



DEMOCRACY AT UNION LEVEL: AN OPEN QUESTION

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What are the many elements that shape the multifarious identity of democracy within the EU? After examining the competing perspectives on the sources of legitimacy of the EU – concluding that the principles of Union legitimacy are different and none of them prevail over the other – this paper will focus on the question of the so-called 'democratic deficit' in the EU. In spite of theories maintaining that democracy in the EU is fully achieved, or that reinforcing democracy is unnecessary or even dangerous for the EU, it will demonstrate that a democratic deficit does exist as a consequence of various factors, and is related to the lack of a European demos. The European Constitution first, and the Lisbon Treaty afterwards, could have provided some remedies. Yet, one can not overlook the fact that the Reform Treaty does not make much of an attempt to solve the problem of the EU's democratic deficit and even dumps some of the not ratified 2004 Treaty's good achievements. As the existing literature generally fails to consider the Lisbon Treaty from this particular point of view, this paper will provide an analysis of some articles aimed to underline their shortcomings in terms of democracy reinforcement.

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1. Introduction

The demand for a reinforced 'eurodemocracy' is an age-old question, traditionally bound to that of the role of the European Parliament in the EU's institutional framework. Already in the far off 1979 – the year of the first election of the MEPs – the European Court of Justice¹ urged the parliamentarisation of the decisional procedures, thus regarding the lack of parliamentary consultation before the adoption of a new Council Regulation as an infringement of the democratic principle². Since then, the indispensable presence of the European Parliament in the decision-making process as a guarantee of the correct functioning of institutional checks and balances and as a vehicle of popular participation has been the constant *refrain* of the ECJ's jurisprudence.

The Court revolved – at least at the beginning – around the classical theory of representative democracy embedded in the constitutional traditions common to Member States, yet pointed out that the peculiar nature of the Community would not require a separation of powers, but an institutional balance based on mutual cooperation. This is why in 1987, just after the coming into force of the European Single Act, the Court³ invalidated the Council Directive 89/428/EC because it was adopted by unanimity according to article 130 EEC and not by the cooperation procedure established in the new article 100A: deepening Community integration through a reinforcement of democratic principles seemed to the Court much more relevant than respecting institutional competences. This 'alliance' between the Court and the Parliament reached its climax in 1990⁴, when the Court admitted for the first time the capacity of the European Parliament to bring an action for annulment, in spite of article 173

¹ *SA Roquette Frères vs. Council*, 29/10/1980 (C-138/79). *Maizena GmbH vs. Council*, 29/19/1980 (C-139/79).

² About the *Roquette Frères* judgement and the other ECJ decisions here mentioned: Ninatti, 2003.

³ *Commission vs. Council*, 11/06/1991 (C-300/89).

⁴ *European Parliament vs. Council*, 22/05/1990 (C-70/1988).

EEC, «provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging breach of them».

The Maastricht Treaty – establishing the European citizenship, introducing the legislative codecision and generally expanding the EP's role – represents a turning point. In 1993, the *Bundesverfassungsgericht* posed the question, in the famous *Maastricht Urteil*⁵, of whether the vertical shift of competences from Member States to a supranational level could be contrary to the democratic principle, the Council being the real legislator and the European Parliament being basically a consultative body. Following this frequently criticised judgement, the debate on the source of legitimacy in the EU, on its nature and on how to reinforce the democracy within the EU obtained new momentum.

The dispute among the advocates of different theories went on for years and caught fire at the beginning of this century, in connection with the long process that brought the signature, in 2004, of the Treaty establishing a Constitution for Europe and its unfortunate end. Presently, while we are anxiously awaiting the entry into force of the Reform Treaty signed in Lisbon in December 2007, hoping that the result of the referendum in Ireland will not create an obstacle to this process, the dispute seems soothed, maybe fearing that it could jeopardise the ratification of the new Treaty in some Member States.

However, some general considerations about the complex nature of legitimacy and democracy – or lack of democracy? – in the EU ought to be made. Therefore, after examining the competing perspectives on the sources of legitimacy of the EU – concluding that the principles of Union legitimacy are different and none of them prevails over the others – this essay will focus on the question of the so-called 'democratic deficit' in the EU. In spite of those theories

⁵ BVerfG 89, 155.

maintaining that democracy in the EU is fully achieved, or that reinforcing democracy is unnecessary or even dangerous for the EU, it will demonstrate that a democratic deficit does exist as a consequence of various factors, and is related to the lack of a European demos. The European Constitution first, and the Lisbon Treaty afterwards, could have provided some remedies. Yet, one can not overlook the fact that the Reform Treaty does not make much of an attempt to solve the problem of the EU's democratic deficit and even dumps some of the not ratified 2004 Treaty's good achievements. As the existing literature generally fails to consider the Lisbon Treaty from this particular point of view, this paper will provide an analysis of some articles aimed to underline their shortcomings in terms of democracy reinforcement.

