Forum för EU-debatt

Lars Anell

Democracy in Europe –

An essay on the real democratic problem in the European Union

Rapport nr 7

DEMOCRACY IN EUROPE – AN ESSAY ON THE REAL DEMOCRATIC PROBLEM IN THE EUROPEAN UNION

By Lars Anell

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Foreword

Forum for EU debate is a think tank which was started in the spring of 2013 and whose purpose is to critically examine the EU from economic and democratic perspectives. We think there is an urgent need to vitalize the EU-debate in Sweden before the Swedish people will vote in the elections to the European parliament in May and the Swedish parliament in September of 2014. We think that debate needs to start from a somewhat new perspective.

There is, in our view, a need for a think tank that is devoted to an independent analysis of the EU against the background of the crisis that the EU is now in and to examine the role played by the current rules of the game, the ill-conceived institutional set-up and the political leadership. We think that much can be learned from economic and political research about the significance of centralized economic policy making, the aims and constitutional limits of the EU and the democratic legitimacy of this system in member countries.

Forum for EU debate is independent from political parties and interest groups. Its value premise is a free and open Europe where its citizens can choose where to live, work and study. This means that we believe in free trade and economic cooperation in the EU, openness towards the rest of the world and protecting democracy and human rights in member countries. By contrast, we do not believe in "more Europe" in the sense of gradually moving towards an EU state. We believe that our value premise enhances democracy, creativity and prosperity, while continued centralization of power

to Brussels leads to increased bureaucracy and political antagonism that threatens the whole European project.

Forum for EU debate aims to produce EU studies that are factual and maintain academic quality but at the same time are brief and easily accessible to a wide audience. The reports are presented and debated at public seminars.

The present report by Lars Anell is no. 7 in the series of reports published by Forum for EU debate. Lars Anell is, among other things, former ambassador to the EU and author of many books. More information about the Forum can be found on our homepage and our page on Facebook. There you will find a list of earlier publications, which can be downloaded, and also see videos from our different seminars. All previous publications are in Swedish, however, as are the seminars.

Stockholm in April 2014

Michael Sohlman, chairman

Previously published reports, all written in Swedish.

1.	Anne-Marie Pålsson	Subsidiaritet – ett tomt löfte
2.	Stefan de Vylder	Eurokrisen och Finanspakten: Ur askan i elden
3.	Nils Lundgren	Flexibel integration. Måste alla länder vara med i allt EU-samarbete?
4.	Lars Anell	EU:s budget på tvärs mot Lissabonstrategin
5.	Sverker Gustavsson	Unionens demokratiska underskott
6.	Anne-Marie Pålsson	EU-nämnden – riksdagens vakande öga eller regeringens lydiga språkrör?

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Contents

Preface

There are many people, like me, who have great respect for some fundamental achievements of the European Union. The creation of the world's largest domestic market and the integration of former communist economies are, by any standard, of historic significance. Yet, I am deeply troubled by other aspects of the Union's development during the last twenty years.

Most observers agree that the European Union suffers from a democratic deficit. There is nothing intrinsically wrong with the decision-making process in Brussels, but it is not embedded in a vital democracy where proposals are debated and contested – and where a visible sovereign is held responsible and brought to account.

All these shortcomings have been widely discussed. Less attention has been paid to what is the focus of this essay – the interplay between the increasing power of Brussels based institutions and the quality of democracy in Member States.

It is easy to see why democratic nation states cede sovereignty in order to take common decision at the European level. However, the unavoidable consequence is that the agenda of national democracy is reduced. If we allow a relentless transfer of competences to Brussels to go on, we put democracy in Member States at risk, since there is no political or legal limit to what the Union can do. The crucial question is how we can establish a visible boundary between the issues that should be dealt with at the federal level and those that should remain in the national democratic sphere.

In order to improve the "flow" of the text in this essay, a lot of supporting information has been placed in the rich undergrowth of footnotes. References to articles in the Lisbon Treaty have been left out to shorten the text.

I have benefitted from comments by Karin Anell, Margit Endler, Sverker Gustavsson, Michael Sohlman, Stefan de Vylder and, in particular, Ina Ganguli and Birgitta Swedenborg. Responsibility for the final text rests with me.

Stockholm, April, 2014.

Introduction

The Way Through the Woods

They shut the road through the woods
Seventy years ago
Weather and rain have undone it again,
And now you would never know
There was once a road through the woods

Before they planted the trees.
It is underneath the coppice and heath
And the thin anemones
Only the keeper sees
That, where the ring-dove broods,
And the badgers roll at ease,
There was once a road through the woods.
Yet, if you enter the woods
Of a summer evening late,
When the night-air cools on the trout-ringed pools
Where the otter whistles his male,
(They fear not men in the woods,
Because they see so few.)
You will hear the beat of a horse's feet,
And the swish of a skirt in the dew,
Steadily cantering through
The misty solitudes,
As though they perfectly knew
The old lost road through the woods.
But there is no road through the woods.

Rudyard Kipling (1865–1936)

If the European Union is compared to a nation state with respect to democratic vitality, it is bound to come up short. Freedom of speech and association is confirmed in the treaties, but there are no genuine European parties and there is no pan-European debate. The political parties in the European Parliament (EP) are basically national and the voting patterns of individual members (MEPs), when push comes to shove, reflect their nationality rather than their political affiliation. The EP is neither a parliament nor a legislature in any real sense of the word. The turnout in elections to the EP has been declining since the beginning almost 40 years ago. It is deplorable but understandable. Democracy is more than the formal requirements of open and secret elections, independent political parties and freedom of speech. It must have substance. There must be a real debate about issues that people care about. Elections must have meaningful effects. There must be a real choice between alternatives. People must see the relation between the act of voting and a possible change. As matters now stand, the electorate is more inclined to see elections to the EP as an opportunity to express its support or – more commonly – dissatisfaction with national governments. Thus, there is no visible link between action in Brussels and accountability that can be addressed by the electorate. In short, the legislative process of the EU is not embedded in a democratic polity where the actions and proposals of the sovereign are scrutinized and contested by a legitimate opposition.

This is what I will refer to as the traditional democratic deficit and, no doubt, there are good reasons to be concerned about it when EU regulations and directives penetrate deep into the democratic life of Member States. However, it must be stressed that the Council, where all Union acts are adopted, is dominated by representatives from the world's most democratic governments. Every piece of legislation has been prepared in working groups involving national civil servants and every effort is made to reach a consensus. Even if the implementation

of Union acts is lost in the maze of *comitology*[1], there is no reason to deny the democratic quality of the actual *decision-making process*.

What is lacking is transparency and accountability. It is difficult to pin down who is responsible for a decision by the Union and there is no way of bringing anyone to account for decisions taken[2]. This is why the interplay between the Union and the national level is at the heart of European democracy. The focus of this essay will therefore be on the consequences for democracy in Member States when power and competences are transferred, deliberately or by accident, to Brussels.

Trade-offs cannot be avoided if we are to deal effectively with globalization and climate change. The creation of the world's largest domestic market could only begin after the Member States had agreed to legislate and regulate on the basis of qualified majority decisions (QMV). It is pointless, and economically hazardous, for a single country to reduce its own emissions of greenhouse gases. But the Union has usurped wide competences that, arguably, should have stayed in the national domain.

It is therefore a serious problem that the European electorate is not allowed the opportunity to oppose a process that lacks a popular mandate – the relentless movement towards "more Europe" – or even to discuss a turn in another direction. What was once a dream about "an ever closer union" in a war-torn Europe has become a straitjacket that deprives us of the American privilege to strive for a "more perfect union".

Sometimes further integration is based on a formal decision; often it is an unintended consequence or an extension of regulatory activities. Any transfer of competence to the European level depletes

1. *Comitology* is the name given to a vast array of committees charged with the task of implementing "the details of the devil".
2. I am not saying that it is easy to see who the culprit is in other organizations. We have made it easy by deciding that it is the CEO, the Director General or the government.

national democracy. By the same token, a restoration of tasks that do not belong to Brussels is a democratic gain in Member States and a reduction of the democratic deficit of the Union.

Europe does not have an engaged, open and honest debate about the future shape and format of the Union. In the end, the lack of a legitimate opposition is a threat both to the European project and to national democracies. Traditional political parties do not reflect the critical view of people if we are to believe the opinion polls. In order to give vent to their frustrations, voters are likely to abstain from voting or to support extremist or xenophobic parties. If we allow the process to continue as it is we are likely to end up with a European Parliament dominated by members opposed to the policies favoured by the Council and the Commission. And some of the suggested solutions to politicize the Parliament and the Commission are recipes for disaster.

From project to process

The debate about the final objective – *finalité européenne* – of the European project ceased very early. As soon as Charles de Gaulle entered the scene and clearly showed that he wanted to depart from the direction indicated (not very clearly) in the Treaty of Rome, it became dangerous to force the issue. In common parlance the Community was referred to as a process – "a journey without a definite destination."[3] Jacques Delors famously called it an Unidentified Political Object (UPO).

Many well-informed observers concluded that this course of events was most fortunate:

> "Undoubtedly this approach to take one step at a time, without long-term visions or grandiose plans has had enormous advantages. It has allowed us to move on. Europe today is very different from what it was in the sixties. Progress has been possible in spite of deep-rooted and stubborn disagreements […]. The process has become, if not irreversible, at least very difficult to turn into another direction."[4]

The British political scientist Mark Leonard, who has written one of the most optimistic tracts about the Union, regards this lack of vision as "the key to its strength."[5] The Belgian diplomat Philippe de Schoutheete, who has personal experience of the change from project to process, notes that it entailed that the Union "deprived itself of the means to justify its activities."[6] Indeed, today the Union has only the negative objective

3. Leonard (2005), p.10.
4. de Schoutheete, p. 123. My translation from Swedish.
5. Leonard (2005), p. 10. The title of the book referred to is "Why Europe Will Run the 21st Century".
6. de Schouteete, p. 123.

that the European Council formulated at Laeken in December 2001, when it informed us that European citizens did not want "a European superstate or European institutions inveigling their way into every nook and cranny of life". The problem is that the on-going process does exactly that in the fashion foreseen in the Laeken Declaration itself – "a creeping expansion of the competence of the Union or […] encroachment upon the exclusive areas of competence of the Member States."[7]

Related to the perception of the Union as a process is the conviction of a broad political elite[8] that the project must keep moving relentlessly towards an "ever closer union" or the project will be derailed. You are not even allowed to pause. Almost all the leading European politicians – Helmut Kohl, Paul-Henri Spaak and Jacques Delors among them – have supported their arguments with the well-known bicycle metaphor. You have to keep pedalling otherwise you will fall over. Anyone who has moderate experience of using a bicycle knows that this is patently false. You can use the brakes and put down your feet when the bike comes to a stop – and take out the map to see where you are going.

7. Presidency Conclusions. European Council in Laeken, 14 and 15 December, 2001.

8. There is no precise definition of the political elite, but everybody who is interested in the EU knows broadly what is meant. At the beginning, almost all leading politicians in Benelux, Germany and Italy were in favour of a very close union. It is more than likely that they would have signed on to an agreement to create a European federation. Only in France was the political class bitterly divided. Since de Gaulle left office, most leading French politicians have been in favour of the European project but with a distinct preference for intergovernmental cooperation in some vital areas. Later, the main political parties in Ireland, Portugal and Spain joined the Europhiles. The Commission is for several reasons a strong advocate of supranationality and the extension of its own mandate.The EP has always been dominated by a pro-European majority and even MEPs in favour of intergovernmental cooperation have found it difficult to maintain a principled attitude to the division of competence. One issue that unites all parliamentarians is that their institution´s mandate and power should be extended. However, it must be borne in mind that the political elite is not monolithic. The Commission is held in very low regard in both Berlin and Paris (and in many other capitals). France and Germany differ on many institutional issues. There is seldom full agreement on what should be done but the solution is still "more Europe". All countries that receive a net contribution from the funds of the Union support European integration for this particular reason. The chairman and the two deputy chairmen of the convention that drafted the Constitutional Treaty (Valéry Giscard d´Estaing, Guiliano Amato and Jean-Luc Dehaene) are all key members of the European political elite as are at least seven or eight of the other nine members of the praesidium. And the possible exception, the member of the British parliament, Gisela Stuart, belongs to the pro-European wing of Labour.

