



# EUROPEAN PAPERS

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### ARTICLES

Edouard Dubout, *The European Form of Family Life: The Case of EU Citizenship* p. 3

Paolo Mazzotti and Mariolina Eliantonio, *Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union* 41

Sara Poli, *The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems* 71

### HISTORICAL MEMORY IN POST-COMMUNIST EUROPE AND THE RULE OF LAW *edited by Grażyna Baranowska and León Castellanos-Jankiewicz*

Grażyna Baranowska and León Castellanos-Jankiewicz, *Historical Memory in post-Communist Europe and the Rule of Law* 95

Nikolay Kopusov, *Historians, Memory Laws, and the Politics of the Past* 107

Alina Cherviatsova, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine* 119

Nika Bruskina, *The Crime of Genocide against the Lithuanian Partisans: A Dialogue between the Council of Europe and the Lithuanian Courts* 137

Miklós Könczöl and István Kevevári, *History and Interpretation in the Fundamental Law of Hungary* 161

### RE-CONNECTING AUTHORITY AND DEMOCRATIC LEGITIMACY IN THE EU *edited by Cristina Fasone, Daniele Gallo and Jan Wouters*

Cristina Fasone, Daniele Gallo and Jan Wouters, *Re-connecting Authority and Democratic Legitimacy in the EU: Introductory Remarks* 175

Lise Rye, *The Legitimacy of the EU in Historical Perspective. History of a Never-ending Quest* p. 191



Julien Navarro, <i>Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit</i>	209
Cesare Pinelli, <i>The Dichotomy Between "Input Legitimacy" and "Output Legitimacy" in the Light of the EU Institutional Developments</i>	225
Aldo Sandulli, <i>The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective</i>	237
Jan Wouters, <i>Revisiting Art. 2 TEU: A True Union of Values?</i>	255

## DIALOGUES

Loïc Azoulay, <i>On Dubious Parallels: The Transnational Europeans and the Jews. A Note on Gareth Davies' Article</i>	279
Gareth Davies, <i>How Citizenship Divides: A Response to Loic Azoulay</i>	283

## INSIGHTS

### QUESTIONING EUROPEAN (UNION) SOVEREIGNTY

*edited by Ségolène Barbou des Places*

Ségolène Barbou des Places, <i>Taking the Language of "European Sovereignty" Seriously</i>	287
Matej Avbelj, <i>A Sovereign Europe as a Future of Sovereignty</i>	299
Antoine Bailleux, <i>The Two Faces of European Sovereignty</i>	303
Thomas Verellen, <i>European Sovereignty Now? – A Reflection on What It Means to Speak of 'European Sovereignty'</i>	307
Christina Eckes, <i>EU Autonomy: Jurisdictional Sovereignty by a Different Name?</i>	319

### EU COURT OF JUSTICE STANDING UP TO ILLIBERAL DEMOCRACY: POLISH JUDICIAL "REFORMS" ON TRIAL

Pablo Martín Rodríguez, <i>Poland Before the Court of Justice: Limitless or Limited Case Law on Art. 19 TEU?</i>	331
Michał Ziólkowski, <i>Two Faces of the Polish Supreme Court After "Reforms" of the Judiciary System in Poland</i>	347

## EUROPEAN FORUM

<i>Insights and Highlights</i>	363
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## ARTICLES

### RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

## RE-CONNECTING AUTHORITY AND DEMOCRATIC LEGITIMACY IN THE EU: INTRODUCTORY REMARKS

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TABLE OF CONTENTS: I. The disconnection between the *loci* of authority and those of democratic control. – II. The competence problem in the Union. – III. Reconciling Europe with its citizens through democracy and rule of law. – IV. Scope and contents.

ABSTRACT: One of the main problems the Union has to cope with is the difficulty in properly articulating the relationship between authority and democratic legitimacy, in particular the disconnection between the allocation of powers to the EU and to its Member States and the forms of democratic control over their exercise in the Union. Indeed, it seems that the more EU authority expands, the more the democratic legitimacy of the Union is in trouble. In the EU the source of authority is dislocated out of the traditional forms of democratic accountability, which have been shaped domestically by centuries of constitutional history. In addition to this, the “punctiform” nature of many EU decision-making processes, starting at one level of government – regional, national or supranational – and ending up being concluded at a different level, favours this feeling of disorientation amongst European citizens. The attitude of several national governments, which tend to blame the EU for their own failures, exacerbates this problem and leads to the perception of EU institutions as not only distant, but also detached from the needs of ordinary citizens.

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KEYWORDS: authority – legitimacy – disconnection – EU competences – democratic control – rule of law.

## I. THE DISCONNECTION BETWEEN THE *LOCI* OF AUTHORITY AND THOSE OF DEMOCRATIC CONTROL

The problem of the “democratic deficit” in the European Union is probably as old as the process of European integration, being initially ascribed by David Marquand, in 1979, to the weak democratic legitimacy of the then European Community institutions due to the limited authority of the Parliamentary Assembly.<sup>1</sup> Against this backdrop he proposed the empowerment of the soon-to be elected European Parliament.<sup>2</sup> Whether the diagnosis of a “democratic deficit” for the Union is still accurate is, however, a different question. The Treaty of Rome in 1957 entailed a limited, but revolutionary for the time, conferral of powers to the Communities’ institutions, though not particularly in favour of the Parliamentary Assembly, which remained mainly a consultative authority at least until the budgetary treaties of the 1970s.<sup>3</sup> However, most powers, and core state powers in particular, firmly remained in the hands of national institutions, including national parliaments.<sup>4</sup> During the first stage of the European integration process, the idea of national legislatures’ disempowerment derives much more from domestic politics and national executive dominance in parliamentary systems, from the rise of the “administrative state”, and from processes of globalisation in general,<sup>5</sup> than from the alleged transfer of powers to the EU without democratic control.

The self-empowering attitude of Community institutions, starting from the Court of Justice,<sup>6</sup> the European Commission<sup>7</sup> and the same European Parliament,<sup>8</sup> drawing on

<sup>1</sup> D. MARQUAND, *Parliament for Europe*, London: Jonathan Cape, 1979, *passim*, and Y. MÉNY, *De La Démocratie en Europe: Old Concepts and New Challenges*, in *Journal of Common Market Studies*, 2003, p. 8.

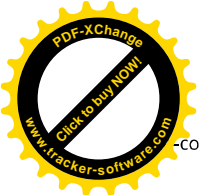
<sup>2</sup> D. MARQUAND, *Parliament for Europe*, *cit.*, p. 64.

<sup>3</sup> See the Treaty amending certain budgetary provisions signed in Luxembourg on 22 April 1970 and entered into force on 1 January 1971, and the Treaty amending Certain Financial Provisions, signed in Brussels on 22 July 1975 and entered into force on 1 June 1977.

<sup>4</sup> Or of Member States’ governments acting at Community level in the Council, which explains why liberal intergovernmentalists have disputed the idea of a democratic deficit of the EU. See, amongst many, A. MORAVCSIK, *In Defence of the “Democratic Deficit”, Reassessing Legitimacy in the European Union*, in *Journal of Common Market Studies*, 2002, p. 603 *et seq.*

<sup>5</sup> See S. ISSACHAROFF, *Democracy’s Deficits*, in *The University of Chicago Law Review*, 2018, p. 485 *et seq.*

<sup>6</sup> Since Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, and Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. Enel*. See D. GALLO, *L’efficacia diretta del diritto dell’Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano: Giuffrè, 2018, *passim*; R. SCHÜTZE, *Direct and indirect effects of Union law*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of EU Law*, Oxford: Oxford University Press, 2018, p. 265 *et seq.*; J.H.H. WEILER, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, in *International Journal of Constitutional Law*, 2014, p. 94 *et seq.*; A. TIZZANO, J. KOKOTT, S. PRECHAL (eds), *50th Anniversary of the Judgment Van Gend en Loos 1963-2013, Conference proceedings*, Luxembourg: Office of the official publications of the European



an extensive and teleological interpretation of the Treaties<sup>9</sup> and leading to the setting up of a supranational organisation in contrast to “ordinary international organizations”,<sup>10</sup> might have fed the rhetoric of the “democratic deficit”. The argument goes as follows: the Community legal system acquires an autonomy of action – an authority – that Member States might not be willing to confer to supranational institutions in principle, based on a literal interpretation of the Treaty. The first European Parliament’s elections in 1979 and the start of the “season” of Treaty revisions, from the 1980s to the Treaty of Lisbon, have probably changed the picture.

On the one hand, it became clear that Member States were in fact willing to increase the Community-Union’s competences at every treaty change so as to encompass, well beyond a purely economic understanding of the internal market, citizenship, coordination of economic policy, migration and criminal law, just to mention the most sensitive areas for the national sovereignty. At the same time, however, the “blame game” of national governments against the EU institutions – despite them being part of the Council and of the European Council – started.<sup>11</sup> European institutions have often been portrayed by domestic executives and media as being completely detached from domestic constitutional systems, making decisions with a huge impact on European citizens’ lives without clear and effective forms of democratic accountability. This understanding, today further echoed by Eurosceptic and populist parties and governments, dismisses and challenges the fundamental tenets of representative democracy in Europe, provided by Art. 10, para. 2, TEU:

Union, 13 May 2013, *passim*; M. POIARES MADURO, L. AZOULAI (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, *passim*; E. EDWARD, *Direct Effect: Myth, Mess or Mystery?*, in J.M. PRINSEN, A. SCHRAUWEN (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine*, Groningen: Europa Law Publishing, 2002, p. 1 *et seq.*; S. PRECHAL, *Does Direct Effect Still Matter?*, in *Common Market Law Review*, 2000, p. 1047 *et seq.*; P. CRAIG, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in *Oxford Journal of Legal Studies*, 1992, p. 453 *et seq.*; P. PESCATORE, *The Doctrine of “Direct Effect”: An Infant Disease of Community Law*, in *European Law Review*, 1983, p. 155 *et seq.*

<sup>7</sup> See L. RYE, *The Legitimacy of the EU in Historical Perspective. History of a Never-ending Quest*, in *European Papers*, 2020, Vol. 5, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 191 *et seq.*

<sup>8</sup> As is well-known, the Parliamentary Assembly renamed itself “European Parliament” in 1962 (*cf.* the Resolution of 30 March 1962 on the name of the Assembly) though the new denomination was acknowledged in primary law only with the Single European Act of 1986. On the self-empowering attitude of the European Parliament, see O. COSTA, *Le Parlement européen, assemblée délibérante*, Bruxelles: Éditions de l’Université de Bruxelles, 2001, p. 120 *et seq.*

<sup>9</sup> M. POIARES MADURO, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, in *European Journal of Legal Studies*, 2007, p. 1 *et seq.*

<sup>10</sup> See J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, 1991, p. 2405 *et seq.*, before the entry into force of the Treaty of Maastricht.

<sup>11</sup> See S. NOVAK, *The silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union*, in *Journal of Common Market Studies*, 2013, p. 1091 *et seq.*; S.B. HOBOLT, J. TILLEY, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014, p. 123 *et seq.*



“Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens”.

