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András Jakab

### **Full Parliamentarisation of the EU without Changing the Treaties *Why We Should Aim for It and How Easily It Can be Achieved***

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**FULL PARLIAMENTARISATION OF THE EU WITHOUT CHANGING THE TREATIES**  
***WHY WE SHOULD AIM FOR IT AND HOW EASILY IT CAN BE ACHIEVED***

By András Jakab\*

“La démocratie est aujourd’hui une philosophie, une manière de vivre, une religion et, presque accessoirement, une forme de gouvernement.”<sup>1</sup>

**Abstract**

The two main reasons why democracy won the contest for the leading legitimacy claim in the modern world are its capacity to generate loyalty and its self-correction potential. In order to use these virtues, the European Commission (conceptualised as the government of the EU) should be elected solely by the European Parliament. According to the general perception, a modification of the treaties would be inevitable in order to achieve such a change. The paper attempts to show that this perception is wrong: there is another (currently more viable) way to achieve this outcome, which was successfully used a long time ago to reform the British constitutional system on a step by step basis. In the U.K., there is currently (and there was) no legal rule prescribing that the monarch has to appoint as Prime Minister the person who commands the majority support of the House of Commons. It is happening though, by a (legally non-binding) constitutional convention. After analysing the concept of constitutional conventions and its applicability to the EU, the paper reaches the conclusion that we can achieve a parliamentary system under the current legal regime, if politicians in the European Parliament have the ambition to take the necessary steps. If it happened, then the EU government system would become similar to some extent to today’s German system, where a party coalition in the lower chamber supports the government, and the upper chamber takes part substantively only in the legislation but not in the formation of the government.

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\* Schumpeter Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg. E-mail: [ajakab@mpil.de](mailto:ajakab@mpil.de).

<sup>1</sup> “Democracy is today a philosophy, a way of life, a religion, and – almost accessorially – a form of government.” Georges Burdeau, *La démocratie*, Paris, Le Seuil, 1956, p. 8.

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## 1. Why does a successful EU have to be democratic?

There are two main strategies to justify democracy.<sup>2</sup> One is to try to show that it is superior to contending theories because it fits better to the *moral* nature of human beings, as e.g. it is based on equal dignity or equal freedom of the people. Iranian religious fundamentalists or European xenophobic-fascist parties, however, definitely have a different view on what is the moral nature of human beings, and beyond the mere assertion that they are wrong it is difficult to argue against them. They simply have a different source of legitimacy (a divine one, or the 'nation' as defined by culture, history and language), which can be internally as coherent as the best democratic theories (even if they are scary in some elements to our sensitive democratic ears).<sup>3</sup> A moral justification for democracy is thus mostly unable to convince anyone who is not a democrat anyway.

The other option is to choose a more neutral language (even if we know that it is never fully neutral, but at least less directly value laden), and to concentrate on *why* democracy won the contest for the leading source of legitimacy in the modern world (and why it changed its *precise* meaning in political discourse in a Proteus-like manner). So we look at democracy's story from a more realistic, outsider or even pragmatic perspective. In this way its virtues will become more convincing (for non-democrats) and its dead ends more instructive (for democrats).<sup>4</sup> Such an approach has less normative (moral philosophical) assumptions as a starting point (in this sense it is a minimalistic approach and is thus less vulnerable to competing normative theories), it

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<sup>2</sup> For valuable criticism and useful remarks I am grateful to Krisztina Arató, Armin von Bogdandy, Jürgen Bast, Paul Behrens, Carlos Closa, Philipp Dann, Sergio Dellavalle, Zsolt Enyedi, Lisa Giles, Gábor Hamza, Ferenc Hörcher, Elena Jileva, Miodrag A. Jovanović, Stephan Kirste, András Körösenyi, Mária Ludassy, Enric Martínez Herrera, Zoltán Pállinger, Theodor Schilling, Allan F. Tatham, Szilárd Tattay, Ingo Venzke, Robert Zbiral, further to the participants of the research seminars held on 20-21 May 2010 in Oñati (Spain), on 24 August 2010 in Heidelberg (Germany), on 12 October 2010 in Budapest (Hungary) and on 8 December 2010 in Mexico City (IACL World Congress workshop).

<sup>3</sup> Cf. Karl Doehring, *Allgemeine Staatslehre*, Heidelberg, CF Müller, 2000, p. 142 pointing at the fact that democracy is based on the fiction that citizens are both morally (except for criminals) and intellectually (except for minors and insane people) qualified to decide about the country's future. But factually untrue starting points are not necessarily a problem for political philosophies. Similarly to ancient gods, people (and politicians) adhere to political philosophies primarily *not* for their intellectual coherence ('intellectual potency'), but for their capability of emotional identification and for their long term practical achievements in society ('political potency'). Cf. John Dunn, *Setting the People Free. The Story of Democracy*, London, Atlantic Books, 2005, p. 17.

<sup>4</sup> Cf. Friedrich August von Hayek, *Die Verfassung der Freiheit* 1971 (1960), p. 129 on the issue that democracy is not an end in itself but a means to achieve goals.

looks rather for explanations for the success of the democratic legitimacy claim. One of the points of the first part of the paper is that the success can be explained by two features of democracy, namely its capability to induce loyalty and its potential for self-correction. The paper then becomes normative only in its second part, when it shows that *if we want to enjoy these two features* (the normative presupposition will be that we do), then we have to have a certain understanding and institutional structure, namely a parliamentary system at EU level.

### *1.1 The success story of democracy or the strength of the claim for democracy*

There is a nice myth, which traces today's democracy back to ancient Greece.<sup>5</sup> As a matter of fact, the Athenians themselves borrowed it from Asia: its origins are to be found rather in today's Syria, Iraq and Iran where the 'inhabitants' (in Sumerian: the *dumu*) decided the important issues in assemblies. The idea has been carried to the West, to Phoenician cities (Byblos, Sidon) which set up similar governmental systems, and then picked up by the Athenians (who were in intensive maritime commercial contact with the Phoenicians).<sup>6</sup> As for the survival after ancient Greece, we have to differentiate between three different issues: (A) the survival of the word 'democracy', (B) the institutional setting of ancient Athens and today's democracies, (C) the idea of popular self-rule or the idea that "it ought to be ordinary people (the adult citizen) and not extra-ordinary people who rule".<sup>7</sup>

Ad (A). We still use the Greek word (δημοκρατία - *dēmokratía*), simply because we know this form of government from the (translated)<sup>8</sup> descriptions by Plato, Aristotle, Aeschylus or Demosthenes, and not because they invented it. As in Athens the system miserably failed (i.e., it led to a military catastrophe similar to the German catastrophe in WWII and occasionally also, again similarly, to the persecution of its own elite, the most notable case of which was the death penalty being given to one of its leading

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<sup>5</sup> E.g., Robert A. Dahl, *Democracy and its Critics*, New Haven and London, Yale Univ. Press 1989, p. 1.

<sup>6</sup> John Keane, *The Life and Death of Democracy*, London e.a., Simon & Schuster 2009, p. xi; Simon Hornblower, *Democratic Institutions in Ancient Greece*, in: John Dunn (ed.), *Democracy. The Unfinished Journey 508 BC to AD 1993*, Oxford OUP 1992, p. 4.

<sup>7</sup> Dunn (n. 6) Preface, p. v. The definition of who are 'ordinary people' has gone through several changes in the history of democracy.

<sup>8</sup> In his Latin translation of Aristotle's *Politics*, William of Moerbeke in the middle of 13<sup>th</sup> century did not translate the Greek word to 'populi potentia', but rather kept the original word *demokratia*, and so determined today's terminology. See Quentin Skinner, *The Italian City-Republics*, in: Dunn (n. 6) p. 59.

intellectuals, Socrates), in the next two thousand years ‘democracy’ was used in a strongly pejorative sense.<sup>9</sup> The Greek ‘democracy’ (meant as direct democracy for everybody, or at least all male adult citizens) was rather explicitly rejected in the name of the ‘republic’ (in today’s terminology: ‘representative democracy’ for the white, male and rich electorate).<sup>10</sup> In the US, the term was not used to describe the own system of government (only as a party-political direction, often in a pejorative sense) until a foreigner, the French aristocrat Alexis de Tocqueville, used it for the American form of government.<sup>11</sup> In Europe it appeared earlier as self-description by certain political forces (first in today’s Holland and Belgium, in the 1780s),<sup>12</sup> not, however, because these forces happened to be fascinated by the Greeks, but out of rhetorical reasons. We will come back to this later.

Ad (B). The core institution of modern representative democracy, the parliament, has its institutional origins in feudalistic Europe, in which the estates were represented. In some countries on a careful step by step basis, in others rather abruptly the general suffrage was widened to today’s size comprising all (in cases limited to sane and non-criminal) adult citizens, which is neither Greek, nor feudalistic in origin. It is simply new.

Ad (C). Today’s idea of popular self-rule is indeed similar to the ancient Greek one, but also to old European (German) tribal traditions.<sup>13</sup> Sporadic Greek inspirations are possible (e.g., through Marsilius of Padua, though even these cases are rather debatable),<sup>14</sup> but none of these can actually be proved to have essentially influenced the

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<sup>9</sup> The good and successful example from the antiquity was rather Rome. Partly with its imperial tradition; partly with its republican tradition, where the unit of political authority was *Senatus Populusque Romanus* in which notably the Senate came first. Dunn (n. 3) p. 54.

<sup>10</sup> James Madison, *The Federalist* Nr. 61, 63 and 65. Also the Italian city-republics in the 12<sup>th</sup> – 18<sup>th</sup> century never described themselves as democracies, and when the first Italian city-republics began to exist, the relevant Greek classics had not yet even been translated into Latin. See Skinner (n. 8) pp. 57-59. Italian city-republics all failed (partly because they were meant to be both institutionally and ideologically just small-size states) and were often (similarly to their Greek predecessors) referred to as an example of chaos, see *ibid.*, pp. 59, 63.

<sup>11</sup> Dunn (n. 3) pp. 72-73. Alexis de Tocqueville, *De la démocratie en Amérique*, vols I-II, Paris 1835-40 (the first volume was translated into English as early as 1839 by Henry Reeve).

<sup>12</sup> Dunn (n. 3) pp. 84-88; John Markoff, *Waves of Democracy. Social Movements and Political Change*, London e.a., Pine Forge 1996, p. 2.

<sup>13</sup> Reinhold Zippelius, *Geschichte der Staatsideen*, München, Beck 10<sup>th</sup> ed. 2003, p. 97; Dahl (n. 5) p. 32.

