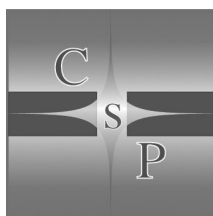


Back to Maastricht

**Back to Maastricht:
Obstacles to Constitutional Reform
within the EU Treaty (1991-2007)**

Edited by

**Stefania Baroncelli, Carlo Spagnolo
and Leila Simona Talani**



Cambridge Scholars Publishing

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ACRONYMS AND ABBREVIATIONS

ACEA	European Automobile Manufacturers Association
AF	Fiat Archives
AIAB	Associazione Italiana per l'Agricoltura Biologica
AMUE	Association for the Monetary Union of Europe
b.	box
BVerfG	<i>Bundesverfassungsgericht</i> (German Constitutional Court)
CAP	Common Agricultural Policy
CBOS	Public Opinion Research Center (Poland)
CCMC	Committee of Automobile Constructors of the Common Market
CCP	Common Commercial Policy
CEC	Central European Countries
CFSP	Common Foreign and Security Policy
CMUE	Committee for the Monetary Union of Europe
COREPER	Committee of Permanent Representatives
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
Ecofin	Council for Economic and Financial Affairs
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECU	European Currency Unit
ECT	EC Treaty
EEC	European Economic Community
EFTA	European Free Trade Association
EG	Elisabeth Guigou
EGA	European Governance Arrangement
ELJ	European Law Journal
EMI	European Monetary Institute
EMS	European Monetary System
EMU	Economic and Monetary Union
ENEL	<i>Ente nazionale per l'energia elettrica</i> (Italy)
EP	European Parliament
EPC	European Political Cooperation in foreign affairs

ERM	Exchange Rate Mechanism
ESCB	European System of Central Banks
EU	European Union
EUI	European University Institute, Florence
EURATOM	European Community for Atomic Energy
ESF	European Social Forum
FDP	Free Democratic Party (Germany)
FNA	French National Archives
GATT	General Agreement on Tariffs and Trade
GISTI	<i>Groupe d'information et de soutien des immigrés</i> (France)
GRACE	<i>Gruppo di Ricerca sull'Azione Collettiva in Europa</i> (Italy)
ICJ	International Court of Justice
IMF	International Monetary Fund
IGC	Intergovernmental Conference
IRI	<i>Istituto per la ricostruzione industriale</i> (Italy)
JHA	Justice and Home Affairs
OCA	Optimal Currency Area
OECD	Organisation for Economic Cooperation and Development
OLAF	European Anti-Fraud Office
OMC	Open Method of Coordination
PESC	see CFSP
QMV	qualified majority voting
RA	Renault Archives
SEA	Single European Act
SGP	Stability and Growth Pact
SPS	Sanitary and Phytosanitary
TEU	Treaty on European Union
URL	Uniform Resource Locator
VAT	Value Added Tax
VER	voluntary export restraint
WTO	World Trade Organisation

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- Belgian *Conseil d'Etat*, opinion No 37.978/AG of 15 February 2005 on the bill concerning the Treaty establishing a Constitution for Europe
- Belgian *Cour d'arbitrage*, Judgment of 13 July 2005 (No 124/2005)
- Bundesfinanzhof, Decision of 9 January 1996, *Europäische Zeitschrift für Wirtschaftsrecht*, 1996: 126
- BVerfG, 31, 145 (1971); English translation in Oppenheimer, A. (ed.), *The Relationship Between European Community Law and National Law: The Cases, vol. 1*. Cambridge: Cambridge University Press, 1994: 415
- BVerfG, *Solange II*, 73, 339 (1986)
- BVerfG, *Kloppenburg* judgment, 75, 223 (1987); English translation in Oppenheimer, A. (ed.), *The Relationship Between European Community Law and National Law: The Cases, vol. 1*. Cambridge: Cambridge University Press, 1994: 508-509
- BVerfG, 89, 155 (1993). English translation in *Common Market Law Reports*, 1994: 57 (“Maastricht Urteil”)
- BVerfG, Case 2 BvR 464/98
- BVerfG, Order of 7 June 2000, 102, 147; English translation in Oppenheimer, A. (ed.), *The Relationship Between European Community Law and National Law: The Cases, vol. 2*. Cambridge: Cambridge University Press, 2003: 270
- BVerfG, Order of 9 January 2001, *Europäische Zeitschrift für Wirtschaftsrecht*, 2001: 225
- BVerfG, 2 BvR 2236/04, judgment of 18 July 2005 (German and English texts at <http://www.bundesverfassungsgericht.de>)
- BVerfG, Case 2 BvE 1/05, of 24 April 2005
- BVerfG, Case 2 BvR 839/05
- Czech Constitutional Court, Judgment No. Pl. ÚS 66/04 of 3 May 2006
- Danish Supreme Court in *Carlson and Others v Rasmussen*, Case No I-361/1997, judgment of 6 April 1998, in Oppenheimer, A. (ed.), *The Relationship Between European Community Law and National Law: The Cases, vol. 2*. Cambridge: Cambridge University Press, 2003: 174
- ECJ, Case 26/62, *Van Gend en Loos* [1963] ECR I