On the other hand, the role and powers of the other pillar of representative democracy in Europe, the European Parliament, have also been severely criticised (Arts 10, para. 2, and 14 TEU). Once being directly elected, high expectations have been raised by the fact that it would have become a parliament like any other. However, in terms of composition and of electoral system(s), there is little doubt that the European Parliament can hardly be equated to a domestic legislature or even to a federal Congress, although comparative studies abound in this regard.<sup>12</sup> Lacking a uniform electoral procedure (Art. 223, para. 1, TFEU), the current mixture of common electoral principles<sup>13</sup> and domestic electoral legislations,<sup>14</sup> even more than the implementation of the principle of degressive proportionality,<sup>15</sup> makes it difficult to perceive the European Parliament as representing European citizenry.<sup>16</sup> Furthermore, once the European Parliament is elected, the current appointment and accountability procedures towards the other institutions and, first of all *vis-à-vis* the Commission, fail to let people understand how their representatives in the Parliament can affect the political directions, the agenda

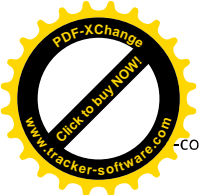
<sup>12</sup> See A. KREPPPEL, *The Environmental Determinants of Legislative Structure: A Comparison of the US House of Representatives and the European Parliament*, in T.J. POWER, N.C. RAE (eds), *Exporting Congress? The Influence of U.S. Congress on World Legislatures*, Pittsburgh: University of Pittsburgh Press, 2006, p. 137 *et seq.*; S. FABBRINI, *Between Power and Influence: the European Parliament in a dual Constitutional Regime*, in *Journal of European Integration*, 2019, p. 417 *et seq.*, especially in relation to the US Congress.

<sup>13</sup> See Council Decision (EC, Euratom) 2002/772 of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision (ECSC, EEC, Euratom) 76/787 of 21 October 2002, and Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage.

<sup>14</sup> On this point, see Court of Justice, judgment of 19 December 2019, case C-502/19, *Junqueras*.

<sup>15</sup> Particularly criticised, as is well known, by the German Federal Constitutional Court in the Lisbon Treaty ruling (judgment of 30 June 2009, 2 BvE 2/08) and in the judgments of 9 November 2011, 2 BvC 4/10, and of 26 February 2014, 2 BvE 2/13 *et al.*, 2 BvR 2220/13 *et al.*, on the national electoral threshold for the European elections. The most evident distortions of the principle of degressive proportionality have recently been corrected, with a revised distribution of seats amongst Member States, “taking advantage” of 46 of the 73 UK seats that have just been vacated after Brexit. While some seats have been redistributed (46), the remaining 27 seats have remained on hold, waiting for future EU enlargements rather than been assigned to a transnational constituency or to transnational lists, for example. See M. BARTL, *Hayek Upside-Down: On the Democratic Effects of Transnational Lists*, in *German Law Journal*, 2020, p. 57.

<sup>16</sup> And this goes well beyond the so-called “no demos” thesis, which seems to have lost sight in the current debate in favour of a more sophisticated account of the EU democratic polity as a “demoicracy”. See K. NICOLAÏDIS, *The Idea of European Demoicracy*, in J. DICKSON, P. ELEFTHERIADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 247 *et seq.*, and R. BELLAMY, *A Republican Europe of States. Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, Cambridge: Cambridge University Press, 2019, especially pp. 95-208.



and the priorities of the Union.<sup>17</sup> The European Parliament typically works by building large majorities, based on changing coalitions of political groups, which often do not mirror the majority formed at the time of the vote of investiture of the Commission.<sup>18</sup> The traditional accounts and alternatives developed within Nation States when it comes to forms of democratic government – parliamentary, presidential and semi-presidential, each of them entailing specific accountability mechanisms – are not satisfactory when referred to the Union. By the same token, the critical assessment of the European Parliament's role in the Union neglects the extraordinary powers which this democratic assembly holds in a comparative perspective. No other parliaments in the Union today can compete with the legislative and budgetary powers of the European Parliament,<sup>19</sup> which has been described as one of the most powerful parliaments in the world.<sup>20</sup>

Does this mean that there is no democratic problem in the Union and that citizens' criticism of EU institutions and the European Parliament especially is only due to a lack of understanding and awareness about the EU institutional set up? In part, as the European Parliament and the European Commission's communication strategies indicate, there is a communication problem on what the EU delivers and how it does so.<sup>21</sup> In part, as happens in many national democracies, the EU is unable to mobilise citizen participation within and beyond the elections, for example through mechanisms of bottom-up civic engagement.<sup>22</sup>

<sup>17</sup> Tasks that Art. 15, para. 1, TEU appears to assign to the European Council, in the first place, on which the European Parliament has very loose tools of control. See W. WESSELS, O. ROZENBERG, *Democratic Control in the Member States of the European Council and the Eurozone Summits*, Study for the European Parliament, Directorate General for Internal Policies, PE 474.392, 2013, and D. DINAN, *Relations Between the European Council and the European Parliament. Institutional and Political Dynamics*, European Parliamentary Research Service, European Council Oversight Unit of the European Parliament, PE 630.288, 2018. On the problem of electoral accountability in the EU see J. NAVARRO, *Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 209 *et seq.*

<sup>18</sup> See R. CORBETT, F. JACOBS, R. NEVILLE, *The European Parliament*, London: John Harper Publishing, 2016, pp. 11-12 and 237.

<sup>19</sup> Even though it is certainly true that the amount of resources that the EP can mobilise through the EU budget are really limited (a little bit more than 1 per cent of the GNI) and is not able, with very limited exceptions, to intervene on the revenues. See C. FASONE, N. LUPO, *The Union Budget and the Budgetary Procedure*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of European Union Law*, cit., p. 809 *et seq.*

<sup>20</sup> S. HIX, A.G. NOURY, G. ROLAND, *Democratic Politics in the European Parliament*, Cambridge: Cambridge University Press, 2007, p. 3.

<sup>21</sup> See the recent application, devised before the 2019 European Parliament's elections, *What Europe does for me*, <https://what-europe-does-for-me.eu/en/home>.

<sup>22</sup> A. ALEMANNI, *Europe's Democracy Challenge. Citizen Participation in and Beyond Elections*, in *German Law Journal*, 2020, p. 35 *et seq.* Petitions, European citizens' initiatives and the Commission's public consultation can be deemed to tackle this problem effectively.





## II. THE COMPETENCE PROBLEM IN THE UNION

However, the discontent towards the EU may also be significantly affected by the confusion that the process of European integration has triggered, with the responsibility of both the Member States and the EU itself, between the *loci* of authority, where the power is held and exercised, and those ensuring the democratic control of the decision-making processes – and hence, their democratic legitimacy – preferably through institutions that are directly elected. What at first sight is a very straightforward principle, the principle of conferral,<sup>23</sup> the bulwark for the articulation of the relationships between the Union and the States, faces several problems in its implementation.

First of all, except for the fields of exclusive competence (Art. 3 TFEU), in all the other fields – albeit to a different extent depending on whether the competence is shared (Art. 4 TFEU), where pre-emption occurs,<sup>24</sup> or, instead, the EU is deemed to support, complement or supplement national actions (Art. 6 TFEU) – the divide amongst the share of power between the States and the Union is somewhat blurred.<sup>25</sup> Where the authority actually lies depends on other principles, in particular subsidiarity and proportionality (Arts 5, paras 3, and 4 TEU), that have been amongst the most contested in the EU.<sup>26</sup> Suffice it to say that especially to tame the (too) creative and political interpreta-

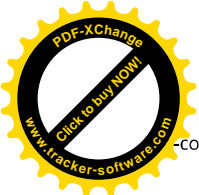
<sup>23</sup> Like happens in most federations: see K. LENAERTS, *Constitutionalism and the Many Faces of Federalism*, in *American Journal of Comparative Law*, 1990, p. 205 *et seq.*; R. SCHÜTZE, *From Dual to Cooperative Federalism. The Changing Structure of EU Law*, Oxford: Oxford University Press, 2009, p. 76 *et seq.*; D. HALBERSTAM, *Federalism: Theory, Policy, Law*, in M. ROSENFELD, A. SAJÓ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, especially pp. 589-602. According to Art. 5, para. 2, TEU: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. On the competences of the EU and the principle of conferral, see A. VON BOGDANDY, J. BAST, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, in *Common Market Law Review*, 2002, p. 227 *et seq.*; L. AZOULAI, *Introduction. The Question of Competence*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 1 *et seq.*; T. KOSTADINIDES, *The competences of the Union*, *cit.*, p. 191 *et seq.*

<sup>24</sup> See A. ARENA, *The Doctrine of Union Preemption in the EU Internal Market: Between Sein and Sollen*, in *Columbia Journal of European Law*, 2010, p. 477 *et seq.* See, however, the “parallel” competences laid down in Art. 4, paras 3 and 4, TFEU, where no pre-emption takes place.

<sup>25</sup> Up to the point of questioning whether, after all, exclusive Member States’ competences still exist: see B. DE WITTE, *Exclusive Member State Competences-Is There Such a Thing?*, in S. GARBEN, I. GOVAERE (eds), *The Division of Competences between the EU and the Member States. Reflections of the Past, Present and Future*, Oxford: Hart Publishing, 2017, p. 59 *et seq.* By contrast, in some fields of exclusive competence, for example monetary policy, the authority of national institutions, like the national central banks through the ESCB, is still crucial for the monetary governance of the Eurozone.

<sup>26</sup> On the principle of proportionality, see G. DE BÜRCA, *The Principle of Proportionality and its Application in EC Law*, in *Yearbook of European Law*, 1993, p. 105 *et seq.*; T.-I. HARBO, *The Function of the Proportionality Principle in EU Law*, in *European Law Journal*, 2010, p. 158 *et seq.*; T. TRIDIMAS, *The Principle of Proportionality*, in *Oxford Principles of EU Law*, *cit.*, p. 243 *et seq.* On the principle of subsidiarity, see G. DE BÜRCA, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, in *Journal of Common Market*





tions of the subsidiarity principle provided by national parliaments – now involved in its *ex ante* monitoring (Art. 12 TEU and Protocol no. 2)<sup>27</sup> – the Juncker Commission established a “task force” on “Subsidiarity, Proportionality and ‘Doing Less More Efficiently’”, chaired by First Vice President Frans Timmermans, precisely to investigate how to deal with them properly and whose conclusions, except for limited innovations, have largely confirmed the problematic management of those principles.<sup>28</sup>

In addition to this, the exercise of powers at supranational level does not normally go in favour of the European Parliament, and sometimes not even of the Council or of the Commission. The number of legislative acts approved through the ordinary legislative procedure per year is just a minimal proportion compared to the other legislative acts and, most importantly, to non-legislative acts.<sup>29</sup> This comes in addition to the regulatory or quasi-rule-making powers which the many EU agencies are equipped with, with more or less effective control by the Commission.<sup>30</sup>

Given the inevitable complexity of EU policy-making procedures – their preeminent technical nature and multilingualism do not help either – it is difficult to hold the decision-maker(s) accountable in a transparent and public manner. The ordinary European citizen may face troubles in understanding who has the power to do what in the Union. In the European context decision-making procedures take place partly at supranational level and partly at domestic level, particularly for the implementation of EU law; with the involvement, next to truly supranational institutions, like the Parliament and the Commission, of national governments represented in EU institutions and of national officials sitting in the many committees the European Commission hosts.<sup>31</sup> There is no

*Studies*, 1998, p. 217 *et seq.*; G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, p. 63 *et seq.*; R. SCHÜTZE, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, in *Cambridge Law Journal*, 2009, p. 525 *et seq.*

<sup>27</sup> K. GRANAT, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Oxford: Hart, 2017, *passim*.

