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Republican Europe

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1

Liberty in the Constitutional Construct of Europe

A republic is the property of the public. But a public is not every kind of human gathering, congregating in any manner, but a numerous gathering brought together by legal consent and community of interest.
Cicero, *The Republic*¹

1. THE CONSTITUTIONAL SOUL OF EUROPE

A CONSTITUTION WITHOUT politics is like a body without a soul.² In Western democracies, Constitutions organise the process by which law is made; they regulate ‘the relationship among citizens and define how their sovereignty is to be expressed in the political community’.³ A constitutional order (in contrast to international law or contract law) sets not only the institutions, substantive rights, rules on the conflict of laws and division of powers but, more importantly, establishes rules about making choices. Opinions may abound on any policy choice; plurality of choices imply a multitude of interests that potentially collide and require balancing in an acceptable way. These interests are represented through the political process and balanced in its course. By laying down rules for the political process, Constitutions provide a ‘mutually agreed, stable framework within which controversial debate (and action) is to take place’.⁴ By shaping the political process (rather than being a product of it), Constitutions enable future majoritarian policy choice.⁵ This makes a Constitution different from international and contract law.

Not every policy choice requires a political process. A policy choice may be imposed by a tyrant; or the interests of all the participants may coincide so there is no need for balancing (unanimity); or balancing can take place in such a way that

¹ *The Republic and The Laws* (Oxford, Oxford University Press, 1998) 19.

² M Poiares Maduro, ‘Sovereignty in Europe: the European Court of Justice and the Creation of European Political Community’ in ML Volcansek and JF Stack Jr (eds), *Courts Crossing Borders. Blurring the Lines of Sovereignty* (Durham, NC, Carolina Academic Press, 2005) 58.

³ *ibid.*, 46.

⁴ Stanford Encyclopedia of Philosophy (<http://plato.stanford.edu/entries/constitutionalism/>).

⁵ See also S Bartolini, ‘Taking “Constitutionalism” and “Legitimacy” Seriously’ (2008) *European Governance Discussion Paper* 2008/01.

every relevant interest is thereby appeased (consensus). In all the three situations, there is no political process: there is either no dialogue, or there is an accord.⁶ Nevertheless, policy choices made by unanimity or consensus may also be regulated by constitutional law. For instance, an interest may be protected from the process of making policy choices by withdrawing the competence to regulate certain interests or to make a certain choice (e.g. outlawing acts of aggression between states or prohibition of torture). In this minimalist sense, the European Economic Community Treaty, the European Convention on Human Rights (ECHR), the UN Charter and the General Agreement on Tariffs and Trade (GATT) are Constitutions: they bind their parties (limit their choices) and benefit from (varying degrees of) enforcement. By limiting policy choices available to the national polities, a Treaty can have a constitutional nature without, at the same time, establishing a political process and without constituting a polity.

European political process neither takes place nor is required for such a feeble constitutional soul. This, at the outset, was the constitutional construct of Europe. The binding nature of EU law achieved through primacy and direct effect limits the national political process and policy choices while at the same time leaving the crux of policy choice with the Member States. National polities enter into a Union (and, with the Lisbon Treaty, can also exit from it) and within this framework represent and negotiate their national choices in such a way that no individual Member State is bound against its will. As long as unanimity or consensus of all Member States guide the shaping of common (European) policy choices, the mere existence of regulatory powers on a European level neither requires nor creates a political process but results in diplomacy between States.⁷ Any controversy, if it existed, is removed by concessions, all the interests are appeased, the outcome not contested. The choice is made by each national polity and no polity has to comply against its own policy choice.

This lifeless image was reflected in EU constitutional scholarship. EU law was said to have constitutional quality due to its 'binding' nature derived from primacy, direct effect and the role of the European Court of Justice (ECJ). The constitutional elements of EC law were limited to the division of powers, the institutional balance, the role of the ECJ. There were no constitutive constitutional elements inasmuch as the Community—and later the Union—was constituted unanimously by Member State governments, who then unanimously made European policy choices. Rather than a 'non-identified political object',⁸ the European Community remained an international organisation with powers both conferred and limited by the States.

