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**"IS THIS REALLY WHAT I VOTED FOR?" –
ON THE LEGITIMACY OF EUROPEAN INTEGRATION**

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ABSTRACT

This paper discusses the problems and dangers of proceeding with European integration without facing a transparent constitutional debate. The crucial issue demanding clarity is whether the current integration in the form of the EU shall be seen within the

framework and concepts of public international law or within those of constitutional law. The authors argue that more intensive integration cannot be achieved on the basis of undermining rule of law and democracy by vacillating between different international law or constitutional law models of proceeding without taking any clear standpoint.

KEYWORDS

EU democracy, supremacy, democratic deficit, sovereignty, constitutionalisation process, integration

INTRODUCTION

As the European Union (EU) moves towards “an ever closer Union”, widens its area(s) of competence and thus encroaches more and more on national competencies, the issue of potential conflicts between the European and national legal orders – a thorny issue already from the start of European integration – becomes more urgent. Although the Community legislator and, much more so, the Community judge tried to solve the issue already in the 1960s, as the Union becomes more invasive into all aspects of national life – from free movement and education to civil liberties and security issues – such tensions become more probable and, in particular, start impinging upon fundamental and even constitutional provisions of member states’ legal order. Additionally, these tensions can no longer be solved by merely applying the principle of the supremacy of EU law, since they touch upon essential constitutional elements of democratic states.

It may be tempting thus to talk about a process of “constitutionalisation” of the EU and of EU law. European integration has since seen the creation of the first European institutions, later to become the EU, and shown evidence of a theoretical conflict between public international law and constitutional law. During its initial stage, perception of European integration¹ even among its ardent defenders was that Europe was a construction of international law albeit with certain specific supranational characteristics (like direct effect). Gradually though, especially from the 1980s onwards, a combination of internal and external factors started giving what was then the European Community (EC) more state-building character and features – thus moving it into or at least closer to the realm of constitutional law. Such approach facilitated and, in a strange interaction, at the same time was accelerated by, the increase of competencies of the Community and later the EU.

However, this gradual surrender of competences from the Member States to the EU did not take the shape of a constitutional debate, but more that of technical adjustments of the EU fields of action and of the division of competences. Even very significant measures that could be seen as – and indeed were – steps towards the creation of a federal system, like introducing a monetary union with a common currency, were handled in this practical manner and without a major debate from a fundamental and constitutional perspective. One effect of this can be seen now, when austerity measures, for example in Greece and Ireland, demonstrate to people that, irrespective of national political choices, the actual policies are imposed from elsewhere from a level over which the national electorate has no direct

¹ In particular after the failure of the European Defence Community (see further below).

influence and often not even much knowledge. This can entail a risk of evacuating democracy and endangering the concept of national demos and may even infringe upon principles of democratic systems like the rule of law or the concept of *Rechtsstaat*. This article discusses the dangers of proceeding with European integration without facing the constitutional debate head on.

1. SUPREMACY OF EU LAW

The principle of supremacy of EU law is well established by the jurisprudence of the European Court of Justice (ECJ), despite the silence of the Treaties on the issue. Though the Constitutional Treaty explicitly consecrated the principle², its failure also led to the disappearance of the explicit principle. The Lisbon Treaty returns to the previous silence of the treaties, adding however a declaration (declaration No 17) on supremacy which simply recalls the relevant consistent jurisprudence of the Court and which extends the principle to the Union – as opposed to the Community – law. Nevertheless and despite that the question of supremacy of EU law is largely well known and understood, the issue of the relationship between the constitutions of the Member States and EU law poses different and more complex questions. This is due to two factors. First, the fact that constitutions are the keys to EU membership and the mechanisms for allowing a state to join such a Union as the EU and therefore, given the current nature of the EU, the factor that provides and to some extent checks Union legitimacy. Secondly, there is the essential role of constitutions in protecting the fundamental rights of individuals. The question of relationship between a legal instrument with such a special role and another legal system such as EU law poses challenges of a different nature than the relationship between regular legislation of the Member States and EU law.

