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A rightful condition for Europe

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Abstract

In Europe, the integration process has domesticated international relations, safeguarded member-states' democracies, and enabled collective action and supranational problem-solving. It has brought about the European Union (EU) and a democratic 'surplus'. How has this been possible when the binding effect of EU law is grounded neither in the sovereign's monopoly on power at the European level nor in the final decision-making authority of the EU? An answer to this puzzle is found in the fact that *a public coercive framework* has been established, which aims at solving the indeterminacy and assurance problems facing international cooperation. The enabling condition of sovereignty is replaced by those of co-legislation and a binding judicial process. The latter creates reasons for deference to legitimate authority and hence a compliance condition. However, since the Union falls short of meeting certain democratic standards, oversteps competences, and is plagued with inertia, there is a call for constitutional reform.

Keywords: The European Union; indeterminacy; compliance; deference; democratic constitution

Introduction

History has made a brutal comeback in Europe.[1] Putin's Russia is waging war against Ukraine. The resistance of Ukraine and the unity of the 'West' teach us that international affairs are not only about power and interests. It is about principles as well – about freedom and self-determination, about human rights, the rule of law, and democracy. Increasingly, with a more assertive China, there is a struggle between autocracy and democracy. Analysts point out that it is not the fear of NATO that caused Putin to resort to arms; rather, it was the fear of a democratic Ukraine in the European Union (EU) (Plokhy, 2023).

The war is a stark reminder of the constitutional intent of the European integration process and the appreciation of democracy, which is a condition sine qua non for a rightful European political order. The war also alerts us to the weaknesses of multilateral regimes. They are unstable and vulnerable to defection. The painstaking form of cooperation that has been established in Western Europe between former antagonists has been based on a scheme that differs from that of the liberal international order, which is premised on cooperation for mutual benefit (see Ikenberry, 2012; Sjursen, 2023). The European scheme of cooperation, which was designed to make it impossible to wage war by binding states in supranational structures, has proven successful. Three issues stand out: One is that the EU has domesticated international relations in Europe. The second is the role that the EU plays in the development and safeguarding of national democracies. The third is the EU's capacity for collective action. New steps of integration, accompanied by democratization,

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have contributed to a *democratic surplus* in Europe in comparison to the regular state of affairs in relations between states. How has this been possible when the enabling condition of sovereign power has been lacking in the European integration process? The binding effect of EU law is grounded neither in the monopoly on coercive power at the European level nor in the final decision-making authority of the EU.

Democracy in the present use depicts a system of self-rule based on free and regular elections, open debate, and a set of basic rights. The lawmaking procedure itself is constituted by a series of norms pertaining to parity of participation, hearing, and openness, which are moral in nature and which subject domestic governments to the constraints of justice conceived impartially.

This article argues that the EU aims to solve the twin problems of indeterminacy of law (i.e. how to provide knowable answers to concrete problems) and assurance (i.e. how to know whether others will comply if I do). The enabling condition of sovereignty is replaced by those of co-legislation and a binding judicial process. *A public coercive framework*, with its separation of legislative, adjudicative, and executive functions, is a condition for democracy also beyond the nation-state. Satisfying this condition at the European level requires that national identities in the form of a closed affective attachment be replaced or constrained by a constitutional identity premised on the set of norms that define democratic politics. However, it takes constitutional reform to realize the full value of the structure in place.

The article holds that constitutional democracy is intrinsic to a rightful condition for Europe and that it incurs obligations on the members of the EU. Owing to the obligations created by the act of becoming an EU member, by subscribing to the Treaty and its basic law provisions, the members have committed themselves to *deferring* to the authority of the EU. Deference is about inter-institutional respect and the willingness to submit to the judgments emanating from legitimate authority. Obligations must however be discharged. The European political order is incomplete when it comes to sanctioning non-compliance. However, it is also faced with the problem of competence creep and power grab – of usurpation. It is thus an order in need of constitutional overhaul. While an amendment to the Lisbon Treaty is called for by several parties, the feasibility of such may seem bleak in the face of rising right-wing populism and internal political problems in several countries.

The article commences by addressing the problem of a rightful order beyond the nation-state and then outlines the three mentioned achievements of the European integration process. Thereafter, the article addresses the issue of rightful supremacy of EU primary law, what it entails and why an attitude of deference is required. Lastly, it addresses the competence creep and the need for concerted action on major societal challenges, which underscore the need for constitutional reform.

Beyond national democracy

Democracy is a claim of justice. The European experiment questions, however, whether it is true that without the 'enabling condition of sovereignty'– with 'some form of law, with the centralized authority to determine the rules and a centralized monopoly of power of enforcement'– there can be no justice and democracy, as Thomas Nagel (2005, p. 116) claims. Nagel follows Rawls (1999), whose political conception of justice is fully associative: it depends on the positive rights that we have towards our fellow national compatriots and not against other persons and groups. According to the 'sovereignists', norms of justice stem from the distinctive relations that people have towards each other in the obligatory and coercive frame of reference of a state.[2] Beyond the nation-state, democracy and justice do not apply because there is no solution to the problem of non-compliance. Unlike in the case of domestic government, there is no legislative body to decide on rights and their reach and no sanctioning mechanisms in the event of norm violations. Yet the

[2]See Sangiovanni (2007), on the point that *egalitarian* obligations only apply to citizens of a state, not because of its coercive nature but because of mutuality.

