dependent on the processes through which such laws are made. This entails that the legitimacy of legal norms depends not only on them being supported by a majority of the individuals affected by it (as purely aggregative theories claim), but also on the preceeding testing and perfectioning of the individual wills being aggregated. Thus, law-making processes are to be regarded and constructed as the institutional embodiment of deliberative discourse. Even if these processes are geared towards ensuring the efficiency of social integration, and consequently should be limited in terms of time and effort, they should be structured so as to maximize the chances that the best arguments have the upper hand. It is thus reason, not raw power, that defines the general will. This does not contradict the premise that the authority of a legal norm depends on the fact that a majority of the citizens or their representatives endorses the given legal norm. It only takes seriously the consistency and persistency of such will, which can only be ensured if decision-making is preceded by deliberation.

Deliberative democracy as a complex theory of democracy

§8. Deliberative democracy is also a *complex* theory of democracy, in the sense that it acknowledges not only the legitimating force of communicative action, but also takes account of the foundational character of fundamental rights[24] and of the normative grounds of establishing a specialised process of applying laws.[25] This is why

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[23] Perhaps the best and pungent argument is to be found in Henry S. Richardson, *Democratic Autonomy*, Oxford: Oxford University Press, 2002. pp. 27ff. See also William Nelson, *On Justifying Democracy*, London: Routledge and Kegan Paul, 1980; Joshua Cohen, 'Deliberation and Democratic Legitimacy', in James Bohman and William Regh, *Deliberative Democracy*, Cambridge: The MIT Press, 1997, pp. 67-91; James Bohman, 'Deliberation and Democracy' in his *Public Deliberation*, Cambridge: The MIT Press, 1996, pp. 1-21; William Nelson, 'The Institutions of Deliberative Democracy', 17 (2000) *Social Philosophy and Policy,* pp. 181-202.

[24] Robert Alexy, 'Discourse Theory and Human Rights', 9 (1996) *Ratio Juris*, pp. 209-35.

[25] Robert Alexy, *A Theory of Legal Argumentation*, Oxford: Oxford University Press, 1989; Aalius Aarnio, *The Rational as Reasonable*, Dordrecht: Kluwer, 1987; Neil D. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Oxford University Press, 1978; *Rhetoric and the Rule of Law*, Oxford: Oxford University

deliberative democracy is to be associated with a three-pillared conception of democratic legitimacy, structured around (1) participation, (2) protection of certain substantive contents (mainly through fundamental rights norms) and (3) guarantee of procedural rights in the process of application of the laws.[26]

§9. Firstly, the core element of a democratic theory of legitimacy is the right of citizens to participate in the deliberation and decision-making stages of the law-making process (political rights, or rights which realise the public autonomy of individuals). The concrete implications of this are considered in detailed in the next subsection.

§10. Secondly, the democratic principle points to a thin substance[27] which grounds the value of *procedural democracy* itself. This explains the close connection between *democratic legitimacy* and *the guarantee of certain substantive values*, what we could call a *thin substance*. This substance is not fully external or independent from the democratic procedure itself, as it points to the very *pragmatic assumptions* we make when we enter into real processes of deliberation. The paradigmatic form of institutionalization of *thin substance* is fundamental rights, which mandate certain substantive content to the legislature.[28] The protection of this substance should not be regarded as an alternative to actual democratic decision-making, but as an inducement and guarantee of democratic decision-making. The entrenchment of fundamental rights can play a major role in the process of democratization itself. In the absence of sufficiently democratic law-making processes, it can provide both a *substantive check* to imperfectly democratic decisions, at the same as it establishes the preconditions under which more extensive political participation is actually possible.

§11. Finally, deliberative democratic theory takes into account a basic insight of theories of legal argumentation, namely, that the discretion of judges in deciding hard cases brings about issues of democratic legitimacy.[29] There are very good reasons why authoritative adjudication on the application of legal norms to concrete cases is to be ultimately trusted to judges. An appropriate respect of the principle of equality before the law figures prominently among them. Theories of legal argumentation can provide guides and structures which reduce discretion, but cannot completely eliminate it, for reasons which are both structural and epistemic.[30] This explains why the rights granted to individuals in relation to the process of legal adjudication are closely related to the democratic legitimacy of these processes. The right to effective judicial protection has both a private and a public dimension. It aims at ensuring proper protection of the *interests* of the individual, but also at empowering her to do so while fostering the *democratic character of the legal rules established at the adjudication*

Press, 2005.

[26] I have argued this in detail in *Justifying Taxes*, Dordrecht: Kluwer, 2001, chapter VI.

[27] David Estlund, 'Making truth safe for democracy', in David Copp, Jean Hampton and John Roemer (eds.), *The Idea of Democracy*, Oxford: Oxford University Press, 1993, pp. 71-100; 'Beyond fairness and deliberation: The epistemic dimension of democratic authority', in James Bohman and William Rehg (eds.), *Deliberative Democracy: essays on reason and politics*, Cambridge (MA): MIT Press, 1997, pp. 173-204; 'The Insularity of the Reasonable: Why Political Liberalism must admit the truth', 108 (1998) *Ethics*, pp. 252-75.

[28] Cf., for example, Robert Alexy, *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2002, at p. 350.

[29] Cf. references in fn. 25.

[30] Alexy, *supra*, fn. 28, at pp. 394f.

level, by means of narrowing, as much as possible, the legitimacy gap necessarily involved in adjudication in hard cases.

The three-fold distinction within the principle of democratic legitimacy: constitution, statutes and statutory regulations

§12. Due to the key role played by arguments in deliberative democratic legitimacy, the principle of democratic legality must be disaggregated in regards to the different degree of legitimacy which stems from different decision-making processes. In concrete terms, we should distinguish three main types of law-making processes with regards to the intensity of the democratic legitimacy they transfer to the norms being approved through them.[31]

§13. The first distinction concerns the specific character of constitutional norms. Constitutional norms are those produced through the most inclusive and demanding decision-making process, in which the consistency, persistency and depth of collective preferences is repeatedly put to the test through public discussion. In this way, the basic identity between authors and subjects of the law required by the democratic principle is applied in full. Citizens should indeed be capable of identifying themselves as actual or potential authors of their constitution for it to be democratically legitimate in a deliberative perspective.[32] The superior legitimacy and dignity of constitutional norms explains the two typical contents of fundamental laws. First, constitutions give concrete legal form and value to the basic values which underpin democracy as a political form, that is public and private autonomy, and in doing so, constitute democratic decision-making in a literal sense. This task is usually discharged by fundamental rights.[33] Second, constitutions contain key decisions on what concerns the institutional structure, decision-making set up and socio-economic choices of each political community, setting it apart from all others. The higher legitimacy and ranking of the Constitution is the foundation of its primacy over all other legal norms, and of the binding character of constitutional norms: they do not only impose themselves upon citizens and public servants, but also upon the ordinary law maker, for the very simple reason that they are the carriers of the *general will* at its finest.

At the same time, democratic constitutions are not intended as substitutes, but as facilitators, of political decision-making. Indeed, the democratic dignity of the Constitution requires that the fundamental law be the framework for the political life of the community, not a substitute of politics. Otherwise, the constitution will not lay

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[31] Such a three-fold distinction is no other one than the characteristic of most national constitutional orders, i.e. that which distinguishes between constitutional, statutory and regulatory norms. See Alexander Türk, *The Concept of Legislation in European Community Law. A Comparative Approach,* Dordrecht: Kluwer, 2006.

[32] See Maurizio Fioravanti, *Constitución: De la Antigüedad a Nuestros Días*, Madrid: Trotta, 2001; Bruce Ackerman, *We The People*, Cambridge, Harvard University Press, 1991 and 1997; Carlos Santiago Nino, *The Constitution of Deliberative Democracy*, New Haven: Yale University Press. See also Bruce Ackerman, 'The Storrs Lectures: Discovering the Constitution', 94 (1984) *The Yale Law Journal*, pp. 1013-72; Bruce Ackerman, 'Constitutional Politics /Constitutional Law' 99 (1989) *Yale Law Journal*, pp. 453-547; Bruce Ackerman and Neal Katyal, 'Our Unconventional Founding', 62 (1995) *The University of Chicago Law Review*, pp. 475-573.

[33] Alexy, *supra*, fn. 24.

the ground for the public autonomy of citizens, but will in effect undermine it.[34] Moreover, there is a need to distinguish between the Constitution and ordinary decision-making, as the latter is required to reconcile the public and private autonomy of citizens. Intense public participation will only be required in constitutional moments; *ordinary politics* would be less demanding, and consequently, will allow for the proper respect of private autonomy.[35]

§14. This brings us to the second distinction, that between ordinary statutes and regulations. Ordinary law-making processes are indeed framed by constitutional norms, both in procedural and substantive terms. Still, they play a key role in any political community, and indeed democracy basically depends on them. [36] The democratic legitimacy of ordinary statutes stems from the fact that ordinary law-making processes are means of discussing and testing political questions raised by the general publics according to the specific procedures of strong publics (typically parliaments), where citizens' voices and decisions are mediated through and taken by representatives of their choice. Indeed, deliberative democratic theory does not conceive law-making processes as mere aggregative processes, but as argumentative processes in which discussion flows on the basis of different interests and value-rankings, and which help to reconsider preferences, and in doing so, help forge a coherent common will. Indeed, the democratic legitimacy they confer upon the resulting norms is a function of the deliberative properties of such procedures, especially the interface they provide between institutions and general publics. [37] their aggregative capacities, and most importantly, the coupling of deliberation and decision-making. Having said that, the democratic legitimacy of ordinary statutes is *prima facie* lower than that of proper constitutional norms, for the simple reason that ordinary law-making tends to be far less inclusive. Not only are citizens' voices highly mediated through their representatives (which may eventually decide against the will of their principals), but the overall degree of public participation and scrutiny tends to be lower.

The ordinary law-making process needs to be complemented by regulative processes, in which the essential elements of statutes are rendered precise and concrete in relation to their concrete application. This further bifurcation of the principle of democratic legality is required because of the very daunting integrative role assigned to law in modern societies. Were the integrative functions of law to be discharged exclusively through constitutional norms and statutes, not only would such decision-making processes be literally flawed, but it would also be much harder to incorporate expert and specialised knowledge in the legal regulation of society. This is why not only a third type of laws is distinguished, but the process through which they are elaborated is radically distinguished from constitutional and ordinary law-making.

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[34] Nino, *supra* , fn. 32.

[35] Ackerman, *supra*, fn. 32.

[36] Francisco Laporta, 'El Ámbito de la Constitución', 24 (2001) *Doxa*, pp. 459-84.

