

European Democracy: A Reconstruction through Dismantling Misconceptions**

Abstract

The democratisation of Europe requires the Europeanisation of democratic thought. This contribution joins that project from a legal perspective. It substantiates art 2 and 10 TEU by engaging with common arguments that deny the European Union's democratic character. It consists in a conceptual reconstruction that reflects European facticity as well as normativity to find a way between apology and utopia. This contribution concludes that the true problem of European democracy does not lie at the Union level, but elsewhere, namely in hybrid Member States.

Keywords: Democracy, democracy, democratisation, citizenship, European Union, political equality, trilogues

The authors of the EU Treaties determined that the Union should operate as a representative democracy (art 10 para 1 TEU). To understand the meaning and the implications of this choice we must analyse and carefully dissect the concept of democracy. This analysis should not be apologetic but recognise the normativity of law. First, I will address how representative institutions can exist without a European *demos* (I). Then, I will consider how elections without electoral equality can result in a representative parliament, how executive councils can be a representative legislature, and how trilogues can bring democratic legislation (II). I will conclude on what I perceive as the Union's greatest democratic challenge, namely hybrid Member States (III).

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I In Whose Name?

From an etymological point of view, democracy means the rule of the people. The European Treaties, however, postulate neither a European people nor a European nation.¹ Nevertheless, the authors of the Treaties define the Union as a representative democracy. Are they walking a conceptually and politically misguided path? Are they building pseudo-democratic institutions in what amounts to a society that is only nominally democratic?

Another interpretation strikes me as more plausible: the authors of the Treaties succeeded in what Peter Badura, already in 1964, identified as the key to a democratic future, namely, freeing democracy, including its theory, from the framework of the nation-state.² To achieve this the authors of the Treaties did not demolish the existing edifice of democratic institutions, theories, and doctrines. Rather, they created openings in this existing edifice, allowing for an expansion able to house twenty-seven nation-state democracies under a new roof. This new edifice spanning almost an entire continent affords democratic life a new dimension. This is reflected in art 2 TEU which postulates a Union founded on democracy.

To build a European democracy, the authors of the Treaties rely on existing national institutions and traditional conceptions. Thus, while they do not postulate a European people, they speak of the ‘peoples of Europe’ (art 1 para 2 TEU), even describing them as the peoples of the Union (‘its peoples’, art 3 para 1 TEU).

The EU Treaty assigns the peoples of the Member States a central role in European democracy. It values national democracy. According to the EU Treaty, it is the peoples who as democratic subjects legitimise the Union by ratifying the Treaties, accessions, and financial resources (art 48 f. TEU, art 311 TFEU) and by participating, through their governments, in the European Council and the Council (art 10 para 2 subpara 2). The strong role of the national parliaments and the councils plays an important part in securing democracy in the EU: it counters a concern already articulated by Kant that a centralised continental government could prove to be particularly despotic.³

The concept of a people continues playing a major role in European discourse, albeit under a new guise. This is already evident from the fact that the authors of the Treaties employ this term not in the singular but in the plural. This implies a conceptual

¹ A European demos is nonetheless postulated by Advocate General Eleanore Sharpston, CJEU Joined cases C-715/17, C-718/17 and C-719/17 *European Commission v Poland and others*, Opinion of AG Sharpston, EU:C:2019:917, para 253 (reacting to the Brexit vote).

² Peter Badura, ‘Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften’ (1966) 23 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 34–104, 38; Martin Nettesheim, ‘Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie’ in Hartmut Bauer, Peter M. Huber and Karl-Peter Sommermann (eds), *Demokratie in Europa* (Mohr Siebeck 2005, Tübingen) 143–189.

³ Immanuel Kant, ‘Zum ewigen Frieden (1795)’ in Karl Vorländer (ed), *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik* (Meiner 1964, Hamburg) 128–129.

transformation. That shift is reflected in the terminological proposal of a *demoicracy*, a democracy of peoples.⁴ By no means is the understanding of democracy as *demoicracy* new, nor does it fail the concept of democracy. Constitutional thought of other continental democracies, in the US and in India, contain similar plural understandings of the ‘people’.⁵ The nation-state has never been the only edifice to house democracy.

However, the concept of the democracy of peoples, *demoicracy*, is helpful but insufficient. It alone does not explain the democratic structures of the EU Treaty. To stay with the metaphor of the house, *demoicracy* captures only the lateral openings but does not capture the new building with its additional common floor.

The authors of the Treaties do not base the Union’s democratic legitimation on the peoples alone. They also based it on Union citizenship. This recourse to citizenship is neither unprecedented nor does it conflict with the concept of democratic legitimacy. In one of his most famous essays Peter Häberle conceptualises German democracy as a ‘citizens’ democracy’ and precisely not as a ‘people’s democracy’.⁶ That fits with the Treaties’ setup: Title II of the EU Treaty, the ‘Provisions on Democratic Principles’ begins with provisions on Union citizenship in art 9 TEU. The establishment of transnational citizenship through the Treaties as the democratic basis of public authority constitutes, next to *demoicracy*, a further breakthrough. Art 10 TEU commits the Union to representative democracy and determines that ‘citizens are directly represented [...] in the European Parliament’.

The authors of the Treaties based the democratic legitimacy of the Union’s institutions on the peoples of the Member States *and* the citizens of the Union.⁷ Art 10 para 2 TEU establishes two strands of democratic representation, one embodied by the European Council and the Council, and another by the European Parliament, which Union citizens elect directly. This can be called dual legitimation.⁸ The EU derives its democratic legitimacy not solely from one source but from the interplay between different institutions. Accordingly, the democratic legitimation of the Union’s institutions is complex. This pluralistic structure is not marred by the fact that it is ultimately the same individuals

⁴ Kalypso Nicolaïdis, ‘The New Constitution as European “Demoi-cracy”?’ (2004) 7 *Critical Review of International Social and Political Philosophy* 76–93, DOI: <https://doi.org/10.1080/1369823042000235985>; Francis Cheneval and Frank Schimmelfennig, ‘The Case for Demoicracy in the European Union’ (2013) 51 *Journal of Common Market Studies* 334–350, DOI: [10.1111/j.1468-5965.2012.02262.x](https://doi.org/10.1111/j.1468-5965.2012.02262.x).

⁵ Philipp Dann and Arun K. Thiruvengadam, ‘Comparing Constitutional Democracy in the European Union and India. An Introduction’ in Philipp Dann, Arun K. Thiruvengadam (eds), *Democratic Constitutionalism in India and the European Union Comparing the Law of Democracy in Continental Politics* (Elgar 2021, Cheltenham, Northampton) 1–40, 2.