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creation of a united and democratic Europe, which is prescribed in the EU Treaties, requires that EU member-states cede sovereignty and subject themselves to a higher authority capable of acting on their behalf. How is that possible for states that 'already have a rightful constitution internally' (Kant, [1785] 1996, pp. 8, 356)? How can they come to submit to a more extended law-governed constitution?

Kant regarded the bounds of state sovereignty as insurmountable. However, the sovereignty of states has in fact been curtailed: *Ius ad bellum*, the right to wage war for whatever reason (which is regarded as crucial for state sovereignty by realists), was abolished by the UN Charter. That document prohibits offensive wars and empowers the UN Security Council to use appropriate means, including military action, whenever a threat to or violation of peace or an attack is present. The Nuremberg and Tokyo war crime tribunals outlawed war itself. Individuals can now be prosecuted for both war crimes and crimes against humanity by the International Criminal Court.

Kant's concerns turn, however, not on the right to wage war but on the right to engage in defensive wars. Even with this, there is a problem regarding a rightful condition. Each state is entitled, as a matter of right, to use defensive force against what it takes to be an aggressor. This undertaking must be at its own discretion. 'Each has only the right to defend itself, and in determining whether to exercise this right, can only do what seems good and right to it' (Ripstein, 2009, p. 227). The risk of arbitrary interaction in international affairs prevails despite the UN regulation – hence the need for a supranational authority that can decide what rights exist according to an objective standard. As justice itself is undetermined, the content and reach of rights must be determined by an authoritative institution – a state. In addition to the problem of *indeterminacy*, there is the problem of rightful *assurance* – that is, how can I know whether others will comply if I do.[3] The question is whether the European integration process has solved the twin problems of indeterminacy and assurance (or free-riding), and, if so, how.

Integration based on a voluntary ceding of sovereignty has been the European response to international turmoil. This follows Kant's credo that 'when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition' (Kant, [1797] 1996, 6, p. 307 §42).[4] Actors whose conduct regularly affects others' rights, and who refuse to abolish an unjust order – an unregulated, lawless situation riddled with uncertainty and insecurity – and bring about a rightful political-legal order, are collectively breaching their natural duty of justice.

European integration is, as we will see, not about the delegation of power to a sovereign – a Leviathan – capable of ensuring compliance in a normless state of nature, but about ensuring compliance in a legally circumscribed political order whose constituent power is increasingly shared with democratic member-states and whose executive depends on the members' powers and administrations for sanction and implementation. The question is not that of pacifying an uncivilized state of nature but of how to solve the indeterminacy and assurance problems that occur under conditions of complex interdependence among democratic states. Today, the normative rationale for supranational institutions is rooted in a series of problems created by globalization that make states and citizens vulnerable to the choices of others, such as connectedness, power asymmetries, interdependence, moral hazard, and negative externalities.

Peace without humiliation

The European dream is, according to Aleida Assman (2018, p. 20), 'a response to the nightmare of war, destruction and crimes against humanity, and it rests on the conviction that the European

[3]See Mikalsen (2011) on the importance of insecurity between states in the state of nature and Eberl and Niesen (2011, p. 136) on the point that insecurity of the epistemic kind is the basic one.

[4]In a state of nature, 'the weaker individual is not secured against the violence of the stronger' and both, by the uncertainty of their condition are prompted 'to submit to a government'. (Madison, 1993, p. 136).

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states together are capable of overcoming this past and solve the increasing challenges in the present and the future'. Europe after 1945 (and again in 1989) could revive the European dream by domesticating the conflict-ridden international system of states. A better Europe, a *Europe without humiliation*, could be built. Instead of the degrading Treaty of Versailles after World War I, there was the *status-enhancing* Schuman Plan in 1950. Unlike in 1919, when Germany was to be punished, the Germans were treated as equal members of decision-making bodies and given co-responsibility for the reconstruction of Europe after the war. The sentiment of 'never again' could hardly be expressed more effectively.

A new political order that transformed the state of affairs among European states arose in the ruins of World War II. Through the integration project, European states have overcome international anarchy and interstate aggression by bringing the warmongering system of states under control. This was achieved through the institutionalization of supranational bodies for resolving disputes and depriving states of their right to retaliation, namely, to reciprocity.

> A member state may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty, since in the legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to the condition of reciprocity.[5]

European states would no longer be able to take the law into their own hands. In Europe, then, the Westphalian anarchic order has been surpassed. That is to say, the international order based on the principles of coexistence and non-interference between sovereign states, and hence tit-for-tat logic, has been abandoned. The European Court of Justice/*Court of Justice of the European Union* (ECJ/CJEU), with its coercive jurisdiction, constitutes a supranational compliance mechanism. There is the *all-or-nothing effect*, which means that countries 'cannot practice the obligations of the Community selectively' (Weiler, 1982, p. 54). This led to 'the replacement of the virtually voluntary character of state obedience which characterizes the classical international legal order with a binding judicial process' (ibid). Reactions to norm violations are not an undertaking at the states' own discretion. European states cannot take the law into their own hands when other European states break agreements but must turn instead to the ECJ. The European states have thus domesticated their international relations. What is more, in Europe, the principle of democracy is made to apply between states.

Democracy among states

Democracy among states is the Achilles' heel of democratic theory. Extending democracy to more states offers no assurance of democracy *among* states. States are geared towards *self-preservation* as the primary responsibility of the decision-makers is in their own constituency (see Morgenthau, 1994, p. 12).[6] The state is, so to speak, limited by the people. Up until recently, we have only known democracy from states and city-states. The power relations between states in Europe, however, not only have been tamed by law but have also been democratized. This happened because Europe did not emulate the UN model.