⁶ A Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford, Oxford University Press, 2008) 160: 'non-democratic process of decision-making ... can be legitimate in relatively homogeneous societies, for these societies are marked by a common belief in the right answer'.

⁷ On the distinction between diplomacy and democracy in international relations see DM Curtin, *Postnational Democracy* (The Hague, Kluwer Law International, 1997) 27–40.

⁸ Speech by Jacques Delors (Luxembourg, 09.09.1985).

The situation is different with respect to majoritarian political processes, where acceptance of choices no longer relies on the satisfaction of all. Here, minorities may be bound by—and resolve to comply with—choices of the majority that contradict their preference for a particular choice. Implied in this compliance is recognition of the group by the reference to which majority is established, the interests are balanced, and majority choices made. Not every group will be so accepted. Emergence of a ‘group feeling’ or ‘bonding’⁹ among individual members within this group (a polity) enables acceptance of majority rule. This is the meaning I will attach to ‘polity’ in this work: a group of people who perceive themselves as a group for the purpose of identifying the majority that makes binding choices. The emergence of a majoritarian political process opens up a new dimension to a legal order, requiring that it now regulate the process of policy choice. This causes the emergence of new constitutive elements of constitutional order, making it very different from international law.

Majoritarian policy choices are a reality in the EU today. A series of developments led to this. Replacing unanimity by qualified majority vote (QMV) in the Council¹⁰ in practice led to decisions by consensus, ‘under the shadow of the vote’.¹¹ This shadow materialised into the vote with increasing difficulties of attaining consensus due to the expansion of the Union and its powers. This, however, was not itself a decisive difference because of the possibility of packages and reciprocal deals. Even when a genuine QMV is possible, the scope of available policy choices will be limited by the conferral of powers, defined by all national polities unanimously on ratification of EU Treaties. Thus, the scope of potential Union powers is closely linked to majoritarian policy choice. Treaty amendments culminating in Lisbon extended Union competences into more politically sensitive fields characterised by high heterogeneity of interests and policy choice preferences. These new powers are less limited by Treaty objectives, leaving ample scope for policy choice.¹² At the same time, the Union enlarged to 28 Member States, increasing the diversity of circumstances and interests across the polities that compose it. As a result, an individual European polity may now be bound by Union law without its consent through Treaty ratification or in the Council and even despite an express negative vote. The majoritarian decision-making process not only binds individual polities to a specific policy choice against their preferred choice but, through the combined operation of pre-emption and primacy, it also withdraws from the national political process competence over the passage of powers from the national level to the EU. Taken together, these changes shifted the reference group for majoritarian choice from the national polities to the Union. Such a shift in polity requires acceptance by Union citizens

⁹ JHH Weiler, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999) 247, 338.

¹⁰ Introduced by the Single European Act (1987) Luxembourg: Office for Official Publications of the European Communities Vol. I+II.

¹¹ Weiler (n 9) 72.

¹² Discussed in detail in Chapter 3.

that in a range of areas of public life, one will accept the legitimacy and authority of decisions adopted by fellow European citizens in the realization that in these areas preference is given to choices made by the out-reaching, non-organic demos, rather than by the in-reaching one.¹³

There is no such European polity today. Eurobarometer surveys¹⁴ and the persistent decline in turnout for the European Parliament elections¹⁵ clearly show this. Majoritarian decision making in policies characterised by disagreement requires—yet, also hinders—emergence of a European political community. This book explores how the self-perception of the peoples of Europe as a unified political community can be built through Union law.