Institutional constraints

The most remarkable feature of the European Union is that no national representative can put forward a fresh proposal and have it discussed and decided upon.[9] The ministers in all the councils and the MEPs work on the basis of proposals from the Commission. This is a legacy of an undemocratic past.

The European Coal and Steel Community (ECSC), proposed by France in May 1950 and entering into force in 1952, was shamelessly and intentionally undemocratic. The philosophy that became the official theory of European integration, neofunctionalism, held national politicians responsible for the collapse of democracy in Germany and Italy, and, consequently, for the Second World War. The originator of this philosophy, David Mitrany, and his successor, Ernst Haas, thought that international cooperation must build on practical solutions worked out by experts. Jean Monnet, with a reasonable claim to be called the father of the EU, was instrumental in putting this theory into practice. He convinced a very small group of key politicians in France and Germany to propose in the Schuman Declaration that "Franco-German production of coal and steel as a whole be placed under a common High Authority" with the power to take decisions that "will bind France, Germany and other members."[10]

9. This is not strictly true. If a Member State wants to change the Treaties it is invited by article 48.2 of TEU to submit a proposal to the Council.

10. The ideas of the Schuman Declaration were presented to the members of the French government on May 9, 1950 and made public later that same day. The German Chancellor Konrad Adenauer was informed in advance, as was the administration in Washington.

This body was made up of nine high-ranking civil servants. They were authorized to regulate and manage the production of steel and coal by removing internal tariffs, controlling subsidies and restrictive practices. They even had the power to tax, since they could finance their activities by direct levies on the production of steel and coal. The Germans and the Dutch insisted successfully that a Council of Ministers could advise the High Authority.[11] The whole process of organizing ECSC was "remotely controlled" from the US embassy in Paris, where a secretariat had been set up to support Jean Monnet.[12]

One central idea of the functionalist theory was that "the concrete achievement of a supranational regime within a limited but controlling area of economic effort", as Monnet put it in his memoirs,[13] would make it attractive or even mandatory to take complementary steps in closely related fields, and in the end, all over the place. He saw it as an organic process, almost dictated by the laws of nature. Limited achievements in certain areas would create the necessary solidarity "from which a federal state would gradually emerge" and it was plainly "wrong to consult the peoples of Europe about a structure of which they had no practical experience."[14] At a more mundane level, the neofunctionalists placed their trust in the common sense of highly specialized *fonctionnaires*, shielded from the turmoil of the political market place – and from the business community. Professional experts would immediately see the advantages of extending their practice and easily find the solutions when nationalistic politicians left them in peace. Once the snowball gained enough momentum, it would be difficult to stop. By definition, neofunctionalism was silent about the end-game.

11. Bache&George, p. 89–99.
12. Bache&George, p. 100–101.
13. Monnet, p. 371.
14. Quoted by Ginsberg, p. 88. When the leader of the German Social Democratic Party, Kurt Schumacher, opposed the ECSC he was told by Monnet that "We are not prepared to negotiate with private interest groups about a venture of such great public importance" (Monnet, p. 373–74). See also Bitsch, p. 64–68.

The Schuman Declaration addressed a very urgent French problem – continued access to coal from Ruhr when it became clear that the Americans and the British had decided to let the Germans start their furnaces – but it was phrased as a peace message. It was therefore logical that Jean Monnet's next idea was to establish a European Defence Community (EDC). The Pleven Plan, that launched the idea of EDC in October 1950, had been worked out by a close circle of *confidants*.[15] The Draft Treaty was signed in May 1952 by the six governments that were members of the ECSC. It was ratified by parliaments in Benelux and Germany, but defeated in the French national assembly two years later while the Italians were waiting in the wings. The model for the EDC was the ECSC. Had it been realized, it would have had a Joint Defence Commission, a Council, an Assembly and a Court. But the Pleven Plan aimed much further – it proposed, five years after the end of the Second World War, "the creation, for our common defence, of a European Army under the political institutions of a united Europe."

The defeat of the EDC, which was also a setback for the neofunctionalist strategy, forced the political elite to retreat from their venture into 'high politics'. Based on initiatives from Benelux politicians, the next phase of European integration aimed at the creation of a common market. The new organization, the European Economic Community, which came into existence in 1958 based on the Treaty of Rome, was more intergovernmental and democratic than the ECSC was and the EDC was intended to be. However, the supranational ambitions were retained. According to the Treaty, decisions would, after the initial phase, be taken by majority vote. The man who became president in France in 1958, Charles de Gaulle, put a stop to that and it would take more than twenty-five years before a process towards supranationality started in earnest.

15. Not even the French Minister of Defence, Jules Moch, was among the initiated.

The legacy of the ECSC is still visible. The Commission is much more than an obedient bureaucracy. It has a near-exclusive right to prepare all legislative acts and authority to monitor and regulate markets as the guardian of the treaties. As far as competition law is concerned, the Commission combines the roles of investigator, prosecutor and judge in one person – in practice without appeal. The Council of Ministers is as close as we get to a legislature but it can only "request the Commission to undertake any studies (it) considers desirable for the common objectives, and to submit to it any appropriate proposals."[16] If the Commission refuses to act, it has to give reasons. When the Council wishes to amend a proposal, it must normally act unanimously.

The European Parliament has gradually enhanced its role in EU law-making and is now almost an equal legislative partner to the Council. Both institutions shall jointly "exercise legislative and budgetary functions." Like the Council, the EP can request the Commission to submit appropriate proposals. The Commission may attend "all the meetings" of Parliament and "shall, at its request, be heard."

The European Council was not mentioned in any treaty until its mere existence was recognized in the Single European Act, which entered into force in July 1987. The Heads of State and Government had by then been meeting regularly twice a year and issued conclusions which the Commission neglected at its peril. In the Maastricht Treaty the European Council was assigned a specific role that was expanded in the Lisbon Treaty. The Heads of State and Government "shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof", but the Treaty says explicitly that it "shall not exercise legislative functions."

16. The popular name of the "constitution" is the Lisbon Treaty which consists of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Given the membership, it is not surprising that the European Council has always been far more important than the treaties are willing to admit. This became starkly evident when the economic crisis hit Europe with full force. There was no one else to turn to when the fault lines of Euroland became exposed and the financial collapse of one small country threatened the whole edifice. The Lisbon Treaty did not allow for the emergency measures that were deemed necessary. The Heads of State and Government had to act as hands-on managers of the crisis and became the dominant legislator in the economic and financial domain. The Maastricht Treaty had created a "three pillar" institutional structure that was unified in the Lisbon Treaty. Now we have a new, intergovernmental pillar, inhabited by the European Council, to coordinate economic policies.

Formal rules do not necessarily convey a reliable picture of the real world. The High Authority of the ECSC had almost dictatorial powers that were of little value in the end. During the early phase, it was smooth sailing thanks to the strong and stable post war boom, but when the first crisis hit the coal industry in 1958–59, the High Authority failed the test. Member States rejected the proposed community-wide proposals and imposed their own individual solutions.

The Treaty on the Functioning of the European Union (TFEU) admonishes Member States to respect the independence of the Members of the Commission and establish that they "shall not seek to influence them in the performance of their task." But commissioners receive ministers from Member States on a daily basis and listen to friendly advice about what they ought to do or not to do. Proposals to force car producers to reduce CO_2 emissions have more than once led to intense pressure from Germany, involving the Chancellor, to convince the Commission to abandon measures that would threaten the competitiveness of German industry. Even minor changes of the Common Agricultural Policy (CAP) bring an army of angry ministers to Brussels. Recently, the German and Finnish governments took the Commission to task because it was too lax in imposing austerity

measures on struggling Eurozone countries.[17] The notorious effort to prohibit open containers of olive oil in restaurants was dropped by the Commission – without comment – after some prime ministers from major Member States expressed their frustration. At some of the Intergovernmental Conferences, when changes of the treaties have been negotiated, the Commission has been sidelined and it was ousted from the preparations for the Constitutional Convention. It is an established practice that the German Chancellor and the French President issue a common statement before particularly important meetings and explain what kind of outcome they want to see. What is said about the European Council in the Lisbon Treaty is a poor reflection of its pre-eminent position.

Still it is an important fact that the final proposal for a legislative act is drafted by the Commission and can be amended only by a unanimous Council. Everybody who has participated in an intergovernmental negotiation knows that one underestimates the power of the pen at one's peril. It is extremely difficult to change, in a significant way, a document that serves as a basis for the negotiation and has support from some members of the group. And, since the Commission is the sole provider, there are no competing proposals. Apart from the fact that it would require a revision of the treaties, it is highly unlikely that the Commission will put forward a proposal for a legally applicable interpretation of subsidiarity or a strict boundary between the realm of market forces and the sphere of democracy, since it would severely restricts its own room to maneuver.

17. *Financial Times*, March 1–2, 2014.

The people and the political elite

That the European Union is an elite project is not a value judgment, but a simple statement of the obvious. Not only have many members of the European political elite confirmed it, but several of them have said it is the only way to proceed. When Jacques Delors in 1992 observed that the Union so far had developed without a clear popular mandate, he added that this phase was over. Unfortunately, that is far from being the case.

It is true that almost all members of the French government were taken by surprise when Schuman presented his plan in May 1950 – and even more so when he later the same day called a press conference and announced it to the general public. Only the administration in Washington and the German Chancellor Konrad Adenauer had advance knowledge outside France. However, there is no reason to suspect that politicians in general tried to hide from the public. All treaties were subject to parliamentary approval. There was simply no popular demand for knowledge about European integration[18]. It was only in France that European integration was a controversial issue but all important negotiations took place in the shadow of the war in Indochina, the insurrection in Algeria and the Suez crisis. The French chief negotiator, Maurice Faure, found it quite comfortable to pursue

18. Writing about how the Messina Declaration was received by the public, the Belgian Foreign Minister Paul-Henri Spaak simply notes that "Dans sa majorité, l'opinion publique n'était pas hostile; elle était indifférante. L'œuvre accomplie fut celle d'une minorité sachant ce qu'elle voulait" (Spaak: Combats inachevés, II, p. 71)

his task "*en dehors de l'opinion publique*."[19] The Prime Minister Pierre Mendès-France did not even bother to demand a vote of confidence when he allowed parliament to turn down the Pleven Plan.[20]

The effects of economic integration disturbed nobody until the late seventies. Internal tariffs were removed ahead of schedule when all continental economies were growing at a faster clip than ever before. Soon full employment really meant full and was taken for granted. Efforts to harmonize rules and regulations got nowhere until the European Court of Justice (ECJ) advanced the formula of mutual recognition in the *Cassis de Dijon* decision in 1979.[21] Whether high, stable economic growth, full employment and low inflation should be attributed to the coming into existence of a common market is a moot point. In any case, it allowed the European politicians to go on with their projects without much external interference. When the postwar boom ended and was succeeded by stagflation in the mid-seventies, the situation naturally took a turn for the worse. However, the problems could not be laid at the doors in Brussels and further integration was seen as the solution not only by the six Member States but also by an increasing number of applicants.

The European Golden Age started in the eighties when, finally, the then twelve Member States were able to establish an internal market for European companies and consumers. For 7–8 years the only news about what was happening in Brussels were reports about progress in every area. The crowning moment for the political elite was the successful negotiations, ratifications and implementation of the Maastricht Treaty.

19. Bitsch, p. 103.
20. The fact that the French electorate was uninformed and uninterested in European affairs did not mean that harmony prevailed. The political class was bitterly divided about all issues concerning European integration. Raymond Aron called the debate about EDC "the greatest ideological and political debate France has known since the Dreyfus affair" (quoted by Parsons, p. 68). Mendès-France would later vote against the ratification of the Treaty of Rome.
21. The official name is C 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.*

But, for the first time, warning bells were chiming. The Danish voters turned down the Maastricht Treaty although it had been massively supported by the country's political establishment and business community. President Mitterrand, eager to show the way, called a snap referendum. This was actually the first time that the French electorate had been invited to debate the European project and they were less than enthusiastic about what they read and heard.[22] Telling the truth was not an option. In a televised debate, Mitterrand firmly denied that the Treaty – described by Craig Parsons as "the greatest voluntary concession of sovereignty ever made to international institutions"[23] – in any way affected the political sovereignty of France.[24] A *petit oui* was saved by late incoming votes from remote islands financed by Community sources.[25]

It was when he saw this writing on the wall that Jacques Delors declared that "Europe began as an elitist project in which it was believed that all that was required was to convince the decision-makers. That phase of benign despotism is over."[26] But, as said previously, this prophecy has turned out to be overly optimistic.