- ECJ, Case 75/63, *Hoekstra (née Unger) v BBDA* [1964] ECR 177
ECJ, Case 6/64, *Costa v ENEL* [1964] ECR 585
ECJ, Case 22/70, *Commission v Council* (ERTA) [1971] ECR 263
ECJ, Case 106/77, *Simmenthal* [1978] ECR 629
ECJ, Case 53/81, *Levin v Staatssecretaris van Justitie* [1982] ECR 1035
ECJ, Case 66/85, *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121
ECJ, Case 139/85, *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741
ECJ, Case 314/85, *Foto-Frost* [1987] ECR 4199
ECJ, Case 262/88, *Barber* [1990] ECR I-1889
ECJ, Cases C-6/90 & C-9/90, *Francovich* [1991] I-5357
ECJ, Case C-369/90 *Micheletti and others v Delegación del Gobierno en Cantabria* [1992], ECR I-4239
ECJ Opinion 1/91 [1991] ECR I-6079
ECJ, C-473/93 *Luxembourg v. Commission* [1996] ECR I-3207
ECJ, Opinion 1/94 [1994] ECR I-5281
ECJ, Opinion 2/94 [1996] ECR I-1759
ECJ, Case C-85/96, *Maria Martínez Sala v Freistaat Bayern* [1998] ECR I-2691
ECJ, Case C-376/98, *Germany v Council* [2000] ECR I-8419
ECJ, Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193
ECJ, Case C-413/99, *Baumbast and R. v Secretary of State and Employment* [2002] ECR I-7091 (opinion of Advocate General Geelhold).
ECJ, Case C-11/00, *Commission v ECB* [2003] I-7147
ECJ, *Schmidberger* Case C-112/00 [2003] ECR I-5659
ECJ, Joined Cases C-482/01 and C-493/01 *Georgios Orfanopoulos and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECR I-5257
ECJ, *Omega* Case C-36/02 [2004] ECR I-9609
ECJ, Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703
ECJ, Case C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573
ECJ, Case C-105/03, *Pupino* [2005] ECR I-5285
ECJ, Case C-209/03, *R (on the application of Dany Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills*, [2005] ECR I-2119
ECJ, Case C-27/04, *Commission v Council* [2004] ECR I-6649
ECJ, Case C-145/04 *Spain v. United Kingdom* [2006] ECR I-7917

- ECJ, Case C-258/04, *Office National de l'Emploi v Ioannis Ioannidis* [2005] ECR I-8275
- ECJ, Case C-406/04, *De Cuyper v Office National de l'Emploi* [2006] ECR I-6947
- ECJ, Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633
- Finanzgericht Rheinland-Pfalz, judgment of 7 November 1994, *Europäische Zeitschrift für Wirtschaftsrecht*, 1995: 588
- French Conseil d'Etat, Decision No 2003-469 DC of 26 March 2003 *Loi constitutionnelle relative à l'organisation décentralisée de la République*
- French Conseil d'État, Décision No. 2004/496, of 10 June 2004 (*Loi pour la confiance dans l'économie numérique*)
- French Conseil d'Etat, decision 2004-497 DC of 1 July 2004
- French Conseil d'Etat, decision 2004-498 DC of 29 July 2004
- French Conseil d'Etat, decision 2004-499 DC of 29 July 2004
- French Conseil d'État, Décision No. 2004/505 DC, of 19 November 2004 (*Traité établissant une Constitution pour l'Europe*);
- French Conseil d'Etat, Decision 2006-540 DC
- French Conseil d'Etat, decision 2006-543 DC of 30 November 2006
- French Conseil d'État, Décision No. 2006/540 DC, of 27 July 2006 (*Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*);
- French Conseil d'État, Décision of 8 February 2007 (*Société Arcelor Atlantique et Lorraine et autres*, No 287110)
- ICJ, *Nottebohm, Liechtenstein v. Guatemala*, 2nd stage, [1955] ICJR: 23
- Luxembourg Conseil d'Etat, opinion No 46.893 of 22 March 2005 on the bill concerning the Treaty establishing a Constitution for Europe
- Polish Constitutional Court, Judgment of 11 May 2005, K 18/04
- Polish Constitutional Court, Judgment of 27 April 2005, P 1/05
- Spanish Constitutional Court, decision 1/2004 DTC of 21 October 2004
- Spanish Constitutional Court, Declaration 1/2004, of 13 December 2004 (in *Boletín Oficial del Estado*, 4 January 2005, No. 3, Supplement: 5
- Supreme Court of Cyprus, Judgment of 7 November 2005 (summarised in Council document 14281/05 of 11 November 2005)

PREFACE

S. BARONCELLI, C. SPAGNOLO & S. TALANI

This book was conceived in the aftermath of the rejection of the EU Constitutional Treaty in the French and Dutch referenda in May-June 2005.¹ That event not only raised doubts about the future capability of the EU to act as a unitary body but also set aside, once more, all federalist expectations of a full political union, thus making it clear that, for the foreseeable future, the EU would be bound to work within the institutional settlement born out of the Maastricht Treaty (TEU) in 1991.

Popular opposition to the European Union was not new, since the TEU itself was ratified in 1992 with a tiny majority in France and initially rejected in Denmark. Yet the defeat of the Constitutional Treaty has shown that these were not isolated episodes and raised serious questions for responsible politicians, observers and scholars of the EU. It gave rise to a widespread uneasiness about the distortion of democracy and social welfare for which the TEU is held responsible. The usual charge is that the TEU has set up a federal state in all but name, thereby emptying national democracy of any substantive content.