Despite the birth of a political soul of Europe, EU constitutional law is pupeteered like a lifeless body. ‘Very often one has the impression that though the political (in the sense of institutions) is well grasped in relation to the case law, the social (in the sense of human dimension and communities) has been far less understood’.¹⁶ The constitutive elements of EU constitutional order identified by scholars kept distance from passions: the institutional framework,¹⁷ Union citizenship¹⁸ and fundamental rights,¹⁹ division of powers,²⁰ substantive policies,²¹

¹³ Weiler (n 9) 346.

¹⁴ Standard Eurobarometer 81 June 2014 *European Citizenship* 10: in June 2014, ‘more than half the respondents defined themselves first by their nationality and then by their European citizenship (51%, +4 percentage points); the proportion of respondents who say that they define themselves first by their European citizenship and then by their nationality is still small (6%, +1); only 2% say that they see themselves solely as European citizens (no change)’.

¹⁵ V Cuesta Lopez, ‘The Lisbon Treaty’s Provisions on Democratic Principles: A Legal Framework for Participatory Democracy’ (2010) 16(1) *European Public Law* 123.

¹⁶ JHH Weiler, ‘Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12(1) *International Journal of Constitutional Law* 98.

¹⁷ See generally: P Craig, ‘Integration, Democracy and Legitimacy’ in P Craig and G De Burca (eds), *Evolution of EU Law* (Oxford, Oxford University Press, 2011); F Laursen (ed), *The EU’s Lisbon Treaty. Institutional Choices and Implementation* (Aldershot, Ashgate, 2012); L Pech, ‘The Institutional Development of the EU Post-Lisbon: A Case of Plus Ça Change...?’ in D Ashiagbor, N Countouris, I Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge, Cambridge University Press, 2012); A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (Oxford, Oxford University Press, 2012); P Craig, *The Lisbon Treaty, Revised Edition: Law, Politics, and Treaty Reform* (Oxford, Oxford University Press, 2013).

¹⁸ See generally: M Condinanzi, A Lang and B Nascimbene, *Citizenship of the Union and Free Movement of Persons* (Leiden, Brill, 2008); FG Jacobs, ‘Citizenship of the European Union—A Legal Analysis’ (2007) 13(5) *European Law Journal*; F Wollenschläger, ‘A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17(1) *European Law Journal*; J Habermas, ‘Bringing the Integration of Citizens into Line with the Integration of States’ (2012) 18(4) *European Law Journal*; PC Jiménez Lobeira, ‘EU Citizenship and Political Identity: The Demos and Telos Problems’ (2012) 18(4) *European Law Journal*.

¹⁹ See generally: S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford, Hart Publishing, 2013); G De Angelis and P Barcelos (eds) *The Long Quest for Identity: Political Identity and Fundamental Rights Protection in the European Union* (Bern, Peter Lang, 2013).

²⁰ See especially: R Schütze, *From Dual to Cooperative Federalism* (Oxford, Oxford University Press, 2011); R Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012).

²¹ See especially: C Barnard, *The Substantive Law of the EU. The Four Freedoms* (Oxford, Oxford University Press, 2013).

and the role of courts.²² Although excellent writings on EU constitutional law abound, few identify what makes EU law constitutional in terms of regulating the process of making policy choices.²³ Few authors retain the focus on polity building as a necessary prerequisite for majority rule.²⁴ Some deny the relevance of constituting a polity with a majoritarian political process²⁵ or suggest a demoi-cracy²⁶ as a model for politics with a plurality of constitutional orders²⁷ that interact, typically through courts.²⁸ All these accounts avoid the core issue of what makes a polity and how this understanding translates into constitutive elements of the EU as constitutional order.

