The Legitimation Crisis of the European Union

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In May and June 2005 the project for a European constitution collapsed in France and the Netherlands. Europe's citizens decided against the new constitution. Does Europe now have no constitution? No, it has one: Europe has long since had a constitution in the European treaties (Rome, Maastricht, Amsterdam, Nice, etc.), and constitutions that proceed out of treaties between states are nothing historically unusual – one need think only of the 1787/88 United States Constitution, which was also initially planned only as a unanimous constitutional treaty under international law, or the constitution of the 1871 German Imperial Constitution. The treaties of the 1781 American confederation or the 1816 German confederation were also confederal constitutions.[1]

However, while the US constitutional treaties and the German Basic Law are of the same democratic-revolutionary type, the German Imperial Constitution and the Constitution of the European Union are of another. This is because, even if all the member states are democracies, they neither *found* nor *constitute* a new political community, nor complete an existing one, nor replace an existing political order with an entirely new one. Rather, they *limit* an existing order by delegating part of the member states' sovereignty to the higher level of the Empire or Community (today the Union), or – in the English case since the late seventeenth century – *limit* an absolute monarchy by *constitutionalizing* it.[2] The difference between the two types of constitution becomes clear when the European constitutional agreement is compared to the convention in Philadelphia that produced the US Constitution. Unlike the European convention, the Americans broke through the framework of a prior unanimous treaty and on their own authority declared a majority of three-quarters of the states to be sufficient. This rather putschist transformation of the ratification rule made the revolutionary, rule-founding character of the Convention, which also marked the constitutional text, explicit early on.

One must distinguish strictly between founding and limiting, constituting and constitutionalizing, even if there are also sudden transitions, as in the case of the US Constitution, and the overlap between the two types of constitution even in revolutionary situations is so large that, as in the case of England, a number of radical reforms can produce a gradual transformation from a *rule-limiting* constitution to a *rule-founding* one, in which the constitutional monarchy disappears into the yellow press. That would probably also have been the fate of Imperial Germany, which had the same type of constitution, had it not sought out and then lost the First World War.

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From the perspective of constitutional theory, it is undisputable that the European treaties from Rome to Nice represent a constitution for the Union.

(1) They are a higher-level, *reflexive law that is used to produce legal norms*.
(2) They guarantee the *normative primacy* of European basic law over national law (including state constitutional law).[3] Even the German Constitutional Court has sharply relativized its claim to final authority in interpreting the German Basic Law in light of European norms, and the European Court in any case claims final jurisdiction [*Kompetenz-Kompetenz*] in matters of European law.[4] But the relation of the European Court to national constitutional courts is de facto one of cooperation rather than subordination, so that one can also speak of a European "compound of constitutional courts."[5]
(3) The European treaties constitute *independent European organs* (the Commission, the Council of Ministers, the Court, the Parliament) that are answerable only to the Community and make community law.
(4) Since the Maastricht and Amsterdam Treaties, which were revolutionary (above all when compared with the now-failed proposal) in this respect, and despite the multiplicity of treaties, there is still only a *single, unitary European Union*, which is not a state but a supranational organization and acts as an autonomous legal person in international law.[6]
(5) Finally, the treaties produce new *rights* of European citizenship, which is thereby unified; these rights are clearly distinct from those of national citizenship.
(6) Even the word *constitution* is regularly used by the juridical community but also in legally binding decisions when it comes to the European treaties.[7]

However, when the European Court designates the European treaties as the Community's *charte constitutionelle*,[8] it unintentionally divulges a truth about the character of the European constitutional system that even the recent and now miserably failed treaty for a new EU Constitution would only have changed at the margins. The expression *charte constitutionelle* was first used in 1814 to designate the counterrevolutionary French constitution after the fall of Napoleon, replacing the republic with a restored, though constitutional, hereditary monarchy. That *charte constitutionelle* was indeed a modern constitution and far from a restoration of the pre-revolutionary Ancien Régime,[9] but it was not, any more than its 1830 successor (also called a *charte constitutionelle*), a constitution for the people – let alone by and through the people. It was a constitution by the King's grace, a constitution for the self-organization of the ruling class.

The European treaties from Rome to Nice are very different from the *charte constitutionelle* of 1814. They constitutionalize a union of democratic legal communities, not an arbitrary hereditary monarchy. But in one respect in 2005 we have the same situation as in 1814 or 1830. The word "constitution" in the proposed treaty does not give the existing treaties a new, let alone a revolutionary, meaning. The old treaties and the new proposal are a constitution for the governmental organs of the member states and the Union, for judges and legal experts,

for professional politicians, business managers, union bosses, television moderators, and ministerial officials. The European treaties are a constitution for the transnational political class, which has allied with the economic powers and the mass media to produce a new and highly flexible ruling class and for some time spoken only top-down of the people out there.

One thing the European treaties (including the failed constitutional treaty) are not is an egalitarian constitution for the citizenry of Europe. In constitutional practice, insofar as it occurs outside the ruling political class, they are not a constitution. The *correct* theory of the few was dashed on the *justified* practice of the many.[10] The constitution of Europe may be a "compound of *states* [Staaten*verbund*]" (Kirchhof), and perhaps also a "compound of constitutional *courts*" (Di Fabio), but it is hardly, at most extremely inadequately, the constitution of a "compound of *citizens*" (Rousseau). This holds as well for the non-transparency, complexity, juristic sophistication, and length of the old and new treaty texts and the constitutional proposal. One cannot outfit citizens with comprehensive rights, then put them in the sandbox and make them play *pouvoir constituant*. The criticism of the complexity and extent of the document that was placed before them for a vote should by no means be frivolously dismissed as populist. It is entirely appropriate, for a constitution is indeed (at least also) "a layman's document, not a lawyer's contract" (Franklin D. Roosevelt).[11] It must – like the German Basic Law and all member-state constitutions – legibly, comprehensibly, and without juridical subtlety contain the ideas that the people have something important to decide and that power comes from them, without ifs, ands, or buts. But it did not.