Within a long-term perspective, there are good arguments to consider the EU rather as an (inadequate) answer to the crisis of national democracy than as its main cause. This does not exclude the possibility that the EU

¹ Expanding its mandate to drafting a true EU Constitution for a prospective political union, the Convention chaired by Giscard d'Estaing had set its targets fairly high, although the final product was not as binding as many would have wished and the following IGC in the summer of 2004 smoothed its supranational peaks. Far from being a rupture with the TEU, the Constitutional Treaty which was eventually submitted to the French and Dutch voters aimed to simplify the institutional structure and to unify the various Treaties into a single legal framework. It also took into account the modifications of the TEU approved in Amsterdam which expanded the list of matters which could be decided by majority votes and modified the weighing of the Member States' voting rights, also including the rights listed in the controversial Nice Declaration of Rights. It also gave institutional solutions to the coordination of foreign policy foreseen in the TEU through a Foreign Minister.

may even be seriously contributing to that crisis, but suggests a more nuanced differentiation between the merits and flaws of integration. To delve deeper into the Union, the authors of this book have chosen to look at its dynamics rather than – as many scholars of European integration usually do – its statics. From this vantage point the traditional opposition between intergovernmentalism and federalism appears less crucial than their interaction. It is not simply a question of striking the balance between two discrete units (national sovereignty vs. supranationalism) but rather of asking whether something original may have resulted from their interaction, such as when a chemical reaction builds a new molecule. Such undertaking goes, in some respect, against the mainstream.

In fact, the compromise for the Treaty Reform reached by the EU Council under the German Presidency in June 2007 might give rise to the feeling that national sovereignty is regaining importance. The arrangement – which will be signed in Lisbon in December 2007 – foresees the adoption of the bulk of the Constitutional Treaty with adjustments to EU decision-making processes, the extension of qualified majority voting and the inclusion of the Nice Declaration of Rights, whilst at the same time definitely setting aside the supranational symbols (the anthem, the hymn) and the idea of an EU federal State.

The compromise, which satisfies the desires of the Polish and British governments, will probably dissatisfy supranational advocates due to its marked intergovernmentalist tone. It can hopefully improve the EU's legitimacy by expanding the role of national parliaments in EU law making, yet it is unclear whether this can remedy the discontent which resulted in the French and Dutch vetoes in 2005. The conferring of more power on weakened States might provide more grounds for conflict, and the introduction of a unilateral right to secede from the Union could have far-reaching consequences. An innovation as important as the relaxing of "qualified majority" rules should enter in force only in 2014. Worse still, until 2017 a minority of member states will remain entitled to block majority votes. The answer could come too late and overlook the substantive aspects that interest EU citizens.

It is interesting in this respect to consider more closely what moved the French and Dutch voters, a large number of whom hailed from the left.² They did not necessarily object to a European Constitution, but rather the Draft Treaty's claim to be a Constitution in liberal disguise. It is likely that opponents feared losing control over their domestic economies

² See Della Porta's contribution in this book.

and welfare regulations, de facto abandoning their own Constitutions whilst locking themselves into a rigid Treaty that did not leave room for change.

The June compromise is likely to dissatisfy also the advocates of national sovereignty because it does not remedy the infringements of national constitutions of which the TEU has repeatedly been accused.³ On the contrary, by endowing the EU with legal personality, and providing the High Representative of the PESC, introduced by the Amsterdam Treaty in 1996, with the status of Commissioner and Vice-President of the Commission, it might further reduce states' autonomy in social and foreign policy.

Nobody should question whether the integration of Central and Eastern Europe required a Treaty amendment, or whether the increasing heterogeneity of the EU now makes common decisions more difficult. What may be surprising instead is how little the inclusion of as many as twelve countries in 2004-2006 has altered the general lines of the agreements reached among the older twelve Western members from Maastricht, and how much the original hybrid Treaty is preferred to a fully constitutional alternative. Does the EU, in its present shape, have sufficient momentum to run an ever increasing number of countries in almost all key issues of state policy?

The question is whether the Maastricht Treaty was already a sort of Constitution and what impact it has had on member states.

The reader who seeks a full description of the EU activity should stop now and look for a comprehensive handbook. The studies here collected do not tackle a range of relevant issues, such as foreign policy, justice - two major fields of EU competence after Maastricht - social affairs and the environment, both because our scope was necessarily more limited and because these issues have been mostly confined into "intergovernmental" forms. Our attention has been focused upon what we regard as the supranational core of the TEU. Drawing on different disciplines, including law, political science, economics and history, we focus here on the four main supranational novelties of the Treaty: law-making beyond the state level; decision-making on governance and subsidiarity; the Economic and Monetary Union (EMU), and the new legal status of "European citizenship". All of these have precedents, yet the question is whether their legal formalisation under the same roof has made a serious qualitative

³ See the references in Baquero's and Ponthoreau's articles.

difference from the previous Treaties: has the Maastricht Treaty established a new regime?

The most important field for EU supranational power and a source of tension for its legitimacy is seen here in the EMU. Only twelve countries entered the monetary union in 1992, which subsequently grew to thirteen after the accession of Slovenia in 2007, as against twenty-seven EU members, with the UK, Denmark and in 2003 Sweden opting out. This gap gives room for contending paradigms about the EU foundations and future. Theoretical standpoints have always encountered difficulties with a hybrid regime which is neither fully international nor national.

