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After the Crash: A Perspective on Multilevel European Democracy

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Abstract: *From a social-market perspective, European integration has reduced the capacity of democratic politics to deal with the challenges of global capitalism, and it has contributed to rising social inequality. The article summarises the institutional asymmetries which have done most to constrain democratic political choices and to shift the balance between capital, labour and the state: the priority of negative over positive integration and of monetary integration over political and social integration. It will then explain why efforts to democratise European politics will not be able to overcome these asymmetries and why politically feasible reforms will not be able to remove them. On the speculative assumption that the aftermath of a deep crisis might indeed create the window of opportunity for a political re-foundation of European integration, the concluding section will outline institutional ground rules that might facilitate democratic political action at both European and national levels.*

Post-war varieties of capitalism and social models in Europe have evolved under specific historical conditions and contingencies, and they were shaped by political processes conditioned by specific configurations of state power, policy legacies, economic structure, cultural repertoires and distributions of political power. Reaching their maturity in the permissive environment of post-war 'embedded liberalism',[1] democratically shaped European political economies differed significantly at the end of the 1960s—differences that were later captured by the concepts of coordinated and liberal market economies,[2] and of social-democratic, conservative and liberal welfare states.[3] In European constitutional democracies, these diverse socioeconomic configurations—which for purposes of the present discussion may be collapsed into the rough distinction between 'social-market' and 'liberal-market' political economies—have become constitutive parts of the legitimate social order.

Since the end of the post-war period, these normatively salient configurations have changed in response to internal moral and social changes and to the external challenges of global capitalism and of European integration.[4] Focusing specifically on

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[1] J.G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic System', (1982) 36 *International Organization* 379–415.

[2] P.A. Hall and D. Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

[3] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity, 1990).

[4] W. Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism* (Verso, 2014).

European integration from a social-market perspective, there is no question that it has greatly widened the range of individual options. But by prioritising negative over positive integration and monetary over social and political integration, it has also reduced the capacity of democratic politics to deal with the challenges of global capitalism, and it has contributed to rising social inequality and the erosion of public services and transfers.

In present political debates, pro-European and left-of-centre authors tend to ascribe the erosion of social-market models exclusively to the forces of globalised capitalism—against which European integration is hoped to provide the effective sword and shield. They see 'more Europe' combined with the democratisation of the present Union as necessary and sufficient conditions for creating a Europe-wide social-market economy.[5] Considering ourselves no less pro-European, colleagues and I are more impressed with the liberalising and deregulatory impact of EU law on social-market economies and with the democratic deficits of decision-making in the present EU.[6] In our view, 'more Europe' under present institutional conditions would destroy the 'legitimate diversity' of European political economies,[7] and it would further undermine the chances of democratic self-government in Europe.

My present contribution will first summarise those aspects of European integration that have done most to constrain the capacity of democratic politics to deal with the challenges of global capitalism—the priority of negative over positive integration, and the priority of saving the euro. I will then explain why efforts to democratise European politics will not be able to overcome these constraints, and why politically feasible institutional reforms will not allow them to be removed. In my view, the changes that would be required to re-create at the European level democratic capacities to shape political economies could only have a chance if present veto positions should be fundamentally shaken. On the speculative assumption that the aftermath of a deep crisis might indeed create the opportunity for a political refoundation of European integration, I will in the concluding section try to outline institutional ground rules that would facilitate effective political action at both the European and national levels.

I Integration through Law and the Priority of Negative over Positive Integration

Among the Original Six, and after the political failure of the European Defense Community, the European Economic Community represented a political commitment to create a common market. After the removal of tariff barriers, the way forward was to be through legislation removing non-tariff barriers by harmonising differing economic regulations (ie, through 'positive integration'). And as European legislation after

[5] S. Collignon, *The European Republic: Reflections on the Political Economy of a Future Constitution* (Federal Trust, 2003); P. Bofinger, J. Habermas and J. Nida-Rümelin, 'Einspruch gegen die Fassadendemokratie', *Frankfurter Allgemeine Zeitung*, 3 August 2012, available at http://www.faz.net/aktuell/feuilleton/kurswechsel-fuer-europa-einspruch-gegen-die-fassadendemokratie-11842820.html.

[6] M. Höpner and A. Schäfer (eds), *Die politische Ökonomie der europäischen Integration* (Campus, 2008); M. Höpner and A. Schäfer, 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe', (2010) 33 *West European Politics* 344–368; F.W. Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"', (2010) 8 *Socio-Economic Review* 211–250.

[7] F.W. Scharpf, 'Political Legitimacy in a Non-optimal Currency Area', (2013) *Max Planck Institute for the Study of Societies Discussion Papers*, MPIfG 13/15.

the 'Luxembourg compromise' of 1966 continued to require unanimity in the Council, respect for the legitimate diversity of Member States was obviously secure, whereas the progress of economic integration through legislative harmonisation was slow.

Governments, however, had failed to appreciate the coup d'état of the European Court of Justice (ECJ), which in 1963 and 1964 had postulated the supremacy and direct effect of European law. As a consequence, 'integration through law'[8] became an option to bypass political legislation through 'judicial legislation' if agreement in the Council could not be obtained. In substantive terms, this meant that all European law and its judicial interpretation would gain constitutional priority over the laws and constitutions of Member States. In other words, political objections to legislative harmonisation could be and were bypassed by the Court's capacity to disallow national regulations and practices which, in its interpretation, were constraining undistorted competition and the free movement of goods, services, labour and capital (ie, 'negative integration').

