

A European Association of Democratic States: Republican Intergovernmentalism, the  
Role of National Parliaments and the Demoi-cratic Constitution of the EU

Richard Bellamy (UCL)

**Introduction: Taking Back Control**

The Brexit referendum was won on the slogan ‘taking back control’. The resonance of this slogan with British voters could be seen as confirming the longstanding complaint regarding the EU’s democratic deficit. Yet, shifting democratic authority away from National Parliaments to the European Parliament might likewise be seen as a loss of control so far as the various peoples or demoi of the member states are concerned. After all, similar reasoning has led national minorities within many of these states to voice demands for a greater devolution of democratic authority and even secession. At the same time, in an interconnected world how far democracy can be realised in one country has become increasingly doubtful. The EU and its member states confront a dilemma, therefore – one that paradoxically the very formation of the EU was in part designed to resolve. On the one hand, interconnectedness renders it necessary for states to form multiple agreements with each other. Only then can their citizens, albeit through their elected governments, have any prospect of exercising some control over their inevitable interactions. The EU simply takes this unavoidable process a step further by forming a more comprehensive set of agreements among its member states. On the other hand, this situation poses multiple questions relating to the most appropriate locus of democracy. For example, can it remain possible for the citizens of these states to remain as in control as before once these agreements are in place? Is the only solution to place the citizens of the various states in direct control of the system of agreements? Yet, if so, how can that occur without these citizens losing control as a self-governing people of a particular state?

In what follows, I shall argue that this dilemma can be resolved by seeing the EU as an association of democratic states, in which their agreements reflect the normative requirements of a two level game (Putnam 1988; Savage and Weale 2009). To do so, these agreements must meet the dual conditions of being both mutually negotiated and consented to by their duly elected governments and endorsed by their respective citizens.

This account conforms to the arrangement that Kalypso Nicolaidis (2013) has termed *demoi*-cratic. In other words, it conceives of the EU not as a *demos*-cracy in the making but as a form of co-governance by different *demoi* in which they exercise mutual control. Within such a system, the main problem is not that of a democratic deficit at the EU level but of what could be called a demoicratic disconnect (Lindseth 2010) between the various national groupings of citizens and EU decision-making at the member state level. Reconnecting the national *demoi* to EU decision-making involves enhancing the role of national parliaments rather than the European Parliament. This may lead to a more differentiated process of integration, yet that may be both more equitable and effective than promoting uniformity at the expense of diversity. At the same time, it might be argued that such a model of Europe would be incompatible with, and hence constrained and undercut by, the operation of EU law, and in particular by the Court's claims to primacy and direct effect. The piece concludes by suggesting how this objection might be met by proposing a *demoi*-cratic constitution for the EU.

### **From *Demos*-cracy to *Demoi*-cracy**

The basic problem outlined above can be formulated in terms of what Dani Rodrik has called 'the fundamental political trilemma of the world economy' (Rodrik 2011: xviii): namely, the impossibility of simultaneously achieving democracy, national self-determination, and economic globalization – one of these has to give (Rodrik 2011: xix, 200-205). As he explains, 'If we want to maintain and deepen democracy, we have to choose between the nation state and international economic integration. And if we want to keep the nation state and self-determination, we have to choose between deepening democracy and deepening globalization' (Rodrik 2011: xix, 200).

Given most (if not all) people regard national autarky as a non-starter, and unregulated free global markets unjust as well as likely to be inefficient and prone to failures, many have concluded that the only answer is to give up national self-determination and subsume national democracy and citizenship within some broader scheme for global democracy. Most federally minded Europeans adopt this line of thinking, regarding the development of supranational democracy at the EU level as the first stage in such a process (Habermas 2015). However, the concern with the EU's democratic deficit enters at this point, with Europhiles joining in an unholy alliance with Eurosceptics to argue that in many core areas decisional authority has

passed upwards to Brussels without adequate democratic oversight. By and large, proposals for addressing this alleged deficit have turned on the practicality and justifiability of enhancing the powers of the European Parliament (EP) and electing the Commission, be it directly or indirectly, and invariably get linked to arguments for further political integration. Unsurprisingly, the main counter-arguments have mirrored this reasoning. They come from those opposing the justifiability of the integration process on democratic grounds. These critics regard the shift of political authority from national to European political structures as at best diluting the democratic influence of each individual voter, and at worst indefensibly undermining the self-determination of sovereign peoples. Such arguments suggest that the EU could never be democratically legitimate – indeed, that further empowering the EP or electing the Commission might deepen rather than lessen the democratic deficit.