In one respect, of course, the treaties have long since been a constitution of all the citizens. They are an egalitarian constitution for individual citizens, who make use of their equal right to go to court and claim their European rights.[12] *Anyone* can do this whenever he or she feels the need, but only as an individual or in concert with the strictly limited deliberative publics of democratically defined courts. The voluntarism of individualized claimants is indeed a constitutive contribution to the egalitarian-democratic legitimation of law,[13] but not a general, legislative will. This is the central problem of the EU constitutional system that became dramatically evident in 2005.

In order to analyze this problem more closely, I distinguish between three levels of constitutional integration: (1) *functional integration*, unplanned and independent of political will, that expresses a certain level of social evolution; (2) *rule-of-law integration*, which could also be called legal or (in the nineteenth-century German sense) constitutional integration and represents a kind of planned evolution of an existing regime; and finally (3) *revolutionary integration* through a democratic constitution with the power to ground rule.

(1) In the early developmental phases of European law in the late 1950s and early 1960s, which were strongly shaped by technocratic thinking, the European treaties tended to defined as a *functional constitution* (Ipsen). Even on a more

demanding understanding of functional integration detached from a teleological means-ends schema, since Rome the European treaties have fulfilled the function of a constitution.[14] The treaties both stabilize the borders that separate the juridical from the political system as well as the juridical from the economic system, and norm border traffic. This is what Luhmann calls *structural coupling*.[15] The structural coupling of law and politics means that every law can be changed by political power and, at the same time, that every exercise of political power is subject to legal norms, while the structural coupling of law and the economy occurs through the exercise of constitutionally guaranteed freedom of contract; other basic rights facilitate the structural coupling of science and law, religion and law, and so on.[16] The enormous explosive power released by functional differentiation and specialization, communicative productive power, is steered by structural coupling along peaceful lines and transformed into a controlled explosion. The clear displacement of the center from politics to the economy by structural coupling in the EU, however, has given a constitutionally privileged place to the market and its laws as against the classic focus on the state. This structural imbalance cannot be corrected by influence alone (through social-democratic Commission policy supported by parliament, deliberative commitology, etc.); it requires a fundamental strengthening of the Union's political power, and thus a transition to a fully developed political union.[17]

However, reducing the evolutionary achievement of the constitution to the function of structural coupling does not do justice to the normative meaning of the modern concept of the constitution. Hobbes already had more or less the same thing in mind as Luhmann with his idea of the social contract. An effective constitutional regime enables the relatively peaceful growth of jurisprudence, political power, economic capital, scientific knowledge, education and general cultivation, and so on. Functional analysis shows, however – unlike Hobbes, who still thought in terms of instrumental rationality – that the same function can be fulfilled by many different types of constitution; we can think of circumstances in which the rule of law and constitutions that arise from an authoritarian state [*Norm- und Maßnahmestaat*] (Fraenkel) would be functionally equivalent to a democratic or an aristocratic constitution, and thus interchangeable. The peaceful expansion of power, capital, and knowledge brought about by structural coupling does not automatically lead to more individual and democratic freedom. Knowledge may a priori be power, but it is certainly not freedom, let alone *equal* freedom.

(2) The rule of law binds the power of the state organs or other political organizations to legal norms. By this means even simple laws are transformed into subjective protective rights against the extralegal encroachments of political power. The spectrum runs from the Hobbesian minimum ('what the law does not prohibit is allowed'), to binding all government agencies by basic rights (German Basic Law, Article 1:3), to extending basic rights protection to private power relations (as in the German Constitutional Court's theory of third-party effects

[*Drittwirkungslehre*]). Beyond merely fulfilling the function of structural coupling, the *rule of law* is a normative ideal, and the political theory that paradigmatically goes with it is that of John Locke. The rule of law sets normative limits on political power without at the same time obstructing the growth of functionally specialized or publicly mobilized power.

The great achievement of the EU is a new form of freedom of movement for Europe, which of course had earlier historical preliminary developments in member-state law and in the reciprocal *indigenat* of federal constitutions (from the dawn of the Swiss confederation, the USA, or the German Empire, but also in the German federation or the US confederation of 1777).[18] The freedom to cross state borders and enjoy national rights (including a few political rights) goes far beyond basic economic freedoms. Thus, to name only one spectacular case, according to a decision of the European Court Irish, women can have legal abortions performed in England although abortion is a criminal offense in Ireland. Today EU citizens – and moreover all (short- and long-term) residents of Union territory and even adjoining states – have more rights than ever before.