<sup>28</sup> The main results of the task force’s work have been, as highlighted in the final report, the predisposition of a model grid for subsidiarity and proportionality to be used as common reference for all EU institutions and for national parliaments and the notion of “EU added value” to be proved by the Commission when putting forward a new legislative proposal.

<sup>29</sup> In 2019, for example, 75 basic legislative acts were adopted through the ordinary legislative procedure (plus 51 amending acts), 320 basic legislative acts were adopted through special legislative procedures as Council acts (75 amending acts), there were 60 basic delegated acts (65 amending acts), 513 basic implementing acts (359 amending ones) and 405 other acts, most of which were the Commission’s decisions. Source: Legal Acts – Statistics, EUR-Lex, eur-lex.europa.eu.

<sup>30</sup> M. BUSUIOC, *European Agencies: Law and Practices of Accountability*, Oxford: Oxford University Press, 2010, p. 75 *et seq.*; M. SIMONCINI, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Oxford: Hart Publishing, 2018, ch. 2.

<sup>31</sup> On comitology, C.F. BERGSTRÖM, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press, 2005, pp. 186-284; M. SAVINO, *The role of Committees in the EU Institutional Balance: Deliberative or Procedural Supranationalism?*, in T. CHRISTIANSEN, J.M. OETTEL, B.



direct accountability chain between the European Parliament and such institutions and bodies, notwithstanding the Parliament's attempt to expand its scrutiny and oversight powers.<sup>32</sup> By the same token, also for national parliaments, despite what was codified in Art. 10 TEU, overall there is still limited access and disclosure by their own government of information regarding the activity of the Council, of the European Council and the other intergovernmental fora.<sup>33</sup> Likewise, for national parliaments, it is anything but easy to control the activity of the EU institutions. Traditionally, accountability tools are designed to work within the same level of government, not across them. Until now, the attempts of both the European Commission and the European Central Bank in the framework of the European Semester and of Banking Union, respectively, to create channels of direct interaction with national parliaments – thus enriching the accountability mechanisms also in favour of the domestic level of government<sup>34</sup> – have not paved the way to an enhanced democratic and streamlined control of EU executive action.<sup>35</sup>

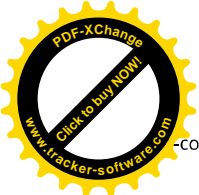
VACCARI (eds), *21st Century Comitology. Implementing Committees in the Enlarged European Union*, Maastricht: European Institute of Public Administration, 2009, p. 19 *et seq.*

<sup>32</sup> The European Parliament has drawn, in particular, on Arts 14 and 15, para. 6, TEU, Arts 230 and 235, para. 2, TFEU, on the inter-institutional agreement on better law-making, and on its rules of procedure (Arts 37 and 118a on annual and multiannual programming; Arts 128, 129, 130 and 210 on parliamentary questions; and Art. 123 on the statements of the Council and the European Council's members in front of the Parliament). Additionally, the Court of Justice has also contributed to this trend, starting from its landmark judgment in: Court of Justice, judgment of 29 October 1980, case C-138/79, *SA Roquette Frères v Council*.

<sup>33</sup> O. ROZENBERG, W. WESSELS, *Democratic Control in the Member States of the European Council and the Euro zone summits*, cit., p. 14 *et seq.*; D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *Modern Law Review*, 2014, p. 1 *et seq.*

<sup>34</sup> See the economic dialogue (e.g. Art. 14 of Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, and Art. 15 of Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area) and the banking dialogue (Arts 20 and 21 of the Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, and Art. 45 of Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010). In addition to these "dialogues" which happened to be established in fields where national interests and national law are still dominant, the European Commission directly interacts with national parliaments in the framework of the early warning mechanism and of the political dialogue (Protocols no. 2 and no. 1 annexed to the Treaty of Lisbon).

<sup>35</sup> On the economic dialogue, see B. CRUM, D. CURTIN, *The Challenge of Making the European Union Executive Power Accountable*, in S. PIATTONI (ed.), *The European Union. Democratic Principles and Institutional Architectures in Times of Crisis*, Oxford: Oxford University Press, 2015, p. 63 *et seq.*; on the banking dialogue, see D. FROMAGE, R. IBRIDO, *The 'Banking Dialogue' as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?*, in *Journal of European Integration*, 2018, p. 295 *et seq.*



Moreover, the problem of the disconnection between the place of authority and the nature of the democratic control that the exercise of EU (conferred) powers entails is further worsened by the asymmetries featuring the degree of integration reached by Member States in a certain policy area or on a single issue. Europe *à la carte* and differentiated integration that tend to materialise through opt-ins and opt-outs, forms of enhanced and structured cooperation (though marginally used so far), agreements amongst some Member States only, not to mention the divide between Eurozone and non-Eurozone, and *de facto* asymmetries (e.g. Northern vs. Southern countries, countries of first arrival vs. countries of final destination, Western vs. Eastern countries, etc.) complicate the disconnection(s) between national and EU decision-makers and the citizens.

The confusion with the powers and limits of the EU is also translated into the academic debate. For one, politics as emerging from democratic discretionary choices is excessively constrained at EU level. The “over-constitutionalisation” of EU primary law thesis argues that the Treaties abound in procedural and substantive details unlike most domestic Constitutions, thus frustrating the possibility for EU institutions to engage with truly autonomous political decisions.<sup>36</sup>

For others, instead, the level of autonomy which EU law has reached – the “unconfined power of EU law” – is able to generate a permanent contestation by national authorities and civil society against the EU that, although potentially positive as long as democratic, can easily be turned into a destructive conflict.<sup>37</sup>

Both visions, though apparently in contrast, highlight the limits of the EU’s political authority and the quest for enhanced democratic legitimacy. The perception of a technocratic domination of the EU, with the many constraints and hurdles posed to democratic scrutiny, both at national and at supranational level, in fact hides the existence of very sophisticated and articulated instances of democratic control of the EU decision-making process within the European Parliament, in national parliaments and through interparliamentary cooperation. All of this fails to provide a coherent system of democratic accountability. Remarkably, in contrast to the “democratic deficit” thesis, some authors argue that the EU is actually affected by a “democratic surplus”.<sup>38</sup> At the same time the idea that the EU has gone too far in “overstretching” its powers without national polities having a say, beyond the occasion of Treaty revisions, has fed the rhetoric of a “re-nationalisation” of EU powers

<sup>36</sup> See D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, p. 460 *et seq.* To some extent this idea also echoes Schmidt’s view of the Union as based on “policies without politics” (V.A. SCHMIDT, *Democracy in Europe: The EU and National Politics*, Oxford: Oxford University Press, 2006, p. 156) and the idea of the EU legislature as constrained by the Court of Justice’s case law, on which see G. DAVIES, *The European Union Legislature as an Agent of the European Court of Justice*, in *Journal of Common Market Studies*, 2016, p. 846 *et seq.*

<sup>37</sup> See D. CHALMERS, *The Unconfined Power of European Union Law*, in *European Papers*, 2016, Vol. 1, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 405 *et seq.*

<sup>38</sup> See A. PSYGKAS, *From the “Democratic Deficit” to a “Democratic Surplus”: Constructing Administrative Democracy in Europe*, Oxford: Oxford University Press, 2017, p. 1 *et seq.*



– taking back control! – as the Brexit saga confirms, and as a controversial and dangerous use of the “national constitutional identity” discourse seems to prove.<sup>39</sup>

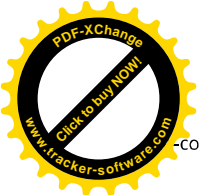
III. Where do citizens stand in such a complex relationship between the EU and its Member States? The many crises the EU has experienced over the last few years – the financial, eurozone, migration, the rule of law and the Coronavirus crises<sup>40</sup> – have further jeopardised the problem of the disconnection between authority and democratic legitimacy in the Union. This has been exacerbated by the Union's inability to deliver. For this not only the EU is to blame: Member States bear significant responsibilities as well. For example, national governments have been unwilling to confer further powers to the EU so as to complete the Economic and Monetary Union (EMU), or to create effective solidarity mechanisms across Member States to tackle migration. *A fortiori* the responsibility for rule of law backsliding and democratic decay affecting several Member States lies primarily at national level,<sup>41</sup> even though it has been convincingly argued that a (too) quick accession to the EU without sufficient scrutiny of the respect of these fundamental principles has not helped the situation.<sup>42</sup>

<sup>39</sup> See the case of the Hungarian Constitutional Court, judgment of 5 December 2016, no. 22, on the European Council Decision 2015/1601/EU of 22 September 2015 on the relocation of immigrants and the quota system, on which see, critically, G. HALMAI, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, in *Review of Central and East European Law*, 2018, p. 23 *et seq.* A number of Constitutional and Supreme Courts today have drawn on Art. 4, para. 2, TEU, which refers to “national identity” to elaborate their own version of the “constitutional identity review” towards EU law; a tool which has been normally used to signal the existence of national supreme constitutional principles to be protected, in a joint cooperative enterprise with the EU institutions and the Court of Justice in particular. In some instances, like the one just mentioned, however, the “constitutional identity” has been used as a confrontational tool, thus leading some scholars to question the constitutional identity review in its entirety. See for instance R.D. KELEMEN, L. PECH, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland*, in *RECONNECT Working Paper*, no. 2, September 2018, *passim*; F. FABBRINI, A. SAJÒ, *The Dangers of Constitutional Identity*, in *European Law Journal*, 2019, p. 457 *et seq.*; G. DI FEDERICO, *The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards*, in *European Public Law*, 2019, p. 347 *et seq.*

<sup>40</sup> On the problematic management of the Eurozone crisis, see C. PINELLI, *The Dichotomy Between “Input Legitimacy” and “Output Legitimacy” in the Light of the EU Institutional Developments*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 225 *et seq.*

<sup>41</sup> See A. SANDULLI, *The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 237 *et seq.* See also T.T. KONCEWICZ, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, in *Review of Central and East European Law*, 2018, p. 116 *et seq.*, and W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019, p. 58 *et seq.*

<sup>42</sup> See J. WOUTERS, *Revisiting Art. 2 TEU: A True Union of Values?*, in *European Papers*, Vol. 5, 2020, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 255 *et seq.* See also D. KOCHENOV, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law*, Den Haag: Kluwer Law International, 2008, *passim*.