The doctrine gained practical importance in the economic crises of the 1970s, which in the US and the UK had revived academic and political support for neoliberal beliefs in the efficiency of unfettered competition in deregulated markets. Economists in the European Commission tended to share these beliefs, but that was not true of all governments of 'high-regulation' states, some of whom had managed the crises of the 1970 rather more successfully. In this historical constellation, 'integration through law' came to play a crucial role in promoting the liberal transformation of social-market Member States.[9] At the national level, the judicial enforcement and extension of 'negative integration' removed the state's control over its economic boundaries and created incentives and opportunities for regulatory and tax competition. Beyond that, it has greatly reduced the space of legally allowable state action in economic matters.

In theory, of course, the liberalising impact of negative integration might be countered by 'positive integration'—that is, by uniform European rules replacing national regulations the Court had disallowed.[10] In contrast to negative integration, however,

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[8] M. Cappelletti, M. Seccombe and J.H.H. Weiler (eds), *Integration Through Law. Europe and the American Federal Experience* (de Gruyter, 1985).

[9] The Court had originally interpreted the Treaty's commitment to a free-trade regime as a prohibition of discrimination on grounds of nationality. At the end of the 1970s, however, the standard was shifted from non-discrimination to non-impediment even in cases lacking any trans-border aspects. From then on, all national regulations and institutions could be challenged as 'non-tariff barriers' impeding the exercise of the Treaty's four 'economic liberties' or as distortions of free competition. Under the Court's 'proportionality test', to be sure, not all challenges would succeed. But those that did were written in constitutional stone, creating a 'ratcheting effect' that allowed 'progress' only in the direction of further liberalisation. Cf Scharpf, *above*, n 6.

[10] If the 'non-tariff barrier' is constituted by the mere diversity of national rules, a uniform European rule of the same type could replace it. But if the national 'impediment' reduces the substantive reach of a Treaty-based 'economic liberty', liberal economic constitutionalism would deny that it could be replaced by an identical European rule (cf E.J. Mestmäcker, 'Power, Law and Economic Constitution', (1973) 11 *The German Economic Review* 177–192; M.P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart, 1998); P. Dardot and C. Laval, *The New Way of the World: On Neo-Liberal Society* (Verso, 2013), chapter 7; G. Davies 'Legislative Control of the European Court of Justice', (2014) 51 *Common Market Law Review* 1579–1608. And in practice, for instance, the case-law defining patient mobility as a Treaty-based liberty did become a significant constraint on uniform EU legislation trying to regulate the conditions under which national health systems would be obliged to pay for hospital care abroad. See D.S. Martinsen, *Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union* (University of Copenhagen, 2014).

positive integration could not be achieved through the Court's liberalising case-by-case decisions.[11] It requires 'political' legislation that, even after the Luxembourg Compromise had been replaced by the present 'Community Method', depends on an initiative by the European Commission, an absolute majority in the European Parliament and a qualified majority of government votes in the Council. In short, European legislation must be adopted in a multi-veto system depending on very broad political agreement—which is ever more difficult to obtain in the increasingly heterogeneous Union.[12] On issues that, among the old Member States, would provoke conflict between 'liberal' and 'social-market' preferences, consensus is practically out of the question, and similar conflicts between old and new Member States or between creditor and debtor states in the eurozone are also beyond resolution by European legislation.

As a consequence, there was and is practically no chance that European legislation by the Community Method would correct the liberalising impact of judicial legislation and negative integration. It, therefore, was and is unreasonable for left-of-centre pro-European political parties and unions to expect that political action at the European level could either create a meaningful 'European social model' or that it would protect the existing social-market economies of EU Member States against the pressures of inter-state competition or the impact of global capitalism.[13]

II Monetary Integration and the Priority of Rescuing the Euro[14]

When the internal market programme was sent on its way in the mid-1980s, the Delors Commission had proclaimed the 'social dimension' as the next item on the European reform agenda, whereas the German foreign minister asked for progress towards a European 'political Union' and the French government promoted monetary union to end the hegemonic role of the German Bundesbank in the European Monetary System (EMS). After the fall of the Berlin Wall and the international politics of German unification, however, it was only the French proposal that was included in the Maastricht Treaty.[15]

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[11] This is strictly true for economic liberalisation, where the Court could at best require the 'mutual recognition' of national regulations, but could not define common European standards. Cf S.K. Schmidt (ed), *Mutual Recognition as a New Mode of Governance* (Routledge, 2008), By contrast, the case-law disallowing gender discrimination or age discrimination in the labour market may have the effect of directly regulating private action. And even though they are also protecting private self-interest against 'community' (see J.H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', (2011) 9 *International Journal of Constitutional Law* 678–694, at 691), these non-discrimination cases are not promoting economic liberalism but rather sociocultural individualism A. Somek, *Individualism. An Essay on the Authority of the European Union* (Oxford University Press, 2008); A. Somek, *Engineering Equality: An Essay on European Antidiscrimination Law* (Oxford University Press, 2011).

[12] M. Höpner and A. Schäfer, 'Integration among Unequals. How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU', (2012) *Max Planck Institute for the Study of Societies Discussion Papers*, MPIfG 12/5.