This chapter unpacks the phenomenon of polity and through it identifies the constitutive elements of the EU as a constitutional order. The acquisition by the Union of a constitutional soul—a majoritarian political process in highly contestable policy fields—both enables and requires that Union law regulate the political process in such a way that the resulting choices are accepted by all the peoples of Europe. It will be argued that acceptance of majoritarian policy choice is based on Loyalty among polities and polity members, which prevents their Exit from majoritarian rule. Beyond merely Member State governments and institutions as actors of EU policy choice, the introduction of Loyalty factors in citizens as a key component of Europe's constitutional order. This more 'human' approach is required by the shift from 'a constitutional order of states'²⁹ towards a Union with a political process based on majority rule. Loyalty here is understood as a

²² See generally: A Stone Sweet, *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2004); B de Witte and HW Micklitz (eds), *The European Court of Justice and the Autonomy of Member States* (Antwerp, Intersentia, 2012); SK Schmidt and RD Kelemen (eds), *The Power of the European Court of Justice* (London, Routledge, 2013).

²³ The following do engage with the question: JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (Cambridge, Cambridge University Press, 2003); K Tuori and S Sankari, *The Many Constitutions of Europe* (Aldershot, Ashgate, 2010); G de Burca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press, 2012).

²⁴ EO Eriksen (ed), *Making the European Polity* (London, Routledge, 2005); EO Eriksen and JE Possum, *Rethinking Democracy in the European Union* (London, Routledge, 2012).

²⁵ For a critique see M Poirares Maduro, 'Where to Look for Legitimacy?' in EO Eriksen, JE Fossum and AJ Menéndez (eds), *Constitution Making and Democratic Legitimacy* (2002) ARENA Report 5.

²⁶ BMJ Szweczyk, 'European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union' (2011) 17 *Columbia Journal of European Law* 151; K Nicolaidis, 'The New Constitution as European Demoi-cracy?' (2004) 7(1) *Critical Review of International Social and Political Philosophy*; S Benson, 'Europe as a Demoi-cratic Polity' (2007) 30(1) *Jurist- og Økonomiforbundets Forlag Retfærd* 116; PL Lindseth, 'Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration' (2014) 15(4) *German Law Journal*.

²⁷ *Ex multis*, M Avbelj and J Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012).

²⁸ A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2004); M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford, Oxford University Press, 2013); A Vauchez, 'The Transnational Politics of Judicialization. Van Gend en Loos and the Making of EU Polity' (2010) 16(1) *European Law Journal*.

²⁹ A Dashwood, *Reviewing Maastricht, Issues for the 1996 IGC* (London, Sweet & Maxwell, 1996) 7; A Arnall, C Barnard, M Dougan and E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford, Hart Publishing, 2011).

relational phenomenon³⁰ underpinned by liberty: it requires one's own idea of *positive liberty* elaborated without *domination*; *interference* with one's own *positive liberty* that results from majoritarian choice can then be accepted if it is balanced out by continuity of the relationship with the other(s) as an integral part of one's own *positive liberty*. The prerequisite of liberty for a lasting union is illustrated by analogy between Loyalty and Love: both result in a self-perceived conception of *positive liberty* in the union with the others(s). This model shows how through interest representation, balancing and protection in the course of the political process a lasting Union can be built through law.

2. LEGITIMACY OF THE UNION AND THE PARADOX OF POLITY

Where policy choices are made at the Union level (the EU has regulatory powers) and bind national polities (through primacy and direct effect) against their preferred choice, the peoples of Europe need to accept not only the expansion of powers and borders of the Union, but also the expansion of their polities from national level to the EU.

In terms of democratic theory, the final objective of a unifying polity is to recoup the loss of democracy inherent in the process of integration. This 'loss' is recouped when the social fabric and discourse are such that the electorate accepts the new boundary of the polity and then accepts totally the legitimacy—in its social dimension—of being subjected to majority rule in a much larger system comprised of the integrated polities.³¹

Without a perception of the Union as a unified polity,³² concerns over legitimacy of majoritarian choices soar.³³

The reasons for the Union's 'legitimacy deficit' are two structural changes that were introduced in the Single European Act and the Maastricht Treaty and

³⁰ On Loyalty as a legal principle of EU law see M Klamert, *The Principle of Loyalty in EU Law* (Oxford, Oxford University Press, 2014).

