



## **Towards a better European democracy: facing the challenges of a federal Europe**

### **Report<sup>1</sup>**

Committee on Political Affairs and Democracy

Rapporteur: Mr Andreas GROSS, Switzerland, Socialist Group

### **Summary**

The report notes that, to regain the trust of the citizens, the main challenge the European Union seems to face today, beyond the management of the fiscal and economic crisis, is the need to advance in the process of democratisation. For this purpose, several alternatives are available, including that of a European federal democracy.

Rather than constituting a model for an ever closer political union or a European State, federalism implies a process of balancing power in a differentiated political order which enables unity while guaranteeing diversity. A European federal democracy, therefore, would not mean more Europe and fewer nation States. It would imply a decentralised government with European competencies, based on the will of the European citizens, enabling it to face transnational issues which could not be addressed effectively by a nation State alone.

The Committee on Political Affairs and Democracy therefore invites all interested Europeans, European institutions and states, including both governments and parliaments, to consider the challenges of a European federal democracy and to evaluate ways to transform today's treaty based European Union in a constitution based European federal Union. For its part, the Assembly, due to historical reasons and in view of its functions and composition, could offer an inter-parliamentary public space for regular evaluations of "the state of the European federal democracy".

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<sup>1</sup> Reference to Committee: Bureau decision, Reference 3888 of 29 June 2012.

## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly of the Council of Europe notes that, while the economic crisis of Europe remains a central concern, the way the integration of Europe took shape and particularly the form and polity of the European Union have also become a matter of reflexion, criticism and political disputes.
2. Having considered it for decades as part of the solution for most of the economic and political problems, citizens have in more recent years increasingly started perceiving the way Europe's integration happened as another source for negative economic developments, increasing social disparities and the erosion of democracy.
3. The rise and strength of nationalist parties in many European countries is another indication of the fact that the political form of the European integration is questioned. Too many citizens are turning their back on the European Union because they have the impression that the more competences it acquires, the less powerful democracy becomes.
4. To regain the trust of the citizens, the main challenge the European Union seems to face today, beyond the management of the fiscal and economic crisis, is the need to advance in the process of democratisation and to develop itself a polity which bases its powers on a strong transnational European democracy. For this purpose, several alternatives are available, including that of a federal Europe empowered with a federal democracy.
5. The Assembly believes that it can provide an ideal forum for deliberations on these alternatives for the future political form of the European Union and more specifically the challenges of opting for a federal European democracy given that:
  - 5.1. the original project lying behind the creation of the Council of Europe and its Parliamentary Assembly in the aftermath of the Second World War was precisely the establishment of a "democratic European federation" on the basis of a European constitution;
  - 5.2. the Assembly is used to deliberating on how the fundamental European values, such as human rights, the rule of law and democracy, are developing and how they can be better protected. For many years, it has gained relevant experience through the adoption of numerous reports dealing with the crises which today's democracies face and looking for answers to the question of how democracy has to be developed in order to re-empower itself, in full respect of the integrity and sovereignty of the States; strengthen its substance and prevent what might be seen as the erosion of democracy and its reduction to a kind of "post-democracy";
  - 5.3. composed of representatives of national parliaments who can enrich and enlarge the essential debate back home, the Assembly bridges the emerging divide between European and national arenas of politics and can discuss available options without committing any governments or the European Union itself;
  - 5.4. all Council of Europe member States and their citizens are linked to the European Union in different ways and to different degrees and have thus an interest in the realisation of institutional reforms which will re-empower democracy and help the Union to overcome its crisis and come closer to its citizens.
6. The Assembly notes that, despite its different historical roots and diverging interpretations, federalism relates mainly to the principle of organising, in a multicultural society, a polity by dividing powers between orders of government. Rather than constituting a model for an ever closer political union or a European State, federalism implies a process of balancing power in a differentiated political order which enables unity while guaranteeing diversity.
7. The Assembly further notes that the guiding principle within a federation for the distribution of powers is subsidiarity in the sense that priority is to be given, in principle, to responsibility for smaller units and that the solution to any problem should be looked for as close as possible to the citizens.

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<sup>2</sup> Draft resolution adopted by the Committee on 7 May 2014.

8. Provided that it is based on democracy, federalism helps integrate diversity while respecting differences. A European federal democracy, therefore, would not mean more Europe and fewer nation States. It would imply a decentralised government with European competencies, based on the will of the European citizens, enabling it to face, in the interest of European citizens, transnational issues which could not be addressed effectively by a nation State alone.

9. Such a European democratic federalism would be a mode of organisation more compatible with the multinational character of societies in today's European Union and the will of its member States to share only those powers with each other which could not be better used at home. As such, it would constitute a political system requiring a continuous balancing between integration and differentiation.

10. For the above-mentioned reasons, the Assembly invites all interested Europeans, European institutions and states, including both governments and parliaments, to consider the challenges of a European federal democracy and to evaluate ways to transform today's treaty based European Union in a constitution based European federal Union. The latter would decentralise power and strengthen only those European competencies which are necessary to face the transnational policy challenges better than any state in Europe could do alone, in the interest of the majority of European citizens.

11. For its part, the Assembly considers that, due to historical reasons and in view of its functions and composition, it could offer an inter-parliamentary public space where regular evaluations of "the state of the European federal democracy" could contribute to the search and the establishment of its right federal balance.

## B. Explanatory memorandum by Mr Gross, rapporteur

### 1. Scope and objectives of the report

1. While the economic crisis of Europe remains a central concern in the nation States, the way the integration of Europe happened and particularly the form and polity of the European Union (EU) has become a matter of reflexion, critic and political disputes. At the same time as the management of the Euro-crisis has led to a Europeanisation of fiscal policies, citizens have lost trust in the EU and its institutions. Many have blamed European integration for negative economic consequences or social disparities affecting nation States in different ways and to varying extents.

2. European integration, leading to “an ever closer union”, is no longer accepted as a guideline for the future and for institutional policy. This permissive consent already began to erode during the last decade of the 20<sup>th</sup> century. Scholars have put the possibility of disintegration on their research agenda.<sup>3</sup> The rise of nationalist parties indicates that politics in Europe is no longer about state versus market or a liberal versus a social Europe, but about European integration versus re-nationalisation of governance.

3. In consequence, a new debate is currently taking place concerning the political order of Europe, which goes far beyond particular matters of Treaty amendments of the EU. It relates to a broader spectrum of alternatives between a European state and dissolution of the EU. The (at least partial) re-nationalisation and re-regionalisation of policies has meanwhile been recommended even by pro-European scholars as a way to reduce disintegrative pressure<sup>4</sup>.

4. This basic question and its politicisation are not a problem per se. Yet it may become a serious problem if the debate turns into a confrontation of parties defending extreme alternatives without clearly showing the consequences for the relation between economy and politics, the relation between the power of the markets and the power of the people, as well as for the future of democracy. The result may be a blockade, fragmentation or degeneration of European governance, with negative effects on the democratic legitimacy.

5. In order to avoid such a confrontation, the debate needs to be channelled into legitimised and appropriate fora and needs to be directed from ideologies to the real challenges to be addressed. Beyond the management of the fiscal and economic crisis, the main challenge the European Union is currently facing is the need to advance in the process of democratisation and correct the power shift from the nation state to transnational markets, from national political institutions to transnational economic forces. Or as Ulrich Beck, Professor in London and Munich, put it recently: “My vision for Europe does not want to overcome the states; in our age of cosmopolitanism they have to be empowered again and capable to act. The conditions for this are democratically legitimate institutions, which reach farer than the nation state.”<sup>5</sup>

6. For his part, the former Prime Minister of Italy, Enrico Letta, when presenting his government a year ago, on 29 April 2013, underscored the legitimacy crisis the EU was facing and concluded: “the port towards which we are heading is called the United States of Europe and our ship is democracy. We should not dream the dream of others, we have ours, and this is the dream of European political unity.” Two days later, in Paris, on 1 May 2013, Enrico Letta firmly pronounced himself in favour of a “federal Europe” considering that the European continent could not be united only through its currency, not even only through its historical past; the state of the European Union should rather share a “common destiny”. “If we are not capable of looking far towards the future, all together, we will not make it”, he added.<sup>6</sup>

7. More recently, Romano Prodi, also former Prime Minister of Italy and former President of the European Commission, called for a “federal Europe”, rather than “a Europe of nations”, as the remedy to the errors of the past.<sup>7</sup>

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<sup>3</sup> E.g. Annegret Eppler and Hendrik Scheller (eds) *Zur Konzeptionalisierung europäischer Desintegration*, Baden-Baden: Nomos, 2013; Douglas Webber, How likely is it that the European Union will disintegrate? A critical analysis of competing theoretical perspectives, *European Journal of International Relations* (1) 2013, DOI: 10.1177/1354066112461286.