[13] F. Rödl, 'Zum Begriff demokratischer und sozialer Union', in J. Bast and F. Rödl (eds), *Wohlfahrtsstaatlichkeit und soziale Demokratie in der Europäischen Union* (Nomos, 2013), at 179–204; P. Dardot and C. Laval, *above*, n 10, chapter 7; D. Grimm, 'Europa: Ja—aber welches?', (2014) 68 *Merkur* 1045–1058.

[14] I apologise for the fact that citations in the following section will be mainly to my own recent work, which contains ample references to the literature and relevant data.

[15] D. Marsh, *The Euro. The Battle for the New Global Currency* (Yale University Press, 2009).

As the difficulties of the EMS had been caused by the divergence of hard-currency and soft-currency Member States, some (mainly American) economist had warned that the future eurozone was not an 'optimal currency area',[16] and from a comparative-political-economy perspective it also seemed clear that a currency union would severely disadvantage economies whose industrial relations systems did not have a capacity for coordinated wage-setting strategies.[17] Commission economists, however, for whom 'one market—one money' appeared as the logical culmination of the internal market programme, downplayed these structural and institutional differences. In their view, monetary union itself would increase competitive pressures to such an extent that any structural differences would soon disappear.[18]

A 1999–2008: Divergence-increasing Monetary Union

What in fact happened was the opposite: Between 1999 and 2008, the convergence of nominal interest rates and uniform European Central Bank (ECB) rates in the face of continuing differences in national inflation rates pushed eurozone economies ever more apart. In low-inflation Germany, real interest rates increased, domestic demand declined, unemployment escalated and real wages fell. By contrast, real interest rates turned negative, while domestic demand, employment and nominal unit labour costs increased in Greece, Portugal, Spain and Ireland (but not in Italy). And since the Monetary Union had eliminated exchange rate risks, the dramatic divergence of capital accounts was conveniently bridged by private capital flowing from surplus to deficit economies.[19]

But when in the fall of 2008 the international (Lehman Bros.) financial crisis caused a worldwide credit squeeze, deficit economies were hit hardest by the collapse of interbank lending. And as all governments came to rescue their overcommitted banks, state debt escalated everywhere, but most dramatically in deficit countries, including Ireland and Spain whose budgets had even been in surplus before 2008. Towards the end of 2009, finally, capital markets also began to worry about the ability-to-pay of over-indebted governments in deficit economies, and in early 2010 rapidly rising risk premia on state bonds raised the spectre of state insolvency, first for Greece, then for Ireland and Portugal, and potentially for Spain and Italy as well.

B Euro Crisis and Euro-rescuing Policies

Under the rules of the Maastricht Treaty, which prohibited the bailout by other Member States as well as monetary state financing by the ECB, the ensuing scenario

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[16] R. Mundell, 'A Theory of Optimal Currency Area', (1961) 51 *American Economic Review* 657–665; B. Eichengreen, 'Is Europe an Optimal Currency Area?' (1990) 478 *CEPR Discussion Papers*; M. Feldstein, 'The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability', (1997) *National Bureau of Economic Research Working Papers*, Working Paper 6150.

[17] F.W. Scharpf, *Crisis and Choice in European Social Democracy* (Cornell University Press, 1991), at 263–269.

[18] Commission of the European Communities, 'One Market—One Money. An evaluation of the potential benefits and costs of forming an economic and Monetary Union', (1990) 44 *European Economy*, available at http://ec.europa.eu/economy_finance/publications/publication7454_en.pdf.

[19] F.W. Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy', (2011) 9(2) *Journal for Comparative Government and European Policy* 163–198.

would have been clear: state insolvencies would be inevitable, state creditors would have to cut their losses, bankrupt states would leave the Monetary Union, and their newly independent currencies would devaluate against the remaining eurozone economies in order to restore international competitiveness. But as it was unclear whether the Monetary Union could then be maintained, the constellation that faced eurozone governments in the spring of 2010 was interpreted as a euro crisis.[20]

Governments of deficit states seem to have considered bankruptcy as the worst-case outcome to be avoided at any cost. But the governments of surplus states, led by Germany and France, also came to realise that it was in their interest to maintain the common currency. As their banks were heavily invested in Greece, Ireland and other deficit economies, insolvencies might unleash a second wave of banking crises which, following so soon after 2008, they would have to face with deplenished fiscal resources. Moreover, a collapse of the euro might boost nominal exchange rates to such an extent that massive job losses in export-dependent industries were to be expected. In order to rescue the euro, therefore, the Council agreed to ignore the Maastricht rules and to create rescue funds that were guaranteed by the fiscal commitments of surplus states.

But the decision to rescue the euro put the focus exclusively on the state-credit crises, rather than on the economic and social crises of deficit economies. And since the 'confidence of the markets' had been lost by the escalating state debt of economies with high current-account deficits, it seemed initially plausible to combine rescue credits with 'conditionalities' that specified fiscal austerity and internal devaluation through wage-reducing 'reforms' for debtor governments. Institutionally, agreement to these conditionalities were not defined by European legislation under the Community Method or through consensus-oriented voting in the Council but through extremely asymmetric bargaining between creditor and debtor governments that resembled conditions of an unconditional surrender.