In 1945, there was feverish activity to establish a new world order, even a world government with its own police force to maintain world peace (see Clark and Sohn, 1958). The *League of Nations*, formed after World War I, had proved inept when it came to reining in the great powers. The league was replaced with the UN, where all states are represented in the General Assembly with equal rights. The founding of the United Nations was the most important legal act of world

[5]Case 38/89, *Ministère Public v. Guy Blanguernon* [1990] ECR I-0083.

[6]For Hobbesian realists, national survival is always at stake, hence the life-or-death anarchic struggle among states (Buchanan, 2005).

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society (Brunkhorst, 2014, p. 422). Article 4(2) of the UN Charter replaced parties to a contract with membership in an international organization to which non-members can apply. Article 2(1) of the Charter establishes *a principle of sovereign equality of all members of the UN*. There is also the change from coordinated to cooperative international law to foster continued friendly relations between sovereign states.[7] However, the problems with veto power and a lack of capacity to act – the missing power base – remained unresolved. The great powers rejected subjection to the UN's collective security arrangement. The nuclear powers were given the right of veto in the Security Council, and a UN army was out of the question.

An effective world community requires that states give up some of their powers and submit to a higher authority that can act on everyone's behalf. The opportunity was there in 1945, but, as New York writer E. B. White noted, *nationalism* was very much present in San Francisco, where the UN negotiations were taking place. Beneath the beautiful, internationalist rhetoric, he heard the steady thuds of the machines: sovereignty, sovereignty, sovereignty (Buruma, 2014, p. 50). The European integration process set out to amend the problem at the regional level. It brought the great powers into close and binding cooperation. This first happened when the *European Coal and Steel Community* in 1951 centralized control of the means of production of war. Coal and steel were brought under the control of a higher authority – later the powerful European Commission. The parties, with Germany and France at the forefront, were locked into binding supranational cooperation. The peace project was institutionalized and organized. Several lock-in institutions, such as the ECJ and the internal market, helped solidify the relationship. Together with the introduction of the euro, these helped lock the members to a path towards a common destiny, with a 'one for all and all for one' effect.

By limiting the sovereignty of states, Europeans aimed for an ever-closer union between the peoples of the continent. Already in the Treaty of Rome (1957), the member-states transferred far more competences to a supranational body than is customary in international law. Competences were assigned to a strong institutional investiture: the Council of Ministers, the Commission, the Joint Parliamentary Assembly, and a Court of Justice. Today, legislative powers rest with the indirectly elected Council and the directly elected European Parliament (EP). Gradually, the directly elected representatives have gained more power through the upgrading of the EP to a co-legislator (together with the Council), with increasing powers to scrutinize the Commission. In many areas, the nation-states have given up their right of veto and accepted that they might be outvoted. The EU members have accepted restrictions on their own sovereignty – not only to cooperate with other states but also to be able to establish a 'legal order of peace and justice between nations', as stated in Article 11 of the Italian Constitution.

Compared to other regions and the standard narratives in international politics, Europe has thus progressed. The relations between the states have been legally domesticated and democratized. Conflicts are resolved by formal dispute-resolution bodies, not through brute power and threats of retaliation. Today, a superior political community, to which the states are subordinate, is in fact in place. The legal structure of this community with the CJEU as its apex holds national constitutions to be intrinsic to Union law,[8] and this ensures not only that the EU structure is perceived as legally but also popularly authorized.

Safeguarding members' democracy

The EU has not just made democracy one of its founding principles. The Union also plays a decisive role in the development and safeguarding of national democracies. The British historian Alan

[7]The principle of cooperation is one of the seven basic principles of international law adopted by the UN General Assembly in 1970.

[8]Article 6(3) of the Treaty on the European Union (TEU) refers to 'constitutional traditions common to the Member States' as 'general principles of the Union's law'.

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Milward (1992) referred to the European integration process as the nation-states' rescue. All states that established the European Community were *reconstituted* after World War II as democratic states constrained by international courts and human rights conventions. Democracies should not be able to abolish themselves. The EU member-states committed themselves to the project of a democratic and united Europe, which, however, changed their status.

In contrast to an ordinary international contract, where presumptive equal parties enter or terminate an agreement premised on their arbitrary wills, possibly renewing it after repeated negotiations, the EU is based on a *status contract*. Such a contract is intended to change or confirm the status of the parties. Becoming members of the Union changed the states' status from that of sovereign nation-states to that of member-states. A distinct characteristic of institutions (such as the state and the family) is that one is involved in these not as independent parties but as *members*. Membership gives rise to new identities, self-perceptions, and self-understandings (see Hegel, 1820, §§ 74, 75). The standards of evaluation change, and collective identity no longer denotes a purely affective relationship unaffected by evidence but a legal one.

Only democratic states can become members of the EU, in contrast to what is the case with NATO and the UN. To become a member of the EU, applicants must have stable institutions that ensure democracy, the rule of law, and human rights. They must be considered economically fit and able to administratively comply with membership obligations. These requirements have led to a landslide of reforms in the candidate countries and have contributed to transforming formerly totalitarian societies into democratic ones. This was the case with Spain, Portugal, Greece, and, with the latest extension, the former European Eastern Bloc countries. Democracy is, however, not just a matter of institutions and principles but of civic spirit and a *liberal culture of tolerance* as well. Democracy is not worth much if the majority is not fighting for it and fails to respect minorities. When illusions are created in immature democratic cultures, when the coming to grips with an authoritarian past fails and nationalism and heroic mentalities take over, backlashes occur.[9] This has been the case with Poland and Hungary in particular, which have curtailed the independence of the courts and the freedom of the press in flagrant breaches of EU basic law.