⁶ Peter Häberle, ‘Die offene Gesellschaft der Verfassungsinterpreten’ (1975) 30 *JuristenZeitung* 297–304, 302.

⁷ Stefan Oeter, ‘Föderalismus und Demokratie’ in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundlagen* (Springer 2009, Berlin) 73–120, 92, DOI: https://doi.org/10.1007/978-3-540-73810-7_3.

⁸ Probably the first to do so was Winfried Kluth, *Die demokratische Legitimation der Europäischen Union. Eine Analyse der These vom Demokratiedefizit der Europäischen Union aus gemeineuropäischer Verfassungsperspektive* (Duncker & Humblot 1995, Berlin) 67 ff.

who vote, once as nationals and once as citizens of the Union:⁹ what is decisive is that democratic mediations go through different institutions and procedures, reflecting multiple roles and identities.¹⁰

Among the two democratic strands, the strand that brings together the twenty-seven national systems is thicker: think of the national ratification of the Treaties and of the European Council's key role. However, giving the Member States such a central role in European democracy requires the Union to oversee the Member States' own democratic credentials. The CJEU attended to this question regarding two extremely sensitive issues: Brexit and the disputes between the Spanish central state and the Catalan separatists.¹¹ Indeed, protecting democracy in some Member States has become the perhaps most difficult task of the Union.¹²

As important as the national strand is, it is not sufficient. Only a few voices, such as the party 'Alternative for Germany', advocate a Union constituted solely of councils, that is, a Union without the European Parliament.¹³ The authors of the Treaties, however, assign the Parliament a constitutive role, placing it at the apex of the Union's institutions. Both art 10 TEU and art 13 TEU list it even before the European Council.

The Union's representative institutions represent the peoples and the citizens of the Union. Do they therefore represent a democratic 'we'? This question is as important as that of a European people. While many authors do not require the existence of a people for a democracy, they do demand a collective identity in the sense of a 'we', since they postulate collective self-determination as democracy's ultimate aim.¹⁴

There is no indication that the authors of the Treaties conditioned European democracy on a European 'we'. That seems realistic: although there are self-reflexive processes in European society, hardly anyone claims that there is a European 'we' of collective self-

⁹ Ingolf Pernice, 'Europäisches und nationales Verfassungsrecht' (2001) 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 148–415, 176; Jelena von Achenbach, *Demokratische Gesetzgebung in der Europäischen Union. Theorie und Praxis der dualen Legitimationsstruktur europäischer Hoheitsgewalt* (Springer 2014, Heidelberg) 463, DOI: <https://doi.org/10.1007/978-3-642-23917-5>.

¹⁰ Jürgen Habermas, 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts. Ein Essay zur Verfassung Europas' (2012) 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1–44, 18 ff.

¹¹ CJEU Case C-621/18 *Wightman et al.*, EU:C:2018:999, para 66; Case C-502/19 *Junqueras Vies*, EU:C:2019:1115, para 63.

¹² See the contributions of Beáta Bakó, Stanislaw Biernat, Armin von Bogdandy, Piotr Bogdanowicz, Matteo Bonelli, Iris Canor, Catherine Dupré, Agnieszka Frackowiak-Adamska, Pawel Filipek, Julia Kirchmayr, Justyna Łacny, Artur Nowak-Far, Jörg Polakiewicz, Giacomo Rugge, Wojciech Sadowski, Matthias Schmidt, Werner Schroeder, Pál Sonnevend, Dimitri Spieker, Maciej Taborowski, Joseph Weiler, Marcin Wiacek, in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021, Berlin).

¹³ Nikolas Klausmann, 'Nur Populismus? AfD will das Europäische Parlament "abschaffen"' Polis Blog, 23.05.2019.

¹⁴ Christoph Möllers, *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (Mohr Siebeck 2005, Tübingen) 28 ff.

determination. The ‘We the People’ of the American Constitution is on the minds, but not in the text. The EU Treaty begins with His Majesty the King of the Belgians, followed by Her Majesty the Queen of Denmark.

Conceptualising democracy as collective self-determination implies declaring the Union as incapable of democracy. Such a view exists in European society and fuels its self-critical attitude. To be sure, collective self-determination is an honourable theoretical idea. But it is not useful for interpreting art 2 TEU and art 10 TEU, since it fails to elaborate the political decision underlying these provisions.

It is to be stressed that by deciding against democracy as self-determination, the authors of the Treaties did not fail democracy. There are numerous respectable theories that present democracy not as collective self-determination but instead as the process of a pluralistic society.¹⁵ Importantly, the authors of the Treaties do not enshrine a minimalist concept of democracy.¹⁶ Art 2 TEU demands that Union acts comply with the principles of pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. This is a more complex formulation of democracy than self-determination, and one more appropriate to the complexities of European society.

The Union’s institutions do not represent a European people or a European ‘we’, but they do represent the twenty-seven Member States and the almost 450 million individuals who are simultaneously nationals and Union citizens. The institutions do not decide for them in the sense of a ‘we’, but in their name. The liberal idea of representation triumphs over identity politics. The Union’s institutions do not embody the citizens, but rather serve their interests (art 13 para 1 TEU).

II Democratic Representation

Pursuant to art 10 para 2 TEU, the European Parliament, the European Council and the Council provide democratic representation. But with regard to the European Parliament the authors of the Treaties opted for unequal elections and, with the Councils, set the executive fox to keep the democratic geese. Are these betrayals of the Member States’ constitutional traditions? A complex concept of democracy shows a way between apology and utopia.¹⁷ Hans Kelsen blazed this trail by identifying compromise as the heart of democracy.

¹⁵ Harold J. Laski, *The Foundations of Sovereignty* (Harcourt Brace & Co. 1921, London) 251–267.

¹⁶ Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp 1973, Frankfurt am Main) 169 ff.

¹⁷ Fritz W. Scharpf, *Demokratiethorie zwischen Utopie und Anpassung* (Universitätsverlag 1970, Constance); Daniel Innerarity, *Democracy in Europe. A Political Philosophy of the EU* (Palgrave Macmillan 2018, London) 61 ff., DOI: <https://doi.org/10.1007/978-3-319-72197-2>.

This entails ‘favouring that which binds over that which divides those who are to be brought together’.¹⁸

1 Unequal Voting Rights

Those who doubt the representative nature of the European Parliament speak with the authoritative voice of the German Constitutional Court’s Second Senate in its Lisbon judgment. The Second Senate held that the authors of the Treaties committed a conceptual error by calling this institution a parliament. The Senate maintained it is nothing but ‘a governmental body representing the peoples bound together by Treaty’.¹⁹ I have already rebutted the underlying doctrine that a parliament must necessarily represent a people (I). However, the Senate’s disqualification of the European Parliament also rests on the fact that not every vote in its election carries the same weight.