<sup>4</sup> E.g., Richard Rose, *Representing Europeans: A Pragmatic Approach*, Oxford: Oxford University Press, 2013, pp 142-158; Fritz W. Scharpf, Legitimacy in the multilevel European polity; *European Political Science Review* 1 (2), 2009, 173-204; Wolfgang Streeck, *Die gekaufte Zeit*, Frankfurt, New York: Campus, 2011.

<sup>5</sup> Debate between Ulrich Beck and Alain Finkielkraut in *die Zeit* (Hamburg), Nr.8, 13 of February 2014, page 3.

<sup>6</sup> Enrico Letta declared his willingness to make Italy “the most pro-European country ... in the forefront of the construction of the ‘United States of Europe’”.

<sup>7</sup> Interview of Romano Prodi at the *Corriere del Trentino*, 1 February 2014.

8. Italian politicians can be so engaged for a European Federal constitution because Italy is the only European country where the majority of the citizens decided that they want them to do so. On 18 June 1989, 88% of the 81 % Italian citizens who participated in the referendum decided that the European Parliament should get the mandate to establish a European federal constitution. This referendum was based on a proposition of the *Movimento Federalista Europeo*, an organisation founded in 1943 by a group of antifascists around Altiero Spinelli (see also below paragraph 12). The proposition was signed in three months during 1988/1989 by 114 000 Italian citizens. The basic idea behind Spinelli's organisation and its successful referendum was the following: "A real European transnational Democracy can never be the result of an intergovernmental conference or a treaty but can only be established by a constitution making process and its result, a European constitution, accepted by the majority of the European citizens and the member States in a European Referendum."<sup>8</sup>

9. After 20 years in the European Parliament (EP), the Green politician Daniel Cohn-Bendit, one of the few MEPs elected in two different countries, shares a striking conclusion in one of his most recent interviews: "The way Germany is dominating politics in Europe is in contradiction to the founding idea of Europe: never again should a country play a hegemonic role. But this is today the reality, Germany dominates everything. (...) Europe was never as much needed as today. But we are much too less courageous in the way we integrate Europe. Today the Germans seem to be the winners; but they forget that, in the future of our globalised world, no European state, including Germany, will be strong enough to belong to the eight biggest industrial powers of the world. This is so because European integration is much too slow. Our sovereignty will be, in the future, a shared European sovereignty and no longer a pure national one."<sup>9</sup>

10. In my opinion, the Parliamentary Assembly of the Council of Europe constitutes today an ideal forum for the debate on the future political order of the European Union and more specifically the challenges of a federal Europe. As it bridges the emerging divide between European and national arenas of politics, it can discuss without being immediately involved in day-to-day politics or being pressed by the need to make decisions. Its clear added value is that it is composed of representatives of national parliaments who can enrich and enlarge the debate back home.

11. But this is not the only reason for which the theme on the challenges of a federal Europe could and should be discussed by our Parliamentary Assembly, despite the fact that it does not seem to directly concern all 47 member States in a similar way. To start with, the legitimacy of our debate flows from the very initial project. What many of the Council of Europe's founding fathers had in mind in the mid 1940's, after the 2nd World War, when they imagined how the European community was to be constructed in order to prevent a 3rd World War, and how to guarantee the wellbeing of all Europeans and to achieve a better democracy on the continent, was precisely a federal Europe. They then imagined a European community based on a European constitution, which would be accepted in a European referendum by a majority of the citizens and the future member States. The member States would transfer to the community a part of their sovereignty in order to promote common economic, social and security policies under the control of a bicameral European Parliament.

12. One of those Europeans who elaborated a vision of a European federation was the Italian Altiero Spinelli (1907-1987). In "the Ventotene Manifesto", Altiero Spinelli, together with his fellow prisoner Ernesto Rossi, wrote during their imprisonment on the Italian island of Ventotene in 1941: "The general spirit today is already far more disposed than it was in the past towards a federal reorganisation of Europe. The hard experience of the last decades has opened the eyes even of those who refused to see, and has matured many circumstances favourable to our ideal. [...]he foundation must be built now for a movement that knows how to mobilise all forces for the birth of the new organism which will be the grandest creation, and the newest, that has occurred in Europe for centuries; and the constitution of a steady federal State, that will have [...] the means to see that its deliberations for the maintenance of common order are executed in the single federal State, while each [member] State will retain the autonomy it needs for a plastic articulation and development of a political life according to the particular characteristics of the various people."<sup>10</sup>

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<sup>8</sup> See Stefan Pöder, The European Constitution as a mandate of Italian citizens, in: *Transnationale Demokratie, Impulse für ein demokratisch verfasstes Europe*, hersg. von R.Erne/A.Gross/B.Kaufmann/H.Kleger, Zürich (Realotopia), November 1995.

<sup>9</sup> Interview published in the SPIEGEL, No 14, 31 March 2014.

<sup>10</sup> This English translation of the Ventotene Manifesto is by Emma Urgesi for CIFE Italia. See also Walter Lipgens, *45 Jahre Ringen um die Europäische Verfassung, Dokumente 1939-1984*, IEP, Frankfurt a.M., 1986, pp.71/72.

13. The German philosopher Hannah Arendt, who had to search for refuge first in Paris and later in the U.S. during the Second World War, might have captured the mood of intellectuals as well as of many Europeans when she noted in 1945: "A real peace we will only achieve when nation States are ready to transfer a part of their economic and political sovereignty to a higher, pan-European authority. What kind of Union this will be, a European Council, a federation or the United States of Europe, is of secondary importance."<sup>11</sup>

14. In spring 1948, 190 MP's of the British Parliament and 169 MP's of the French National Assembly called for "the establishment of a European constitution providing for an Assembly with the duty to set up the institutions of a democratic European federation. This Assembly should be constituted by delegates from the parliaments of all European nations which were ready to unite themselves in a European federation."<sup>12</sup>

15. The stage was therefore set for the creation of the Parliamentary Assembly of the Council of Europe (PACE), which was created a year later in May 1949. But the original motivation of the most engaged pioneers failed. The PACE was not empowered as the constitution making body of a European federation. This was the reason why its first president, Paul-Henri Spaak (1899-1972), resigned from the presidency in December 1951, protesting against the fact "that it was no longer this Assembly which was fighting for a United Europe".<sup>13</sup>

16. This ambition to create the constitution making Assembly for a European federation was too high for those times; the necessary conditions had not yet been achieved. The original goal and federal project was thus later abandoned in favour of a more pragmatic concept. Instead of a constitution, a treaty would be the basis; instead of citizens, the governments would be the driving forces, and, instead of politics, the starting point would be common economic efforts.

17. This second best economical, governmental and treaty based "elitist" way was so successful that in the early 1990's, when the historical conditions for a come-back to the original federal model of the European integration could have been met, it was simply forgotten by most of the leading actors. They went even further in the second-best way of integration. A common currency was decided without a real common European democracy to legitimise common fiscal, social and economic policies.

18. It is clear that when the European Union undergoes a profound institutional crisis, as is the case today, all Council of Europe member States, linked to the European Union in different ways and to different degrees, suffer from the consequences of the crisis. They thus have also an interest in the realisation of institutional reforms which could save the Union, as well as the Euro, but bring the citizens, their needs and their interests back into the European politics.

19. Moreover, reflexions on the developed federal model for the European Union can inspire individual Council of Europe member States, as well as their MPs and citizens, whether or not members of the European Union, in the designing of their own political organisation. Last but not least, I would argue that if there are two unions currently in the making in the larger Europe, that of the Council of Europe, namely the EU and the Eurasia, they both have to reflect on how to organise the relation between political integration, on the one hand, and economic, on the other. In this respect, all Council of Europe member States are concerned by the discussion.