[37] See Nancy Fraser 'Rethinking the public sphere. A contribution to the critique of actually existing democracy', in Craig Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge: The MIT Press, 1992), pp.109-42; Erik Oddvar Eriksen and John Erik Fossum, 'Democracy through Strong Publics in the European Union?', 40 (2002) *Journal of Common Market Studies*, pp. 401-24; *Conceptualising European Public Spheres: General, Segmented and Strong Publics*, Working Paper ARENA 3/04; and Hauke Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism', 31 (2002) *Millenium: Journal of International Studies*, pp. 675-90.

The legitimacy of regulatory norms is only derivatively democratic to the extent that their contents implement the normative mandates of constitutional and statutory norms, it is further complemented by the capacity to recruit expert and specialised knowledge.

Deliberative democracy and representative democracy

§15. It must be rendered clear from the outset that I do not agree with characterising deliberative democracy as an alternative to representative democracy, as is frequently the case. On the contrary, I claim that deliberative democracy is the best possible theoretical foundation of the existing institutional mechanisms of political representation, even if they fall very short of the normative ideal of deliberative democracy. Representative democratic theory assigns a key role to argumentation both among citizens and within the arenas of representation. The timing and formal organization of electoral contests is intended to enhance the chances for cross-examination of political arguments (even if practice may fall well short of such an ideal). This is the reason why, for example, many national electoral laws establish not only financial but also temporal limits to political advertising, designating the day before polling as "reflection day", during which no more campaigning is allowed. Similarly, representative institutions and their decision-making procedures are concrete manifestations of argumentative ideals, intended to ensure the testing and clarification of arguments in the court of public reason. Indeed, the rules of procedure of national parliaments can be read as concrete manifestations of the very idea of public reason.

The fact that there is indeed no contradiction, but deep affinity, between deliberative and representative democracy has been obscured by the dominance of a rather limited, aggregative conception of democracy since the end of the Second World War. In the specific historical context of the aftermath of a conflict in which all normative taboos were broken, normative democratic ideals were restated in rather minimalistic terms. Self-government was redefined as a matter of a periodical competition for power among elites arbitrated by the aggregation of citizens' preferences. The ideological context of the cold war favoured giving primacy to private freedoms and downgrading public autonomy and positive liberty. In the classical formulation of Joseph Schumpeter, political freedoms basically entail citizens playing a role akin to market consumers who can "kick the rascals out" every now and then, only to elect another bunch of "rascals".[38] However, such a "minimalistic" understanding, in which will-formation is fully decoupled from deliberation, is a historical anomaly, not a rule.

The grounds of the EU's legitimacy

§16. In this section I consider the four main grounds of the EU's democratic legitimacy, which are (1) its institutional potential to recouple law and democracy by

[38] Paradigmatic are the definitions of democracy to be found in Joseph Schumpeter, *Capitalism, Socialism and Democracy*, London: Allen and Unwin, 1942. See also John Medearis, *Schumpeter's two theories of democracy*, Cambridge: Harvard University Press, 2001. On the impact of the Cold War, see Jeremy Suri, *Henry Kissinger and the American Century*, Cambridge: Harvard University Press, 2007.

creating institutions at the right level of government; (2) the identity of its constitutional norms, which essentially reflect the constitutional norms common to the Member States; (3) the democratic legitimacy structurally guaranteed to European laws by the decision-making process through which they are produced, essentially the ordinary Community procedure and co-decision; (4) the modicum of democratic legitimacy inserted into regulatory norms by the role assigned to law-making institutions in the regulatory process.

European law as a means of realising the democratic principle both at the national and the European level

§17. The first source of democratic potential of the European Union is the very size and scope of its institutional structure, to the extent that it creates the conditions under which it is possible to recouple the constituency of those affected by legal norms and those who have the chance to deliberate and decide on these norms. A system of European sovereign nation-states, with its corresponding structure of fully autonomous legal orders, is bound to be structurally incapable of realising the democratic principle in Europe, given the special intensity of common interests across borders which call for the establishment of common institutions and decision-making processes.[39] It is a fact that national borders in Europe cut across intense webs of societal relationships, which have been genuinely transnational for centuries. The integration of a *de facto* European society with fully independent national legal orders is bound to give rise not only to dysfunctionalities (which could still be mitigated to a large extent through smart coordination of conflicting national law rules) [40] but also to huge democratic shortcomings. By affirming themselves as *unbounded sovereigns*, the classical Westphalian nation-states could affect the lives of nationals of other European states, while denying them any *say* over decisions. Today this gives rise to a structural democratic problem, as it creates large constituencies which are affected by laws over which they have absolutely no say as they are *foreign* laws; laws of *other* Member States.

§18. In the last century, Europeans have learned from two successive disasters that this state of affairs can end up undermining national democratic systems, and bring about confrontation and large-scale war.[41] Quite obviously, the causal chain leading to the two world wars of the 20th century is a large and complex one, but it is hard to escape the conclusion that the lack of a common institutional framework, and of common norms of action which could solve conflicts and coordinate action in view of common goals, played a relevant role in the unleashing of the conflicts.[42] This helps to

[39] Mutual affection also explains the transformation of public international law and international relations during the last sixty years. However, the web of common interests of European states can still be said to be even denser. This might explain why the process of European integration has gone further politically as well as legally.

[40] The need for some degree of coordination of national legal systems was felt from the very early XIXth centurt, and even by some of the champions of nation-states, such as Pasquale Stanislao Mancini (see his *Della nazionalità come fondamento del diritto delle genti*, reissued recently, Torino: Giappichelli, 2000).

[41] Jürgen Habermas, 'Learning by disaster? A diagnostic look on the short 20th century', 5 (1997) *Constellations*, pp. 307-20.

[42] Just one (extremely illuminating, though) example is the famous John Maynard Keynes, *The Economic Consequences of the Peace. Vol II of Collected Writings of John Maynard Keynes.* London: MacMillan, 1971.

explain the numerous initiatives to establish common institutions capable of enacting common laws governing economic activities in Europe in the post-war era, especially concerning commerce on goods. Indeed, economic matters, and especially commerce, were perceived as the key area in which national measures had extraterritorial effects.[43] However, it is important to keep in mind that the establishment of common trade norms was not perceived as an end in itself, but as a means to ensure the peace, stability and prosperity of the continent.

§19. This realisation was first translated into legal language in the national constitutions written in the immediate aftermath of the Second World War. If we limit ourselves to the constitutions of the founding members of the original Communities, five out of six contain innovative international clauses which not only authorise, but also mandate some form of international integration at the time of the signing and ratification of the Rome Treaties in 1957.[44] These clauses were original in comparative constitutionalism because they contemplated the active participation of the state in multilateral international institutions, which necessarily implied a collective exercise of public powers, and consequently, the transfer of sovereign powers to multilateral organisations. In contrast, "classical" international clauses limited themselves to

[43] Department of Economic Affairs of the United Nations, *Customs Unions: a League of Nations contribution to the study of customs union problem*, New York: United Nations, 1947.

[44] The Preamble of the 1946 French Constitution stated that "provided the principle of reciprocity is guaranteed, the French Republic will agree to limitations of sovereignty when necessary for the organisation and guarantee of peace". It must be added that the Constitution broke with the radical dualist tradition in French law, and rendered its legal system more open to international law. Article 11 of the Italian Constitution reads "Italy repudiates war as an instrument offending the liberty of the peoples and as a means of settling international disputes; it agrees to limitations to sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends". Bartolomeo Ruini, the social-democratic President of the Commission which drafted the Italian Constitution who played a major role in shaping this Article, established a clear link between its contents and the obligation to create supranational institutions. The first two sections of Article 24 of the German Constitution stated that "1. The Federation may, by legislation, transfer sovereign powers to international institutions; 2. For the maintenance of peace, the Federation may join a system of mutual collective security; in doing so it will consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world". It must be added that even if the Luxembourgeois constitution did not still contain anything vaguely resembling a proto-European clause, the Conseil d'Êtat constructed its fundamental law with the same purpose in mind. When reviewing the constitutionality of the Treaty establishing the Coal and Steel Community, the Conseil affirmed that Luxembourg not only could, but should, renounce certain sovereign powers if the public good so required (See Avis du Conseil d'État of 9 April 1952, at http://www.ena.lu?lang=1&doc=9644 (visited 1 September 2006)). By 1957, both the Dutch and the Luxembourgeois constitution had been amended to include a similar proto-European clause. In the Dutch case, the constitutional amendment had been introduced in 1953 in view of the eventual ratification of the Treaty which established the European Defence Community (see Jonkheer HF van. Panhuys, 'The Netherlands Constitution and International law', 47 (1953) American Journal of International Law, pp. 537-558). The new drafting of Article 67 enabled the conferral of legislative, administrative and jurisdictional powers to "organizations based on international law", at the same time that Article 63 went as far as to stating that "the contents of an agreement may deviate from certain provisions of the constitution", subject to the double condition "development of the international legal order requires this" and the agreement is approved by a two-thirds majority in both parliamentary chambers. Moreover, Article 65 as thus amended affirmed the primacy of international law within the national legal order. What concerns the Constitution of the Grand Duchy, a new Article 49a was inserted into the fundamental law in 1956, and it read that "[t]he exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily vested by treaty in institutions governed by international law".

regulating the way in which treaties should be negotiated, signed and ratified, and the place they should occupy within the national system of legal sources.

It could be objected that such provisions only made open-ended references to supranational institutions, and unlike present European clauses, contained no explicit reference to neither European integration nor to the treaties establishing the three original European Communities. However, this lack of specificity is not very surprising. A precise allusion was in most cases simply impossible given that the national constitutions were approved *before* any of the European communities were established. In all cases, it would have been inappropriate to make such references *before* concrete institutions became consolidated. Several alternative projects of European integration were launched in the aftermath of the war.[45] If, and only if, "supranational" constitutional clauses were abstract enough could they be used in order to (eventually) ratify as many treaties as needed before a really successful set of common institutions took hold.

§20. The European Union can thus be regarded as a concrete institutional embodiment of the cosmopolitan ideal of *integration and peace through law*, which can indeed be traced back to the philosophers of the Enlightenment era,[46] and more recently, to the "normative" thinkers of international law in the first half of the twentieth century.[47] The international and proto-European clauses of national constitutions must be regarded not only as the late fruit of democratic conceptions of international law developed in the interwar period, but also as forerunners of the explicit *European clauses* that have been introduced in the constitutions of many Member States.[48]

§21. Integration through law thus has the *potential* to create the conditions under which the structural democratic problem of the system of nation-states may be overcome; but as we will see *in extenso* in the third section of this article, it is not by itself a guarantee that it will actually be overcome. My point here is indeed a modest one. The EU has structural democratising potential; whether this is realised depends

[45] Cf. Ernst Haas, 'The United States of Europe', 48 (1948) *Political Science Quarterly*, pp. 528-550.