Even if supremacy of EU law as a concept is well known, this concept has been created without a thorough debate about the process of “constitutionalisation” of the Union. This may not be a problem in relation to clearly defined areas of law that are explicitly delegated to the EU, but as the areas of application of EU law grow, various issues linked to basic principles of democratic systems, like the rule of law, become ever more relevant. In such contexts it is important to be clear on how EU primary and secondary legislation interrelates with national constitutions and how conflicts between the supranational and the national legal systems can and should be resolved. There are different ways to look at the relationship between EU law and national law of the Member States, but in any case it is not a consistent,

² *Treaty Establishing a Constitution for Europe*, Official Journal of the European Union (2004, C310/01), art. I-5.

hierarchical system like that of a state. Supremacy of EU law is one aspect of the system, but without at the same time considering factors such as which areas are regulated by EU law at all, how national constitutions – and not least the protection of fundamental rights – fit into the EU legal system and the obligations Member States and/or the EU have under public international law, the mere invocation of supremacy does not provide a full answer to the question of the legal order in the EU.

As already noted, the supremacy of Community law has been repeatedly asserted by the ECJ in various rulings already from the 1960s, the case *Costa vs. ENEL*³ being one of the first and most important ones. In 1970 the ECJ went as far as to affirm that Community law had superior force over even constitutional provisions.⁴ Despite the constant, even though prudent position of the ECJ over this latter issue, it is obvious that conflicts between the constitution of a Member State and EU law cannot – and indeed should not – be solved by the blanket subordination of one legal order to another. This is not suitable in order to deal with the complexity of the relationship between different legal orders in the EU of today. Moreover, even the ECJ has recognized that different legal orders are not hierarchical but that the relationship between them is based on different criteria.⁵

2. THE NEED FOR A NEW THEORETICAL FRAMEWORK AND CONSTITUTIONAL DOCTRINE

One main issue on which clarity is needed is whether European integration in the form of the EU shall be seen within the framework and concepts of public international law or within those of constitutional law. This is not just an academic question, as it is the difference between these branches of law that determines the answer to many questions of how the development of the EU should proceed, what should be decided at the EU level and what demands a decision of the Member States. Even if there is no inherent theoretical conflict between international law⁶ and constitutional law, in any event there is a theoretical difference. There is a trend to find new ideas on how to settle the constitutional dialogue to elaborate a basis for a common constitutional space.⁷

³ *Costa v. ENEL*, European Court of Justice (1964, Case 6/64).

⁴ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, European Court of Justice (1970, Case 11/70).

⁵ *Kadi v. Council*, European Court of Justice (2008, Case C-402/05P); *Transportes Urbanos v. Administracion del Estado*, Advocate General in European Court of Justice (2010, Case C-118/08).

⁶ The expression “international law” used in this article should be seen as meaning public international law.

⁷ Tanel Kerikmäe, “Estonia as an EU state: lack of proactive constitutional dialogue”; in: Kyriaki Topidi and Alexander H. E. Morawa, eds., *Constitutional Evolution in Central and Eastern Europe Expansion and Integration in the EU* (Farnham, Surrey: Ashgate Press, 2010).

Determining the hierarchy of legal orders is never an easy matter and this is an instance in which it should be absolutely clear within which legal system one is operating. Even in federal systems where the hierarchy between federal and state law is much better regulated than in the EU, the issue is a thorny, uncertain and especially evolving one. The Supreme Court's role in the United States constitutional and political developments is an example. The situation seems even more uncertain in the case of the EU, which is clearly not a federal state – though what it is, is a moot point. Although to a large extent constitutionalists have shunned the debate on the relationship between national and EU legal orders, leaving the field to integration theorists, many scholars defend – or rather try to apply in this context – a dynamic constitutional doctrine. According to this viewpoint a dynamic constitutional doctrine (flexible, open to change and different interpretations) facilitates legal certainty and rule of law. One theory is that of deliberative constitutionalism – the need for Member States to place greater emphasis on interpreting EU norms from a normative viewpoint as well as from the viewpoint of impact on Member States.⁸ At the same time, though, the arguments for flexibility and deliberations can be reversed. From a legal positivist and monist background, there may be fears that it may result in the reverse to legal certainty: if dynamic equals permanent adaptation – and hence modification of the national or European law or of its interpretation – the dialectical relationship between the national and the supranational legal norms might create at least temporarily a legal uncertainty.⁹ Rather than defend the need for a flexible system with deliberations as the basic principle, when a European norm is adopted, it should already be made certain that no constitutional or other obstacle may arise.