The multilevel constellation that makes up the EU is dependent on attitudes that allow for *deference*. Deference entails a form of respect between levels of government, which includes respect for higher-level institutions and legal frameworks. Deference is about respecting the normative judgements of others even when this entails acting against one's own view. Such respect includes the obligation to keep promises made – to accept being constrained by external considerations. *Promises create obligations*, including legal ones. Being a member of a state or a political union involves redeeming obligations and deference 'to a legislator who is doing exactly the job I would do if I were in his or her place: expecting compliance with the norms enacted in good faith for the good of the community' (Soper, 2002, p. 170).

Acting on democratic principles enshrined in the EU Treaties and in national constitutions does not amount to alien interference in national affairs, as the Visegrád 4 (V4) countries – that is, the Czech Republic, Hungary, Poland, and Slovakia – from time to time claim. Being subordinate to supranational European law is not being dominated by an alien power, but rather being constrained by impartial principles of justice and co-authored law. EU legislation can be challenged on the basis of national identities according to Article 4(2) of the Treaty on European Union (TEU). The V4 claim to *exclusionary nationalism* is part of a global backlash against self-limiting government, which is the essence of constitutionalism.[10] Apparently, the V4's collective identity has not changed in line with the EU's requirements – hence the lack of attitudes that allow for deference to higher-level bodies. Non-deference in this case implies breaking a

[9]Backsliding is, as Carothers and Hartnett (2024, p. 24) claim, 'less a result of democracies failing to deliver than of democracies failing to constrain the predatory political ambitions and methods of certain elected leaders'.

[10]'National identity was rediscovered in common ancestry and shared ethnocultural heritage, which enabled governments to advance exclusivist constitutional agendas' (Kovács, 2023, p. 1).

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promise. The EU members have committed themselves to upholding a set of core values, including democracy, pluralism, and the rule of law (Article 2 of the TEU). By signing the EU Treaties, they made promises, which incur obligations. Moreover, the Treaties established a way of sanctioning states that violate these values in grave and persistent ways (see Article 7 of the TEU).

Constraining will power

Today, Hungary and Poland are required to stick to the rules of the game if they are to continue to be EU member-states with equal rights.[11] Democracy requires compliance with some basic, constitutionalized rights that a political majority cannot dispose of. These are necessary to ensure autonomous public opinion- and will-formation processes, free and independent elections, and that the courts can do their job of ensuring political compliance with the law. Without independent courts and a free press, there is no democracy. What is more, democracy itself requires the possibility to refer legal violations to supranational bodies.

National self-rule does not itself ensure the observance of democracy's basic principles, nor that a state will comply with its obligations towards others. The democratic nation-state is not a self-sufficient community. This becomes clear once we see that the democratic procedure is made up of a series of universal principles and norms pertaining to equal participatory rights, openness, public debate, etc. Some human rights have been made into basic rights. They have been constitutionalized constraining the willpower of governments – sometimes with the help of international courts. Therefore, the normative meaning of democracy does not stop at national borders. Moreover, any political community may get it wrong as all known decision-making procedures are imperfect. Electoral majorities can violate the rights of individuals and minorities; and national law – through the Supreme Court – does not always stand up against the will of the majority or public opinion, in the protection of basic principles. Democracy premised on one-person-one-vote vote needs redress and external checks. It requires possibilities for referring cases to higher-ranking bodies in the event of rights' violations. Supranational bodies are needed to prevent nation-states from violating citizens' rights, as well as to ensure that they do not violate other states' rights and that their policies do not have negative externalities and by-products that others suffer the consequences of. Democratic nation-states are also among the actors who may have an interest in being free riders and imposing costs on others without compensation.

The European integration process is of a constitutional nature as it has changed the conditions for determining how individuals are subjected to public authority. It concerns the macro issues of just institutional design through which material benefits are produced. One may ask in what condition democracy would have been in Europe without the collective goods – such as peace, freedom, stability, non-discrimination, the single market, and a level playing field – that the integration process has created. In particular, it has brought about a public law arrangement with legislative, juridical, and executive powers aiming at solving the indeterminacy problem of rights determination. It has dealt with the elimination of morally arbitrary inequalities through a *public coercive framework* – ensuring the determination and protection of rights.

Organized action capacity

Today, the EU is an overarching political community with a supranational administrative structure. The EU is a rule- and standard-setting machinery with global reach that has developed beyond a mere regulatory polity (Genschel and Jachtenfuchs, 2018). This has come about because

[11]The ECJ has given its approval to the suggestion that the Commission can withhold funds from Next Generation EU, a Covid-19 recovery plan to help member-states after the pandemic, from countries that do not follow the basic principles of the TEU.

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nation-states have voluntarily relinquished sovereignty and reduced their independence to enable a supranational entity to act on everyone's behalf.

The EU is unique in world history; it is an experiment without historical precedent. The Union is an innovation that breaks with conventional theories of political integration. Its basis is not primordial values, power, and territorial control but a set of basic rights and common institutions. States have voluntarily ceded sovereignty to an entity that is bound by the principles of democracy and the rule of law and by which they themselves are bound.[12] It is a construction that enables collective action by depriving states of the temptation to be free riders. By sanctioning non-compliers, through fines and the threat of legal proceedings, with ostracism or exclusion as the ultimate collective reaction, it aims to solve the assurance problem. Sanctioning non-compliance provides an incentive for actors to observe obligations without risk of losing out. The actual sanctioning power of the Union is, however, as we will see, rather weak.