Joy about this is of course somewhat clouded, since despite the unmistakable accumulation of the rights, rights claims, and legal instruments of constitutionalism in the Union area, it is not better in every respect than without the Union. The many special regulations, exceptions, and highly flexible formal compromises in EU law threaten legal security and invite abuse by powerful state and private actors.[19] A striking example is the newly created possibility for citizens of an EU country suspected of crimes in another EU country to be deported without a judicial hearing and face a court in the other country. In terms of the rule of law, this is a scandal that will only be worsened by the fact that this kind of loss of rights, which began when member-state asylum law was lifted for Union citizens, is a hardly avoidable consequence of the growing rights of members. These rights are not better protected by the European Commission's assurance that the rule of law is *in general* the same in all member states. For in court what counts is not the *general* level of human rights and the rule of law, which is incontestably high in all member states, but rather the *particular case*; here Spanish, Irish, or Swedish law can make an enormous difference that extends from the admissibility of evidence to sentencing and conditions of imprisonment and can, in individual cases, cut deep into the basic rights of the affected party.[20] Cases like these show that the EU should be credited not only with *gains* but also with some not inconsiderable *losses* regarding to the rule of law, even if on the whole the gains far exceed the losses.[21]

Externally too, the Union offers its citizens protections that in many cases go far beyond those of the individual states. In this way the penetration of international law is filtered through Union institutions. As Hilf and Reuss write, the EU has a "hinge function," mediating global economic, trade, and consumer laws in Union member states.[22] This hinge function protects EU citizens, for example, from the implementation of WTO norms that would violate national or European

rights. Here too there are of course striking counterexamples that can lead to deep encroachments into political rights in the member states, federal units, and local governments – for instance the global deregulation of the water economy, which would deprive German local government of an important part of its self-governing authority.[23] But none of this changes the fact that the rate of increase of *private autonomy* across the whole spectrum is clearly higher than countervailing tendencies. It would be a mistake (and was a mistake of the French '*non*' campaign) to reduce private autonomy to neoliberal competitive freedom and market deregulation. This is connected to the fact that private autonomy consists of citizens reciprocally granting one another rights that can only be implemented and guaranteed without loss through the exercise of public autonomy in positive law.[24]

The fact that Europe's citizens have new rights directly from the Union (personal mobility, domestic treatment as well as prohibition of discrimination, voting rights, diplomatic protection, right to petition)[25] has far-reaching implications for the Union's legitimation structure. The European Court already recognized this in 1963, when these rights were not fixed as such but only implicitly inferred from the Rome Treaties; on this basis since the late 1960s it developed and applied the theory of the *direct effect* of European law and the supremacy of European law it implies.[26] According to this principle, I can claim my rights *as* a European citizen in court anywhere in Europe. National courts thereby became simultaneously national *and* European courts, bound by European law and its primacy just as much as they are bound by German, French, Danish, etc. law.[27]

The Court deduced the theory of direct effect from the Commission's and member states' right to legal action (EEC Treaty, ex-Art. 169) and used it for a subversive, *citizen-oriented* reinterpretation of the pre-eminent application of international law (ibid., Art. 177), whereby the primary application of European law was enabled and prescribed for national courts. Since the creation of a common market "is of direct concern to interested parties in the community," the EEC Treaty is "more than an agreement which merely creates mutual obligations between the contracting states"; rather, it "constitutes a new legal order" that "imposes obligations" and therefore "also confers upon them rights." This emerges from the Preamble, which refers to states *and* peoples, as well as and especially from the "the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens." Therefore, the Court concluded, "community law has an authority which can be invoked by their nationals before [national] courts and tribunals."[28]

The rights claims that accrue to Europe's citizens from direct effect open *up a source of legitimation* of European law that is independent of treaties between states and *arises directly from European citizenship*. As we have known since the famous 1963 European Court decision at the latest, the EU is no longer legitimated only by the treaties of the rulers ratified by national parliaments or peoples, but at the same time by the implementation of unmediated Union citizen rights.

Today "the legal subjects of the Community are not only the member states but also" – at least legally on the same level – "their citizens."[29] Union citizenship "shall complement…national citizenship" (EC Treaty, Art. 17: 1) and provides the Community's "legal personality," which is independent under international law (ibid., Art. 281), with a "double legitimation."[30] One consequence of this is that the existence of subjective rights between the Community and its citizens prohibits the dissolution of the Community "even against the will of all the member states."[31] Since all Europe's citizens in all the member states have rights that they enjoy only *as* citizens of the Union, only the united Union citizenry as the people of the European Community could dissolve it, or would at least have to be asked to *participate* in one way or another (and any non-participation would require justification). The provisions of the recently rejected new Constitution that for the first time regulated the withdrawal of a state from the Union would also have had to be evaluated against this standard; they were unconstitutional to the extent that they allowed this without sufficient citizen participation.

In principle, European law's need for double legitimation is already an implication of the *indigenat* – already prevalent in the classic federal constitutions (American, Swiss, German) – by which the member states reciprocally grant their citizens residency rights as citizens of the federation, the Union, or the Community.[32] It was already contained in the *indigenat*, initially agreed upon only by the states (through a treaty binding under international law and democratically legitimated only the member states and their parliaments). It is the "germ cell of European citizen rights."[33] It sets in motion a "logic of development"[34] that, when its possibilities are used, overshoots merely functional-specific market or economic citizenship just as much as it does democratic legitimation restricted to the nation-state by the "masters of the treaties" (Kirchhof). Since personal freedom of movement aims at equal rights among member-state citizens in other member states that encompasses the whole spectrum of citizen rights, it is something entirely other and much more than merely market freedom or the free movement of goods.[35] It therefore makes it necessary to supplement the legitimation of a European compound of states (Kirchhof) and constitutional courts (Di Fabio) by a *compound of citizens*.