<sup>14</sup> For a convincing critique of the view that Marsilius was an early ‘democrat’ see Hans Leo Reimann, *Überlieferung und Rezeption im Mittelalter [der Demokratie]*, in: Otto Brunner, Werner Conze, Reinhart Kosselleck (eds), *Geschichtliche Grundbegriffe*, Stuttgart, Klett-Cotta, 4<sup>th</sup> ed. 1992, pp. 836/837 with further references.

18<sup>th</sup> century re-emergence of popular self-rule. As an idea it was based rather on eventually secularised but originally biblical Christian ideas of equality in their protestant interpretation,<sup>15</sup> and on the feudal idea of basing authority on contract (between the liege and his vassals).<sup>16</sup> To emphasise these origins would have, however, been unwise, as the idea of popular self-rule as a source of legitimacy was directed against the divine legitimacy of feudal monarchs. To mask it *ex post facto* as a revival of some old Ancient Greek truth (which was prestigious enough but evidently different from the rejected feudalism) was rhetorically much more effective. And so it happened: they began to call it democracy – after they invented it without the Greeks.

But even if we see, that the idea is based on a certain interpretation of Christianity and on feudalistic contractualism, it still remains unclear, (1) *why* it emerged exactly in the 18<sup>th</sup> century (and not e.g. in the 14<sup>th</sup>), and (2) *why* it became stronger than the traditional hierarchical conceptions of (monarchical) authority which were equally based in (a different interpretation of) the very same ideas.

Ad (1). The social and political situation for successful democratic claims became ripe first in the 18<sup>th</sup> century. (a) The main reason for that is *secularisation* (not to be confused with atheism which remained rare even during this period), meaning here the declining explanatory and justificatory force of religion in politics. Secularisation also meant a growing acceptance of social changes: the static nature of law and society of the Middle Ages was based on the pre-given order by the infallible divine will, and as the

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<sup>15</sup> David Wootton, *The Levellers*, in: Dunn (n. 6) pp. 71-90. The leveller idea of giving suffrage to *every* male adult proved to be too radical in the 17<sup>th</sup> century and has been successfully oppressed. Even though democratic claims were not totally unknown in Catholic theology (Francisco Suárez, 1548-1617), in practice Catholicism stood for a long time clearly on the traditionalist hierarchic anti-democratic side. The American Revolution in the 18<sup>th</sup> century used later similar justifications (with eventually tamed claims on suffrage) see the *Declaration of Independence* 1776: 'all men are created equal, that they are endowed by their Creator with certain unalienable Rights'. The French *Declaration of the Rights of Man and of the Citizen* (1789) became slightly less directly Christian, but the origins are even obvious here: '...the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen: Article 1. Men are born and remain free and equal in rights.' Besides the biblical equality idea, the institution of medieval towns (*universitas civium*) in which the community members (city-members, or 'citizens') were free and equal should be mentioned as a predecessor of modern citizens' equality. Randall Lesaffer, *European Legal History*, Cambridge, Cambridge Univ. Press, 2009, p. 226.

<sup>16</sup> The feudal contract was developed from Germanic tribal traditions, and included *mutual* rights and obligations. See Lesaffer (n. 15) p. 151. Also the *Magna Carta* of 1215 was contractual in nature, even if the text seems a one-sided grant of freedoms: the barons (who were vassals of the King) were expected to be loyal and to accept royal authority in exchange for the King's signing (or rather: sealing) of the document. The prime example of modern constitutions, the US Constitution is contractual even in its text ('We the people... in order to form a more perfect union...').



order was losing its religious side, it was also losing its unchangeable and sacred nature.<sup>17</sup> In the language of politics, theological divine will has been substituted by the legal will of the sovereign or by the will of the legislator.<sup>18</sup> It was caused by a unique constellation of European developments. (a/1) Early feudal monarchs used the church as a legitimacy-supporting organisation for the kingdom or the empire, which was in theory ('spiritually') subordinated to an independent pope, but in practice served the stability of the respective monarchy.<sup>19</sup> The Investiture Controversy (11<sup>th</sup> – 12<sup>th</sup> centuries) as an independence struggle of the church against secular authority or even as a fight for taking over the leading role in the Christian world led, however, to a certain distance between religious and political authority (Concordat of Worms, 1122).<sup>20</sup> The ongoing legal quest between the pope and the emperor and the attempt of these powers to strengthen their internal hierarchical administration by legal rules made more lawyers necessary on both sides: canonists (or decretists, experts in church laws) and legists (experts in secular Roman law).<sup>21</sup> This growing amount of legal knowledge and the finding of a remaining copy of Justinian's *Digesta* (i.e., a vast secular but extremely prestigious body of law) at the end of the 11<sup>th</sup> century contributed eventually also to the autonomy of legal science from theology (so resulting in separate faculties of law at the early universities).<sup>22</sup> (a/2) Based on the actual political practice of Italian city-republics in the 15<sup>th</sup> and 16<sup>th</sup> centuries (which did not claim any divine legitimacy), Machiavelli described the internal logic of politics in his *Il principe* and the *Discorsi*. Even though it outraged most of Europe, it also contributed considerably to thinking about public

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<sup>17</sup> António Manuel Hespanha, *Cultura jurídica europea. Síntesis de un milenio*, Madrid, Tecnos, 2002, pp. 59-66.

<sup>18</sup> Hespanha (n. 17) pp. 71, 105-106.

<sup>19</sup> For the justification of this situation, the 'two swords doctrine' of Pope Gelasius I (492-96) was used, according to which the secular ('temporal') sword also stems from the church (the pope), but it is used by secular monarchs (the emperor) for secular government, but the spiritual sword remains with the pope. Gerhard Köbler, *Deutsche Rechtsgeschichte*, München, Franz Vahlen, 5<sup>th</sup> ed. 1996, p. 109. It is based on Luke 22:38, where the disciples tell the arrested Jesus: "Lord, behold, here are two swords." The re-interpretation of this passage and of this doctrine was itself part of the Investiture Controversy.

<sup>20</sup> Lesaffer (n. 15) pp. 212-216.

<sup>21</sup> Roman law was especially used by the secular side as a pool of argument, especially the phrases by Ulpian 'quod principi placuit, legis habet vigorem' ('what pleases the emperor, has the force of law') and 'princeps legibus solutus est' ('the emperor is not bound by the law'). D. 1.4.1 and D. 1.3.31. It was used later by other secular powers (kings, princes) against the emperor himself. For more detail see Piper Gilmore, *Arguments from Roman Law in Political Thought, 1220-1600*, Cambridge, Mass., 1941; Jacques Krynen – Albert Rigaudière (eds), *Droits savants et pratiques françaises du pouvoir, 11e-15e siècles*, Bordeaux, Presses Universitaires de Bordeaux 1992.

<sup>22</sup> Lesaffer (n. 15) pp. 236, 243, 253-254.

authority in a secular way.<sup>23</sup> (a/3) Even more importantly, the reformation and the following religious wars in the 16<sup>th</sup> and 17<sup>th</sup> centuries have shaken the force of the church (or from then on: the churches) even in the spiritual arena. The struggle between Catholicism and Protestantism ended undecided (Peace of Augsburg, 1555; Peace of Westphalia, 1648): both continued to exist in a Europe which was from now on recognised to consist of equally sovereign states. It also meant that claims for universal (papal or imperial) authority have been rejected. But by shaking the unified religious authority, monarchical (divine) legitimacy was also weakened, and needed additional (secular) support. As basing their authority on the assent of aristocrats (which would actually have been a historically more appropriate explanation of the original emergence of their power) would have weakened their internal situation, it was not an attractive option. They needed a new doctrine: the doctrine of sovereignty.<sup>24</sup> One of the leading figures of sovereignty doctrine, Hobbes explained monarchical power by two contracts: the people first make a contract with each other and then with the monarch making him sovereign. From this, it was only a small (but important) intellectual step to leave aside the second contract, i.e. to keep the sovereignty with the people itself (Locke, Rousseau).

(b) Another reason for the success of the democratic idea based on equal freedom of individuals was *individualism*.<sup>25</sup> The corporatist (in which rights and duties depended on belonging to a social-juridical group, like an estate) and hierarchic picture of society faded away. (b/1) European states chased each other through constant wars into becoming more centralised, militarily and financially more efficient states (those which were unable to take up this path, like Poland, disappeared). The new absolutistic states subdued traditional aristocracies, what led the people living on the territory of the aristocrats to considering themselves rather as direct subjects of the king, than belonging to the aristocrat. Instead of group or collectivistic logic, they became in the new constellation simply *individual* subjects of the central monarchical power.<sup>26</sup> (b/2)

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<sup>23</sup> Lesaffer (n. 15) p. 313.

<sup>24</sup> For more details see András Jakab, Neutralizing the Sovereignty Question. Compromise Strategies in Constitutional Argumentations about the Concept of Sovereignty before European Integration and since, *European Constitutional Law Review* 2006/3. pp. 375-397, esp. 375-378 and 383-384.

<sup>25</sup> Some authors trace back individualism to John Duns Scotus (1266-1308) or to William of Ockham (1300-c.1350). Hespanha (n. 17) p. 70. It might be true as a germinal anticipation of the epistemological individualism, but definitely untrue as a political idea.

<sup>26</sup> Markoff (n. 12) pp. 43-45.

Self-governing commercial city republics in Italy with their necessarily more open mentality social structure were also more open to new ideas, to critical thinking and to reasoning instead of authority, thus preparing the landscape for renaissance humanism (instead of scholasticism) which then spread throughout Europe. (b/3) Johannes Guttenberg's inventing the printing machine around 1440 not only contributed to the success of the above mentioned reformation, but it also made possible the existence of printed newspapers. For the 18<sup>th</sup> century, in England, France, certain parts of the Holy Roman Empire, the Netherlands and British colonies of North America (today's US East Coast), the number of literate people and the connecting journalism reached a critical mass. Public opinion was considerably formed by newspapers, and for a printed text it was less important, who said it in which pompous palace. The argument itself became more important, about which each reader formed his opinion *individually*.<sup>27</sup> (b/4) The weakening of general religious spiritual authority (i.e., secularisation) led to a certain extent being 'lonely' intellectually, without the former unquestionable truths. One had to believe in his or her own (individual) reason, which served as the epistemological starting point for the Enlightenment that eventually promoted on the political level equality and freedom.