As the EU has institutions for determining rights, it can also solve the indeterminacy problem. Unlike international organizations in general, in which members enjoy the right of veto, the EU makes decisions by qualified majority voting in many areas; it is in the possession of a pan-European judiciary and has legal personality; it can make and end contracts with other states. Problems are solved and objectives are realized by the Commission based on legislation in the Council and the EP under the supervision of the ECJ. It is a *quasi-federal* legal system based on the precepts of higher-law constitutionalism. It was generated by the ECJ in the combined doctrines of *direct effect*, which affirms the full legal character, under certain conditions, of EU norms[13], and the *primacy of Union law*, stating that national norms must give way to Community ones when an irreducible conflict arises *within the scope of application of the Treaties*.[14]

The European integration process has redistributed power and resources and created an economic and political 'superpower' that is now flexing its muscles. For example, the EU initiates and upholds sanctions against Russia and coordinates its members' humanitarian contributions to Ukraine. It coordinates and finances European arms deliveries through its European Peace Facility. The EU gives refugees from Ukraine collective protection and has accepted the country as a candidate for EU membership. The EU has also procured vaccines for all its citizens, and, thanks to common debt issuance, it is massively funding 'Next Generation EU' projects to help national economies recover from the pandemic.

The capacity for collective action is underpinned by *a community of risks* that has been created, particularly through the introduction of the euro. 'If the euro falls, the EU falls,' stated German Chancellor Angela Merkel during the Eurozone crisis. The 'one for all and all for one' logic applies in several areas: We are not saved from the pandemic until everyone is; sanctions against Russia are only effective when everyone stands behind them; climate measures are worth little without everyone's compliance. United we stand, divided we fall! An involuntary community of risk has, so to say, united Europeans.

The organized capacity to act at the supranational level makes states less vulnerable to external shocks. It also makes it possible to sanction powerful states' violations of human rights, including those of member-states. Organized action capacity, which entails the ability to act effectively also on oneself, is intrinsic to a rightful order.

Democratic surplus

The EU is deemed by law – it is *lege* but falls short of certain democratic standards. The term 'democratic deficit', however, is not apt for the state of affairs. The question of democracy is not a

[12]Case 6/64, *Flaminio Costa v. ENEL* (81964) ECR 585.

[13]Meaning that EU law applies automatically at the domestic level.

[14]See the leading cases 26/62 NV Algemeine Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] and 6/64 Flaminio Costa v ENEL [1964].

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question of balance in an economic budget but a question of meeting ideals and principles that will always be utopian. Democracy is a relative value. Yet, if something like a 'democratic deficit' can be said to exist, it must be possible to identify a 'democratic surplus'.

The claim of a democratic deficit in the EU is based on a comparison with nation-state democracies. If, on the other hand, we compare the EU to international affairs generally, or to other regional organizations, we see that the EU represents a 'surplus'. The Union not only enables collective action and safeguards democracy at the national level but is also an experiment in ensuring democracy between and above the member-states. This is due to new rights and powers for the citizens, along with new European institutions with regulatory and steering competences. But, since the EU has limited authority and no 'monopoly on violence', its power to interfere in zones of freedom is limited. The democratic requirements are thus not as strong as those that apply to states.

Standards of representation, voting, public debate, and political competition are not fully met, and the executive, the Commission, is not the emanation of an electoral majority. However, an organization that makes decisions after thorough scrutiny in competent administrations and extensive public debate in two chambers, the Parliament and the Council, has democratic value (see Van Parijs, 2019). With a separation of legislative, adjudicative, and executive powers that makes individual rights effective in space and time, a public coercive framework is in place, capable of tracking the interests, views, and wills of the citizens and ensuring the protection of the rights of affected parties. A framework for opinion- and will-formation, for initiation, legitimation, decision-making, and criticism, is in place and makes it possible for citizens across Europe to participate in elections and public debate. This framework, albeit flawed and insufficient, means that there are European procedures in place for coping, handling contingencies, and problem-solving – goal attainment and conflict resolution – which did not exist in 1939. The Union thus establishes conditions for a rightful order, in which unilateral private choices – orientated towards a particular end – are replaced by a common, *omnilateral will* (i.e. public law), which provides procedures for making, applying, and enforcing the law.

Joint European rule

Today, the EU Treaties function as a proxy for a constitution. However, it is widely held that there is in fact no constitutional *unity* in the EU in the sense that there is no willingness to contemplate the ECJ as the sole judicial master of both the national and European legal orders. Constitutional pluralism prevails (Walker, 2023).[15]The states cede sovereignty to the EU but do not lose control over it. Through the European Council, the national executives enjoy the right of veto.

The binding effect of EU law is thus grounded neither in the monopoly on coercive power at the European level nor in the final decision-making authority of the EU. But then in what? The EU does not have the competence to increase its own competence (*Kompetenz-Kompetenz*), and the ECJ is not the final arbitrator of EU law (see Grimm, 2017). As it has no treasury, no army, no prison, and no intelligence service, the Union lacks the defining characteristics of a state – and it has a flag without being a nation. The EU's power is shared with its member-states, which implement its legal acts and retain the monopoly on violence. However, while the members may enjoy the privilege of veto, they do not hold constituent power alone. They can block initiatives but not amend the Treaties. A decision to increase EU competences requires the consent of others. Changes to the Treaties can be proposed also by the Commission and the EP. There is thus *a mediated constituent power* at the European level.[16] 'The EU's basic legal order is in the hands of a complex political subject of which members states form part, but whose decisions none of them

[15]There are conflicting claims to ultimate authority in the European legal order. In a series of judgements in 2020 and 2001, the constitutional courts in Germany, Poland, and Romania reaffirmed the constitutional primacy of their basic laws. The Commission and the CJEU associated supremacy of EU law with the defence of rule of law (see Menéndez, 2024).