Since the signing of the Maastricht Treaty, the debate has moved away from both the early functionalist idea that integration would strip member states of their sovereignty and from the neo-realist assumption that the Community would be a servant of nation states.⁴ If sovereignty is being transformed in this process, there is something to learn from an empirical analysis which questions whether and how the supranational novelties of the Maastricht Treaty have shaped the relationship between the member states and the EU.

The book is organised into five parts which explore the aims of the TEU and its development over the past fifteen years. The first part deals with the settlement of national sovereignty in the Maastricht Treaty and its later interpretation by the ECJ and Constitutional courts. The second part assesses the meaning of EU governance, the constitutional role of EMU and its implications for Central European newcomers. The third part investigates the political and economic assumptions behind the EMU. The fourth part assesses the political and economic impact of the EMU in a language accessible to non-specialists. The fifth and final part deals with the introduction of European citizenship and its evolution as part of soft law. It also asks whether a new generation of “critical” European citizens is emerging and considers the prospects which this opens up for a European political sphere.

The book was completed as the Reform Treaty was under way. As far as possible, the authors have taken account of its features and general implications. However, its full effects will not be felt until its entry into force, due to occur - if ratification will be completed as scheduled - not earlier than 2009. Some of its clauses will become law only in 2014. Social scientists have never been in the business of forecasting. However,

⁴ Rosamond, B., *Theories of European integration*. New York: Palgrave, 2000.

we view the present circumstances as a sign of a deep change that has occurred in the integration process. Insofar as our opinion may be of any relevance, we think that the EU reform is not yet over.

The Web sites quoted were active, if not otherwise specified, on 30 October 2007.

Bari, Bolzano/Bozen and London, 30 November 2007

INTRODUCTION

THE MAASTRICHT TREATY IN HINDSIGHT (1949-2007): A BREAK WITH “PASSIVE INTEGRATION”?

CARLO SPAGNOLO

1. Premise

This introduction seeks to explain some of the reasons for the defeat of the Constitutional Treaty which emerge from the essays in this collection. It will suggest a historical constructivist approach which may overcome, if possible, the traditional quarrel between intergovernmentalism and supranationalism. To this end it shall briefly try to define what kind of polity the Union is, then going on to examine its political meaning through the category of “passive integration”, linking the legal and the political-economic features of the EC first and the TEU later. Thirdly, it will sketch out some elements of debate on the origins and functioning of the EMU which emerge from this book. Finally, it will examine the prospects of EU politicisation.

2. The EU as a Republic

European integration has long defied previous notions of state sovereignty and has since the days of the Coal and Steel Community been pursued with original supranational instruments. However, the Treaty of Rome did not arouse the same degree of popular opposition against the infringement of national sovereignty as the Maastricht Treaty did. Did the TEU, in historical and legal terms, mark a rupture from the previous path of European integration? In the opening essay, de Witte argues that in a long-term perspective the Maastricht Treaty appears as just one “milestone along the road of European constitution-making” but on closer inspection

the TEU “marked a watershed in the evolution of European law”. Not only has the “three pillars” architecture (the economic-monetary union with foreign policy and justice and social affairs) expanded the competences of the Union so far that there is no subject where the state is completely separable from the EU, but also the institutional form of the Economic and Monetary Union has modified the previous method of Community law-making (see Baroncelli’s essay).

Bruno de Witte provides a thorough historical overview of the various attempts, often forgotten in the literature, to consolidate the various Treaties of the Communities into a single instrument, from the Merger Treaty of 1965 to the Treaty Reform of 2007, including the steps which led to the Constitutional treaty. Throughout the process of integration he traces a tension between “supranational” pressures, originating with the Commission, and neo-realist Gaullist-like preferences to keep the various Treaties separate. The TEU opened the door to a compromise, which the Treaty Reform is about to complete, according to which legal unification is almost reached but the “intergovernmental” approach prevails and the Union absorbs the Community. The Union emerges as an undefined legal “entity”.

If measured against a federal state, the Union appears quixotic and irrational. States hold on to the power to decide on ultimate competences, which the German constitutionalists call *Kompetenz-Kompetenz*, whereas the supremacy of EC law is accepted (see Ponthoreau’s essay). Powers are unevenly distributed and this makes decision-making cumbersome. Yet it works and there are good reasons for it, which are not merely economic. In trying to make sense of the Union as a *political* venture, I would suggest provisionally setting aside the division, so predominant in the literature and in public opinion, between national sovereignty and the creation of a super state - not because it is irrelevant but because it forces the inquiry into pre-established paths and cannot provide any guidance as to the political meaning of the “entity”.

At the beginning of his essay de Witte suggests an alternative way – which I would like to take up – of dealing with the political content of constitutionalism, namely to look at the TEU as one product of the overall process of European integration. In this long term perspective, the break with nation-state sovereignty lies in the process itself rather than in a specific Treaty, whereas Treaties mark its internal phases. By “process” I refer to the well-known decline of the European nation state and the creation of a network of international bodies which occurred throughout the 20th Century, after which “the modern State (...) no longer exists.