2. Legitimacy of the EU: different approaches

The academic literature has explored the different sources of legitimacy in the EU and their political implications for a long time, expressing opposite tendencies that can be summarised – maybe with excessive simplicity – as follows⁶. One approach maintains that the legitimacy of the EU – as clearly stated by the German Constitutional Court in its famous decision on the Maastricht Treaty – is indirect (or derivative) and depends on the legitimacy of its Member States, on its respect for their sovereignty and on its ability to serve their purpose. This is because the treaty-making power belongs to the Member States and allows them to shape the extent of the EU competences at their own will. According to this view, in which the respect of the subsidiarity principle by European institutions plays a central role, democracy is respected as long as parliamentary control on governative acts and political choices works well at a national level, inside each Member State.

Another theory, emerging from the dominant ECJ jurisprudence, lays the foundation of legitimacy in a combination of Member States' will, expressed by

the Council, and popular will, expressed by a directly elected European Parliament. This dual legitimacy – a vision not immune to federalist suggestions – has its core in the concept of European citizenship, to be expressed both in a representative and in a participative vision of democracy, and implies that the powers of the European Parliament should be implemented, as well as the system of checks and balances between the carriers of those two legitimacy claims. However, this view seems not to give enough space to the vocation of the European Commission for gaining credit as the main EU governing body.

This last consideration gives way to the theory of the ‘technocratic legitimacy’ (Majone, 2003)⁷, according to which what matters is mainly the ability of the European non-majoritarian institutions – the European Commission, the European Court of Justice and the European Central Bank – to improve the welfare of the overwhelming majority of citizens. In fact, the progressive development of non-majoritarian institutions is a feature of all liberal democracies, showing that reliability, specialisation, equity and independence are often considered more important to obtain certain scopes than direct responsibility towards the electorate.

Focusing on the rights of citizens as the base of democracy and on the fact that problem-solving in the interest of citizens cannot be effective without a normative agreement on how groups and individuals should be treated, some point out the necessary observation of prescribed procedures as a source of legitimacy. This ‘procedural legitimacy’ implies that, although authorisation by Member States was the original source of the EU’s powers, the Union can now evolve in an autonomous direction because of the capacity of the rights guaranteed by the Union to generate new rights and the social approval for the enforcement of those rights even against States.

⁶ About the plurality of legitimating principles in the EU and the ‘creative disagreement’ on them: Lord and Magnette, 2004.

⁷ Also Giuliani, 2004 outlines that democracy in the EU is not guaranteed by procedures, but by consensual agreement among different public and private players influencing the decision-making.

Obtaining the *reductio ad unum* of such different attitudes is impossible because they are based on four irreconcilable criteria (Majone, 2003): the criterion of analogy between the EU and national institutions, according to which the democratic deficit in the EU is a result of an asymmetry between the two systems; the criterion of majoritarian democracy (Westminster model), implying that democracy entirely arises from the Parliament and is bound to the progressive implementation of the EP's powers; the criterion of derivative legitimacy, focusing on the role of democratic institutions of national States as leaders of the European integration process; finally, the social criterion, according to which democracy in the EU is lacking because of the too limited involvement of the EU in the social field. Each criterion can partly explain some of the reasons why a democratic deficit exists in the EU, but is also inadequately representative of the whole question, thus laying itself open to some criticism.

It is therefore clear that none of the foregoing vectors of legitimacy exists in a pure form in the EU: they coexist in a peculiar mix of conflict and complementariness that suffers from the lack of any norm arranging them into a hierarchy. Nevertheless, «the degree of uncertainty that is deliberately maintained around the principles of Union legitimacy can be seen as a deficiency insofar as it inhibits the formation of a common identity, but as a virtue insofar as it feeds a continuous process of constitutional deliberation» (Lord and Magette, 2004: 198).

3. Does a democratic deficit exist?

Democracy cannot exist without a continuous relationship between public policies and citizens; in other words, to be truly democratic organisations have to provide for those instruments aimed to deliver decisional powers from the bottom to the top, thus allowing people to influence decision-making processes (Ninatti, 2003: 575). However, multifarious sources of legitimacy in the EU and an absence of any hierarchic order among them determine strong disagreement

among academics and EU experts about the existence of a deficit in the level of democracy in the EU and about its causes and consequences. This brief essay is not the proper place to discuss the different points of view in detail. Some of them, however, are worthy of an outline.

First of all, although most scholars agree on the existence of the so-called democratic deficit⁸ – yet have different theories to explain its nature – a minoritarian part of them considers the question irrelevant. Moravcsik, for instance, maintains that «constitutional checks and balances, indirect democratic control via national governments and the increasing powers of the European Parliament are sufficient to assure that the EU policy-making is, nearly in all cases, clean, transparent, effective, and politically responsive to the demands of European citizens» (Moravcsik 2004: 14). According to his view (Moravcsik, 2004: 15-21), the threat of a European superstate is a myth because of the multiple constraints to which the EU is subjected. First of all, «the EU's current activities are restricted by Treaty and practice to a modest subset of the substantive activities pursued by a modern state»; the EU's competences do not include, as it happens in Member States, «taxation and the setting of fiscal priorities, social welfare provision, defence and police powers, education policy, cultural policy, non-economic civil litigation, direct cultural promotion and regulation, the funding of civilian infrastructure, and most other regulatory policies unrelated to cross-border economic activity». Above all, «the EU has no police, military force, or significant investigatory capacity – and no realistic prospect of obtaining any of these». Moreover, the EU implements very few of its own regulation and it couldn't be otherwise, given the extraordinarily small size of its bureaucracy and the EU's restricted capacity in the fiscal domain. Finally, «EU policy-making is constrained by institutional checks and balances, notably the separation of powers, a multilevel structure of decision-