Combined with the ECB's expansion of the money supply and its interventions in the market for state bonds, these measures have so for averted the collapse of the euro. From the perspective of creditor states, they succeeded (for the time being) in avoiding both, the need to cope with another banking crisis[21] and the job losses caused by a massive revaluation. From the perspective of debtor states, however, conditionalities combining fiscal austerity and internal devaluation have reduced domestic demand to such an extent that declining economic activity and escalating rates of unemployment have not only caused a deep economic and social crisis but have further increased excessive public sector indebtedness. Hence, even though declining domestic demand has reduced imports and thus current-account deficits, and even though rising unemployment has reduced average unit labour costs and thus the overvaluation of real effective exchange rates, the basic vulnerability of debtor states still remains.[22] As a consequence, the original state-credit crisis could still

[20] F.W. Scharpf, 'No Exit from the Euro-Rescuing Trap?' (2014) *MPIfG Discussion Paper* 14/4, Max Planck Institute for the Study of Societies, Cologne.

[21] As private capital was withdrawn in the euro crisis, the need to finance continuing current deficits through capital imports was and is reflected in the surplus positions of 'Northern' central banks on the ECB's 'Target-2' balance sheet. In effect, the private risk of creditor banks and investors has been transformed into the public risk of these central banks and the states owning them. Cf H.W. Sinn and T. Wollmershaeuser, 'Target Loans, Current Account Balances and Capital Flows: The ECB's Rescue Facility', (2011) *NBER Working Papers*, Working Paper 17626.

[22] W. Streeck and L. Elsässer, 'Monetary Disunion. The Domestic Politics of Euroland', (2014) *Max Planck Institute for the Study of Societies Discussion Papers*, Discussion Paper 14/17.

reassert itself if the confidence of 'the markets' in the ECB's resolve and capacity to support the credit worthiness of debtor states would come into question.

C The New Euro Regime

In order to reduce the risk of another euro crisis, a new regime has been designed and partly implemented over the last three years. Its options have been quite limited, however. Since the structural heterogeneity of EMU Member States persists, uniform exchange rate and monetary policies will continue to generate divergent impulses. In a federal state with full taxing powers and a large budget, these would be counteracted by the central government's fiscal, economic, labour market and social policies. But these capacities are lacking at the European level. Hence, the new euro regime must attempt to prevent the rise of external imbalances by either transferring additional competences to the European level or by increasing central controls over the exercise of governing powers remaining at the level of EMU Member States.

Thus, the new regime is adding banking regulation and supervision to the centralised competences of monetary and exchange rate policies. Beyond that, however, it adopts and extends the model established through the 'conditionalities' imposed on debtor states in the euro crisis. In substantive terms, the new Fiscal Compact combined with the Six-Pack's 'Excessive Deficit Procedure' and the 'European Semester' generalises the austerity requirements that were initially imposed on debtor states. And the 'Six-Pack' regulations adopted at the end of 2011 also include a new 'Excessive Imbalance Procedure', which invests the Commission with practically unlimited authority to investigate economic conditions in Member States, to identify imbalances on a wide variety of indicators, to define some of these as 'excessive', and to require their correction through national policy choices without regard to the division of European and national competences in the Treaties.[23] Moreover, these requirements are to be imposed and enforced with severe sanctions—unless the Council should object by reverse-qualified vote.

D Economic and Distributional Implications of the New Euro Regime

In substantive terms, these policies are guided by a consistent economic logic: If EMU Member States continue to be structurally heterogeneous, and if the resources of a European federal state are beyond reach, the Monetary Union will generate external imbalances that cannot be corrected through the adjustment of nominal exchange rates or countercyclical monetary policies. And if it is further assumed that rising state deficits my again trigger state-credit crises, the insistence on fiscal austerity and budget consolidation will also constrain the countercyclical use of national fiscal policy. In other words, economic imbalances must be prevented by the use of the remaining domestic policy competences of national governments.[24]

In a booming economy, therefore, governments must prevent external deficits and rising real exchange rates by cutting domestic demand through restrictive credit regulations, tax increases, spending cuts, and above all by somehow preventing the rise of nominal unit labour costs. If the economy is moving into a recession, however,

[23] F.W. Scharpf, *above*, n 19; M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', (2013) 76 *Modern Law Review* 817–844.

[24] Scharpf, *above*, n 7.

fiscal reflation of domestic demand through tax cuts and deficit spending is ruled out, and the regime may instead force the state to adopt additional austerity cutbacks to avoid violating the deficit rules. Under these conditions, cost-reducing supply-side reforms and wage cuts appear as the only option that might contribute to an export-led recovery. But if this strategy should succeed, as it did for Germany between 2001 and 2005, the consequence will be external surpluses that will then imply external deficits elsewhere.

In economic and distributional terms, therefore, the new euro regime implies that governments must exert continuous downward pressures on public sector functions and on wages—in the upswing to dampen the rise of external deficits and in the downswing to stimulate export-led recovery. If it were successful under both conditions, this regime would institutionalise a vicious cycle of competitive internal devaluation in the eurozone, where successful wage restraint in some parts would undermine competitiveness elsewhere, requiring new rounds of fiscal cutbacks, supply-side reforms and wage concessions, and so on. Under these structural conditions, therefore, the distributional balance between capital, labour and the state, which became externally constrained by international capital mobility after the 1970s, will be systematically shifted even further in favour of capital incomes by the new euro regime. In other words, saving the euro will continue to require national policies that have the effect of reducing the role of the state and increasing social inequality in eurozone economies.[25]