[46] See, among others, Abbé Saint Pierre, *Abrégé du projet de paix perpétuelle*, Rotterdam: J.-D. Beman, 1729; Immanuel Kant, 'Toward Perpetual Peace', in *Practical Philosophy*, Cambridge: Cambridge University Press, 1996, pp. 311-51.

[47] Hans Kelsen, 'Les rapports de système entre le droit interne et le droit internationale public' 14 (1926) *Recueil des Cours*, pp.227-331; Joseph Gabriel Starke, 'Monism and Dualism in the Theory of International Law', 17 (1936) *British Yearbook of International Law*, pp. 66-81; Boris Mirkine-Guetzévitch, 'Droit International et droit constitutionnel', 38 (1938) *Recueil des Cours*, pp. 311-463; Umberto Campagnolo, *Nations et Droit*. Paris: Felix Alcan, 1938; Albéric Rolin, *Les Origines de l'Institut de droit international (1873-1923): Souvenirs d'un témoin*, Bruxelles: Vroment, 1923. A concrete application to Europe before the Second World War is documented in B Mirkine-Guetzevicth and Georges Scelle (eds.), *L'Union Européenne*, Paris: Librairie Delagrave, 1931. In the war period, see Hans Kelsen, *Peace through law*, Chapel Hill: University of North Carolina, 1944; in the postwar, Hans Kelsen, *The Law of the United Nations*, London: Stevens and sons, 1950; Alf Ross, *Constitution of the United Nations*, Copenhagen: Munksgaard, 1950.

[48] On European clauses, see Monica Claes, 'Constitutionalising Europe at its source', 24 (2005) *Yearbook of European Law*, pp. 81-125 and Christopher Grabenwarter, 'National Constitutional Law Relating to the European Union', in Armin Von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law*, Oxford: Hart Publishers, 2006, pp. 95-144; on more recent clauses, see Anneli Albi,'"Europe" Articles in the Constitutions of Central and Eastern European Countries', 42 (2005) *Common Market Law Review*, pp. 399-423.

on the concrete way in which decision-making is structured in the Union.

The common constitutional traditions

§22. The formal international character of the founding Treaties created a tension between *process* and *substance.* It is widely accepted that at one point European Community law became a constitutional legal order. It is also clear that this was not the result of a process of forging and testing of the common constitutional will of European citizens in forms and manners similar to the ones resorted to in *national democratic* processes of constitution-building.[49] To put it differently, the transformation of Community law from a subsystem of public international law to a constitutionalised legal system took place in the absence both a "constitutional moment" (i.e. *it was not based on the actual exercise of the constituting power of Europeans, either collectively or as national communities*) and of a constitutional text. As Martin Shapiro once put it, the Union has constitutional law but no constitutional politics so far.[50]

§23. Contrary to what is sometimes argued, such a *legitimacy base* cannot be regarded as obsolete and unnecessary, and thus be dispensed with. That would indeed contradict the very rationale of European integration, that is overcoming a nationalist and aggregative concept of sovereignty in the name of fundamental rights and freedoms.[51] On such a basis, one may be tempted to assume that the lack of a written constitution, elaborated through a democratic constitution-building process, is at the core of the democratic troubles of the European Union. There is some truth in that, as we will see in the third section. But perhaps that is not the only truth. It seems to me that one of the genuinely innovative features of the process of European integration is that it has revealed to us a democratic alternative to the exercise of the *pouvoir constituent* for the establishment of a political community. Such an alternative is no other than the very idea of a "common constitutional law" as a temporary substitute of a written democratic constitution, which can be referred to as the "theory of constitutional synthesis".[52] The term "synthesis" is intended to reflect the process of

[49] There is no plausible reconstruction of the process of integration which will allow us to conclude that it was based on the exercise of democratic constituent power. There was no process which could remotely qualify as test of the will of European citizens to endorse the resulting set of European constitutional norms. There was a widespread feeling, among partisans and detractors, of the importance of the launch of the process of integration, and of its constitutional import, but this did not result in following the procedures equivalent to those of constitutional reform.

[50] Martin Shapiro, 'Comparative law and Comparative Politics', 53 (1980) *Southern California Law Review*, pp. 537-42.

[51] Jürgen Habermas, *Between Facts and Norms*, Cambridge (MA): The MIT Press, 1996, p. 301: "This is not to denounce the intuition connected with the idea of popular sovereignty, but to interpret it intersubjectively". *Technocratic characterisations* of European integration were vocal in a context marked by the *failure of most European nation-states* to ensure peace and economic stability (from which the very *drive to integrate* originated) and by the *recurrent crisis of trust in political decision-making processes* (and very noticeably, in the late sixties and early seventies as the result of the combination of social radicalisation and economic crises).

[52] The theory of constitutional thesis owes a big intellectual debt to Francisco Rubio Llorente 'El constitucionalismo de los Estados Integrados de Europa', 48 *Revista Española de Derecho Constitucional*, pp. 9-33, to Massimo La Torre, 'Legal Pluralism as an Evolutionary Achievement of Community Law', 12 (1999) *Ratio Juris*, pp. 182-95 and to Neil MacCormick's seminal "Beyond Sovereignty", 52 (1993) *Modern Law Review*, pp. 1-18. It seems to me that it is quite close to the constitutional theory advocated in Miguel Azpitarte Sánchez, 'Del derecho constitucional común a la Constitución europea', 16 (2005) *Teoría y*

combining national constitutional norms, through which a new set of European constitutional norms emerges. Such a process does not annul their separate constitutional identities (synthesis does not imply that national constitutional norms *disappear* as national norms, or that they are directly transformed in their substantive content or validity basis); at the same time, it clearly affirms that a common constitutional law is the outcome of the process, and that such common law is not based on the mere juxtaposition of norms according to a least common denominator. There is a genuine synthesis, through which idiosyncratic national norms are expelled from the European (and the national) canon of constitutionality.[53] Still, "synthesis" is not applied in a strict Hegelian sense, as it is not used with a *transcendental connotation*, as national constitutional norms keep on having their own validity basis after they merge with other nations' constitutional norms into a common constitution.

What is of key importance from the point of view of democratic legitimacy is that in the process of synthesis, national constitutional norms transmit their democratic legitimacy to the synthesising European norms, which in turn radiate such legitimacy to all infra-constitutional norms of the European legal order, given that their validity is conditioned to their European constitutionality.

To put it differently, the legitimising role played by the processes through which the existence of a common constitutional will is tested, is substituted in the EU by the transference of the democratic legitimacy of the common constitutional norms of the Member States. This is so because the European legal order was based, since its very creation, on the constitutional norms common to the Member States, and not only on its founding treaties. Such common constitutional norms as national constitutional norms, were all characterised by their high degree of democratic legitimacy, to the extent that they are the product of a common national constitutional will, tested through democratically demanding processes at the national level. Because the validity of all European norms is dependent on their compatibility with common European constitutional norms, the democratic legitimacy transferred by national constitutional norms is radiated to all European norms.

The typical example of fusion is that of the principle of protection of fundamental rights, affirmed by the Court to be an unwritten but key general principle of Union law since its judgment in *Stauder*.[54] However, constitutional synthesis has indeed been the framework within which European law has evolved since its very inception.[55]

Constitutional synthesis is thus capable of explaining how the establishment of a constitutional order can be democratically legitimate even if the constituting power of those subject to the constitutional order is not exerted through a constitution-making

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Realidad Constitucional, pp. 343-73.

[53] Although European integration *indirectly* results in the transformation of both substance and validity. But that is a subject for another occasion.

[54] See Case 29/69, *Stauder vs. city of Ulm* [1969] ECR 419, paragraph 7: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the *fundamental rights enshrined in the general principles of Community law protected by the Court*" (my italics) and Case 11/70, *Internationale*, [1970] ECR 1125.

[55] Koen Lenaerts, 'Le droit comparé dans le travail du juge communitaire', 37 (2001) *Revue Trimestrelle du Droit Européen*, 487-528.

process. However, as we will have the chance to consider in the third section, such a legitimising role can only be time-limited, as the indirect constitutional legitimacy transferred to European law is bound to regress as time passes.

Ordinary law-making

§24. The founding Treaties not only established permanent European institutions, but also assigned to them law-making powers.[56] The institutions of the European Union were empowered to produce secondary norms, most importantly regulations and directives. The very name of such acts speaks volumes about the original characterisation of the Communities as a supranational administrative body, to which we have already referred (§4); it was only natural that Community acts were conceived as regulatory norms that implemented the framework laws of the Communities, i.e. the founding Treaties.[57]

However, the substantive questions to which regulations and directives were to be applied, starkly contradicted their characterisation as typical implementing norms. In many cases, regulations and directives were supposed to regulate matters explicitly designated in national constitutions to be decided by parliaments. To claim that in all cases the Treaties established the basic legal discipline, and that regulations and directives merely implemented it, was simply impossible given the succinct and programmatic character of most Treaty provisions.[58] The ensuing tension was solved in constitutional practice in favour of the characterisation of regulations and directives as statutes in a "material sense".[59]

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[56] This, it can be argued, was part and parcel of the argument of European Court of Justice in *Costa v. Enel*, [1964] ECR 585. See especially the following passage: "by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and representation on the international plane and, more particularly, *real powers stemming from a limitation of sovereignty and a transfer of powers from the states to the community*, the Member States have limited their sovereign rights, albeit within limited fields, and have thus *created a body of law which binds both their nationals and themselves*".

[57] See the opinion of Advocate General in case 6/64 *Costa c. Enel*, [1964] C.M.L.R. 425, pp. 442: "It is certainly true to say that the E.E.C. Treaty has, in a sense, the character of a genuine constitution, the constitution of the Community (and from this point of view it is made complete by the protocols and the schedules having the same value as the Treaty itself and not that of regulation); but for the greater part, the Treaty has above all the character of what we can call a ' *loi-cadre* '; and this is a perfectly legitimate approach when one is dealing with a situation of an evolutionary nature such as the establishment of a Common Market in respect of which the objects to be attained and the conditions to be realised (rather than the manner of realisation) are defined in such a way that the generality of the provisions need not exclude precision: we are still far from the 'blankseeings' (or 'free-hand') in which certain national parliaments indulge."

[58] To consider one key example, the Treaty of the European Economic Community foresaw the creation of a customs union, which would require not only eliminating all tariffs and quantitative restrictions among Member States, but also the establishment of a common external tariff. This entailed that a Community regulation would define the tax fact, base and rate of all tariffs, and that such definitions would have direct and immediate effect in all Member States. However, taxes were and are still a subject matter typically reserved to statutes; the constitutions of all Member States rule out that these questions be sorted out in independent, autonomous regulations. Indeed, the European regulation which established the common external tariff actually derogated what were national parliamentary statutes.