Yet for a long time the EU has probably been slow and ineffective in its reaction to the rule of law crisis,<sup>43</sup> only recently trying to propose a more comprehensive and coordinated toolkit of measures to face rule of law problems.<sup>44</sup> The active and consistent stance of the Court of Justice in its latest decisions has also supported a shift in the approach,<sup>45</sup> with a view to promote “integration through the rule of law”.<sup>46</sup>

In light of these developments, citizens have remained mainly spectators of this drama, with fundamental rights seriously in danger in those Member States, like Hungary and Poland, that have been affected most by rule of law backsliding: political capture of courts, free media under attack, academic institutions forced to relocate elsewhere and even the right to have free and democratic elections have been put into question.<sup>47</sup> Although the national governments in question have been established through democratic elections, as they gradually dismantled the institutions from within a (formal) constitutional state,<sup>48</sup> the basic tenets of liberal constitutionalism have gone. This is happening while the level of trust of citizens towards national and EU institutions has gradually declined.<sup>49</sup>

<sup>43</sup> See L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*

<sup>44</sup> See the Communication COM(2019) 163 final of 3 April 2019 from the Commission to European Parliament, the European Council and the Council on Further strengthening the Rule of Law within the Union. State of play and possible next steps, and Communication COM(2019) 343 final of 17 July 2019 from the Commission to European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Strengthening the rule of Law within the Union. A Blueprint for Action, and the critical remarks by D. KOCHENOV, *Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law*, in *Hague Journal on the Rule of Law*, 2019, p. 423 *et seq.*

<sup>45</sup> See Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*; judgment of 25 July 2018, case C-216/18 PPU, *LM*; order of 17 December 2018 and judgment of 24 June 2019, case C-619/18, *Commission v. Poland*; judgment of 5 November 2019, case C-192/18, *Commission v. Poland*; judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. Krajowa Rada Sądowictwa*, and *CP and DO v. Sąd Najwyższy*; all of them emphasising the link between effective judicial protection under Art. 19 TEU and Art. 47 of the Charter of fundamental rights of the EU (Charter) and the principle of judicial independence.

<sup>46</sup> K. LENAERTS, *New Horizons for the Rule of Law Within the EU*, in *German Law Journal*, 2020, p. 29.

<sup>47</sup> See Venice Commission, Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion no. 720/2013 of 29 May 2012, CDL(2012)023, Strasbourg; Venice Commission-OSCE/ODIHR, Draft joint opinion on the Act on the elections of Members of Parliament of Hungary, Opinion no. 662/2012 of 1 June 2012, CDL(2012)033, Strasbourg, and B. MAJTÉNYI, A. NAGY, P. KÁLLAI, “*Only Fidesz*” – *Minority Electoral Law in Hungary*, in *Verfassungsblog*, 31 March 2018, [verfassungsblog.de](http://verfassungsblog.de).

<sup>48</sup> This is a point that many scholars highlight, in comparison to the traditional practice of authoritarian *coups d'état*: see A. HUO, T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 2018, p. 78 *et seq.*; D. ZIBLATT, S. LEVITSKY, *How Democracies Die. What History Reveals About Our Future*, London: Viking, 2018, *passim*; M.A. GRABER, *What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds), *Constitutional Democracy in Crisis*, Oxford: Oxford University Press, 2018, p. 665 *et seq.*

<sup>49</sup> See the European Council Bratislava Declaration and Roadmap adopted on 16 September 2016 in the framework of the Bratislava Summit of 27 Member States, and the Report by L. VAN DEN BRANDE, Spe-





It can thus be asked whether the EU is apt to restore trust with European citizens and rescue national constitutional democracies like it did, at the start of the integration process, with States in the aftermath of the Second World War.<sup>50</sup> The RECONNECT Horizon 2020 Project on “Reconciling Europe with its Citizens through Democracy and Rule of Law”, in the framework of which this *Special Section* is published, contends that the EU can regain legitimacy if it takes citizens’ aspirations and preferences duly into account. Art. 2 TEU raises high expectations on what the EU can deliver,<sup>51</sup> also in relation to countries that seem to have lost confidence in rule of law and democratic principles. Human dignity, freedom, democracy, equality, the rule of law and protection of minorities are values upon which the EU is founded and are common to the Member States, according to Art. 2 TEU. Moreover, these values are deemed to be implemented in societies in which “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. In particular, the RECONNECT project emphasises the importance of preserving and promoting justice and solidarity in all areas of the Union’s action as a way to restore citizens’ credibility in the EU institutions. The results of the 2019 European elections, with the defeat and normalisation-institutionalisation of the Eurosceptic front, are to some extent a further confirmation of this.<sup>52</sup>

Through a comprehensive examination of principles, practices, and perceptions of democracy and the rule of law in the EU carried out by a consortium of 18 academic partner institutions led by KU Leuven, RECONNECT aims to detect how democratic and rule of law principles and practices of national and EU institutions resonate with the actual aspirations, perceptions and preferences of citizens so as to build up a new narrative for Europe reconnecting the Union to its citizens.

The *Articles* of this *Special Section* were first presented at the RECONNECT workshop held on 1 February 2019 at LUISS Guido Carli on “Reconceptualizing Authority and Legitimacy in the EU: New Architectures and Procedures to Reconnect the Union with its Citizens”, organised in the framework of Work Package 4 of RECONNECT, looking at concepts like democracy and rule of law, legitimacy and authority in relation to solidarity and justice, and to sovereignty. Since then the papers have been revised and re-worked to provide a more consistent account for the authority and legitimacy challenges which the EU faces.

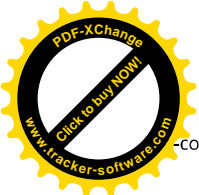
cial Adviser to the President of the European Commission, Jean-Claude Juncker, on *Reaching Out to EU Citizens: A New Opportunity. “About us, with us, for us”*, October 2017, ec.europa.eu.

<sup>50</sup> See A. MILWARD, *The European Rescue of the Nation-State*, 2000, London: Routledge, p. 21 *et seq.* A Recent Standard Eurobarometer Survey, after the 2019 European elections, however, shows an improvement in the perception of the EU by the European citizens, including a record high support for the euro: Standard Eurobarometer 91, August 2019.

<sup>51</sup> See J. WOUTERS, *Revisiting Art. 2 TEU*, cit., and A. VON BOGDANDY, L.D. SPIEKER, *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, in *European Constitutional Law Review*, 2019, p. 391 *et seq.*

<sup>52</sup> See Editorial, *The 2019 Elections and the Future Role of the European Parliament: Upsetting the Institutional Balance?*, in *European Papers*, Vol. 4, 2019, No 1, www.europeanpapers.eu, p. 3 *et seq.*





#### IV. SCOPE AND CONTENTS

As highlighted above, one of the main problems the Union has to cope with is the difficulty in properly articulating the relationship between authority and democratic legitimacy. This leads to the perception of EU institutions as not only distant, but also detached from the needs of ordinary citizens. In the EU the source of authority is dislocated out of the traditional forms of democratic accountability, which have been shaped domestically by centuries of constitutional history. In addition to this, the “punctiform” nature of many EU decision-making processes, starting at one level of government – regional, national or supranational – and ending up being concluded at a different level, favours this feeling of disorientation amongst European citizens. The attitude of several national governments, which tend to blame the EU for their own failures, exacerbates this problem.

The aim of this *Special Section* is to tackle the problem of the disconnection between the allocation of powers between the EU and its Member States and the forms of democratic control over the exercise of authority in the Union. In order to highlight the evolution of this problem, it is investigated at different moments in time of the European integration process, from its foundation to the crises that occurred during the last decade. Indeed, it seems that the more the EU authority expands, the more the democratic legitimacy of the Union is in trouble. Each contribution looks at the problem of the disconnection that has been highlighted from a specific perspective: the design by the Union’s “founding fathers” of mechanisms of democratic accountability of the Commission; the effectiveness of the electoral accountability of the European Parliament; the democratic legitimacy problems caused by the Eurozone crisis and leading to the tension between technocratic dominance and populism; the asymmetry between administrative and constitutional developments of the EU and the limits of the role of law in the Union; and the ability of the EU to effectively control the respect of the fundamental values on which the entire European construction is built. Every article refers to a critical juncture of European integration:<sup>53</sup> the passage from the Treaty of Paris to the Treaty of Rome; the making of an elected supranational Parliament after 1979; the crisis triggered by the rejection of the Constitutional Treaty; the Eurozone crisis; and the rule of law crisis or, more fundamentally, the erosion of the values enshrined in Art. 2 TEU.

All the Authors highlight, from their own perspective of analysis, how one of the controversial points for the legitimacy of the EU is precisely the mismatch between the authority exercised by the European institutions and by the Member States, the reach and the limits of such authority and the mechanisms of democratic accountability. The interdisciplinary nature of the RECONNECT project is demonstrated by the multidisciplinary background of the authors of this *Special Section*, ranging from law, political science and history.

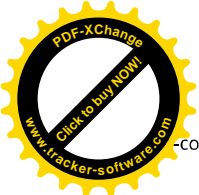
<sup>53</sup> G. CAPOCCIA, R.D. KELEMEN, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, in *World Politics*, 2007, p. 341 et seq.



Lise Rye's Article on *The Legitimacy of the EU in Historical Perspective: History of a Never-ending Quest* opens the *Special Section* by focusing on the foundational decade of the European integration process. It critically assesses the idea of legitimacy as "legality" stemming from the Treaty of Paris and from the Treaty of Rome, considering the Member States' decision to create a common market as the justification for the setting up of supranational institutions and for the empowerment of the European Commission. The *Article* argues that while the mechanisms for ensuring democratic legitimacy were weak in the Treaty of Rome, and the democratic relationship between citizens and Community institutions was not a central concern back then, the Treaty provided for basic accountability mechanisms, for example of the Commission *vis-à-vis* the then Parliamentary Assembly, that would acquire more visibility and strength in the decades to come.

Julien Navarro's Article on *Electoral Accountability in the European Union: An Analysis of the European Parliament Elections with Respect to the EU's Political Deficit* examines accountability in the EU by looking at European elections. The *Article* discusses and challenges the idea that the Union suffers from a democratic deficit. The author advances that it is rather a political deficit that affects the EU and its disconnection from the citizens, linked to a problem of electoral accountability. The European Parliament elections are of special interest as they provide – at least in theory – the most direct channel for institutional accountability as well as the necessary incentives for political actors to act responsively. However, the declining turnout in European elections and the lack of knowledge about the EU on the part of voters reveal flaws in the performance of the accountability mechanisms at EU level. Such deficiencies depend, in part, on the internal procedures of the Parliament and on the design and the practice of the European Parliament's elections, which to a large extent are still reliant on national electoral rules and electoral campaigns.

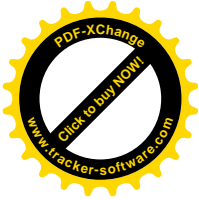
Cesare Pinelli's Article on *The Dichotomy Between "Input Legitimacy" and "Output Legitimacy" in the Light of the EU Institutional Developments* leads us to the complex legitimacy problem that arose in the aftermath of the Eurozone's sovereign debt crisis. This crisis has triggered a "twin legitimacy deficit", with output legitimacy undermined, in terms of the EU's capacity to react through European-wide redistributive policies, and the input legitimacy of national representative institutions severely limited under the strict conditionality put in place by the new governance system and by the "command-and-control relationship" imposed. According to the author, the case-law of the Court of Justice, in cases like *Pringle* and *Gauweiler*, has revealed the same paradox. On the one hand, we have witnessed the imposition by an "unaccountable technocracy" (or the self-imposition by Member States) of a series of automatism that limit the autonomy of national governments. On the other hand, the "command-and-control" style of intervention is also meant to impose a structural convergence amongst very different national economies and can be considered as illegitimate. Technocratic and intergovernmental dominance has further worsened the disconnection between the EU and its citizens also from the input legitimacy perspective, favouring a sort of populist backlash against the Union.