⁸ Majone, 2003 and Giuliani, 2004 outline that paradoxically the European Union would not accept itself among its members because of its insufficient level of democracy. Majone (2006: 7) also argues that «the functionalist (or Monnet) approach to European integration taken in the 1950's entails a fundamental trade-off between integration and democracy. The logic of the approach is such that any time a choice between integration and democracy has to be made, the decision is, and must be, always in favour of integration».

making, and a plural executive». Moravcsik does not overlook the fact that direct democratic accountability in the EU is weak because of the weakness of the European Parliament, due to the absence of real European political parties and of a proper political contraposition; yet, he believes that «accountability is imposed, increasingly not through direct participation in majoritarian decision-making, but instead through complex systems of indirect representation, selection of representatives, professional socialisation, *ex post* review, and balances between branches of governments». To him, in conclusion, European elections are not the main form of democratic accountability also because «a more important channel lies in the democratically elected governments of the Member States».

In spite of Moravcsik's theories, a vast majority of scholars seems convinced that democracy in the EU is indeed deficitarian. Among them, Halberstam (2005: 790-1) clearly expresses one of the most shareable critics to Moravcsik's view: «the claim that the Union's democratic process can be thin because the policies of the Union merely regulate (or deregulate) cross-border economic activity and thus do not regulate, or spend money on, welfare, culture, and security, is dubious. Like social welfare policy, many European Union policies directly or indirectly effect a significant redistribution of wealth» and «the off-budget redistribution of wealth conducted at European level is certainly worthy of democratic attention». It is also not true that the EU's competences do not include security issues, police measures and social and cultural policies: many examples (Halberstam, 2005: 792-4) can be cited to demonstrate their growing weight in the European regulatory agenda and their still too scarce democratic legitimation. In fact, the Europeanisation of policy-making carries a real risk of undermining democracy, because «moving policies to the European level of governance extracts them from the broader domestic context of formal and informal arguing and bargaining. Any resulting absence (or dilution) of formal and informal mechanisms of democratic participation and control at the European level cannot be cured by the accountability of the Member States'»

executive branches. And Member State government participation in the European lawmaking process through the Council cannot make up for such loss of democratic legitimacy elsewhere» (Halberstam, 2005: 795)⁹.

If the shift of policy-making from a national to a supranational level represents a peril for democracy, some words ought to be put in to discuss briefly the question of the role of the European Commission and its political accountability¹⁰. Although the Treaty tends to depict it not as a political, but as a technical *super partes* institution, the Commission is actually deeply politicised, in the sense that it reflects national governments' preferences and not a European political majority. As Pasquino (2002: 38) points out, «the very important decisions that lead to the formation of the Commission are entirely in the hands, minds, and willingness of the heads of state and government. The Commission's legitimacy derives from a body that has not been mandated to do so and is not bound by any commitments taken on with its electorate». In this situation, any further shift of competences to Brussels would worsen the gravity of the democratic deficit. Yet, in the last years the Commission has growingly shown ambitions to being acknowledged as a real European government, whose competences should include foreign policy and economic and fiscal coordination¹¹. However such a role is incompatible with its supposed nature of a technical body, as it implies a democratic political legitimation that is presently too weak, despite the intervention of the EP in the President's and Commissioners' nomination. In fact, possible developments of the current model of governance according to the Commission's ambitions could be hazardous, as they could lead to the marginalisation of the government-parliament decisional circuit in favour of a decision-making system dominated by the interaction of different public and

⁹ Yet, he remarks also that «the Europeanisation of public policy has a tremendous potential to enhance democracy as well. For example, the Union might add a new dimension of democratic engagement to policy processes that have otherwise been monopolised by a constellation of formal and informal interests in a non-transparent equilibrium of power». In fact, the existence of a democratic deficit in the EU does not mean that the European institutions do not contribute positively to the democratic life of Member States: this *prima facie* paradox is outlined by Majone, 2003: 31.

¹⁰ About the role of the European Commission: Bianco 2005; Gerkrath, 2006: 379-382; Kadelbach, 2006: 386; Majone, 2003: 27-31; Valvo, 2004.

¹¹ This attitude emerges from many Commission's White Papers, among which: *Reforming the Commission*, COM(2000) 200, March 2000; *European Governance*, COM(2001) 428, July 2001.

private centres, leaving little space for popular sovereignty. Moreover, should the Commission be recognised as a real executive body similar to a national government, it should relinquish its privilege of being the sole subject entitled to present legislative drafts, which cannot be preserved in a parliamentary system based on the separation of powers.