Above all the criterion of modernity - the state-centred unity of people and power, of region and sovereignty - no longer appears to be valid.”¹

From a historian’s perspective, the working hypothesis that can be advanced is that the EU has emerged from a dual process: the “democratisation” of international relations, on the one hand, and the “rescue” of liberal democracy, on the other.² The former is a global trend, relating to the well-known spread of democracy at global level, while the second refers to the danger for liberalism represented by the expansion of State intervention and collectivist ideologies which was particularly felt in continental Europe after the Great War and the 1929 crisis. European integration has been helpful at re-legitimizing liberal capitalism after WWII. Between the end of the 1970s and the early 1980s this second process turned into an open challenge of liberalism to the State intervention in the economy that had rescued Western capitalism from collapse after 1945. The conflictual interplay between democratisation and liberal capitalism has turned the EU into a constitutional “regional” system.

If we were to take European integration as one of the most advanced experiments into the “constitutionalisation” of international law, as e.g. done by Weiler, we would grasp only the first aspect of this twofold process.³ Instead, we can also see in the most recent contradictions between the intergovernmental Union and the older “Community method” a product of the transformation of liberal democracy. Europe, which produced the modern state, is striving to produce a new form of polity that is not fully understandable within the old categories of international law, and the balance of which will not only be decided by its internal politics but also influenced by the outcome of an ongoing tension between a cosmopolitan world order and the rise of new global empires.

¹ Reinhard, W., *Storia del potere politico in Europa*. Bologna: Il Mulino, 2001: 645.

² The emphasis shifts here to politics rather than to national sovereignty, as in Milward, A. S., *The European Rescue of the Nation-State*. London: Routledge, 1992.

³ Weiler, J. J., *La costituzione dell’Europa*. Bologna: Il Mulino, 2003, in particular the debate with Mancini, F., “Per uno Stato europeo”, *Il Mulino*, 377, (May-June 1998): 408-418; and Grimm, D., “Does Europe Need a Constitution?”, *European Law Journal*, 1, (1995): 295; Blanke, H.-J. & Mangiameli, S. (eds.), *Governing Europe under a Constitution: the hard Road from the European Treaties to a European Constitutional Treaty*, Berlin: Springer, 2006: XXIX-XXX.

In the perspective set out above, the transitional “entity” can be grasped through the ideal-type of a multi-layered regional Republic. The concept of Republic (*res publica*), as suggested by others, applies to the Union in the ancient sense - that still used by Rousseau and Kant - of a political system that consents to law, provides for the formation of the general interest against the specific will of its individual members and has been endowed with the powers to place checks on the risky tyranny of the majority.⁴ The ideal-type encompasses the Union and the Communities without confusing the units with the whole, or the ideal with its reality.

The Republic defines a polity which aims at the survival of liberal democracy in the era of globalisation, overcoming nation-states as exclusive units of political and economic organisation. In setting up the Union, the TEU modified the institutional answers to the long-term crisis of sovereign democracy flowing from the establishment of the European Communities, and earlier still in the ECSC Treaty. The latter complemented national with functional representation, in part through the extension of neo-corporatist arrangements to a Community level, and in part by substituting them with consultation between public authorities and organised interests through technical committees, while vesting an independent Authority with executive power.⁵ The Republic on the other hand has developed a model in which Commission, Parliament, and Council share legislative power, whereas executive power is vested with several bodies such as the ECB, the Commission and the Council.

Thus the TEU recognises the long-term transformation of modern parliamentary European states as it formalises *a shift in the locus of power outside the representative system*. This does not automatically mean that it is anti-democratic. It is rather an original construction, with some affinity with the administrative state in the German tradition with a touch of French centralism. Democracy is encapsulated at state level and has an increasingly procedural meaning. Since 1993, democracy has been a requisite for accession, and can be regarded as an aspect of the *acquis*

⁴ Maihofer, W., “Die Politische Idee der Europäischen Integration und die Juridische Realität der Europäischen Union”, in Lenk, H. & Poser, H. (eds.), *Neue Realitäten – Herausforderungen der Philosophie. XVI. Deutschen Kongress für Philosophie, Berlin, 20.-24. September 1993*. Berlin: Akademie Verlag, 1995: 368-387.

⁵ A rapid institutional review of comitology is in Hix, S., *The Political System of the European Union*. New York: Palgrave, 1999: 41-45. See also Vibert, F., *The rise of the unelected: democracy and the new separation of powers*. Cambridge: Cambridge University Press, 2007.

communautaire.⁶ By extension, we can say that the foundations are democratic but the building is not. The relationship between democracy and Republic is not unproblematic and creates strains on both sides; at the same time it is a hidden engine of the EU institutional dynamics and opens up new opportunities to rethink liberal democracy.

As a result, the common opinion that there is a “democratic deficit” in the Republic appears at the same time to be a correct observation and yet an incorrect diagnosis. In order for a democratic *deficit* to arise, a democracy must be in place. Yet the EU is not a “sovereign democracy” nor is it likely to become one in the short term and should not necessarily be considered on that basis, even though it does result from a general pressure for democracy.⁷ Paradoxically, the democratic deficit applies to member states.

The Republic is instead a liberal, pragmatic and supposedly anti-ideological, construction.⁸ It seeks to correct the vagaries of popular will and moderate its disturbing effects on the stability of liberal capitalism.⁹

⁶ The “Copenhagen criteria” stipulate that a country may become a member state if it has achieved: 1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criteria); 2. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU (economic criteria); and 3. The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (the ability to transpose the EU *acquis*).