Aldo Sandulli's *Article on The Double Face of the Rule of Law in the European Legal Order: An Administrative Law Perspective* turns our attention to the role of law in the Union and its understanding and objectives, in order to explain the disconnection between European citizens and EU institutions. Three main asymmetries of the EU legal system are detected in comparison to the evolution of modern States. The first derives from a predominantly legalistic approach in the development of the Union, with the law being in an imbalanced relationship with other social sciences like economics and sociology. The second asymmetry, linked to the former, depends on the EU process of "juridification" of economic rules, with a specific ordoliberal approach entrenched in EU primary and secondary law and with narrow avenues for national economies to deviate from EU legal "orthodoxy". The third asymmetry arises from the contrast between the growing body of EU administrative law *vis-à-vis* the very limited development of constitutional law in the European legal system, whereby constitutional law refers to the (lack of the) ability of the EU to constitute power and to mobilise resources on its own. This asymmetry is the most problematic from a democratic perspective, as the development of constitutional law, at least at national level, is expected to prepare the ground for the advancement of administrative law, and not the other way around. The *Article* concludes by arguing that the attempt to reconnect European citizens and EU institutions needs to start from a conception of the law that is non-infrastructural nor instrumental to serve a specific economic project and from a more appropriate consistent balance between administrative and constitutional law.

Finally, Jan Wouters' *Revisiting Art. 2 of the TEU: A Union of Values?* offers a critical assessment of this Treaty provision, from its genesis to its implementation so far. The *Article* examines the enforcement of the EU's foundational values both in the accession stage and during the membership of the Union. The author highlights two main weaknesses related to Art. 2 TEU with regard to the main discourse that this *Special Section* seeks to advance. First, there is an asymmetry between the nature of Art. 2 TEU's values, which are foundational of the whole EU architecture, and the limited reach of EU action for their enforcement. Second, the EU and the Commission in particular, have followed quite a legalistic-technocratic assessment of the compliance with the rule of law principles rather than endorsing a broader and far-reaching view on Art. 2 TEU application that could combine all the values together. Under such broader view, other values like democracy, justice and solidarity could be given the same rank and strength as the rule of law, at the time of the accession process and once membership is acquired. This would probably help the Union to connect more strongly with the citizens of the acceding countries and to reconnect with those of the Member States, even though there are limits for the EU alone to deliver without the active cooperation of the Member States.





## ARTICLES

### RE-CONCEPTUALIZING AUTHORITY AND LEGITIMACY IN THE EU

edited by Cristina Fasone, Daniele Gallo and Jan Wouters

# THE LEGITIMACY OF THE EU IN HISTORICAL PERSPECTIVE: HISTORY OF A NEVER-ENDING QUEST

LISE RYE\*

TABLE OF CONTENTS: I. Introduction. – II. The Treaty of Paris and the introduction of supranationality. – III. The idea of legitimacy as legality in the Treaty of Rome. – IV. Mechanisms for legitimacy through democratic rule in the Treaty of Rome. – V. Concluding remarks.

ABSTRACT: This *Article* revisits the EU's foundational decade with the view to explain the idea of legitimacy as legality that made its mark on the Treaties of Paris (1951) and Rome (1957). To the architects of these Treaties, it was the Member States' decision to create a common market that justified the creation of supranational institutions in general and the powers of the European Commission in particular. While the mechanisms for legitimacy through democratic rule in the Treaty of Rome were weak, this Treaty nevertheless included the seeds for such rule, leading to the conclusion that the legacy of the Treaty of Rome in this matter is mixed.

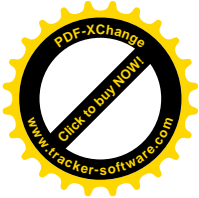
KEYWORDS: common market – elitism – technocracy – legitimacy – Spaak – democratic rule.

## I. INTRODUCTION

The period of permissive consensus is generally and across academic disciplines interpreted as a period where legitimacy, in a European context, was a non-issue.<sup>1</sup> This period thus contrasts sharply with the post-Maastricht period, where concerns about the

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<sup>1</sup> F. LANGDAL, G. VON SYDOW, *Democracy, Legitimacy and Constitutionalism*, in *Scandinavian Studies in Law*, 2007, p. 351 *et seq.*



legitimacy of European integration became widespread.<sup>2</sup> Existing research explains the absence of politicization of European level politics in the period between the French National Assembly's 1954 rejection of the Treaty establishing the European Defense Community (EDC) and the 1991 Treaty on European Union with this period's focus on market integration. "The implications for most people (except perhaps for farmers) were limited or not transparent", Hooghe and Marks point out, in a highly cited article from 2009. Consequently, "Public opinion was quiescent".<sup>3</sup> This *Article* shifts the focus from the general public to the political and administrative *élites* that prepared and negotiated the 1951 Treaty of Paris and the 1957 Treaty on the European Economic Community (henceforth the Treaty of Rome). The *Article's* point of departure is that ideas of legitimacy did inform the work leading up to the founding Treaties and that an idea of legitimacy as legality dominated this work. Drawing on the existing canon of historical literature and primary sources from the Historical Archives of the European Union, the purpose of the *Article* is to explain how the idea of legitimacy as legality developed and manifested itself in the institutional architectures and in the 1957 decision to authorize the Commission to negotiate trade deals with third countries.<sup>4</sup>

The following section discusses the introduction of supranationality in the Treaty of Paris, which from a perspective of popular participation set the European integration project off on the wrong foot. Turning to the Treaty of Rome, the third and fourth sections examine the work in the Intergovernmental Committee and the Intergovernmental Conference respectively. Historians have generally not been too preoccupied with the emergence of European-level institutions, leading to a situation where historical research has relied heavily on *memoirs*.<sup>5</sup> Anne Borger-de Smedt's 2012 article into the basis for European law in the Treaties of the 1950s is a welcome exception to this trend. Borger-de Smedt investigates why the Treaties of Paris and Rome offered "sufficient legal basis for the European Court of Justice (ECJ) to build its constitutional interpretation", when they were "apparently designed to ensure the centrality of the Member-States."<sup>6</sup> This *Article* concentrates on the role of the European Commission. Section three asks how the Treaty of Rome came to include this common institution with pow-

<sup>2</sup> A. FØLLESDAL, *Legitimacy Theories of the European Union*, in *ARENA Working Papers*, 2004, available at [www.sv.uio.no](http://www.sv.uio.no).

<sup>3</sup> L. HOOGHE, G. MARKS, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, in *British Journal of Political Science*, 2008, p. 5.

<sup>4</sup> The archives consulted for this *Article* is the CM3/NEGO-fonds held by the Historical Archives of the European Union (HAEU). The CM3/NEGO fonds consist of 418 files, covering the period from the 1955 relaunch of European integration to the 1957 Treaties of Rome. I am thankful to my colleague at Copenhagen University, Morten Rasmussen, who generously lent me a digitalized version of these fonds.

<sup>5</sup> K. SEIDEL, *The Process of Politics in Europe: The Rise of European Elites and Supranational Institutions*, London, New York: I.B. Tauris Publishers, pp. 2-3.

<sup>6</sup> A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome*, in *Contemporary European History*, 2012, p. 340.





ers of its own. The argument presented is that Paul-Henri Spaak's role in this matter was key. In making sure that all proposals could be traced back to the decisions of the participating governments, Spaak managed to keep the sovereignty conscious governments on board. Spaak also formulated the principles that informed the work in the Intergovernmental Committee, and that eventually led this Committee to propose four distinct institutions. Section four examines the negotiating parties' decision to grant the Commission the authority to negotiate trade deals with third countries, explaining how this was considered a necessary consequence of the move from sectoral to general integration. In both cases that the *Article* examines, the States' decision to create a common market justified the creation of supranational institutions, in general, and powers of the European Commission, in particular. In combination with the deliberate exclusion of mechanisms for legitimacy through democratic rule, this set the scene for the backlash that manifested itself against the EU legitimacy deficit from the 1990s onwards.

## II. THE TREATY OF PARIS AND THE INTRODUCTION OF SUPRANATIONALITY

Historical research interprets the formulation of the 1951 Treaty of Paris as a tug-of-war between the advocates of a strong and independent High Authority and the champions of democratic control.<sup>7</sup> In her fine empirical study of the basis for European law, Anne Borger-de Smedt demonstrates how this tug-of-war eventually ended in a pragmatic compromise.<sup>8</sup> This compromise also constituted a first and important step in the establishment of an elitist culture where experts exerted significant power and where the mechanisms for popular participation and control were weak. In that sense, the Treaty represented a victory for the functionalist approach to European integration, and a setback for the competing, constitutional approach that other European federalists had advocated since the final years of World War II. With this Treaty, the signatories initiated a predominantly pragmatic and technocratic form of cooperation that paid little concern to citizens' participation. The Europe that took shape from the beginning of the 1950s was the Europe of Jean Monnet, not of Altiero Spinelli – Monnet's Italian contemporary, who conducted a life-long battle for a more democratic Europe.

The Treaty of Paris established an institutional architecture that reflected contemporary political, economic and social concerns and the personal experience of key actors. The centerpiece of this architecture was the High Authority – the mighty predecessor of today's European Commission and the brainchild of Jean Monnet.<sup>9</sup> The historical literature traces Monnet's insistence on a powerful supranational institution to his positive experience with inter-allied executive committees during the World Wars, with eco-

<sup>7</sup> A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, London: Routledge, 1984, p. 409.

<sup>8</sup> A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law, 1950-57*, cit., p. 347.

<sup>9</sup> D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community. Supranationality in Operation*, London: Weidenfeld & Nicolson, 1994, p. 10.



conomic planning in France after World War II, as well as to the role of transatlantic policy networks.<sup>10</sup> The existing scholarly research argues that the legacy of the Monnet Plan that led to the creation of the European Coal and Steel Community (ECSC) was to establish the notion of a technocratic approach as well as a corporatist mode of operation.<sup>11</sup> On a more general level, the faith in experts, the elite-orientation and the delegation of authority to supranational institutions that would eventually characterize the ECSC was also a reaction against the mobilization of masses associated with totalitarianism and the failure of the more intergovernmental League of Nations to prevent World War II.<sup>12</sup>

The Schuman Plan envisaged a vague institutional structure, making no mention of either a council of ministers or an assembly. Its focus was on the new and supranational body – the High Authority –, while stressing that “appropriate measures” would be provided “for means of appeal against the decisions of the Authority”.<sup>13</sup> At the opening of the Paris negotiations, it soon became clear that while the other delegations accepted the supranational institution in principle, they insisted on the need for political and judicial measures to limit and control its powers.<sup>14</sup> Dirk Spierenburg, the head of the Dutch delegation, later recalled how Monnet, in his capacity as chair, tried to solve the institutional problems early, in restricted sessions with the heads of delegation.<sup>15</sup> In these settings, Monnet argued the case of the High Authority, but he also introduced the creation of an assembly representing the national parliaments: “Independent of governments, its members would take decisions by majority voting and be accountable to an assembly representing the parliaments of the member countries. It would have

<sup>10</sup> For a general introduction to the connection between Monnet's international experience and his viewpoints on European institutions, see J. GILLINGHAM, *European Integration 1950-2003. Superstate or New Market Economy*, Cambridge: Cambridge University Press, 2003, pp. 20-21. For a thorough account of Monnet's international experience during and between the world wars, see F. DÜCHENE, *Jean Monnet. The First Statesman of Interdependence*, New York: W.W. Norton & Company, 1994. On the role of the national delegations in the Paris negotiations, see J. GILLINGHAM, *Coal, Steel, and the Rebirth of Europe, 1945-1955*, Cambridge: Cambridge University Press, ch. 5. For an in-depth historical study of the role of transatlantic policy networks in the formulation of the Treaty of Paris, see B. LEUCHT, *Transatlantic Policy Networks and the Formation of Core Europe*, Portsmouth: University of Portsmouth, 2008.