[59] The very fact that in many cases directives are transposed through national statutes approved by Parliaments furnishes us with solid evidence. In the jurisprudence of the European Court of Justice this becomes crystal clear when considering the "division of labour" which should prevail between regulations and directives and "implementing" regulations and directives produced through "delegation of powers" to comitology committees. In that regard, see judgment in case 25/70, *Köster* [1970] ECR 1161.

The granting of genuine law-making powers to European institutions is easy to justify by reference to the reach and breadth of the legislation, in line with what was said in the second section of this chapter. European norms must be seen as an alternative to *undemocratic national norms*, i.e. to those national norms which had substantive effects across borders, but in the deliberation and decision-making of which only nationals participated. Moreover, European norms sometimes replaced what *de facto* was private law-making, devoid of any trace of democratic legitimacy. The regulation of the production of coal and steel is indeed the first and a remarkably clear example. Supranational integration clearly implied the formal transfer of powers from the Member States to the European Coal and Steel Community; but as a matter of fact, it can be more properly described as a process by means of which public institutions regained power by means of pooling their sovereignty, and creating institutions and decision-making processes capable of reining in the private power of the corporations which frequently colluded in cartels.[60]

§25. This *material-legal* reading of regulations and directives was clearly favoured by the fact that the decision-making processes through which the said legal acts are adopted can be constructed as processes through which a "general European will" is tested and consistently formulated.

At the time of the founding, most decisions were taken through what can be labelled the ordinary Community method of decision-making. That is, a process where the right of legislative initiative is monopolised by the European Commission, where the European Parliament is consulted (even if its opinion is not binding), and where the final decision is left in the hands of the Council of Ministers (ex article 94 of the Treaty of European Community). A general European will is said to exist, and consequently, to transform the proposal into law, if and only if there is a unanimous agreement among the members of the Council. In democratic terms, this entails that where the standard Community method is applied, the general European will is defined as the aggregation of national general wills. Consequently, the chain of legitimacy of the decision is not only long, but most of its links are national. If the vote of each national representative in the Council infuses the decision with democratic legitimacy, it is because it acts as the speaker of a national general will, forged through a democratic process in each and every Member State. This is so to the extent that ministers sitting in the Council have been designated by a Prime Minister or President who is herself accountable to the national parliament, where direct representatives of citizens sit.

Since the Maastricht Treaty, a second main definition of the general European will has been established. The so-called co-decision procedure grants the European Parliament co-legislative powers by means of adding new procedural steps on top of those characteristic of the ordinary Community decision-making process. In most cases, this goes hand in hand with the redefinition of the voting rules according to which national common wills are aggregated in the Council; a qualified majority of votes, not unanimity, is now sufficient for forming a positive Council will. At any rate, the fact that no proposal can be turned into law if the European Parliament votes against it, entails that where co-decision is applied, the general European will is defined as a double general will: the will of a qualified number of national general wills, as aggregated in the Council, and the will of the majority of the direct representatives of

[60] See, for example, Paul Reuter, *La Communauté européen du charbon et du acier,* Paris : LGDJ, 1953.

European citizens. In democratic terms, this "double majority" reflects the federal character of the European Union, to the extent that aggregated national wills are necessary to form a general European will, but such a will can be forged even if some national governments oppose the measure.[61]

The specific means of implementing laws in Union law: Comitology as a means of producing regulations

§26. The founding Treaties of the Communities did not foresee any decision-making procedure through which regulations and directives could be implemented, by means of producing general and abstract norms that specified and concretised the general normative choices contained in the main normative acts. However, it was soon realised that the ordinary Community decision-making process would not suffice to generate the enormous amount of norms needed to realise the objectives of the Treaties. First, the members of the Council would not be capable passing all necessary norms, as they could not afford to spend the necessary time discharging such tasks. The number of norms to be produced was enormous in fields such as agricultural policy.[62] True, the Council was quick to transform itself into a hierarchical trinity consisting of the Committee of Permanent Representatives, already foreseen in the Treaties (the so-called COCOR in the Paris Treaty, and COREPER in the Rome Treaty, further split in two in 1962), which prepared the discussions of the Council of Ministers,[63] a number of specialised preparatory committees (some of them not foreseen in the Treaties, such as the Special Committee on Agriculture or the Financial Services Committee) and of working Groups.[64] However, and that is the second spring of the functional pressure to create regulatory decision-making processes, not even this trinity could recruit the expertise and specialised knowledge that was needed in order to produce effective implementing regulations and directives.

§27. The combination of such functional pressures and the absence of a constitutionally embedded regulatory decision-making process, lead to the use of the method of "delegation of powers" to produce regulatory norms. The Council was formally said to delegate such powers to the Commission, while at the same time subjecting its exercise of the powers to the control of committees composed of national representatives. This is the essence of the so-called "comitology" procedure.

§28. Comitology contributes to the democratic legitimacy of the European Union in two different respects. Firstly, comitology guarantees that the very institutions which are assigned key decision-making powers in law-making procedures can exert a degree of control over the contents of regulatory norms. This was always the case

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[61] See Koen Lenaerts 'Some Reflections on the Separation of Powers in the European Community', 28 (1991) *Common Market Law Review*, pp 11-35 and Stefan Oeter, 'Federalism and Democracy' in Armin Von Bogdandy y Jürgen Bast (eds.), *Principles of European Constitutional Law*, Oxford: Hart, 2006, pp. 53-93.

[62] Francis Snyder, 'The use of legal acts in EC agricultural policy', in Gerd Winter (ed.), *Sources and categories of European Union Law*, Baden-Baden: Nomos, 1996, pp. 347-84.

[63] Cf. Emile Noël 'The Comité of Permanent Representatives' 6 (1967) *Journal of Common Market Studies*, pp. 219-51.

[64] Jans Beyers y G Diericks, 'The working groups of the Council of the European Union: supranational or intergovernmental negotiations', 36 (1998) *Journal of Common Market Studies*, pp. 289-318; Eves Fouilleux, Jacques de Maillard y Andy Smith, 'Technical or Political? The working groups of the EU Council of Ministers', 12 (2005) *Journal of European Public Policy*, pp. 609-23.

with regard to the Council, and is now also the case (after the adoption of the new Comitology decision in 2006), with regard to the European Parliament, although with certain limitations.[65] The soundness of this conclusion depends, quite obviously, on accepting that *implementation procedures* are to be properly and duly framed by *general legal norms*, and are not to be regarded as *alternatives* to democratic law-making. True, the division of labour between statutes and regulations is far from neat in European Community law, as reflected in the fact that the European Court of Justice has refused to introduce a hierarchical relationship between regulations and directives and implementing norms.[66] This may occasionally result in implementing regulations and directives containing norms whose substantive content would seem to command their inclusion in a regulation or directive approved through the standard law-making procedures. However, it is the very fact that the Council and the European Parliament can monitor comitology committees that renders this procedure democratically superior to blank delegation to national executives or administrations. It provides a way of writing *implementation norms* in ways in which *substantive correctness* and *democratic inputs* are combined.[67] Secondly, comitology committees are composed of representatives of national governments who contribute through their technical, scientific or local knowledge to the quality of the procedure. It has been observed that their own identities as experts; providers of scientific, technical or local knowledge, tend to foster *a deliberative logic of interaction* within the committees.[68] This contributes to reinforcing the democratic legitimacy of the Union, to the extent that communicative interaction ensures a more impartial outcome than the mere aggregation of national interests, and consequently reinforces the equality of European citizens before the law.

§29. The grounds of the EU's democratic legitimacy considered so far allow us to understand why accession to the European Union is not a unidirectional process, by means of which European law is imposed upon new Member States, but (at least potentially) a reciprocal process. New Member States gain not only a voice and a say in European decision-making processes, both legal and regulatory, but more importantly, their constitutional law may question and help transforming the definition of what is regarded as the common constitutional law of the Union. Given the fact that only countries whose constitutional order is already in line with the basic common constitutional law of the Union can become members, no spectacular changes can be expected to take place, but the "new" national constitutional traditions can play the (slow and contained) role of "irritants" which is characteristic of the national constitutional traditions of the "old" Member States. Moreover, accession is as necessary in their case as in that of "old" Member States in order to realise the democratic principles in the core of their national constitutions. This explains why the decision to accept a new Member State has been in most cases rather consensual. If

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[65] See Manuela Alfé, Thomas Christiansen and Sonia Piedrafita, '21st century comitology: The role of implementation committees in the EU27', available at http://www.arena.uio.no/events/seminarpapers/2007/Thomas_Christiansen.pdf.

[66] Cf. the judgment in case 41/69 *ACF Chemiefarma*, [1970] ECR 661, par. 60-62.

[67] An analysis of similar problems in a different legal order can be found in Bruce Ackerman, 'The New Separation of Powers', 113 (2000) *Harvard Law Review*, pp. 633-729.

[68] Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 (1997) *European Law Journal*, pp. 273-99; Christian Joerges, 'Deliberative Supranationalism: Two Defenses' 8 (2002) *European Law Journal*, 133-51.

concrete enlargements prove extremely controversial (the accession of the United Kingdom in the sixties and early seventies, that of Turkey nowadays) it is not so much because of the resulting increase in the breadth and scope of Union law, but because the enlargement is said to imply a constitutional transformation of the Union, precipitating a radical mutation of the kind of project the European Union is.

Legitimacy through substance: Economic freedoms, fundamental rights and the review of European constitutionality

§30. Economic liberties (the four freedoms enshrined in the first and third titles of the third part of the Treaty of the European Community, i.e. free movement of goods, free movement of workers, freedom of provision of services and of establishment, plus the principle of free and undistorted competition) and the principle of protection of fundamental rights (as explicated in the jurisprudence of the European Court of Justice) are the key components of the canon of European constitutionality. Any norm belonging to the legal order of any Member State, including those of constitutional rank and dignity, may be set aside by national judges when they come into conflict with this "constitutional core" of European Community law.[69] This was not obvious at the time of the founding of the Communities, although it is perfectly in line with the systematic interpretation of Community law in view of its integrative purpose. It also has obvious democratic implications.

§31. Concerning the protection of economic liberties, the literal tenor of the Treaties appeared to invite their characterization as a programmatic text, with no immediate legal implications, bar their concretization in the law-making process of the Communities. However, the Court of Justice quickly affirmed that some provisions of the Treaties could directly give rise to individual rights and obligations within national legal orders, thus boldly rejecting the notion that the Treaties were merely a political program and not a legal text.[70] The provisions which were acknowledged to have direct effect were essentially those concerning the immediate control of the national economic borders, such as the one contained in the article whose interpretation was discussed in *Van Gent*, viz, Article 12, which forbade, among other things, increasing the customs duties applicable to intra-community trade. It was only much later (in 1974, only months after Italy had introduced measures to openly restrain the free movement of goods in a desperate attempt to revive the economy after the massive shock experienced during the first oil crisis)[71] that the Court affirmed the direct effect of Article 30, which enshrined the principle of free movement of goods, and started a de facto review of national legal norms to determine if they were in breach of this fundamental principle of Community law.[72] Both the key position assigned to the free movement of goods in the Treaties (still contained in the first title of the third part of the Treaty, and still self-standing,

[69] The leading judgment is that in case 106/77, *Simmenthal II*, [1978] ECR 629, par. 21; this is applied in the judgments in case C-183/91, [1993] ECR 3131 (where the ECJ rules that a Greek constitutional norm should be set aside) ; C-473/93, [1996] ECR I-3207 (the rule being set aside is part of the Constitution of Luxembourg); C-285/98, *Kreil*, [2000] ECR I-69 (the conclusions of the Court can only be upheld in defiance of the clear literal tenor of the German Constitution).