[16]According to Article 48 of the TEU; see also Patberg (2020, p. 148); Cohen (2012, p. 146).

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controls unilaterally' (Patberg, 2020, p. 145). Hence, the standard term 'masters of the treaty' is a misnomer.

Joint European rule entails the capacity to co-determine the exercise of authority and not the final power of arbitration. Primacy is *a collision norm*, according to which European law should prevail when there is a conflict with national law. This is the case because if European citizens are to be treated equally, EU law must rank higher. Compliance is a condition for the equal protection of rights. Likewise, for the integrity of the internal market and its demand for a level playing field and 'one-stop-shop solutions', there must be only one solution to legal conflicts. Preferences, the parochial interests that parties may happen to have, and constitutional idiosyncrasies of a single member-state cannot be allowed to annul a measure applicable to all.

However, it is not merely in the functional sense that the EU enjoys primacy.[17] Also in a normative sense, the EU enjoys primacy. The EU members initially *promised* to respect EU laws and institutions and are legally obligated to do so. Owing to the obligations created by the act of becoming an EU member, by subscribing to the Treaties, the members have committed themselves to defer to the Union's authority.

There is thus basis for a claim of *rightful primacy* of EU law over national law. The theory of well-placed deference does not solve the problem of who has the last word but leaves it to inter-institutional reasoning, where it places a justificatory burden on those who will not submit to EU law (cf Eriksen and Eriksen, 2024). *Primacy* has prima facie the upper hand, as there is a duty to uphold the legal structure of European cooperation. When such a structure is in the perceived interest of all, deference to the European legislator is required, even when this goes against the better judgement of an individual member. Moreover, according to Kant, 'the *dependence* of all upon a single common legislation' is one of the core preconditions for equal freedom (Kant, [1795] 1996, pp. 8, 350, italics in original).

Procedural justice

When it is the member-states that keep the monopoly on violence in reserve, the EU can only be effective to the extent that actors voluntarily comply. Until recently, compliance, which in principle is an *autonomous voluntary act* of the member-states, has prevailed even when there was disagreement. The question is whether the institutionalized procedures for authoritative decision-making, which are like the legitimating mechanisms operating at the national level, can be effective despite the lack of supranational enforcement power.

When decisions are correctly made, when they emanate from democratically authorized procedures, the likelihood that they will be respected is high. The form and quality of the pre-established procedures of a rule-making institution exert a pull towards compliance on those addressed because they hold that the institution 'has come into being and operates in accordance with generally accepted principles of right process' (Franck, 1990, p. 24). Studies of decision acceptance confirm that *procedural justice* is especially important in shaping people's willingness to defer to the decisions made by legal authorities (Lind and Tyler, 1988). A rightful condition with egalitarian structures of decision-making as an important component creates obligations and confers authority upon the laws and legitimacy upon decisions. This is because its lawmaking procedure is made up of a series of moral norms pertaining to equality, inclusion, participation, hearing, and openness. There are norms for representation and for the composition of decision-making bodies, as well as for speech, replies, and reporting aimed at ensuring *equal access and public accountability*. The assumption, then, is that the complex institutional nexus of opinion- and will-formation, of procedures for deliberation, negotiation, and voting underscored by the system of rights, itself makes up a basis for democracy at the European level, that it goes a long way

[17]Community law leaves 'inconsistent national law valid but unapplied' (Von Bogdandy, 2006, p. 14).

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in ensuring compliance by exerting normative pressure. Hence, compliance with EU law will be expected because:

(a) the initial authorization of European integration through the establishment of the European Coal and Steel Community was voluntary;
(b) the ensuing applications for membership by individual states have generally been supported by popular referenda; and
(c) citizens' representatives are involved in the decision-making procedures through which EU law is made. (Habermas, 2012; Eriksen, 2019, 170)

The supranational authority and legitimacy of the EP, the Council, the CJEU, and the Commission are generally recognized by European citizens (Hobolt and de Vries, 2016). A post −2019 election Eurobarometer survey following Russia's attack on Ukraine showed huge support among citizens for the EU policies. The war in Ukraine is a reminder of the raison d'être of the European integration process and thus of constitutional intent. What the EU is and stands for is *ex hypothesi* reflective of the constitutional intent of the European integration process, the reasons, which 'we', the heirs to a founding generation, share.[18]

Political obligations

The multilevel legal order in Europe, with national courts and the CJEU (and in some cases also the European Court of Human Rights) sharing jurisdictional power, ensures in principle the judicial monitoring of laws, along with the ability to handle 'conflicts of law' and to reach conclusions in difficult cases within a time limit. The EU does not represent a constitutionalization of already constitutionalized orders – an *imperium in imperio* – but a fusion of orders in which different levels have a share in decision-making power. It is a union that is kept in check with the help of different mechanisms such as:

- the veto power of states in Treaty changes and in vital policy areas;
- the right to leave the union;
- a monopoly over the legitimate use of force resting with the member-states;
- the principle of the equality of citizens and of states;
- administrative, implementing power resting with the member-states;
- national constitutional courts possessing the right to monitor and review EU law;
- the principle of limited conferral of powers; and
- the principle of degressive proportionality in the EP.[19]

These provisions are meant to prevent its usurpation, namely, an illegitimate takeover of powers. However, they do not effectively guard against self-empowerment, an issue we will return to below, nor do they warrant compliance, as the Hungarian case in particular attests to.