These concerns are further buttressed by the fact that the EU has the promotion of economic globalization broadly hard wired into its constitutional structure (Isiksel 2016). Initially at least, the integration process was also deliberately pursued in non-democratic ways, in part to avoid potential resistance from the different *demos* of the member states (Müller 2011: 128,142). Meanwhile, the rights that came to be associated with Union citizenship were largely tied to mobility and the economic opportunities provided by the single market. As a result, they were exercised by less than 5% of the EU population. Of course, the exception is the right to vote for the EP, but the exercise of this right had hitherto steadily fallen since its inception in 1979 and been below 50% since 1999, reaching the low of 42.61% in the 2014 election. In the 2019 election, possibly as a result of Brexit, turn out did go up to 50.66%, with dramatic increases in a number of West European countries, such as Germany. However, Portugal and many Central and Eastern European countries continue to register figures around and often below 30%, while – as has been the case domestically across the EU – the share of the vote of centre left and right parties (the European People's Party and the Progressive Alliance of Socialists and Democracy) went down, so that they lost their majority within the European Parliament for the first time. As I note below, the fracturing of the EU Grand Coalition may offer an opportunity for the positive politicisation of EU decision-making. Nevertheless, that is unlikely to be achieved unless main stream domestic parties are prepared to engage with EU affairs in a more pro-active way, rather than simply seeking to counter growing Euro scepticism from Left and Right. Meanwhile, it remains true that the EP

has been a far weaker venue for the exercise of citizen preferences than that offered by EU law to economic enterprises and social groups seeking to challenge laws and regulations that have been negotiated at the national level (Isiksel 2016: 143).

Part of the problem confronting the democratic legitimacy of the EP has been that the transfer of allegiance to the EU has been fairly shallow. Attachment to nationality remains considerably stronger in all member states than attachment to the EU (Eurobarometer 89, 2018: 7, 12). So long as the EU was associated with the post war period of peace and prosperity, it has enjoyed 'output' legitimacy and sustained a broad degree of 'banal' identification for the security and economic benefits with which it has been credited (McNamara 2015). But the euro crisis and the more recent association of the EU in many countries with widespread austerity policies and the reduction of public spending, especially on social welfare, have sorely tested the 'permissive consensus' of European citizens with the integration process. As Brexit indicated, those opposing the EU, who account for as much as a third of the electorate or more in many countries across the EU (Eurobarometer 89, 2018: 12), are typically far more vocal and passionate than its supporters tend to be.

Again, many pro-Europeans have seen the obvious response as being the adoption by the EU of more socially integrative policies - such as an EU wide basic income (Van Parijs 2016) - that might support a transfer of democratic political authority to the EU level. Yet, such a move begs the question of whether EU citizens desire greater social integration in the first place. To many, such a move would be yet another top down imposition, with a very real risk of further undermining the incomplete, but nevertheless far superior, social welfare systems existing at the national level, along with the democratic systems that facilitated their emergence (Streeck 2014).

How might we avoid this impasse? As Rodrik (2011) notes, an alternative response to the global 'trilemma' involves collaboration between democratic states to collectively regulate globalisation in 'smart' ways, as he believed Keynes's design of the Bretton Woods system achieved for the post war period. From this perspective, the democratic legitimacy of the EU lies in its strengthening and legitimising the democratic systems of the member states rather than by offering an alternative to them. However, that cannot be achieved by treating the national self-determination of one state in isolation from that of other states – either morally or practically. The democratic decisions of almost all states affect, and are themselves affected by, the

democratic decisions of other states, whether they are formally associated within a structure such as the EU or not. To the extent that democratically made decisions of one state undercut those of other states, or reduce the options available to them, while being in their turn partially determined by these other states, all states risk losing democratic legitimacy. Meanwhile, as I noted above, domestic democracy is further diminished by its inability to tackle problems that require cooperation between states, either because these problems are by their nature global in character – such as global warming – or involve transnational activities and processes among multinational organisations, be it financial movements, migration flows or terrorism. Therefore, a domestic democratic deficit exists from the very fact of democratic states being part of an interconnected world in which autarky no longer offers a plausible or desirable option (Bellamy 2013).