⁷ “It is possible to disagree, first, on whether the Union should be democratic at all; second, on how far it should be rendered democratic through its own institutions or those of its member States; and third on what standards should be applied with what weights.” Lord, C., “Contested Meanings, Democracy Assessment and the European Union”, *Comparative European Politics*, 5 (2007): 78.

⁸ Anti-totalitarianism could be considered as a basic ideology below EU political culture. The widening of the Holocaust celebrations in the last years shows that, given the difficulty in identifying other common symbols for celebration, the condemnation of Nazi German violence is taken as the moral ground for a common identity which allows many EU members to brush aside their own fascist or collaborationist past. An implicit, and un-official, equivalence between Nazism and Soviet Socialism nourishes celebrative rhetorics. Thus totalitarianism is the only recognised enemy and prompts a permanent temptation to obscure the dramas of modernity and the conflicts within liberal democracy. The difficult relationship of EU countries with their past remains an obstacle to building a *demos* and reciprocal solidarity.

⁹ The debate on the weakness of parliamentary representation – which was very much alive within the post-war political elites that started European integration –

The project has enjoyed strong popular support because in the Western European countries throughout the 1980s and 1990s there was a widespread desire to overcome the class conflicts and ideological disputes which had divided domestic constituencies up to the late Seventies, whereas in the former Soviet satellites the desire to introduce individual freedoms, along with market and democratic reforms, had ultimately broken Socialist structures.¹⁰

Such a meta-political body does not look for full sovereignty because it could not at present tolerate it. It is a crucial point within this reasoning that security has always largely lain beyond the reach of the European institutions. Defence was never completely in national hands, as neo-realist scholars of European integration implicitly assume: it was and still is located at another supranational level, under the control of the Great powers.¹¹ Even after 1991 the EU countries have preferred not to bear the full cost of their defence and as long as they leave this function to the NATO it is unlikely that a European state will arise. After all, Republican legitimacy rests on the rejection of the notion of exclusive sovereignty, contained in several post-war European constitutions, and the expectation of social gains by political, financial and administrative elites with broad, though contested, popular support.¹² European integration thus develops an enlarged notion of democracy, which gives priority to levels of consumption, social welfare and individual freedom over people's

has a long history which we cannot recapitulate here, including f.i. Weber, M., *Political writings*. edited by Lassman, P. and Speirs, R., New York: Cambridge University Press, 1994; Blum, L., *XXX. Lettres sur la réforme gouvernementale*. Paris: B. Grasset, 1918; Salvemini, G., *Sulla democrazia*. edited by Bucchi, S., Torino: Bollati Boringhieri, 2007. The main arguments were two: first, that "experience has shown that electors rarely chose the best ones. As a matter of fact, they chose usually mediocre at times even the worst individuals of the community" (Salvemini, G., "Che cos'è la libertà?". Conference in Philadelphia on 6 april 1935, see above); and second, that the extension of state competence due to industrial-scientific development had prompted a structural deficit of technical knowledge within the legislative and executive branches of state.

¹⁰ Maier, C. S., *Dissolution: the crisis of Communism and the end of East Germany*. Princeton, N.J.: Princeton University Press, 1997.

¹¹ This is a point of disagreement with the neo-realist assumptions of Moravcsik, A., *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca: Cornell U.P., 1998.

¹² Verdun, A., *European Responses to Globalization and Financial Market Integration. Perceptions of EMU in Britain, France and Germany*. Basingstoke: Palgrave-Macmillan/ New York: St. Martin's Press, 2002.

power.¹³ The Republic hence suffers from a problem of ex-post legitimacy, rather than a deficit of democracy. In classical terms, it is rather government *for* than *of* the people.

The EU Republic is a peculiar legal institution, not a state-of-law but rather an *estate-of-law*: a contractual polity based on negotiated laws and regulations, whose main rationale is participating to the world market without jeopardising social stability. The *acquis communautaire* draws the political boundaries of a Republican enterprise which is called the “creation of a single internal market” and should produce an “ever closer union”. The *acquis communautaire* escapes normative definitions because it embraces agreements, informal decisions and compromises that do not necessarily fall under the jurisdiction of the ECJ. A historian has convincingly emphasised “the close connection between the use of the concept of the *acquis* and enlargement” and explained that the concept, elaborated in the 1960s, emerged formally at the Hague Conference in 1970 as an obligation for new members to accept previous acquisitions unconditionally, in particular as a guarantee to France that the UK’s entry would not turn the Customs Union into a free trade area and that agricultural protectionism would not be questioned.¹⁴ While the *acquis* encapsulates the neo-mercantilist core of the Common Market and preserves it against newcomers, its content is subject to contention as EU membership grows.

If so, the EU Republican polity may be divided between those who are tempted to tame domestic capitalism and those who prefer to give

¹³ “The Europe that we strive to build is a Europe intended in a democratic sense: this is one of the fundamental hinges of our associative conception. Democracy, as we intend it, means also necessarily a perspective of social development and justice to be achieved in liberty”. See Moro, A., “Democrazia, sicurezza e cooperazione obiettivi dei costruttori dell’Europa”, opening speech at the UEO Assembly, 22.6.1964, *Relazioni internazionali*, copy in Archivio Centrale dello Stato, Fondo Aldo Moro, s. 1, ss. 8, <http://www.archivionline.senato.it/GeaWeb/Objects_ACS/ACS%20MORO/01_08_0125/ACS_MORO_01_08_UA0125_0001.jpg>. As all the links of this essay, it was active on 30 september 2007.