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

[71] On the context, see Marcello de Cecco, 'Italy's Payments Crisis: International Responsibilities', 51 (1975) *International Affairs*, pp. 3-22.

[72] Case 8/74 *Dassonville v Procurer du Roi*, [1974] ECR 837.

distinguished from the other three economic freedoms) and the very direction which the process of integration followed, help to account for this avant-garde role of this principle. Since then, the Court has tended to increase step by step the breadth of the principle, thus increasing the constituency of national norms which can potentially be in conflict with it.[73] Given the affirmation of direct effect, the progressive expansion of its application with regard to all four economic freedoms was only a matter of time.[74] This transformation contributed to fosters key preconditions for the realization of democracy in Europe. First, such values gave rise to *subjective rights* of which the right-holders were all residents within the area of the Communities. When interpreted systematically, as realisations of the principle of interdiction of discrimination on the grounds of nationality, they ensured a minimal level of protection of rights to non-nationals (at least to those non-nationals who were resident in the Communities),[75] and consequently constrained the unfettered exploitation of the mismatch between citizens and those affected by national law to the detriment of foreigners. Second, the effective upholding of the four economic freedoms could be regarded as a *basic precondition* for the effective protection of all *fundamental rights*. This presupposes the claim that in the absence of such a protection, peace and material prosperity is at risk,[76] and with it, political, civic and socio-economic rights; or in brief, all rights.

§32. Regarding the protection of fundamental rights, it has become commonplace to claim that the line of jurisprudence which started with *Stauder* and *Internationale* was motivated by the wish to preserve the primacy of Community law, threatened by ordinary Italian and German judges denouncing the consequences of acknowledging unlimited primacy to Community law, whose founding Treaties did not even mention fundamental rights. By affirming that there was a basic, albeit unwritten, principle of protection of fundamental rights at the basis of Community law, the Court internalized, so to speak, what was potentially a conflict between legal orders. In doing so, it ensured pacific respect of its primacy doctrine, and consequently fostered the aggrandizement of its jurisdiction.[77] But the move had deeper, and less

[73] Case 120/78, *Rewe Zentral* (Cassis de Dijon), [1979] ECR 649; see Joseph Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods" in Paul Craig and Grainne de Búrca, *The Evolution of EU Law*, Oxford: Oxford University Press, 1999, pp. 349-76; Miguel Maduro, *We the Court*, Oxford: Hart Publishers, 1998. While the Court has had second thoughts (of which case C-267/91 *Keck*, [1993] ECR I-6097 is the paradigmatic example), it has shown scarce doubts on what concerns expanding its case law to review purely internal national laws, with no discriminatory feature.

[74] See Julio Baquero Cruz, *Entre competencia y libre circulación*, Madrid: Civitas, 2002; Álvaro de Castro Oliveira, 'Workers and Other Persons: Step by Step from Movement to Citizenship', 39 (2002) *Common Market Law Review*, pp. 77-127; Vassilis Hatzopoulos and Thien Uyen Do, 'The Case Law of the ECJ concerning the free provision of services: 2000-2005', 43 (2006) *Common Market Law Review*, pp. 923-91; Eddy Wymeersch, 'The Transfer of the Company's Seat in EEC Law', 40 (2002) *Common Market Law* Review, pp. 661-95; S. Mohamed, *European Community Law on the Free Movement of Capital*, Stockholm: Kluwer Law International, 1999; A. Landsmeer, 'Movement of Capital and other Freedoms', 28 (2001) *Legal Issues of Economic Integration*, pp. 57-69; Leo Flynn, 'Coming of Age: The free Movement of Capital Case Law', 39 (2002) 773-805; Mads Andenas, Tilmann Gütt and Matthias Pannier, 'Free Movement of Capital and National Company Law', 16 (2005) *European Business Law Review*, pp. 757-86.

[75] This is a possible interpretation of the substantive value of Weiler's principle of constitutional tolerance. See 'Federalism and Constitutionalism: Europe's *Sonderweg*', in Robert Howse and Kalypso Nicolaidis (eds.), *The Federal Vision*, Oxford: Oxford University Press, 2002, pp. 54-70.

[76] See Menéndez, 'Finalité through rights' in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *The Chartering of Europe*, Baden-Baden: Nomos, pp. 30-47.

[77] See the discussion between Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking

instrumental or self-interested, constitutional implications.[78] At any rate, these judgments opened the way to a wider interpretation of the *substantive values* grounding Community law. This had the potential of widening the *constitutional substantive basis* of Community law to proportions similar to those of national constitutions.

Legitimacy through procedural rights

§33. The interpretation of Community law in a constitutional key has contributed to the acknowledgment of specific procedural rights by Community law to European citizens. The granting of full-blown legislative powers to Community institutions in the founding Treaties coincided with the establishment of a court with compulsory jurisdiction.[79] The Court of Justice of the European Communities was mandated to become the guardian of 'legality' in the interpretation and application of the Treaties,[80] and to review the *legality* of all acts of Community institutions (something which the Court will claim *must comprise* also the acts of Member States which implement or subject to exceptions Community acts).

§34. There are two basic procedural avenues through which individuals might, in an unmediated or mediated way, challenge the European constitutionality of Community or national legal norms. Firstly, they might request their annulment directly to the Court of Justice, provided they can prove that the measure affects them directly and individually (as established in Article 230 TEC). Secondly, they might challenge the norms within a national judicial procedure. The national judge or court can then pose a preliminary question to the European Court of Justice on the constitutionality or legality of the Community legal norm. This has been the preferred occasion for the Court to review the European constitutionality of national norms.

In addition to the specific recognition of new procedures in the Treaties, Community law has had an enormous impact on national procedural law. In principle, the federal character of the Union went hand in hand with the full national autonomy on what concerns the design of the procedures through which "Community" claims were to be discussed before national courts. In more contemporary terms, one could conclude that the relationships between the state, the judiciary and the citizens were part and parcel of each national constitutional identity. However, the effectiveness of the rights and obligations stemming from Community law could be compromised if no adequate remedies were available. Moreover, equality before European law, a basic

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Rights Seriously?' 12 (1992) *Legal Studies* 227-45 and Joseph Weiler and Nicholas J S Lockhart 'Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *Common Market Law Review*, pp. 51-94 and 579-627.

[78] An early attempt at such a reconstruction, well before the leading cases of the ECJ were decided, in Pierre Pescatore, 'Les Droits de l´Homme et l'Integration Européenne', 4 (1968) *Cahiers de droit européen*, pp. 629-73 and 'Fundamental Rights and Freedoms in the System of the European Communities', 24 (1970) *American Journal of Comparative Law*, pp. 343-51. See also Menéndez, *supra*, fn. 76, on alternative explanations.

[79] See Articles 164 to 188 of the Treaty establishing the European Economic Community. On this, see André M. Donner, *The Role of the Lawyer in the European Communities*, Edinburgh: Edinburgh University Press, 1964, p. 59.

[80] Article 164 TEC: "The Court of Justice shall insure that in the interpretation application of this Treaty the law is observed".

precondition for democratic legitimacy, not only requires that all citizens be subject to the same formal norms, but that the same concrete consequences derive from their application throughout the Union. This is why the Court has come to affirm that national autonomy on procedural matters is limited by the principles of equivalence and effectiveness of national remedies.[81] Equivalence requires that national procedural remedies available in case of breach of a Community right be no less favourable than those available when national rights are infringed. Effectiveness casts the shadow of unconstitutionality upon national procedural norms which render impossible or too cumbersome the exercise of those rights granted to citizens by Community law.[82] This has resulted in the Court expanding individual procedural rights, by declaring the European unconstitutionality of national norms which limit in unreasonable ways the time available to appeal,[83] set limits to arguing on the basis of Community law at certain stages of the process,[84] constrain the right of access to a court,[85] or result in the denial of injunctions.[86] Moreover, the Court has come to claim that national procedural systems should ensure the effective judicial protection of citizens qua European citizens and subjects of Community law.[87]

The democratic shortcomings of Union law

§35. The European democratic paradox is that the democratic *surpluses* of the Union in terms of scope and in terms of the deliberation and decision-making on norms of implementation come together with a four-fold democratic procedural deficit, related to (1) the democratic legitimacy of European constitutional norms; (2) the democratic properties of European law-making procedures; (3) the protection of fundamental rights in Union law and (4) the procedural guarantees in the process of application of Union law.

The fading light cast by common constitutional norms

§36. The common constitutional norms can only play a limited legitimating role. The legitimacy they offer is bound to shrink with time, and the abstract principle of "constitutional traditions common to the Member States" is rendered concrete through specific decisions, which end up leading to a gap between concrete national constitutional norms and the concrete Community constitutional norms *expected* to reflect the commonality of national norms. This gives rise to a dynamics which weakens the democratic legitimacy of the Union and which can only be compensated by direct outflows of democratic legitimacy, either at the constitutional level (by means of the collective exercise of constitution-making power, capable of re-politicising the constitutional law of the European Union) or at the ordinary decision-making level (by means of a reform of such processes in such a way that they come to

[81] Case 33/76, *Rewe*, [1976] ECR 1989, par. 6, where the principle of equivalence is affirmed.

[82] Case 199/82, *San Giorgio*, [1983] ECR 3595, par. 17. See a direct precedent in the judgment in case 8/77, *Sagulo*, [1977] ECR 1495, par. 12.

[83] Case 208/90, *Emmott*, [1991] ECR I-4269.

[84] Cases 430-431/93, *Van Schjindel*, [1995] ECR I-4705 and 312/93, *Peterbroeck*, [1995] ECR I-4599.

[85] Case 222/84, *Johnston*, [1986] ECR 1651.

[86] Case 213/89, *Factortame*, [1990] ECR, I-2433.

[87] Case C-50/00 P, *Unión de Pequeños Agricultores*, [2002] ECR I-6677, esp. par. 41 and 42.

reflect more accurately the *volonté génerale* of European citizens, and not merely the aggregate common will of Member States according to formulae which can lead to other results than the realisation of the common will of European citizens).