European construction – and even more so, ECJ case-law – is based on the voluntary surrender of competences by Member States in specific areas. States have agreed to apply unequivocally EU legislation whenever it is adopted on the basis of the existing EU competences. Formally the EU is built on the competence and elements of sovereignty handed over by Member States but in reality such handing-over is often done in a manner that is encompassing and general enough for there to be scope to discuss if perhaps the EU indeed also has its own

⁸ Sacha Prechal, "Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union. – The Fundamentals of EU Law Revisited": 55; in: Catherine Barnard, ed., *Assessing the Impact of the Constitutional Debate* (Oxford University Press, 2007); Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International, 2002), p 39-50.

⁹ It should be recalled, nevertheless, that such a legal uncertainty is the rule in the United States; the Supreme Court has done and undone on several occasions the law both on individual rights – *Dred Scott v. Sandford*, U.S. Supreme Court (1856, no. 60 U.S. 393); and the *Slaughterhouse Cases*, U.S. Supreme Court (1872, no. 83 U.S. 16 Wall. 36 36); and federal powers (the various interpretations of the Commerce Clause) without major suffering in the US constitutional certainty.

sovereignty.¹⁰ At the same time, national constitutional courts like the German one tend to underline the sovereignty of the Member States to emphasise that this has not disappeared because of the development of the EU.¹¹ Some authors suggest that sovereignty is a bundle of rights and responsibilities, some of which may be shared, transferred or confiscated.¹² Just discussing who has sovereignty and how much of it may be handed over by states does not answer the question of who should do what and how this is to be decided.

It may be discussed to what extent a more voluntary implementation of EU legislation by states, which would obey other reasoning too, would be possible. This is too near the concept of a legal "Europe a la carte" and would entail that the EU legal system would have to find mechanisms to overcome the danger of non-application of EU legislation. Deliberative constitutionalism can be a way of preventing the dangers inherent in "Europe a la carte" if it means that Member States among themselves in their role as States and together with EU institutions discuss – deliberate – in order to find the proper balance between the State's guarantee of rights and that of the EU.

At the same time, such deliberations may be suitable if the EU is seen as an international organization, albeit one with many special powers and features (*sui generis*) but less appropriate if it is in fact even if not in name instead engaged in state-building. This leads back to the question posed above: should the EU be seen through the prism of international law or is it time to consider it primarily from the viewpoint of constitutional law? The answer to this question will provide a first answer also to the question of whether a hierarchical system of norms with constitutional controls built into the system or a flexible system with deliberative constitutionalism is the way forward for the EU.

3. THE DEVELOPMENT OF EUROPEAN INTEGRATION, LEADING TO STATE-BUILDING

The motive for European integration after the Second World War was predominantly to avoid the possibility of any future war among the European states that joined the integration system (excluding East and Central Europe then under Soviet dominance). The shape of integration was fashioned around this general objective, which in practice led to different integration alternatives, like the Council

¹⁰ Tobias Locke, "Why the European Union is not a State: Some critical remarks," *European Constitutional Law Review* 5 (2009): 413.