¹⁴ Rasmussen, M., “State Power and the Acquis Communautaire in the European Community of the early 1970s”, in van der Harst, J., and Harryvan, A. G. (eds.), *Beyond the Customs Union: the European Community's Quest for Completion, Deepening and Enlargement, 1969-1975*. Nomos Verlag: Baden Baden, 2007. See also Ludlow, Piers N., *The European Community and the Crises of the 1960s. Negotiating the Gaullist challenge*. London and New York: Routledge, 2006.

market forces free rein. This very rough model gives a clue as to why the legislative power is not centrally vested in a single representative institution, namely the European Parliament (EP), which could enforce sovereign decisions.

Baquero's chapter points out that this fragmentation only apparently protects member state sovereignty because national courts have accepted ECJ's supremacy in the economic realm since the famous *van Geld and Loos* (1963) and *Costa* (1964) decisions. EU legal supremacy results instead in tensions between the uniform notion of European law nurtured by the ECJ (and the Commission) and national courts' defence of special legal regimes in all fields other than economic integration. The TEU distinction between the three pillars has thus been consolidated by national Constitutional Courts.

Baquero deals at length with the important decision of the German Constitutional Court on the ratification of the Treaty, the so-called "*Maastricht Urteil*". It stated that the expansion of EU power has reached the boundaries of state sovereignty and, given the limited democratic legitimacy of the EU, should not expand further. Baquero reviews the strong reactions of other Constitutional courts, in Denmark, France, Spain, Belgium, Austria and in new member states such as Poland, Cyprus and the Czech Republic. They have followed the German sentence with ominous implications for the uniformity of the EU legal regime. In his opinion, the legal consensus that allowed for the development of EC law supremacy has been called into question.

Baquero's comparative review is persuasive as far as the dangers of this conflict are concerned, yet one might ask whether a return to "sovereignty" was really the threat. It is true that the *Maastricht Urteil* sees the TEU as problematic for state democracies. Nonetheless, it accepted the constitutionality of full economic and monetary integration, whilst putting a break on other fields where integration is much less advanced. Why is something acceptable in economics when it is not in justice and social affairs? Weiler has proposed a first explanation that Baquero seems to share: the German Constitutional Court has linked democracy with a cultural (ethno-linguistic) definition of "nation" and would regard incursions on to national identity as anti-democratic. This argument applies in part, though specifying that the German court did not exclude an evolution of cultural belonging beyond national boundaries and insisted more on democratic than on national requirements. In any case, the argument does not offer a full understanding as to why economic cooperation is not also regarded as a threat to national identity.

Baroncelli, who sheds light on the EMU exceptionalism in the constitutional architecture of the Republic, suggests an alternative explanation. She links up the special independence of the ECB, the Stability and Growth Pact, and the Maastricht *Urteil*. She emphasises that the German Supreme Court, rather than putting generic limitations on EU sovereignty, aimed rather at conditioning its content. The Court justified the constitutionality of EMU on the basis of the obligation to maintain price stability. The Maastricht *Urteil* created the legal room for a German Parliament's right to reject future decisions of the EU Council, "envisaging the possibility of denying access to EMU for some states, where convergence criteria had not been adhered to in a sufficient manner". The EMU had to respect monetary and price stability.

The suspicion arises that German legal culture has regarded European integration in the light of its compatibility with Germany's highly productive social capitalist model and has threatened retaliation in the event of negative domestic consequences of surrender of the Deutschmark. It was not by chance that the *Urteil* attributed constitutional value to the Maastricht financial parameters, originally established for the transition to monetary unification.¹⁵ It thus widened the gap between those countries which could respect these parameters without substantial cuts in social welfare payments and others which could not. In this sense, one must agree with Baquero that the legacy of the *Maastricht Urteil* is loaded in that it reified state fiscal boundaries that were already part of an economic union, whilst also hampering majority decisions at the core of the Community.

In defending their sovereignty these national Constitutional Courts have actually sanctioned a hierarchy between more indebted and wealthier (and hence more efficient) states. Baroncelli shows that in France the Constitution was amended precisely because it was considered incompatible with certain TEU provisions, including in particular the EMU. The encroachment was accepted and the French courts did not impose conditions for the following of EMU policy (such as full employment or inflation rates), but rather anchored more flexibly the constitutionality of the EMU on to the general objectives of article 2 of the TEU, which included economic and social progress. One could argue that some Supreme Courts increased the costs of participation while others had to concede ground, although all were bargaining within an EU Republican logic. The courts of the wealthier states reserved to themselves the task of

¹⁵ See Baroncelli's contribution.

reviewing the socio-economic effects of the TEU whenever Republican decisions might lower democratically established standards. They have taken for granted that the EU should protect economic interests, social rights and democracy, and have sought to raise the legal standards of the Republic to their domestic levels.