E Institutional Implications of the New Euro Regime

Apart from the effectively centralised competences of exchange rate, monetary, and in the future banking policy, the competences that need to be employed for the management of individual eurozone economies will remain at the Member State level. Thus, actual policies on taxation, social services and transfers, labour law, wage control, or credit regulation must be adopted and implemented by national governments. Compared with the 'global' management of aggregate demand through monetary policy, these policy choices will be more complex, less-well understood, and likely to have much higher political salience and to generate more political conflict.[26]

From the perspective of the euro regime, therefore, democratically accountable national governments acting on their own cannot be relied upon to pursue precisely those policies that the Commission considers essential for avoiding another euro crisis. Hence, it is indeed necessary that these choices should be supervised by a supranational authority in charge of the eurozone at large and with the capacity to enforce its directions. That is why the 'European Semester' requires national budgets to be reviewed by the Commission before they are even communicated to the national parliament. And that is why the Six-Pack regulations authorise the Commission to issue specific recommendations of national policy choices, and to enforce these

[25] D. Schraad-Tischler and C. Kroll, *Social Justice in the EU—A Cross-national Comparison. Social Inclusion Monitor Europe—Index Report* (Bertelsmann Stiftung, 2014).

[26] The use of monetary policy instruments may draw on theoretical and econometric models, which are not available for other policy instruments. Moreover, monetary policy is meant to serve macroeconomic purposes, short-term changes are expected, and debates are generally confined to an expert constituency. By contrast, policies regarding taxes, pensions, minimum wages, labour law or mortgage rules are meant to serve their own purposes, expected to create a stable environment for private actors, and debated in their own constituencies which may not be ready to accept the priority of macroeconomic purposes.

recommendations through severe sanctions. The euro group of the ECOFIN Council is formally involved in all these processes—except that the government under examination is not allowed to participate. But for binding recommendations and for the imposition of sanctions, the distrust of political solidarity among member governments is so acute that under the 'reversed qualified-majority' rule the Commission's proposals will become effective unless they are rejected by a qualified majority in the Council.[27]

In effect, therefore, the new euro regime depends on the supranational capacity to control and if necessary override democratic political processes at the national level. This power, including the authority to also override political majorities in the Council,[28] has been vested in the Commission by the Six-Pack regulations that were adopted as European law by the Community Method. Under normal constitutional standards, however, these regulations cannot legitimate the Commission's exercise of this authority.

F The Commission's Authority under the Euro Is Not a 'Rule of Law'

Regardless of its democratic deficit, Europe has always claimed to be 'a government of laws, not of men'.[29] And it was generally accepted that the legitimacy of these laws rested either on Treaties adopted by democratic Member States or on European legislation adopted according to the Community Method defined by the treaties. Under these conditions, acts of government applying European law were to be accepted under the legitimating principle of 'legality'. By the same logic, the Maastricht Treaty and the Stability Pact had attempted to establish a rule-based (although economically counterproductive) regime for the Monetary Union. When these rules were ignored or fudged in the international financial crisis and in the euro crisis, deviations could be justified as emergency measures that had the blessings of member governments as the 'masters of the Treaty'. For fiscal policy, the new Excessive Deficit Procedure is an attempt to return to a greatly tightened rule-based regime (which presently is again proving to be economically counterproductive).

By contrast, the Excessive Imbalance Procedure, which was also established by the Six-Pack legislation, seems to be based on the recognition that the eurozone economy (or any economy, for that matter) cannot be successfully managed by predefined rules. In order to prevent the rise of external and internal macroeconomic imbalances, the Commission must respond to extremely divergent, highly contingent and extremely variable conditions in Member State economies. To have any chance of success at all, therefore, the Excessive Imbalance Procedure must rely on the informed judgement of policy-makers who must be allowed to respond flexibly, even opportunistically and unequally to highly diverse and uncertain problem constellations. And it must be able to employ all policy instruments available at the national level—without regard to the division of European and national competences in the

[27] (F.W. Scharpf, *above*, n 19; D. Seikel, *Wie die Verfahrensregeln der neuen europäischen Economic Governance die Asymmetrie zwischen positiver und negativer Integration verstärken* (Hans-Böckler-Stiftung. Wirtschafts- und Sozialwissenschaftliches Institut, 2014).

[28] The European Parliament in its unrelenting hostility against the Council would even have preferred the automatic effectiveness of Commission proposals.

[29] On the ordo-liberal foundations of this commitment to rule-bound economic governance, see, eg, E.J. Mestmäcker, *above*, n 10; P. Dardot and C. Laval, *above*, n 10, ch. 7; C. Joerges, 'Brother, Can You Paradigm?' (2014) 12 *International Journal of Constitutional Law* 769–785.

Treaties.[30] Hence, the Six-Pack legislation did only define the procedures through which the Commission may act. But it did not and could not specify rules for the actual exercise of the Commission's functions. In total departure from any claims to rule-bound legitimacy, therefore, what the Excessive Imbalance Procedure has established is, and is meant to be, an entirely discretionary regime whose scope of delegated authority far exceeds the limits of generally allowable delegation in constitutional democracies.

In constitutional democracies, it is true, exceptionally wide discretionary authority is not entirely unheard of. But on matters with potentially high political salience, it is delegated to political actors whose authority rests, directly or indirectly, on democratic accountability. That is true of the autonomous powers of the directly elected president in the US or in France, and it is also true of heads of governments or ministers in parliamentary democracies whose delegated authority may be limited or withdrawn by parliamentary majorities at any time. These conditions are obviously lacking in the case of the European Commission.