For the reciprocal granting of national rights by the member states – from the early prohibition of discrimination in Article 7 through the later freedom of movement of Article 18, section 1 of the EC Treaty – creates new, common European rights that from the moment of their creation escape the sovereignty and sole disposition of the states that concluded the treaties because they are citizen rights, which only citizens can reciprocally grant one another.[36] This of course distinguishes citizen rights from mere privileges (or protection rights) that a sovereign grants his subjects or uses to bind himself (in the name of a higher power, God, natural law, reason, etc.). European *citizen rights* are thus from the beginning rights of European *citizenship* that originates along with them.[37] One cannot go without the other. European law must therefore at the same time be legitimated by

reciprocal obligations among the states as well as through the reciprocal rights of its citizens. This also clearly separates the subjects of legitimation of the Union from the subjects of legitimation of the member states: the representatives of the European Parliament represent "the peoples of the States brought together in the Community" (EC Treaty, Art. 189: 1), "as a whole" and "not, for instance, as the representatives of the peoples of separate states."[38]

But what does legitimation really mean here? What on the level of subjective rights is a clear case of co-originary legitimation becomes highly unbalanced in its legal organization. Legitimation by law in democratic legal communities has one and only one meaning: it means democratic legitimation.[39] However, law is not only democratically legitimated on the input-side of the legislation process through public discussion, "elections and other votes" (German Basic Law, Art. 20: 2); rather, democratic legitimation encompasses the whole process of norm-production, which occurs on all levels of the concretization and implementation of the legislative will. The democratic legitimation of law extends on the input-side from discussion in pubs to the lobby of the Bundestag, from "nightly phone conversations and political consultations with participants of all kinds,"[40] from sit-ins on the Autobahn to television coverage, from party congresses and election campaigns to parliamentary legislation, and it continues on all levels of the legal edifice: in government directives, administrative decrees, police law, court decisions, specific orders, and the customary local practices of police and prison guards.[41] The legal claims and rights to sue, judicial remedies and direct effect, enabled and protected by informal discussions as much as by demonstrations and freedom of association, that are prescribed for the German Federal Republic in the democratically-organized hierarchy of the law in Article 20, sections 2 and 3 (for which there is so far no normative equivalent in the European Constitution), are important aspects of democratic legitimation that become effective on the output-side of the legislative process. At the latest here *We, the People* take the public stage in order to force decisions ("in the name of the people"[42]) concerning the concretization of law in concrete norms. By making use of our private autonomy as individuals, we can go to court and require judges to open a case that in the end produces a new, concrete norm or modifies, supplements, or confirms an old one.[43]

Following Christoph Möllers, one can call this "individual legitimation" in a broad sense[44] so long as one bears in mind that that individual legitimation through judicial remedies, which can be arbitrarily enforced but must then be publicly justified in trials, only possesses legitimating power because it is an essential moment in the larger process of public or democratic will-formation; it therefore has no independent legitimating function. To this extent, the direct effect of European law not only expands the private autonomy of Union citizens; it is itself already a moment of public legitimation that goes well beyond mere constitutionality. But the claim to democratic self-determination based on the existence of subjective rights cannot be fulfilled merely by individual self-determination in court. To this extent Weiler hits the nail on the head when he

writes: "But you could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and Jews were made citizens they enjoyed direct effect."[45] In fact, in the time of the Roman Empire even a (high-ranking) slave (by order of his master) could make a legal appeal, appearing in court *as if* he were a free man: *…si liber esset ex iure Quiritium* (…as if he were free according to Quiritian law).[46] This is the counterfactual emancipatory power of the norm. But in reality it changes nothing. That is the Janus face of law.

Individual self-determination rights indeed limit domination and concretize legislation, but they do not *ground* the rule-breaking "rule by the ruled."[47] They only work as a moment of this grounding when the laws to be concretized in court were produced democratically. Otherwise the subjective freedom that is to be secured by reciprocal rights of freedom of movement lacks determination through the "democratic procedure" that first defines the "reach of subjective freedom" and thereby makes this freedom reliable, non-arbitrary, and thereby "court-proof."[48] No rule of law [*Rechtsstaat*] without democracy (Habermas). Judicial remedies without public autonomy secure rights that are stolen from the citizens and delivered to the mercy of the democratically unbounded interpretive authority of the court; "the interpretation of these rights without a democratic process organized according to the principle of equal freedom" leads not only to "demanding too much of the legal text to be interpreted, it also overestimates the legitimating possibilities of judicial procedures, which now take decisions without a legislative corrective, the reach of which [far exceeds] the parties to the trial."[49]

(3) Now in the EU there are not only individual self-determination rights that are at once preconditions and moments of democratic legitimation; there are also instruments of direct democratic legitimation: European elections, a European Parliament, etc. But even when supplemented by elections to the European Parliament and the constantly growing but still democratically inadequate parliamentary rights, individual self-determination does not produce *sufficient* democratic legitimation to ground rule. Like the German parliament in the Bismarck era, today's European Parliament is not a ruling parliament but a parliament of subjects – despite the completely lacking subject mentality.[50] The mentality and culture of the Union – from individual representatives to commission leaders – is thoroughly democratic; think only of the somewhat hypersensitive reaction to the Austrian elections that allowed a radical-right party to become the coalition partner of the conservative majority party and its creatures to become ministers. But the democratic organizational power of the Union agencies is relatively small.