(c) Due to developing trade and demographic growth, commercialised agriculture gained terrain. In countries where it meant also a strong bourgeoisie (and due to political contingencies a balance between the monarch and the land-owner aristocracy), hierarchical feudalistic social structures became more likely to get weaker and to give way to democratisation.<sup>28</sup> Capitalism also meant relatively autonomous firms and an economic growth, the latter of which had the consequence that politics was not a zero-sum game, so it was in the interest of different social groups within the state to agree to compromise solutions with political opponents.<sup>29</sup>

(d) Changes in military organisation and technique made the sheer number of foot soldiers with relatively cheap equipment the decisive factor in winning wars in the

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<sup>27</sup> Markoff (n. 12) p. 46.

<sup>28</sup> Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy*, Boston, Beacon Press, 1966, esp. 3-155, 413-422.

<sup>29</sup> Dahl (n. 5) p. 252.

17<sup>th</sup> century.<sup>30</sup> With the appearance of heavy artillery, mortars, machine guns, tanks, and air power, this factor is not any more existent, but at the birth of modern political democracy it did play an essential role.<sup>31</sup>

All these factors (but none of them alone decisively) contributed to a certain structural probability for the success of democratic arguments. It did not make the re-emergence of the democratic idea a 'historical necessity', but it made concrete democratic actions and movements likelier to succeed.

Ad (2). *Why* did democracy become in the following 250 years so successful? *Why* has this legitimacy claim proved in practice stronger than other claims? The strength of the democratic argument lies in its capacity to widen the circle of political actors. So whoever needs 'outsider' support in a political chess game, new figures can be placed on the chess board with reference to democracy.<sup>32</sup> This is why intellectually different social movements fought under the devise of democracy and this is why the democrats of the 18<sup>th</sup> or even of the 19<sup>th</sup> century would count today as blatant antidemocrats.<sup>33</sup> In the name of democracy the suffrage was broadened from white rich males to the poor and to women. In the name of democracy, slavery and feudalistic dependencies were abolished. In the name of democracy, the power of the elected representative body (parliament) gained competences and control over the executive. In the name of democracy, a struggle was fought for honest electoral counts and secret voting in order to obtain the real will of the electorate. And in the name of democracy, organised political parties gained acceptance as legitimate social actors. It was not obvious at all that whoever fought for one these goals also agreed with the others.

Through these struggles with respectively different stakeholders and with considerably different political ideas, democracy has been redefined again and again, either by the people challenging powerholders in the streets and fields, or by the

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<sup>30</sup> Dahl (n. 5) pp. 245-248. One of the factors in democratizing ancient Athens was also the change in military technique (instead of expensive cavalry rather hoplites and rower galleys). On the topic in general see Stanislav Andreski, *Military Organization and Society*, Berkeley, Univ. of California Press, 1968.

<sup>31</sup> Dahl (n. 5) p. 248.

<sup>32</sup> It is extremely difficult (mostly possible only through violence) to reverse democratisation: with the exception of some short-lived and tragic exceptions, it is a one-way street. Dunn (n. 3) p. 154 talks about 'the political logic of ever-widening representation'. Any claim to narrow democracy would automatically make the claimer into an open enemy of all those who would lose their political rights, so it is a risk which a rational politician is normally not willing to take.

<sup>33</sup> Markoff (n. 12) pp. 3-4.

powerholders themselves writing new laws and constitutional documents.<sup>34</sup> Whether a specific struggle was motivated cynically by self-interest,<sup>35</sup> or whether it happened out of a deep and honest moral conviction, varied. The two motivations could even reinforce each other, like in the case of women's right to vote. After WWI, the suffragette movement received support from archconservative circles who wanted to have some counterweight after the right to vote was broadened to the poor male (due to the need for their support as soldiers in WWI or due to fear from the returning veterans after the war), as conservatives hoped that the females being rather religious would impede or at least slow down a radical left turn in politics.<sup>36</sup> Similarly, for the 19<sup>th</sup> century step by step suffrage broadening in Britain, the main motive of the elite was to divide the poorer, in order to avoid a revolutionary explosion similar to France.<sup>37</sup> The social (financial, human resources or popular support) costs of counterbalancing a democratic claim with another one seemed to be smaller than the costs of oppressing all democratic claims.

If democratic claims emerge, even anti-democrats tend to be forced to do at least lip-service to democracy. As the political sociologist John Markoff convincingly puts it:<sup>38</sup>

Before the end of the [18<sup>th</sup>] century, the future Pope Pius VII, in his Christmas talk, was saying that 'democratic government' was compatible with the Gospel.<sup>39</sup> Such developments were to a significant degree stimulated by the French events. But even after the French defeat, countries that had experienced French rule could not restore the previous divine-right hierarchy. To match the French achievement, France's enemies had to build enormous armies. To do so, many of them needed to court the ordinary people who would fill the ranks and supply the armies. Even governments with no wish to give real power to those below were beginning to find essential the claim to be doing so.

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<sup>34</sup> Markoff (n. 12) p. xvi.

<sup>35</sup> According to Herodotus, even the Athenian origins can be explained rather by the self-interest of a certain part of the elite: Kleisthenes adopted democracy not because of personal conviction, but because he needed help for his fight against rival aristocrats and their Spartan supporters. Herodotus, *History*, tr. AD Godley (Cambridge, Mass: Harvard Univ. Press, 1922) V,66,2: pp. 72-73. Cf. Mogens H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford, Blackwell, 1991, pp. 33-34.

<sup>36</sup> Markoff (n. 12) p. 86.

<sup>37</sup> Thomas Babington Macaulay, speech of 2 March 1831, in: James B. Conacher, *The Emergence of British Parliamentary Democracy in the Nineteenth Century*, New York, Wiley, 1971, p. 25.

<sup>38</sup> Markoff (n. 12) p. 49 (footnote in original).

<sup>39</sup> Robert R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America, 1760-1800*, vol. 1 (Princeton, NJ, Princeton Univ. Press, 1959) p. 18.

And once you open up the gates rhetorically, you make it more difficult to oppress democratic claims than before.

But democratic movements not only proved to be successful for the power-contest within a state, also already established democratic states showed impressive power in international conflicts. So democracy was not simply an epidemic which unavoidably caught some countries and then doomed them, but rather the opposite: it helped them to become considerably stronger. This was for two main reasons: (a) it was able to produce loyalty and (b) it had a remarkable capacity for self-correction.

Ad (a). On the one hand, it strengthened the loyalty of their respective political community-members by giving them a voice in what was happening (or at least it gave them the impression that they had it).<sup>40</sup> This was especially important during times of crisis or even war.<sup>41</sup>

Ad (b). On the other hand, it seemed to be an efficient procedural solution to promote the citizens' interests through the possibility of making elected officials responsible for not promoting these interests (by not re-electing them, i.e. by making them compete on the basis of who can promote the citizens' interests best).<sup>42</sup> Governments could be forced by their electorate to change measures harmful to its interests (trial and error).<sup>43</sup> This eventually made these communities also economically stronger, what was necessary for successfully fighting international conflicts.<sup>44</sup> Empirical studies have confirmed that (except for extremely poor countries) democracy makes economic growth more likely (all other factors being equal).<sup>45</sup>

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<sup>40</sup> Robert C. Cooter, *The Strategic Constitution*, Princeton, NJ, Princeton Univ. Press, 2000, p. 144.

<sup>41</sup> Albert O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States*, Cambridge, Mass., Harvard Univ. Press 1970.

<sup>42</sup> Cooter (n. 40) pp. 4, 11, 13, 17, 359-360, 373-374. Cf. Amartya Sen, *Development as Freedom*, New York, Knopf, 1999, p. 152: 'no substantial famine has ever occurred in any independent country with a democratic form of government and a relatively free press.'

<sup>43</sup> Karl Raimund Popper, *The Open Society and Its Enemies*, Routledge 2006, vol. I, pp. 163, 167, vol. II. 90, 143, 434; Christoph Möllers, *Demokratie. Zumutungen und Versprechen*, Berlin, Klaus Wagenbach, 2008, pp. 11, 13.

<sup>44</sup> The idea of equal freedom itself has also economic implications, as it helps competition. Non-discrimination means that the most capable should do the job, only his or her individual achievements count. Protection of private property is necessary for capitalist economic growth. Protection of privacy and freedom of thought contribute to a fearless and creative working environment. Political freedoms ensure democracy, so their economic impact is more indirect than the one of the latter. For a deep analysis of these questions with further references see Cooter (n. 40) pp. 241-357.

<sup>45</sup> Elias Papaioannou – Gregorios Siourounis, *Democratization and Growth*, *CEDI Working Papers* 2007-13, available at <http://ideas.repec.org/p/edb/cedidp/07-13.html>.

Since the end of 18<sup>th</sup> century, democratisation succeeded in its above mentioned struggles in the world through different transnational or even multicontinental waves, in which one country's experience often helped the other ones, resulting in 'democratic waves' – the latest one after the fall of communism.<sup>46</sup> Sometimes democracy (in its then understood form) was directly imposed by an army (the French in the 1790s in Europe, the US after WWII, or lately in Haiti and Iraq), sometimes it was followed by respective elites as a model of success (especially after winning major international conflicts, like WWI, WWII or the Cold War),<sup>47</sup> sometimes by powercontenders as a strong tool to challenge existing power structures, or sometimes simply by offering students fellowships after which they return to their home country to spread their newly learned ideas (all major western democracies follow this latter practice).<sup>48</sup> These mechanisms contribute to the fact that generally only a limited number of political models are followed in the world, and that changes in the political model are rather wave-like than sporadic.<sup>49</sup> As for now, neither a new major democratic wave (not many countries remain to be democratised with our current concept of democracy, only a few island-like countries resist to accept the democratic claim), nor antidemocratic waves are to be seen. Democracy seems to have acquired a quasi-monopoly as today's political legitimacy claim.<sup>50</sup>

Also the EU itself claims democratic legitimacy in the Preamble, further in Art. 2 and 10 TEU. The question is, however, whether it has any other choice, or whether it could base itself on another form of legitimacy. In the light of the above, the answer seems to be in the negative, but as in the literature the alternative option of 'output legitimacy' is sometimes mentioned,<sup>51</sup> we have to deal with it here too.

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<sup>46</sup> Improving communication and transportation contributed to the spreading of broad ideas, forms of public action (e.g., strike, demonstration, non-violent resistance), organisational vehicles, symbols or slogans. Waves became in this manner faster and more effective. Markoff (n. 12) pp. 25-28.

<sup>47</sup> The US and the French revolutions proved also the power of democratic states and their ability to mobilize masses. Markoff (n. 12) p. 50; Dunn (n. 3) p. 91.

<sup>48</sup> Markoff (n. 12) pp. 32-34.

<sup>49</sup> Through these mechanisms, antidemocratic waves are also possible: in the 1920s and 1930s, most of the newly established European democracies swapped side to authoritarian or even totalitarian regimes.