And even if the political role of the Council were not emasculated by the reverse-qualified majority rule, its formal authority could not invest the Commission's discretionary decisions with democratic legitimacy. Ministers in Council may be indirectly legitimated by being accountable to their national parliaments that are legitimated by national elections. If that chain of legitimation is thought to be sufficient, it could legitimate the German minister of finance to accept sacrifices for Germany and to agree to general rules applying to all Member States. But there is no normatively acceptable argument empowering German voters to authorise German ministers to impose discretionary orders and severe sanctions on Greece. From the perspective of Greek citizens, being ruled by the euro group of the ECOFIN Council is not democratic self-government but the rule of foreign governments. In short, it is not only the practically unlimited scope of delegation and the intrusiveness of decisions that make the Six-Pack regime normatively unacceptable, but also the lack of democratic legitimacy of the Commission's exercise of discretionary authority.

III Is Democratisation the Answer?

Left-of-centre authors who are concerned about the erosion of social-market economies and the rise of transnational and social inequality under the euro regime nevertheless consider the 'transfer of sovereignty' to the EU as part of the solution, rather than as the problem. And if they acknowledge present deficiencies of European action, the standard response is to reassert a commitment to a genuine democratisation of the EU.[31] What is necessary, in their view, is to transform the Union into a parliamentary democracy, the Commission into a parliamentary government, and to replace the veto positions of national executives through majority rule in a bicameral European legislature. As a consequence, legitimacy deficits would be overcome as

[30] F.W. Scharpf, 'Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis', (2012) *Max Planck Institute for the Study of Societies Discussion Papers*, MPIfG Discussion Paper 12/6; F.W. Scharpf, *above*, n 7.

[31] See, for example, S. Collignon, *above*, n 5; S. Hix, *What's Wrong with the European Union and How to Fix It* (Polity, 2008); J. Habermas, *Zur Verfassung Europas. Ein Essay* (Suhrkamp, 2011).

expanded European competences, and resources would be employed and controlled by democratic European politics.

At this point, I will not reiterate the obvious arguments against the political feasibility of such changes under the existing rules of Treaty amendment or against the adequacy of present political parties and political communications for linking the exercise of European governing powers to the interests and expressed preferences of European voters. Instead, I will argue against the desirability of majoritarian democracy in the present EU on grounds of normative democratic theory.

A Majoritarian Democracy and Persistent Minorities

The question in which type of collectivities majority rule could be justified is one of the most difficult and least explored in normative democratic theory. In regard to democracy at the European level, it cannot even be discussed without entering the normative and empirical minefield of the '*no-demos*' debate.[32] Eventually, this field will have to be charted, but not in the present contribution. I will also not base my present argument on 'communitarian' or 'republican' versions of normative political philosophy.[33] Instead, I will turn to a strictly individualistic or 'liberal' version of axiomatic democratic theory that bypasses these issues, and to an author who has explicated a deductive justification of straightforward majority rule derived from normatively undisputed egalitarian principles.[34]

In Christiano's view, the fundamental principle of democratic equality cannot imply equality of outcomes. But it does imply equality of resources to influence the outcomes of political decisions. At minimum, therefore, democratic legitimacy presupposes the 'one-man-one-vote' rule and equality of voting power. By the same logic, democratic equality also implies neutrality: decision rules must not favour certain preferences or discriminate against others. In the abstract, both of these principles are uniquely realised by the rule of decision-making by simple majority. Any supermajoritarian rules or institutions would favour some preferences over others—generally, the defenders of the status quo over the promoters of change. But the two principles justifying simple majority rule come into conflict with each other when they are applied in real-world constellations where the specific preferences of 'persistent minorities' would never have a chance to influence the outcomes.[35] Under these conditions—Christiano refers to the situation of Catholics in Northern Ireland for an illustration—egalitarian democratic theory must allow for the possibility of supermajoritarian correctives.

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[32] P.G. Kielmansegg, 'Integration und Demokratie', in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (Leske & Budrich, 1996), at 47–71; J. Habermas, *The Post-national Constellation* (Polity, 2001); T. Risse, 'No Demos? Identities and Public Spheres in the Euro Crisis', (2014) 52 *Journal of Common Market Studies* 1207–1215.

[33] F.W. Scharpf, *above*, n 30.

[34] T. Christiano, *The Rule of the Many. Fundamental Issues in Democratic Theory* (Westview, 1996).

[35] T. Christiano, 'Democratic Equality and the Problem of Persistent Minorities', (1994) *Philosophical Papers* 169–190; T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), 119–137; S. Ganghof, 'Politische Gleichheit und echte Mehrheitsdemokratie. Über die normativen Grundlagen institutioneller Arrangements', (2005) 15 *Zeitschrift für Politikwissenschaft*, 741–763, at 758–759; S. Ganghof, 'Four Visions of Democracy. Powell's Elections as Instruments of Democracy, and Beyond', (2015) 13 *Political Studies Review*, 69–79.