§37. The establishment of the Communities coincided with the opening of the process of fusion of national constitutional law, and thus, the actual enactment of a common constitutional law. However, because what was common was not explicited, it basically remained an unwritten regulative ideal. The immediate consequence of substituting *the exercise of an explicit pouvoir constituant* for the constitutional traditions common to the Member States was that European constitutional norms remained to a large extent *unwritten rules*. It is true that the norms being synthesised, i.e. national constitutional norms, were in most cases *written*. But as we take the further step of considering *all these national constitutional norms* as fused into a common constitutional law, the formal and substantial differences between national constitutions introduce a degree of uncertainty as to what is the actual content of the common constitutional law. Firstly, the degree of correspondence between the formal and the material constitution varies. Some constitutions (generally older ones, such as the Belgian Constitution at the time of the founding) do not contain all, and perhaps not even most, of the constitutional norms *as practiced*. The "living constitution" complements the "written constitution"; understanding how may be a pretty straightforward affair for national legal scholars, but the practice creates serious uncertainties and complexities for legal scholars from other Member States, not to speak of citizens in general. In other cases, the formal constitution would basically correspond to the material constitution; but the written constitution having been enacted recently (as was the case in France, Germany and Italy at the time of the founding), the concrete implications of constitutional norms would not have been fully worked out yet. To put it differently, neither political nor judicial practice would have sufficiently determined the derivative constitutional norms deriving from the written constitutional statements. Secondly, European integration was rendered possible by a high degree of structural affinity between national constitutions. Still, there were differences galore. On the one hand, there were (and still is) differences in terms of which questions have to be decided at the constitutional level. For example, which rights should be regarded as part of the "fundamental core" of the constitution, and which should be regarded as mere constitutional rights, or even ordinary rights, is a question which is answered in different ways in different national constitutional traditions. On the other hand, there were (and still are) differences in the weighing and balancing of conflicting constitutional principles, resulting in different derivative constitutional rights. To give one example, all Member States do affirm that citizens have a right to property and a right to health, but there are differences in the way these two rights are be weighed and balanced in concrete cases. Moreover, we must take account of the fact that all national constitutional norms were drafted as part and parcel of national constitutional law, and thus will rarely be automatically transferable to the Community legal order, for the simple reason that the context of integration is actually a different one. At the European level, norms have to become part and parcel not of the constitutional law of an established legal order, but of a legal system of integrated legal orders. This very often requires *adapting* national constitutional norms, once again calling for a constrained exercise of law-making.

Because the Treaties themselves could only go half the way in spelling out of what the common constitutional law said, the task was forced upon the Community legislator and the Community courts by the very dynamics of the integration process. In

discharging this task, they were left a more difficult challenge than that required under national written constitutions. The discretion which is required from law makers and courts is much less restrained than the one exercised under national constitutional law. Firstly, if common constitutional law remained an unwritten regulative ideal, this was because there had not been a European constitution-making process. Consequently, neither law makers nor judges could make use of the constitutional debates as a guide when interpreting constitutional norms, as is customary at the national level. Secondly, the very weakness of the European political process, due to the (democratically poor) design of the institutional structure and ordinary decision-making process, which are in fact obstacles to the Europeanisation of national public spheres, deprives legal actors of a further guide in the interpretation of Community constitutional norms. As these factors cumulate into concrete decisions, the definition of European constitutional law becomes *autonomous* from national constitutional law, with the possible consequence of path-driven judgments resulting in outright contradiction. As European constitutional practice thickens, laws and judgments become more self-referential, thus weakening the normative link between the legal and judicial formulation of European constitutional norms and *national constitutional norms*. This has resulted not only in an increased perception of European laws as *external norms* imposed upon citizens who feel like subjects devoid of political rights to deliberate and decide on European norms, but also in the punctual breaking of the democratic legitimacy chain between European and national law. This applies with special strength to the interpretation that the European Court of Justice has made of the basic European economic freedoms and especially their *active* use as yardsticks of the constitutionality of market-correcting national norms. This can result in a formulation of European constitutional law clearly at odds with the norms resulting from a systematic interpretation of national constitutional law. In that regard, it suffices to consider, for example, the jurisprudence of the Court of Justice concerning the implications for national company taxation of the principle of freedom of establishment.[88]

§38. It could be counter-argued that all constitutional practice tends to become self-referential as time passes; it is only "natural" that judges ground their new decision on past decisions, as they are supposed to be developing a coherent case law which elucidates constitutional law. However, it is still the case that the legitimacy of their decisions is based on their being capable of presenting themselves as guardians of the decisions taken by the *puovoir constituent* against the constituted powers of the state.[89]

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[88] The last episode in the long saga is Case C-196/04, *Cadbury Schweppes*, in which the Court of Justice has followed the lead of Advocate General Leger and ruled that " [I]n order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory" (paragraph 55 of the judgment). Or what is the same, establishment *only aimed at reduced the tax burden* is acceptable, provided the arrangements undertaken *are not fully artificial*. On the previous chapter of the saga, see, among others, my 'The taxation of corporate income in the European Union', to be published in a forthcoming ARENA Report, and now available at http://www.arena.uio.no/cidel/WorkshopStockholm/Menendez.pdf.

[89] See Carlos Santiago Nino, 'A Philosophical Reconstruction of Judicial Review', 14 (1993) *Cardozo Law Review*, pp. 799-846; and Bruce Ackerman, 'The Political Case for Constitutional Courts', in Bernard Yack, Bernard (ed.); *Liberalism without Illusions. Essays on Liberal Theory and the Political Vision of Judith N. Shklar*, Chicago and London: The University of Chicago Press, 1996, pp. 205-19; Gustavo Zagrebelsky, *Principì e voti*, Torino: Einaudi, 2005.

Even the constitutional court with more self-referential proclivities has to pretend to take good notice of constitutional debates and of debates on constitutional issues which take place in strong publics. But European courts, both the ECJ and national courts discharging European constitutional tasks, simply do not have such reference points. Thus, they run a higher risk of depleting the legitimacy added by the common constitutional traditions by simply taking the wrong decisions on the actual content of such common constitutional traditions. A chain of mistakes would necessarily lead to a definition of a European constitutional norm clearly at odds with the relevant national constitutional norms.

Democratic Participation in the making of Union laws

§39. As we have already seen, there are very good critical normative reasons to regard regulations and directives as legal norms in a material sense (§).The very breadth and scope of Union law, and consequently of regulations and directives, creates the structural conditions under which the democratic principle could be realised at a European scale through the promulgation of regulations and directives (§). The fact that Community law-making procedures forge a general European will by means of testing if there is either an aggregate national will (ordinary Community decision-making), or a double will composed of a qualified majority of national wills and of a majority of direct representatives of citizens (co-decision), establishes the democratic legitimacy of European law *prima facie*. However, it does not offer conclusive evidence of its full democratic legitimacy.

§40. Specifically, we can individuate three major problems which undermine the democratic legitimacy of regulations and directives:

- There are missing links in the chain of democratic legitimation caused by the design of law-making procedures, which diminish the influence that national strong and general publics and European general publics, can exert over decision-making processes.
- The division of labour between law-making procedures does not correspond to federal criteria (that is, to the intensity of the competences assigned to the Union in each policy field) and this results in a structural bias in favour of certain substantive outcomes.
- The insufficient interconnection of European publics weakens the influence of European general publics.

All three shortcomings are aggravated, rather than alleviated, by the affirmation of the primacy of Union law over national law in case of normative conflict. This is so because the *inferior normative credentials* of European law enter into direct confrontation with the assumption that hierarchy corresponds to norms of a *higher normative legitimacy*.

Missing links in the chain of democratic legitimation

§41. As was argued in §25, "material" European laws (i.e. regulations and directives) are approved if and only if a general European will in favour of them can be ascertained. Such a will is defined in the vast majority of cases either as the aggregation of all national wills, as defined in national decision-making processes, or as the combination of a qualified majority of national wills plus a majority of wills

among the direct representatives of European citizens. Such a definition of the general European will is a plausible concretisation of the democratic principle in a federal polity such as the EU.

However, once we move from general principle to concrete institutional realities, we can observe that the democratic legitimacy of regulations and directives is seriously hampered by the lack of transparency in the functioning of the European Council, and to a lesser extent, the European Commission. This applies both to the ordinary law-making process and to co-decision, but has a much more serious effect in the former, for the concurrent reasons that the allocation of law-making powers to the European Parliament has the effect of increasing the degree of knowledge available about the manoeuvres within the Council of Ministers, and thus, reducing the scope for abuse; and that, as we will see, the publicity of the Council's deliberations is indeed only prescribed for those procedures where co-decision applies (more *infra*).

The source of the lack of transparency is to be found in the Rules of Procedure of the Council.[90] Even after the adoption of the decision in 2002 to increase the publicity of the Council's meetings, especially with regard to its law-making activities,[91] the lifting of the veil of secrecy has been very limited. [92] Firstly, publicity is mandated only on what concerns the meetings of the upper tip of the Council's iceberg, namely, the meetings of the Council of Ministers as such, not the meetings of the COREPER, the preparatory committees or the working groups. This means that publicity affects around 15 per cent of all decisions, which is the actual proportion of dossiers which are not agreed below the ministerial level. [93] Thus, in the remaining 85 per cent of the cases, publicity is (at most) limited to the mere decision to accept a decision taken by bodies still fully protected from the public light. Secondly, even with regard to meetings at the ministerial level, publicity is severely constrained. Article 8.1 of the Rules of Procedure prescribes publicity of the deliberations of the Council *only* if the applicable law-making procedure is co-decision. When any other law-making procedure is applicable (which in most cases means the ordinary Community law-making process), publicity only extends, according to Article 9.1 of the Rules of Procedure, to the provision that "the results of votes and explanations of votes by Council members, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of legislative acts, shall be made public".[94]

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[90] Council Decision (2004/338/EC, Euratom) of 22 March 2004 adopting the Council's Rules of Procedure, OJ L 106, of 15.04.2004, pp. 22-45 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:106:0022:0045:EN:PDF) and Decision 2004/701/EC, of 11 October 2004, amending the Council's Rules of Procedure, OJ L 319, of 20.10.2004, pp.15-6 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:319:0015:0016:EN:PDF).

[91] Presidency Conclusions of the Seville European Council, June 2002, Annex 2, points 10-11, 'Opening Council meetings to the public when the Council is acting in accordance with the procedure for codecision with the European Parliament', available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72638.pdf.

[92] A preliminary assessment of the new provisions in Jo Shaw, 'Transparency in the Council of Ministers', (1996) *European Newsletter* pp. 3-5, available at http://www.fedtrust.co.uk/admin/uploads/News_Jan_06.pdf. A recent empirical study on the concrete area of sugar regulation in Richard Laming, 'Openness and secrecy in the EU institutions: lessons from the EU sugar regime', *Federal Trust Policy Brief* 2006, available at http://www.fedtrust.co.uk/admin/uploads/PolicyBrief28.pdf.