If binding EU decisions are to be democratically legitimated – as its treaties have long prescribed – they, like nation-states, must be measured by whether these decisions can actually be traced back along an unbroken and relatively short

legitimating chain to the wills of the affected citizenry. Anything else means that the claim to democratic legitimation (as well as its effective reach) sinks far below the level of the German Basic Law. If this level is also to be maintained under the rule of a *supra*national regional regime like the EU, the citizens of the Union must be able regularly to choose between alternative programs and personnel in "elections and other votes." But today's European parliamentary elections are only pseudo-elections because they do not offer corresponding choices for decision. They are prohibited from doing so by the organizational law of the Union and Community treaties, which are therefore undemocratic.

The pseudo-democracy of European elections is reflected in the structure of the European governmental authorities. The EU has legislative organs in Parliament and the Council of Ministers, an executive organ in the Commission, and a judicial organ in the European Court. But because parliamentary legislation is not binding, in the last instance the Court is destined to be the co- or even the chief legislator to a much greater extent than, for instance, the German Constitutional Court.

Owing to its exclusive right of initiative, its control over the agenda of the Council of Ministers, and its weak parliamentary responsibility (and despite the merely factual integration into horizontal negotiation systems based on power relations[51]), the Commission, together with the Council, has a legislative function that far exceeds the "executive legislation" member-state constitutions allow their governments;[52] above all, this function is not delegated by Parliament and therefore cannot be withdrawn at any time. This is the big difference between executive legislation in the member states and in the Union.

The same holds even more for the European Central Bank, which, like the Council of Ministers, has the entire legislative palette of the Union at its disposal (EC Treaty, Art. 110: 1 and 2) and can impose direct sanctions (Art. 110: 3). While the German legislature can intervene into the monetary policy of the national central bank and even abolish it at any time, the European Parliament and/or the Council of Ministers lack any effective powers of oversight. Only by consensus in weakly legalized (like a national parliament!) occasional meetings can heads of government change or overturn the norms or existence of the central bank. Despite the connection to treaty modifications in national parliaments, which are becoming steadily more notional – as a rule they are approved by majorities like under Saddam Hussein – this resembles collective Bonapartism more than democratic legitimation and legislation.

From the perspective of democratic theory, empowering the central bank or another executive organ is only unproblematic as long as there is a guarantee that all its decisions "are tied to the general political process by a legislative decision for their establishment."[53] This, however, is not the case in the Union. When the empowerment of the executive organ proceeds not from a simple (Parliament, the Council of Ministers) but rather from a constitution-making legislator (the treaties), and thus from the united executive powers, the fundamental condition of the reversibility of democratically legitimated decisions is destroyed and the

executive becomes a *special* legislator that annihilates the democratic *generality* of representative legislation, which consists in the possibility of "taking up any topic" at any time.[54]

Finally, the position of the Council of Ministers within the arrangement of powers corresponds more to the legislative power of the German Bundestag [the more powerful, nationally-elected house] than that of the Bundesrat [the second house, appointed by the states], while the role of the European Parliament is comparable to that of the Bundesrat (with the ability to block legislation in certain cases, so that even the negative overall competence is normatively ruled out). This leads automatically to a structural de-democratization on all levels of the system, while the members of the Council of Ministers have legislative powers on the European level that elude parliamentary responsibility, which is available only on the national level.[55] These gaps in legitimation, which have been torn wide open by the cooperative dominance of the Council and the Commission, are tailor-made for security laws that are problematic for civil rights. In Hegelian terms, such a regime amounts to the consolidation of the rule of the *particular* (the executive) over the *universal* (the legislature). This makes the EU a caricature of a parliamentary system, which would be no (or only a small) problem if there were a sufficient replacement for it in direct "other votes" (German Basic Law, Art. 20:2)[56] or new forms of representation, such as a strong European compound of parliaments.[57]

The growing *influence* – which must be strictly sociologically distinguished from organized *power* – of Parliament changes nothing so long as the relation between the two lines of legitimacy, the states and the citizens, remains unbalanced and there is no real two-chamber system (or functional equivalent). Until then, citizenship and democracy in the Union *and* the member states come up short. The public autonomy of the Union citizenry may be growing much more slowly than the quantity and regulatory reach of democratically deficient Union law, which cuts deep into the flesh of national law and is still only halfway democratically legitimated. In this process, parliamentary democracy and the people who legitimate it are left behind in their native backwaters while governments and elites are ever more tightly and effectively hooked into the multilevel global system on all levels.[58]

The way the European Council of Ministers operates is exemplary. When the German Interior Minister wants to implement an anti-civil rights security policy in the form of laws and biometric passports and cannot get it through the Bundestag or the government, he meets with his fellow interior ministers in Brussels and pressures them – regardless of instructions and on his own, bound only by the European common good as defined by the cooperative circle of police ministers themselves – to make a corresponding European directive, which is then binding on the Bundestag and the German government. Today the passport, tomorrow, after the next big attack (and the next increase in Union authority), torture as an EU directive. The sovereignty of parliament is thereby just as effective annulled as

the directive authority of the German Chancellor, who, along with her government, is responsible to parliament. This long-standing practice has been institutionally consolidated in Europe in nearly all policy areas by a fragmentation of ministries that already recalls the condition of African states. This is not a European phenomenon but a global trend,[59] though in the European Union it is especially effectively organized.