B The Community Method Protects Democratic Legitimacy

And in fact, this has been the practice of constitutional democracies (such as Switzerland, Belgium or Canada) with deeply divided societies, structural majorities and hence potentially persistent minorities. In order to avoid disruptive conflicts or ultimately disintegration, they have developed institutions and practices of 'consociational' or 'consensus democracy'[36] with bicameral legislatures, super-majoritarian decision rules and consensus-seeking procedures that are supposed to protect the highly salient interests and preferences of minority groups. Surely no less would be required by democratic legitimacy in the EU.

Compared with consociational democracies, the economic, institutional, cultural and political heterogeneity of European states is extreme. And in terms of the varieties of capitalism, differences are now greater than they were in EU12 or EU15 in the 1980s and 1990s, when the present typologies were developed.[37] In effect, not only the German model of capitalism is, in Wolfgang Streeck' words[38] 'parochial' and cannot be generalised, but the same qualification also applies in principle to all non-liberal models of capitalism and the welfare state.

From the perspective of egalitarian democratic theory, therefore, they all would qualify as persistent minorities in a Europe-wide egalitarian democracy—at least with regard to majority decisions that would interfere with the politically salient values, institutions and interests of their parochial political economies. And in fact, EU decision rules for political legislation have respected this counter-majoritarian democratic restraint. The consensus requirements of the EU's 'Community Method' are so high that it appears most unlikely that EU legislation would ever override the politically salient interests of even a small group of Member States.

Present decision rules could of course be modified in some ways, perhaps to relax the Commission's monopoly of legislative initiatives. But they could not be replaced by a regime of straightforward majority rule without provoking disruptive political conflicts and radical anti-European opposition in Member States whose national politico-economic and socioeconomic orders and values could be overridden by explicitly political decisions adopted by majorities of 'foreigners' in the European Parliament (EP) and in the Council. In other words, the explicit switch to majority rule would destroy the protection of persistent minorities that is presently ensured by the Community Method. And it could politicise European legislation in ways that might transform the largely dormant 'no-demos issue' of EU legitimacy into conflicts that could destroy the Union.[39]

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[36] G. Lehmbruch, *Proporzdemokratie. Politisches System und politische Kultur in der Schweiz und in Österreich* (J.C.B. Mohr, 1967); A. Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Sage, 1968); A. Lijphart, *Patterns of Democracy. Government Forms and Performance in 36 Countries* (Yale University Press, 2012).

[37] P.A. Hall, 'Varieties of Capitalism and the Euro Crisis', (2014) 37 *West European Politics* 1223–1243; M. Höpner and M. Lutter, 'One Currency and Many Modes of Wage Formation: Why the Eurozone Is Too Heterogeneous for the Euro', (2014) *Max Planck Institute for the Study of Societies Discussion Papers*, MPIfG Discussion Paper 14/14; W. Streeck and L. Elsässer *above*, n 22.

[38] W. Streeck, 'German Capitalism: Does It Exist? Can It Survive?' in C. Crouch and W. Streeck (eds), *Political Economy of Modern Capitalism: Mapping Convergence and Diversity* (Sage, 1997), at 33–54.

[39] S. Bartolini, *Restructuring Europe: Centre Formation, System Building and Political Restructuring between the Nation State and the European Union* (Oxford University Press, 2005).

C But the Price Is High

The EU, however, is paying a very high price for respecting the normative limits of majoritarian democratic legitimacy:

The immediate effect is the procedural self-paralysis of legislative political action at the European level. Institutionalised veto positions are, of course, not only used in defence of the legitimate diversity of national institutions and values; they may be employed to advance any kind of interest—not least the interest of less-involved governments in maximising the price at which they could sell their vote. In the past, 'bloody minded bargaining' was to some extent impeded by the pro-European *esprit de corps* of long-serving national officials in the Committee of Permanent Representatives and the Council Secretariat. But what worked in EU12 or EU15[40] has in the meantime become less effective. At any rate, when consensus appears unattainable, the Commission will not even try to launch a legislative initiative. So where it does, total blockade will be less likely than extended bargaining over relative advantages and ultimately agreement on the lowest common denominator. In other words, on issues involving salient conflicts of interest, European legislation has never been, and is not now, an instrument of effective political action.[41]

That is why the 'bypass' of integration through law has been effective in promoting economic liberalism even in periods where a majority of Member States were governed by left-of-centre political parties. It is also why, when confronted with a fundamental crisis that could not be resolved through judicial action, European efforts to rescue the Monetary Union completely bypassed the Community Method in favour of asymmetric bargaining between creditor and debtor states. And when the emergency measures adopted in disregard of the Maastricht rules were followed by institutional reforms, the new euro regime abandoned even the pretence of relying on political consensus in the Council. What has been established instead is the supranational authority of the Commission to adopt and impose discretionary policy choices on EMU Member States without either parliamentary or intergovernmental political control.

In substantive terms, moreover, it hardly needs saying that the liberalising effect of integration through law on social-market political economies is being dramatically reinforced by the euro regime, which is compelled to ensure the continuing confidence of 'the markets' in the solvency of eurozone states by imposing continuous downward pressures on wages and government spending in all eurozone political economies. In short, from the perspective of pro-European and pro-social-market democrats, the present combination of policy-making regimes in Europe must appear as an unmitigated failure in terms of both problem-solving effectiveness and political legitimacy.

D The EU at an Impasse—Waiting for the Crash?