Meeting this challenge requires some regulation of the interactions between states and a mechanism for fostering cooperation among them. To achieve that purpose while still retaining meaningful forms of self-determination for the peoples of these states, we need to reconceive the purpose of supranational bodies. Instead of being superior and independent sources of democratic authority to their constituent states, we should see them as mechanisms that allow democratic communities to co-exist on mutually agreed and equitable terms. As such, these bodies have to remain subordinate to their constituent members as a delegated authority under their joint and equal control.

As I noted above, this proposal constitutes a ‘demoi-cratic’ solution to the democratic legitimacy issue, whereby, in Kalypso Nicolaidis’s felicitous phrase, the peoples of the EU ‘govern together but not as one’ (Nicolaidis 2013: 351). On my account, they achieve this result through a form of ‘republican intergovernmentalism’ (Bellamy 2013, 2019). For decision-making to be legitimate in the republican sense it must be non-dominating – that is, the decision cannot be the product of the arbitrary will of the decision maker, with no need on that agent or agency’s part to track the reasons and interests of those subject to the decision (Pettit 1997; Bellamy 2019: ch 2). To ensure that is the case and domination avoided, legal and political authority must be subject to the equal influence and control of those subject to it. Republican intergovernmentalism achieves this condition by institutionalising a practice of reaching agreements among democratic states, in which governments must both act credibly as the democratic representatives of their respective peoples and respect each

other as the democratically authorised and accountable representatives of their respective peoples (Pettit 2010). To do so, governments need both to agree amongst each other on an equal basis at the international level, while at the same time securing the long-term democratic agreement of their citizens. The aim is for inter-national decision making to achieve the dual goal of avoiding governments dominating either the citizens of the state they represent, on the one side, or the citizens of other states with which they interact, on the other side. In so doing, they can simultaneously meet republican criteria for non-domination both internally and externally when making collective agreements to regulate their interactions, including the possibility for citizens to move freely among the states of the association, and to secure justice and common goods at the regional or global level.

### **From the Democratic Deficit to the Demoi-cratic Disconnect**

The problem of democratic legitimacy thereby changes from being one of a democratic deficit at the supranational level to that of a *demoi*-cratic disconnect between the peoples of the constituent states and the inter- and multi-national decisions their domestic representatives make in their name, including the creation and control of supranational regulatory bodies (Bellamy and Weale 2015).

If empowering the EP has provided the standard response to the EU's supposed democratic deficit, then empowering National Parliaments (NPs) provides the obvious route to overcoming the *demoi*-cratic disconnect. As Sandra Kröger and I have argued elsewhere (Kröger and Bellamy 2016), the aim of such empowerment is to promote a *demoi*-cratic reconnection of the EU through the 'domestication' of EU politics, by relating it to the everyday concerns of citizens, and 'bringing it back home', by placing EU decision-making in a context that is closer to citizens and that they understand. At the same time, EU decision-making needs to be 'normalised'. The current politicisation of the EU is mainly along the axis of 'pro-' or 'anti-', 'in' or 'out'. Instead, it needs to be polarised along the 'left' or 'right' and other cleavages – 'green', 'feminist', 'multicultural' etc. – which inform domestic politics. Political debate about the EU can thereby be shifted from 'should the EU exist at all?' to a more nuanced 'what is the best way for it to do the useful things it does?', and 'what should those things be?'

Steps in this direction have already been made (Auel and Christianson 2015). The Lisbon Treaty mentioned the NPs as participants in the EU's decision making for

the first time. Since then, the role of NPs in EU affairs has been greatly strengthened. All NPs established European committees to scrutinise EU proposals and the actions of their own representatives in the various European Councils of heads of government or ministers where EU policy is largely made. NPs can also send ‘reasoned opinions’ highlighting issues to the Commission. Additionally, NPs obtained certain negative powers that allow them to challenge whether an EU measure is truly necessary or not, or might be better undertaken by the member states – the so-called Early Warning Mechanism. This is not an individual veto as at least one third of national parliaments must raise an objection for the measure to be reconsidered (a ‘yellow’ card) or 55% for it to be withdrawn (an ‘orange’ card). Collaboration between Parliaments is facilitated through COSAC – the French acronym of the Conference of Parliamentary Committees for Union Affairs. There are also two Inter-parliamentary Committees comprising representatives of all national parliaments and the European Parliament: one to foster oversight and cooperation in Common Foreign, Defence and Security Policy, and the other to oversee policy relating to the European Fiscal Compact under the Article 13 of the Treaty on Stability, Coordination and Governance (TSCG).