But can the European Union turn into a parliamentary system? Currently, it seems an unattainable goal, and maybe also an unadvisable one, as it would imply a substantial disruption of the EU's institutional equilibrium, which is not based on the separation of powers, but on the representation of interests: in fact, according to the model of the so-called 'mixed government', each European institution is representative of a peculiar interest – that of Member States (Council), that of the European peoples (Parliament), the EU general interest (Commission) – and the prevalence of one of those interests above the others in the different domains where the EU is involved determines the law-making process and its results in that field (Majone, 2003: 23). The system established by the Treaties cannot be mistaken either for an international organisation, or for a State confederation, or for a federal system: the EU is a *tertium genus*, featuring a unique and complex combination of supranational powers and intergovernmental cooperation. Moreover, the EU is not likely to turn into a confederation or a federation by strengthening the bonds among its Member States, not even in the future: it is, and will stay, a peculiar entity that has been defined as a *consortium* or a *condominium* (Schmitter, 2000: 33), which cannot be compared to a nation-state – not even to a federal one – because it has developed an ineliminable dissociation between territorial domain and functional competences, in the sense that EU authorities cannot exert coercive powers on a delimited territory as national authorities do (Schmitter, 2000: 30). The EU is not a system of parliamentary sovereignty but one of separation of powers, constrained by exceptional checks and balances among multi-level institutions; political authority and discretion is thus divided horizontally amongst the Commission, Council, Parliament and Court, and

vertically amongst local, national and transnational level (Moravcsik, 2008: 173). Therefore, the EU's *sui generis* nature prevents us from making use, while debating on the problem of its insufficient level of democracy, of those political and juridical categories which are normally applicable to national States¹²

Anyway, should one espouse the idea that the only way to eliminate the democratic deficit in the EU would be that of reinforcing the EP's political role, the Parliament being the only elected body and thus the only authentically representative one¹³, one should reflect on the actual EP's capability of being considered the source of democratic legitimacy of a European executive body worthy of that name¹⁴. In fact, although its weight as co-legislator is doomed to increase after the entry into force of the Lisbon Treaty, the Parliament's legislative role will still be too limited in many crucial sectors, like foreign, security and defence policy, monetary issues, fiscality and social security. Added to these is the lack of any power to determine the sources of public revenues constituting the EU budget. Moreover, the European Parliament has – and will have – a limited possibility to have recourse to the Court of Justice and to influence the Commission's legislative drafts. Finally, the lack of European political parties¹⁵ in the proper sense of this word and that of a common electoral procedure cause the EP normally to be perceived as scarcely representative and too vaguely politically oriented, which is probably one of the reasons for the citizens' electoral disaffection¹⁶. For all these reasons, the European Parliament absolutely does not seem capable of legitimating any European government according to a model of parliamentary democracy.

¹² Giuliani (2004: 348) refers to this incorrect, but widespread tendency as "imperfect benchmarking".

¹³ Although Moravcsik (2008: 171) points out that «the EP is institutionally weaker than its national counterparts, and its elections are decentralised, apathetic affairs, in which a small number of voters act on the basis of national rather than EU concerns».

¹⁴ Some (e. g. Pasquino, 2002; Follesdal and Hix 2006; Hix, 2008) contend that one of the hypothetical options for the future of the European Union, to the extent of reducing the democratic deficit, could be to turn it into a neo-parliamentary or a neo-presidential system, as this would help provide an institutional mechanism for generating debate and contestation about politics within the EU.

¹⁵ About the European political groups and the perspective of their evolution into European parties: Ciancio, 2007.

However, despite their scarce knowledge and awareness regarding the European Parliament emerging from Eurobarometer surveys¹⁷, many EU citizens believe it should have the greatest decision-making power within the EU¹⁸ and that it should play a more important role than it presently does¹⁹. They also widely describe the EP as ‘democratic’²⁰, whereas only a minority of them regards it as ‘technocratic’²¹ or ‘inefficient’²² or has a generally negative perception of it²³. The perceived democratic nature of the EP also emerges from the list of priorities assigned to it: in fact, the key-value the European Parliament should defend as a matter of priority seems to be the protection of human rights in the world²⁴, followed by the promotion of gender equality²⁵. It is clear, then, that the European Parliament can be considered as an institution that is respected by citizens, and it is possible to talk of a form of public support for the important position that the European Parliament is seen to occupy, and which the public would like to be strengthened in the future. This is why any serious theory about how to democratise the EU cannot disregard a careful reflection on the EP’s role.

Anyway, it is a fact that EU decisions affect Member States’ sovereignty and thus citizens’ lives. Therefore, given the difficulty of guaranteeing true and intense popular participation through the European Parliament in all domains of the EU’s interest, a remedy against the scarce democratic legitimation of the EU decision-making process has been found in enhancing the influence national parliaments can exert on it. Currently, as in the protocol annexed to the

¹⁶ Majone 2006:6, points out the negative correlation between the constant decrease in voters’ turn in European elections and the expanding powers of the EP, attempting an explanation of this tendency based on the de-legitimizing and destabilizing effects of decades of poor economic performance.

¹⁷ According to a recent Eurobarometer survey concerning the European Parliament, published in March 2008, 48% of the people polled feel that they are “fairly badly informed” about the EP’s activities, and 25% “very badly informed” (Special Eurobarometer 288/Wave 68.1, p. 24).

¹⁸ According to the above mentioned Eurobarometer survey (p. 36), 47% of the people polled share this opinion.

¹⁹ According to the above mentioned Eurobarometer survey (p. 41), 48% of the people polled share this opinion.