Beneath the conflict between “national sovereignty” and EU law supremacy we can discover a transnational Republican tension around social and economic policy. Contending claims for constitutional supremacy can coexist under the doctrine of “unity in diversity” if EU targets are shared. Ponthoreau reveals how national constitutional courts and the ECJ carve their autonomous legal sphere out of reciprocal recognition: most courts shrewdly recognise the supremacy of EC law as a product of their own legal orders. Thus the “national identity clause” works within the TEU as does the “European clause” in certain national constitutions. The first consequence of this constitutional pluralism is unclear: the legal order may increase conflict instead of solving it, and if an EU law were to violate the fundamental principles of a state constitution, then the Treaty would not be able to solve it and politics would have to intervene (what might ultimately not be so bad). The second one is clearer: the system can work if a common constitutional culture arises. On balance, Ponthoreau argues that the protection of “national identity” in the TEU is a sign of a weakness, that may force otherwise pluralist visions of national identity and history into legal and univocal definition. In the event, she suggests that British unwritten constitutionalism may be better than French normative tradition at building a European common legal order.

Out of this constitutional review a latent conflict emerges over the location of ultimate power which is dressed in old “sovereign” garb but has the substance of a quarrel on the reciprocal obligations enshrined in the TEU. Could such a conflict prompt the disintegration of the EU? Perhaps so, but it is not certain even then that a return to national sovereignty would be chosen. The Treaty Reform facilitates “enhanced cooperation” among clusters of member states, as already foreseen in the TEU, pointing towards another and more fragmented Republican settlement.

3. Passive Integration

Politically, the EU Republic can be regarded as a means for maintaining in place “passive integration”. By passive integration I mean a

process under which very different national capitalist economies can increasingly integrate and adapt to world competition without prompting direct political effects, thereby allowing continuity in domestic social hierarchies. Passive integration requires the severing of political economy from parliamentary politics, regulating the first in the international realm while leaving domestic issues to the latter (this model assumes a tension between national democracy and liberal capitalism). Passive integration characterised European cooperation from the very beginning and has substituted itself for a European bourgeoisie (perhaps today in formation), that is able to maintain a cultural hegemony over anti-market forces in the event of political unification. National political elites have had to cope with domestic resistance to liberal capitalism by externalising its negative effects upon the Communities. To the extent that passive integration allows for social change, it cannot neutralise politics completely but goes far enough to favour a smooth adaptation of power elites.

The concept draws on Gramsci's "passive revolution", by which national political elites control social transformation resulting from transition to new modes of production without eliciting revolutionary change.¹⁶ Passive integration has been one of the main political features of European integration since the late 1940s, when the idea of Europe legitimated German reintegration into liberal capitalism. Its success has been preserved by constitutionalising the common market. This positive legacy was partly maintained in the SEA and the TEU, as the latter had to strike a careful balance between the unification of the internal market and the maintenance of member states power structures. Adjusting passive integration to British resistance and the German model of shared sovereignty came with a price, however, consisting of a lack of political guidance in the Union.

In the language of EU scholarship, passive integration is couched in the well-known institutional asymmetry between negative and positive integration. Negative integration means the abolition of all obstacles to the internal market. Its basic elements were already contained in the Treaty of Rome. The supremacy of Community law finds its justification there and the ECJ could assert it from the 1960s onwards without eliciting any

¹⁶ Gramsci, A., *Quaderni del Carcere*. edited by Gerratana, V., Torino: Einaudi, 1975: 41 (Q. 1, par. 41). Gramsci applied that concept to the Italian Risorgimento, when – and here there is an element of analogy with European integration – a culturally defined ruling class was to cope with an extremely varied rural populace, which did not even share a common language.

serious opposition from the member states. Supranationalism is coupled with negative integration and, in contrast to federalist thinking, is the least democratic feature in the history of European integration. On the contrary, positive integration requires the agreement of national representatives in the Council of Ministers through intergovernmental decision-making and is more difficult to achieve. Intra-governmentalism is more open to voters' pressure, but at the same time is less effective in establishing a "general interest" and is more prone to domestic and international contingencies.

Passive integration involves maintaining an asymmetry between these two forms of cooperation, in order to protect the liberal features of the supranational economic core from "irrational" changes of the democratic will. Passive integration was crucial during the Cold War, when transatlantic monetary and military cooperation first and European integration later subtracted powers from parliaments in which Communists and Socialists occupied important positions. At the outset, European integration was marked by anti-Communism in two ways. Domestically, it provided legitimacy to liberal economic policies; internationally, it favoured the US' acquiescence in the building of a Western European competitor provided with special protections and economic privileges.¹⁷ Several post-war democratic constitutions in Western Europe agreed to self-limitations of sovereignty with the intention of preventing war and fostering growth. European integration emerged during the Cold War as a political-economic cluster within a wider Western settlement led by the US and was essential to building an anticommunist Western Europe that was able to grow within a liberal economic order. Liberal capitalism might have otherwise been jeopardised by the extent of state intervention in the economy which accompanied the unprecedented growth of Western Europe from the late 1940s to the early 1970s. Arising from the ashes of a "European civil war", passive integration has kept peace on the continent, assured prosperity and economic growth while preventing a relapse in to

¹⁷ Several scholars of the Cold War tend to emphasise the US hegemonic design and its support for European integration; the argument here is that inadequate attention has been devoted to the diverging political interests between continental European democracies and the Western Allies in the *shaping* of integration. See f.i. Hogan, M., *The Marshall Plan: America, Britain and the Reconstruction of Western Europe, 1947-1952*. New York: Cambridge University Press, 1987; Lundestad, G., *"Empire" by Integration. The United States and European Integration 1945-1997*. Oxford: Oxford University Press, 1998; Spagnolo, C., *La stabilizzazione incompiuta. Il Piano Marshall in Italia 1947-1952*. Roma: Carocci, 2001.