20. We are not the only ones who think the moment has come for Europeans to be asking the question of federalism. The very experienced, long serving British MEP Andrew Duff wrote recently: "When the European Union wants to save the Euro and wants to prevent Europe to drift apart, then it has to face the federal basic question, how a better and deeper integrated European Union should be governed." Duff reminds us that the European Parliament might call for a new Convention to discuss this question and he thinks this should happen shortly after the British elections in May 2015.<sup>14</sup>

21. For all the above reasons, this report, based on research done by Professor Arthur Benz, from the Darmstadt University of Technology, intends to contribute to this discussion by elaborating the idea of a *federal democracy for Europe* in order to re-empower democracy, renew the European integration politics and overcome the different crises and alienations today's Union suffers from thus distancing itself from

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<sup>11</sup> Quoted in Hauke Brunkhorst, *Das doppelte Gesicht Europas*, Frankfurt a.M., 2014, p.26

<sup>12</sup> Lipgens, pp. 236-238.

<sup>13</sup> Lipgens, p. 311.

<sup>14</sup> Andrew Duff, *Back to the core question: a federal order for Europe*, published in German in the *Journal Integration*, Berlin Nr 1 /2014, p.65-71.

millions of Europeans who would like to see the EU as part of the solution and not of the problem. The report follows previous work done by the rapporteur on the problems of democracy in contemporary Europe in reports on: The state of human rights and democracy in Europe ([Res 1547 \(2007\)](#)); The state of democracy in Europe; Specific challenges facing European democracies: the case of diversity and migration ([Res 1617 \(2008\)](#)); Democracy in Europe: crisis and perspectives ([Res 1746 \(2010\)](#)) and The crisis of democracy and the role of the State in today's Europe ([Res 1888 \(2012\)](#)).

22. For a long time, federalism has been used as a concept for integrating nation states, in Europe and elsewhere (India, North America, and South Africa). Yet this concept has caused many misunderstandings which still burden our discussions and have to be overcome. For instance, federalism has, wrongly, often been seen and understood as an obstacle for democracy. The present report explains that the idea of a federation is founded on a particular understanding of both the concept of federalism and the concept of democracy and gives reasons why a federal Europe could be more effective, democratic and stable and also better serve the citizens than a Europe of (cooperating or competing) nation States or a European state.

## 2. The concept of federalism

23. Federalism relates to a principle of organising a polity by dividing powers between orders of government. Rather than constituting a model or an ideal for an ever closer political union or a European state, it points out a *process* of balancing power in a differentiated political order.<sup>15</sup> For this reason, it can provide a useful frame of reference guiding the necessary political discussion on alternative ways to effectively and convincingly govern Europe.

24. The concept of federalism has different historical roots.<sup>16</sup> This explains diverging interpretations of the concept, which leads to some confusion in discussions. In continental Europe, the idea of federalism emerged in the 16<sup>th</sup> century as an alternative to the notion of a sovereign power. Johannes Althusius (1604)<sup>17</sup> formulated the most prominent version of this federal theory, by which he challenged Jean Bodin's argument for a sovereign state.

25. This political idea, founded on the political theology of Reformed Protestantism, re-emerged in the late 18<sup>th</sup> century in the newly created North American States. The founders of the U.S. Constitution transformed this idea in order to justify the unification of independent states cooperating in a confederation. In order to distinguish the newly created sovereign union, the founders invented the term federal government.<sup>18</sup> For this reason, the Anglo-Saxon use of federalism usually refers to a compound, but sovereign state and a process of centralisation (or integration), while the same term points out a decentralised system in the continental European tradition, where the principle of subsidiarity is part of the concept of federalism.<sup>19</sup>

26. Subsidiarity relates to responsibility and the distribution of powers within a federal system and signifies that priority is to be given in principle to responsibility for smaller units. The original justification for such priority in the Protestant Reformed church and in Catholic social teaching was the premise that the natural community (family, community) should not be restricted through state control.

27. The contemporary justification refers to proximity to citizens and opportunities for participation, i.e. to democracy. As a rule, however, these reasons are not reflected, and the old understanding of a basis in the community still resonates. Thus the concept is not completely problem-free.

28. Subsidiarity emphasises variety, whereas federalism demands a balance between unity and variety. In other words, federalism should be regarded as a precondition for the application of subsidiarity, and in that respect, the two concepts should be interlinked.

29. Thus subsidiarity is the guiding principle within a federation for the distribution of powers (in the event of doubt, for devolution, whereas any centralisation needs to be explicitly justified). It is only the principle of federalism that justifies integration between small units, regions or states, on condition that these are not swallowed up by unity. In this respect, it could also be argued that federalism and subsidiarity are concepts

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<sup>15</sup> Carl J. Friedrich, *Trends of Federalism in Theory and Practice*, New York: Praeger, 1968.

<sup>16</sup> Michael Burgess, *Comparative Federalism. Theory and Practice*, London, New York: Routledge, 2006, pp. 162-191.

<sup>17</sup> Johannes Althusius, *Politica*, an abridged Translation of *Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*, ed. and translated by F. S. Carney, Indianapolis: Liberty Fund, 1994 (first ed.: 1604, revised in 1614).

<sup>18</sup> Burgess, *Comparative Federalism* (note 4), pp. 50-66.

<sup>19</sup> George A. Berman, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*; *Columbia Law Review* 94 (2), 1994, pp. 331-456.

which mean different things, but that they are interdependent – at least in the understanding of federalism shaped in Europe and argued for by the Rapporteur.

30. Meanwhile, comparative research on federalism has discovered a range of different varieties of federal systems, including confederations, dual (interstate) federal governments, cooperative (intrastate) federal governments, mono-national or multi-national federal states, centralised and decentralised federations etc.<sup>20</sup> This diversity indicates that federalism never exists as a static structure but evolves and remains, for the most part, as a process.

31. Given the interdependence and diversity of economies and societies, neither the sovereign nation state nor a “supra-national” European state offer feasible alternatives for a good political order of Europe. From a pragmatic point of view, other scenarios of possible political structures need to be compared. According to a first scenario, nation States mutually adjust their policies in an “anarchic field”<sup>21</sup>. In a common market, their governments have to respond to the dynamics of competition in the market. A second scenario implies a multilateral intergovernmental order where governments negotiate joint decisions and settle treaties ratified by their democratic institutions; and a third alternative consists of a real federal order of Europe. Today’s European Union includes elements of all three scenarios which produce a kind of over centralised, under-democratised polity which disintegrates and endangers the variety rather than integrating the different peoples and convincing most citizens.

32. The first alternative cannot guarantee effective and democratic governance since it is likely to end with powerful states dominating the others and to cause serious coordination deficits, which would thwart good governance in the affected states. Intergovernmental policy-making can in principle foster democracy. However, a democratic Europe can better work in a federal order, despite all tensions between federalism and democracy, as will be explained below. Moreover, federalism constitutes a framework in which other alternatives of inter-state relations can be turned into effective and democratic modes of governance.

33. Intergovernmental and federal political order have often been distinguished according to the degree of decentralisation versus centralisation of power or of autonomy versus integration of constituent units. However, this is a misleading categorisation.

34. In fact, a federal order consists of at least two levels of government, the union and its constituent states with both having legislative powers. These powers can be more or less centralised and uniform, but in principle, a federal system is “non-centralised”<sup>22</sup>. It is for this reason that the federal model, as defined in this report, can be of interest to big states, in order to strengthen the unity in diversity avoiding centralisation and without endangering the autonomy of those who ask for as much subsidiarity as possible.

35. Yet in order to become stable and integrate different communities of people, federalism must be based on democracy. If the central government selects and controls lower level governors or if authoritarian governments at both levels join power against the people, a federal order turns into an empty shell, as can be observed in Russia after 2004, or in Latin American federations under military governments (Argentina, Brazil). Under authoritarian rule, conflicts among territories may be suppressed for some time but they intensify under the surface of central rule.

36. In intergovernmental policy-making, a high degree of uniformity is possible through policy-specific agreements, which imply a concentration of powers in negotiating governments. In a federal Europe, law is legitimised by decision of legislative institutions of the Union, while intergovernmental law is based on treaties concluded by national governments and ratified by their parliaments. In the federal model, the interests of the union are expressed by its own institutions, whereas in an intergovernmental order, they result from negotiations among governments of the constituent states. Federal institutions bring together representatives of the union and the member States. Hence, while intergovernmental governance implies a horizontal division of powers, federalism adds a vertical dimension of division of powers.