²⁰ 69% of the people polled, according to the above mentioned Eurobarometer survey (p. 51).

²¹ 38% of the people polled, according to the above mentioned Eurobarometer survey (p. 51).

²² 32% of the people polled, according to the above mentioned Eurobarometer survey (p. 51).

²³ Only 15% of the people polled (EU average), according to the above mentioned Eurobarometer survey (p. 57).

²⁴ 58% of the people polled think so, according to the above mentioned Eurobarometer survey (p. 62).

²⁵ 41% of the people polled, according to the above mentioned Eurobarometer survey (p. 62). Other values obtained far lower percentages (36% to 17%).

Nice Treaty, national parliaments receive all the Commission's legislative drafts from their governments and can count on six weeks before the draft is discussed in the Council to examine it and to address suggestions and indications to their governments, according to national procedures²⁶. This process is meant to improve control mechanisms through which national parliaments supervise national governments' political choices on behalf of citizens, thus ensuring their democratic legitimation²⁷.

However, after the entry into force of the Lisbon Treaty, as already in the 2004 Treaty establishing a Constitution for Europe²⁸, according to art. 12 national parliaments will receive any draft European legislative act and will have plenty of time²⁹ before a draft is placed on the Council agenda to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether it complies with the principle of subsidiarity; should a consistent number of such opinions³⁰ state non-compliance with such a principle, the draft shall be reviewed³¹; should any national parliament remain unsatisfied, it will urge its government to bring to the Court of Justice an action on the grounds of infringement of the principle of subsidiarity. This kind of control will also apply to legislative initiatives submitted in the domains of judicial cooperation in criminal matters and police cooperation³². Also, national parliaments will be informed of the content and results of the evaluation performed by the Commission and Member States of the implementation of the Union policies referred to the areas of freedom, security and justice³³, as well as

²⁶ Protocol n. 9 on the role of national parliaments in the European Union, annexed to the Treaty on European Union.

²⁷ According to Gerkrath (2006: 376) and Kadelbach (2006: 386), not only the role of the EP is deficitarian in the decision-making process, but also national parliaments have difficulties in influencing their governments' political positions.

²⁸ Protocol n. 1 (on the role of national parliaments) and 2 (on the application of the principles of subsidiarity and proportionality) annexed to that Treaty and confirmed by the Lisbon Treaty.

²⁹ Six weeks according to the Treaty establishing a Constitution for Europe, eight weeks according to the Lisbon Treaty.

³⁰ Each national parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral parliamentary system, each of the two chambers shall have one vote. Where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments, the draft must be reviewed. This threshold shall be a quarter in the case of a draft European legislative act submitted on the area of freedom, security and justice.

³¹ Such procedure is known as "early warning system".

³² Art. 69 of the new TFEU (Lisbon).

³³ Art. 70 of the new TFEU (Lisbon).

of the evaluation of Eurojust's and Europol's activities³⁴. Even the standing committee in charge of ensuring that operational cooperation on internal security is promoted and strengthened within the Union shall keep national parliaments informed of its proceedings³⁵. According to other provisions of the Treaty, national parliaments will also be notified of any application for membership submitted by third countries³⁶, informed on any proposal to amend the Treaties³⁷ and entitled to send delegates to the Convention committed to the examination of such proposals³⁸. Moreover, a single national parliament will be able to oppose any decision of the Council referred to in the second subparagraph of art. 81 TFEU (judicial cooperation in civil matters), and to block any Council decision authorising the Council itself to act by qualified majority in areas or cases where the Treaties prescribe acting by unanimity³⁹. Finally, the European Commission shall draw national parliaments' attention to proposals based on the application of the so-called 'flexibility clause'⁴⁰.

The involvement of national parliaments in the decision-making at Union level is a very delicate question⁴¹ because, although it is true that a better cooperation between national parliaments and national governments in the European decision-making process would lead to a better and easier implementation of EU decisions by Member States, it is also true that it would surely slacken the decision-making process and may lead to a reinforcement of national particularism. It has been outlined, in addition, that «even if a national parliament successfully challenges a European decision in which its government has been engaged, it is unlikely to sway the position of other governments. Hence, at best the role of national parliaments is a negative one of blocking an agreement, while they have no real ability to contribute towards a

³⁴ Art. 85, par. 1, and art. 88, par. 1, of the new TFEU (Lisbon).

³⁵ Art. 71 of the new TFEU (Lisbon).

³⁶ Art. 49 of the new TEU (Lisbon).

³⁷ Art. 48, par. 2, of the new TEU (Lisbon).

³⁸ Art. 48, par. 3, of the new TEU (Lisbon).

³⁹ Art. 48, par. 7, of the new TEU (Lisbon).

⁴⁰ Art. 352, par. 2, of the new TFEU (Lisbon), substituting article 308 TEC currently in force.

⁴¹ On the role of national parliaments in the EU decision-making process: Allegri, 2005 (and its bibliographic quotations).

constructive solution» (Crum, 2005: 458). In conclusion, making national parliaments a vehicle of popular representation within the EU – thus giving space to a nationally oriented form of representation – would frustrate the European Parliament’s ambitions of becoming a true representative body of the European people. This would not make the EU more democratic in itself, but would contribute to setting a pattern where democracy in the EU results from the sum of Member States’ democracies⁴².