These measures have provided an incentive for some national politicians to become more informed about EU affairs and has prompted the EP and Commission to interact more with NPs so as to be alert and responsive to potential opposition. They have also encouraged cooperation and the sharing of information among NPs – not least in Brussels itself, where almost all NPs now have an office and a representative. However, two major problems stand in the way of their further and more positive involvement as mechanisms for the ‘normalisation’ and ‘domestication’ of European politics.

First, the main centre-left and centre-right parties have felt inhibited about politicising EU affairs. Part of the reason lies in their belonging to the grand coalition of governmental parties within the EP. As a result, they feel they cannot criticise policies that they have played an indirect role in bringing about. Worse, they fear that to politicise the EU opens up a Pandora’s box from which the more EU sceptical Left and Right wing parties have more to gain than them. As a result, the main EU political debates tend to be between those in favour of the European project and those opposing it, rather than about different policy options that the EU might adopt.

Second, the establishment of the Single Market and the austerity measures associated with the Euro crisis have led citizens to feel that the EU undercuts political

debate and constrains policy making at the national level, creating a domestic democratic deficit. Governments cannot act responsively with regard to their voters. Rather, they must act responsibly and simply implement the public spending cuts demanded by the guardians of the Euro zone. Indeed, thanks to the TSCG and the Treaty Establishing the European Stability Mechanism, the governance of the euro area operates through a variety of institutions that have evolved outside the European Treaties and so involve comparatively little democratic scrutiny by either NPs or the EP (Hennette et. al 2019: 2-3, 63). This is particularly true of the central institution of this system of governance, the Eurogroup, a collective term commonly employed for the monthly informal meetings of the finance ministers of the eurozone in combination with the Commissioner for economic and financial affairs, taxation and customs and the President of the European Central Bank (Hennette et. al 2019: 1). Moreover, schemes for financial assistance have been conditional on the relevant member states undertaking far reaching austerity and public spending measures. There have even been moves under the European Semester's Macroeconomic Imbalance Procedure (MIP) for Eurozone members more generally to be encouraged to constitutionalise such conditionality practices and be subject to fines for failing to make the requisite structural measures, thereby constraining considerably domestic democratic choice on macro economic policy. As a result, EU level decision-making has steadily moved into core social and political areas of the member states, such as social policies, pensions, labour law and public spending and taxation more generally (Hennette et. al 2019: 180).

Two proposals have recently emerged that potentially address each of these problems respectively. While I am sympathetic to both, I offer here some variations on each of them geared towards reinforcing their democratic credentials. **The first proposal** is for a 'Green' Card whereby NPs could play a broader role in amending and proposing legislative proposals. Various forms of this proposal were put forward from 2013-15 by the Dutch and Danish NPs and the UK House of Lords (Fasone and Fromage 2016: 307), with a 2015 COSAC working group finding support from around half of the EUs parliamentary bodies for some form of legislative input (Fasone and Fromage 2016: 303). My own version (developed with Sandra Kröger) puts forward what we call a Parliamentary Legislative Initiative, whereby a third of MPs in a quarter of national parliaments may make a legislative proposal for the Commission to put forward (for details see Kröger and Bellamy 2016). This proposal



seeks to address the first problem by providing incentives for political debate among all national parties to be about which policies the EU should pursue rather than simply whether it ought to exist at all. The aim here is to allow national parties to have different positive policies on the EU to argue and campaign for rather than being reduced to simply accepting or rejecting whatever is put to them. The comparatively low threshold allows opposition party groups the possibility of putting forward proposals, perhaps with the support of certain rebels from the governing party(ies). Otherwise, the danger might be that the Green card would never be used, as governments could be assumed to have already agreed with current EU policy.

**The second proposal** is that of Hennette, Piketty, Sacriste, and Vauchez (2019) for democratising the Euro zone by developing the Interparliamentary Conference on Stability, Economic Coordination and Governance into a Parliamentary Assembly to oversee the European Stability Mechanism. A number of commentators have argued that the only adequate way to manage the Euro and avoid a further crisis is to move towards both a fiscal and a deeper political Union, that effectively turns the EP into a European legislature and the Commission into an elected EU government with tax and spend powers. Hennette et al. (2019: 178-82) raise a number of pragmatic problems with this argument. First, it would involve a major Treaty change, which would likely meet with considerable domestic opposition. Second, not all member states are in the euro or wish to be so. If the EP was responsible for monitoring the Euro group, that would involve the 28 member states currently belonging to the EU defining the policies for the 19 states of the euro area. Third, handing such responsibilities to the EP would deprive NPs of their core power to control the supply of funds and spending priorities of elected governments, thereby creating a domestic democratic deficit and rendering the democratic disconnect between the national and the EU levels even more problematic. Their proposal seeks to overcome all three of these difficulties. Rather than revisiting the EU Treaties, they suggest replicating the *modus operandi* of the TSCG and ESM Treaty with a Treaty on the Democratisation of the Governance of the Euro Area (or T-Dem) (Hennette et al. 2019: 65). The new Assembly to oversee the European Stability Mechanism would consist of 400 members, 320 from NPs based on the population of the member state and 80 from the European Parliament. As such, they believe that it empowers NPs in the euro arena without necessarily disempowering the EP. Indeed, they contend that as the new