¹¹ Roland Bieber, "An Association of Sovereign States," *European Constitutional Law Review* 5 (2009): 392; *Karlsruhe decision*, BVerfG (Federal Constitutional Court of Germany) (2009, no. 2 BvE 2/08): paragraph 224-226// www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

¹² Sebastian. C. St. J Anstis and Mark W. Zacher, "The Normative Bases of the Global Territorial Order," *Diplomacy & Statecraft* 21 (2010): 319.

of Europe (1949) with its more intergovernmental structure and decision-making process and the European Coal and Steel Community (ECSC, in 1952) with majority decisions and independent supranational institutions. The European Defence Community (EDC) was both a building block and at the same time a turning point in the construction of European integration. This was logical given the peace-building aim of integration. The EDC Treaty was signed in 1952 but never entered into force because of the failure of the French parliament to ratify it.¹³ At the time, the debates in France, where the issue was heatedly disputed not only among politicians but also among the general public, concentrated on the allegedly superior role of Germany in European defence and the disappearance of the millenary French state; nevertheless, these debates acknowledged and even openly recognized the intrinsically constitutional and state-building character of the EDC. Indeed, Article 38 of the EDC Treaty itself provided for the link between defence integration and political unification, stipulating that the ECSC Assembly would be transformed into an 'ad hoc' assembly entrusted with the drafting of a text concerning the final organisation of European integration "within the framework of an ultimate federal or a confederal structure" based upon the principle of the separation of powers and including, in particular, a bicameral representative system".

The EDC failure, which was a shock to post-war federalists convinced of the ineluctability of the constitutional transformation of Europe, altered significantly the viewpoint and the context: integration was deliberately to be limited to so-called low politics, areas of minor public resistance and indeed scant public interest. From the 1960s onwards therefore (in particular during and after the Luxembourg compromise in 1965, to prevent French obstruction from paralysing the EC) Europe was seen and in fact acted as a construction of international law even if with specific characteristics (like direct effect).

This state of affairs changed gradually from the 1980s onwards for a combination of internal and external factors (among them, the active presidency of the Commission by Jacques Delors, the significant increase in the Community budget and, as a result, the substantial increase in Community budgetary interventions in member states) started giving the EC more state-like character and features. To give some examples, Community funding imposed internal public administration reforms and the single market imposed significant legislative adaptations on Member States. This gradual evolution facilitated the increase of competencies of the EC, later the EU, often without any fundamental debate about

¹³ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 1998), p. 10.

such increase of competences.¹⁴ The debates more often concentrated on the specific narrow issues at hand.¹⁵

4. THE ROLE OF CASE LAW VERSUS THE ROLE OF LEGISLATION

Another feature of the development of the competence of the EU is that the relationship between the legal order of the Member States and EU (previously EC) law has been predominantly set out by the case law of the ECJ. This has contributed to the situation in which often no political debate is held, at least not in a consistent manner. What the ECJ has stated about the content of EU law has not been invented by it, but based on the Treaties and the Court's interpretation of these. However, as the Treaties are written as framework Treaties in need of authoritative interpretation in order to establish the real meaning of various concepts, the scope for creative interpretation is often large and the case law of the ECJ has thus had enormous importance. This role of the ECJ is no accident and not a case of the ECJ overreaching itself, but rather of it fulfilling its intended role as set out in the Treaties. Even so, the question of the suitability of this way to "make law" may be legitimate, as the ECJ is a court that is called by the treaties not to represent the Member States as States but rather to defend Community interest. If there is a situation in which there may be limitation or a change of constitutional rights in the Member States in light of EU law, is it acceptable to them that the Court decides on this? Additionally, it is clear that this manner of developing the law may contribute to the avoidance of a consistent political debate.¹⁶

The division between case law and legislation in the EU is *sui generis*, just like the organization itself. The main reason for this is that the institutional structure of the EU is a careful balancing of national Member State interests and those of the Union as a whole. All institutions have a distinct role to play to ensure that interests at different levels (which also include interests of EU citizens) can be taken into consideration. The ECJ has a different role than the Council and the European Parliament, the main decision-makers, or indeed the Commission, the body that proposes legislation.¹⁷

¹⁴ In was indeed named "integration by stealth". See Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005).