37. Viewed in this way, a federal Europe is closer to the reality rather than to a vision, although essential elements of a federal Europe – constitution, bicameral system, clear separation of powers, anti-centralisation protections – are still missing or not sufficiently implemented. If a return to the nation state must be ruled out

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<sup>20</sup> Thomas O. Hueglin and Alan Fenna, *Comparative Federalism. A Systematic Inquiry*, Peterborough, Ont.: Broadview Press, 2006; Ronald Watts, *Comparing Federal Systems*, Montréal: McGill-Queen's University Press 2008 (3<sup>rd</sup> ed).

<sup>21</sup> This and the following concept of “joint decision-making” are elaborated in Fritz W. Scharpf, *Games Real Actors Play*, Boulder, Col.: Westview Press 1997.

<sup>22</sup> Daniel J. Elazar, *Exploring Federalism*, Tuscaloosa, AL: University of Alabama Press 1987.



in view of the interdependence of economy and society, the challenge is to find a balance of powers between European, national and sub-national institutions which is appropriate to the fulfilment of functions and to the diversity of member States. Moreover, institutions and processes of democracy must be adjusted to the multilevel character of politics and policy-making.<sup>23</sup>

### 3. The concept of democracy

38. Different types of democracy have been proven to work in modern societies on the communal, regional, and national level. They emerged during the late 18<sup>th</sup> century. In this period, the ancient understanding of democracy as governing by many, i.e. by all or a majority of citizens, was transformed into the idea according to which some govern but all citizens participate in the election of the government. Those governing act as representatives for the people and are accountable to citizens who control the government. In some systems, all citizens can even take part in the making of the laws and the development of the constitution, prepared by the representative bodies. In all cases, representatives have to be trusted by citizens and to be held accountable.<sup>24</sup>

39. Thus representative democracy was designed as a mechanism inducing governments to make decisions that come close to the will of the people. In case political decisions deviate from the will of the people, it compels governments to revise them accordingly. Direct democracy always includes a representative body but does not reduce the institutional participation of citizens to its election but enables them also to decide on laws and constitutional amendments in people's votes, triggered by initiatives and referenda.

40. Representation constitutes a "vertical" relation between legitimate institutions and citizens with the former being responsible to decide on and implement the presumed common good and the latter controlling and acting in complementarity whenever decisions of rulers seem not to be in conformity with their perception of the common good. In a continuous process of responsive and accountable governance, representatives and citizens can find out and put into practice what is the best decision for all citizens. In a strong democracy there is a government by, for and with the people and the political power is shared horizontally and vertically between them in a subtle way.

41. Beyond the vertical relation between representatives and represented, democracy requires that citizens are bound together in a horizontal relation of communication and recognition.<sup>25</sup> If they only regard policy proposal or decisions from an individualist point of view, they would never accept decisions with redistributive effects, and those in power would be inclined to avoid such decisions.

42. Therefore, democratic governance requires that citizens reflect their own interests in the light of the interests of others which they recognise as equally justified. Citizens act for what they perceive as the common good which is more than just the sum of private interests. These horizontal relations of trust and communicative processes, disputes and efforts of understandings turn the many isolated individuals into a "people", not in the sense of a closed community defined by shared norms and a common culture, but in the sense of a communicating plurality of citizens.

43. In processes of public communication under the condition of mutual recognition, citizens are also able to organise parties competing for power, providing alternative proposals for policies and office holders, mediating between representatives and represented and supporting public communication among citizens.

44. This idea of representative democracy became the core principle for organising permanent governance in modern states and the basic source of legitimacy. However, the reality of representative democracy is far from perfect, both concerning the vertical and the horizontal dimension. Therefore, this core of democratic representation is embedded in additional structures and processes. They include decision-making by citizens in the form of initiatives and referenda; the participation of associations in pluralist or corporatist pattern of interest intermediation; diverse modes of monitoring of policy-making by media; scientific institutions, private organisations or international organisations; institutions and procedures

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<sup>23</sup> The 88 year old German intellectual and social democratic politician Erhard Eppler wrote in an essay for the magazine "Der Spiegel" (Nr.18, April 28 2014): "(In view of Ukraine) ...we Europeans have to answer the question: How a culturally divided country might get a functioning state? For this there is, as German history also illustrates, only one method: The federal one. The different regions have to be able to live with their specific language and culture on their own and how they want to. This is also true, when the Russian government says the same." (page 30).

<sup>24</sup> Bernhard Manin, *The Principles of Representative Government*, Cambridge: Cambridge University Press 1997.

<sup>25</sup> Nadia Urbiniati, *Representative Democracy. Principles and Genealogy*, Chicago: University of Chicago Press, 2006.

designed to control office holders in systems of checks and balances. They also include decision-making by courts and supplementary sources of legitimacy by expertise or law. But these elements may support responsiveness and accountability of those in power to citizens, they never replace them.

45. Regarding Europe, it has been argued that democracy fails for basically two reasons: on the one hand, the relations between representatives and citizens are rather weak and characterised by information asymmetries; on the other hand, scholars have maintained that there exists no “*demos*” (“people”) in Europe as the latter is composed of well-established nations. The second aspect could justify a federal order bringing together multiple “*demoi*” (“peoples”). In fact, there are already old democracies where the state include many different nations and *demoi* (Belgium, Canada, Switzerland). These multinational states and democracies might illustrate that a “*demos*”, as the basis and source of power in a democracy, can also be composed by different *demoi* and that this is not only possible when all the people have the same history, language or cultural identity.

46. As can be exemplified by experience in these federations, in a functioning multinational democracy, citizens reveal multiple loyalties at national, regional or local levels. These loyalties are not given but result from political practice and participation of citizens in policy-making, which may be quite different. In Switzerland, direct democracy has contributed to bridging the linguistic and cultural divides between parts of the country. In Belgium, decentralisation has led to the dissolution of state-wide parties but still organisations of social partners and their pragmatic cooperation in social policy hold the country together. In Canada, decades of public debates about the constitution created a common understanding among citizens and political leaders in the provinces that the diversity of people is more a benefit than a burden for the democratic state. Therefore we have every reason to assume that the duality of people as European *demos* and national *demoi* does not burden but rather enriches democracy.

47. However, federalism is criticised for aggravating two basic problems because, on the one hand, it further dissociates power from citizens as powers are delegated to European institutions, and, on the other, it constrains the equal recognition of citizens by giving precedence to the representation of governments or nations. Indeed, the challenge of a democratic federalism is to maintain an appropriate balance of power. Moreover, in a multinational federation linking multiple *demoi*, the concept of representation needs to be adjusted to the multilevel structure. Yet, a federal order establishes conditions for enriching representative democracy with additional elements.

#### **4. Democratic federalism: safeguards for a federal balance of power**

48. A democratic government creates power and at the same time limits the power of elected representatives. Federalism adds to limiting power between democratic governments. Nonetheless it has often been argued that, due to inbuilt mechanisms of centralisation, a federal Europe risks becoming over-integrated, and many of those pointing out this risk maintain that European integration has already transgressed the threshold of an appropriate shift of powers from the nation States. These arguments echo similar debates in federal states like the U.S. or Germany, where centralist trends indeed prevailed. Others have argued that a federal Europe lacks the integrative forces holding the union together.<sup>26</sup> They often refer to failed federations such as the former Yugoslavia or the dissolution of the USSR. Yet in democratic federations, countervailing powers exist against over-centralisation, whereas failed federations often lacked democratic institutions designed to manage conflicts. Democratic federalism establishes institutions and procedures conducive to maintaining a balance of power.

49. In any event, a federal system needs integration mechanisms. Discussing the differences is precisely the best way to integrate diversity. In this sense the Swiss direct democracy contributes essentially to the integration of a very diverse and decentralised, but nevertheless integrated state.

50. Indeed, federalism does not mean bringing different polities together as one, however decentralised. It means instead retaining what is separate, the *demoi*, in spite of all that is common. Federalism thus does not mean more Europe and fewer nation States. Nor does it simply mean decentralised government. Instead, it is a mode of organisation as old as human society that is more compatible with the existence of many *demoi* than that of a single *demos*.<sup>27</sup> It constitutes a political system which requires a continuous balance between integration and differentiation.