Assembly would operate outside the EU Treaties, the position of the EP within the EU structures remains untouched.

In many respects, the T-Dem proposal adopts the demoi-cratic logic proposed here (see the commentary of Nicolaïdis 2019). As they note, any positive policies for additional funding and investment need to support of national taxpayers. The reason the EU has turned to austerity policies rests on limited solidarity between states, itself the product of a perceived lack of control. Empowering national parliaments in this area enables them to take back control. That said, the common policies they hope might be legitimised through such an Assembly could risk imposing inappropriate ‘one size fits all’ regulations on the highly diverse economies of the EU in ways likely to benefit the richer more developed states at the expense of the poorer and less developed (Joerges 2019: 127-8). The different demoi of the member states might also continue to block redistributive policies from one state to another.

Therefore, to avoid these problems my version of this second proposal seeks to limit its scope by restricting the euro zone to a banking union rather than a fiscal union. It gives such an Assembly of NPs a key role in overseeing an EU Banking Union but leaves fiscal policy a member state competence. Completing the banking union would allow fiscal policy to be returned to national governments by reducing the danger that fiscal mismanagement in one country could spread to others and potentially upset the banking system. If governments make bad decisions and overspend they would need to restructure their debts rather than receiving a bail out from other states. A genuine European Monetary Fund would replace the ECB and European Commission as lender of last resort, able to ensure liquidity, providing for a European debt-restructuring programme. The fund could be overseen by a Parliamentary Assembly based on the Interparliamentary Conference on Economic and Financial Governance of the European Union that was set up under Article 13 of the TSCG. As a result, the process of granting an emergency loan could be given “demoi-cratic” legitimacy.

### **From Unity to Differentiation**

The demoi-cratic view of the EU naturally allows for differentiated integration within the EU, in much the same way that liberal egalitarian commitments to multinationalism and multiculturalism allow for differentiation within most democratic states (Kymlicka 1995, 2001), including many of the member states of the

EU. Procedurally, that means ministers in the Council should be responsive to their respective national parliaments. Likewise, parties in the EP should be linked more strongly to their national parties, with national parliaments gaining a more direct and collaborative role in EU policy making. Substantively, it allows for a more differentiated system of integration – one in which, on democratic grounds, states may collaborate more or less than other states, depending on the greater or lesser stake they have in pursuing collective policies at the EU level; opt out when collective policies infringe domestic constitutional and cultural norms; and insist common rules treat them as equals by taking into account relevant differences (Bellamy and Kröger 2017).

Of course, all states have a moral obligation to participate in those collective policies necessary to secure such basic rights as are to be found in conventions such as the European Convention on Human Rights (ECHR) (Christiano 2016). Similarly, they have to guard against such clear collective harms as global environmental catastrophe and to assist what John Rawls called ‘burdened societies’ (Rawls 1999: 90, 106) – that is, societies so burdened by extreme poverty, a lack of natural resources and low human capital that basic rights cannot be secured and they lack the means to order themselves effectively in a democratic manner. Yet, the vast majority of the EU’s competences operate beyond the morally obligatory. Here, it is appropriate to seek to protect the variety of capitalisms and related welfare systems of the member states (Hall and Soskice 2001), while allowing cooperation to ensure greater efficiency and equity in their interrelations. As Christian Joerges notes, the chief failing of the response to the eurozone crisis – a product of the EU’s democratic disconnect – has been to try and impose structural convergence between the southern and northern economies, ignoring that market economies do not operate uniformly not only because of their different institutional configurations but also because of their diverse ideational commitments (Joerges 2019: 127).