¹⁵ Bieber notes that when the Karlsruhe court listed competences of a state that form part of its characteristics as a state, the list coincided with the existing division of competences between the EU and its Member States and did not raise questions of for example the role of monetary policy as a basic element of a state (Roland Bieber, *supra* note 11: 392).

¹⁶ Katrin Nyman-Metcalf and Ioannis Papageorgiou, *Regional Integration and the Courts of Justice* (Intersentia, 2005), p. 68-71; Christiaan Timmermans, "The European Union's Judicial System," *Common Market Law Review* 41 (2004): 393-405.

¹⁷ Katrin Nyman-Metcalf and Ioannis Papageorgiou, *supra* note 16, p. 79.

Interpretation by the ECJ has allowed taking into consideration the spirit of the treaties.¹⁸ With such interpretation methods it has been possible for the ECJ to be dynamic and find relevant meanings to terms and concepts even when the treaties have been incomplete. This is the kind of ECJ activity that has led to claims of excessive judicial activism. A wider interpretation is however not the same as judicial activism, as long as it is foreseen in the treaties and as long as it is within the competence given to the Court in such treaties. It is instead a way for the Court to be able to properly fulfil its role as the final interpreter of EU law and to ensure that there is no situation of *non licet*.

This said, especially in light of such wider, functional interpretations, the possibility to foresee the content of EU law is different from that common to continental legal systems based primarily on written laws. This is a challenge for national constitutional courts, which must determine the risk for violations of constitutional principles based on the spirit of the Treaties in addition to the letter of them (and secondary legislation).

In the Schmidberger case¹⁹ free movement – one of the basic EU rights – could be hindered to some extent for the protection of the constitutional principle of freedom of association, which is a common principle of Member States and enshrined in the European Convention on Human Rights. The case emphasized proportionality and it is not possible to see from this case if the constitutional right to freedom of association would have had precedence also in a situation where that would have meant a more serious limitation to an EU freedom.²⁰

5. THE EU AS A *RECHTSSTAAT*

The EU undoubtedly has brought change to the traditional structure of international law, as integration in the EU goes much further than any other regional integration system or international organisation.²¹ Joining the EU is a voluntary act and in that respect is no different than traditional international law, but Member States within the EU have delegated so much sovereignty²² that the EU in some respects may itself have come to resemble a state.²³

¹⁸ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, European Court of Justice (1963, Case 26/62); Andrew T. Williams, "Taking values seriously: Toward a Philosophy of EU Law," *Oxford Journal of Legal Studies* 29(3) (2009): 549-577.

¹⁹ *Schmidberger v. Austria*, European Court of Justice (2003, Case C-112/00).

²⁰ *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, European Court of Justice (2004, Case C-36/02); Andrew T. Williams, *supra* note 18: 567.

²¹ One popular expression for what the EU is, is "pooling of sovereignties". For example, Wolfgang Wessels, "An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes," *Journal of Common Market Studies* Vol. 35 No. 2 (1997): 274.

²² Bruno de Witte, "International Law as a Tool for the European Union," *European Constitutional Law Review* 5 (2009): 282-283.

²³ Weiler calls it a massive transfer of competencies and an unprecedented empowerment of Community institutions leading to a new architecture of power (Joseph H. H. Weiler, "European Neo-

The practical concern of this theoretical debate is that an international law construction, built by a number of states which abide by the principles of rule of law, such as EU Member States, cannot be permitted, as a totality, to weaken the rule of law nature of its component parts. Instead, rule of law should act as the cement of multi-level governance. Legal certainty in the creation of rules as well as in their enforcement is an element of rule of law. If there is a lack of legal certainty – perhaps due to the lack of a clear concept of what kind of creation the EU is and how its law should develop – the rule of law may suffer.