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<sup>26</sup> For a good overview see the volume edited by Epper and Scheller (note 1).

<sup>27</sup> Kalypso Nicolaïdis, *Our European Demoi-cracy: Is this Constitution a third way for Europe?*, in Kalypso Nicolaïdis and Stephen Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union*, European Studies at Oxford Series, Oxford University Press, Fall 2003. In this article, Professor Nicolaïdis is suggesting that the

51. From a comparative perspective, no political order which is feasible for organising the European Union promises to avoid risks of either too much centralisation or integration or too much differentiation that can lead to disintegration. Indeed, the other models mentioned above which may cope with the interdependence between nation States are no less prone to these risks and probably more instable than the federal model, although the consequences of failure are different.

52. In an anarchic field of interdependent states, mutual adjustment cannot guarantee the solution of common problems or divergences between national jurisdictions if no hegemonic government takes the lead. However an imbalance of power can provoke the use of force to settle conflicts by unilateral decision. Failure of intergovernmental politics may end in an anarchic field of sovereign nation States, if enduring deadlocks lead to dissolution of treaty based governance.

53. A federal order, too, is notoriously instable<sup>28</sup> and vulnerable to centralist trends or, in the case of unsettled conflicts, to disintegration ending in an intergovernmental structure. Yet, in contrast to the other two types, the balance of a federal order can be maintained by institutional safeguards working against over-centralisation and disintegration, whereas an intergovernmental order depends on the commitment of the individual governments, each of them being in a position to threaten their exit.

54. The possibility to vary the degree of centralisation and decentralisation, which is not available in other political orders, is the main cause as to why federal orders are instable: policy-makers at the different levels not only deal with policy issues, but also fight for power. As a rule, it is the executive that is involved in this struggle for power and that can profit from governance across levels. Therefore, instability may also cause a deficit in democracy. On the other hand, democratising federalism contributes to stabilising the balance between centralisation and decentralisation or unity and diversity, provided that democracy is strengthened at the different levels.

55. The challenge of a federal Europe is to balance powers between the different levels of governments. It is the continuous search for balance and the existence of mechanisms correcting imbalance, which is a fundamental requirement. Therefore, federalism needs a *system of "safeguards"*.<sup>29</sup>

## 5. Lessons to be drawn for Europe from federal experiences

56. Comparative research shows that different federal systems provide for different institutions and combined different procedures to counter imbalance. Some of them are based on non-democratic sources of legitimacy, while others contribute to democratising federal governance.

57. Most federal systems have established *constitutional courts* as safeguards of a federal balance.<sup>30</sup> The German solution, which influenced discussion on the Constitutional Treaty in the EU, is based on a detailed enumeration of powers in the constitution. Moreover, German basic law includes the principle of subsidiarity as a legal norm. Consequently, legal proceedings before the Federal Constitutional Court have turned out to be the main mechanism of safeguarding a balance of power, although the *Länder* governments can in principle defend their powers by rejecting federal legislation in the *Bundesrat*. While decisions on the allocation of power are of a political nature, the German solution fosters a juridification and de-politicisation of these decisions.

58. The European Court of Justice (ECJ) fulfils a similar function in the EU. In contrast to the German Court, it has contributed to "integration by law"<sup>31</sup>, thus strengthening the power of the EU against member States. In Germany, court decisions can be revised by constitutional amendments. Given the need for a unanimous agreement of member States to change the Treaties, this is much more difficult in the EU.

59. In the US, the Supreme Court plays a similarly powerful role. In contrast to the German Federal Constitutional Court, judges are selected, amongst other criteria, according to their political opinions.

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Constitution should back then have been bold enough to present the EU as a federal union, not as a federal state, and thus "rescue the federal baby from the bathwater".

<sup>28</sup> See: William H. Riker, *Federalism. Origins, Operation, Significance*, Boston/Toronto: Little Brown & Co 1964; Mikhail Filippov, Peter C. Ordeshook, Olga Shvetsova, *Designing Federalism*, New York: Cambridge University Press 2004.

<sup>29</sup> Jenna Bednar, *A Robust Federation*, New York: Cambridge University Press 2009.

<sup>30</sup> Gerald Baier, *Courts and Federalism*, Vancouver, Toronto: UBC Press 2006, Nicolas Arony, John Kincaid (eds), *Courts in Federalism*, Oxford: Oxford University Press, forthcoming 2014.

<sup>31</sup> Joseph H. Weiler, *The European Court of Justice: The Politics of Judicial Integration*, Basingstoke: Palgrave Macmillan, 1998.

Accordingly, their decisions are influenced by political reasoning and this is accepted as far as constitutional decisions are concerned. Hence, the court became part of power politics in US-federalism.

60. Among the political mechanisms for maintaining a balance of power, the *constitutional referendum* applied in Switzerland is worth mentioning. However, it must be noted that direct democracy there works more or less under specific Swiss conditions (lack of a federal constitutional court, lack of financial transparency and equity, incomplete interface between democracy and human rights). Its shortcomings have to be understood as a consequence of these Swiss specificities and should not be blamed on the principles of direct democracy which could work much better in the interest of all citizens.

61. In the European Union, basic changes still require the unanimous agreement of all member States, which is unlikely to be achieved in a European referendum today. Notably, agreements of executives preparing Treaty amendments, often initiated by specific interest organisations, increase the centralisation of power. Therefore, a different procedure of constitutional change in Europe would probably produce better results towards balancing power.<sup>32</sup>

62. In federal Switzerland, constitutional changes are realised by the double majority of citizens and cantons, in the Swiss Federation still seen as “the states”. This requires a solidly constructed and nevertheless always endangered common mutual societal loyalty that we still have to build up in the European Union. Nevertheless, I am convinced that basic constitutional decisions can be made by the majority of European citizens and states and that those who would lose could accept their defeat when they have the chance to belong to a new majority in another European constitutional referendum in the not too distant future. As can be learned from Swiss experiences, the probability of a successful constitutional referendum can be increased by intense consultation with civil society organisations from different sectors.

63. Scholars comparing federal systems agree that constitutions and constitutional courts cannot guarantee a balance of power between levels of government. In this respect, the mechanism of *subsidiarity control* introduced by the Lisbon Treaty has recently attracted attention.<sup>33</sup> In fact, this procedure is based on the assumption that subsidiarity is a political principle. As a consequence, national parliaments are responsible to see to it that the principle is taken care of.

64. The effectiveness of the mechanisms of subsidiarity control should not be overestimated, since it requires that national parliaments coordinate their interventions. So far, they only prevented one directive proposed by the Commission from being passed by the Council and the European Parliament. However, experiences so far are not disappointing. Moreover, with elected institutions of the member States checking the allocation of power, these constitutional decisions are democratised.

65. Another option for safeguarding a balance of power was invented in Canada, which is also applied in other federations: it gives lower level governments the right to “*opt out*” from uniform decisions. In fact, this option empowers individual parliaments of constituent units to counter centralist trends. In multinational federations, this mechanism can threaten the federal balance and may provoke calls for secession, as can be observed in Spain. Here, individual autonomous communities can compel the central government to negotiate on a decentralisation of powers. This constitutional provision, intended to protect the historical autonomous communities’ stimulated competition for power, threatened to weaken the central government. While political parties at the centre were divided and unable to agree on a federal constitutional reform, the Constitutional Court had to step in to end this vicious cycle.

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<sup>32</sup> A practical way on how to build a bridge between today’s treaty based EU and a future constitutionally based new European federal community would be a convention, foreseen in the Lisbon treaty, which would elaborate a new article in the treaty providing, for instance, that five million Europeans could ask for a constitution making process – a proposal which would be voted in a European referendum by the European citizens in a double majority vote; if Europeans agreed to that proposal, then they would elect a 200-member European Constitution Making Council (ECMC). Such an article would have to be ratified by all EU member States. The ECMC would have the opportunity to elaborate in three or four years, following many popular consultations, a constitutional draft which would be submitted again in a European-wide referendum and would only succeed to the Lisbon Treaty following approval by a double majority of European citizens and member States. Those states which would refuse the constitution would be allowed to leave the new European community.