Nevertheless, the EU has the option of moving in a different and less unitary direction (Bellamy 2013). The intergovernmental and developing interparliamentary processes of the EU and the forms of differentiated integration they produce can and should be regarded not as pragmatic compromises but as matters of principle, whereby the EU seeks to achieve equality of concern and respect among the peoples of Europe (Bellamy and Kröger 2017). After all, the EU prides itself as seeking unity in diversity. If, as liberal intergovernmental scholars have noted, the role of member

state governments has been a key factor in moderating the EU's democratic deficit (Moravcsik, 2008), the role of NPs can mitigate its democratic disconnect. Nor need stressing that the EU is a union of national democracies rather than a European democracy in the making undercut the value of EU citizenship. The core right of this status is not voting for the EP but the possibility of free movement between citizens of these different peoples. This possibility ensures no individual is disadvantaged through having been born in one state rather than another (Bellamy 2015 and 2019, Ch. 5). It gives all citizens an equal opportunity to choose where to live and work without discrimination on the basis of nationality. Yet, at the same time freedom of movement preserves, and to some degree facilitates, the ability of the different states of Europe to pursue and experiment with different social and economic arrangements.

### **The Democratic Constitution of the EU**

It will be objected that I have so far ignored what is the main obstacle to a democratic and more differentiated EU: namely, the uniformity of EU law and its primacy and direct effect as interpreted by the most powerful EU institution, the European Court of Justice. The process of integration by law and its close links to the construction of the single market has led to the judicial creation of what has been termed an economic constitution for the EU. Here I explore the extent to which these legal constraints can be rendered compatible with the democratic account of the EU given above.

There have been two important steps towards reasserting the democratic constitution of the EU following the Lisbon Treaty. First, Article 4 (2) TEU commits the EU to showing equal respect to the national constitutional identities of the member states, albeit subject to upholding the democratic values outlined in Articles 2 and 6, with the possibility of suspending certain rights of membership under Article 7 of those states that fail to do so. Second, as I noted above, Articles 10 and 12 TEU gave a role to national parliaments as part of the EU decision-making process.

The German Federal Constitutional Court's Lisbon and OMT judgments testify to a continued willingness by national constitutional courts to push back against incursions by EU law on national understandings of constitutional essentials. So have similar references by the Spanish and Italian courts in *Melloni* and *Taricco*, concerning the European Arrest Warrant and the right to a fair trial under the Spanish Constitution and EU VAT law and the nature of legality in Italian constitutional law

respectively. Such moves suggest that the picture of a steady erosion of national constitutional provisions can be exaggerated. As other commentators have noted, the EU's legal structures as often as not exemplify a remarkable degree of constitutional pluralism (MacCormick 1993, 1995; Jaklic 2014). Indeed, some claim 'constitutional toleration', whereby the European legal order involves member states and the EU mutually recognising and accommodating their legal systems in a non-hierarchical manner to each other - to offer the distinctive EU model (Weiler 2003: 20-21). That claim may be under increasing strain (Weiler 2012, Kelemen 2016), as its chief advocate acknowledged from the start (Weiler 1999: 90-101), but it suggests the possibility of a democratic constitutional alternative (Weiler 1999: 346-47).

The German Court's OMT ruling had turned on its interpretation of Article 38(1) of the German Basic Law as requiring that state authority could not be transferred to the extent to which it makes democratic control nugatory, and that Germany's obligations under outright monetary transactions could not be such as to undermine the Bundestag's budgetary oversight (Bellamy and Weale 2015: 264-65; Grimm 2017: 170-71). That judgment has served to reinforce the role of national parliaments in other member states. Although the preparedness and capacity of national parliaments to take on their new functions varies between member states, I suggested above that the possibility for them being the agents of a democratic reconnection to EU policy-making existed.

However, these steps of themselves are insufficient. On the one side, they may not suffice to challenge the incremental constitutionalisation of the Treaties by the ECJ and the resulting process of ever more negative integration through law. On the other side, there remains the problem of the cumbersome and often dysfunctional character of the Community method as a mode of EU policy making. Fritz Scharpf has offered two related sets of suggestions that might address each of these issues to some degree.

The first set of suggestion explores the possibility of a political override of ECJ decisions by the European Council (Scharpf 2009: 199-200). Although constitutional pluralists regard the validity of EU law as ultimately resting on domestic sources of law as interpreted by national constitutional courts, that raises the worry of a potential clash between national courts and the ECJ should the former consider the latter to have overreached its competence – a challenge the Court of Justice has viewed as *per se* illegitimate given its own claim to Kompetenz-

Kompetenz. In fact, both sides have carefully steered clear of such a clash, fearing it represents a nuclear option (Weiler 1999: ). Yet, in the long-term such avoidance strategies ultimately play into the hands of the ECJ as it increases the sway of European law by a kind of ratchet effect.