<sup>11</sup> K. FEATHERSTONE, *Jean Monnet and the “Democratic Deficit” in the European Union*, in *Journal of Common Market Studies*, 1994, p. 150.

<sup>12</sup> On the Coal and Steel Community as a measure to prevent new conflict, see M. EILSTRUP-SANGIOVANNI, D. VERDIER, *European Integration as a Solution to War*, in *European Journal of International Relations*, 2005, p. 99 *et seq.*

<sup>13</sup> The Schuman Declaration, 9 May 1950. The full text of the declaration is available at [europa.eu](http://europa.eu).

<sup>14</sup> A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 342; A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

<sup>15</sup> D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community*, cit., p. 14. The other heads of delegations were Walter Hallstein (West Germany), Maximilien Suetens (Belgium), Paolo Emilio Taviani (Italy) and Albert Wehrer (Luxembourg).



contacts with all interest groups through a series of advisory committees, and it would have its own resources, rather than depending on government subsidies".<sup>16</sup>

The literature on the ECSC negotiations seems to agree that France was responsible for adding the assembly, in the words of Alan S. Milward as a means to "blunt the technocratic edge of the Authority".<sup>17</sup> Anne Boerger-de-Smedt traces this decision back to the French socialist politician, André Philip, "who had sternly condemned the lack of democratic supervision in the new organization".<sup>18</sup> Confronted with concerns from the other delegations, most notably the Benelux countries, Monnet also agreed to demands for a council of ministers and a judicial body that could settle disputes. The Benelux countries wanted not only a certain level of governmental supervision, but also a clear definition of the powers of the High Authority.<sup>19</sup> Along with West Germany, these countries also insisted on the introduction of a permanent court, if for somewhat different reasons. The Benelux countries argued the case for an international court that would not only review the legality of the High Authority's decisions but also assess, in its rulings, the socio-economic consequences within which this authority had acted. Bonn favored a court that also could act as a constitutional court. The result was, Boerger-de-Smedt concludes, a court that defies easy categorization: "More than an international Court, but not quite a constitutional Court either, it was mainly an administrative Court, empowered to ensure that the HA would act within the powers granted by the Treaty".<sup>20</sup>

Overall, the architects of the first European community paid little concern to popular participation. The ECSC was designed to protect the peoples of Europe from their tendency to wage war. Five years after World War II, the prevailing opinion was that peace would be best served by a greater emphasis on technocracy. The political legitimacy of the new community was indirect – borrowed from the democratic Member States that chose to participate in it. This approach was not without its critics. Altiero Spinelli – a champion of the competing constitutional approach to European integration – was one of them. "Monnet has the great merit of having built Europe", he reportedly said, "and the great responsibility to have built it badly".<sup>21</sup>

<sup>16</sup> D. SPIERENBURG, R. POIDEVIN, *The History of the High Authority of the European Coal and Steel Community*, cit., pp. 14-15.

<sup>17</sup> A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

<sup>18</sup> A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 341.

<sup>19</sup> A.S. MILWARD, *The Reconstruction of Western Europe 1945-51*, cit., p. 409.

<sup>20</sup> A. BOERGER-DE-SMEDT, *Negotiating the Foundations of European Law*, cit., p. 346.

<sup>21</sup> M. BURGESS, *Federalism and European Union*, London: Routledge, 1989, pp. 55-56, cited in K. FEATHERSTONE, *Jean Monnet and the "Democratic Deficit"*, cit., p. 150.



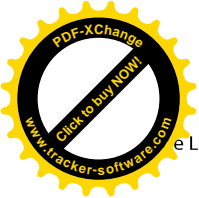
### III. THE IDEA OF LEGITIMACY AS LEGALITY IN THE TREATY OF ROME

The 1955 decision to move from sectoral integration in two industries to a general common market triggered a revision of the institutional architecture that had been established with the Treaty of Paris. The decision to make the establishment of a common market their objective in economic policy was one of the outcomes of the Messina Conference in June that year, where the foreign ministers of the six ECSC Member States came together to discuss how to develop their cooperation. The decision to pursue European integration in the economic sphere, broke the impasse that had occurred the year before, when the French National Assembly rejected the plan for defense integration among the six, and thereby closed the door to the accompanying plan for foreign political cooperation. The shift to further economic integration was a way out of deadlock and a reflection of the fact that the small and highly trade-dependent Benelux countries had assumed the role as the drivers of European integration.<sup>22</sup> To the architects of this Treaty, the end justified the means. It was the States' decision to establish a common market that legitimized the creation of supranational institutions.

By 1955, the idea of a European common market had already floated around for three years. Motivated by his own country's dependence on exports, and inspired by the experience of the Benelux Union, based on a customs union agreement dating back to 1944, Johan Willem Beyen, Dutch Minister of Foreign Affairs, had made two previous attempts to convince the members of the ECSC of the virtues of a general common market. From his own experience as an international banker and businessperson, Beyen also recognized that protectionism was an issue that was difficult to address at a national level and one that, consequently, required an international approach. French resistance had blocked Beyen's previous advances. This time, he allied with his Belgian colleague, Paul-Henri Spaak, who linked Beyen's vision to France's interest in atomic energy cooperation. Together with Joseph Beck, Luxembourg's Minister of Foreign Affairs, they formulated their proposal in a May 1955 memorandum that was presented to the French, German and Italian governments later that same month. At the Messina Conference in June that same year, the ECSC member states adopted a declaration identifying a common market as one of the ways in which to ensure progress in the uniting of Europe.

The decision to create a common market justified the creation of supranational institutions. The Benelux countries argued from the outset that the creation of a common market presupposed the establishment of a common institution, equipped with the au-

<sup>22</sup> A.S. MILWARD, *The European Rescue of the Nation-State*, London: Routledge, 1992. On the key role of the Netherlands in the process leading up to the Treaties of Rome, see A.G. HARRYVAN, *In Pursuit of Influence. The Netherlands' European Policy during the Formative Years of the European Union*, Brussels: P.I.E. Peter Lang, 2009.



thority that the realization of this market would take.<sup>23</sup> Eventually, the Messina Declaration did not go that far. This declaration simply identified the study of “institutional agencies appropriate for the realization and operating of the common market” as one of the prerequisites for the said market.<sup>24</sup> The declaration gave no guidance on the authority to be invested in such agencies. It made no mention of the need for oversight through some kind of democratic apparatus. It merely established that intergovernmental conferences would be convened to draft the relevant Treaties, and that these conferences would be prepared by an Intergovernmental committee assisted by experts and under the leadership of “a political personality”.<sup>25</sup>

That political personality was Paul-Henri Spaak, a member of the Belgian Socialist party and a holder of numerous ministerial positions. The Intergovernmental Committee included, in addition to Spaak, the heads of the six national delegations – four politicians, an ambassador and a university professor.<sup>26</sup> Finally, a representative of the British government also attended the Committee’s meetings. The Intergovernmental Committee convened for the first time on 9 July 1955. A Steering Committee comprising the heads of the national delegations and chaired by Spaak was immediately appointed to initiate, direct, coordinate and regularly monitor the work of the specialized committees. These included a committee on the common market, investments and social problems; a committee on conventional energy sources; a committee on nuclear energy; a committee on transport and public works plus several sub-committees. In accordance with the Messina Declaration, the Intergovernmental Committee would submit its report by 1 October 1955. The general assumption was that this deadline would be too tight. “The date of 1 October will probably come and go”, *Le Figaro* wrote the day after the constituent meeting.<sup>27</sup>

Spaak played a central role in the process leading to the Treaty of Rome. This is not a controversial claim. According to Pierre-Henri Laurent, the work in the Intergovernmental Committee “remained under the near absolute control of the appointed president of the comité”.<sup>28</sup> Laurent commends Spaak for his handling of the institutional question, where the Benelux countries’ call for a joint institution with a proper authority

<sup>23</sup> Mémorandum des Pays Benelux aux six Pays de la CECA, undated, Historical Archives of the European Union (HAEU), CM3/NEGO 3.

<sup>24</sup> Résolution adoptée par les Ministres des Affaires étrangères des Etats membres de la CECA, réunis à Messine les 1<sup>er</sup> et 2 juin 1955, HAEU CM3/NEGO 6.

<sup>25</sup> *Ibid.*

<sup>26</sup> The national delegations were led by Ambassador Ophüls (Germany), Baron Snoy (Belgium), Félix Gaillard (France), Ludovico Benvenuti (Italy), Lambert Schaus (Luxembourg) and Professor Verryn Stuart (the Netherlands). P.-H. SPAAK, *The Continuing Battle. Memoirs of a European 1936-1966*, London: Weidenfeld and Nicolson, 1971, p. 238.

<sup>27</sup> J.L., *La conférence de la relance européenne s'ouvre aujourd'hui à Bruxelles*, in *Le Figaro*, 10 July 1955, translation available at cvce.eu.

<sup>28</sup> P.H. LAURENT, *Paul-Henri Spaak and the Diplomatic Origins of the Common Market, 1955-56*, in *Political Science Quarterly*, 1970, p. 384.



collided with the positions of France and Germany, who insisted “on the elimination of the principle of supranationality from the language of the future”.<sup>29</sup> This raises the question of how the Treaty of Rome nevertheless came to include provisions for a common institution with powers of its own. Laurent argues that Spaak, in keeping with the Benelux countries’ position, “wanted an institution with power of its own and ability to act independently of the national governments”.<sup>30</sup> In what follows, I identify two moves made by Spaak that helped achieve this goal.

First, Spaak insisted on a strict division of labor between politicians and experts, making sure that all expert proposals had a basis in decisions made by the Member States. The point of departure for the Intergovernmental Committee’s work, was the decision to create a common market, as stated in the Messina Declaration. The Steering Committee developed its directives to the specialized committees on basis of the provisions of this declaration. The specialized Committees’ mandates were further restricted to a discussion of technical issues only. When presenting the Committee’s work to the foreign ministers of the six in Noordwijk in September 1955, Spaak argued that this would leave the experts the freedom to approach the technical issues without any a priori or doctrinal ideas. Their sole concern would be to identify the most effective solutions. The proposals for institutional structures should in turn follow from the experts’ technical recommendations. The experts in the specialized committees were explicitly instructed *not* to present proposals regarding the establishment of common institutions: “Ils ne doivent présenter de propositions en ce qui concerne l’établissement de certaines institutions que dans le cadre des solutions proposées et pour autant que ces solutions l’exigent. Ainsi, les propositions en matière institutionnelle devront-elles apparaître comme une conséquence des propositions techniques, les problèmes étant abordés sans aucun a priori et sans aucune idée doctrinale, mais uniquement avec le souci de l’efficacité à atteindre”.<sup>31</sup> To the ministers gathering in Noordwijk, Spaak emphasized that more general statements remained the domain of the national politicians, as they were the ones with a link to the general public. He also took care to point out that the political responsibility resided with the director and, eventually, with the ministers.<sup>32</sup>

Second, Spaak formulated four principles that supplemented the Messina Declaration and guided the work in the specialized committees. The first of these principles established that the handling of issues related to the common market could not be dependent on consensual or majoritarian decision-making. These issues included the monitoring of the application of Member States commitments and compliance with competition rules,

<sup>29</sup> *Ibid.*, p. 378.