4. No democracy without a *demos*

Indeed, a subject of crucial importance is which kind of democratic pattern suits the EU best. Up to now, no definite choice has been made, but the EU has trodden warily on various paths, without a clear direction. Yet, the dilemma can be reduced to a choice between two macro-models, as follows.

On one hand, the idea of a ‘Union of democracies’, according to which democracy in the EU results from the truly democratic nature of its Member States and can be reinforced as long as national parliaments are made opportunely aware of the EU decisional processes and are enabled to influence them, not only by conditioning their governments’ position within the Council of Ministers, but also through direct intervention in the EU legislative procedures. Supporters of this model are convinced that the more national parliaments are involved in the European decision-making process as watchdogs on behalf of those (national) citizens they represent, the higher the standard of democracy the EU will perform. Yet, this view implies a certain mistrust of the European Parliament, probably seen as unable or unwilling to guarantee the respect of the subsidiarity principle by itself and too weak in defending citizens’ interests.

On the other hand, the idea of a ‘democratic EU’ is shared by those who are convinced that any effort has to be made in order to implement the current system of institutional checks and balances, to ensure the judicial protection of fundamental rights at a supranational level and to encourage European citizens’

⁴² Many scholars have different opinions about the involvement of national parliament in the EU institutional framework. Among them, Villani (2005: 659) maintains that control powers given to national parliaments assure that decisions are taken as closely as possible to citizens, thus implementing the principle of representative democracy.

participation. Such efforts should be aimed to construct a peculiar model of democracy, fully based on the notion of European *demos*, without which democracy sounds like an empty word.

Then, the core question is: does a European *demos* exist?

Habermas, for instance, criticises the 'no-*demos*' thesis: «A nation of citizens must not be confused with a community of fate shaped by common descent, language and history. This confusion fails to capture the voluntaristic character of a civic nation, the collective identity of which exists neither independent of nor prior to the democratic process from which it springs. Such a civic, as opposed to ethnic, conception of 'the nation' reflects both the actual historical trajectory of the European nation-states and the fact that democratic citizenship establishes an abstract, legally mediated solidarity between strangers» (Habermas, 2001: 15-18). In order to favour this painful process of abstraction, leading from local and dynastic identities to national and democratic ones, Habermas would suggest three remedies: a referendum on the European Constitution, arousing a European-wide debate and having a catalytic effect on the formation of a European civil society; a different attitude of national media, which should cover the substance of relevant controversies in the other countries, so that all the national public opinions converge on the same range of contributions to the same set of issues, regardless of their origins, thus creating a European-wide public sphere⁴³; the enhancement of what Europeans have in common (e. g. Christianity, rule of law, human rights), because a European public sphere needs to be embedded in a political culture shared by all.

My opinion is, by contrast, that currently a European *demos* does not exist, although different European peoples partly sharing a common cultural heritage do (Fragola, 2006: 432). The absence of common language, media, political culture, and the growing size of the EU, all make a genuine EU public sphere

⁴³ On the inadequacy of mass media to form a European public opinion: Kadelbach, 2006: 387. On the European public sphere deficit as a specific case of the general malaise of democracy: Trenz, 2008.

unlikely (Bellamy, 2006: 733)⁴⁴. Europeans don't seem to feel they share a common identity (Majone, 2003: 31), and don't seem ready to make good use of the opportunities for participatory democracy given by the Lisbon Treaty⁴⁵, also because of the inconsistency of European public opinion (Fragola, 2006: 432). In fact, despite the importance of the notion of transparency emerging from the Treaties⁴⁶, in order to promote good governance and to ensure the participation of civil society, citizens tend to have an idea of the EU as a band of mysterious and powerful technocrats (Giuliani, 2004: 432), both because national governments are often ready to lay on the EU the blame for their own unachieved goals, and because national media normally dedicate little space and poor care to the coverage of EU-related issues or tend to emphasise the failures of the EU system – to make the headlines! – rather than its good features (Fragola, 2006: 433). Moreover, the opacity of decision-making processes at the European level, and the scarce opportunities for any participation in them, cause mutual distrust among citizens.

As Simon Hix (2008: 76-86) points out, there is no electoral contest for political leadership at the European level or over the direction of the EU policy agenda. This happens for several reasons, as follows: the Commission President is not appointed through an open and competitive battle between politicians, but through top-secret negotiations; national elections are never fought on European issues, but only on domestic themes; EP elections are no more than second-order national elections; European referendums allow voters to express

⁴⁴ Bellamy, 2006 maintains that theories aimed to prove that the democratic deficit in the EU is not problematic are flawed. In fact, those who claim that a European consensus on rights can offer the basis of citizen allegiance to a EU-wide democracy, thereby overcoming the *demos* deficit, underestimate the existence among people of an ineliminable disagreement about the nature of such rights. Those who argue that so long as delegated authorities enact policies that are 'for' the people, then the absence of institutional forms that facilitate democracy "by" the people are unnecessary, do not consider that EU regulations have significant redistributive effects with identifiable winners and losers, and that experts have an unfortunate tendency to overlook issues that are legitimate worries for ordinary folk.