Scharpf (2009: 199-200) suggests that a supermajority decision in the Council offers an appropriate mechanism for addressing such situations – and indeed, it would make them possible by offering a democratically legitimate mechanism for resolving them. In essence, this mechanism would reduce the role of the ECJ to that of ‘weak review’. It would remove judicial supremacy by making clear that elected governments are the Masters of the Treaties. In line with the norms of ‘republican intergovernmentalism’, a democratic government disputing an ECJ ruling would be submitting to the judgment of its peers among other member states and asking to be treated with equal concern and respect. On the one hand, other democratic governments can be expected to be appreciative of the need to attune decisions to different domestic contexts and in particular the two forms of heterogeneity that motivate DI. They will also understand the adverse reaction an ECJ decision perceived as insensitive to such considerations and in error might arouse. On the other hand, that need not mean they would tolerate almost any objection to a ruling that proved inconvenient for the government concerned – quite the contrary. For they would also be fully alive to the dangers of allowing states to renege on their solidaristic obligations and of undermining the Court’s authority through frivolous or self-serving challenges. A parallel move for undoing the constitutionalisation of the Treaties by the Court would involve a) only permitting litigation and infringement proceedings based on regulations and directives adopted under Articles 289-291 TFEU (Scharpf 2017: 322), and b) allowing the proposed legislative proposals from national parliaments and the Council to involve partial or total abandonment of parts of the *acquis* for some or all states, subject to the approval of a qualified majority in the Council and a majority in the European Parliament (Scharpf 2016: 403). This last measure would enable the removal of aspects of the *acquis* that no longer command political support, not least because they have outlived their usefulness.

This last proposal links up with the second set of suggestions (Scharpf 2009: 400-404; 2017: 330-332). If instrumental, constitutional and legislative DI become normalised, not least by allowing challenges to the ECJ and opt outs from the *acquis*, then majority rule also becomes more legitimate. Indeed, there is a certain symmetry

between the two. In areas where majority or qualified majority rule prevails, there should be the possibility for member states to opt out of ordinary legislation. To guard against that occurring in areas where either free-riding or negative externalities might arise, it should be possible to block such requests by qualified majority in the Council and an absolute majority in the EP. Meanwhile, the Community Method and consensus would prevail with regard to Treaty making.

These suggestions aim to facilitate effective and equitable decision-making that remains consistent with the norms and practices of democratic legitimacy. Given the heterogeneity of the EU that cannot be achieved by simply scaling up democracy to the EU level. However, it can be achieved if the EU adopts a democratic constitution that allows for mutually agreed variable geometry among its constituent members. Moreover, it would be wrong to regard such a Union as a pragmatic rag bag, consisting of 'ins' and 'outs'. Rather, it reflects a principled conception of an international community of democratic states based on equal concern and respect. In particular, it allows a shift from free trade to fair trade, not least in distinguishing anti-protectionism at the borders from de-regulation within borders. The first has been broadly beneficial in improving efficiency by allowing countries to play to their comparative advantage. However, the second has led to disembedding markets from the social and political structures that have been democratically negotiated at the state level to maintain production and labour standards and offer social support and training to the potential losers of freer trade (Ruggie 1982: 382-83, 393-38; Gilpin 1987: 355). It has been pushed for and exploited by those multinational corporate interests able to benefit from such changes, but has served to enhance the gap between the winners and losers by eroding social protection in the name of market liberalisation (Scharpf 2010: 223; Isiksel 2016: 173-79). Allowing DI restores a degree of national regulatory autonomy that provide incentives for the EU itself to adopt countervailing measures, such as protection of labour standards and the coordination of corporate tax levels, that can increase domestic political buy in to a scheme of free trade by balancing its benefits against its inegalitarian redistributive effects and the capacity of states to mitigate them.