<sup>30</sup> *Ibid.*, p. 388.

<sup>31</sup> Projet de Procès-Verbal de la réunion des Ministres des Affaires Etrangères des Etat membres de la CECA, tenue à Noordwijk le 6 septembre 1955, HAEU CM3/NEGO 180, p. 9.

<sup>32</sup> *Ibid.*, p. 10.





and the administration of safeguard clauses.<sup>33</sup> Spaak's notes to the heads of delegations give some insight into the reasoning behind this principle. A consensus-based system of decision-making implied the likelihood of vetoes and the risk that the law would disappear in interstate bargaining. Majoritarian decision-making could, in turn, pave the way for the emergence of interest coalitions. Consequently, Spaak wrote to the heads of delegation in October 1955 that "[...] la création d'un organe doté d'une autorité propre et d'une responsabilité commune apparaît indispensable".<sup>34</sup>

The second principle established a distinction between general economic policy and the specific problems related to the functioning of the common market. The expectation was, Spaak explained to the heads of delegation, that the Member States would eventually harmonize their monetary, budgetary and social policies. Pending such harmonization, a distinction between general economic policy and the handling of problems related to the common market was necessary. The Member States would retain their competences in general economic policy. Given the impact that this policy would have on the common market, a certain level of coordination would nevertheless be required. Consequently, the Member States should confer upon the common institution the power to conduct studies and make proposals in economic policy.<sup>35</sup>

The third principle stated the need for an appellate and dispute-settling institution. The need for a legal and binding mechanism caused little discussion, possibly because a common court with corresponding competences already existed in the ECSC. In the matter of this institution, Spaak merely pointed out that there was a need for a body where appeals against the decisions of the common institution could be addressed and that could settle disputes between the common institution and the Member States as well as disputes between Member States.

Finally, the fourth principle established that the responsibilities of the common institutions had to be clearly defined. If these principles were recognized, Spaak told the heads of delegations in November 1955, the parties would succeed in establishing an institution with decision-making powers in the areas of competition rules and safeguard clauses, and with the power to conduct studies and present proposals in economic policy in general.<sup>36</sup>

A preoccupation with legitimacy accompanied the formulation of these principles. From Spaak's 1955 perspective, a common supranational institution was advantageous

<sup>33</sup> The concern with the administration of safeguard clauses reflected the position of the French government, which was the one of the Six that was less favorable to trade liberalization than its involvement in the creation of a common market could suggest. The French protectionist tradition was strong, and Paris was eager to maintain as many of its protective measures for as long as possible. L. RYE, *In Quest of Time, Protection and Approval: France and the Claims for Social Harmonization in the European Economic Community, 1955-56*, in *Journal of European Integration History*, 2002, p. 85 *et seq.*

<sup>34</sup> Note to the Heads of Delegation of 24 October 1955, HAEU CM3/NEGO 41.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*



not only because it would enable the members of the common market to avoid the pitfalls associated with consensus or majoritarian rule. The independent authority that he prescribed would also be in position to take legitimate decisions on behalf of the members of the common market, as this market was an area where the members had a shared responsibility, and where they, consequently, did not represent the specific interests of the national governments: "L'avantage immédiat d'un organisme commun est qu'il peut légitimement statuer à la majorité parce que ses membres ont une responsabilité commune, au lieu d'être les représentants individuels de gouvernements nationaux".<sup>37</sup>

The historical evidence leaves no doubt about the impact that Spaak's four principles had on the Intergovernmental Committee's work and, subsequently, on the institutional architecture of the Treaty of Rome. As the minutes of the meetings in the Steering Committee demonstrate, the heads of the national delegations frequently returned to these principles in their discussions, and they never discarded them.<sup>38</sup> The principles thus appear in the Intergovernmental Committee's report of April 1956, commonly referred to as the Spaak Report. In this report, the four principles are rearranged, but easily recognizable. The principle that general economic policy is distinct from the specific problems related to the common market figures first. Then follows the principle that the running of a common market is incompatible with consensual or majoritarian decision-making, leading to the conclusion that the creation of this market demands the creation of an institution with a proper authority and a common responsibility. The third principle, as it appears in the Spaak Report, states that as the general economic policies of the Member States impact the common market decisively, a certain coordination between such policies and common market issues is necessary. When this is the case, the common institution may make proposals with a bearing on general economic policy, and the principle of unanimity may be departed from, "grâce à la garantie d'objectivité" that follows from the existence of a common institution. The fourth principle states the need for legal recourse and parliamentary control.<sup>39</sup> As stated in the Spaak Report, the Intergovernmental Committee's proposal to create four distinct institutions was based on these principles: "De ces principes ressort la nécessité d'établir quatre institutions distincts".<sup>40</sup>

The collection of historical documents relating to the Rome Treaty negotiations include files on the history of each treaty article. The file pertaining to Art. 155, on the powers of the Commission, contain the minutes of a meeting between Spaak and the heads of the national delegations entitled "Problème des Institutions". The point of departure for this meeting was the four principles that then figured in the Spaak Report. At the opening

<sup>37</sup> *Ibid.*

<sup>38</sup> Document de travail No. 6, du 8 novembre 1955, Institutions, Comité intergouvernemental créé par la conférence de Messine, HAEU CM3/NEGO 30.

<sup>39</sup> Rapport des Chefs de Délégation aux Ministres des affaires étrangères du 21 Avril 1956, CM3/NEGO 91.

<sup>40</sup> *Ibid.*, p. 18.



of the meeting, Spaak encouraged those that disagreed with these principles, or who had comments relating to these principles, to make these known. In the following interventions, neither France nor Germany objected to the four principles. Both Paris and Bonn insisted, however, that the Council of Ministers should have a more influential role in the common market than what was the case in the Coal and Steel Community.<sup>41</sup>

#### IV. MECHANISMS FOR LEGITIMACY THROUGH DEMOCRATIC RULE IN THE TREATY OF ROME

One of the advances in the 1957 Treaty of Rome was the chapter on a common commercial policy. In contrast to the ECSC, which had no external powers, this chapter, inter alia, delegated authority to negotiate trade agreements from the Member States to the European Commission. This Treaty's Art. 113, section three, stated that: "Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it".<sup>42</sup> Previous research explains the delegation of authority to the European Commission in the area of trade negotiations with two main factors. First, in insulating the policy-making process from domestic pressure, the assumption was that this would enable the promotion of a more liberal international trade order. Second, the expectation was that a single voice in trade policy would facilitate the conclusion of trade agreements with third countries and increase the Community's external influence.<sup>43</sup> The Treaty of Rome was, as Meunier and Nikolaidis state, "a revolutionary document" in the field of trade.<sup>44</sup> A refusal to introduce direct elections to the Assembly (European Parliament) accompanied the decision to authorize the Commission in trade. The idea of legitimacy as legality thus gained ground, while mechanisms for legitimacy through democratic rule were rejected, amplifying the elitist and technocratic nature of European integration.

To the Treaty's architects, the Commission's authority in trade negotiations was a necessary consequence of the decision to move from sectoral to general integration. The Intergovernmental Committee already by the autumn 1955 took the position that the negotiation of trade agreements had to become a matter for the Community. The Committee's starting-point was that the establishment of a common commercial policy followed logically from the decision to create a common market. The cooperation that

<sup>41</sup> Réunion des Chefs de Délégation, *Problème des Institutions*, undated, CM3/NEGO 257.

<sup>42</sup> Art. 113, section 3, of the Treaty of Rome.

<sup>43</sup> S. MEUNIER, K. NIKOLAÏDIS, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, in *Journal of Common Market Studies*, 1999, p. 480.

<sup>44</sup> *Ibid.*, p. 479.



had been established with the ECSC was deep, but at the same time limited, confined to two industries. The reduced scope of this cooperation had allowed for a certain autonomy on the part of the Member States, as trade in coal and steel were but two elements in a more comprehensive balance of payments. With the transition to a general common market, trade policy would become a matter of common concern. A November 1955 working document stated that just as the parties had acknowledged that the Community would have a common external policy, it would also be for the Community to negotiate common trade agreements.<sup>45</sup>

The Intergovernmental Committee's next move in the process that eventually led to the adoption of Art. 113 was to propose a division of labor between intergovernmental and supranational institutions. From February 1956, the Committee worked on the assumption that there would be four institutions: a council of ministers, a commission (as an executive), a court of justice and an assembly. Spaak convened the heads of delegation in the middle of this month with the view to discussing procedures, competences and the workings of the different institutions.<sup>46</sup> The point of departure was the tasks that the establishment and operating of the common market required. The list of requirements was long. It included overseeing compliance with the obligations undertaken by the Member States; supervision of the companies' compliance with competition rules; the settling of conditions for the maintenance or elimination of subsidies or other measures with equivalent effect; the administration of exceptions and safeguard clauses; the removal of discrimination; the mending of trade distortions and the preparation – to the degree that this would be possible – of legal harmonization and the management of restructuring- and development funds.

The division of labor between the institutions that the Intergovernmental Committee put forward, empowered of the Commission in all matters pertaining to the common market. The Committee identified the Council as the governments' instrument for general political coordination and the organ for joint governmental decisions. The Council should, as a rule, make decisions based on unanimity. The committee substantiated this position with the argument that a majority of governments constituted no objective entity, only a coalition of interests. Unanimity would be of the essence in matters pertaining to harmonization of legislation; financial balance; employment and stabilization policy. However, and as touched upon in the previous section, decisions in these matters would also have a direct bearing on the workings of the common market. Consequently, the committee argued, to facilitate the functioning of the common market, it would be legitimate to entrust the Commission with the power to submit proposals on these matters to the Council. Occasionally, operating the common market would also demand a clarification of questions that were rooted in general economic

<sup>45</sup> Working document no. 7 of 30 November 1955, HAEU CM3/NEGO 31.

<sup>46</sup> Appendix to document no. 6 of 13 February 1956 on *Institutions*, HAEU CM3/NEGO 32.



policy but that were too essential to risk their blocking by veto. On such occasions, the parties could deviate from the principle of unanimity.<sup>47</sup>

The Committee described the Commission as the organ entrusted with administration of the treaty. Importantly, the Committee also identified this institution as the one that would oversee the functioning and development of the common market. In some matters, the Commission would have decision-making authority. These were all matters that could affect the functioning of the common market including competition rules, subsidies and other dispositions with discriminatory effect, such as the use of safeguard clauses.<sup>48</sup>

The Intergovernmental Committee submitted its report in April 1956. Spaak later compared this document to the Messina Declaration, pointing out the progress that had been achieved. "The ideas which had only been outlined vaguely at Messina were this time listed, defined and explained", Spaak wrote in his memoirs.<sup>49</sup> The report thus put the governments in a position, Spaak pointed out, where they could accurately assess the implications of a policy which they until then had endorsed in principle only. The foreign ministers of the Six adopted the report at their meeting in Venice in May 1956, after less than two hours of discussion.<sup>50</sup> The Intergovernmental Conference opened in Brussels the following month with the view to draft two Treaties based on the Spaak Committee's report, for the Common Market and Euratom respectively. Two groups were appointed to examine technical questions. Hans von der Groeben, a German diplomat, chaired the group for the common market. A drafting group was also set up, under the direction of Italian ambassador Roberto Ducci. Its task was to frame the conclusions of the Spaak Report in the form of articles that could serve as a basis of the first version of the Treaties. A committee of heads of delegations chaired by Spaak directed the process.