<sup>33</sup> Ian Cooper, A ‘Virtual Third Chamber’ for the European Union? National Parliaments after the Treaty of Lisbon; West European Politics 35 (3), 2012, pp. 441-65. Viera Knutelská, Cooperation among National Parliaments: An Effective Contribution to EU Legitimation?, in: Ben Crum and John Erik Fossum (eds.), Practices of Inter-Parliamentary Coordination in International Politics – The European Union and Beyond, Colchester: ECPR Press 2013, pp. 33-49.

66. This experience proves that institutional devices protecting constituent units of a federation must be supplemented by mechanisms holding the federation together, like a constitution and constitutional courts or, probably more effectively, veto powers of a federal parliament. In Germany, a 2006 constitutional amendment implemented such a mechanism, although limited to very few legislative powers. In certain areas of concurrent legislation, the *Länder* can, under qualified conditions, deviate from a federal law, as long as the federal legislature does not revise the respective federal law.

67. Safeguards can be more or less effective. Their effectiveness depends on the character of the federation and the particular constitutional problems it is confronted with. We can also distinguish safeguards based on law and court decisions and those based on political decisions in parliaments. The latter not only conform to the political nature of the issue but also contribute to the democratic legitimacy of a federal order. In the EU, it is in particular the mechanism of subsidiarity control which needs to be strengthened in the “system of safeguards”<sup>34</sup>.

68. Institutions and procedures stabilising the federal balance mobilise countervailing forces against an unintended “migration” of powers. At the same time, they compel policy-makers to explain how they intend to apply their power. In procedures determined to define the allocation of powers, standards of policy-making have to be established. Thus, conflicts about who should get the power are made explicit, and processes to deal with these conflicts are transformed into deliberation on how policies are made at the different levels.

69. Accordingly, a system of safeguards in federal Europe, which induces policy-makers to justify their claims and decisions, establishes monitoring institutions. They are of particular relevance for democracy in transnational contexts.<sup>35</sup> Thus while working to maintain a balance of power between levels of government; the system of safeguards contributes to improving accountability of government to parliaments and citizens.

70. A federal order is threatened by instability, but the flipside of this is the advantage of flexibility. Constitutional rules never determine the allocation of powers in every detail. To a considerable extent, policy-makers can choose between different framings of policies. They can be made by the union or left to lower levels of government, and the allocation of powers of policy-making often allows “self-rule” or “shared-rule”. Shared rule, which would be the norm rather than the exception in a federal Europe (like in other federal systems), can be applied in different ways of power sharing and different modes of multilevel governance.

71. In order to coordinate policies across levels and between jurisdictions, mutual adjustment of competing governments (contests for best practices), intergovernmental negotiations of voluntary agreements, and joint governance (based on binding agreements) can be used as alternative modes of policy-making. In any case, federalism constitutes a variable and dynamic political system providing different options on how to deal with tasks.<sup>36</sup>

72. As mentioned above, the allocation of powers and the mode of governance affect the way policies are made. Therefore, “constitutional” decisions concerning the rules of policy-making and policy choices related to specific tasks are closely connected, although they have to be distinguished from a normative point of view. This wider range of options given in a federal order contributes to invigorating democracy. Nevertheless, it can overload policy-making with constitutional issues. A stable federal order requires the right balance between what is defined in a constitution and what is left to political decision on flexible adjustment of the federal constitution. The challenge is to determine the necessary rigidity and to open sufficient flexibility with appropriate procedures guiding the use of such flexibility.<sup>37</sup> For the EU, this is a decisive issue to address in order to make a federal Europe work in view of the difficulties to change the treaties of the EU.

73. A balanced federation can be stabilised against centralisation or disintegration by well-functioning safeguards. Apart from a constitutional court, democratic institutions and processes constitute these provisions. Hence only democracy can make federalism work as a political system coping with conflicts in a multinational, plural society as it exists in Europe.

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<sup>34</sup> Bednar, Robust Federation (note 15).

<sup>35</sup> John Keane, *The Life and Death of Democracy*, London: Simon and Schuster, 2009, pp. 585-836.

<sup>36</sup> Martin Landau, Federalism, Redundancy, and System Reliability, *Publius* 3(3) 1973, pp. 173-96; Kalypso Nicolaïdis, Conclusion: The Federal Vision Beyond the Federal State, in Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press, 2001, pp. 443-84.

<sup>37</sup> Arthur Benz, Balancing Rigidity and Flexibility: Constitutional Change in Federal Systems, *West European Politics*, 36 (4), 2013, 726-49.

74. By organising plurality on the principle of subsidiarity and by dividing, and thus limiting, powers in a balanced multilevel order, a federation establishes important conditions for democracy. But federalism is not as such democratic. Three challenges have to be met: (1) a European federation needs to integrate citizens of Europe, but also citizens as members of nations; (2) it must achieve a horizontal balance of power and opportunities among members of the federation without undermining diversity; and (3) it must maintain effectiveness of policy-making despite the complexity of multilevel governance.

75. Democracy strengthens federal systems in two ways: on the one hand, it creates the conditions to limit powers in a stable way. On the other, it offers procedures which develop integrating effects in divided societies.

76. To quote some examples, in Canada, the federal party system has had an integrative effect. It was the development of a publicly deliberated constitution making process which contributed to the integration of this very diverse society. Last but not least, one could mention the fact that strong provincial parliamentary democracies act significantly against a kind of federalism which would reduce the decentralisation and lead to the mere execution of decisions taken at a centralised level.

77. Since the 1970's, Belgium has faced six major reforms of its federal system which has made Belgium one of the most decentralised states. The political parties were also influenced by this decentralisation and still exist only as regional parties. Although the federal balance may be more precarious than the Canadian one overall, one can recognise in Belgium factors which stabilise the federal balance. I would mention the welfare state, the social partnership as well as the spirit of consensus which mark the Belgian federal governments as such factors.

78. In Switzerland, which is still for many a multicultural or multinational federal state although it labels itself as a "Confederation", direct democracy and civil society - strengthened by its participative elements - keep the very diverse Swiss federation together. The direct democratic mechanisms, with the double majority of citizens and cantons required for a federal law to be passed, which enhance legitimacy, also contribute to the respect for the autonomies of the cantons and the decentralised structure of the Federation.

## 6. Federal democracy in a multinational Europe

79. As regards a European political union, many have argued that democracy is bound to fail due to the absence of a European "*demos*", i.e. a community of citizens who, with the help of media, parties and interest groups, are able to reflect and revise their opinion on public policies in the light of opinions expressed by others.<sup>38</sup> In its decision on the Lisbon Treaty, the German Federal Constitutional Court argued that democratic legitimacy still must be based on accountability to national parliaments rather than solely on powers exerted by the European Parliament.<sup>39</sup> For this reason, the court characterises the EU as a "*Staatenverbund*", a particular association of states combining federal and con-federal elements.

80. While it does not make the case for a return to the nation state, the court's reasoning on democracy can be exploited by protagonists of re-nationalisation. However, the "non-*demos*-thesis" proves to be unconvincing, if we conceive the EU as a federal order which includes multiple "*demos*". "*Demoicracy*" is defined as a union of peoples understood both as states and as citizens.<sup>40</sup> In fact, the European Union constitutes a dual order of democratic representation of citizens. Associated in a European *demos* by comparatively weak bonds of a multilingual public, citizens are *directly* represented in the European Parliament. The national *demos* are represented by members of the Council who are accountable to their national parliaments. Due to the weak ties among European citizens, this second structure of *indirect* representation necessarily complements representation in the European Parliament, while direct representation of European citizens in the European Parliament reflects the achieved degree of political and societal integration in Europe.

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<sup>38</sup> E.g., Dieter Grimm, Braucht Europa eine Verfassung?, *Juristenzeitung* 50, 1995, pp. 581-91; Peter Graf Kielmansegg, Integration und Demokratie, in: Markus Jachtenfuchs and Beate Kohler-Koch (eds.), *Europäische Integration*, Opladen: Leske & Budrich, 2003, pp. 49-83.

<sup>39</sup> Lisbon Treaty case (2009), BVerfGE 2 BvE 2/08, paragraphs 271, 277, 278, ([http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html); last accessed 30 Jan.2014).