Pursuant to art 14 para 3 TEU, the members of the European Parliament are elected by direct universal suffrage in a free and secret ballot, but they are not elected by equal suffrage. Like in the United States, the inequality first results from the fact that the elections take place under different Member State laws. The Treaty mandate in art 223 para 1 TFEU to enact a uniform law has not been fulfilled.²⁰

But the disqualification results above all from the decision set down in art 14 para 2 TEU that representation in the European Parliament shall be ‘degressively proportional’. Degressive proportionality means that the populous Member States send proportionally fewer representatives than the less populous ones. On average, one seat in the European Parliament represents about 630,000 citizens. Yet the spread between the two extremes is wide: each of the 96 German seats represents about 860,000 inhabitants of this most populous Member State, while each of the 6 Maltese seats represents about 77,000 inhabitants. The value of a German vote compared to a Maltese vote is reminiscent of the value of a vote from the third estate compared to one from the first estate under the undemocratic Prussian three-class electoral system of the late 19th century.

No one promotes the current electoral law for the European Parliament as a model of democratic parliamentarism: there is much room for improvement.²¹ But the authors of the

¹⁸ Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd edn, J.C.B. Mohr 1929, Tübingen) 57; idem. Kelsen, *The Essence and Value of Democracy*, edited by Nadia Urbinati and Carlo Invernizzi Accetti, translated by Brian Graf (Rowman & Littlefield 2013, Lanham) 70.

¹⁹ BVerfGE 129, 300 – Five Per Cent Threshold for European Elections, para 81.

²⁰ On the reasons Sergio Alonso de León, ‘Four Decades of the European Electoral Act: a Look Back and a Look Ahead to an Unfulfilled Ambition’ (2017) 42 *European Law Review* 353–368.

²¹ Felix Arndt, ‘Ausrechnen statt aushandeln: Rationalitätsgewinne durch ein formalisiertes Modell für die Bestimmung der Zusammensetzung des Europäischen Parlaments’ (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 247–279.

Treaties did not opt for Hegel's model of representation by estates²² or for Maltese class rule over the Germans. What the German Constitutional Court's Second Senate failed to recognise in absolutising the outcome equality of votes, is that the requirement of electoral equality emerged to counteract privileging upper classes, that is, to neutralise differences in social influence.²³ But the numerical overrepresentation of the populations of small Member States does not mirror class rule. Rather, as in other democratic federations, it mirrors pluralism and the protection of minorities, both principles enshrined in art 2 TEU.²⁴ These reasons also explain and justify the overrepresentation of the Danish and Sorbian minorities under the German Basic Law.²⁵ There are good democratic reasons against absolutising the equality of a vote's impact, which is why the European settlement has the blessing of all Member States.²⁶

2 The Executive Fox among the Democratic Geese

The democratic legitimation of the European political process has a second strand, which begins with elections in the Member States and passes through the European Council and the Council. The representatives in these two bodies are not appointed by the Member States' parliaments, as is the case with the Austrian Federal Council and, until 1913, the US Senate (art 35 of the Austrian Federal Constitutional Act, art 1 s 3 of the US Constitution, amended by the 17th amendment). Since they are composed of members of the Member State governments, these institutions resemble the German *Bundesrat*, with one essential difference: art 10 para 2 TEU declares that the European Council and the Council are representative bodies. The Basic Law includes no such declaration.

Because the two councils are composed of representatives from the national *executive* branches, art 10 para 2 TEU seems to set the executive fox among the democratic geese. This metaphor comes to mind if one understands representative institutions in opposition to executive bodies. Such an understanding is particularly present in constitutional traditions in which democratic parliaments had to establish themselves against monarchical

²² Georg Wilhelm Friedrich Hegel, 'Grundlinien der Philosophie des Rechts' in Eva Moldenhauer and Karl Markus Michel (eds), *Werke in zwanzig Bänden mit Registerband*. Bd 7 (first published 1821, Suhrkamp 1970, Frankfurt am Main) § 301.

²³ Martin Morlok, 'Art. 38 GG' in Horst Dreier (ed), *Grundgesetz Kommentar* Bd 2 (Mohr Siebeck 2015, Tübingen) 1053–1134, para 57, 99.

²⁴ Jürgen Habermas, 'Zur Prinzipienkonkurrenz von Bürgergleichheit und Staatengleichheit im supranationalen Gemeinwesen. Eine Notiz aus Anlass der Frage nach der Legitimität der ungleichen Repräsentation der Bürger im Europäischen Parlament' (2014) 53 *Der Staat* 167–192, DOI: <https://doi.org/10.3790/staa.53.2.167>; Christopher Lord and Johannes Pollak, 'Unequal But Democratic? Equality According to Karlsruhe' (2013) 20 *Journal of European Public Policy* 190–205, DOI: <https://doi.org/10.1080/13501763.2013.746116>.

²⁵ § 6 para 3 cl 2 of the Federal Electoral Act; § 3 para 1 cl 2 of the Electoral Act of Schleswig-Holstein; § 3 para 1 cl 2 of the Electoral Act of Brandenburg; Sara Pennicino, 'Elections' in Rainer Grote and others (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2017, Oxford) para 17.

²⁶ The unanimous European Council Decision 2018/937 of 28 June 2018 establishing the composition of the European Parliament determines the current distribution.

governments.²⁷ However, this battle has been fought and won: in all Member States, and especially in the European monarchies, the governments require parliamentary confirmation. The governments of the Member States are democratic institutions, and so are the two councils.

The democratic transformation of the fox has succeeded. The understanding that the Member States' executive branches are undemocratic is misleading. The democratic constitutional development in the 20th century aims for governments that derive their legitimation from elections, but simultaneously form a centre of power able to realise democratic rule.²⁸ This latter aspect explains the European Council's crucial role in the European system of government.²⁹

It has not always been like this. In the first decades of integration, the paradigm was the Community method, according to which it was first the duo of the Commission and the Council and then the trio of the Commission, the Council, and the Parliament that should dominate the European political process. To the chagrin of many a Euro-federalist, the increasing role of the European Council since the 1970s was superimposed on this method.³⁰ From the 1990s, the European Council has ever more assumed a role which the Member State constitutions ascribe to the office holders of which it is composed: political leadership. Many constitutions conceive – and many citizens understand – this office as a centre of power that shall determine the general direction in difficult policy fields and take critical decisions. Without political agency, there is no democracy.³¹

Today, the European Council, more than any other institution, ensures the Union's agency – as a provider of guidelines, as a shaper, mediator and crisis manager, as communicator with the public.³² This reveals an irony of the European transformation: an institution that initially appeared to signal the EU's intergovernmental atrophy arguably became its most powerful engine.³³ Accordingly, much of the media presents the European Council as the quintessence of the European machine of compromise.