<sup>50</sup> Cf. Francis Fukuyama, *The End of History and the Last Man*, New York, Free Press, 1992. When communism fell, also the justification for some right wing dictatorships fell, as they could not point at the enemy anymore, so it also accelerated their democratisation. Markoff (n. 12) p. 97.

<sup>51</sup> E.g., Fritz Scharpf, *Demokratietheorie zwischen Utopie und Anpassung*, Konstanz 1970, pp. 21-28; Giandomenico Majone, *Regulating Europe*, London ea 1996; Daniel Wincott, *Does the European Union*

## 1.2 Is output legitimacy an alternative?

Output legitimacy means that an authority has to be obeyed because its decisions lead to good (acceptable) results.<sup>52</sup> So it is not about the source of the authority but about its use and result. To a certain degree, this enlightened technocratic idea served historically as the base of the EU.<sup>53</sup> A similar argument is, when the EU (EC, EEC) is described as exercising rather a technical-regulatory expert type of legislation, than a political one, which for this reason does not even need a democratic legitimacy.<sup>54</sup> The latter (i.e. non-political) argument is becoming weaker by every revision of the founding treaties, but even from the beginning there was potential for a democratic institutional system in European integration.<sup>55</sup>

The above explanation of the success of democracy was itself partly output-oriented, as its success (besides structural features of politics) was partly explained by its results. But it is quite a different thing to rely explicitly and directly in the discourse on the output without the bridging element of a moralistic or emotional rhetoric. That is happening, however, in the case of what we call ‘output legitimacy’.

Output legitimacy has two main weaknesses. (1) The first is that such an approach is unlikely to survive crisis situations. If the reason for obeying an authority is that it is successful, then in lack of success the political community dissolves very quickly. As opposed to the emotional loyalty produced by democratic procedures

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pervert democracy? Questions of Democracy in New Constitutionalist Thought on the Future of Europe, *European Law Journal* 1998, p. 414.

<sup>52</sup> Fritz Scharpf, *Regieren in Europa*, Frankfurt aM 1999, pp. 16-28; Marcus Höreth, *Die Europäische Union im Legitimationstrilemma*, Baden-Baden, Nomos, 1999, pp. 82-87.

<sup>53</sup> On Jean Monnet’s approach see Ernst Haas, *The Uniting of Europe*, Stanford, Stanford Univ. Press, 1958, p. 456; Kevin Featherstone, Jean Monnet and the democratic deficit in the European Union, *Journal of Common Market Studies* 1994, pp. 149-170. For further details on neo-functionalist approaches of legitimacy (i.e. concentrating on economic, rationality-driven integration instead of political identity) see Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, Kluwer Law International, The Hague e.a., 2002, pp. 14, 65.

<sup>54</sup> Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 1044; Hans Peter Ipsen, *Fusionsverfassung Europäische Gemeinschaften*, Bad Homburg e.a.: Gehlen 1969, pp. 64-66. Cf. Giandomenico Majone, Europe’s “Democratic Deficit”. The Question of Standards, *European Law Journal* 1998, pp. 8-10. The danger of legitimacy based on expert knowledge is that it does not possess a well-defined procedural solution of self-correction, see Dahl (n. 5) p. 76. On self-interest of experts, on necessary moral implications of expert-decisions and on disagreement amongst experts see *ibid.* pp. 61-62, 74, 76.

<sup>55</sup> „Indeed, it made little sense to provide for the future elections of a Common Assembly responsible under the terms of the ECSC Treaty only for debating coal and steel policy, unless such a body were to evolve into something more far reaching.” Richard Corbett, Francis Jacobs, Michael Shackleton, *The European Parliament*, London, Catermill, 3<sup>rd</sup> ed. 1995, p. 8.



(“voice”), there is no motivation to stand up for a struggling authority based on output legitimacy. Output legitimacy’s survival probability is thus lower than that of democratic legitimacy. (2) The second is that output legitimacy does not counterbalance democratic claims. Democratic claims (as we have seen in its history) can be counterbalanced only by other democratic claims. So what output legitimacy claims do, is simply postponing the question to a later occasion, when a democratic claim turns up. To sum up, output legitimacy is simply fragile, and due to its too concrete promises it cannot guarantee to keep communities emotionally together in crisis situations.

Today, both in political scientific and legal analysis, the requirement of a democratic legitimacy for the EU is absolutely dominant. So the question is not whether the authority of the EU has to be democratically legitimised, but *how* we achieve it, i.e. what kind of conceptual, procedural and infrastructural solution we need to achieve that.

## **2. Criteria for the well-functioning of democracy and their fulfilment in the EU**

In the first part of the article we have seen how democracy can be approached by looking at its history in a rather pragmatic way, and we also have seen which two virtues explain its success. In the second part, we are going to sophisticate this picture in order to gain a more accurate view of the kind of democracy that we could aim for in the EU. We need this more accurate or sophisticated view because the concrete implementation of the general idea of democracy (i.e., popular self-rule) can blatantly contradict the moral aspirations of the framers and devastate political unity,<sup>56</sup> or it can even economically ruin the country.<sup>57</sup> If we want to run a well-functioning democracy, i.e. if we want to achieve or keep the competitive advantages of democracy (loyalty and economic growth through self-correction of mistaken decisions), then we have to fulfil some further criteria.

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<sup>56</sup> On the fear from ‘elective despotism’ see Thomas Jefferson, *Notes on the State of Virginia*, New York, Harper, 1964, pp. 113-124.

<sup>57</sup> On populist welfare states see Markoff (n. 12) p. 93, Dunn (n. 3) pp. 149-150.

## 2.1 A technical-procedural issue: direct or representative democracy

If we conceive the virtue of democracy as expressing the will of the people (the ‘general will’), then direct democracy seems superior to representative democracy.<sup>58</sup> But if we think of democracy as an instrument to achieve loyalty and economic growth through self-correction of mistaken decisions, like we did above, then the choice seems to be a mere technical one, as representative democracy can ensure these achievements.

In large democracies (nation-states) it is physically impossible to let the people vote on all important questions (even with the use of Internet, it would be at least impractical for citizens because of the constant research for the information needed for the decisions). Citizens cannot devote all their time to public affairs (in lack of slaves working for them), so they have to elect representatives.<sup>59</sup> Political decisions become in modern times complicated, for which we need full-time expert politicians (or even teams of politicians); the task of the voter will be to choose the right person(s) who will make the right substantive decisions for him or her.<sup>60</sup> Even if we have referenda, they are normally under the influence of party-politics, as the necessary financial and infrastructural background for successful referendum campaigns lies with political parties.<sup>61</sup> With the exotic *half*-exemptions of Switzerland (or as a US member state, California) today’s political democracies are representative democracies, where referenda are rarely or even never used.

The EU itself makes the right choice in this matter when Art. 10(1) TEU states that “The functioning of the Union shall be founded on representative democracy.”<sup>62</sup> As

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<sup>58</sup> Following Rousseau e.g. Carl Schmitt, *Verfassungslehre*, Berlin, Duncker & Humblot 9<sup>th</sup> ed. 2003, pp. 221-359.

<sup>59</sup> Benjamin Constant, *De la liberté des Anciens comparée à celle des Modernes* [1819], in: *Ecrits politiques*, Paris, Gallimard/Folio, 1997, pp. 591-619.

<sup>60</sup> Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (London, 3<sup>rd</sup> ed. 1950) pp. 269-283. This structural feature necessarily leads to campaign-financing issues. See Cooter (n. 40) p. 15: “Politics has a large effect on citizens, whereas each individual citizen has a small effect on politics. Since ordinary citizens gain little for themselves by participating in democracy, few citizens invest the time and energy needed to obtain detailed information about electoral candidates and issues. When citizens remain rationally ignorant, politicians need costly campaigns to influence citizens and win votes. To finance campaigns, politicians trade political influence for money from lobbyists.”

<sup>61</sup> Ernst-Wolfgang Böckenförde, *Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie. Bemerkungen zu Begriff und Verwirklichungsproblemen der Demokratie als Staats- und Regierungsform*, in: Georg Müller e.a. (eds), *Festschrift Kurt Eichenberger*, Basel, Frankfurt aM, Helbing & Lichtenhahn, 1982, pp. 301-328.

<sup>62</sup> The principle of democracy (as many other later treaty provisions) came up first in the case-law of the ECJ. See Case 138/79, *Roquette Frères v. Council* 1980 ECR 3333, para 33: “the fundamental democratic

a nice jewel with limited practical relevance, in Art. 11(4) TEU, also the direct democratic institution of the citizens' initiative has been introduced by the Treaty of Lisbon, with no legal binding force concerning the actual decision.<sup>63</sup>

## *2.2 Political freedoms and access to information on government*

Democracy without political freedoms is unlikely to sustain itself. The institutional system of even voting procedures (i.e., regular elections) might be similar to functioning democracies, but once someone gets into power (either democratically or through violence) s/he is unlikely to get voted out of it. So self-correction mechanisms cannot work efficiently;<sup>64</sup> textbook examples of this were formerly the socialist states (democratic centralism), today such states are called in the literature 'illiberal democracies'.<sup>65</sup> Even though in every country there might be doubts about certain part-aspects of some political freedoms, this is probably one of the least problematic issues in the EU as a whole. Not only because the Charter of Fundamental Rights of the European Union has full legal binding force after the Treaty of Lisbon, but also because the constitutional systems of the member states all ensure these rights.

But political freedoms can be used effectively only if we know what the government did, so if its work is transparent enough. Otherwise we cannot measure whether they deserve to be voted out of power, i.e. the self-correction mechanism cannot work either. Traditionally, the EU was criticised much more (and for good reasons) on this base.<sup>66</sup> After the Treaty of Lisbon the situation is, however, probably not worse than

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principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly"; similarly in Case 139/79, *Maïzena v. Council* [1980] ECR 3393 para 34.

<sup>63</sup> "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. (...)"

<sup>64</sup> Oppression and the lack of political freedoms can even lead to the loss of loyalty (i.e., the other virtue of democracies besides the self-correction capacity), especially in those parts of society (e.g., minorities) which suffer from it.

<sup>65</sup> Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York, W. W. Norton & Company, 2007.

<sup>66</sup> E.g., Fiona Hayes-Renshaw and Helen Wallace, Executive Power in the European Union: The Functions and limits of the Council of Ministers, *Journal of European Public Policy* 1995, pp. 559-582; Michael Newman, *Democracy, Sovereignty and the European Union*, London: C. Hurst and Co. Publishing, 1996, p. 198; Kieran St C. Bradley, La transparence de l'Union Européenne, *Cahiers de droit européen*, N° 3-4 (1999) pp. 285-362.

in most European states:<sup>67</sup> both the meetings of the Council and the European Parliament are now open, also a general right to access to EU documents is enshrined in Art. 15 TFEU. A further general clause on the principle of transparency is now contained in Art. 11 TEU.