<sup>40</sup> Kalypso Nicolaïdis, European *Demos*-cracy and its Crisis, *Journal of Common Market Studies* 51, (2) 2013 pp. 351-369; Jan-Werner Müller, The Promise of *Demos*-cracy: Diversity and Domination in the European Public Order, in Jürgen Neyer and Antje Wiener (eds) *The Political Theory of the European Union*, Oxford: Oxford University Press, 2010, pp. 187-205; Francis Cheneval and Frank Schimmelfennig, The Case for *demoicracy*, *Journal of Common Market Studies* 51, (2) 2013, pp. 334-350.

81. Representation of *demos* by accountable executives constitutes a particular type of “council governance”.<sup>41</sup> In the European Union, accountability binds the members of the Council to their constituencies, but actually they are responsible to the majorities in national parliaments. Thus the vertical structure of representation exists. Certainly, information asymmetry to the advantage of the executive may reduce the influence of national parliaments, although the European Commission provides all documents.

82. However, the real problem of this indirect representation relates to the horizontal structure. If individual parliaments pursue pure national interests, members of the Council are either prevented from finding an effective agreement or decide without taking into account the opinion of their parliament, which then can only accept or ratify. The first situation has been described as the “joint-decision trap”<sup>42</sup>, while the second resembles a constellation discussed in federal states as “executive federalism”.

83. Therefore, as citizens need to reflect their individual opinions by considering the opinion of their fellow citizens, so do national parliaments need to reflect their policy positions by considering those of other parliaments, if the indirect representation of *demos* should contribute to defining a common good in European governance (horizontal dimension of representation).

84. In fact, the Lisbon Treaty has introduced the concept of inter-parliamentary relations and thus takes account of the horizontal dimension of *demos*. Moreover, with the subsidiarity control mechanism, it has established a procedure that can foster these relations. In order to get their voice heard, national parliaments have to coordinate their opinions, and they have started to communicate on policy issues. Moreover, they established the Conference of Parliamentary Committees for Union Affairs (COSAC), where members of the European Affairs Committees of the national parliaments meet on a regular basis. Conferences of special committees or exchanges of visits among delegations of parliaments add to this horizontal structure of inter-parliamentary relations.

85. So far, inter-parliamentary relations are rather fragmented and still do not work as a relevant public forum where representatives of multiple *demos* in Europe communicate on policies and constitutional issues. Moreover, the Euro-crisis has damaged emerging multilateral inter-parliamentary relations and has given rise to bilateral relations.<sup>43</sup> Yet not only parliaments of the member States are involved. If a European federation is considered as an open polity with a variable geometry and overlapping spaces, parliamentary assemblies of other European organisations may participate in forming an inter-parliamentary public space. Among these assemblies, the Parliamentary Assembly of the Council of Europe certainly has a particular status, due to historical reasons and due to its functions and the scope of its members.

## 7. A federal reform outlook for a more inclusive Europe and a stronger democracy

86. Still this horizontal fundament of a European federation needs to be further developed. However, it needs to be included as a decisive element of a democratic federation. Therefore, instead of searching for the ideal of a European public of citizens, a federal Europe should be founded on a transnational public of members of parliament representing national *demos*. This is a necessary complement of the public forum which is established by the European Parliament.

87. Thus Europe is and will remain a continent of different nations. If these nations should participate in solving common problems in European governance, they have to be included on an equal basis. At a glance, equality of nations seems to speak for an intergovernmental order. Yet the reality of politics in intergovernmental governance rarely meets this requirement. Bargaining power usually differs to a considerable extent. In contrast, a federal order allows for correcting inequalities of nations by protecting distinct societies, by defining minority rights and by balancing powers in the horizontal relations among member state governments. Thus it balances equality and diversity.

88. Diversity can justify an asymmetric allocation of powers between levels, with the degree of centralisation or sharing of powers varying between territories (“variable geometry”). In the theory of federalism, overlapping functional units (like the Euro-Zone or the Schengen Area) are acknowledged as

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<sup>41</sup> Thomas O. Hueglin, Comparing federalisms: variations or distinct models?, in Arthur Benz and Jörg Broschek (eds) *Federal Dynamics*, Oxford: Oxford University Press, 2013, p. 43.

<sup>42</sup> Fritz W. Scharpf, The Joint Decision Trap. Lessons from German Federalism and European Integration, *Public Administration* 66 (3), 1988, pp. 239-78.

<sup>43</sup> Arthur Benz, An Asymmetric Two-level Game. Parliaments in the Euro Crisis, in: Ben Crum and John Erik Fossum (eds.), *Practices of Inter-Parliamentary Coordination in International Politics*, Colchester: ECPR Press 2013, pp. 125-40.

appropriate responses to particular interests and capacities of member States.<sup>44</sup> They neither contradict nor weaken the idea of a federal Europe.

89. As the Euro crisis has revealed, imbalance of effective powers among member States has its roots in economic disparities. In the long run, a federation can be threatened by economic and social divides, even if decision rules protect small member States or minorities. Depending on the willingness and the capacities of the member States, a federal Europe allows for the reduction of these economic imbalances by various measures.

90. Neither does this mean that there should be a fiscal equalisation at the European level in addition to the Structural Funds, nor does a federal Europe imply a centralisation of fiscal powers. Yet given the economic interdependence of diverse national and regional economies, a political order of the European Union should not exclude measures to reduce serious economic inequalities, not least since such disparities could otherwise prove detrimental to all member States. Re-nationalisation of Europe would thus rule out certain policy options which need to be considered and carefully examined. Re-nationalisation, even in a limited form, is tantamount to a refusal of solidarity.

91. In pluralist societies, political decisions cannot be justified as “true”.<sup>45</sup> Therefore, democratic governance never aims at *the* common good, but rather a common good considered as such by a majority of citizens and accepted by all citizens under the provision that it can be revised. Democratic politics needs to provide alternatives, both regarding to the holders of powers and the policies implemented. Alternatives are generated in *policy learning* which is essential for a democratic order. This applies even more to a multinational federation.

92. In principle, a federal order increases the options for making choices between alternative policies by dividing powers between levels. However, powers of the different levels may be shared, and many policies need to be coordinated across levels or among governments. Thus multilevel governance gives rise to joint decision-making which reduces choices to the lowest common denominator of interests pursued by the different governments and usually includes the executives and weakens accountability to parliaments. In the worst case, governance runs into the “joint decision trap”, i.e. allows only incremental change of existing policies. But if political leaders provide no alternatives, technocracy rules, elitist governance prevails, or the pressure of constraints justifies decisions. Certainly, no political order can rule out these patterns of power from obstructing democracy, in particular under the condition of a crisis, but a complex multilevel order could appear to be particularly likely to strengthen executive and reduce choice.

93. However, provisions to empower parliaments and the existence of arenas of multilevel parliamentary relations can precisely prevent the rise of executive federalism or joint decision traps, as mentioned above. Moreover, in a federal order, a limitation of choice is less likely to occur than in political systems where power is concentrated, since the manifold division of powers is conducive to the generation of options. Depending on an appropriate institutional design, federalism in particular allows for experimental policy-making and policy innovation.

94. In a federal order, policy learning is supported from above and can be induced from below. In both alternatives, the interplay of central and decentralised governments in a non-centralised federal order is decisive.

95. Learning from below can be stimulated by competition among governments.<sup>46</sup> By claiming to provide best public goods or services for their citizens, they are motivated to trump policy proposals by opposition parties and policies implemented by other governments. Competition between jurisdictions can induce innovation and the diffusion of innovative policies to other jurisdictions. As a rule such a process of innovation and diffusion works best in a federal order where the central government organises the exchange of information.

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<sup>44</sup> Bruno S. Frey, European unification: a new proposal; *Constitutional Political Economy* 24, 2012, pp. 285-294; Bruno S. Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe*, Cheltenham: Edward Elgar, 1999.

<sup>45</sup> See Peter Graf Kielmansegg, *Die Grammatik der Freiheit. Acht Versuche über den demokratischen Verfassungsstaat*, Baden-Baden: Nomos, pp. 11-37.

<sup>46</sup> Wolfgang Kerber and Martina Eckardt, Policy Learning in Europe: The “Open Method of Coordination” and Laboratory Federalism; *Journal of European Public Policy* 14 (2), 2007, pp. 227–47; Pierre Salmon, Assigning powers in the European Union in the light of yardstick competition among governments, in: Manfred J. Holler, et al. (eds.), *European Governance*, Tübingen: Mohr-Siebeck, 2003, pp. 197-216.