The Constitutional Convention

The process that started in Laeken in December 2001 when the European Council decided to summon a convention to draft a constitutional treaty and ended when it entered into force eight years later, illustrates rather well the state of democracy in the Union and the continued dominance of the political elite. The natural point of departure is the declaration issued by the Heads of State and Government, since it was intended to serve as terms of reference for the

22. In 1972 a referendum was organised concerning the enlargement of the Community from six to nine Member States (Gauthier, p. 93).
23. Parsons, p. 202.
24. James, p. 277. Pedersen, p. 172. I personally had the opportunity to see the debate on TV.
25. The exit polls in France indicated that the people might reject the treaty. The fear that they could lose their huge subsidies and cheap flights to Paris brought the islanders to the polls and they voted massively in favour of the Treaty.
26. *The Independent*, July 26, 1993. Quoted by Leonard (1998), p. 18.

convention. To my knowledge this document is unique in more than one respect. It is of course not free from the traditional self-praise, but it is also refreshingly critical of many features and poses a large number of open-ended questions. The most remarkable fact is that it actually entertains the idea that it is possible to change course.

As a starter, the European Council emphasized that the Union must be more democratic. There was a need to focus on the essential tasks and refrain from meddling with matters that are "by their nature better left to Member States' and regions' elected representatives." On the basis of what the European Council presumed to be the demands from the European citizenry, it outlined a reform agenda that was broad and radical. Of particular importance was the division of competences between Brussels and Member States. Not only did the declaration call for a treaty that could "ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive sphere of competence of the Member States". Even more surprising was the idea that these changes could reduce the sacrosanct *acquis communautaire*, since some tasks might be restored to Member States. In fact, even if the principle of subsidiarity was referred to in passing, the Heads of State and Government seemed to allow for a dynamic interpretation of it. Finally, they gave the lawgivers at the Convention a very sound piece of advice when they asked them to give careful consideration to what should be put in a treaty that would be extremely difficult to alter and what should be normal legislation subject to change by a qualified majority. As a matter of fact, they did not ask the Convention to draft a treaty – only to consider what could be the basic features of a constitution. And the European Council spelled out what it saw as its main components: "The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union."[27]

27. All quotations from Presidency Conclusions, European Council in Laeken, 14 and 15 December 2001.

To sum up, the European Council instructed the convention to look carefully at a number of fundamental issues and present their conclusions in a brief, transparent and understandable text. In all likelihood the Heads of State and Government expected to be presented with several alternatives that would serve as a basis for their own Intergovernmental Conference. On all counts they would be disappointed.

The chairman of the convention, Valerie Giscard d'Estaing, started the process with a six-month long *phase d'écoute* after which he informed the participants that he hadn't heard a word about any transfer of competences back to Member States (which was probably true).[28] The Convention was totally dominated by Brussels-based insiders and never came close to a serious discussion of the issues raised in the Laeken declaration. Almost all the members of the powerful praesidium that masterminded the Convention were pro-European insiders. The one person who could (and should?) have voiced her concern was the British Labour MP Gisela Stuart. She has later admitted that the Constitution was drawn up by a "self-selected pro-European elite" with the firm intention to transfer competence irrevocably to Brussels: "Not once in the 16 months I spent on the convention did representatives question whether deeper integration is what the people of Europe want, whether it serves their best interests or whether it provides the best basis for a sustainable structure for an expanded union."[29]

Giscard d'Estaing, together with his two deputies Guiliano Amato and Jean-Luc Dehaene, convinced the *conventionnels* that only if they could agree on a common text would they become the Found-

28. *Le Monde*, July 23, 2002.

29. Quotes from a pamphlet Mrs. Stuart wrote for the Fabian Society (*Economist*, December 13, 2003). Alain Dauvergne gives an apt description of how the insiders played at home while it was a very difficult away game for members of national parliaments and government representatives (p. 49–51). See also Gillingham, p. 341.

ing Fathers of the New Europe.[30] In the end the Heads of State and Government were not presented with the expected menu for their own deliberations but with a *fait accompli*.[31] Giscard used the short time allotted for the final negotiations to his advantage – the voluminous part III of the draft treaty was actually distributed for the first time during the last session – and produced a text that the *conventionnels* could either reject *in toto* or support.[32] The subsequent intergovernmental conference made a large number of small changes bud did not in any significant sense change the format or substance of the document that was presented for public approval in several Member States.

To be fair, the Convention was a rare opportunity for nationally elected parliamentarians and government representatives to have a say regarding fundamental issues concerned with the governance of the Union. The proceedings were laudably transparent and easy to follow for any citizen ready to invest a moderate amount of time and energy. However, the Convention and its all-important presidium were not ready to allow any deviation from their chosen path. At an early session the convention debated its own rules of procedure and came to the conclusion that decisions would be taken by consensus. In practice it meant that even very animated debates ended with Giscard d'Estaing beginning his summary with the two words: *"Je constate"*. However, there was no sign that any group of national representatives ever mounted a serious challenge.[33] And the way in

30. Dauvergne, p. 173–175. Giscard d'Estaing often referred to "the road to Philadelphia" to call forth the parallel to the American Founding Fathers and insisted on a single text already in his introductory speech to the Convention.
31. When the European Council, meeting in June, 2003, got the draft for a "Constitution for Europe" it welcomed the document, true to form, as a "good basis for starting negotiations in the Intergovernmental Conference" to be convened in October (Norman, p. 299).
32. The text was never properly discussed, but nothing suggests that that it would have been markedly different if time had allowed a more careful scrutiny (Dauvergne, p. 247).
33. Norman, p. 27–36 and Dauvergne, p. 225–227.

which an unwelcome result was dealt with showed that the political elite had no intention to let go.[34]

No is not the answer

The most important referenda took place in two founding members – France and the Netherlands – in late May and early June 2005. Almost 70 percent of the French electorate took part and more than 55 percent of them rejected the treaty on offer. The Dutch participation rate was lower, a little bit more than 63 percent, but almost 62 percent said no.[35]

The French had held a referendum on the Maastricht Treaty, but this second popular verdict was arguably the most informed decision in any European country. All the key issues were debated daily on prime time television and half of the top ten books on the bestseller list were devoted to the EU and the constitution. According to an opinion poll by *Paris Match*, fully 83 percent of the voters had discussed the constitution the week before they went to the polls.

In the Netherlands, a country long regarded as the most pro-European of the lot, it was the first time in 200 years that a referendum took place and the first time ever that the people were asked to express their opinion about European integration.[36] Clearly in such a situation individual voters had many reasons for their final choice. The Prime Minister Jan Balkenende concluded that the people thought that the European project cost too much and that the constitution was a bridge too far.

34. Neither the Commission nor Giscard d'Estaing were fully satisfied with the text drafted by the Convention. On different occasions they produced their own texts to the surprise and dismay of almost everybody else. Their efforts were soundly rejected but caused a lot of bad feeling. If Giscard's text had been adopted it would have turned the Union in the direction of a more intergovernmental organization dominated by the major states.

35. It is equally significant that 43 percent of the voters in Luxembourg rejected the proposal.

36. The earlier occasion also concerned a constitution. The French army that occupied the country in 1797 wanted the Dutch to adopt a constitution for the newly established Batavian Republic. The people were then even more recalcitrant. Only some 25 per cent supported the French initiative.

We will discuss forever why this happened. Some observers claim that the people actually chose this opportunity to express their dissatisfaction with their own governments. If so, they must have regarded the referendum as unimportant. It is obvious that in both countries, some irrelevant issues figured in the debate. On the other hand, the people who took part were very well informed, in France extremely so, and it was the first time they took a serious, rounded look at the European project.[37]

As far as I can recollect, no member of the European political elite ever considered the idea that the rejected proposal should be discarded simply because it had been turned down by the people. The Belgian former Prime Minister and deputy chairman of the Convention, Jean-Luc Dehaene, inferred that "Europe could not rely on referenda if it were to develop. It may sound provocative but it is true."[38] The German commissioner, Günther Verheugen, admonished his colleagues in the political elite not to give in to blackmail.[39] The French writer Philippe Riès asserted that the European project under the successful leadership of a "small, enlightened elite" was the "victim of an overdose of democracy." The majority that had rejected the Constitutional Treaty was guided by narrow vested interests and national egoism and therefore the electoral mandate was not "legitimate."[40] The problem, as it was formulated by international scholars at a SIEPS seminar in Stockholm, was how one could "get the French and Dutch governments off the hook."[41] Maybe the President of the European Council, Herman van Rompuy, put it best when he said that the winds of populism stand in the way of the European project. Less metaphorically it means that the electorate is trying to prevent what the political elite wants.[42]

37. Startin and Krouwel have recently published an informative article about the French and Dutch referenda.
38. *Le Soir* (quoted in *The Economist*, August 11, 2007).
39. George, p. 85.
40. Riès, p. 10.
41. Personal observation.
42. *Svenska Dagbladet*, April 8, 2013.

The consensus among members of the political elite was that referenda had to be avoided. Cosmetic changes were made to the text in order to pretend that it was substantially different from the one that had been rejected in France and the Netherlands. The only remaining problem was then that the Irish were bound by their constitution to let the people decide. Unfortunately they got it wrong the first time and, as was by then an established practice, had to make a new effort.[43]

The final text was signed by the Member States in Lisbon in December 2007. It entered into force two years later.

43. The reaction among the political elite, in particular in Germany, was that the Irish should step aside for a while and let the others continue.

The creeping expansion

The European project does not have a known final destination. It is now a process – but it moves inexorably towards "more Europe". The speed is not constant but it never really stops. Normally the "creeping expansion", that the Heads of State and Government warned against in the Laeken Declaration, happens incrementally but sometimes it expands by leaps and bounds.

An analysis of the state of democracy in the Union must pay attention to the legitimacy of decisions in Brussels as well as the vitality of national institutions. A transfer of competence to the supranational level diminishes the scope and quality of democracy in Member States. It is not necessarily a zero sum game and it is all right to argue that countries are pooling their sovereignty but it is not possible to hide the fact that the sphere of national democracy is depleted. When matters are decided by Union institutions or strongly influenced by Union acts, there are simply fewer issues that can enrich the national debate or be contested in elections. As long as the legitimacy of governance is strong in Member States and weak in Brussels, a continued transfer of competence to the Union is not only undesirable from a democratic point of view but also dangerous. It is important to keep in mind that it is primarily national parliaments that are deprived of influence when an increasing number of decisions are taken behind closed doors in Brussels.

There are obvious – and logical – reasons why the European project moves along a fixed path. The EU can be described as a set of institutions and a legal framework to encourage and facilitate

cooperation among European countries.[44] It is consistent that the political and administrative structure is geared towards deeper integration since the stated goal is an ever closer union. The bureaucracy is surprisingly small considering its all-embracing mandate and the Commission must enlist the cooperation of many thousands of national civil servants to staff working groups to prepare legislation and committees to monitor its implementation. This mode of operation has several advantages. It enhances the democratic quality of decision-making *inside* the Union and often reveals opportunities to realize European added value.

However, there are numerous problems. To a large extent the creeping expansion of Brussels' competences takes place without proper democratic oversight – or any oversight at all. Since the Commission is the sole provider of proposals, there is seldom an honest debate where different alternatives are considered and contested. Even when significant political issues are at stake, the debate is reduced to whether one is ready or not to take the next step along the fixed route. There is no visible final limit and no legal protection against the wish of a qualified majority. The result is not only that the people increasingly fail to support the process – many perceive it as a threat.

The prevailing interpretation of the four freedoms[45] puts the whole public sector at the mercy of market forces and no area is beyond the challenge of European competition law. It started very early. Since the 1960's the European Court of Justice (ECJ) has delivered many hundreds of decisions on social security and provisions of social assistance.[46] In parallel there is a gradual transformation of the traditional European welfare system into one based on rights that individuals can assert in the courtroom. In the long run this process is bound to undermine and confuse the electoral contract between

44. Paul Magnette defines the EU as a "set of institutions and rules designed to strengthen European states by encouraging them to cooperate" (p. 3).
45. The freedom to move across national borders for goods, services, capital and people.
46. Cf. Liebfried&Pierson in Wallace and Wallace (p. 267–289).

the people and their national government. Nowhere did a European elected assembly deliberate and decide on this trajectory.