### 2.3 Statehood

Traditionally, democracy has been conceived as the form of government within the state.<sup>68</sup> One of the usual objections against the EU is, that it cannot be democratic as it is not a state, so EU competences are not simply opposed to national sovereignty but they are opposed (conceptually) to popular sovereignty and democracy.<sup>69</sup> On its own, the statement is a mere assertion without much convincing power,<sup>70</sup> but sometimes these objections come up mixed together with the arguments that ‘there is no homogeneous European demos’ or that ‘there is no European national identity’. Without these non-legal factors – so the critics – a democracy on EU level can have similar legal institutions as on national level, but it won’t really work. In the following we turn to these criticisms.

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<sup>67</sup> Stephen C. Sieberson, The Treaty of Lisbon and its Impact on the European Union’s Democratic Deficit, *Columbia Journal of European Law* 2007-2008. pp. 453-454.

<sup>68</sup> Verhoeven (n. 53) p. xi.

<sup>69</sup> Dieter Grimm, Does Europe need a constitution?, *European Law Journal* 1995, p. 282; Jean-Marie Guéhenno, *La fin de la démocratie*, Paris, Flammarion, 1993; Fritz W. Scharpf, Democratic polity in Europe, *European Law Journal* 1996, p. 136; Claus Offe, Homogeneity and constitutional democracy: coping with identity conflicts through group rights, *The Journal of Political Philosophy* 1998, pp. 113-141; Paul Kirchhof, Der deutsche Staat im Prozeß der europäischen Integration, in: Josef Isensee – Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. VII: Normativität und Schutz der Verfassung – Internationale Beziehungen*, Heidelberg, CF Müller, 1992, marginal number 33, 53; Udo die Fabio, Der neue Art. 23 des Grundgesetzes, *Der Staat* 1993, pp. 200-201, 206. The argument is especially strong in Germany, with its etatistic public law scholarship tradition. Cf. András Jakab, Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany, *International and Comparative Law Quarterly* 2009. pp. 933-955.

<sup>70</sup> For an impressive demonstration see Deirdre M. Curtin, *Postnational Democracy. The European Union in Search of a Political Philosophy*, Kluwer Law International, 1997. Cf. Robert A. Dahl – Edward R. Tufte, *Size and Democracy*, Stanford University Press, Stanford 1973, p. 135: “Today and in the foreseeable future, people will live in a multiplicity of political units. (...) Rather than conceiving democracy as located in a particular kind of inclusive, sovereign unit, we must learn to conceive of democracy spreading through a set of interrelated political systems, sometimes though not always arranged like Chinese boxes, the smaller nesting in the larger. The central theoretical problem is no longer to find suitable rules, like the majority principle, to apply within a sovereign unit, but to find suitable rules to apply among a variety of units, none of which is sovereign.”

## 2.4 Non-legal political and social infrastructure

### 2.4.1 A homogeneous demos

A usual topic in the debate on EU democracy is whether there is a European demos which could be the bearer of EU popular sovereignty.<sup>71</sup> The argument has two forms: 1. it can concern the factual homogeneity of the EU, and 2. it can concern the feeling of togetherness (national identity) of the European citizens.<sup>72</sup> The latter will be dealt with in the next subsection, here we are analysing only the former.

The worry about the value and the survival capacity of democracy in view of social inequalities is a well-known classic topic (Thomas Jefferson, Anatole France), and in the light of some recent South-American or African developments still an appropriate one, but in the EU the homogeneity concern is of different nature. It is about *cultural homogeneity*.<sup>73</sup>

There are numerous counterarguments against this approach. (1) According to a well-known classic argument, it is not homogeneity, but rather the opposite *heterogeneity* that is necessary for democracy. In Madison's faction theory (Federalist Nr. 10) different social factions are the guarantee that none of them will have full power and none of them will be oppressed. (2) Another argument goes along the line that not heterogeneity itself can be the problem, but only if the heterogeneous groups are fixed

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<sup>71</sup> Answering in the positive: Verhoeven (n. 53) pp. 159-189. Opposing the idea of a European demos: Winfried Veil, *Volkssouveränität und Völkersouveränität in der EU*, Baden-Baden, Nomos, 2007, pp. 77-104; Marcel Kaufmann, *Europäische Integration und Demokratieprinzip*, Baden-Baden, Nomos, 1997; Joseph H.H. Weiler, European Democracy and its Critics: Polity and System, in: *The Constitution of Europe*, Cambridge, Cambridge Univ. Press, 1999, p. 265; Albrecht Randelzhofer, Souveränität und Rechtsstaat: Anforderungen an eine Europäische Verfassung, in: Heiner Noske (ed), *Der Rechtsstaat am Ende?*, München, Olzog 1995, pp. 130-131; Fritz Ossenbühl, Maastricht und das Grundgesetz, *Deutsches Verwaltungsblatt* 1993, p. 634; Grimm (n. 69) p. 295.

<sup>72</sup> Both arguments have a soft ('not yet') and a radical ('there will never be a European demos') version. Cf. Carlos Closa, Some Foundations for the Normative Discussion on Supranational Citizenship and Democracy, in: Ulrich K. Preuss, Ferrán Roquejo (eds), *European Citizenship, multiculturalism and the State*, Baden-Baden, Nomos, 1998, p. 113.

<sup>73</sup> Linguistic heterogeneity will be dealt with below at 2.4.4 *Interested public opinion and media coverage*. The question of exactly how much homogeneity is necessary (and of how we actually measure it), is mostly not explained. What is mostly stated is simply that 'it is not homogeneous enough (yet)'. A modified argument is also possible by stating the EU cannot ever be homogeneous enough, because it is just too big. The last argument can easily be countered by a reference to the US or to India. See Dahl (n. 5) p. 217.

(e.g. along national or religious lines).<sup>74</sup> In this case elections are not elections, but only population censuses. But European elections did not seem to move towards this dead-end yet, so a fear from it would be premature. (3) A third counterargument emphasises that not even European nation states are any more as homogeneous as some want to see them. We are currently living in multicultural societies (not only in the US or in Switzerland, but in most EU member states).<sup>75</sup> The requirement of homogeneity (if it goes further than the requirement to accept the rule of law and democracy) would bring up the danger of assimilation and exclusion, or even a friend-enemy distinction within the society.<sup>76</sup> (4) A fourth argument is based on history stating that most of today's nation states have not been formed along ethnic lines: it was rather the other way around. First there was the political unit, and it formed the population to one cultural and linguistic unit.<sup>77</sup> At the time of the French Revolution (1789) half of the population of France did not speak French (but Italian, German, Breton, English, Occitan, Catalan, Basque, Dutch), and only 12-13% spoke it correctly. At the time of the Italian unification (1861) only 2.5% (!) of the population spoke the Italian we call today Italian.<sup>78</sup> (5) A fifth argument concentrates on the logic of democracy: it is based on *individuals* (and not on collectivist units) and the popular unity will be formed first by the democratic procedure itself.<sup>79</sup> So *ethnos* and *demos* are analytically different.<sup>80</sup>

In the light of the above arguments it is very difficult to say that it is conceptually impossible to have a democracy on EU level because of cultural differences.<sup>81</sup> But we can

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<sup>74</sup> Christoph Gusy, *Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU*, *Zeitschrift für Politik* 1998, p. 279, Peters (n. 100) p. 712.

<sup>75</sup> Verhoeven (n. 53) p. xi.

<sup>76</sup> Peters (n. 100) p. 704.

<sup>77</sup> The traditional opposing idea originates e.g. from Herder, Savigny, Meinecke based on the rather peculiar German case, where actually common identity was first and then came the political unity. See Peters (n. 100) p. 653. In public law scholarship for an early formulation of the necessity of a pre-legal cultural unit of people for the state-forming see Georg Jellinek, *Die Lehre von den Staatenverbindungen*, Wien, Hölder, 1882, p. 263. For a contemporary formulation in the context of the EU see Ernst-Wolfgang Böckenförde, *Welchen Weg geht Europa?*, München: Carl-Friedrich-von-Siemens-Stiftung, 1997, pp. 40-41.

<sup>78</sup> Eric J. Hobsbawm, *Nations and nationalism since 1780. Programme, myth, reality*, Cambridge Univ. Press, 1990, pp. 60-61.

<sup>79</sup> Peters (n. 100) p. 649 n. 86, pp. 704, 707. A classic form of this idea is to be found in Emmanuel-Joseph Sieyès, *Qu'est-ce que le Tiers État?* (1789) and remained strong in the French republican tradition.

<sup>80</sup> Emerich K. Francis, *Ethnos und Demos*, Berlin, Duncker & Humblot, 1965, p. 77.

<sup>81</sup> We can reason though that a simple Westminster style majoritarian parliamentary would not be the right choice for the pluralist EU, but a consensual coalition style parliamentarism is better. On the

still state that practically it would not work...the main reason being that the European peoples just do not want it, they do not have the feeling of togetherness with other European peoples.

#### 2.4.2 Political identity or the European 'nation'

The critics of the idea of a European demos as formed by procedures can easily point out that separatist Catalan or Scottish nationalists were not impressed by the Spanish or British procedures either, and national identity in general does not necessarily flow from procedures. So the problem is not factual similarity or dissimilarity, but rather the identity.<sup>82</sup> And identity still primarily belongs to the nation states.<sup>83</sup>

It is all very true. (1) One possible counterargument is that national identity is fading in general in the world,<sup>84</sup> so in time the feeling of togetherness will lose its relevance. This would be, however, a weak counterargument. We do not have exact and convincing empirical data about fading national identities, and examples of the opposite can also be brought. But even if we had data for it, it would be very difficult to project a certain level of fading to the future as a continuous development. (2) A more convincing argument says that even in the US, when the famous words „We the people” have been put on paper, it was nothing more than wishful thinking, or rather political manipulation. So we could give it a go similarly in the EU.<sup>85</sup> We can also point out that nations are imagined or even mythical communities, so it is not a fixed fact, it can even change by time (as it is happening when an ethnic minority assimilates into the majority).<sup>86</sup> Peaceful methods of identity building are possible (like having EU sport teams competing against the Americans or the Chinese), which could be used in the future. I have some doubts whether it can work in the foreseeable future. But it is less relevant here, as my actual point would be that national identity in this strong

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difference between majoritarian and consensus government see Arend Lijphart, *Democracies*, New Haven and London, Yale Univ. Press, 1984, esp. pp. 1-36.