Compromises – that is one of the central arguments of this study – are in principle valuable, though by no means necessarily so. Indeed, compromises can also compromise

²⁷ Christoph Schönberger, *Das Parlament im Anstaltsstaat. Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918)* (Klostermann 1997, Frankfurt am Main) 13 ff.

²⁸ Armin von Bogdandy, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik* (Mohr Siebeck 2000, Tübingen) 39 ff., 107 ff.

²⁹ Jan Werts, *The European Council* (2nd edn, John Harper 2008, London) 184 f.

³⁰ Pierre Pescatore, 'Some Critical Remarks on the Single European Act' (1987) 24 (1) *Common Market Law Review* 9–18, 11 ff, DOI: <https://doi.org/10.2307/j.ctvnjbf19>.

³¹ Sabino Cassese, *Il buon governo. L'età dei doveri* (Mondadori 2020, Milano) 6–11.

³² Luuk van Middelaar, *Alarums & Excursions: Improvising Politics on the European Stage* (Agenda 2019, Newcastle upon Tyne) 178 ff, DOI: <https://doi.org/10.2307/j.ctvnjbf19>.

³³ For a history written entirely from this perspective, see Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (Yale University Press 2014, London).

democracy. Compromises in the European institutions, to have constitutional value, must comply with the principles of art 2 TEU. In the case of the European Council, this is sometimes questionable, especially when we consider that the Treaty provides for the separation of powers as an expression of the principle of the rule of law. This can be exemplified by the discussion of the European Council's influence on Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, which is intended to also safeguard the democratic rule of law in the Member States.³⁴

Now, it does not seem problematic that the European Council played a role in that legislative process, since preserving the Union's constitutional values is at stake. The issue concerns the Member States' essential interests and has encountered serious opposition from Poland and Hungary. Therefore, it corresponds to the logic of the European political system that the European Council renders a fundamental decision on this matter. Art 15 para 1 cl 1 TEU explicitly provides that the European Council establishes the 'general political directions and priorities' of the Union's development.³⁵

But the role of the European Council does become problematic if it oversteps this remit and overrides the democratic process as established by the authors of the Treaties.³⁶ Art 15 para 1 cl 2 TEU prohibits the European Council from exercising legislative functions. That prohibition comes into question when European Council conclusions determine in detail what the European legislature, consisting of the Council and the Parliament, should enact, impinging on their function of democratic representation. In the case of Regulation 2020/2092, the European Council even imposed detailed requirements for its application.³⁷ It is important to protect the Union legislature from the European Council. Institutionally, this task falls to the duo of the European Parliament and the European Court of Justice.

The central role of the European Council in the Union's political process, as defined in art 15 para 1 TEU, is not unusual in comparative constitutional law. Rather, it expresses the presidentialisation of many political systems against the backdrop of increasing complexity, globalisation, and Europeanisation, structures of attention in the media, the dynamics of election campaigns, and the weakness of traditional party structures.³⁸ Notwithstanding the problems

³⁴ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

³⁵ See for example the guidelines set by the European Council in the context of dealing with financial repercussions of the Covid 19 pandemic, European Council Conclusions, 17–21 July 2020, 15 f.

³⁶ See the contrasting views in Editorial Comments, 'Compromising (on) the General Conditionality Mechanism and the Rule of Law' (2021) 58 *Common Market Law Review* 267–284 (infringement) DOI: <https://doi.org/10.54648/COLA2021020>; Bruno de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 (3) *Common Market Law Review* 635–682, 667 ff., 681 (no infringement) DOI: <https://doi.org/10.54648/COLA2021046>.

³⁷ European Council Conclusions, 10–11 December 2020, 1–4.

³⁸ Thomas Poguntke, 'Die Präsidialisierung des politischen Prozesses: Welche Rolle bleibt den politischen Parteien?' in Julian Krüper, Heiker Mertens and Thomas Poguntke (eds), *Parteienwissenschaften* (Nomos 2015, Baden-Baden) 261–282, DOI: <https://doi.org/10.5771/9783845257839-261>.

that presidentialisation entails, it comes with good democratic reasons. They become clear when we consider the former socialist states of Central and Eastern Europe. It is a significant aspect of their transformations that government gained in stature over the ruling party, which previously had total power.³⁹ In Poland, the situation after 2015 was already deficient because the country's most powerful politician, Jarosław Kaczyński, was not part of the government (until the autumn of 2020), but determined the country's fate as a party leader from behind.

When old constitutional thinking – for instance about the *division* of powers between the legislative and the executive branch – persists, it hinders the understanding of the Councils' democratic role. Contrary to art 10 para 2 subpara 2 TEU, the German Basic Law fails to declare the *Bundesrat* to be a body of democratic representation and mainstream German constitutional theory denies such a role.⁴⁰ The prevalent idea holds that the German people, represented solely by the *Bundestag*, bear the entire burden of democratic legitimation. The Federal Republic is, after all, a *unitary* federal state.⁴¹ That is not the case with the European Union.

3 Weiler's Doubts

The authors of the Treaties posit the Parliament and the Councils as democratic institutions. But their will alone cannot create a living democracy. Now, European politics are certainly lively: the Union institutions are buzzing with activity, the European political process has been undeniably politicised. However, it is disputed, famously by Joseph Weiler, that the institutions produce a democracy.⁴² Confronting his doubts helps to clarify further structures of European democracy.

Weiler's argumentation emphasises the first-person plural. For him, democracy means that *we* decide by means of elections. This 'we' expresses a conception of democracy that requires a strong collective identity. In Weiler's view, the meaning of elections ultimately lies in *our* collective decision between different candidates for the office of head of government,

³⁹ Klaus H. Goetz and Hellmut Wollmann, 'Governmentalizing Central Executives in Post-Communist Europe: a Four-Country Comparison' (2001) 8 *Journal of European Public Policy* 864–887, DOI: <https://doi.org/10.1080/13501760110098260>.

⁴⁰ On the discussion, Alexander Hanebeck, *Der demokratische Bundesstaat des Grundgesetzes* (Duncker & Humblot 2004, Berlin) 199–205, 279–282, 312–313.

⁴¹ Konrad Hesse, *Der unitarische Bundesstaat* (Müller 1962, Karlsruhe); Holger Hestermeyer, *Eigenständigkeit und Homogenität in föderalen Systemen. Eine vergleichende Studie der föderalen Ordnungen der Bundesrepublik Deutschland, der Vereinigten Staaten und der Europäischen Union* (Mohr Siebeck 2019, Tübingen) 115 ff.