[93] Fiona Hayes Renshaw and Hellen Wallace, *The Council of Ministers*, Basingstoke: Palgrave, 2006, p. 77.

[94] The same article also requires to make public: "(a) results of votes and explanations of votes, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of a common position pursuant to Article 251 or 252 of the EC Treaty; (b) results of votes and explanations of

§42. Secrecy creates and reinforces the informational and capacity asymmetries which characterize the relationship between national executives and national parliaments on what concerns European issues. Secrecy precludes national parliaments from having sources of information alternative to the accounts offered by national ministers (or regional ministers in some federal countries). This renders difficult not only to know what has actually been said in such meetings, but especially *why* decisions have been adopted. This relativises the actual efficiency of even the most sophisticated systems of accountability, such as the Danish one, for the very simple reason that ministers may escape censure by moulding the facts to fit their interests.[95] The full institutional autonomy of each nation-state when designing the system of parliamentary control of national ministers sitting in the Council, comes at the price of depriving parliaments of what could be an additional source of information, provided there were some commonalities in their procedures, and channels of information sharing and common action were established.[96]

§43. It is true that in recent years, the Council has increased the publicity of even its internal documents;[97] and in a similar vein, the Commission has made much of its willingness to pay attention to "stakeholders".[98] However, the idea of "stakeholder accountability" is rather vague, and its democratic self-standing is, at best, rather weak, as was already argued (§3).[99] Moreover, in the absence of functional European general publics, it is obvious that the Commission's strategy runs the risk of being the

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votes by members of the Council or their representatives on the Conciliation Committee set up by Article 251 of the EC Treaty, as well as the statements in the Council minutes and the items in those minutes relating to the Conciliation Committee meeting; (c) results of votes and explanations of votes, as well as the statements in the Council minutes and the items in those minutes relating to the establishment by the Council of a convention on the basis of Title VI of the Treaty on European Union".

[95] See the Preparatory Note to the Working Group of the Laeken Convention on national parliaments, CONV 67, available at http://register.consilium.eu.int/pdf/en/02/cv00/00067en2.pdf. See also R. Holzhacker, 'National Parliamentary Scrutiny over EU Issues. Comparing the Goals and Methods of Governing and Opposition Parties', 3 (2002) *European Union Politics*, pp. 459-79.

[96] In that regard, the contribution of the Dutch parliamentarian Hans Van Baalen to the referred Working Group of the Convention is rather telling, even if more focused on efficient monitoring. See http://european-convention.eu.int/docs/wd4/1524.pdf.

[97] Council Decision 2000/527/EC, of 14 August 2000, amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents, OJ L 212, of 23.8.2000, pp. 10-11; Regulation (EC) 1049/2001 of the European Parliament and of the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents, OJ L 145, of 31.5.2001, pp. 43-8. See also the web page in which requests can be made to get access to Council Documents, http://ue.eu.int/docCenter.asp?lang=en&cmsid=245. For the Commission, see its register, at http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm#. The background and a critical assessment in Deirdre Curtin and Herman Meijers, 'Access to European Union Information: an element of citizenship and a neglected constitutional right', in Nanette A. Neuwahl and Allan Rosas (eds.), *The European Union and Human Rights*, The Hague: Martinus Nijoff, 1995, pp. 77-104; Edoardo Chiti, 'The Right of Access to Community Information Under the Code of Practice: the Implications for Administrative Development', 2 (1996) *European Public Law*, pp. 363-74; Deirdre Curtin, *Authoritarian temptations seduce EU decision-markers*, available at http://www.statewatch.org/secret/essays.pdf ; Deidre Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout', 37 (2000) *Common Market Law Review*, pp. 7-41.

[98] White Paper on European Governance, *supra*, fn. 7.

[99] Indeed, the term and the concept of stakeholder responsibility are borrowed from company law, where the question of accountability (rightly or wrongly) is posed in rather different substantive terms (the question being the protection of *material economic interests*, and not the respect of *political rights*).

embellishment of lobbying or ends up in the co-optation of certain societal interests with a view of giving a legitimacy aura to technocratic decision-making.[100]

Inappropriate division of labour between law-making procedures results in a structural bias in Community law

§44. If secrecy results in missing links in the chain of democratic legitimacy, the lack of a coherent correlation between the general European will required to pass a proposal into law and the depth and scope of the powers transferred to the Union in the substantive matter regulated by the proposal leads to a structural bias in Community law in favour of certain substantive outcomes.

§45. Quite paradoxically, the decision from which this democratic shortcoming springs is generally perceived as having *democratized* the Union. Indeed, the existence of a structural democratic shortcoming stems from the introduction of law-making procedures different from the ordinary Community-method; first co-operation and then co-decision. Both procedures were perceived as having democratizing effects because they eroded the power of one single national government to veto law-making, and because they increased the law-making powers assigned to the European Parliament. What has been far less noticed is that the price of doing so was to entrench a neat distinction between issues considered as part and parcel of the market-making process ("progressively establishing the internal market (…) an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured", as stated in Article 14 of the Treaty of the European Communities) and issues where the Union might have some competence basis, but which are not central to market-making. Through successive Treaty amendments, most market-making questions are now subject to co-decision, while non-market making questions, and especially, all decisions which actually rectify the allocation of economic resources operated by markets (paramount among which taxation, social policy and labour law) are subject to the ordinary Community law-making process.

Because *market-correcting decisions* remain subject to a more onerous decision-making process, the more co-decision is extended to market-making, and the more the number of votes needed to obtain a qualified majority is reduced, the more Union law comes to *structurally favour* market-making over market-correcting; negative over positive integration. This leads to the decoupling of *market-making norms* from the implications they might have on matters which fall beyond the market-making competence of the Union. Indeed, it has been typical that *such other issues* (e.g. implications for national social or health policies) have been either *left aside* or paid *secondary attention*. Similarly, the transfer of an exclusive competence on *monetary policy* to the Union, to be exercised by what is now the most federal and least democratic institution of the Union, the ECB, *while* keeping taxing powers firmly in the hands of *the unanimous Council*, has resulted in a decrease of *public power* over the shape of the economy in the Union as a whole.[101]

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[100] Cf. Beate Kohler-Koch and Barbara Finke 'The Institutional Shaping of EU-Society Relations: A Contribution to Democracy via Participation?', 3 (2007) *Journal of Civil Society*, forthcoming, available at http://www.sowi.uni-mannheim.de/lehrstuehle/lspol2/service/dl/JCS-2006.pdf.

[101] Cf. Frans Vanistendael, 'Redistribution of Tax Law-Making Power in EMU?, 7 (1998) *EC Tax Review*, pp. 74-9; 'The Making or Breaking of Europe or the challenges for a European Tax Policy', 1 (2000) *European Business Organization Law Review*, pp. 109-23.

§46. Similarly, the transferring of certain competences to the Union, with the Member States retaining relevant related powers, might serve the purpose of *weakening* the overall capacity of public institutions to make relevant and effective decisions, actually transferring power to *markets*. Fragmented public power may result in no public power at all[102]

Moreover, the atomisation of public power and the multiplication of veto points can give rise to *false silences and false negatives*, and consequently impede the transformation of an underlying collective European will into legal norms. After all, the characterization of deliberation and decision-making procedures as *democratic* depends not only on their being configured in such a way that *minorities* cannot decide for the majority, but also the reverse; that *a majority underpinned by the force of the better argument* can also actually decide. Unanimity voting on tax measures,[103] even on those closely related to the goal of building a common market, is a clear example of a *democracy-restraining measure,* which is actually advocated on democratic grounds.[104] And that for the very simple reason that it renders public decision-making improbable (at the European level) or ineffective (because only a *common* norm set at the European level stands the chance of curbing private power on this point).

Insufficient interconnection of European publics weakens the influence of European general publics

§47. European general publics[105] are insufficiently interconnected, and as a consequence, they have a weak and erratic impact upon the processes of law-making.[106] The emergence of European publics would require the interconnection of local, regional and national *publics*, something which would presuppose that issues are debated simultaneously and according to a roughly similar agenda, so that the arguments can flow across borders and influence the debates of general publics, such as the European Parliament. This is prevented by entrenched social conditions accruing in Europe, such as the plurality of languages spoken, and the limited language skills of most Europeans (although there are dramatic variations across different national educational systems). Nothing prevents Europeans acquiring the skills which will render one language a common one, but in the meantime the emergence of coalitions across borders is clearly hampered. However, it must be said than an equally powerful obstacle is constituted by the institutional set-up of the Union, and by the discourse reproduced by the European institutions. As liberal inter-governmentalists have stressed, the process of European integration tends to reinforce

[102] Cf. Colin Crouch, *Post-Democracy*, Cambridge: Polity, 2004.

[103] Expressly guaranteed by Article TEC 95.2.

[104] The rhetorical use of democratic considerations explains why the specific provisions of Article TEC 96 have not been applied on tax matters, not even in order to curb the rampant tax evasion of capital income. For a crystal clear (and deeply cynical) invocation of democracy, see Tony Blair and Juhan Parts, 'Non à l'harmonisation fiscale', *Le Figaro*, 3 November 2003.

[105] See references fn. 37.

[106] Many observers tackle this question by referring to the "European public sphere". However, such a monistic analysis is of dubious utility. There will never be *a* European public sphere, in the same way as there is *no* German, French or Italian public spheres, but a set of interconnecting public spheres which can be labeled as the German, French or Italian *public* only as an abbreviation.

(at least some) *national* cleavages.[107] The central position of some national institutions, such as governments, in the European decision-making process, turns them into the main vehicle of societal claims, and creates the proper incentives to encourage them to engage in discourses aiming at the definition of the *national interest*.[108] This counterbalances, and sometimes clearly overweighs, the role played by European institutions such as the Commission in articulating a European interest.

§48. As long as European publics remain weak, critical democratic functions, such as the insertion of viewpoints, information and arguments into the agenda of institutionalized, strong publics, will remain unfulfilled.[109] Only general publics can ensure the fairness and completeness of the European political agenda.[110]

Supremacy

§49. To this, it must be added that its democratic shortcomings are rather aggravated by the fact that Union law *trumps* national laws within its field of competence. Primacy of Union law can easily be justified in the name of the principle of equality before the law of all European residents, and as such, be traced back to the constitutional traditions common to all Member States.[111] However, the supremacy of Community law is problematic in terms of democratic legitimacy for the very simple reason that it implies giving preference to a piece of legislation that, at least in terms of procedure if not in terms of scope, is potentially less democratically dignified than the one being left aside. Even if in many cases the national legislation over which Union law prevails might run afoul of the principle of non-discrimination on the basis of nationality, and could even be unconstitutional from a *national* standpoint, the *democratic fragility* of Community legislation explains the rage occasionally expressed when the European Court of Justice or a national court gives preference to *Union* over *national* law. It also explains the periodic irate judgments of national constitutional courts.[112]

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[107] Andrew Moravcsik, *The Choice for Europe*, Ithaca: Cornell University Press, 1998; Alan Milward, *The European Rescue of the Nation-State*, London: Routledge, 1992.