In the multilevel constellation that makes up the EU, there is general acceptance of a reciprocal responsibility to respect collective decisions, even though direct popular authorization is in short supply. Consent may, however, be neither necessary nor sufficient for legitimacy because of the *obligations* that are at work. Political obligation is a special case of involuntary obligations to establish conditions for a rightful order, which is one that realizes the equal freedom of individuals. Due to the EU's binding treaties, there is an obligation to accept decisions one disagrees with. What we thus have to do with is not merely associative obligations that stem from the practice of a social group (Dworkin, 1991, 195pp), but rather obligations that apply in the

[18]See Article 2(1) of the TEU: The Union's aim is to promote peace, its values, and the well-being of its peoples.
[19]See von Achenbach (2017) for a critical discussion of this principle.

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practice of states in large-scale political communities. Political obligation has to do with the moral right of the state to rule and the citizens' corresponding obligation to obey, even in the case of laws with which they disagree (see Kant [1793] 1996, 297; Simmons, 2002).

There are intrinsic reasons for deference because of promises made and because of the consequences of non-compliance for others. Under conditions of complex and intense interdependence and interconnectedness, of far-reaching legal, administrative, and economic integration, reasons for deference to the EU authority multiply. Non-compliance has consequences. Brexit is an illuminating case in point. It causes harm to self, adversely affects other members' interests, and threatens the European political order itself (see Loussouarn, 2022). The EU's lack of effective sanctioning mechanisms resulted in the non-compliance crisis. It has lasted for more than a decade, without being able to trigger Article 7 of the TEU (see Hernández, 2023, p. 2; Kelemen, 2017). There is no equality before the law if norms can be broken with impunity. There is also the risk that other states will follow suit.

Overstepping competences

Since the Treaty of Maastricht, EU member-states have pursued ever more supranational problem-solving through the EU but have refrained from conferring necessary powers upon the Union. Consequently, the EU has taken upon itself new tasks beyond its assigned competences. Allocated competences have been overstepped: there is self-referential provision of competences; there is rule circumvention and the bending of rules; and there is dominance and judicial deference even in cases of extra-legal measures (Kreuder-Sonnen, 2021, pp. 128–129; Eriksen, 2018; see also White, 2023). However, it is not just emergencies that trigger extraordinary politics and extra-legal measures.

Competence creep, denoting that the EU somehow manages to legislate and/or otherwise act in areas where it has not been granted a specific competence, has been the case for a long time. It has been needed for solving problems in areas where EU competences are lacking, and it has continued despite the Lisbon Treaty's efforts to restrict European integration in areas of core state powers. Sacha Garben (2019) identifies six sources of competence creep, including aid packages produced by the European Monetary Union (EMU) as a response to the Eurozone crisis that comes with strings attached and agreements outside the EU framework. The agreements have their own intergovernmental decision-making bodies and operate behind a shield of extensive immunity and confidentiality. There is in fact *stealth deference* to *de novo* decision-making bodies, which, as the rules for ordinary rule-making are transgressed, amounts to a case of usurpation.

Competences not only have been stretched but have also been delegated, even when the principle of limited conferral applies. The TEU foresaw, in accordance with the *Meroni Doctrine*, the delegation of legally binding powers to the Commission only. Yet 'discretionary policy-making power' has been delegated to EU agencies (Scholten, 2014, p. 299). The European Securities and Markets Authority's short-selling ruling states that *EU agencies can be assigned powers to take legally binding decisions of general application.* When competences that the EU itself is not in possession of are delegated, neither legal nor electoral control mechanisms are fitting. Parliaments cannot hold discretionary executive power to account, and courts cannot review rule compliance when the agencies establish the rules themselves.

The competences of the EU have expanded over time, intruding into what once were *core state powers* such as monetary policy, migration, and defence (Genschel and Jachtenfuchs, 2018). There is hardly any portion of sovereignty that a member-state can invoke against the EU (de Witte, 2017, p. 60). National identity, as stated in the Treaties, does not in itself prevent European integration in areas of core state powers because 'the CJEU is unlikely to annul a measure applicable to the whole EU in light of the constitutional idiosyncrasy of a single Member State'. (Garben, 2020, pp. 51–52)

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The CJEU appears to respect Article 4(2) of the TEU by referring to the type of national identity entrenched by the domestic legal system only when such is founded on universal principles. This is in line with the German concept of constitutional identity, which is premised on the eternity clause and is thus distinctively a non-particularistic, reflexive civic one akin to *constitutional patriotism* (Habermas, 1998, p. 225). Such an identity referring to foundational universal values of the democratic constitution runs counter to the closed, ethnic identity pursued by the V4.[20]

The EU is a system of shared rule and self-rule that has not had *a constitutional moment* to settle the division of competences in a binding pact. The member-states play the role of mediated constituent power, but the EU is a polity that wields power over its 'constituent' parties and is thus in need of a formal constitution. All power stems from the people, but it takes institutions to identify 'We, the people'. Moreover, there can be no rightful condition without solving the indeterminacy problem of the law by a legislature authorizing acts that 'change, enforce or demarcate rights' (Ripstein, 2009, p. 173). There is thus a need for Europeans to come together to clarify the rules for their coexistence – to determine the precise content of their co-citizens' moral rights. Under modern conditions, with a division of powers and popular sovereignty dispersed, the people are only sovereign when it comes to constitution-making (Habermas, 2015, 34).