⁴² Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403–2483, DOI: <https://doi.org/10.2307/796898>; Joseph H. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012, Oxford) 137–158, DOI: <https://doi.org/10.1093/acprof:oso/9780199588770.003.0006>; Joseph H. H. Weiler, 'The Crumbling of European Democracy' in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional democracy in crisis?* (Oxford University Press 2018, Oxford) 629–638.

candidates who represent contrasting programmes. Thus, elections determine *our* will and *our* destiny. Nota bene: Weiler does not advocate democratising the Union along those lines, which would imply advocating a European federal state and a European people. Weiler's understanding of democracy serves to criticise, but not to show a way for a more democratic Union. In contrast to Weiler, I am convinced that the authors of the Treaties' decision in favour of a European democracy without a collective identity and Westminster-like structures is theoretically plausible, conforms with the Member States' constitutional traditions and enjoys democratic legitimacy.

The authors of the Treaties decided against a competitive model and in favour of a democracy of many mediations and broad majorities. Democratic theories speak of a democracy of compromise, concordance, consensus, or negotiation.⁴³ Just consider the composition and voting modes in the two Councils, the composition and voting modes of the European Parliament, the composition of the Commission and the interdependence of these institutions. The logic of art 15 para 4 TEU, art 16 para 4 TEU, and art 17 para 7 TEU forces the European political process to consider the interests of many political camps. European democracy understands and uses the legitimising power of consensus.⁴⁴ The idea of leading candidates (*Spitzenkandidaten*), whereby the candidate of the largest EP group should preside over the Commission, is fully compatible with a democracy of compromise, concordance, consensus, or negotiation.⁴⁵

For Weiler, the decision by the authors of the Treaties in favour of a democracy of many mediations fails the idea of democracy. This position could be substantiated if the Member State elections determined the head of government and decided between right-wing and left-wing politics. But that is hardly the case. In most Member States, electoral law has come to reflect societal pluralism. Thus, the electoral decision is only one stage of an often long and unpredictable path to a government and a government programme.⁴⁶ Seeking compromise, consensus, concordance, and negotiation characterise many Member States' politics today. While nobody disputes the ensuing problems,⁴⁷ neither does anyone call into question the democratic nature of the Member States for that reason. If a government were

⁴³ On the various approaches Manfred G. Schmidt, *Demokratietheorien. Eine Einführung* (Leske + Budrich 1995, Opladen) 319–328.

⁴⁴ Christine Reh, 'European Integration as Compromise: Recognition, Concession and the Limits of Cooperation' (2012) 47 *Government and Opposition* 414–440, DOI: <https://doi.org/10.1111/j.1477-7053.2012.01369.x>.

⁴⁵ For an assessment, see Nicola Lupo, 'La forma di governo dell'Unione, dopo le elezioni europee del maggio 2019' in Paolo Caretti and others (eds), *Liber Amicorum per Pasquale Costanzo Diritto costituzionale in trasformazione VI: Diritto costituzionale europolitano e comparazione costituzionale* (2020, Genova) 25–36; 'Editorial. Spitzenkandidaten and the European Union's System of Government' (2019) 15 *European Constitutional Law Review* 609–618, DOI: 10.1017/S1574019619000427.

⁴⁶ Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (2nd edn, Yale University Press 2012, New Heaven – London) 130–157; but see also Alan Renwick and Volker Weichsel, 'Im Interesse der Macht: Ungarns neues Wahlsystem' (2012) 62 *Osteuropa* 3–17.

⁴⁷ On parallels between the democratic problems of the Federal Republic and the EU, see Florian Meinel, *Vertrauensfrage. Zur Krise des heutigen Parlamentarismus* (C.H. Beck 2019, Munich) 25.

only democratic if elections directly decided the head of government, proceedings under art 7 TEU would have to be initiated against many Member States.

Some critics claim, similar to Weiler, that the rules of decision-making in the EU are so complex that hardly anyone understands them and that this is a serious democratic problem.⁴⁸ I maintain that this view is inaccurate. The public perceives Brussels as the site of arduous struggles for compromise. Indeed, as a rule, the councils decide all important issues by consensus. Only rarely, and only as a last resort, do they decide by majority according to a complex formula that does not allow the majority to impose its will unilaterally. The Union is a consensus system in the shadow of qualified majority voting. This is well-known, sensible, and harnesses the intuitive legitimacy of consensus.

Weiler further calls the elections to the European Parliament into question by pointing out low voter turnout, which, he claims, confirms the meaninglessness of European elections.⁴⁹ It is true that voter turnout fell from 63 per cent in 1979 to 51 per cent in 2019, having reached its lowest point with 43 per cent in 2014. However, such turnout rates hardly support Weiler's argument. State elections in German states generally have similarly low turnout rates, yet no one doubts the democratic legitimacy of *Länder* parliaments and state governments. Even in the motherland of modern democracy, the United States of America, in the elections with most participation, the presidential elections, voter turnout totalled only 42 per cent in 2014, 53 per cent in 2018, and 66 per cent in 2020 – the latter being the best turnout in decades.

For Weiler, European elections are not sufficiently meaningful as they lack a specifically European meaning.⁵⁰ Indeed, many voters seem to be guided not so much by European election programmes as by the national party spectrum, making their decision based on the domestic political situation. To me, this does not seem meaningless at all, but rather sensible. For one, the European election enables voters to guide their government's policies in the two councils of the Union. For another, voters have reason to assume that the representatives of a party in the European Parliament pursue similar objectives as in the national context.

With their vote, citizens ensure that their preferences are represented in the many mediations of the European political process. Elections to the European Parliament are relevant to how Union citizens are governed. Of course, usually it is not a grand or sweeping right-left decision that is at stake. We may recall slogans such as 'freedom or socialism', 'Moscow is voting for Brandt ... and you?', 'Instead of Star Wars, peace on earth', or, to cite a catchy American example, 'coal, guns, freedom'. The elections to the European Parliament do not reflect such a grand collective choice of direction between left and right, but just one among many instances of mediation between many different preferences and world views.

⁴⁸ Christoph Möllers, *Die Europäische Union als demokratische Föderation* (Fritz Thyssen Stiftung 2019, Cologne) 24.

⁴⁹ Weiler, 'The Crumbling of European Democracy' (n 42) 630.

⁵⁰ Joseph H. H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999, Cambridge) 350.