The vast regulatory power of the Commission has led one of the leading authorities in this area, Giandomenico Majone, to speak of "the attempt to achieve European integration by stealth rather than by frankly political means."[47] The already mentioned notorious proposal that restaurants should be obliged to provide olive oil only in sealed containers may be a small but useful illustration. The idea was scrapped when leading politicians from major countries gave vent to their frustration. Suspicious observers believe that the proposal was the result of successful lobbying by the olive growers' organisation. It could of course have been motivated by health concerns. If so, the Commission ought to have stood its ground. Majone's concern is not so much that national democracy is affected but the efforts of supranational institutions to expand their remit risk "depleting their limited resources of legitimacy."[48] Each small regulatory theft is unimportant but the cumulative effect is significant.

Mark Pollack had predicted that the creeping EU expansion during the period 1957–92 would ebb as a consequence of financial restraints and a broad application of the principle of subsidiarity. When he looked back at the period after the conclusion of the Maastricht negotiations, he could register the effects of Germany's waning enthusiasm to act as *Zahlmeister*, but with regard to regulatory activities he was forced to agree with Majone that the expansion had continued its relentless growth.[49]

Emergency integration

EMU and its unintended consequences will have dramatic consequences for all countries in the Eurozone. The first step – giving up control of the exchange rate; no longer being able to borrow

47. Majone (2009), p. xiii.
48. Ibid. p. 32.
49. Pollack.

in your own currency; assuming that government bonds were risk free and handing over monetary policy to a European copy of the Bundesbank – was premeditated. The second step – a fiscal union and supranational scrutiny and control (?) of national budgets and stabilization policy – is, according to the political elite, necessary to take the Eurozone out of the crisis.

The Treaty on Stability, Coordination and Governance itself will deprive Member States of large swathes of the stuff democracy is made of.[50] It lays down very strict and detailed rules for an automatic mechanism to deal with excessive deficits (the lower limit of a structural deficit is 0.5 per cent of GDP at market prices) of Eurozone countries.

According to article 5:

> "A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact."

All Contracting Parties shall incorporate the Pact in national law "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to."[51] The automatic correction mechanism shall be based on a proposal from the Commission while respecting "the

50. No compensation for accepting this discipline is in sight for the crisis countries. The German coalition agreement "Deutschlands Zukunft gestalten", concluded in December 2013 between CDU, CSU and SPD, is quite clear. "Das Prinzip, dass jeder Mitgliedstaat für seine Verbindlichkeiten selbst haftet, muss aber erhalten werden" (p. 159).
51. Article 3.2.

prerogatives of national Parliaments." If the Commission considers that a Member State has failed to comply, the matter will be brought to the ECJ and its judgment "shall be binding."[52]

The measures adopted by the European Council to deal with the crisis have only a tenuous link to the Union. Using the simplified method to amend TFEU, the Heads of States and Governments added to article 136 the right for Eurocountries to establish a stability mechanism to be activated when necessary to safeguard the stability of the euro as a whole. But the agreement on the European Stability Mechanism is a separate international treaty.[53]

The alleged need for drastic, unorthodox measures to deal with the crisis has led Jonathan White at London School of Economics to speak of emergency politics.[54] When the first rescue package was launched in 2011, José Manuel Barroso announced that these were exceptional measures in exceptional times. It would never happen again. Since immediate action was called for in order to avoid a looming catastrophe, haste became a virtue. A new realm opened up in which normal rules did not apply. Democratic procedures had to be dispensed with until normalcy returned. But all the steps that have been taken, "stitch by stitch", by the Eurocountries since the crisis began have changed the European polity for good.[55] The new

52. Article 8. Sweden has signed and ratified the Treaty and is therefore a Contracting Party. We are not bound by the Treaty as long as we have not adopted the euro. Still we have made a moral commitment and signaled that the Treaty is based on a wise economic doctrine.

53. The addition to the Treaty was challenged and the Court had to address the question whether the 17 members of Euroland had acted in breach of EU law when they concluded a treaty among themselves. The measure adopted was accepted by the ECJ in one of its most fateful decisions – C-370/12 *Pringle*. If the Court had ruled the establishment of a rescue fund inconsistent with the Treaty, it would have raised havoc with financial markets. It was dealt with by a full Court, i.e. all 27 judges, which is extremely rare – and they accomplished their task in only four months.

54. *Emergency Europe*. Unpublished paper. Political Union Seminar, 13th December, 2012 (j.p.white@lse.ac.uk). Forthcoming in *Political Studies*.

55. Chiti and Teixeria provide an excellent overview of all the pacts that have been concluded among the Eurocountries.

structure is explicitly permanent.[56] In no time the fixed exchange rate has been embedded in a strict, orthodox fiscal straitjacket which significantly restricts the possibility for participating Member States to pursue an independent economic policy. Not long ago the electorate was told that the EMU was a self-contained project. Now, being in a hole, Eurocountries are told to keep digging.

A dream come true

The Lisbon Treaty does not provide a reliable defence of national democracy. Measures taken by Union institutions affect almost all areas. In a number of politically sensitive areas it is anybody's guess whether the Commission and the ECJ will side with the market or respect an untouchable democratic sphere. Since there is no legally applicable principle of subsidiarity, these two bodies are the final arbiters without appeal. The solution has so far almost always been "more Europe".

The current process is the dream of the neofunctionalists come true. In the early 1960's the snowball never gained momentum and de Gaulle almost put a stop to the show. Euratom never became a functionalist cousin of ECSC.[57] In the 1980's Margaret Thatcher could infuriate everybody around the table but she could not stop the process or change its course.[58]

Few, if any, Member States take a principled approach to the question of what should be dealt with at European level and what should remain a national prerogative beyond the reach of the ECJ. To prepare for the negotiations that led to the Maastricht Treaty, the Belgian presidency invited all Member States to suggest what

56. Alan Walters was not alone in predicting that the EMU was a "Trojan horse that would bring in the forces of political union" (in Minford, p. 3).
57. Jean Monnet accorded higher priority to the Euratom than to the EEC.
58. François Mitterand and Helmut Kohl actually discussed whether they should ask Great Britain to leave the Union.

the Intergovernmental Conference should address.[59] As expected, countries put forward their own pet ideas. Since no one wasted political capital in opposing the priorities of others the Maastricht agenda expanded – and the same mechanism was at work in the Convention that drafted the Constitutional Treaty.

It actually started already in Rome. The French government had the opinion that their industry was at a disadvantage because of the high social costs for employees and equal pay for men and women. They succeeded in imposing these obligations on other Member States by means of the Treaty of Rome. Sweden has quite successfully argued in favour of a treaty bound regulation of working hours, protection of the habitat, animal welfare and development assistance to low income countries. All worthy causes in their own right, but it deprives us of a moral authority to oppose other countries' hobbyhorses.

The "federalists" may want the process to speed up, but they do not need to worry about the direction. They can sit back and watch. Those who should be eager to define a legally enforceable federal division of labour are those who want an orderly and vital relationship between a strong, but restricted, Union and Member States living in a safe democratic haven.

Federal is not a dirty word.[60] It is simply the given name to a polity where authority and competence are constitutionally shared between the national and regional levels. Some decisions belong to the highest level while others are taken by, for instance, cantons in Switzerland or *Länder* in Germany. Normally one defines the tasks that are federal and stipulates that all other competences stay at the national level (which is actually what article 5 of the TEU says).

59. *Intergovernmental conference* is the name of the meeting where Heads of State and Government meet to negotiate changes of the treaties.
60. It is certainly a dirty word for the British. Under no circumstances can they accept any wording that imply that the Union is federal in any respect.

We already have a federal union in some important respects. The legal order can be compared with the system of federal states like Germany, Switzerland and the United States. The common market is in some respects more common than the American one. Any kind of discrimination on the basis of nationality is strictly forbidden.

The issue is not whether we want a federal or intergovernmental community, but how we should distribute competences between Brussels and the nation states – and, in particular, how to protect national democracies against a "creeping expansion" of Union competence. Given the poor state of democracy in the Union, in particular the lack of transparent responsibility and the absence of accountability, it is evident that any transfer of competence to Brussels diminishes the people's democratic power to influence political decisions.

Unsafe for democracy

There is no common prescription for what a constitution shall contain, but it is important to keep in mind the one feature that is common to all of them – the text is, and is intended to be, very hard to change. If the Convention, or rather its praesidium, had heeded the advice of the European Council in the Laeken Declaration, it would have produced a shorter and more readable text about the basic principles for governing the Union. The secretary of the praesidium, Sir John Kerr, deplored this fact since he thought that such a proposal would have been accepted by the electorates in France and the Netherlands.[61]

The first part of the Lisbon treaty, (TEU), contains what one expects to find in a constitution, though it comes as a surprise that around forty percent of the space is made up of detailed provisions on common foreign and security policy. The second part (TFEU) is by far the more voluminous, making up some 80 percent of the pages. Much of the content would not qualify as statutory law – or law at all – in any Member State.[62]

It is useful to bear in mind that a normal constitution is about *how* a country is governed and *how* governments are brought to account, while it leaves it to political parties to propose, debate and decide *what* should be done. The Lisbon Treaty also contains provisions about insti-

61. Private conversation.

62. The Lisbon Treaty contains several provisions that establish advisory bodies and in article 151 of TFEU we are informed that Member States "believe" that something will happen. It is also quite remarkable that the *conventionnels* decided to elevate the prevailing orthodox economic theory to constitutional status.

tutions and decision-making, but it is overwhelmingly concerned with *what* the Union wants to achieve. In many respects it reads like a work programme. And, in fact, the Treaty of Rome *was* a work programme.

The exclusive competences of the Union are surprisingly few – and self-explanatory.[63] Competences shared with the Member States are more numerous.[64] However, the Member States can exercise their share of the competences only to the extent that the Union has not exercised its share or ceased to exercise it. In most cases it is obvious that the Union must provide leadership, even if it seems a bit worrying that we should have to wait for action in Brussels to maintain law and order. Research, technological development and space are other shared competences, but for obvious reasons Member States are allowed to strike out on their own. The same holds true for development cooperation and humanitarian aid.

All Member States "shall coordinate their economic policies within the Union" and "take measures to ensure coordination of the employment policies". These confident provisions figured already in the Treaty of Rome. According to the carefully negotiated article 2.4 in TFEU: "The Union shall have competence, in accordance with the Treaty on European Union[65], to define and implement a common foreign and security policy, including the progressive framing of a common defence policy." Since the beginning the Council has had the right to take action, when necessary, to attain objectives set out in the treaties, even if they have not "provided the necessary powers".

63. Customs union; competition rules; conservation of marine biological resources; common commercial policy and, for Eurocountries, monetary policy.
64. Internal market; social policy for the aspects defined in the Treaty; economic, social and territorial cohesion; agriculture and fisheries excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice and common safety concerns in public health matters, for the aspects defined in the Treaty. In the first draft from the praesidium it was said that competences were conferred upon the Union *by the Constitution.* It was later recognized that it was actually the Member State which ceded competences (Norman, p. 196).
65. It is interesting that the general principles are found in the Treaty on the Functioning of the European Union and the detailed prescription in the Treaty on European Union.

The Council must then be unanimous, act with the consent of the EP and on a proposal from the Commission.[66]

It is worth noting that provisions identical in wording often have different operational implications. Agriculture and cohesion policies are financed from the common budget and implemented in accordance with detailed prescriptions. The Commission may withhold funding if national authorities do not meet required conditions. On the other hand, a common foreign policy and coordination of economic policies remain unfulfilled dreams.[67] More surprising is that the common commercial policy – an exclusive competence – is to a large extent pursued individually by Member States.

The Union "shall have competence to carry out actions to support, coordinate or supplement the action of Member States" in areas such as human health, industry, culture, tourism, education, vocational training, youth, sport, civil protection and administrative cooperation. On top of that the Lisbon Treaty is replete with exhortations that the Union shall cooperate, stimulate, dialogue with and promote almost any human activity. As a matter of fact, one has a hard time to find areas that the Union shall, explicitly, leave at peace.

During the campaign preceding the Swedish referendum on the Accession Treaty, a member of the Green Party claimed that the bureaucracy in Brussels would control everything but church issues. The next day the Deputy Prime Minister Margareta Winberg, who incidentally was against Swedish EU membership, closed even this small breathing space when she warned us against the power of the Pope. More responsible people explained that these worries were pure fantasy. Reading the TFEU one is not so sure. In article 17 it states that "The Union respects and does not prejudice the status under

66. Art. 352 (TFEU). Frustrated with the slow progress of European integration, the Heads of State and Governments recommended full use of this escape clause at the Summit in Paris in 1972 (Weiler, p. 53).