Here it is a matter of *interests* and *relations of domination*. The winner of the game is the political class; the loser, the European citizenry. The path of the political class over supranational (and international) law stabilizes the arbitrary rule of the government over parliament, ministers over their areas of competence, the administration close to the government over the regions, and the political class and its networks of employers associations, bank presidents, union bosses, and political media stars over the people. The new constitution, had it come, would have changed nothing essential about this.

The development of a new transnational ruling class, what Craig Calhoun has called the cosmopolitism of the few,[60] is not a European but a global process, though it is massively reinforced and institutionally stabilized by organizations like the EU. For the European Union is a central, *regional*, intermediate stage in the denationalization and globalization of previously state-centered constitutional law. Like a state, it deals with a multiplicity of functions and functional systems, while *global* organizations like the Security Council, the WHO, the ILO, or the WTO specialize in one or only a few functions. Moreover, it tightly coordinates all state powers, while the Security Council is an independent executive power that at best is loosely connected to international courts or parliamentary meetings of states like the General Assembly. While global institutions do produce individual rights, as a union with its own citizenry whose rights are not shared by other citizens of the world, here too the EU resembles a state. The difference lies not so much in the apparatus of violence and repression still reserved to the state, which European law also asserts, as in its undemocratic constitutional law of checks and balances. It approaches the nation-state above all in its executive power, which is much more agile and global than that of the legislature or the judiciary. Through European and international law, regional and global organizations and networks, it can free itself from the burden of democratic controls and win new room for maneuver. And what one wins, the other – parliaments, the national subjects of legitimation, the place-bound foot-soldiers [*Fußvolk*] – loses.

But the foot-soldiers have caught on to this, and in France and Holland they responded by withholding legitimation. The negative vote of the French and Dutch people, who here for the first time have acted *as* a European people and indeed as the *pouvoir constituant*, have exposed Europe's *legitimation crisis*, long latent and suppressed only by the Union's economic success. For the first time in the history of the *elitist* European project, the imbalance between citizen and statist legitimation became the problem of an egalitarian European public. The *non*-voters may have underestimated the real democratic progress that would

have become possible with the new constitution. Even the effective propagandistic reduction of the immense expansion of private autonomy in the Union to a neoliberal political program, which was a strong reason to vote no, was not even half the truth. There are far more citizen rights in Europe than freedom to compete, and they should be taken seriously by citizens.[61]

But *non*-voters were completely right when they declared the condition of public autonomy in the Union and the, in this respect miserable, constitutional proposal inadequate.[62] A political community or a civil society only has public autonomy if its constitution has not only a full charter of rights, but also an egalitarian system of organizational norms (a "constitutional law of checks and balances") that enables a democratic politics that excludes no one without generalizable grounds – and democratic politics means that the citizens exercise communicative power, can establish a general will through public deliberations that are observable by all (and not accessible only to experts, professional politicians, and political talk show stars), and can regularly choose between political alternatives. The philosophical and political founding fathers of this understanding of the constitution are not Hobbes and Locke, but Rousseau and Kant, Jefferson and Sieyès.[63]

The citizens of France and the Netherlands did nothing other than take their European citizen rights seriously, not only individually, but *democratically*. They used their opportunity to make a real, all-European choice and thereby unleashed a crisis. After the rejection of the constitutional proposal by the *pouvoir constituant*, they stand before a *choice* between constitutionalism and a constitution: either back to a *constitutional* deregulatory regime with the growing executive power of Europe's united political, economic, and media class, or the *constituting* refoundation of the Union as a democratic community with (subsidiarally structured) competence that is in fact derived from the will-formation of the citizenry and is correspondingly normed by the constitution's division of powers. This is also the choice between the exclusion and the inclusion of the periphery. An EU reduced to its neoliberal core would be a "European banana" that arches from London by way of Düsseldorf, Frankfurt, and Milan to Barcelona, ever fatter and shinier, and makes the huge periphery around it look ever dingier and more barren. After the rejection of the nominal constitution by the people, there is only one honest choice: to abolish parliament or to make the intergovernmental structure cede to the parliamentary structure.

(Translated by James Ingram)

NOTES

1. Christoph Schönberger, "Die Europäische Union als Bund – Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas," ms, Freiburg, 2003; see also Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1989), 363ff.

2. Christoph Möllers, "Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa," in Armin v. Bogdandy, ed., *Europäisches Verfassungsrecht* (Berlin: Springer, 2003), 1ff. Möllers calls the second type 'evolutionary.' As we will see, however, this does not correspond to the sociological sense of evolution as a a spontaneous but non-arbitrary development.

3. Hans Peter Ipsen, "Die Bundesrepublik Deutschland in den Europäischen Gemeinschaften," in Josef Isensee and Paul Kirchhof, eds., *Handbuch des Staatsrechts der Bundesrepublik Deutschl*and (Heidelberg: Müller, 1987), §181, RN 32; D. Grimm, "Braucht Europa eine Verfassung?," *Die Verfassung und die Politik. Einsprüche in Störfällen* (München: Beck, 2001), 229f; Angela Augustin, *Das Volk der Europäischen Union* (Berlin: Duncker & Humblot, 2000), 253; Fritz Scharpf, "Regieren im europäischen Mehrebenensystem – Ansätze zu einer Theorie," *Leviathan* 1 (2002): 76; Christian Joerges, "Rechtswissenschaftliche Integrationstheorien," in Beate Kohler-Koch and Wichard Woyke, eds., *Die Europäische Union. Lexikon der Politik*, vol. 5 (München: Beck, 1996), 230; Marcel Kaufmann, "Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäischen Staatenverbund," *Der Staat* 4 (1997): 522, 526f, 534; Marcus Heintzen, "Die 'Herrschaft' über die europäischen Gemeinschaftsverträge," *Archiv des öffentlichen Rechts* 119 (1994): 574ff, 585ff; Claus Dieter Classen, "Europäische Integration und demokratische Legitimation," *Archiv des öffentlichen Rechts* 119 (1994): 240f; idem., "Einführung," *Europa-Recht* (München: dtv, 2001), XIVf.