³¹ JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2472.

³² Although the majority of Europeans feel that they are citizens of the EU, the overwhelming majority consistently perceive themselves first of all as nationals of their Member States—as members of their national polities. The fraction of Union citizens who see themselves first as Europeans and only then nationals of their Member States remains insignificant (and similar to the rate of mobility of Union citizens between Member States). See Standard Eurobarometer 83 (Spring 2015) *Public Opinion in the European Union*, Section IV, Standard Eurobarometer 81 (Spring 2014) *European Citizenship*, 10; Standard Eurobarometer 80 (Autumn 2013) *European Citizenship*, 29–39; Eurobarometer Qualitative Study (September 2014) *The Promise of the EU*, 12.

³³ *Ex multis*, G De Burca, 'The Quest for Legitimacy in the European Union' (1996) 59(3) *MLR*; K Lenaerts and M Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) 39 *CML Rev*; SC Sieberson, 'The Treaty of Lisbon and Its Impact on the European Union's Democratic Deficit' (2008) 14 *Columbia Journal of European Law* 445; J Priban, 'The Self-Referential European Polity, its Legal Context and Systemic Differentiation: Theoretical Reflections on the Emergence of the EU's Political and Legal Autopoiesis' (2009) 15(4) *European Law Journal*; N Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' (2005) 3(2 & 3) *International Journal of Constitutional Law*; JC Piris, *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 112.

elaborated in subsequent Treaty amendments. The first concerns the reach of Union policies and powers and can be termed as policy interdependence.³⁴ Policy interdependence takes place independently from the decision-making procedure at Union level (unanimity, consensus or QMV) and refers to the factual capacity of each national polity to regulate within its jurisdiction (to implement a policy choice). This capacity can be undermined as a result of externalities and interdependence between the national polities created by European integration, whereby regulatory decisions by one polity may affect the regulatory capacity of the other. A good example of policy interdependence are the Schengen area and the euro, where immigration and budgetary decisions respectively of one Member State may produce effects on the policies pursued by another Member State. The problem caused by policy interdependence can be resolved by shifting policy making from the national level to the EU. National polities and national political processes would then lend their legitimacy to the Union and its policies (through Article 10(2) Treaty on European Union (TEU)) as long as these are adopted by unanimity or consensus. In return, the increased regulatory capacity of Member States in the Union increases the legitimacy of the national political process.

The second structural evolution of the Union that gives rise to legitimacy concerns is the method of decision making, which causes polity interdependence. The departure from unanimity in the making of policy choices³⁵ implies that Union policies no longer derive legitimacy from the national political process because individual Member States may find themselves bound against the preferred choice as it emerged from the national political process. This creates interdependence between the national and European levels of decision making, between the national and European political processes. On the one hand, the legitimacy of the resulting European policy choice will be linked to the legitimacy of choices made within each national polity. On the other hand, legitimacy of the national political process is undermined because the national polity can be bound against its will; an alternative source of legitimacy is needed on the Union level to compensate for this loss. Several options are available for this alternative legitimacy source:

1. *Messianic or promise legitimacy* corresponds to the original promise of Europe to deliver peace and prosperity to its peoples.³⁶ To the extent that this promise is fulfilled, this type of legitimacy is exhausted³⁷ and transformed into output or result legitimacy.
2. *Substantive or output legitimacy* links the acceptance of public power to the results that this power achieves. It is also the extent to which the polity is

³⁴ Chronologically, this is the second element that gained prominence with the abolition of internal borders and the introduction of the single currency.

³⁵ Although QMV was foreseen already in the original 1957 EEC Treaty, it was not exercised until the 1986 Single European Act.

³⁶ Recital 8, Preamble to the 1957 EEC Treaty; Schuman Declaration (Paris, 9 May 1950).

³⁷ JHH Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9(3–4) *International Journal of Constitutional Law* 683.