<sup>82</sup> Grimm (n. 69) p. 297.

<sup>83</sup> For an empirical survey proving this see Matthieu Deflem – Fred C. Pampel, The myth of postnational identity: popular support for European unification, *Social Forces* vol. 75, 1996, pp. 119-143.

<sup>84</sup> Michael Sandel, *Democracy's Discontent*, Cambridge, Mass.: Belknap Press of Harvard University Press, 1996, p. 344.

<sup>85</sup> Manfred Zuleeg, What holds a nation together? Cohesion and democracy in the United States of America and in the European Union, *American Journal of Comparative Law* 1997, p. 526.

<sup>86</sup> Shown on the example of France by Eugen Weber, *From Peasants into Frenchmen: The Modernization of Rural France, 1880–1914*, Stanford University Press 1976.

substantive sense is not absolutely necessary. (3) What we need is only a loyalty towards the system, towards the procedures of democracy (such a loyalty is possible only of course, if the procedures work).<sup>87</sup> It helps the effectivity of law (so the rule of law), and with the adherence to these basic constitutional values (and the connecting emotional identification) it can survive crisis situations too. Nationalism can be indeed a centrifugal force in the integration, but it did not lead in Western Europe to any secession until now. As a matter of fact, one of the reasons it did not happen until now is exactly the fear of secessionists that they might get rid of the oppressive (normally majority) nation, but they might find themselves also outside of the EU, which none of them really wants. As for now, independence of these countries (Flanders, Scotland, Catalonia or the Basque Country) is unsure, but even if they reach it, it is likely to happen within the frame of the EU. Nationalism can rather lead to explosions if a basic democratic mentality is missing (as we have seen in former socialist countries).

#### 2.4.3 Democratic mentality

If citizens talk about politics, they very often switch into an irrational and emotional way of arguing.<sup>88</sup> It is more or less natural, as (in lack of expertise and time) we cannot judge exactly the actions by politicians (we have only sporadic factual impressions, which do not have to be underestimated either though), we can only promote our own mentality (i.e., vote for politicians with similar mentality), which is necessarily based partly on emotions. So to a certain extent, it is rational for citizens to be emotional. Citizens are not political philosophers.

But we have a real problem from the point of view of democracy only if the democratic struggle for the power evolves into a general distinction between friend and enemy ('cold civil war' or 'life or death fight'), and if the struggle steps over the limits of law. In a democracy we need a minimum level of brotherhood,<sup>89</sup> where we suppose that

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<sup>87</sup> To name national identity as a precondition for democracy is methodologically biased, as it reconstructs the concept of democracy along the concrete sociological features of some democracies. See Jürgen Habermas, Remarks on Dieter Grimm's 'Does Europe need a Constitution?' *European Law Journal*, 1995, pp. 303-307.

<sup>88</sup> Schumpeter (n. 60) p. 262 "Thus the typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyzes in a way which he would readily recognize as infantile within the sphere of his real interests. He becomes a primitive again. His thinking becomes associative and affective."

<sup>89</sup> Möllers (n. 43) p. 19.



the other party is not going to devastate deliberately (or betray) the country or to destroy our basic values.<sup>90</sup> We need citizens who are able and willing to accept that they can lose in elections. A democracy needs democrats.<sup>91</sup>

We can have doubts about the democratic nature of the EU, but it would be farfetched to think in general that European citizens living under domestic democracies are lacking this mentality. Democratic procedures formed their mentality, in some fortunate countries for centuries, in others for decades.<sup>92</sup> What in the EU as a whole the problem could be is not really an overheated antidemocratic politics, but rather the opposite: the lack of interest.<sup>93</sup>

#### 2.4.4 Interested public opinion and media coverage

The lack of interest can be explained by different factors. One is that there is no unified media coverage due to linguistic heterogeneity. Consequently, public opinion is focusing dominantly on domestic issues.<sup>94</sup>

The real problem is, however, not the linguistic heterogeneity. It is possible to have relevant public opinion in multilingual societies (even if practically more difficult than in a unilingual society),<sup>95</sup> as it is shown in Finland, Canada, Switzerland, or India.<sup>96</sup> And also the other way around: the same language does not result automatically in unified media coverage either, Austrian and German newspapers write about very different issues. So the link between language and unified media coverage (which is the actual problem from the point of view of building a relevant public opinion)<sup>97</sup> is not

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<sup>90</sup> Dahl (n. 5) p. 255.

<sup>91</sup> Martin Kriele, *Einführung in die Staatslehre*, Stuttgart e.a., Kohlhammer, 6<sup>th</sup> ed 2003, p. 268. For an explanation of the failure of the Weimar Republic on these grounds see Georg Lukács, *Die Zerstörung der Vernunft* (Aufbau Verlag, Berlin 1955), p. 61: 'Thus the Weimar Republic was basically a republic without republicans, a democracy without democrats.' (translation mine).

<sup>92</sup> Institutions form mentalities, see Kriele (n. 91) p. 268.

<sup>93</sup> As further non-legal preconditions we can name the non-tribal social structure, the lack of a dominant theocratic religion, and the existence of a developed school system. See Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in: *ibid.*, *Staat, Verfassung, Demokratie*, Frankfurt aM, Suhrkamp, 1991, pp. 345-346, 351-352. All these seem to be given in the whole of the EU.

<sup>94</sup> Alexander von Brünneck, *Die öffentliche Meinung in der EG als Verfassungsproblem*, *Europarecht*, 1989, pp. 251-252.

<sup>95</sup> Elisabeth Bakke, *Towards a European Identity?*, *ARENA Working Paper*, 10/95, Oslo.

<sup>96</sup> Peters (n. 100) p. 706.

<sup>97</sup> Ingolf Pernice, *Maastricht, Staat und Demokratie*, *Die Verwaltung* 1993, pp. 479-481; Manfred Zuleeg, *Demokratie in der Europäischen Gemeinschaft*, *Juristen-Zeitung* 1993, pp. 1073-1074; Claus Dieter Classen, *Europäische Integration und demokratische Legitimation*, *Archiv des öffentlichen Rechts* 1994, pp. 255-257; Jochen A. Frowein, *Die verfassung der Europäischen Union aus der Sicht der*

automatic. But if we want to have a unified discourse space forming a public opinion,<sup>98</sup> we need questions which might be relevant for all the readers as voters. We do not even need the exact same information (e.g., in the form of translated news, like Euronews) reaching readers. We just need more or less overlapping relevant information potentially reaching them what is arguably given even now. But the electorate are just not really interested in such news (with the notable exceptions when the EU is in a serious crisis, like the euro crisis now).

So the real issue is rather that readers (as voters) have to see that they will be able to decide about the direction of (EU) government power at the next EU election, so they will need information for that decision. The EU would thus not be any more a necessary evil, some kind of *vis maior*, which we cannot influence, but it would be our (democratically elected) government. It is the case if there is a direct link between election and political responsibility of the EU government, i.e. the Commission.<sup>99</sup>

### *2.5 The direct link between election and responsibility: the effectiveness of popular will*

Where the actual problem lies, is rather what Anne Peters calls ‘the missing correlation between election and responsibility’.<sup>100</sup> I.e., there are elections, and also a new government (Commission) will be set up, but the direct link between the two acts is missing.<sup>101</sup> There seem to be only two institutional solutions to ensure the virtues of

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Mitgliedstaaten, *Europarecht* 1995, p. 324; Siegfried Magiera, Das Europäische Parlament als Garant der demokratischen Legitimation in der Europäischen Union, in: Ole Due, Marcus Lutte, Jürgen Schwarze (eds), *Festschrift Ulrich Everling*, Baden-Baden, Nomos, 1995, vol. I. pp. 797-798; Christian Tomuschat, Das Endziel der europäischen Integration, *Deutsches Verwaltungsgblatt* 1996, p. 1079 n. 29.

<sup>98</sup> It is debatable that even within one country, how far discourse spaces are entirely unified. Readers of the Sun and of the Guardian might have indeed very different perceptions what is happening in the UK, but their discourse space is at least partly the same.

<sup>99</sup> The Commission can be conceptualised as the government of the EU, the European Parliament as the lower chamber, the Council as the upper chamber of the legislative branch (even if the latter has some limited executive functions). See Simon Hix, Legislative behaviour and party competition in the European Parliament, *Journal of Common Market Studies* 2001. pp. 663-688; Andreas Maurer / Wolfgang Wessels, *Das Europäische Parlament nach Amsterdam und Nizza: Akteur, Arena oder Alibi?*, Baden-Baden, 2003, p. 213. For a different conceptualisation see Philipp Dann, *Parlamente im Exekutivföderalismus* (Berlin e.a., Springer 2004) pp. 316-321.

<sup>100</sup> Anne Peters, *Elemente einer Theorie der Verfassung Europas*, Berlin, Duncker & Humblot 2001, p. 627: ‘mangelnde Korrelation zwischen Wahl und Verantwortung’.

<sup>101</sup> Some authors criticise not only the election of the Commission, but also that a complicated regulatory network with independent (i.e., not accountable) authorities have the power. See András Sajó, EU Networks under the New Constitution, Impact on Domestic Constitutional Structures, in: Ingolf Pernice – Jiri Zemanek (eds), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, Baden-Baden, Nomos 2005, pp. 183-198; Joseph Weiler, To Be a European Citizen: Eros and Civilization, in: *The Constitution of Europe*, Cambridge, Cambridge Univ. Press, 1999, p. 349. This is a general problem of

democracy (both loyalty and self-correction): one possibility would be to transform the EU into a presidential system (similar to the US), the other would be to parliamentarize it.<sup>102</sup> The latter seems to be a more viable option, as the current system is much nearer to the parliamentary system, i.e. only minor institutional changes would be necessary to achieve it.<sup>103</sup> The solution would be thus to make only the European Parliament responsible for the election of the Commission, whereas the European Council could have a ceremonial role similar to monarchs or presidents in parliamentary systems.<sup>104</sup> The possible answers to counter this idea are fourfold. In the following we are going to analyse them.

### 2.5.1 ‘The current system is democratic enough, as we have democratic empowerment chains leading to the people’

The answer, according to which the Commission has a dual democratic legitimacy,<sup>105</sup> as the European Council is democratically legitimised on a national level, and the European Parliament is legitimised on a European level, misses the point. We can of course trace back on a long chain (or rather on separate several chains)<sup>106</sup> the Commission’s authority to ordinary citizens. But the nice metaphysical picture about the

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supranational influence in domestic affairs (OECD, WTO, World Bank), which we cannot deal with in this paper.