4. Bverf G 2 Bvl 1/97, 6. Juni 2000; Scharpf, "Regieren im europäischen Mehrebenensystem," 76; Stefan Oeter, "Souveränität und Demokratie als Probleme in der 'Verfassungsentwicklung' der Europäischen Union," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) (1995): 687.

5. Udo DiFabio, *Der Verfassungsstaat in der Weltgesellschaft* (Tübingen: Mohr, 2001), 76, 78f, 96.

6. A. v. Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform* (Baden-Baden: Nomos, 1999), 10, 32f, 38ff. The supranational/supra-state character of the Community was recognized early on: Heinhard Steiger, *Staatlichkeit und Überstaatlichkeit* (Berlin: Duncker & Humblot, 1966).

7. See BverfG 22, 293 (296); ECJ RS. 294/83 Les Verts/Europäisches Parlament 1986, 1357 (1365); see also Grimm, "Braucht Europa eine Verfassung?," 215f, 229f; idem., "Vertrag oder Verfassung?," in D. Grimm, J.J. Hesse, R. Jochimsen, and F.W. Scharpf, eds., *Zur Neuordnung der Europäischen Union* (Baden-Baden: Nomos, 1997), 9; Augustin, *Das Volk der Europäischen Union*, 249, 274; Joseph H.H. Weiler, "The Transformation of Europe," *Yale L. J.*100 (1991): 2407; Jürgen Schwarze, "Die Entstehung einer europäischen Verfassungsordnung," in Schwarze, ed., *Die Entstehung einer europäischen Verfassungsordnung* (Baden-Baden: Nomos, 2000), 464f.

8. ECJ RS. 294/83 Les Verts /Europäisches Parlament 1986, 1357 (1365).

9. Volker Sellin, *Die geraubte Revolution. Der Sturz Napoleons und die Restauration in Europa* (Göttingen: Vandenhoek, 2001).

10. For a systematic perspective of this distinction: Cristina Lafont, "Is the ideal of a deliberative democracy coherent?," unpub. lecture, Chicago 2005.

11. Address on Constitution Day, Washington, D. C., September 17, 1937, §33.

12. The European Court calls this "direction effect"; see H.-P. Ipsen, RN 16, 58–61.

13. On individual aspects of the legitimation of democratic law: C. Möllers, *Gewaltengliederung* (Tübingen: Mohr, 2005).

14. One this function: Niklas Luhmann, "Verfassung als evolutionäre Errungenschaft," *Rechtshistorisches Journal* 9 (1990); idem., *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993), 440ff; idem., *Die Gesellschaft der Gesellschaft* (Frankfurt: Suhrkamp, 1997), 92ff; Marcelo Neves, *Zwischen Themis und Leviathan: Eine schwierige Beziehung* (Baden-Baden: Nomos, 2000), 80ff.

15. Luhmann, "Verfassung als evolutionäre Errungenschaft."

16. Luhmann, *Grundrechte als Institution* (Berlin: Duncker & Humblot, 1986 (1965)).

17. On the distinction between power and influence in this context, see Gary Marks, Liesbet Hooghe, and Kermit Blank, "European Integration from the 1980s: State-Centric *v*. Multi-level Governance," *Journal of Common Market Studies* 34, no. 3 (1996): 341–78.

18. See Christoph Schönberger, *Föderale Angehörigkeit*, habilitation, Freiburg 2005.

19. Möllers, *Verfassungsgebende Gewalt*.

20. On a similar case with reference to the planned European bar: Klaus Lüdersen in *Frankfurt Allgemeine*, Dec. 29, 2003; see also idem., "Europäisierung des Strafrechts und Gubernative Rechtsetzung," *Goldthammers Archiv für Strafrecht* (2003): 71–84. The Constitutional Court has since made a ruling.

21. On the rights of Union citizens: Angela Augustin, *Das Volk der Europäischen Union* (Berlin: Duncker & Humblot, 2000), 30ff, 43ff, 61, 63ff, 67ff, 82ff, 87ff; cf., Grimm, "Braucht Europa eine Verfassung?," 229 ("Verrechtlichung der Staatsgewalt"); Christian Tietje, "Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen der Europäisierung und Internationalisierung," *Deutsches Verwaltungsblatt* 17 (2003): 1081–46; Christian Joerges, "Zur Legitimität des Eurpäischen Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU," in Joerges and Gunther Teubner, eds., *Rechtsverfassungsrecht – Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, Internationale Studien zur Privatrechtstheorie, vol. 4 (Baden-Baden: Nomos, 2003), 183–212; EUI Working Paper LAW No. 2004/04 10ff.

22. Meinhard Hilf and Mathias Reuß, "Verfassungsfragen lebensmittelrechtlicher Normierung," in *Zeitschrift für das gesamte Lebensmittelrecht* (1997): 293ff, 296, 300.

23. Gertrud Lübbe-Wolff, "Globalisierung und Demokratie. Überlegungen am Beispiel der Wasserwirtschaft," *Recht und Politik* 3 (2004): 130–43.