## **Conclusion**

Against the Eurosceptic proponents of Brexit, I have argued we can only exercise control through bodies such as the EU; against some Europhile proponents of political

union, I have suggested we achieve control through collaboration among European democracies, not by creating a EU-level democracy. Both the Eurosceptic and the federal Europhile alternatives involve losing control. By leaving the EU, the British government and those who voted for this proposal have committed a moral and political wrong against themselves and others. They have placed themselves in a situation where they will inevitably be controlled and dominated by other states and organisations and can only respond by seeking, largely vainly, to control and dominate them in turn. In terms of Rodrik's trilemma, they have delivered a formal façade of national sovereignty, symbolised by certain immigration controls against the poor and powerless that disregard their moral obligations to assist those in dire need, combined with a total openness to global economic processes over which they will have little or no democratic control. By contrast, attempts to turn the EU into a *demos*-cracy imperil the cultural and socio-economic heterogeneity of the member states. Yet such pluralism deserves protection not for purely pragmatic reasons but for normative reasons – it allows for what J S Mill called 'experiments in living' (Mill 1977: 261) and a variety of valuable modes of social life. The *demoi*-cratic view conceives the EU as providing a mechanism for enabling the different political and socio-economic cultures of the member states to co-exist on terms of mutual recognition and respect. The EU becomes in this way a means for them retaining rather than losing control.

## References

- Bellamy, R. (2013). 'An Ever Closer Union of Peoples: Republican Intergovernmentalism, *Demoi*-cracy and Representation in the EU', *Journal of European Integration*, 35(5): 499-516.
- Bellamy, R. (2015) 'A Duty Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights', *European Law Review*, 21.4 (2015), pp. 558-65.
- Bellamy, R. (2019) *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU*, Cambridge: Cambridge University Press



- Bellamy, R. and Weale, A. (2015). 'Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-Level Games', *Journal of European Public Policy*, 22(2): 257-74.
- Bellamy, R. and Kröger, S. (2017) 'The Demoi-cratic Justifiability of Differentiated Integration in a Heterogeneous EU', *Journal of European Integration*, 39:5, 625-639.
- Christiano, T. (2016) 'Replies to David Álvarez, David Lefkowitz, and Michael Blake', *Law, Ethics and Politics*, 4: 221-236.
- Fasone, C. and Fromage, D. (2016) 'From Veto Players to Agenda-Setters? National Parliaments and their 'Green Card' to the European Commission' *Maastricht Journal of European and Comparative Law*, 23 (2): 294-317.
- Habermas, J. (2015) 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible', *European Law Journal*, 21 (4): 546-57
- Hall, P. A. and Soskice, D. W. (2001) (eds.) *Varieties of Capitalism: The Institutional Foundations of Capitalism*, Oxford: Oxford University Press
- Hennette, S; Piketty, T., Sacriste, G. and Vauchez, A. (2019) *How to Democratize Europe*, Cambridge MA., Harvard University Press
- Isiksel, T. (2016) *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*, Oxford: Oxford University Press
- Joerges, C. (2019). 'The Economy is a Polity: Implications for the New Modes of Economic Governance in the EU', in Hennette et. al. 2019: 122-130.
- Kröger S. and Bellamy, R. (2016) 'Beyond a Constraining Dissensus: The Role of National Parliaments in Domesticating and Normalising the Politicization of European Integration', *Comparative European Politics*, 14.2 (2016), pp. 131-53

- Kymlicka, W. (1995). *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Oxford University Press.
- Kymlicka, W. (2001) *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford: Oxford University Press.
- McNamara, K. R. (2015) *The Politics of Everyday Europe: Constructing Authority in the European Union*, Oxford: Oxford University Press
- Mill, J. S. (1977) *On Liberty*, ed. J. M. Robson, Toronto: University of Toronto.
- Moravcsik, A. (2008) 'The Myth of Europe's "Democratic Deficit"', *Intereconomics* November/December: 331-40
- Nicolaïdis, K. (2013). 'European Democracy and its Crisis', *Journal of Common Market Studies*, 51(2): 351-369
- Nicolaïdis, K. (2019). 'For a Democratisation of Eurozone Governance', in Hennette et. al. 2019: 100-108.
- Pettit, P. (2010). 'A Republican Law of Peoples', *European Journal of Political Theory*, 9(1): 70-94.
- Putnam, Robert D. (1988). 'Diplomacy and Domestic Politics: The Logic of Two Level Games', *International Organization*, 42(3): 427-60.
- Rawls, J. (1999). *The Law of Peoples*, Cambridge, MA: Harvard University Press.
- Rodrik, D. (2011) *The Globalization Paradox*, Oxford: Oxford University Press
- Savage, D. and Weale, A. (2009). 'Political Representation and the Normative Logic of Two-Level Games', *European Political Science Review*, 1(1): 63-81.

Streeck, W. (2014) *Buying Time: The Delayed Crisis of Democratic Capitalism*,  
London: Verso