Overcoming inertia

On several occasions, the unanswered question of European supremacy has left the EU on the brink of breakdown. Obstructions and *epistemic inefficiency* weigh heavily on the EU's legitimacy. The EU has too often found itself confronted with a paradox as 'nation states having lost control to the supranational level [are] unable to act effectively on their own, while at the same time, they keep enough power to obstruct common solutions' (Auer, 2022, 75). Because of limited competence, necessary action is not undertaken despite overwhelming documentation, public attention, and civic engagement. At the same time, the member-states do not want to take back control and agency nor are they able or capable of doing so. The ability to solve cross-bordering problems and the major societal challenges linked to the consecutive sovereign debt, refugee, environmental, pandemic, security crises, and artificial intelligence out of control depends upon the ceding of sovereignty to equip a supranational body with an organized capacity to act in the name of all at the international level.

The EU has outgrown its own competences and is not formally able to give itself new ones. There is a lack of competences to sanction obstructers and violators of basic norms, as well as to handle crises and exigencies effectively and fairly. The EU is facing a series of problems that need remediation, ranging from rule of law issues, democratic backsliding, populist transgressions – imperilled liberal democracy in Poland and Hungary – via emergency politics and executive dominance in the Eurozone, to sclerosis and inaction in particular policy fields.[21] The disgraceful (non-)solutions to the refugee and immigration crises, the persistent problems of financial insecurity and economic stability, and the practice of competence-stretching attest to the need for constitutional reform, as do the lingering security and enlargement issues. The euro is unfinished business, not only because its banking and fiscal unions remain incomplete but, more importantly, because it still raises serious questions about democratic legitimacy at a time when democracies are under ever-growing pressure.

Today, the pandemic-related setbacks, along with the long-term dismal effects of austerity measures, of winners and losers in the integration process, the new security situation, and the risk of inability to prevent future catastrophes, are all elements of a collective risk scenario that on its

[20]However, the German Constitutional Court has itself from time to time used the legal universalistic concept of democracy in a somewhat idiosyncratic manner; see Eriksen and Fossum (2011).

[21]There is, however, a move towards a supranational rule of law enforcement due to the rule of law conditionality mechanism of 2020 (see Priebus and Anders, 2024).

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own under benevolent conditions would be able to trigger a constitutional moment. Such moments do not necessarily require popular uproar but the encouragement of an engaged citizenry to trigger *the convention method*. According to the ordinary revision procedure for amending the Treaties (Article 48 of the TEU), the government of any member-state, the EP, or the Commission may submit amendments, and thereafter, the European Council may convene a convention 'composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission'.[22]

The European integration process is at a critical juncture. Necessary reforms are opposed by institutional self-interests and elected leaders exploiting nationalistic sentiments. Reforms are, however, needed to end inertia and ensure the conditions for a rightful order – that is, to end the arbitrary, non-authorized exercise of power, by ensuring the primacy of EU basic law in core areas and by instituting a proper division of competence between the levels of authorized rule.

Reforms include:

- bringing the intermediate arrangements outside of the Treaties under the realm of constitutional provisions;
- delimiting the power that the Treaties confer on the European Council – the heads of state – and the Commission;
- establishing a proper two-chamber system where the European Council is incorporated into the Council of Ministers (see Habermas, 2015, p. 41);
- allowing transnational lists for the EP in European elections;
- assigning the EP the right to propose legislative initiatives;
- extending the ordinary legislative procedure to all policy fields;
- extending the scope of qualified majority voting by EU member-states in the Council; and
- equipping the EU with a finance ministry and powers of taxation.

What is then needed is the convening of a convention that can enable the amendment of the Lisbon Treaty, turning it into a democratic constitution.[23] Is Treaty change feasible? On the one hand, a rightful condition for Europe requires such an amendment, and it has been called for by prominent parties. For some important members (like Germany), Treaty change is a condition for future enlargements of the Union. On the other hand, the political circumstances are not favourable. The rise of Euro-scepticism and nationalism makes it difficult to pass more power on to the EU.

Conclusion

The ability to solve the gross global challenges pertaining to refugees, climate change, big tech, and security depends upon the ceding of sovereignty to an entity authorized to act in the name of all. It requires the willingness to submit to a supranational authority and equipping it with an organized capacity to act. The EU is an impressive and unprecedented entity that has contributed to the elimination of morally arbitrary inequalities and to solving the assurance and indeterminacy problems at the international level through a binding and democratically authorized judicial process. European states' self-help means of reciprocity and counter-measures have been removed by the European integration process. Due to the integration process, there has thus been a democratic legal domestication of international affairs. The upshot is a *democratic surplus* in Europe in comparison with international affairs in general, where states enjoy the illusion of unbridled sovereignty. Yet, the EU suffers from democratic shortcomings. Moreover, its task

[22]See the Conference on the Future of Europe (CoFoE, 2022), which raised expectations of constitutional reforms but lacked a clear conception of 'who "We, the people" are' (Patberg, 2023, p. 2).

[23]In fact, on 22 November 2023, the EP approved a resolution with detailed proposals for reforming the EU Treaties and expressed its wish to convene a Convention.

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environment has outgrown what the present system can provide democratic legitimation for and what is needed to alleviate the problem of epistemic inefficiency. Hence the call for constitutional reform. The EU is still a work under construction.

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