24. This is the central thesis of Jürgen Habermas, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992).

25. On the significance of freedom of movement and voting rights on the constitution of a federal order, see Schönberger, *Föderale Ordnung*, 161f, 288f, 313, 315ff, 324ff, 399ff, 514ff.

26. EuGH Rs. 26/62, Slg.1963, 1 – *Van Gend v. Loos*. See Joerges, *Recht im Prozeß der europäischen Integration*, 9ff.

27. On the social evolution and implementation of direct effect, which was not an immediate consequence of the judgment but rather arose from a complex process of selection through national courts, see Karen Alter, "The European Court's Political Power," *West European Politics* 3 (1996): 458–87.

28. EuGH Rs. 26/62, Slg. 1963, 1 – *Van Gend v. Loos*, 24f.

29. Marcus Heintzen, "Die 'Herrschaft' über die europäischen Gemeinschaftsverträge," *Archiv des öffentlichen Rechts* 119 (1994): 570.

30. Claus Dieter Classen, "Europäische Integration und demokratische Legitimation," *Archiv für öffentliches Recht* 119 (1994): 259f.

31. Möllers, *Staat als Argument*, 404 (with reference to Everling).

32. Schönberger, *Föderale Angehörigkeit*, 307ff.

33. Ibid., 401.

34. Ibid., 323; see also Siofra O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (The Hague, 1996), 21.

35. Schönberger, *Föderale Angehörigkeit*, 407f.

36. Habermas, *Faktizität und Geltung*, 116f, 155ff.

37. On the co-originality of private and public or political autonomy, see ibid., 161f.

38. Schönberger, *Föderale Angehörigkeit*, 517, see also 519ff.

39. For a different view, see Möllers, *Gewaltengliederung*, 25ff.

40. Armin von Bogdandy, "Entmachtung der Parlamente?," *Frankfurter Allgemeine*, May 4, 2005, 8.

41. On the legal edifice (*Stufenbau*), see Hermann Heller, "Der Begriff des Gesetzes in der Reichsverfassung" (1927), *Gesammelte Schriften* (Leiden: Sijthoff, 1971), 225ff; Adolf Merkl, *Allgemeines Verwaltungsrecht* (Vienna/Berlin: Julius Springer, 1927).

42. In Germany, this is formula with which every court decision begins.

43. This does not refer to the output-legitimation of political scientists, which simply includes the effectiveness of the regime in economic and security matters, but rather the possibility of citizens to intervene at the end of the legislative process in the concretization of norms. On its meaning for political science, which has nothing to do with democracy, see F. Scharpf, *Regieren in Europa – Effektiv und demokratisch?* (Frankfurt: Campus, 1999).

44. Möllers, *Gewaltengliederung*, habilitation, Heidelberg 2003.

45. J.H.H. Weiler, "To be a European citizen – Eros and civilisation," *Journal of European Public Policy* 4, no. 4 (1997): 495–519, 503.

46. Alfons Bürge, *Römisches Privatrecht* (Darmstadt: Wiss. Buchges., 1999), 174.

47. Möllers, "Der parlamentarische Bundesstaat – Das vergessene Spannungsverhältnis von Parlament, Demokratie und Bundesstaat," *Föderalismus – Auflösung oder Zukunft der Staatlichkeit?* (Munich: Boorberg, 1997), 97.

48. Möllers, *Gewaltengliederung*, 230, 232, on the democratic deficit of transnational civil rights: 235, 411. See also on the WTO: von Bogdandy, "Verfassungsrechtliche Dimensionen der Welthandelsorganisation," *Kritische Justiz* 34, no. 3 (2001): 271, 273.

49. Möllers, *Gewaltengliederung*, 231.

50. Schönberger, *Das Parlament im Anstaltsstaat* (Frankfurt: Klostermann, 1997).

51. Moravcsik, *Choice for Europe*.

52. Armin von Bogdandy, *Gubernative Rechtsetzung* (Tübingen: Mohr, 2000).

53. Möllers, *Gewaltengliederung*, 114f.

54. Ibid., 170.

55. Ibid., 223; for a comparison of the EU to the US, where this gap in constitutional law is closed: 331.

56. Heidrun Abromeit, *Ein neuer Minimalismus*, ms., Frankfurt/Darmstadt 2002.

57. G. Grözinger, "Die 'Vereinigten Parlamente von Europa' und weitere Überlegungen zur subsidiären Demokratie," in C. Offe, ed., *Demokratisierung der Demokratie* (Frankfurt: Campus, 2003), 211–31.

58. Instructive: Klaus Dieter Wolf, *Die neue Staatsräson* (Baden-Baden: Nomos, 1999).

59. On the global trend toward the fragmentation of the state, see also John W. Meyer's observations in *Weltkultur* (Frankfut: Suhrkamp, 2005), 176 and passim.

60. Craig Calhoun, "Cosmopolitism and Belonging," paper presented to the 37th World Congress of the International Institute of Sociology, Stockholm 2005.

61. See Ronald Dworkin, *Taking Rights Seriously*, rev. ed. (Cambridge, MA: Harvard University Press, 2005).

62. On the 'co-originality' of public and private autonomy, see Habermas, *Faktizität und Geltung*.

63. Ingeborg Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt: Suhrkamp, 1992); Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie VI* (Berlin: Duncker & Humblot, 1997); Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, MA: MIT Press, 2005); as well as Hannah Arendt, *On Revolution* (New York: Penguin, 1962).

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