67. As far as economic policies are concerned, this may change as a consequence of the implementation of the Treaty on Stability, Coordination and Governance.

national law of churches and religious associations or communities in Member States." The obvious question is why the Union needs to say this – or why it shall "maintain an open, transparent and regular dialogue with these churches and organisations."

Is there a limit to what the Union can do?

The main problem is that the Lisbon Treaty, and in particular the TFEU, does not establish a visible boundary between a national, democratic sphere and the domain governed by the four freedoms. And since it is statutory law, the ECJ is the final arbiter. It is, in fact, difficult to predict how several democratically important paragraphs will be interpreted by the learned jurists in Luxembourg, since it is widely accepted that their reading of the law often extends to lawmaking. The "Court has effectively interposed itself alongside the Union legislature as an important lawmaker" is how Thomas Horsley puts it.[68] And in practically all areas, the language is fuzzy with regard to competence and responsibility. We shall, by way of example, only be able deal with a few of these areas.

Protocol 29, having the same legal status as the Treaties themselves, deals with public broadcasting. It starts by saying that "the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism" before fleshing out the rules of the game in the operational paragraph:

> "The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account."

68. Horsley in *Common Market Law Review*, Vol 50, No 4, August 2013.

The problem is obvious. Funding for a strong public broadcasting organization is bound to affect "trading conditions and competition". There is a conflict between the quality of news service and the profitability of commercial radio- and TV-channels. In Sweden and many other countries, public service is considered vitally important for the quality of democratic debate but it exists only as long as the ECJ accepts that its success is not "contrary to the common interest."

A related issue concerns the Swedish system to support newspapers. It is obvious that the system is not intended to subsidize owners of media corporations, but it will reduce the profitability of newspapers that would otherwise have a national or regional monopoly. The only purpose is to increase the number of voices in our democratic debate. The most generous support is received by the Norwegian owner of *Svenska Dagbladet*. The Commission dislikes the system and has demanded that it be changed.

Social housing is another area where public efforts to provide subsidized housing for families with children easily come into conflict with the functioning of the market. The purpose may be to prevent segregation but it affects the trading conditions of contractors and developers.

Article 168.7 of the TFEU promises that Union action "shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them." Unlike the statement about public broadcasting, the text is crystal clear. It is the prerogative of Member States to plan, organize, deliver and finance health services and medical care. It therefore came as a surprise to most, if not all, Member States when the ECJ specified in a number of cases that a European citizen could turn to hospitals abroad to find the care they wanted.[69] Even a waiting list at home gave the right to

69. The relevant cases are *Watts, Kohll, Decker and Smits-Peerboms*. Obermaier (2009) claims that the Court, in later decisions, has limited the financial impact (p. 173).

turn to foreign providers. It is probably wise to use excess capacity in other countries in order to improve health care for European citizens, but it should be decided by democratic institutions that are responsible for the necessary supporting legislation.

Even more important is that the ECJ is transforming the traditional welfare systems of European countries, based on parliamentary legislation related to appropriations, to a model based on rights. In the long run, it will have profound political and economic consequences when citizens can enforce their claims before European courts and send the bills to their national authorities.[70] Another development that is almost certainly unwanted in most Member States is the emergence of an American-type of litigation culture.[71]

French mail distribution and German chimney sweeps – and common sense.

The Union and Member States share the responsibility for services of general economic interest and shall see to it that they "operate on the basis of the principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions." It is promised that protocol 26 contains "interpretative provisions." However, all we learn is that national authorities enjoy wide discretion in providing these services and that they are important and differ between countries due to geographical, social and cultural conditions. Still we have a right to regard mail distribution and chimney sweeping as services of general economic interests. Again we have to ponder where to draw the line between the market and the activities that countries want to organize in accordance with other principles.

It is obvious that if a country has decided to open a market for free competition, it cannot exclude any actor doing legal business in the Union. Sweden allows competition as far as mail distribution

70. Kelemen, p. 196–197.
71. Ibid. p. 67–90. One of the fiercest critics of the ECJ is the former President of Germany and former President of the German Constitutional Court, Roman Herzog (Herzog and Gerken).

is concerned. There is no reason to deprive us of the benefits of foreign competition. But what if France, having an excellent and probably costly system for mail distribution, would like to maintain a government monopoly? Economists would probably advise the French to dismantle the system and introduce competition in order to reduce costs. Now the system is a tax on the general economy which weakens French competitiveness. But that should only be a concern for the French and they may have other reasons to keep the system. As long as it is not used to generate profits that subsidize efforts to enter foreign markets it is difficult to see why Union legislation, interpreted by the Commission or the ECJ, should force Paris to give up something they want to keep.

The Germans have had a highly regulated system for chimney sweeping. The origins are medieval and the traces show. Each *Schornsteinfegermeister*, dressed up with a top hat and golden buttons, is allocated a district and he is legally obliged to visit each property twice a year. In accordance with a law issued by Himmler in 1937, a chimney sweep has the right to enter any household. The Commission has worked long and hard to open the German market and since January of last year, the monopoly is gone. It is difficult to see why the Union should force the Germans to give up a unique workforce structure that they apparently love even if it is evident that each visit is rather expensive. One good reason to keep the system is of course that only a handful of 80 million people die of carbon monoxide poisoning in a year compared to 400 out of 60 million people in France.[72]

On the whole, it is useful that the Commission and the ECJ act as watchdogs to keep protectionist measures out of the internal market. However, it is interesting to distinguish between *discrimination* against imported goods and measures that only *restrict the size of the market*.

72. *Prospect*, June 2013. It goes without saying that the trade must be open also to non-Germans.

In that respect there is one illuminating case concerning Swedish authorities' efforts to protect the environment in the archipelago.[73]

The issue at stake is whether a government, notwithstanding what are now articles 34 and 36 in the TFEU, may adopt measures that restrict the use of a particular product, in this case jet-skis. The obvious answer is yes, if certain conditions are met. The key message from the ECJ to the local court in Luleå is that national regulations to protect the environment are justified if their "restrictive effects on the free movements of goods do not go beyond what is necessary to achieve that aim." If measures are judged to be unduly restrictive, they are considered to have effects equivalent to forbidden quantitative restrictions. The ECJ devotes a large part of its reasoning to the effect of regulations which "do not have the aim of or effect of treating goods coming from other Member States less favourably." But that is not the issue. There is not the slightest risk of discrimination in favour of domestic products (if any). And when the ECJ says that restrictions may influence the behaviour of consumers, it is simply stating the obvious.

The interpretation of the ECJ is certainly correct. It is an established principle in trade legislation that measures that may be allowed under certain conditions shall be implemented in the least trade restrictive way. It is still important to pose the question since my concern is how to protect and enrich national democracy. Why should we read articles 34 and 36 in combination as an obligation to expand the market per se even if there is not a hint of discrimination. One wonders if the judge in Luleå and his lay assessors are any wiser after having read the preliminary ruling from Luxembourg. They are told to assess the *potential* sales effect of the limited restrictions on the use of jet-skis.

73. C 142/05 *Åklagaren v Percy Mickelsson and Joakim Roos*. Cf. Horsley (2012).

As close as possible to information, responsibility and accountability

The constitutional backbone of a federal state is the principle of subsidiarity and the Union is federal enough to deserve a backbone. At the minimum it should define the division of competence between the federal and national level.

It is pure common sense. To the extent possible, a decision should be taken by the people who have the richest information about the issue at hand and care about the consequences. The fact that the politicians making these decisions are well known to people does not only mean that they can be held accountable, but also that they may count on some sympathetic understanding. When restrictions are imposed from above, the politicians need good arguments. If they are lacking, the measures taken are bound to cause frustration and reduce the legitimacy of federal and, in many cases, also national authorities.

Oddly enough, the European Council in Laeken referred to subsidiarity only in passing. However, the chairman of the Convention, Giscard d'Estaing announced, after the *phase d'écoute*, that he wished to see a principle of subsidiarity that had both legal and political substance.

The principle of subsidiarity with general application first appeared in the Maastricht Treaty.[74] The text in the Lisbon Treaty has been reformulated and extended:

74. Before that it only applied to the area of environment.

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[75]

There is in the TEU a special article, 5.4, dealing with proportionality:

> "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

The differences are worth noting. The principle of proportionality applies also to areas where the Union has exclusive competence while, of course, the rules of subsidiarity do not. More importantly the principle of proportionality relates to "the objectives of the Treaties" while subsidiarity applies to "the objectives of the proposed action."

The objective of the subsidiarity clause in a constitution is to protect *Länder* or cantons from being dispossessed of power and authority. The article in the TEU does not come close to meeting this condition. The key problem is that a decision can be taken at the Union level as soon as a majority finds that the chosen objective can "be better achieved" there. In order for a principle of subsidiarity to have legal precision and predictability it must require that proponents of an action are forced to prove that it is *necessary* to act at the supranational level. Only then will it be possible to fulfil the demand of the Heads of State or Government in the Laeken Declaration to put a stop to a furtive transfer of competences to Brussels encroaching on national prerogatives. The head of the Council's legal service, Jean-Claude Piris, informed the subsidiarity working group of the Convention that maintaining the word "better" in the Maastricht

75. Article 5.3 in the TEU. Paragraph 5.2 in the same article says that "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."

Treaty would mean that subsidiarity would be "an essentially political and subjective principle." The ECJ "had never annulled an act on the grounds of infringement of subsidiarity."[76] It should therefore not come as a surprise that Jacques Delors was in favour of subsidiarity because it would transfer competence to Brussels.

The protocol, no 2, concerning subsidiarity contains some other qualifications of the principle and also a scheme empowering national parliaments to demand the authorities to reconsider their proposal. It was never meant to be effective and it isn't.[77]

76. Norman, p. 94. In other cases the ECJ has annulled programmes because they lacked a legal base (Nugent, p. 180–181).

77. Pålsson. A useful discussion of the principle of subsidiarity and its application is also found in Thomas Horsley's article *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?* in Journal of Common Market Studies, Vol 50, No 2, 2012. According to Horsley, the Court considers the principle justiciable but it has never used it to strike down any Union act. It has been argued that the Commission was forced to retract a proposed regulation to deal with transnational industrial action in March 2012 when twelve Member States voiced their opposition. However, the more likely reason is that the Commission realized that the proposal would not be supported by a majority either in the Council or the EP. Furthermore, since the regulation dealt with a transnational activity, it did, in fact, comply with the principle of subsidiarity. The Commission got a yellow card without having committed a foul (Fabbrini and Granat).

Who is responsible?

Part of the democratic deficit of the Union is that there is no mechanism to bring someone to account. However, if such a formal procedure existed, it would be difficult to pinpoint who is responsible.

One key advantage of a vital democracy is that we learn from our mistakes and can put things right – and the correction is usually brought about by a legitimate opposition who has not invested any prestige in the failed policies. Even more important is that the people in charge know that they will have to account for what they have done in a short while. Unfortunately, the EU does not benefit from any of these mechanisms. It is true that the EP can dismiss the whole Commission – but not individual commissioners – if a two-third majority supports a motion of censure.[78] It has never been used and it is not intended to be used to punish failed policies, but rather abuse of power. Furthermore, it would be strange to punish a non-political body which primarily has the task of putting forth proposals to be decided upon by the Council and the EP.

The Union's energy and climate policy is a mess. *The Economist* has called the efforts to subsidize renewable energy sources and, at the same time, raise the price of CO_2 – emissions "worse than useless". It is not difficult to agree. Companies are cutting emissions at a cost of more than 150 euros a tonne under the renewables programme while emission permits can be obtained for 5 euros per tonne.[79] And the total cost of subsidies exceeds everyone's expectation. It is quite

78. The two-third majority of votes cast have to include a majority of all MEPs (Art. 234 TFEU).
79. *The Economist*, January 25, 2014.

clear that the Commission is the principal culprit. It has designed the programme and is responsible for its management. In a national democracy the chances to be re-elected would be severely compromised. But the relevant legislation has been adopted by representatives of the Member States.

According to several observers, including the present author, the Commission should be prosecuted before the International Criminal Court in Rome for its conduct of the fisheries policy. It has almost always increased the quotas recommended by its own scientific experts and it is one of the exclusive competences of the Union. But the Council has always added even more to what the Commission proposed.