96. The “Open Method of Coordination” introduced by the European Commission was an attempt to create such a process of competitive policy learning.<sup>47</sup> In practice, it was undermined by the unwillingness of member States to provide the necessary information in policy fields where the EU has no power to legislate.

97. Learning from above occurs, if the federal government allows experimental policy-making in member States.<sup>48</sup> It can select one state to implement a new policy in order to test its effects, or it can induce a contest among selected governments for best practices in a policy field. While the EU avoids experimental policy in the first sense, it has used the second strategy in its implementation of the Structural Funds.

98. It is worth mentioning that federal systems may also reduce the chances for policy learning, not only due to the need to come to compromises among governments engaged in joint decision-making, but also due to an economic imbalance preventing fair competition for best practices. Policy learning requires the policy-makers and citizens to accept differences in policies made in member States, but it also requires that all member States have an equal chance to discover and implement innovative practices.

## 8. Federalism and options for democratisation

99. As mentioned above, democracy is an ongoing effort, a never ending process and can never be expected to be perfect. For this reason, scholars point out the need for *continuous democratisation in democracies*. Democratisation means to reduce the imperfections of democracy knowing that the perfect one will never be reached. Democratisation means the transformation and improvement of existing democratic polities on the local, regional and national level as much as constituting new democratic levels on the transnational level, European as well as global.

100. A democratic federation implying checks and balances and vertical and horizontal relations at different levels can never achieve an optimal equilibrium. It compels actors to adjust to new constellations and to continuously learn to find new solutions of conflicts. This dynamic is part of the ongoing process of democratisation. Debates about the role of parliaments or about subsidiarity and autonomy of lower level units are indications of this process.

101. Moreover, a federal order has the advantage of opening various access points for participation of citizens and associations, and it allows for applying various elements adding to the basic structure of representative democracy. The different levels of government also constitute arenas for experimenting with different patterns of democratisation:

- In most democratic federations, regional and local governments provide ample opportunities for citizen participation, citizen initiatives or referenda even if they play a more limited role at the central level. In the European Union, suggestions for European wide referenda may be problematic due to the deficient public communication in a multinational constellation<sup>49</sup>, but member States from time to time organise referenda on Treaty amendments (compulsory in Ireland and consultative in other member States).
- Private interest groups find access at the different level. They are confronted with the problem of coordinating their opinions, if they press for a particular policy. But a federal structure also allows them to express diverse interests of their members, in particular if they are divided along national lines. For governments, the division of powers between levels creates more channels for communicating with private interest groups, but they also are able to shield against pressure from powerful associations by coordinating their positions in joint decision-making<sup>50</sup>. Thus federal structures contribute to balance powers both between governments and private interest groups and among organised interests.

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<sup>47</sup> Arthur Benz, *Accountable Multilevel Governance by the Open Method of Coordination?*, *European Law Journal* 13 (4), 2007, pp. 505-22.

<sup>48</sup> Jenna Bednar, *Nudging Federalism toward Productive Experimentation*, *Regional and Federal Studies*, 21 (4), 2011, pp. 503-521.

<sup>49</sup> Heidrun Abromeit discussed the conditions of European referenda and suggested sectorial and regional referenda as practical alternatives; Heidrun Abromeit, *Democracy in Europe: Legitimising Politics in a Non-state Polity*, New York: Berghahn Books, 1998; Heidrun Abromeit, *Ein Vorschlag zur Demokratisierung des europäischen Entscheidungssystems*, *Politische Vierteljahresschrift*, 39 (1), 1998, pp. 80-90.

<sup>50</sup> Edgar Grande, *Das Paradox der Schwäche. Forschungspolitik und die Einflußlogik europäischer Politikverflechtung*, in: Markus Jachtenfuchs and Beate Kohler-Koch (eds), *Europäische Integration* (Opladen: Leske + Budrich, 1<sup>st</sup> ed) 1996, pp. 373-99.

- A federal organisation includes many organisations checking the power of the executive. Governments at the different levels mutually observe how other governments use their competences. Moreover, courts play a particular role as arbiters among governments. However, to an increasing degree, federal systems attract private organisations evaluating and benchmarking policies of the different governments. While this “monitoring” primarily addresses and compares lower level governments, it takes general standards of good governance accepted in the federation as points of references. This way, monitoring indirectly reviews whether central policies are realistic and how they are implemented in practice.

## 9. Conclusions

102. Without ignoring the indications of democratic deficits in the existing multilevel order of Europe, there are good reasons to argue that a European federal democracy could be more effective, democratic and stable than a Europe of (cooperating or competing) nation States or a European state. The idea of federalism does not necessarily justify calls for more integration, nor does it imply more decentralisation or re-nationalisation. It can however provide a conceptual framework for constituting and maintaining a territorially differentiated political system adjusted to the distinct economies and societies of today's European Union.

103. Federalism implies a pragmatic approach to politics. Like democracy, it does not promise a perfect political system. Aiming at conflicting goals, it requires continuous reflection and revision of structures and policies. Therefore, it emphasises processes of policy learning and constitutional flexibility in order to balance powers and resources. Instead of opening an ideological debate, the concept of a European federal democracy directs discussion to practical issues. Without claiming to present a complete and detailed list of suggestions, practical implication and current challenges of a European federal democracy can be summarised as follows:

- The concept of a European federal democracy implies that integration is no one-way street towards an ever closer union. Therefore, the *continuous search for a balance of power between European and national institutions and modes of multi-level governance is an essential prerequisite*. This process of balancing needs to be institutionalised in an appropriate way, in order to *enable a revision of an existing allocation of powers* and in order to *check the application of powers*.
- Federalism implies *variety, not only between levels and jurisdictions but also in the degree of integration of the different territories*. Policy-specific arrangements of multilevel governance with variable territorial scope, overlapping territorial organisations of the European space, and different kinds of partnerships with neighbouring states characterise a federation, which is not a federal state. This variety expresses the plurality of Europe and thus constitutes a foundation of democracy.
- In a democratic federation, processes aimed at checking powers and at a revision of the distribution of powers *must include parliamentary institutions at the European and national levels*.
- Regarding the revision of powers, the right to initiate change and the arenas of negotiation are not less important than the right to decide. Accordingly, procedures for Treaty amendments could be reconsidered. For this purpose, an *inter-parliamentary dialogue* (suggested by the EP as a pre-legislative process) could give national parliaments a more effective voice compared to current procedures. Moreover, regular evaluations of the “state of the European federal democracy” can support the search for a federal balance, a task that probably can be fulfilled by the Parliamentary Assembly of the Council of Europe.
- Experimental policies can increase the dynamics of power structures in a European federal democracy. Yet they need to follow rules, guiding and limiting the flexibility.
- Regarding checking the application of powers, the existing “system of safeguards”, which combines judicial and political-democratic mechanisms, could be further developed, with a particular emphasis on the subsidiarity checks by national parliaments.
- Modes of multilevel governance in Europe should preserve the autonomy of lower levels as far as possible. Moreover, these modes should induce and support policy learning by allowing for and fostering decentralised variation and comparative evaluation of policies, within a framework

of standards and procedures set at the European level. A European federal democracy should use the whole range of old (legislation) and new modes of governance (like the Open Method of Coordination (OMC)) which the EU has developed during the last decades.

- Accountability of executives to parliaments is essential in multilevel governance. A system of checking and revising the balance of power by parliaments can improve accountability, if the evaluation results are submitted to public deliberation in parliaments.
- Existing horizontal inter-parliamentary relations in a federal *demoicracy* could be stabilised and extended. They are a decisive element for an effective subsidiarity check and for effective governance.
- The differentiated structure of a federation opens room for combining representative democracy with additional elements of direct and associative (or participatory) democracy, as well as monitoring functions. They should be used in a continuous process of democratisation of a federal democracy, which cannot end in a fixed institutional design but must proceed in ongoing experimental policy-making.

104. These tentative conclusions are derived from the concept of a European federal democracy. As long as the concept of federalism raises misunderstandings, the reasoning leading to a pragmatic approach is not convincing. Therefore, a dialogue on what federalism means and how it applies to Europe should aim at bridging the divergence in definitions caused by the different historical roots of the idea.