[108] A good example is provided by the financing of the European Union. The fact that most of the revenue is collected through national contributions, and not through a genuine European tax power, gives rise to a periodic construction and reconstruction of alleged national interests by national exchequers. The balance between what a Member State transfers to the Union and the total sum of the transfers from the European budget to its citizens become the major *reference point* in the debates. This prevents the analysis of the question from the standpoint of criteria of distributive justice (and, one must say, efficiency). Consequently, political mobilization is structured around national, not economic lines, as could be expected on a tax issue. To the extent that national publics debate the issue, they do so in terms of *what is good for us, nationals*, something which clearly renders almost impossible the mutual influence of national debates, and consequently, the interconnection of the publics.

[109] See Habermas, *supra*, fn. 51, at pp. 183, 185-6.

[110] The European case supports the claim made by Brunkhorst that '*democratic strong publics* should be conceptualised as a system including what are usually labelled *weak publics*'. See Brunkhorst, *supra*, fn. 37, at p. 677.

[111] See my 'Some elements of a theory of European Fundamental Rights', Erik O. Eriksen and Agustín J. Menéndez (eds.), *Arguing Fundamental Rights,* Dordrecht: Springer, 2006, pp. 155-83. The argument is hinted at by A. M. Donner 'National Law and the Case Law of the Court of Justice of the European Communities´, 1 (1963-4) *Common Market Law Review*, pp. 8-16.

[112] The most famous judgments are those issued by the German and the Italian Constitutional Courts; but the Polish Constitutional Court has turned itself into a much observed player recently. Refreshing analyses in Ross Phelan, *Revolt or Revolution. The Constitutional Boundaries of the European Community*, Dublin: Round Hall Sweet and Maxwell, 1997; Neil MacCormick, 'Risking Constitutional Collision in

Legitimacy through substance: the perils of a judge-made bill of rights and of widening too much the scope of economic freedoms

§52. On what concerns fundamental rights, the jurisprudential origin of the bill of rights implies that all rights being acknowledged as part and parcel of European constitutional law are considered so because they fall under the general and non-discriminatory protective shelter of the general principle of protection of fundamental rights. Consequently, all rights have been placed on an equal footing. This purely binomial code lacks the subtlety of most national constitutions, where fundamental rights are not only enunciated, but also ranked. In relation to democratic legitimacy, this is very problematic because it grants too much discretion to judges, who acquire a wide margin of appreciation in order to recognize one right as fundamental or ordinary, and in determining the relative weight to be granted to it when rights collide. The elaboration and later solemn declaration of the Charter of Fundamental Rights of the European Union might be interpreted as alleviating some of these problems and assuaging some democratic concerns.[113] The Charter establishes a catalogue of rights with an internal structure, within which it is possible to distinguish not only between fundamental rights proper and general principles aimed at guiding legislation, but also between provisions which express a fundamental subjective right position and others which express a common good. This reduces the realm of discretion when weighing and balancing conflicting fundamental rights.[114] Moreover, the Charter was elaborated by a Convention where representatives of national parliaments and governments sat together with representatives of European institutions. Even if far from optimal, their *democratic credentials* were thus much higher than that of the Court of Justice, or indeed of any court. Having said that, it is still the case that the Charter has not been formally incorporated into Union law. Its normative contents are *binding* to the extent that they represent a consolidation of pre-existing law, and to the extent that the European Court of Justice and national courts, explicitly or implicitly, feel bound by its contents. Without a clear constitutional mandate, the relationship between the positive provisions of the Charter and the *acquis communitaire* reflected in the case law of the Court, is unclear. Judges are thus even better placed to pick and choose among sources of European fundamental rights, with the Charter making it even easier to cover discretionary decisions if different sources are applied selectively. The decision of the Court of Justice to start making reference to the Charter precisely at the time that the Constitutional Treaty has been formally buried is not especially reassuring in this regard.[115]

§53. Concerning economic liberties, the unqualified expansion of their breadth and scope has resulted in the subjection of all national law to a potential review of

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Europe', *Oxford Journal of Legal Studies*, 18 (1998) pp. 517-32; and René Barents, *The Autonomy of Community Law*, Dordrecht: Kluwer, 2004, pp. 150 ff ("Constitutional Ideology").

[113] See Menéndez, *supra,* fn. 10.

[114] Olivier De Schutter, 'La contribution de la Charte des droits fondamentaux de l'Union européenne à la garantie des droits sociaux dans l'ordre juridique communitaire', 12 (2001) *Revue Universelle des Droits de l'Homme*, pp. 37-47 and Agustín José Menéndez, 'The Sinews of Peace', 16 (2003) *Ratio Juris*, pp. 374-98.

[115] Cf. Case C-540/03, *Parliament v Council*, Judgment of 27 June 2006, not yet reported, par. 34, 38 and 58-9; Case C-411/04 P, *Mannesmannröhren-Werke AG v Commission*, Judgment of 25 January 2007, not yet reported, par 32-3, 35, 45, 50; Case C-432/05, *UNIBET (London) LTD v Justitiekanslern*, Judgment of 13 March 2007, not yet reported, par. 37; Case C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007, not yet reported, par. 45-6.

constitutionality against the four economic freedoms enshrined in the Treaties. This has exacerbated the structural bias stemming from the mismatch of the present division of labour between law-making process and the division of competences between the Union and its Member States (see §§44-46). This is so because not only is the argumentative burden shifted towards any national law which aims at realizing socio-economic objectives which may have non-discriminatory incidental effects on the four economic freedoms, occasionally leading to their being set aside, but this also leads to a systematic expansion of "commodified" and "monetarised" relationships into social realms where the national constitutional traditions require social relationships to be governed by different principles.[116] This has been a major (even if largely unnoticed) side effect of the "citizenship" line of jurisprudence opened by *Martínez Sala* and *Baumbast*.[117] Both side effects of the present jurisprudence of the Court have very serious democratic implications. The scope of democratic choice is narrowed, sometimes dramatically, not only because certain concrete outcomes are simply forbidden by Union law, but also because their social and economic preconditions (for example, progressive taxation of capital income) are endangered by the present understanding of the breadth and strength of the four economic freedoms.

Legitimacy through procedural rights

§54. The main shadow that can be cast upon procedural rights as a source of democratic legitimacy of Union law is that the Court has favoured the expansion of such rights for reasons *instrumental* to the protection of its own status as the ultimate guardian of the law in Europe. Indeed, the systematic reconstruction of the jurisprudence of the Court indicates that it has regarded the right to effective judicial protection, and to effective and full participation in the debates before judges adjudicating upon Community law, as ancillary to the structural principles of Community law, viz. primacy and direct effect.

§55. A clear illustration can be provided by the case law on the *locus standi* to seek the annulment of a Community general legal norm under Article TEC 230. While the Court has followed a generous interpretation of the conditions under which national courts can pose preliminary questions, it has been extremely restrictive on granting standing to individuals who have sought to use the procedure established in the referred article. As a matter of fact, individuals tend to be denied *locus standi* unless they can prove that they are directly and individually affected by the Community legislative act. In most cases, the Court is only ready to accept that such conditions are met if the Community act is *formally a general act*, and substantively *an administrative act or set of administrative acts*.[118] This might have been instrumental in nurturing and consolidating a working relationship with national courts, but it undermines both the *effectiveness* of judicial protection in Community law and *the democratic potential* of procedural rights for two reasons. Firstly, it rules out that Article TEC 230 is interpreted as the embryo of a system of constitutional review of Community law. It is true that such a right only exists in *some* national constitutional traditions. But it is

[116] See Stefano Giubboni, 'Free Movement of Persons and European Solidarity', 13 (2007) *European Law Journal*, pp. 360-79.

[117] See Agustín José Menéndez, 'More human, less social?' forthcoming in Miguel Maduro and Loïc Azoulay (eds.), 'The Past and Future of EU Law', Oxford: Hart Publishers, 2008.

[118] The Court reaffirmed such jurisprudence in *Unión de Pequeños Agricultores*, *supra*, fn. 87.

also correct that if it does not exist in the other national constitutional traditions, it is because the protection of fundamental rights is trusted to *democratic decision-making*, the Parliament is seen as a better *forum of principle* to define and uphold fundamental rights than courts, even constitutional ones. However, it is doubtful whether it can be claimed that the Council, or even the Council and the European Parliament together in co-decision, are better fora for the outworking and limitation of fundamental rights than courts. Indeed, given the democratic shortcomings of the Community law-making system, some form of judicial protection of fundamental rights in Union law seems *prima facie* required, not only in the name of the national constitutional traditions where such a right exists, but also in the name of all *national constitutional traditions* which take seriously the idea of the constitution. Secondly, it creates a severe risk that the constitutionality or legality of implementing norms goes unchecked, especially that concerning acts which are self-executing.

Conclusion

In this article, I have explored the different components of democracy in the European Union from the standpoint of deliberative democratic theory. Contrary to standard accounts, I claim that the question must be disaggregated, given that the Union has not only several democratic deficits, but also some democratic surpluses. Key among the latter is the central role played by the constitutional traditions common to the Member States (which I have argued are to be regarded as the constitutional ground of the whole European legal edifice). In addition, I asserted that the proper reconstruction of both European law and regulation making allows unearthing their capacity to ensure a modicum of democratic legitimacy. The review of European constitutionality by reference to the core constitutional principles of Union law (fundamental rights and economic liberties) and the granting of a whole array of procedural rights to citizens, complete the set of sources of democratic legitimacy of Union law. But if in general and abstract terms the Union can be said to have sources of democratic legitimacy not very dissimilar from those of nation-states, there is also a dark democratic side to the Union. In the third section of this paper I showed why many critics are wrong in their diagnosis, but also why there are serious reasons to be (very) critical from a democratic point of view. The core cause of the democratic shortcomings of the Union is at the same time the centerpiece of its democratic legitimacy. The constitutional traditions common to the Member States can only provide a limited and temporary legitimacy. Their democratizing radiating force is bound to diminish as time passes, and their content is concretized through procedures which are insufficiently and improperly linked to political deliberation and decision-making at a European scale. In addition, the division of labour between the two main law-making processes mismatches the division of competences between the Union and its Member States, and results in a structural bias in favour of certain substantive, deregulatory outcomes. Such bias is exacerbated by the case law of the European Court of Justice, especially by its enormously wide definition of the breadth and scope of economic liberties. The restrictive definition of the right to seek annulment of Community laws and regulations by private individuals forecloses a possible avenue of feedback into the political process.

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