One of the underlying fears of many Euro-sceptics all over the continent is that the EU is not a *Rechtsstaat*. Legal literature has long debated whether the term *Rechtsstaat* is the same as a state where the rule of law applies. Both concepts tend to be interpreted in various ways, which obviously affects the basic question of their similarity or differences. Despite this debate (and the view that rule of law may even be a reaction to the more state-centred *Rechtsstaat*), Article 2 of the EU Treaty in English uses the term “rule of law” and in German the term *Rechtsstaat*. This issue would greatly benefit from an unemotional legal analysis. The German Constitutional Court has elaborated as to the reasons why the EU legal system cannot be clearly defined as a *Rechtsstaat*.²⁴ As a consequence, an EU Member State – and the societies in Member States – may, theoretically, at some point be obliged to accept a EU law that would run contrary to the rule of law (or at least to the rule of law as understood in that specific country) if the rigid approach to the relationship between EU and national law continues to rule. This raises the question: what would, could and should a State do in such a case? The question cannot be answered directly because any reply would produce an unbearable political and legal responsibility. However, as a hypothetical question, it merits careful analysis.

The protection of fundamental rights is an element of rule of law as well as of the *Rechtsstaat* and one of the aspects that makes the relationship between EU law and national constitutions particularly relevant.²⁵ Application and supremacy of EU law cannot threaten the protection of rights. This situation is somewhat different after the entry into force of the Lisbon Treaty and with it the legal binding force given to the Charter of Fundamental Rights.

constitutionalism: In search of Foundations for the European Constitutional Order,” *Political Studies* XLIV (1996): 520).

²⁴ *Karlsruhe decision*, *supra* note 11.

²⁵ It is no coincidence that the first case on the supremacy of EU law over constitutional provisions (the above mentioned *Internationale Handelsgesellschaft* dealt in fact with fundamental rights and specified that “respect for human rights is an integral part of the general principles of law whose respect the Court ensures” and that, in order for the Court to determine the content of these rights it should draw from “the constitutional traditions common to member states” (*Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *supra* note 4).

Even so, the German Constitutional Court in its decision of June 2009 shows a certain lack of dynamic thinking in that the main message appears to be that things are not so bad, no need for Member States to worry, as the Lisbon agreement has not added or changed the fundamental rights of states. It directs importance to the question of the implementation in national law of EU obligations and the importance of doing this correctly, something that allows the constitutional court to look primarily at national law even if the underlying principles come from EU law.²⁶

6. DEMOCRATIC DEFICIT

To give real content to the debate regarding the existence or extent of a democratic deficit in the EU one needs to be clear on at which level – or levels – democracy should be found. Here the difference between an international law formation and a quasi-state creation under constitutional law is quite important. If the EU is to be seen exclusively or mainly as an international organisation, it is quite in line with international law as well as with the expectations of people that democracy remains a matter for Member States and is exercised on the international level through them. There are no serious demands about popular participation in, for example, the United Nations. If, however, the state-building professed by the EU is taken seriously, democracy must be considered in this exercise and guaranteed at various levels and in the various processes of the Union. The discussion of democracy in the Karlsruhe decision touched upon the issue of what (and why) democracy should be in the EU, but concluded without very much detail that the EU is not a state so the democracy it should have needs not be that of a state.²⁷

The different aspects of democratic deficit that are usually brought up in the debate include the above-mentioned role of the ECJ as well as what is called “executive dominance”, where the main decision-making role of Member States is exercised by the governments rather than the parliaments.²⁸ The Lisbon Treaty attempts, to some extent, to rectify this but the main underlying problem of a lack of direct influence by parliaments cannot easily be remedied. The direct election of the European Parliament and the increased role of this institution is not an effective remedy, both because it still lacks the kind of role that a parliament has in a parliamentary democracy (not only because it is only a co-decision maker rather

²⁶ As shown in *Data Retention Case* (*Data Retention Case*, BVerfG (Federal Constitutional Court of Germany) (2010, no. 1 BvR 256/08) // http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html) the German Constitutional Court case from 2 March 2010 on data protection in relation to telecommunications firms gathering information under Directive 2006/24/EC.

²⁷ Roland Bieber, *supra* note 11: 393-394.