<sup>102</sup> Different institutional sub- and in-between types are considered with their advantages by Werner van Gerven, *The European Union: A Polity of States and Peoples* (Oxford, Portland: Hart 2005) pp. 318-332.

<sup>103</sup> See van Gerven (n. 102) pp. 344-345.

<sup>104</sup> For a similar approach see Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, *Harvard International Law Journal* 1999, p. 463; van Gerven (n. 102) p. 350. The idea goes back almost to the beginning of the EEC, see Walter Hallstein, the first president of the Commission on this issue: „[a]s a parliamentary democracy, the Community is still imperfect [...] because the European Parliament has not yet acquired its full role”. Walter Hallstein, *Europe in the Making*, London, Allen & Unwin, 1972, pp. 40-41. Jean Monnet had a different view on the issue, see above n. 53.

<sup>105</sup> On the idea of dual democratic legitimacy of EU institutions and legislation see Winfried Kluth, *Die demokratische Legitimation der Europäischen Union*, Berlin, Duncker & Humblot, 1995, p. 87; Karl-Peter Sommermann, *Verfassungsperspektiven für die Demokratie in der erweiterten Europäischen Union: Gefahr der Entdemokratisierung oder Fortentwicklung im Rahmen europäischer Supranationalität?*, *Die öffentliche Verwaltung* 2003, pp. 1009-1017. The idea has even been codified in Art. 10(2) TEU. There is a third option (besides the dual legitimacy and purely European legitimacy): legitimacy based purely on national parliaments. In an old fashioned etatistic and radical reasoning, in a surprising manner of *Begriffsjurisprudenz*, the German Federal Constitutional Court followed this approach in its Lisbon Decision. BVerfG, 2 BvE 2/08, of June 30, 2009. For one of the many convincing criticisms on the judgments see Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht’s Epigones At Sea*, *German Law Journal* 2009, pp. 1201-1218.

<sup>106</sup> The chain theory is especially vivid in German constitutional doctrine. See Böckenförde (n. 93) pp. 300-311, also BVerfGE 83, 60, 72; 93, 37, 66f.

“source of power” being the people is simply a metaphor which cuts short the debate about the reasons for having a democracy. This shortcut works normally pretty well, except if we take too seriously the metaphor itself and try to analyse it too much. This is happening, however, unfortunately often in the discourse about democracy in the EU. We should concentrate rather on the two keys for its international success mentioned above: 1. loyalty, 2. self-correction.

What we need for that (at this point) is to have a system where the citizens (in our case: the European citizens) can vote out one government and vote in another (the Commission). The Lisbon Treaty did not change much on this issue either (cf. Art. 17(7) TEU).<sup>107</sup> In the current situation, the European Parliament has only a veto as to the President and the other members of the Commission. This is probably one of the major reasons for having a low turnout at European polls and for having in general a low interest of citizens in EU politics.<sup>108</sup>

#### 2.5.2 ‘The EU has democratic origins, so its functioning must be democratic’

We could refer to the fact that the Founding Treaties and all their modifications were democratically legitimised, as they have been ratified by their respective democratically elected bodies or organs.<sup>109</sup> This is very true. But this is unfortunately not the issue here. The actual issue is whether *currently* the EU is running democratically. The origin of a system does not say much of its current functioning. As a matter of fact, democracies are normally born non-democratically.<sup>110</sup> The example of modern constitutions, the US

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<sup>107</sup> The only relevant change is a vague statement in Art. 17(7) that the European Council has to take „into account the elections to the European Parliament” when choosing the candidate for the President of the Commission.

<sup>108</sup> Cf. Mattias Kumm, Why Europeans will not embrace constitutional patriotism, *International Journal of Constitutional Law* 2008, p. 130: „The fact that citizens turn out for [European Parliament] elections at all, knowing that their vote is practically not to change anything, has long puzzled public choice theorists.”

<sup>109</sup> Peter Badura, Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 1966, p. 72; Pierre Pescatore, Les exigences de la démocratie et la légitimité de la Communauté européenne, *Cahiers de droit européen* 1974, pp. 508-509; Joseph Weiler, The Transformation of Europe, *The Yale Law Journal* 1991, p. 2472; Hans Heinrich Rupp, Europäische “Verfassung” und demokratische Legitimation, *Archiv des öffentlichen Rechts* 1995, p. 271; Armin von Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, Baden-Baden, Nomos, 1999, p. 56; Thomas W. Pogge, How to Create Supra-National Institutions Democratically, in: Andreas Føllesdahl – Peter Koslowski (eds), *Democracy and the European Union*, Berlin, Springer, 1998, pp. 160-185.

<sup>110</sup> Möllers (n. 43) p. 20.

Constitution's birth was blatantly non-democratic, even a clear breach of the democratic procedures of the then constitution, the Articles of Confederation:<sup>111</sup>

'We the People of the United States...' Begin with the remarkable act involved in writing these opening words. Only six years before, all thirteen states had unanimously agreed on the Articles of Confederation, which they solemnly proclaimed the basis of 'perpetual Union.' Now, after a short summer of top secret meetings, thirty-nine 'patriots' at the Convention were not only proposing to destroy this initial hard-won effort. They were also claiming authority, in the name of the People, to ignore the rules that the Articles themselves laid out to govern their own revision. The Articles explicitly required the agreement of all thirteen states before any constitutional change was enacted; yet the Founders declared that their new Constitution spoke for 'We the People' if only nine states give their assent. This revolutionary redefinition of the rules of the game extended further—to the manner in which the nine states were to signify their approval. As the Convention looked ahead to the struggle over ratification, it refused to permit existing state governments to veto its authority to speak for the People. Only special 'constitutional conventions' would be allowed to determine the fate of the new Constitution. What [in the world] justified the Federalists in asserting that this end run around legal forms gave them a *better* claim to represent the People than the standing government of the day?

Probably the most influential and (at least in Europe) most copied European constitution, the German *Grundgesetz* has similarly dubious origins, where even foreign military pressure can be proven.<sup>112</sup> A democratic origin can have some role in ensuring the loyalty of the population, but long term (as shown in the US or in Germany) it loses its relevance. And about the functioning of the self-correction mechanisms, which would be the other reason for having a democracy, the origin does not say anything.

So the democratic origin of EU cannot satisfy the requirement for its *current* democratic running. The question about the democratic origins is a different and clearly secondary one.

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<sup>111</sup> Bruce Ackerman, *We the People. 1: Foundations*, Belknap Press of Harvard Univ. Press, 1991, pp. 167-168.

<sup>112</sup> Carlo Schmid, *Erinnerungen*, Bern–München, Scherz, 1979, p. 370.

### 2.5.3 'We should rather make national parliaments stronger'

A usual claim is that the EU can be made more democratic by making national parliaments stronger. Even Art. 12 TEU emphasises the role of national parliaments in the EU. This is a serious misunderstanding and definitely the wrong direction to take. The definition of fundamental legal concepts, such as that of democracy, is a conceptual game which should be played out in a manner which leads to practically (morally or economically) acceptable results.

Efficient control by national parliaments is primarily possible, if decisions in the Council are made by unanimity.<sup>113</sup> But this is less and less the case. Democratic control through a bunch of national parliaments is not only inefficient,<sup>114</sup> but it also misses the point, which would be to have a clear and efficient procedure whereby voters can vote out one and vote in another government. This self-correction mechanism can work efficiently *only* if voters receive the direct question whether they want to keep a team of politicians (a Commission) in power or not. But the question cannot be put in this direct way right now, as the European Parliament just does not have the right to choose (on its own) the members of the Commission.

Emphasising the role of national parliaments is simply a civilised (because democratic) rhetorical form of expressing nationalism.<sup>115</sup> It is the strongest argument to counter the claim for a parliamentary system on EU level,<sup>116</sup> or to counter European

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<sup>113</sup> Closa (n. 72) p. 109. National parliaments controlling European institutions (i.e. not their own government) would be either procedurally cumbersome (why not the European Parliament?), or it would invite national veto players to block EU legislation. Cf. for (fortunately shy) misplaced attempts in this direction *Protocol on the role of national parliaments in the European Union* and *Protocol on the application of the principles of subsidiarity and proportionality*.

<sup>114</sup> Joseph Weiler, Does Europe Need a Constitution?, *European Law Journal* 1995, p. 232: „national procedures to ensure democratic control over international treaties of the State are clearly ill-suited and woefully inadequate to address the problems posited by the European Union”. EU negotiations force national governments to act quickly (to accept or to refuse unforeseeable compromises) in the Council, and afterwards their actions will simply be accepted by national parliaments, where they normally have the majority anyway.

<sup>115</sup> Those who stick to the idea of national states, normally see the democratic deficit in the weakness of national parliaments, those who support a European federal state see the democratic deficit in the weakness of the European Parliament. Stephen C. Sieberson, The Treaty of Lisbon and its Impact on the European Union's Democratic Deficit, *Columbia Journal of European Law* 2007-2008, p. 447.

<sup>116</sup> It makes sense only as long as there is a possibility of veto in the Council. „So long as each Member Government can veto a Council decision, if it wants to, there is a sense in which each Member Government [can] be held to account for them by its Parliament. If national vetoes disappear this will no longer be true [...] The resulting 'democratic deficit' would not be acceptable in a Community committed to democratic principles. Yet such a deficit would be inevitable unless the gap were somehow to be filled by the European Parliament” David Marquand, *Parliament for Europe*, London, Jonathan Cape Ltd 1979,

integration in general.<sup>117</sup>

But the question is not any more whether we would like to have a deep European integration, or whether we want to see public authority in Brussels deciding about policy issues in Europe. It is already there. The question is rather whether we want to use those democratic mechanisms to run it,<sup>118</sup> which made democratic countries so powerful. If we decide that a parliamentary system is not desirable on an EU level, we are still going to deal with the EU's authority, but this authority will be less efficient and useful for us in the long term.<sup>119</sup> If we think, however, that in the light of the above a parliamentary system is desirable (as I do), then we have to answer the practical question of how to introduce it.

#### 2.5.4 'It is practically impossible, as member state politicians would not allow it'

The claim for introducing a parliamentary system can be countered by saying that it would be nice, but it is an unrealistic dream, as member state governments (or at least some of them) would never give up such a power (i.e., to choose the members of the Commission).<sup>120</sup> It is all very true. But if they have to follow rules which tell them to do so, then they will be forced to do so. We can think of three different types of rules: (a) explicit treaty rules, (b) a tricky lawyerly interpretation of some treaty rules which implies an obligation to leave the choice of Commission members to the European Parliament and to have simply a ceremonial role by the European Council, (c) constitutional conventions.