Within the framework of the Intergovernmental conference, the discussion on the authority of the various institutions continued. The fundamental problem was to establish procedures for the decision-making that the implementation of the treaty demanded. From the perspective of the conference, all other problems were subordinate to this. Mechanisms for consultation, representation and management would in any case be introduced in keeping with practice in all complex international organizations. The problem had two dimensions, namely the need to know who should take decisions, and the need to know who should control them. On the one hand, the treaty imposed specific obligations on its members. In such matters, it would be for the Member States to ensure implementation. On the other hand, the treaty included objectives that could not be realized by state obligations only. Consequently, the Conference established that it would be necessary to charge the community, and more precisely some of the com-

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> P.-H. SPAAK, *The Continuing Battle*, cit., p. 240.

<sup>50</sup> *Ibid.*



munity institutions, with the task to take some decisions.<sup>51</sup> The conference also highlighted a new argument in favor of this position, namely that in a program that would cover many years, it was impossible to include all necessary decisions in one treaty. The countries would have to create common institutions, and to confer on these institutions the authority to take necessary decisions.<sup>52</sup>

As had been the case in the Intergovernmental Committee, a key concern was the need to strike the balance between sovereignty and efficiency – between national interests on the one hand, and the demands that followed from the realization of the common market on the other.<sup>53</sup> Pierre Pescatore was the legal adviser to the Luxembourg Foreign Ministry and a member of the drafting group directed by Roberto Ducci. He later recalled how the negotiations took place in an atmosphere of urgency and prudence. On the one hand, there was an urgent need to “regroup in the face of a Soviet threat that was still very real”. On the other hand, there was the awareness of limits, following the EDC failure and the situation in France: “People had had enough, given the position of the State in France and the failure of the EDC, which had been attempted in a supra-national spirit: the word was taboo”.<sup>54</sup>

The question that remained was to establish which institutions should take which decisions. When approaching this question, the conference introduced the concept of “matters of essential interest for the member states”, distinguishing between matters of such interest and matters where the realization of treaty objectives was paramount.<sup>55</sup> The first category included significant treaty amendments, decisions that exceeded existing treaty obligations and matters of economic policy where the Member States remained accountable to the national parliaments. In such matters, the concern with the most efficient realization of treaty objectives would have to yield to the need to obtain consensus. The second category included issues where concern with the realization of treaty objectives was stronger, and where national interests were less at stake. In such matters, the Council of Ministers could take majority decisions, with the consent of the Commission. A State could thus be overruled, but only if the Commission gave a “European guarantee”.<sup>56</sup> Finally, the secretariat envisaged a third category, where the efficient realization of the common market was crucial, or where the interests of every Member State demanded an avoidance of vetoes or interest coalitions. In such matters,

<sup>51</sup> Note du 11 October 1956, sur le système essentiel à prévoir dans le Traité sur le Marché commun européen, HAEU CM3/NEGO 185.

<sup>52</sup> Draft note from the President of 12 October 1956, HAEU CM3/NEGO 185.

<sup>53</sup> Note du Secrétariat du 11 octobre 1956, HAEU CM3/NEGO 185.

<sup>54</sup> P. PESCATORE, in Centre virtuel de la connaissance sur l'Europe, *Interview with Pierre Pescatore: The international context at the time of the Val Duchesse negotiations*, 10 September 2003, cvce.eu.

<sup>55</sup> Note du Secrétariat du 11 October 1956, cit.

<sup>56</sup> *Ibid.*





the decision-making authority could reside in the Commission, on condition of this body's prior consulting with the Council.<sup>57</sup>

From the end of November 1956, drafts of what would eventually become Arts 110-116 shuttled back and forth between the working group on the common market and the committee of heads of delegations. In the early drafts, the Commission was entrusted with the power to negotiate customs only.<sup>58</sup> This was still the case in a draft for the chapter on a common commercial policy tabled by the conference secretariat on 3 January 1957. This draft stated that there would be a common commercial policy and that the conclusion of trade agreements should be based on common principles.

A few days later, the Common Market group formulated a new draft for the same chapter. This version included a draft Art. 62 (later to become Art. 113) that granted the Commission the authority to negotiate agreements pertaining to the common commercial policy: "En vue de l'élaboration de la politique commerciale commune, la Commission soumet des propositions au Conseil. Les négociations sont conduites par la Commission en consultation avec un Comité désigné par le Conseil pour l'assister dans cette tâche, et dans le cadre des directives que le Conseil peut lui adresser. Les résultats des négociations sont soumis à l'approbation du Conseil, qui statue à la majorité qualifiée".<sup>59</sup>

The archives consulted for this *Article* show that the new draft was the result of a meeting in the committee for heads of delegation at the end of December. In this meeting, Von der Groeben, the chair of the Common Market group, asked that Art. 62 should go back to his group for new examination. When re-examining it, the group should take into consideration the situation that would emerge if the Member States, at the end of the transition period, had not succeeded in harmonizing their liberalization vis-à-vis third countries. The group should further act in consideration of the fact that negotiations occurring within the framework of the Common Commercial Policy should follow the same procedure as the one provided for in tariff negotiations, on the understanding that this procedure should apply not only in tariff negotiations but in all other negotiations that the member states would conduct after the end of the transition period.<sup>60</sup>

Shortly after the decision to authorize the Commission in trade negotiations, the ECSC countries rejected a proposal for direct elections to the Common Assembly. The proposal was tabled by Italy. When the foreign ministers of the ECSC countries met to settle outstanding issues in January/February 1957, Gaetano Martino reminded his colleagues of the fundamentally political nature of their endeavor. For the purpose of the political unification of Europe, the introduction of direct elections to the Common As-

<sup>57</sup> *Ibid.*

<sup>58</sup> Groupe du Marché Commun du 20 Novembre 1956, HAEU CM3/NEGO 244.

<sup>59</sup> Groupe du Marché Commun, Document de travail du 8 janvier 1957, concernant la politique commerciale commune, HAEU CM3/NEGO 244, p. 7.

<sup>60</sup> Comité des Chefs de Délégation, Projet de procès-verbal de la réunion du Comité des Chefs de Délégation tenue à Bruxelles les 19 et 20 décembre 1956, du 27 décembre 1956, HAEU CM3/NEGO 119.



sembly would, he argued, constitute a first step “dont l’effet psychologique sur l’opinion publique serait certain”.<sup>61</sup> The proposal did not succeed. As the minutes of this meeting makes clear, the other ministers expressed the opinion that this would be premature: “il leur paraît premature de prévoir dès a present l’élection des membres de l’Assemblée au suffrage universel direct”.<sup>62</sup>

That the national delegations disagreed on the provisions for a motion of censure against the Commission, suggest that they were guided by diverging ideas of legitimacy. Minutes from meetings of the national delegations show that “certaines délégations” argued that the Assembly, in order to ensure the stability of the Commission, only should be able to vote on a motion of censure once per year. The German, Italian and Dutch delegations argued in contrast to this that there should be no limits on the Assembly’s right to conduct such vote. When explaining his government’s position, Germany’s foreign minister, Heinrich von Brentano, made it clear that it was “essentiellement inspirée par le souci de renforcer l’influence de l’Assemblée”.<sup>63</sup> This position eventually prevailed, finding its way into the treaty in its Art. 144.

## V. CONCLUDING REFLECTIONS

This *Article* set out to explain the idea of legitimacy as legality that informed the founding Treaties of the 1950s, searching for answers in the existing canon of historical literature and in the holdings of the Historical Archives of the European Union. The creation of the ECSC High Authority reflected contemporary concerns and the personal experience of Jean Monnet. Due to the insistence of other delegations, the creation of the High Authority was accompanied by other institutions that would somewhat balance its authority. Eventually, the ECSC institutional structure nevertheless stand out as technocratic and elitist, with little room for popular participation. A few years later, Paul-Henri Spaak formulated the principles that informed the institutional structure of what would eventually become the European Economic Community. From Spaak’s 1955 perspective, the European Commission was able to take legitimate decisions on behalf of the Member States in matters pertaining to the common market, because the Commission represented the Member States, and because it enabled their decision to create a common market.

Today, the 1950s may seem long gone and without obvious relevance for the union’s present-day challenges. The EU nevertheless builds on the institutional structure that emerged in this decade, and while this structure has developed considerably since then, it still reflects ideas that prevailed at the time and circumstances long since changed. The early history of the EU is thus important to the understanding of trends

<sup>61</sup> Projet de procès-verbal de la Conférence des Ministres des Affaires Etrangères des Etats membres de la CECA, Bruxelles, 26-28 janvier et 4 février 1957, HAEU CM3/NEGO 96.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*



that emerged in the 1990s. The existing historical research links the decreasing public support for the EU that manifested itself in this decade to the approach that marked the formulation of the founding Treaties of the 1950s. It was the legacy of Monnet's technocracy and elitism, the argument goes, to leave the Commission as a weak and fragile democratic entity. Moreover, so long as attempts to rectify the democratic deficit concentrated on the relationship between the Council and the European Parliament, an important part of the problem remained.<sup>64</sup> The EU policy-making machinery broke down, John Gillingham writes, "at the very time that regulations and directives implementing the Single European Act began to register in the lives of ordinary people".<sup>65</sup>

Political scientists argue that democratization in the EU is the result of constitutional conflict between institutional actors. Strong actors in this system push, the argument goes, for further integration in order to increase efficiency without paying much attention to democratic legitimacy. Such behaviour leaves, in turn, room for weak actors, to question the legitimacy of integration and put normative pressure on the powerful actors. Democracy in the EU has normative origins, Frank Schimmelfennig argues, that differ from the economic or social origins of democracy highlighted in studies of the nation-state.<sup>66</sup> Historians tend to agree with this line of reasoning. Eirini Karamouzi and Emma De Angelis show how the process of identifying the EC with democracy started in the European Parliament, where MEPs "managed to turn the existence of their at the time near-powerless institution into a symbol of the Community's commitment to democracy".<sup>67</sup> While the Treaty of Rome established an institutional structure that was predominantly elitist and technocratic, this structure also contained the seeds of a more democratic EU.

<sup>64</sup> K. FEATHERSTONE, *Jean Monnet and the "Democratic Deficit"*, cit., p. 150.

<sup>65</sup> J. GILLINGHAM, *European Integration 1950-2003*, cit., p. 305.

<sup>66</sup> F. SCHIMMELFENNIG, *The Normative Origins of Democracy in the European Union: Toward a Transformational Theory of Democratization*, in *European Political Science Review*, 2010, p. 211 et seq.

<sup>67</sup> E. DE ANGELIS, E. KARAMOUI, *Enlargement and the Historical Origins of the European Community's Democratic Identity, 1961-1978*, in *Contemporary European History*, 2016, p. 457.