²⁸ Paul Craig and Gráinne de Búrca, *supra* note 13, p. 156.

than the main decision maker but also because it is unable to effectively elect the executive) and because the low interest and participation in European Parliament is mentioned as another aspect of democratic deficit. The complexity of the EU, the distance between its various institutions and the people and the sheer volume of decisions, rules and regulations applicable in a vast and diverse area are mentioned as other elements of such democratic deficit.

Also in this debate one can see the confusion about what the EU really is and should be. The democratic deficit is often discussed as a mixture of questions relevant under international law or under constitutional law. In a federal state, there are established ways of dealing with democracy at different levels. In international law, the democracy element tends to be only about the voting in the organisation itself. The EU is *sui generis* but the importance of democracy at different levels, perhaps to some extent the responsibility for it even removed from the Member State to the EU when the EU takes over certain competences, has not been thoroughly discussed.

A country can be pro-active in the EU through defending its stance within the context of the EU institutions (mainly the Council). It can also establish alliances with other like-minded Member States or in the pre-legislative level (either in Parliament or in a closer collaboration with other national parliaments). This looks currently like international law action, common to activities in the framework of international organisations. Similar possibilities may exist in federal states as well, but are often more circumscribed by the constitutional order.

7. THE NEED FOR A TOTAL LOOK AT THE STATE-BUILDING EXERCISES OF THE EU

The gradual surrender of Member State competence to the EU level never did take the shape of constitutional debate, but, instead, more that of technical modification, in a “salami” manner of one small(ish) bit after the other—rather than as a consistent debate.

As an example, one of the most significant federal measures, a monetary union (a fundamental feature of a state), slithered in but hardly anybody said that exclusive monetary policy can only be conducted by a state. What would have been a very relevant debate on legitimacy and accountability and ultimately democracy was even less pronounced than the debate on the monetary union as such. It is relevant that the development of the monetary union was made at an unfortunate moment for Europe as it coincided with globalization and an understanding of the

fragility of European presence in the world and the role of the state as we knew it. This led to anti-European reactions among many societies or levels of society.

Another negative consequence of the piece-meal way of dealing with major issues of integration is that even such matters as are regulated in the Lisbon Treaty, particularly in areas with shared competence, are regulated in such a way that it is not clear where the competence lies and the disputes on this can in reality hamper the work of the EU. This has been seen in relation to environmental matters where in the context of international conferences Member States (through the Council) and the Commission have disagreed on who should represent the EU, whether the Lisbon Treaty gives this role to the Commission or whether the situation has not changed compared with that prior to Lisbon when both Member States and the Commission had competence in shared areas. While the background for the unclear provisions can to some extent be understood, as the drafters felt there was a need for caution in order to get the Treaty accepted, especially after the set-backs with the Constitutional Treaty, avoiding stating things clearly in order to hide the potential for disagreements is not a tenable way forward.

The austerity measures introduced as prerequisites for the financial assistance packages for countries such as Greece and Ireland show that irrespective of national political choice the actual policies implemented in the country are imposed from another group over which the national electorate has no direct influence and not even any knowledge. This leads to the danger of evacuating democracy and renders the concept of national demos very endangered.

The Lisbon Treaty emphasised the absence of *kompetenz-kompetenz* of the EU by stipulating the principle of conferral (Article 5). At the same time, as the development of the crisis mechanism for the Euro zone has shown, this does not mean in practice that new competences and issues may not be added to the EU without a process of Treaty amendment.

The relative silence of the political debate on Europe as far as more profound matters are concerned has been largely deliberate and in some respects useful as it allowed for the gradual construction of significant power. On the other hand it hid the real nature of the European process, which can no longer be kept under the cape of international law but must be treated as what it really is: a state building process of sorts and therefore a constitutional law enterprise. The nature of this process can be agreed upon even while disagreeing on exactly how far the state building exercise has come or will come. It is time that the debate about Europe takes its natural ground.