Another case that is even more complex is the euro crisis. The Economic and Monetary Union and the provisions for its entry into force were designed by eminent heads of central banks in a committee chaired by Jacques Delors. The Commission affirmed in a report, in order to reject the accusation that it was a political prestige project, that the arguments for the monetary union had solid support in economic theory.[80] It became part of the Maastricht Treaty that was ratified by all Member States. Even if the Dutch central bank economist, André Szász, is right when he says that "Not one of the politicians who agreed the Maastricht Treaty understood what they were doing,"[81] it does not relieve them of their responsibility. A Stability Pact was supposed to prevent participating countries from straying from the narrow path. Thus, part of the blame falls on France and Germany, who broke the rules immediately.

80. One Market, One Money, p. 28–29.

81. Quoted by Marsh, p. 43. The fact that membership of a monetary union deprived you from the possibility to devalue was of course pointed out in all analytical documents, but another important point was, to my knowledge, hardly mentioned, namely that you would no longer be able to borrow in your own currency.

The Commission and the European Central Bank (ECB) shared the task of monitoring the development and managing the EMU. Crowds of eminent experts had all the detailed facts to pore over and could follow imbalances building up and deficits ballooning. Instead of seeing the convergence of Greek and German government bond prices as the anomaly it was, the head of the ECB, Jean-Claude Trichet, praised it as a success. In May 2008 the Commission published a 328-page brochure "gushing with exaggerated praise"[82] about the development of the EMU. The Commission could see no problems at the horizon and did not worry about any repercussions of the American crisis:

> "Governments coordinate their economic policies to ensure that all economies work harmoniously together. […].The single currency itself also acts as a protective shield against external shocks. […]. Existing coordinating mechanisms mean that decisions can be taken quickly and smoothly – both in economic good times and in the event of economic and financial difficulties."[83]

The ECB apparently assumed that the deficits and surpluses of individual countries would be self-financing, since it only "published statistics for the euro bloc's combined balance of payments, but not for individual members."[84]

The renowned journalist David Marsh, with access to all leading European politicians, places the responsibility rather squarely with the technocrats and eurocrats in the ECB and the Commission and

82. Marsh, p. 44.
83. Quoted by Marsh, p. 44. The report can be downloaded from http://ec.europa.eu/economy_finance/emu10/myths_en.htm
84. Marsh, p. 43.

proposes a kind of Truth and Reconciliation Commission to carry out a full investigation of what went wrong.[85]

Quite clearly, if the responsibility could be laid at the door of one group or institution, it would be relieved of duty or dismissed. But once the crisis broke on this side of the Atlantic, the European Council took charge. And by all accounts, the Heads of State and Government have done too little too late – and never really accepted that it is a European crisis.[86]

The question now is not whether austerity at any cost will take us out of the slump – slumps always end one way or the other. The real issue is the enormous suffering imposed on tens of millions of people in Europe. At present the Eurozone is the worst performing area in the world. Since the beginning of the EMU, all member countries send a rapidly increasing share of their exports to regions outside Euroland.

The lack of transparent accountability is a serious democratic problem in its own right. It also serves to shield the political elite from responsibility or even a proper debate.

85. Marsh also points out that the promise of the present head of ECB, Mario Draghi, "to do whatever it takes to preserve the euro", would, if ever tried, be illegal according to an analysis by the German Bundesbank (p. 48–52). The fact that no one, whether a public official or a business executive, has been brought to account or prosecuted is not unique to Europe. No high-level executive has been successfully prosecuted in the country where the crisis started as a consequence of blatant misconduct on the part of several institutions and individuals. It is rather surprising, since the junk bond peddlers were duly brought to justice in the 1970's; the savings-and-loan scandal in the 1980's put several hundreds of people behind bars and in the 1990's, the CEOs and others of Enron and WorldCom were successfully prosecuted (Rakoff).
86. It is difficult to argue that the eurocrisis has made the Union more democratic but it is quite clear that it has become more intergovernmental since the European Council is in charge.

War is not the alternative

The pro-Europeans have held the moral high ground since the beginning. The German Minister of Economy, Ludwig Erhard, was less than enthusiastic about the protectionism that other Member States advocated. But when he criticized the policies of the EEC he was told that he was a bad European. "If I criticize the German constitution no one tells me that I am a bad German. But if I criticize the Community of the Six and argue in favour of a broader European solution I am immediately accused of being a bad European."[87] Lack of pro-European enthusiasm is still regarded with suspicion in Germany and is not easy to reconcile with a career in the major parties.[88]

The legacy of these early years is still with us. Today the European Union is a robust polity with a strong federal legal order, but a legitimate opposition is still rejected by the political elite and the institutions. Constructive criticism is rebuffed as anti-European and those offering unwanted advice are labelled eurosceptics who, almost by definition, are narrow-minded nationalists.[89] Friendly think tanks are subsidized while insiders and former employees are literally prevented from participating in the debate.[90] In its Declaration on Foreign Policy 2014 to Parliament, the Swedish government comes dangerously close to placing xenophobia and mistrust of the EU on equal footing.[91]

87. Quoted by Monnet (1976), p. 528.
88. Marsh, p. 64.
89. *The Economist*, July 3, 2010.
90. Art. 339 (TFEU). Eppink, p. 39.
91. *Regeringens deklaration vid 2014 års utrikespolitiska debatt* (February 19, 2014).

Any argument seems to be legitimate in the defence of Union policies. When opinion polls indicated that the French electorate might reject the Maastricht Treaty, a *Le Monde* editorial claimed that a negative outcome "for France and for Europe would signify the worst catastrophe since Hitler assumed power."[92] *The Economist* could not see any redeeming good points in the constitution and recommended that it be thrown into the waste bin. A German journalist agreed privately with the Brussels correspondent of the British magazine but added that the alternative would be that we started to kill each other again.[93] This was apparently the opinion of the Dutch government when it campaigned in favour of the Constitutional Treaty. The Prime Minister, Jan Peter Balkenende, suggested that a rejection of the treaty could generate a war and lead all the way to Auschwitz. His Minister of Justice thought that Yugoslav type conflicts were more likely.[94] Chancellor Kohl in particular, but also many others, including Göran Persson, claimed that acceptance of the euro was vital for the preservation of peace in this century. Even the chairman of the Norwegian Nobel Committee, Thorbjörn Jagland, defended the decision to award the Peace Prize to the EU with the argument that the organization had saved us from "awful wars".[95] If the only alternatives to the acceptance of an abstruse 300-page treaty are war and gas chambers (for whom?) the debate is bound to be limited.

At a more pedestrian level, it would be a step in the right direction if politicians were telling the truth more often. It is of course unavoidable that ministers, coming home from negotiations in Brussels, want praise for having fought bravely for national interests. Everybody remembers John Major's claim that he had won "game, set and match" when he had successfully negotiated opt-outs for Britain from the social chapter and the EMU in the Maastricht Treaty. It is

92. Quoted from Dinan, p. 126.
93. *The Economist*, July 5, 2003.
94. *The Economist*, May 21, 2005.
95. Quoted by Zielonka.

commonplace that the outcome of a meeting is heralded as a firm step towards a political union in Belgium and described as a bulwark against further supranationality on the other side of the Channel. One of the main reasons for the Single European Act was that it would pave the way for majority decisions. Coming home from the negotiations, both the French and the British Foreign Minister claimed that the so called Luxembourg Compromise, which protects vital national interests, remained fully in force.[96] As already pointed out, President Mitterand claimed that the creation of an independent central bank did not affect French sovereignty. Documents published by the Commission are very often at odds with the serious problems and shortcomings exposed in internal reports. Sweden was one of few countries that was fully qualified to join the EMU, but the government decided to wait and see. If it worked out we could accede later. It was not a particularly important issue. Five years later the government decided to organize a referendum and sought a popular mandate to join the Eurozone. And suddenly the euro was a matter of war and peace. The future of the welfare state was at stake.

The defeat of the Constitution in France and the Netherlands cast a gloom over the political elite and the business community – but the predicted catastrophe did not arrive. Indeed, one of the problems for the supporters of the new treaty was that they were never able to explain what it was good for. This was probably the major reason why the Irish also turned it down. Once it was tacitly agreed to avoid referenda and the final version was put on the market, the key sales pitch was that it did not really change anything.

We accept that politicians have a cause to defend and choose their words accordingly. It is more disturbing that many journalists and scholars seem to regard the Union as a fragile creature that needs or deserves to be protected from honest scrutiny.

96. Weiler, p. 69.

During the Swedish Presidency in the first half of 2001, the Brussels press corps was invited to Stockholm. The Swedish Minister of Trade, Leif Pagrotsky, hosted a dinner and agreed to respond to questions. Almost all of them turned on Sweden's reluctance to fall in line and march towards more Europe. A particular concern was that Stockholm did not want to join the EMU although Sweden was one of few countries to qualify. Towards the end of the session, the mood became distinctly disagreeable and Pagrotsky concluded that he had expected to have an exchange of views with journalists, but instead he had been lectured to by missionaries.

Many scholars write about European integration "in eggshell pieties", to borrow a metaphor from Hilary Mantel. That peace and prosperity are attributed to the EU is almost as common in textbooks and academic papers as in leaflets from the Commission.[97] The "proof" that the EU has guaranteed the peace in Europe is simply that France and Germany have not been at war since 1945. Few scholars would, without reservation, subscribe to Telò's assertation that anybody who has studied the matter is bound to agree that the CAP is a historic success.[98] But many regard the common agricultural policy as a positive achievement, simply because it is common. Often there is an implied assumption that more Europe is better than less. An agreement to deepen integration has a value *per se* and the distinction between failed regional policies and the creation of the internal market gets lost in the process. Eduardo Chiti and Gustavo Teixeria are on to something when they say that

> "if the standard is simply that of further integration as a value *per se*, as seems to be the case for a great part of the European legal scholarship, the processes triggered by the EU responses to the financial and public

97. Bongiovanni, p. 15 and 30; Bossuat, p. 257; Dinan, p. 39; Eppink, p. 385–386; Ginsberg, p. 2–4; Hamon and Keller, p. 104–105; Hill, p. 200–201; Reid, p. 227; Riès, p. 10; Telò, p. 5 –6, 100–109, 165 and 201. Reid also gives the Union credit for the Eurovision Song Contest.
98. Telò, p. 160.

> debt crisis may be considered as positive developments. They demonstrate the efforts of the EU to adjust its institutional setting in such a way to tackle the financial and public debt crisis, and to bring about growth of competences and further integration among Member States. If assessed by reference to the normative standard of the European social and democratic *Rechtsstaat*, instead, the ongoing processes cannot but represent a failure of the EU project, given the potential undermining of the democratic quality of EU decision-making that they bring about, the loss of coherence of the EU legal system and the rise of executive, depoliticized federalism within the EMU."[99]

The suppression of the debate about the future of Europe, deliberate or not, is unfortunate for the vitality of our democracy. A more influential debate is necessary since we are now entering unchartered waters without a popular mandate. Alexis de Tocqueville said many profound things about democracy and may have been the first to grasp what it actually was.[100] One of the most valuable features of a vital democracy, he taught us, is that people can learn from experience and correct the course to avoid repeating what went wrong. The Union needs this mechanism for repairing some obvious defects – and it is strong enough to withstand a critical debate.