Finally, Weiler objects to what he perceives as a lack of political accountability in the Union, since no one can be voted out of office for bad policies.⁵¹ But if we look at this issue more closely, this position is hardly tenable. Every Member of Parliament must stand for re-election. The Commission's term of office is limited. There is the motion of censure under art 234 TFEU, similar to the impeachment proceedings against the US President under art I s 3 of the US Constitution. The councils are also accountable, as they are tied to the national democratic systems in which the government's European policies often play a decisive role.⁵²

The European system of government has many mechanisms of democratic accountability. But it is true that it is hard for a democracy of compromise, consensus, concordance, and negotiation to bring about political catharsis. The US elections of 3 November 2020 provide one example for the latter. A majority of Americans probably see them as a liberation and a choice of direction for the American people. But quite a few other Americans believe that there was election fraud, that the new government is illegitimate, and some are ready to resist by force.⁵³

The true difference between American and European society does not lie in their respective heterogeneity but in the logic of how it is addressed. To bring matters to a head: the current political system in the US is defined by its *partisanship*, by the Schmittian scheme of friend and foe, while the European system is defined by its many mediations.⁵⁴ On the other side of the Atlantic, compromise seems to be a betrayal of the cause, whereas on this side, it seems to be a political virtue.

4 The Democratic Value of Trilogues

An important doctrine of European public law states that laws (*lois, Gesetze*) constitute the centre of the legal order because legislation fuses the many individual wills into the *volonté générale*.⁵⁵ It builds on art 6 of the French Declaration of the Rights of Man and of the

⁵¹ Joseph H. H. Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2012) *Singapore Journal of Legal Studies* 248–268, 252.

⁵² On this nexus, Cesare Pinelli, 'Il doppio cappello dei governi fra Stati e Unione europea' (2016) *Rivista trimestrale di diritto pubblico* 639–649.

⁵³ Bright Line Watch, 'A Democratic Stress Test – The 2020 Election and Its Aftermath. Bright Line Watch November 2020 Surveys', <<http://brightlinewatch.org/a-democratic-stress-test-the-2020-election-and-its-aftermathbright-line-watch-november-2020-survey/>> accessed 22 December 2021.

⁵⁴ Justin Greenwood, Christilla Roederer-Rynning, 'Taming Trilogues: The EU's Law-Making Process in a Comparative Perspective' in Olivier Costa (ed), *The European Parliament in Times of EU Crisis Dynamics and Transformations* (Palgrave Macmillan 2019, Cham) 121–141, DOI: https://doi.org/10.1007/978-3-319-97391-3_6; Cathie Jo Martin, 'Conditions for Successful Negotiation: Lessons from Europe' in Jane Mansbridge and Cathie Jo Martin (eds), *Political Negotiation: A Handbook* (Brookings Institution Press 2016, Washington D.C.) 199–230.

⁵⁵ Alf Ross, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmen-historischer Untersuchungen* (Deuticke 1929, Leipzig – Wien) 34 f.; Raymond Carré de Malberg, *La loi, expression de la volonté générale. Étude sur le concept de la loi dans la Constitution de 1875* (Recueil Sirey 1931, Paris); Michael Stolleis, *Im Namen des Gesetzes* (Duncker & Humblot 2004, Berlin) 14.

Citizen of 1789: 'law (*la loi*) is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its formation.'

Therefore, the laborious and still incomplete path towards European laws and legislation symbolises the path of European society towards its democracy.⁵⁶ Already the ECSC Treaty of 1951 and then the EEC Treaty of 1957 authorised the enactment of general and abstract, that is, statute-equivalent rules, albeit not in the form of statutes (*lois*) but only as regulations and directives. According to Member State constitutional traditions, regulations and directives are general and abstract norms of the executive branch that lack the dignity and legitimacy of a statute which only originates in parliament.

The authors of the Treaties introduced the concept of the legislature only in 1997, but in an entirely subordinate position and, ironically, in relation to the law-making role of the Council, but not the Parliament. In 2004, however, they attempted a great leap with the Constitutional Treaty. Under this Treaty, the Union legislature was supposed to enact Union statutes (*lois, Gesetze*) by means of a legislative procedure. As is well known, the Constitutional Treaty failed.

How the authors of the Lisbon Treaty reacted to this failure is characteristic of the tortuous emergence of the democratic European society. Today, the Union has a *legislature* (art 14 TEU), which adopts *legislative acts* (art 12 TEU) by means of *legislation* (art 16 TEU) in the ordinary *legislative procedure* (art 289 TFEU). However, making a small concession to the sceptics, the Lisbon Treaty does not refer to the legislative acts as statutes (*lois, Gesetze*). It still uses the terms *regulation* and *directive*. The incomplete state of terminological transformation is representative of the general incompleteness of the Union's democratic transformation.

The authors of the Treaties accorded legislation the same top position it occupies in the Member States' constitutional traditions: it is always the first-named, that is, the paramount public function (art 14 TEU, art 16 TEU). But many scholars, pointing to the trilogue, call into question whether the legislative procedure provides democratic legitimation. I shall argue, against such doubts, that the trilogical structures not only do not betray European democracy but should even be understood as a significant democratic innovation.

The Union's ordinary legislative procedure is complex, as is commensurate with the concept of dual legitimation. A legislative act requires 'joint adoption by the European Parliament and the Council [...] on a proposal from the Commission' (art 289 para 1 TFEU). This accommodates a Hegelian approach, which relies on mediation and therefore not on the separation but on the cooperation of powers.⁵⁷

The Treaty sets up the legislative procedure in a way that requires much mediating between the institutions. It creates the Conciliation Committee as a forum for consolidating

⁵⁶ Jürgen Bast, 'Europäische Gesetzgebung – Fünf Stationen in der Verfassungsentwicklung der EU' in Claudio Franzius, Franz C. Mayer and Jürgen Neyer (eds), *Strukturfragen der Europäischen Union* (Nomos 2010, Baden-Baden) 171–181, DOI: <https://doi.org/10.5771/9783845228792-171>.

⁵⁷ Hegel (n 22) §§ 272, 300.

the different interests, preferences, and positions into a general European will. That committee consists of

the members of the Council [...] and an equal number of members representing the European Parliament' and has 'the task of reaching agreement [...] by a qualified majority of the members of the Council [...] and by a majority of the members representing the European Parliament within six weeks of its being convened' (art 294 para 10 TFEU).

Given, on average, 120 legislative acts per year, we might expect this forum, this agora, this marketplace of European democracy to be full, bustling, noisy. But in fact, it is quiet and empty.

In 2019 and 2020 the Conciliation Committee did not meet once. Matters are similar in Germany. The Mediation Committee under art 77 para 2 of the German Basic Law, which is supposed to mediate between the ideas of the Bundestag and those of the Bundesrat, has successfully concluded only six mediation procedures in the last legislative period. From here, we can begin tracing the path towards a significant innovation of European democracy.