⁴⁵ According to Moravcsik 2006a: 23-25 «the most plausible account of why European citizens fail to participate in the EU politics, even when institutional opportunities abound, is simply because the issues dealt with by the EU are far less salient than issues dealt with by national governments. [...] The most salient issues, notably those involving fiscal outlays, remain firmly national». This theory can be partly subscribed to, though it has to be outlined that the issues dealt with by the EU are not less salient than national ones, but often incorrectly perceived as less salient by uninformed citizens.

⁴⁶ Actually, the 2004 'constitutional Treaty' contained art. I-50 entitled 'Transparency of the proceedings of Union institutions, bodies, offices and agencies'. The content of this article has been transferred (with some amendments) to

opinions only on specific and isolated issues and are not very effective at connecting citizens' views on EU-level themes. The result is that, without a competition for political power, the EU is closer to a form of enlightened despotism than a genuine democracy .

Because of these reasons, in the new TEU – as it was in the 2004 'constitutional Treaty' – the content of the principle of participatory democracy (art. 11) is poor and weak, as it is fundamentally based on dialogue and consultation and doesn't include 'strong' participatory powers for citizens, like the right to promote referendums or to form European political parties (Valvo, 2004: 32). It is not even clear who is the primary beneficiary of such a principle, as art. 11 mentions citizens, representative associations and civil society. It is clear, however, that participation is meant by the Treaties as a collective rather than individual opportunity, although article 24 TFEU rules that every citizen has the right to petition the European Parliament, to apply to the Ombudsman, and to write to any of the institutions, bodies, offices or agencies of the Union in one of the official languages, receiving an answer in the same language. Moreover, par. 4 of art. 11 TEU does not make clear if European citizens (no less than one million) will be able to predetermine in detail the contents of proposals they will invite the Commission to submit, or if the definition of such contents will be up to the Commission itself (Villani 2005: 661)⁴⁷. The vagueness of the principle of participatory democracy can be interpreted as a sign of mistrust of the European people or even as a sign of its inconsistency: in both cases, future perspectives for European democracy look gloomy.

Even the principle of representative democracy, expressed in art. 10 of the new Treaty on European Union, has two souls, reflecting the ambivalence of the notion of democratic accountability. In fact, on one hand it asserts that citizens

art. 15 of the new TFEU, yet losing its title. Therefore, the word "transparency" never occurs in the new TUE and TFEU. On the importance of transparency: Gerkrath, 2006: 380-382.

⁴⁷ Gerkrath (2006: 379) underlines a risk implicit in this model of participatory democracy: it might turn into system deeply influenced by lobbies, where only the major groups of interest count.

are directly represented at Union level in the European Parliament, but on the other it refers to national governments represented in the Council as democratically accountable either to their national parliaments or to their citizens. This is a consequence of the '*funktionalen Verdopplung*' of the European citizens, who are the source of both national and Union legitimacy, but it does not consider that national governments are never elected or nominated on the strength of their European political programmes and therefore lack any specific mandate in this domain (Gerkrath, 2006: 376-7)⁴⁸. Representative democracy in the EU – based on the principle of 'degressive proportionality' implying an unproportionated representation of small and large states (art. 14 TEU) – is the outcome of a compromise between the claims of national States and European people (Gerkrath, 2006: 377), although it is incompatible with the idea of democratic equality expressed in art. 9 of the same Treaty. Moreover, the absence of a European *demos* hinders the formation of real supranational European parties and subordinates European electoral campaigns to national political struggles (Ciancio, 2007). This is why art. 10 TEU also rules that «political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union»: notably, political parties at European level, not European parties.

It is true, however, that «the late twentieth century has been a period of the 'decline of parliaments' and the rise of courts, public administrations and the 'core executive'. Democratic accountability in such bodies is imposed not simply through indirect control through majoritarian institutions, but also through complex systems of indirect representation, selection of representatives, procedural norms and precise balances among branches of government» (Moravcsik, 2008: 176). Anyway, the question facing Europe is not to rescue national democracy, but to reconstitute democracy within a complex multilevel and pluralistic European setting. If the so-called 'decline of parliament' can be

⁴⁸ Gerkrath (2006: 373) also argues that, since the EU is made of twenty-seven different States and thus twenty-seven different views of democracy, their *reductio ad unum* can be achieved only through a peculiar kind of 'demoi-cracy',

considered an explanation for the weakness of the principles of participatory and representative democracy expressed in the European Treaties, one should not forget that, although such general decline is evident, it remains deplorable: the European Union should not give way to such a widespread tendency without even making an attempt to check it⁴⁹.

Therefore, Moravcsik's thesis (2005a: 374, 2006a: 227, 2008: 177) – that criticises the common belief that the key to generating support for the EU is to disseminate more accurate information about the EU voters – is untenable. He thinks that forcing participation is likely to be counterproductive⁵⁰, as the popular response is condemned to be ignorant (because individuals have no incentive to generate sufficient information to render concrete interests and political behaviour consistent), irrelevant (because public opinion tends to 'import' into the debate at Union level national or local issues), and ideological (because intense efforts to stimulate electoral participation tend to encourage symbolic rather than substantive politics). Moreover, even if an increased participation were desirable, it is unlikely to occur: European citizens tend to be apathetic because, probably, the scope of EU regulatory activity is inversely correlated with the importance of issues in their minds (Moravcsik 2008:178). Yet, this radically pessimistic view fails to distinguish 'populist' from 'deliberative' forms of democracy and to consider that the character of public deliberation largely depends upon the quality of the institutions that support and facilitate it.

meant as sovereignty of several peoples.