99. Chiti and Teixeria, p. 705.
100. That is at least what David Runciman argues quite convincingly in his recent book *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present.*

… into cleanness leaping …

There is no lack of proposals to deal with the democratic deficit of the Union. Here it must suffice to mention a few examples to indicate the spectrum of the debate. Quite a few respected scholars argue that it is not a problem worthy of our consideration. In his book, *Regulating Europe*, Giandomenico Majone makes a heroic effort to distinguish between efficiency issues, which can be left to regulatory agencies, and redistributive matters which should remain in the realm of democracy. It is not unreasonable to analyse, in these terms, the first 25 years, when civil servants laboured fruitlessly to harmonize product standards and drafted directives to achieve uniform implementation. Today, Majone is less certain that a distinction can be made between non-political regulation and democratic legislation. He highlights the evident threat to legitimacy when supranational institutions unrelentingly try to "expand their own competence, even at the risk of depleting their limited resources of legitimacy, and of a growing ineffectiveness of European policies."[101]

The central thesis of Andrew Moravcsik is that the Union has been and remains at heart an intergovernmental project. In his major work *The Choice for Europe* he musters solid evidence to show that a number of key decisions were the outcome of negotiations between the major Member States. In several articles he has maintained that:

> "The EU remains tightly controlled by elected national politicians. True, each country surrenders some unilateral control over its domestic policy, but in exchange it secures influence over the policies of other countries

101. Majone (2009), p. 32.

> that affect it. In the EU, concurrent decision-making by national officials and directly elected European parliamentarians amounts to a form of limited government that would make John Locke and James Madison proud. No one's democratic rights are restricted as long as the people of every member state freely choose to act in union, and cooperation preserves the same public input and transparency that Europeans expect in domestic policymaking."[102]

Even Moravcsik wavers a bit when he analyses the crisis of the EMU. A more balanced Eurozone "is not just a pragmatic necessity; it is a democratic imperative." But if the project collapses, "it will be because of an abundance of democracy as much as a lack of it."[103]

Moravcsik has always downplayed the role of EU institutions. And it is true that the major Member States often try to sideline the eurocrats in Brussels. However, it is unreasonable to neglect that the Commission has the power of the pen; runs the daily show in Brussels; has quasi-dictatorial power to regulate the market and, in some cases, has played a crucial rule in treaty making. Also important is that the Commission is in charge of implementation, which requires an interpretation of the legislators' intent. Even more obvious is the role of the ECJ and the ECB in extending the federal power of the Union. The European Central Bank is at the heart of the process to take Europe out of the crisis and its decisions, beyond any influence from elected assemblies, have fundamental consequences for people's welfare. There is an interesting debate about whether the Court is restrained by the potential threat of override or noncompliance, but the overwhelming scholarly opinion is that Member States' intransigence stimulate rather than paralyze the EU's legal system.[104] The decision by the Court to open up health care as a service to all European citizens was strongly opposed by a large number of Member States. Another of Moravcsik's blind spots is that elected national politicians,

102. Moravcsik (2012), p. 66. One section of the article is aptly entitled *Democratic surplus.*
103. Ibid. p. 67.
104. Cf. Stone Sweet and Brunell (2012) and Carruba; Gabel and Hankla (2012).

who allegedly control the Union, may be accountable at home, but not when they act as members of the European political elite.

Most other scholars accept that there is a democratic void in the midst of the Union. It is not surprising that the gut reaction is to politicize the institutions. Simon Hix' point of departure is that the Union is already developing into a quasi-democracy. In particular, the EP is now a key actor. Much more can happen within the existing institutions. Important steps would be community-wide political alliances, common political platforms and a candidate for the Presidency of the Union. Hix is well aware of the risks. A political *avantgarde* may push the process further and faster than the electorate is willing to follow[105] – in particular since no one is willing to say what is *avant*.

Nicolas Berggruen and Nathan Gardels want a federal Union based on the Swiss model – but Europe "must accomplish its shift to full political union in years and decades, not centuries." The central government should be small but apparently responsible for financial homogeneity and "harmonized minimum taxation in order to fund a European budget." Such measures "would help drive deep structural reforms in individual countries, such as increasing flexibility in labour markets, that would promote competitiveness."

The article by Berggruen and Gardels in *Foreign Affairs* is based on discussions among an illustrious group of 24 politicians and scholars, all of them male and most of them members of the European political elite. It is quite clear that they prefer a strong, but smaller Union:

> "Although a federal Europe must be open to all EU members states, forward movement toward it should not be blocked because some are not yet willing to go there, but nor should it be imposed from on high. The democratic public of each state will have to decide whether it is in its long-term interest to join the federation or opt out. It is an illusion to believe that a strong political union can be built on the weak allegiance that results from tweaking treaties. Its foundation must be a popular mandate."[106]

105. Hix (1999) and Hix (2008).
106. All quotations from Berggruen and Gardels.

The elected President of the Commission will select ministers from the larger parties in the EP to form a government. The current European Council would become an upper house. A curious feature is that representatives of parties that obtain less than 10 or 15 percent of votes would only be able to speak, but not vote. It could easily mean that more than half of the electorate would be left without a vote. The purpose is to guarantee a centrist government. However, at the time of writing it is not unreasonable to expect an alliance of nationalist and xenophobic parties to get more than 15 percent of the vote.

All these proposals deserve our respect since Berggruen and Gardels leave no doubt about what they are aiming at.[107] The major problem is that the process can only start when we have cohesive European political parties that can aggregate interest along ideological lines. Only then can a European assembly have any kind of legitimacy. The idea seems to be that a more powerful EP would force European political parties to create alliances. But the role of the EP already provides a strong incentive for pan-European cooperation. The bigger impediment is that MEPs will remain more national than European for a long time. Their election is dependent on their standing in their constituency back home. There is almost no MEP who is known outside her or his own country, and very few are well-known at home. It may be true, as is argued by Scully; Hix and Farrell,[108] that party affiliation is becoming stronger among MEPs, but we will not in the foreseeable future have political parties who can act the part assigned to them by Hix and Berggruen and Gardels.

107. Clearly the Berggruen and Gardels proposal is an invitation to "enhanced cooperation" among a group of hardliners but it is hard to see that any national democracy could join the project on the basis of a popular referendum. One is left to wonder to what extent members of the group, like Tony Blair, Felipe González, Gerhard Schroeder, Matti Vanhanen and Franz Vranitzky, actually subscribe to what is said in the article, or if they would be ready to explain and defend the proposal in front of a national audience. It seems that Bismarck was right when he said that when politicians put forward proposals that they would never present in their own country, they do it in the name of Europe.

108. Their study is not particularly convincing, since only a third of the MEPs responded to the questionnaire. It is also confusing that the number of respondents is 270 in the text, while the figures in the tables seem to be around 170.

The most dangerous proposition is to politicize the Commission or to even turn it into a government. Any civilized state needs a fairly large, professional and impartial bureaucracy. Indeed, one of the major conclusions of the comprehensive study of corruption in EU Member States is that the legitimacy of governance has a stronger correlation with the effectiveness and honesty of the administration than with democracy.[109] The European project will simply not survive without a strong and honest civil service. The Commission and its 16 000 corps of eurocrats does not fully meet all these demands, but that should be the aim. As the Centre for European Reform (CER) in London has pointed out – the Commission "needs to act as an impartial referee and not as captain of one of the teams."[110] Given the amount of pride and prestige invested in the important negotiations among Member States, there is a need for a facilitator that can suggest the necessary compromise. The Commission itself claims that as guardian of the Treaties, it stands above the fray of domestic politics. It is not entirely true – many commissioners participate in national party meetings because they expect to continue their political career back home – but such impartiality is what we should aim at. And the historical record is clear. When the Commission is perceived as promoting its own interests, it usually ends in disaster, while it plays a strong hand when acting in the common European interest. The first President of the Commission, Walter Hallstein, has been described as a "bureaucrat run mad, or at least half-mad"[111] but he got one fundamental thing right – he insisted that the employees were impartial European civil servants.

109. Charron; Lapuente and Rothstein. On the basis of evidence from more than 100 surveys in close to 80 countries Pedro Magalhâes is able to conclude that in democratic countries "government effectiveness, understood as the quality of policy-making formulation and implementation, is linked to higher levels of support for democracy."

110. *The Economist*, October 26, 2013.

111 Gillingham, p. 55.

Some kind of conclusion

Nowadays it is common parlance in Brussels that the Union should focus on essential tasks that produce European added value, and let the national states deal with household matters. This was the advice the European Council gave to the *conventionnels*. It is a stock phrase in José Manuel Barroso's speeches. So far not "one jot or one tittle"[112] has passed from the law.

It is an urgent task. The main problem is not only that the democratic legitimacy of the Union is weak, but that the ongoing process undermines the quality of national democracies. As soon as competences, even if only partially, move to Brussels the chain of responsibility becomes less transparent, decisions less informed and politicians less accountable.

In order to suggest a solution, it is probably necessary to state one's credentials. I am in favour of a federal Europe in the very basic sense that some clearly defined, important tasks are decided at the European level. I am convinced that the ongoing process is impractical, ineffective and dangerous. It is not an effective way to organize European integration and economic cooperation. It is dangerous because it undermines national democracy by putting matters beyond the reach of accountability. It is a process that lacks a popular mandate. The European people deserve a Union they can support and be proud of.

112. Matt. 5:17–18.

The solution is beautifully simple and not all of it should be political anathema.

The basic *raison d'être* for the European project is that it allows a group of countries to do together what they cannot achieve on their own. This idea was actually at the heart of the European project in the 1940's. The old continent had lost its pre-eminence. The prevailing view was that it would take at least a generation to reach pre-war living standards. And the message from the Congress of Europe was unequivocal:

> "Alone, no one of our countries can hope seriously to defend its independence. Alone, no one of our countries can solve the economic problems of today. Without a freely agreed union our present anarchy will expose us tomorrow to forcible unification whether by the intervention of a foreign empire or usurpation by a political party."[113]

The most urgent issue was addressed less than a year after the conference when NATO came into being and the United States, Canada and ten European countries agreed to defend each other in case of aggression.

The second objective took longer to achieve. A small step was taken when the ECSC was created. Another when the EEC entered into force in 1958. Inside a customs union internal tariffs were quickly dismantled, but technical barriers to trade remained in force. A genuine common market was put in place only from 1985 to 1992, when the Community had twelve Member States and was about to become a Union.

This common market, now embracing 28 members, is still the Big Rational European Project. It puts at the disposal of European

113. The conference was held in The Hague during four days in May 1948. It was chaired by Winston Churchill and practically all important politicians from European democracies were among the 800 participants. It is worth remembering that they knew exactly who the enemy was. They did not fear a war between France and Germany and the solution to Europe's security problem was NATO and American soldiers as close to the border of the Warsaw Pact as possible.

consumers and industry the world's largest domestic market. And it is obvious that many issues pertaining to the regulation of the internal market must be either an exclusive Union competence or subject to supranational majority decisions. Rules of competition, limits to government subsidies and all kind of standards for products put on the market must be common.

It is not unusual that states, both democratic and authoritarian ones, abstain from full sovereignty in certain areas in order to gain something. All binding international agreements have that effect. The example nearest at hand is the comprehensive treaty governing global trade. For small export-oriented countries the trade-off is easy. They bind their tariffs and accept a number of provisions for subsidies and other trade related measures in exchange for generous and predictable market access all over the world. The regulatory network and legal competence of the World Trade Organisation has increased significantly since it began in the late 1940's. The internal market of the EU is a very close parallel. Member States are willing to give up their sovereign right to regulate markets in order to enlarge the "domestic" market. The sphere of national democracy shrinks, but a solid majority considers that it is a price worth paying. It is important to be clear on this point. The problem is *not* that issues are decided by a qualified majority in Brussels or regulated by the Commission, but that so many of these issues are better dealt with by national or even local democratic assemblies.

It would, as was once proposed, be an advantage if shop hours, for instance for pharmacies, would be the same all over Europe. But it is not necessary. Harmonization of working hours would be more logical but it is difficult to see that it is necessary. The fact that strong unions in very rich Member States have been able to shorten the working week is not a good reason to impose this restriction on workers in poor countries who may have other priorities.[114] Truck

114. It is also one of the most expensive directives on the book (*The Economist*, February 22, 2014).

drivers and airline pilots, however, will, on good grounds, have to adhere to common rules.

It would be foolish to pretend that it is easy to draw the line, but in most cases it is pretty clear-cut. A British conservative MP ridiculed the Commission for concerning itself with such petty details as the noise levels of lawn movers. Certainly it would be better if local communities were allowed to decide how much noise they could tolerate. A moment's reflection is enough to realize that all national governments would be inclined to accommodate the wishes of domestic producers if they could set their own product standards – and noise level is a product standard. In fact, product standards *are* details.[115]

Far more difficult, but even more important, is to establish a boundary between the realm of market forces and a sphere where democracy reigns. Some guidelines may be generally acceptable. If a government seeks to promote the national interest *at the expense of* the legitimate interests of other Member States Union institutions must intervene. Non-discrimination is and must remain a cornerstone of European integration. If a government wants to restrict the use of a particular product, totally, locally or during a certain season, there is no obvious reason why it should not be allowed to do so unless it is protectionism in disguise. It is difficult to see why the ECJ and the Commission act as if they had an obligation simply to *expand* markets. Special attention must be paid to activities related to social welfare and democracy. Not even the hallowed principle of non-discrimination can be allowed to stand in the way of lavishly funded public service corporations or, for instance, public housing. The proper approach is to single out democratically sensitive areas and try to establish general principles in areas where trespassing is likely to occur.