The declining importance of the German mediation committee is a sign of its increasingly fragmented party-political landscape.⁵⁸ Today many politically decisive mediations take place directly between the parties.⁵⁹ With 190 parties in the European Parliament and no European parties to guide the process of political positioning across institutions, the European democracy of negotiation cannot pursue such a path. It has developed another and, indeed, more democratic way: the trilogue.⁶⁰

Trilogues are committees that bring together representatives of the Council, the Parliament, and the Commission. They are much smaller than the Conciliation Committee. The Presidency of the Council participates, assisted by the General Secretariat. The European Parliament sends the concerned rapporteur, accompanied by the shadow rapporteurs of the other political groups. The Commission is present with its top administrative staff. As a rule, the meetings involve fewer than thirty people. This is essential: thanks to the manageable number of participants, a trilogue enables dialogic encounter and substantive negotiation. In this way, it differs from the much larger Conciliation Committee, which brings together more than twice the number of people. The fact that the meetings are not open to the public and that there are no minutes also promotes dialogue and substantive negotiations. However, the meetings are by no means secret: the public is informed of a trilogue, and the

⁵⁸ Meinel (n 47) 35 f.

⁵⁹ Schmidt (n 43) 319. For criticism of all-party governments, Ernst-Wolfgang Böckenförde, 'Sozialer Bundesstaat und parlamentarische Demokratie' in Jürgen Jekewitz, Michael Melzer and Wolfgang Zeh (eds), *Politik als gelebte Verfassung: Aktuelle Probleme des modernen Verfassungsstaates* (VS Verlag für Sozialwissenschaften 1980, Wiesbaden) 182–199, 191 f, DOI: https://doi.org/10.1007/978-3-322-87747-5_15.

⁶⁰ The following remarks are based on the dissertation of Giacomo Rugge, *Trilogues: The Democratic Secret of European Legislation* (Dissertation, Goethe University Frankfurt 2021).

shadow rapporteurs, who are often critical of the proposals under debate, can report on the proceedings in the committees and to the public.⁶¹

A trilogue is not an institution; it cannot decide anything. But the participants can establish a consensus. Such a consensus exerts great influence because all subsequent steps are usually a mere formality. The legislative project in its agreed form is transmitted to the Council and the Parliament, which almost always establish it as the European general will, usually without further debate.

The high success rate shows that there is enormous pressure on all participants to succeed. It also shows that they have strong mandates. All participants can assume that the institutions involved will support any outcome within the given mandates. Such a mandate requires, in turn, a great deal of internal negotiation beforehand. Without a strong mandate, there will be no trilogue. Thus, for example, the Council, which has had the Commission's proposal for a reform of European refugee law since 2016, has not yet been able to formulate a viable negotiating mandate because the positions within the Council are too heterogeneous. In such cases, no trilogue is initiated.

The European Parliament develops its negotiating mandate in a double filtering system: both the majority of the negotiator's political group and the majority of the committee responsible must support it.⁶² This system of will-formation, similar to the procedure in the Council, aims for broad majorities. Importantly, the political groups and the committee not only serve to formalise agreements reached elsewhere but are often the actual place of mediation. In this context, the members of the European Parliament are often better able to provide democratic representation than their national counterparts, who frequently have to support a government line.⁶³ I see it as a strength and not a weakness of European democracy that it allows for such pluralism and does not subordinate the various conflicts to one overarching line of conflict.⁶⁴

There is even more: institutional logic urges the parliamentary delegation to propose a strong political alternative to the Commission and the Council, since this serves to increase public awareness of the parliamentarians' political profile. This is a starting point for dealing with an important deficiency of the European political process: the technocratic argument that there is no alternative.⁶⁵ The logic of European parliamentarism is to bring forth alternatives, which, however, need to be better communicated to the public.

⁶¹ On the problems with the representatives of Eurosceptic parties, see Ariadna Ripoll Servant and Lara Panning, 'Eurosceptics in Trilogue Settings: Interest Formation and Contestation in the European Parliament' (2019) 42 *West European Politics* 755–775, DOI: <https://doi.org/10.1080/01402382.2019.1575639>.

⁶² Rügge (n 60) 50.

⁶³ Peter Mair and Jacques Thomassen, 'Political representation and government in the European Union' (2010) 17 *Journal of European Public Policy* 20–35, 23 ff, DOI: <https://doi.org/10.1080/13501760903465132>.

⁶⁴ But this is the argument in Möllers, *Die Europäische Union als demokratische Föderation* (n 48) 18.

⁶⁵ Renaud Dehousse, 'Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?' (1995) 18 *West European Politics* 118–136, 122, 124 f, DOI: <https://doi.org/10.1080/01402389508425094>; van Middelaar, *Alarums and Excursions* (n 32) 240.

Trilogues meet with a great deal of criticism:⁶⁶ parliamentarians, who are unknown to most citizens and appointed as rapporteurs in obscure procedures, develop a text with the Council Presidency in a non-transparent process of wheeling and dealing that takes place far from the public eye. Moreover, this text then almost automatically comes to become the European *volonté générale*. Opposing this phalanx, Giacomo Ruggie shows that trilogue procedures are the functional equivalent of strong parties and even have several democratic advantages.⁶⁷

According to the traditional model of parliamentarism, parliament is supposed to determine the general will after a struggle in public session and based on the best argument. The practice of 20th-century parliamentary democracies falls short of this model – a fact which Carl Schmitt, who personifies the Weimar critique of parties and representation, used to delegitimise liberal parliamentarism.⁶⁸ Gerhard Leibholz turns this critique into something constructive: he recodes the haggling of party politics into the central achievement of democratic mediation.⁶⁹ This successful recoding contributes to the understanding of the Federal Republic as a democratic polity; similar recodings were also undertaken in other European states.⁷⁰

However, this means that the place of mediation lies outside the public institutions and is hardly framed by procedural law. Political parties are private associations. The provisions of the German Political Parties Act do not concern their decision-making process on legislative proposals. There is no duty to inform the public about a negotiation. Access to the place of mediation is not regulated. The opposition is mostly excluded unless its participation is required. This makes parties' democratic monitoring function more difficult. The intra-party logic of power can break through largely unchecked.

Trilogues are more democratic. Both the access to them and their procedures are regulated, including in the Joint Declaration on Practical Arrangements for the Codecision Procedure, the Rules of Procedure of the European Parliament, and the Parliament's Code of Conduct for Negotiating in the Context of the Ordinary Legislative Procedure. The public does not have access to a trilogue, and the lead negotiators need not publicly justify

⁶⁶ Deirdre Curtin and Päivi Leino, 'In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn' (2017) 54 (6) *Common Market Law Review* 1673–1712, DOI: <https://doi.org/10.54648/COLA2017146>; Jelena von Achenbach, 'Verfassungswandel durch Selbstorganisation: Trilogie im europäischen Gesetzgebungsverfahren' (2016) 55 *Der Staat* 1–39, DOI: 10.3790/staa.55.1.1.