In the popular debate the question whether the EU will become a state and replace the Member States in their role as states is raised every now and then. The

question betrays an ignorance of international law (or rather, intentionally phrases the question in a more extreme and eye-catching manner). The sovereignty of states in the international legal system means that there is no higher body than states that could determine that some entity has become or ceased to be a state. If all EU Member States agree to call the EU a state and give it such functions so they themselves should no longer be seen as states, this is possible as an extension of the EU of today and – just like the EU of today – as an expression of state sovereignty that the state can decide to express by its own actions or in actions together with other states. As long as states are not prepared to take such a step (which today looks politically unlikely), who is there to deprive states of their statehood just because they are in a powerful organization? It becomes a theoretical exercise to determine what powers really exist at what levels and which level consequently more resembles that which is normally seen as a state in international law. This said, sovereignty is a mobile concept given the globalization and internationalization of the world generally, so a future scenario with different components of the international system than states in the traditional sense is not a utopia, even if lies in the future.

The fact that the EU will not just become a state whatever its Members say does not mean that it may not in reality already resemble a state in some ways, although Member States are not prepared to call a spade a spade and admit this. To what extent this is the case with the EU of today is a question with a bewildering number of facets. There is different EU law on different issues, there are varying competences for institutions; there are changes over time and exceptions for some Members.

Events in the EU constantly provide real life illustrations to the questions of balance of competence and extent of transferred sovereignty. The economic crisis in a number of EU and Eurozone Member States in 2010, for example, shows the dangers of a currency union without a full economic and fiscal union. Analogous situations can be imagined when EU law requires certain action but fails to provide adequate protection for fundamental rights that may be affected by such action. Both the ECJ and national constitutional courts have stressed elements of interpretation to avoid the occurrence of such a situation. The ECJ has done it for some time now, through pointing to the applicability of the European Convention of Human Rights as well as principles common to the Member States as elements of

EU law²⁹, whereas national courts like the Karlsruhe court have emphasized the continued role of national constitutional principles.³⁰

SOME CONCLUDING REMARKS

The absence of a coherent constitutional debate on the development of the EU leads to the danger of evacuating democracy and significantly endangers the concept of national demos. The EU may develop rather well even without a proper debate. The silence of the political debate on Europe was deliberate and in some respects useful as it allowed for the gradual construction of significant power, but on the other hand it hid the real nature of the European process, which can no longer be kept under the cape of international law but should be seen for what it really is: a state building process and therefore a constitutional law enterprise.

It is time that the debate about Europe takes its natural ground and that the debate is tackled head-on and in its totality. This is risky as it may well lead to questioning many aspects of the EU and for various reasons only remotely linked to the EU as such, people in Member States may be very negative towards the EU. It is the setting of economic and financial crisis in many Member States and affecting the Euro-zone as a whole that have highlighted the need for a consistent debate, but these same crises may mean that the debate will be very tough. Delaying it yet again and continuing to just discuss current, limited questions, one-by-one, looks easier but that is a short-sighted view.

People who vote for a politician of a certain political colour and expect that politician to deliver on his or her promises, find more and more often that the policy decisions are instead made somewhere else and the politician is reduced to implementing the details of a policy decided at a different level. This level is far removed from the people of the Member States not just by the absence of a direct vote for the policy makers and physical distance but also by a lack of common knowledge and understanding of such a level.

The authors do not want to argue for "less Europe" as indeed in many areas "more Europe" and more decisions taken at the EU level and forcefully implemented are what is effective in different circumstances. But "more Europe" cannot be achieved on the basis of undermining rule of law and democracy by vacillating between different international law or constitutional law models of proceeding without taking any clear standpoint.

²⁹ *Nold v. Commission*, European Court of Justice (1975, Case 4/73); *Hauer v. Land Rheinland-Pfalz*, European Court of Justice (1979, Case 44/79).

³⁰ *Solange I*, BVerfGE (1974, no. 37, 271); *Solange II - Wünsche Handelsgesellschaft decision*, BVerfGE (73, 339, 1986, no. 197/83).

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