115. Wall, p. 73. The irony of the case is that this particular directive stemmed from a British initiative.

Many environmental issues and climate policy should be dealt with at the European level for obvious reasons. Almost all emissions affect at least neighbouring countries and greenhouse gases have global consequences wherever the actual emission takes place. Protection of the habitat is not necessarily a union competence. Migrant birds obviously require community-wide cooperation but few people understand why Brussels should regulate hunting of wolves in northern Scandinavia. It is a highly controversial issue that divides Swedish political parties down the middle and responsibility should stay with the people and politicians concerned and those in possession of local knowledge. It is expensive to impose the same rules for preserving the natural environment from Sagres to Kiruna. This should have been evident already when ministers agreed on the directive for bathing water. The efforts to regulate the water quality standards of lakes and rivers have been called 25 years of regulatory failure.[116] That may be the case but the problem is that it should not be regulated at all by Brussels. Countries living up- or downstream the same river can take care of their own problem. Also the priority accorded to the quality of bathing water differs between rich and poor countries.

There are also a number of potential Union competences that would strengthen the legitimacy of Brussels. No single country in Europe can effectively prevent tax evasion across borders. The total loss to European government budgets amounts to many billions of euro. If the European political elite accorded this issue the priority it deserves it would, in fact, be easy to address. No major international company can refrain from doing business in the world's largest market. Effective, coordinated action against organized international crime would probably please a large majority of EU-citizens. According to the Laeken Declaration, the Union should seek "to set globalization within a moral framework." An important task would then be to bring the law to the high seas. Ships are registered in places

116. Study quoted by Majone (2009), p. 107.

like Panama, Liberia or landlocked Mongolia. They are owned by a company in one country, managed from a second and chartered to someone in a third – a situation tailor-made to skimp on taxes, fees and regulations. After Romanians became too expensive, the crews became predominantly Asian while the officers are European – a resurrection of a colonial pattern. There is already a Convention on the High Seas, dealing i.a. with piracy, but enforcement is patchy. Eighty percent of all detained pirates are released because there is no place where authorities are willing to prosecute. In particular, it would be important to guarantee decent working conditions for the seamen that bring the cargos to European ports. Today it seems to be common that what is reported to the International Transport Workers' Federation may often be at odds with what is actually paid to the crew.[117] Furthermore, it is evident that it would be an advantage if the Commission could negotiate with Russia and China on behalf of all Member States.[118] It is a reasonable proposition since commercial policy is an exclusive Union competence. Unfortunately the major Member States will not hear of it and Moscow and Beijing can continue to play the interests of individual countries against each other.

But the Union also does a number of things that actually weaken the competitiveness of European business and, at the same time, impair democracy. As a matter of fact, the two major items in the EU budget – *Cohesion for Growth and Employment* and *Market Related Expenditure and Direct Payments* – almost certainly have a number of negative effects.[119]

Since 2003, agricultural subsidies are paid in cash to individuals and firms in possession of arable land entitled to support (Single Farm Payments or Single Area Payments). The amounts are based

117. George (2013). It would not be expensive to pay decent wages because the crew, even on a giant ship, is very small.
118. In particular Kokko and Schmidt-Felzman, but also other articles, in *EU och de globala obalanserna*, bear out this conclusion.
119. A more detailed analysis is presented in Anell (2013).

on what was received in the old system based on prohibitive border protection and high, guaranteed prices. The owners of land are not required to farm it; only to fill up the forms and keep the meadows in Good Agricultural and Ecological Condition (GAEC). Once this condition is met they can do pretty much what they like. It is generally agreed, even by the Commission, that the old and the new Common Agricultural Policy (CAP) amount to a massive transfer of resources from ordinary taxpayers and consumers to relatively wealthy people. In general, the system weakens the competitiveness of European businesses because it increases the cost of food and land. More serious is that an important issue is erased from the domestic political agenda. Political issues do not come more local and context dependent than agriculture. It is an obvious advantage if decisions are taken by democratic assemblies that have all the information at hand and know that they will bear full responsibility for what they are doing. Since the new CAP has established a ceiling for how much support can be handed out to agriculture, it should be up to each country to decide, below that level, how much damage it will do to the rest of the economy and what principles of fairness it wants to apply in distributing available resources. When the EU Budget Directorate had a subsidiarity test made of the various items in the budget, the conclusion was clear. As far as CAP was concerned, only negotiations about international trade should stay in Brussels.[120]

A transfer of resources to Member States for cohesion and regional policies is treaty bound and most people seem to agree that the rich North should support poorer countries in the East and South (a principle not applied within the Eurozone). However, it is an anomaly that also the richest Member States send substantial amounts to Brussels and engage in negotiations to claw back as much as possible. If successful they have to match the "contribution" from the Union budget with an equal amount. The results are waste, distorted incen-

120. ECORYS, CPB and IFO (2008).

tives and a serious democratic deficit also in poorer net recipients. Regional policy is a key political issue in any country. Should the government use financial resources to help backward areas where employment opportunities are scarce or primarily invest in growth areas where the prospects are better? It is obvious that much will be gained if decisions are taken by national democratic assemblies. We have an impressive amount of empirical evidence to show that regional subsidies are ill spent. That is a very good reason to let Member States make their own mistakes and answer for them.

Support from the structural funds in combination with CAP-money for rural development exerts considerable influence on the allocation of financial resources for regional development. As a consequence of perceived fraud and misuse of funds, the Commission has developed a comprehensive scheme for planning, monitoring and control. The system may reduce corruption, but it dilutes political responsibility and distorts economic incentives. Repatriation and reform of CAP and regional policies would reduce the democratic deficit in Brussels; strengthen democracy at the national level and give Member States an incentive to deal with corruption.

The repatriation of a number of issues is vital for Europe's democratic future. It has long been regarded as an impossible task, since the vested interests of the rent-reapers are strong. However, the landscape may be about to change. The British give the impression of caring primarily about their own "red lines", but would probably be interested in a discussion on principles.[121] The German Constitutional Court in Karlsruhe has so far always been able to find a reasoning that allows it to support the government's pro-European approach. Lately the court has, on a number of occasions, added "hither but not further". It will be difficult to repeat that forever. Even Angela Merkel has said that competences can travel back to Member States,

121. The German poet, Heinrich Heine, famously asserted that the British did not much care about lofty principles. They were only interested in "the utility or disutility of a thing, and produce facts, for or against". It is time they give it a try.

but that should probably be seen in its German context where it is part of the continuous tug-of-war between *Länder* and Berlin.[122] The most interesting development has taken place in the Netherlands. The government instructed the ministries to take a careful look at all legislation in Brussels' pipeline on the basis of added value, relation between costs and objectives and compliance with the principle of subsidiarity. The result is a list of 54 proposals that the Dutch would like to put a stop to, change or restore to the national level. The principle of subsidiarity employed by the government in The Hague has the invaluable quality that it can be legally applied. Measures should be taken "at European level only when it is necessary, at national level whenever it is possible".[123] The Dutch are not convinced that structural funds are well spent in rich countries or that the eurocrats should concern themselves with the quality of school meals. They also argue that the legislator must intervene when the ECJ becomes too extravagant.

To repatriate issues that clearly do not pass the subsidiarity test is the first step to building a stronger and more democratic Union. The next step is to formulate a principle of subsidiarity that provides a comfort zone for national democracies simply because the division of competences becomes predictable. The Dutch wording is a good start. It catches both the requirement that Union action must be necessary and that national democracy has primacy. At the minimum a principle of subsidiarity must provide the basis on which it is possible to ascertain whether a competence is federal or not. The Dutch formulation or any formulation with a necessity test has two advantages – it places the burden of proof where it belongs and establishes a set of justiciable criteria.

122. *The Economist*, March 1, 2014.

123. http://www.government.nl/documents-and-publications/notes/2013/06/21/testing-european-legislation-for-subsidiarity-and proportionality-dutch-list-of-points-for-action.html There is in fact a stricter subsidiarity principle in the TFEU but it applies only to the interoperationality of transeuropean networks (Art. 171.1).

In principle, it would require a change of the Lisbon Treaty, but the taste for such an operation is weak. Most observers seem to rule out the possibility of changing the Treaties any time soon. The avenue chosen to deal with the euro crisis has been to establish pacts addressing specific issues. The ECJ would probably respect a Subsidiarity Pact if it was clear that it represented the collective view of the legislators.

If acted upon this will lead to a smaller Union and quite a few commissioners will find their workload significantly eased – maybe gone altogether. But this leaner Union shall not prevent groups of countries from deepening their cooperation and integration in select areas.

Enhanced cooperation has always been an unnecessarily controversial issue. In the beginning it was taken for granted that all countries were bound by the treaties in equal measure. Soon, some countries negotiated opt-outs from laws that bound others. The Schengen agreement was a step in another direction. Only some countries, and some non-Member States, joined. The Economic and Monetary Union is more significant. It was established only for those countries that would qualify. Thus, we already have a Union with different levels of commitment. One may also add that since 1949 we have had a military union – including most Member States and a few significant allies – far stronger than any alternative we can dream of before the next glacial era.

The treaties have gradually become more accommodating to what is called enhanced cooperation, but it is still seen as "a last resort" to be adopted only after it has been established that "such cooperation cannot be attained […] by the Union as a whole."[124] And at least nine Member States must participate.

This is an unduly restrictive approach. It is difficult to see why enhanced cooperation should not be encouraged as long as two conditions are met. Both are obvious – enhanced cooperation must

124. Art. 20.2 TEU.

not undermine or erode the rights of Member States that do not participate and it must be open to countries that want to join later. Both the Schengen community and the EMU pass this test.[125]

Patent cooperation is a concrete example of how useful flexible integration can be, and how difficult it is to realize. The Commission has shown the huge differences in direct costs between a European patent on the one hand and a US or Japanese patent on the other.[126] The idea to create a uniform EU-system has been discussed since 1975. It is a sad story that may finally come to a happy ending.

The most effective solution would have been to agree on English as the *lingua franca*, since the documents then could be used to file also on the world's second largest market. But disagreement about the language regime is one of the issues that have thwarted a conclusion of the negotiations for some forty years. Spain and Italy asked the ECJ in 2011 to stop a proposal from the Commission because only English, French and German were accepted as working languages.[127] The Court did not accept their arguments and Spain is now trying to have the implementing legislation declared inconsistent with the Lisbon Treaty. What we can hope for is that a far from perfect uniform patent system will enter into force in 2016.[128] But it is rather absurd to have to admit that it would have been easier to form an alliance of the willing *outside* the Union.

Promoting flexible integration has several advantages. Some countries keep claiming that they want to deepen European integration and feel constrained by the slowcoaches. There is no reason why they should not be encouraged to move ahead (which

125. The rights of non-participating Member States are well protected in articles 20.3 and 20.4 in TEU, articles 326 and 328.1 in TFEU. Juha Paitio (2013) addresses the risk that enhanced cooperation may lead to unwanted fragmentation.
126. COM (2007) 165 final.
127. Joined cases C-274/11 and 295/11 decided by the ECJ in April 2013. Britain is seeking the support of the ECJ in its efforts to stop a large group of Member states from introducing the Tobin tax as a form of enhanced cooperation.
128. Lundgren provides a fuller discussion of the advantages of flexible integration.

may actually be calling their bluff) as long as their project passes the test. Successful cooperation may of course increase the competitiveness of the participating economies. This is not a problem, but rather an opportunity for others to take part. In some cases it may not be reasonable to restore certain tasks to the national level. Enhanced cooperation could be the second best solution. It is difficult to see that any democracy would find the Berggruen and Gardels scheme attractive, but if some would, there is no reason for others to prevent them from going ahead. In fact their proposal is an invitation to enhanced cooperation for those committed to a more federal Europe.

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This essay deals primarily with the interplay between the decisions taken by European Union institutions and the competences that should remain the prerogative of democratic assemblies in Member States. The basic reason for the European Union is that it allows democratic countries to achieve something that they can not do on their own. However, after many years of creeping expansion, the competences of Brussels include a number of issues that are better dealt with at the national level, by politicians who have richer information and will face the consequences. This essay is an effort to address the key federal issue. What should be decided in Brussels and what should remain in the national democratic sphere? How can we bring democratic oversight to the transfer of competence to Union institutions?

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