Ad (a). If we want to have explicit treaty rules, then we have to modify the TEU. For that purpose we need the ratification of all member states. Having seen the miserable struggle with Draft Constitution and then with the Lisbon Treaty, it is unlikely

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p. 65. For a similar argument (the turn to majority voting unleashed legitimacy problems, veto is democratic), see Joseph Weiler, Problems of legitimacy in post-1992 Europe, *Außenwirtschaft* 1991, pp. 411-437.

<sup>117</sup> Cf. the heavily criticised Lisbon decision of the German Federal Constitutional Court: BVerfG, 2 BvE 2/08, of June 30, 2009. See Schönberger (n. 105).

<sup>118</sup> On the dilemma see Thomas D. Zweifel, *Democratic Deficit: Institutions and Regulation in the European Union, Switzerland and the United States*, Lanham ea, Lexington, 2002, p. 142.

<sup>119</sup> Intergovernmental package deals tend to favour partial bureaucratic interests in an intransparent and uncontrollable way, see Stefan Oeter, Souveränität und Demokratie in der „Verfassungsentwicklung“ der Europäischen Union, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1995. p. 699.

<sup>120</sup> Simon Hix, *The Political System of the European Union*, New York, Palgrave Macmillan, 2<sup>nd</sup> ed. 2005, p. 62.

that in the foreseeable future such an attempt could be successful.<sup>121</sup> So this is not an option.

Ad (b). We could try to argue that the passage introduced by the Lisbon Treaty saying that the candidate for the president of the Commission has to be chosen by the European Parliament “taking into account the elections to the European Parliament and after having held the appropriate consultations” (Art. 17(7) TEU) actually means (in the light of the general democratic principle underlying the EU), that *legally* the decisive organ in choosing the Commission members is the European Parliament and the European Council actually has only a ceremonial role. Such an interpretation would clearly contradict the text of TEU, what on itself does not make it impossible that the ECJ (in a procedure of art. 263(1) TEU when the “act” would be the appointment of the president and other members of the Commission) would venture such a revolutionary move. Such *contra legem* move already happened when the ECJ introduced the direct effect for directives. But to do the same in a politically so sensitive issue would probably go too far even for the ECJ. So we have to go for another option to parliamentarise the EU.

Ad (c). The solution I am proposing is the following: we have to accept that the EU legally cannot become a parliamentary system, but the non-legal political structure can still be changed. For that purpose we first have to have a look at the concept of constitutional conventions as used in British constitutional doctrine and at one of its examples being the most relevant for us: the appointment of the PM.

Constitutional conventions can be defined as ‘understandings and practices that are not legally binding’,<sup>122</sup> as rules of ‘political morality’,<sup>123</sup> or as ‘rules of constitutional morality’.<sup>124</sup> They are something like constitutional soft law, but they are not: there was no law making procedure.<sup>125</sup> It is rather a habit, which is considered to be obligatory but

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<sup>121</sup> On this problem see Julio Baquero Cruz, *Alternativas a las condiciones de revisión y entrada en vigor*, in: Iñigo Méndez de Vigo (ed), *¿Qué fue de la Constitución Europea?*, Rafael del Pino, 2007, pp. 293-306; Bruno de Witte, *The rules of change in the European Union. The lost balance between rigidity and flexibility*, in: Catherine Moury – Luís de Sousa (eds), *Institutional Challenges in Post-Constitutional Europe* (London, New York: Routledge 2009) pp. 33-42.

<sup>122</sup> John Alder, *Constitutional and Administrative Law*, New York, Palgrave Macmillan, 52005, p. 43.

<sup>123</sup> Geoffrey Marshall, *Constitutional Theory*, Oxford Clarendon 1971, p. 9.

<sup>124</sup> Frederick William Maitland, *The Constitutional History of England*, Cambridge, Cambridge Univ. Press 1908, p. 398.

<sup>125</sup> Geoffrey Marshall, *Constitutional Conventions*, Oxford, Oxford Univ. Press, 1984, p. 216.



not in a strict legal sense.<sup>126</sup> It is a certain type of self-restriction, but it can also be forced by other actors onto a constitutional organ.<sup>127</sup> Conventions cannot be enforced directly in a court,<sup>128</sup> but they have an indirect legal effect in interpreting legal rules.<sup>129</sup> Conventions may arise through a series of precedents, but they may arise much more quickly than this, without any previous history as usage.<sup>130</sup> 'A single precedent with a good reason may be enough to establish the rule.'<sup>131</sup>

Conventions are obeyed because they are part of a shared system of values<sup>132</sup> and because their breach would result in political consequences (such as the political blame of antidemocratic or unconstitutional behaviour). For our current topic, the most relevant example is that from a *legal* point of view, the Queen could choose anyone for the position of PM, but by *convention* she should choose as PM the person who can command a majority support in the House of Commons.<sup>133</sup> She does not breach any law by obeying this convention, she just uses her powers in a way which *also* fits the conventions.<sup>134</sup>

This is exactly what we need now. The election of Commission members should depend on which MEP faction(s) have the most seats, and who they (in coalition) want to see in the seats of Commission members. But how can the European Council be forced to such a practice? The mere blame of antidemocratic behaviour can probably not force them, as they would refer to the text of TEU which favours a non-parliamentary solution. So the solution would simply be, that the European Parliament by using its veto possibilities (or to put it more bluntly: blackmailing capacity) only accepts those

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<sup>126</sup> Kenneth Wheare, *Modern Constitutions*, London, Oxford Univ. Press, 1951, p. 179. On the legal or non-legal nature of conventions in detail see Joseph Jaconelli, Do constitutional conventions bind?, *Cambridge Law Journal* 2005, pp. 149-176.

<sup>127</sup> Colin Turpin, *British Government and the Constitution*, London Butterworths, Lexis-Nexis, 52002, p. 115.

<sup>128</sup> Albert Venn Dicey, *An Introduction to the Study of the Constitution*, 10<sup>th</sup> ed. 1959, p. 24.

<sup>129</sup> Marshall (n. 125) p. 14.

<sup>130</sup> Wheare (n. 126) p. 180.

<sup>131</sup> Ivor Jennings, *The Law and the Constitution*, London, Univ. of London Press, 5<sup>th</sup> ed. 1959, p. 136.

<sup>132</sup> Colin R. Munro, *Studies in Constitutional Law*, London, Butterworths, 1999, p. 61.

<sup>133</sup> As a matter of fact, the office of PM itself is also based on constitutional convention, see Andrew Le Sueur – Maurice Sunkin, *Public Law*, London – New York, Longman, 1997, p. 56.

<sup>134</sup> Conventions in this sense exist also in other countries, but they have their most prominent role in British constitutional life due to the rudimentary legal framework of the British constitution. Cf. James G Wilson, American Constitutional Conventions, *Buffalo Law Review* 1992, pp. 645-738; A Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto 1991; Giuseppe Ugo Rescigno, *Le convenzioni costituzionali*, Padua 1972.

concretely (and before the relevant meeting of the European Council already) defined persons as candidates by the European Council, whom the majority of the European Parliament supports.<sup>135</sup> All other candidates will be refused.

The logic of such a change is not unknown to the EU institutions: before Mr. Barroso the first time became President of the Commission, the European Council intended to propose a person from the political left, even though the elections to the European Parliament have been won by the political right. The European Parliament vetoed the idea, and the European Council had to choose someone from the political right. It would be only one step in the same direction (an important and big step though), if the European Parliament announced that they will accept only one particular person for that position. Such a revolt by the European Parliament is most likely if the political colour of the European Council and of the European Parliament differ, as it happened in Mr. Barroso's case.

Once it happened,<sup>136</sup> the next elections to the European Parliament will already be with a much higher probability about concrete persons to be elected to the position, who would probably even work out some understandable and concrete policies to campaign for votes. These policies could be checked on at the following elections, and if unfulfilled, the Commission could be voted out. With such a transparent and direct link between election and responsibility, i.e., with an effectiveness of popular will, the turnout at European Parliament elections would very probably rise,<sup>137</sup> the respective campaign would be much more about EU policies and with the growth of public interest the media would also cover EU affairs more thoroughly.<sup>138</sup> A real European party system would be likely to follow these changes, as the logic of power contenders makes it necessary to build up the appropriate infrastructure to fight efficiently for power in the

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<sup>135</sup> This would not transform the EU into a majoritarian system (in Lijphart's terminology, see above n. 81) similar to the UK, as the majority support in the EU would still mean a party coalition, and the quasi-constitutional court control of the ECJ (based on the treaties) would strongly limit the Commission. It would become a parliamentary system similar to Germany.

<sup>136</sup> The first time it happens, we probably would not call it as a convention, but the second or third time it will become convention. See above n. 131 and the relevant main text.

<sup>137</sup> Dana Spinant, How to make elections sexy: Give voters a say in Europe's top jobs, *European Voice* February 5-11, 2004, p. 12.

<sup>138</sup> For a mostly similar view see Hix (n. 120) pp. 179-180, 203-204.

EU.<sup>139</sup> If it happened, then the EU government system would become similar to some extent to today's German system, where a party coalition in the lower chamber supports the government, and the upper chamber takes part substantively only in the legislation but not in the formation of the government.

### **3. What shall be done?**

The above is a nice plan, but what actually should be done right now? First of all future MEPs have to be convinced that this is a viable way. Strong, willing and able politicians are needed in the European Parliament, who will have enough ambition to make this change. As politicians are mostly not lacking ambition, I am optimistic that soon or later they will make the steps as described above. The right moment when the political colour of the European Parliament and that of the Council will be different in order to play out this conflict will soon or later arrive.

With the words of John Markoff: "One might anticipate a recapitulation of Europe's nineteenth-century struggles over democratisation on a larger scale, in which the power of the European Parliament in Strasbourg in relation to the European bureaucracy becomes a central point of contention."<sup>140</sup> It is happening here and now, and the outcome is likely to be the same as in the 19<sup>th</sup> century. The sooner, the better.

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<sup>139</sup> The fact that MEPs cannot initiate legislation is not central from a democratic point of view. If their trustees are sitting in the Commission (which has the competence to initiate legislation), then the question who initiates legislation is merely a technical one. Also the fact that the Commission can be dismissed only by a two thirds majority is secondary (a simple majority would probably be healthier though), because democracy's self-correction mechanism at the latest at the next EP elections can work efficiently: for the new Commission only a simple majority is needed (Art. 17(7) TEU).

<sup>140</sup> Markoff (n. 12) p. 135.