⁴⁹ Therefore, I cannot espouse Bellamy's (2006: 742) thesis, that sounds like a surrender to the 'Union of democracies' thesis: «If an EU *demos* can be said to exist, then a move should be made towards enhancing the role played by directly elected majoritarian decision-making bodies within the EU. If, as seems more likely, an EU *demos* and public sphere remain absent with little immediate prospect of being established, then means need to be found for enhancing the democratic accountability of EU decision-makers within the established democracies of the member States».

⁵⁰ Hurrelmann (2006: 354) shares the same opinion. He maintains that the attitude of citizens towards the European Union is based on what he calls 'permissive consensus', that is to say that they do not take much interest in European politics, but support the broad goals of the integration project. When they are forced to participate – as in the case of the European Constitution – the result might actually be a reduced support for the EU. To sum up (358), «the persistence of 'permissive consensus' on European integration implies that attempts to increase the democratic legitimacy of the EU run the risk of endangering social support for its institutions».

In fact, popular response cannot be underestimated, as some (Eriksen and Fossum, 2007: 19) correctly argue: «to function, a modern democratic polity presupposes popular legitimacy, collective identity, democratic representation and adequate governing capacity. Properly reconstituting democracy in Europe therefore presupposes that these functional requirements are fulfilled» and this cannot be effectively achieved without recognising the key role of the European people. In fact, as exhaustively and persuasively argued by Eriksen and Fossum (2007: 20), the EU is neither a state nor is it a nation, and since 'government' is not equivalent to 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. This model of democracy can be defined 'cosmopolitan', and «posits that the Union's democratic legitimacy can be based on the credentials of criss-crossing public debate, multileveled democratic decision-making procedures and the protection of fundamental rights to ensure an 'autonomous' civil (transnational) society» (Eriksen and Fossum 2007: 21). Of course, «this model's core presumption is that European citizens will be able to consider themselves as self-legislating citizens within the functional domain that is the exclusive preserve of the European government» (Eriksen and Fossum, 2007: 22).

To reach this scope, the means of representative and participatory democracy the new Treaty provides for are not sufficient because of their intrinsic weakness, as already argued. Nevertheless, the Treaty establishing a Constitution for Europe contained a major improvement in the same direction: a new and simplified criterion expressed in art. I-25 defines the qualified majority, giving a due relevance to the European people as a whole. Unluckily, the European Council of June 2007 reached a compromise, according to which this new double majority method will enter into force (if ever) only in 2017, after a transitional period of three years (art. 16 TEU). This retardation is a symptom of a clear bias against a potentially self-legislating European people. A European people national governments probably fear, as they concerned themselves with purging the new Treaties agreed in Lisbon of all the symbolic elements

suggestive of a European identity: references to the Constitution, flag, anthem, motto, Europe day and European law.

5. Conclusion

The model of integration the EU presently features derives from different vectors of legitimacy, coexisting in a peculiar mix of conflict and complementariness: Member States' will, democratic accountability of both national and (more weakly) European institutions, citizens' interest and normative procedures. Paradoxically, the causes of the democratic shortcomings of the Union are at the same time the centrepieces of its democratic legitimacy, as each of the Union's legitimating factors shows some failures, imperfections and frailties. Although some deny or underestimate the existence of a democratic deficit, I claim that it exists. It is the outcome of several ingredients – among which the shift of policy-making from a national to a supranational level, the Commission's scarce political accountability, the still limited role of the European Parliament, the deficiencies of both the participative and representative circuits, Member States' tendencies to national particularism – but above all it derives from the lack of a real European *demos*. In fact, the inconsistency of a European public opinion, mainly due to an irresponsible carelessness of the media system, makes European citizens apathetic and unwilling (or unable) to profit from those means provided by the Treaties allowing them to exert an influence on decision-making processes and political choices at Union level. This is deplorable, as the European Union can only exercise its powers legitimately if its institutional structure and decision-making processes are sufficiently democratic, that is, if they ensure European citizens a sufficient degree of participation and influence. In order to reach this aim, hopefully in the near future, the Lisbon Treaty – should it come into force in 2009 as originally predicted, despite the result of the Irish referendum – should supply an appropriate legal basis. Of course, norms alone are not sufficient to ensure the intrinsic democracy of a system, because it also arises from many other non-juridical elements, but adequate normative grounds are indispensable

to that scope. Unluckily, the Lisbon Treaty does not forge far ahead in this way: the principles of participatory and representative democracy, although pompously enunciated, are flawed; the increased involvement of national parliaments, seen as an antidote to the democratic deficit, frustrate the European Parliament's role and disaggregate European people's will; the disappearance of symbols deprives the European identity of its identification marks. The road towards democracy in the EU still looks long and rough.

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