⁶⁷ Ruggie (n 60) ch V and VI.

⁶⁸ Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (2nd edn, Duncker & Humblot 1926, München). On this conception, Armin von Bogdandy, 'Parlamentarismus in Europa. Eine Verfalls- oder Erfolgsgeschichte?' (2005) 130 *Archiv des öffentlichen Rechts* 445–464, DOI: <https://doi.org/10.1628/000389105780275681>.

⁶⁹ Gerhard Leibholz, *Der Strukturwandel der modernen Demokratie. Vortrag, gehalten in der Juristischen Studiengesellschaft in Karlsruhe am 30. April 1952* (C.F. Müller 1952, Karlsruhe). On Leibholz' role Anna-Bettina Kaiser (ed), *Der Parteienstaat. Zum Staatsverständnis von Gerhard Leibholz* (Nomos 2013, Baden-Baden).

⁷⁰ E.g. Pietro Scoppola, *La repubblica dei partiti. Evoluzione e crisi di un sistema politico (1945–1996)* (Il Mulino 1997, Bologna).

how they conduct the negotiations. However, they do have to inform the parliament⁷¹ and are subject to monitoring by the shadow rapporteurs of the competing parties. Thereby, the opposition is involved. It strikes me as difficult to dispute the democratic nature of this process.

This is especially true when we consider trilogues in their constitutional context. A trilogue is only the final component in a long series of democratic mediations. The first component are the competences and Treaty objectives, legitimised by the Member States' ratifications. The second component consists of the European Council's mediations in the shape of its 'impulses', 'objectives' and 'priorities' for European legislation. A third component is the annual roadmap of European legislation negotiated by the Parliament, the Council, and the Commission.⁷² On the basis of the Commission's proposal, each institution then internally mediates the different interests, preferences, and positions into a mandate that makes a trilogue possible. Only then can a trilogue consolidate the various interests, preferences, and positions into the general will of European society.

These many complex mediations may seem to be an errant democratic path if we interpret the general will as the expression of a compact majority will that is realised in a statute's enactment. But in a plural, differentiated, diverse society, such a compact will of the majority is usually fictitious. Today, the majority will mostly aggregates overlapping particularities.⁷³ To put it in Hegelian terms: the European legislative act is the result of a multitude of complex mediations that correspond to the fundamental principles of art 2 TEU. We should not disqualify a compromise that arises from such mediations as the lowest common denominator but understand its democratic value.⁷⁴

To conclude with a Hegelian figure, European society will only be fully at ease with itself once many citizens understand the trilogues of the EU as an integral aspect of their democracy, which both demands and consists of compromises. Until this insight is achieved, the problem of alienation will plague European society.

III A More Democratic Union

To avoid the impression of an apology, let me emphasise that I have focused on the classificatory dimension of the concept of democracy, whether the Union is a democratic or rather an undemocratic system of government. But the concept of democracy has not

⁷¹ Gijts Jan Brandsma, 'Transparency of EU Informal Trilogues Through Public Feedback in the European Parliament: Promise Unfulfilled' (2019) 26 *Journal of European Public Policy* 1464–1483, DOI: <https://doi.org/10.1080/13501763.2018.1528295>.

⁷² Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L123/1.

⁷³ Pierre Rosanvallon, *La légitimité démocratique. Impartialité, réflexivité, proximité* (Seuil 2008, Paris) 10–12.

⁷⁴ This is the fundamental thesis of Ruggie (n 60).

only a classificatory, but also a comparative dimension. Democracies can be more or less democratic.⁷⁵ Indeed, democracies can and should become more democratic. This applies to the European Union as well.⁷⁶

According to Eurobarometer 2019, 55 percent of respondents are satisfied with the EU's democracy.⁷⁷ On the one hand, this is remarkable, considering the categorical denial of the Union's democratic nature by some. On the other hand, the result is not satisfactory. The 55 per cent for the institutions of the EU are only in the lower midfield in European comparison: frontrunners like Denmark's democracy have a satisfaction rate of 95 per cent, Ireland's democracy achieves 80 per cent and Germany's 74 per cent. At the same time, satisfaction with French democracy, at 53 per cent, with Greek democracy, at 35 per cent, and with Croatian democracy, at only 33 per cent, is worse than with the EU. The components of European democracy are not only diverse but also of very different quality.⁷⁸

The Union should become more democratic. In many respects, this aim seems open, but in others it does not. For example, hardly anyone is advocating that the Union be modelled on the American, British, Chinese, Russian, or Swiss type of government. European society is forging its own path of democratic mediations, and indeed the authors of the Treaties mandate the Union's institutions to bring about more democracy.

The institutions must 'aim to promote its values' (art 13 para 1 TEU). Art 2 TEU, read together with the provisions in the EU Treaty's three introductory titles that contour it, suggests that the basic idea of a representative and just democracy that protects human rights and is based on the rule of law and on solidarity should guide the interpretation of all further provisions of the EU Treaty and the TFEU.

Against this backdrop, various issues come to the fore. To me, the most important by far is improving democracy in national societies that show systemic deficiencies, some of which are even considered as not fully democratic, but rather hybrid regimes. Today, the true European democratic deficit is not at the European, but at the national level. That is the flip side of the importance of national democracy to European democracy. After the Europeanisation of democratic thought, the further democratisation of Europe requires above all the democratisation of some national systems of government.

⁷⁵ Hans-Joachim Lauth, *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich* (Springer 2004, Wiesbaden). See, concretely, the democracy index Freedom House, <<https://freedomhouse.org/report/freedom-world>> accessed 22 December 2021; Varieties of Democracy (V-Dem), <<https://www.v-dem.net/>> accessed 22 December 2021; Bertelsmann Transformation Index, <<https://bti-project.org/en/home.html?&cb=00000>> accessed 22 December 2021.

⁷⁶ Sylvie Goulard and Mario Monti, *La democrazia in Europa. Guardare lontano* (Rizzoli 2012, Milano); Antoine Vauchez, *Démocratiser l'Europe* (Seuil 2014, Paris); Möllers, *Die Europäische Union als demokratische Föderation* (n 48).

⁷⁷ European Union, Standard Eurobarometer 91, Spring 2019, 144, <<https://europa.eu/eurobarometer/surveys/detail/2253>> accessed 22 December 2021.

⁷⁸ Ibid 141.