Present demands for the democratisation of the EU, assuming they were politically feasible, might improve problem-solving effectiveness if they implied straightforward majority rule. But then they would be normatively unacceptable, violating fundamen-

[40] F. Hayes-Renshaw and H.S. Wallace, *The Council of Ministers* (Macmillan, 2007); J. Lewis, 'The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council's Infrastructure', (2000) 7 *Journal of European Public Policy* 261–289.

[41] G. Falkner (ed), *The EU's Decision Traps. Comparing Policies* (Oxford University Press, 2011).

tal requirements of democratic equality, and they might well raise political conflict to a level where the EU might disintegrate. In any case, however, all radical institutional reforms that might strengthen problem-solving effectiveness and democratic legitimacy at the same time would appear to lack political feasibility. They would have to be designed and adopted in the same veto system that is presently constraining democratic political action as well as the range of feasible policy options. Under these conditions, institutional and policy reforms would continue to depend on the agreement of all present veto players. Hence, feasible changes will at best be incremental and path-dependent, and thus most likely to produce 'more Europe' of the same variety—more liberalisation internal devaluation, centralisation and more technocratic-authoritarian rule.

In short, the EU seems to be at an impasse in which, according to the best of our present knowledge as political economists, political scientists and policy researchers, politically feasible policies appear to be ineffective and illegitimate, whereas radical policy changes seem to lack political feasibility. In other words, our conclusions seem to resemble the advice the tourist received when asking the Irish farmer for the way to Tipperary: 'If I were you, I wouldn't start from here'.

We also know, however, that political-feasibility constraints depend on conditions that may change. Institutional positions may lose their veto, occupants of veto positions may be displaced, the exercise of veto power may be de-legitimated, and veto players may even change their policy preferences in light of changed circumstances or changed ideas. Thus, the most likely scenario that would allow major institutional and policy changes would be a crisis that is so deep and destructive that present policies cannot be maintained and that present veto players are either swept away or will no longer have a preference for the status quo. For a moment, the international financial crisis following the collapse of the Lehman Bros. bank in the fall of 2008 seemed to provide such an opportunity as the neoliberal belief in the efficiency and stability of unregulated financial markets was badly shaken. But once stop-gap measures at taxpayers' expense had prevented the total collapse, initiatives for regulatory reforms were slow in coming, and international agreement was soon impeded by governments defending the interests of their respective financial industries.

Perhaps that crisis was not deep enough to jolt international and European political economies out of their path-dependent tracks. But it also matters that there were no political forces, internationally or in Europe, that were prepared to exploit the crisis as an opportunity for fundamental change. What we had and have are brilliant analyses of what has gone wrong, in Europe and the world since the end of *trentes glorieuses*. But we did and do not have normatively and pragmatically convincing ideas of what could and should be done if the window of political opportunity for a basic overhaul of the system should open. This is regrettable, because the opportunity might arise again.

There is little assurance that the international financial system should now be more stable than it was before 2008. And by all realistic accounts, the euro crisis is not yet over, and it seems that present policies may actually increase the risk of its recurrence. And if it should recur, Angela Merkel's prediction of 19 May 2010 may yet be confirmed: '*Scheitert der Euro, dann scheitert Europa*'.[42] But if the euro should indeed

[42] Regierungserklärung, 19 May 2010, available at https://www.bundestag.de/dokumente/textarchiv/2010/29826227_kw20_de_stabilisierungsmechanismus/201760.

fail and throw Europe into an existential crisis, we must hope that the response will not again be about saving the euro. It should be about saving Europe.

Even if that extreme emergency should arise, the world would not come to an end. But political veto positions might be shaken, and previously unthinkable options might suddenly be worth considering. I have little doubt that climatologists, when faced with the opportunity, would have programmes to promote. And since almost everybody (with the possible exception of Jacques Delors and Helmut Kohl) now seems to consider the Monetary Union a mistake, one should also hope that political economists studying its deficiencies[43] would propose not just limited improvements but fundamental (and viable) alternatives to the present regime—perhaps even including the option of replacing bank money with 'sovereign money'.[44] These are perspectives that I will not pursue here.

But even the best substantive policy proposals might fail, or would deepen the EU legitimacy deficit, unless they could go hand in hand with the activation of democratically legitimated capacities for political action at the European and national levels. For Europeanist policy researchers, including myself, that implies a shift of normative perspective from the critique of output legitimacy to an emphasis on input legitimacy.[45] This shift does not imply a belief in the prestabilised harmony between ('deliberative') democratic inputs and the common good. It responds, instead, to the suffering imposed on European non-elites through European policies defined by democratically unconstrained pro-European elites. If this is felt to have populist overtones, so be it. Democracy is meant to empower non-elites in relation to governing elites.[46] And as depoliticised integration through law and the depoliticised euro regime have led Europe into its preset impasse, a fundamental change of direction will presuppose the politicisation of policy choices under conditions of political accountability on both levels of government.

IV Community and Autonomy

But politicisation without the possibility of autonomous policy choices is more likely to produce frustration, alienation, apathy or rebellion, rather than democratic legitimacy. In multilevel polities, however, political autonomy is necessarily constrained at both levels. These constraints are minimised in the institutional architecture of 'sepa-

[43] P. De Grauwe and J. Yuemei, 'The Fragility of Two Monetary Regimes: The European Monetary System and the Eurozone', (2015) 20 *International Journal of Finance and Economics* 1–15.

[44] A. Jackson and B. Dyson, *Modernising Money. Why Our Monetary System Is Broken and How It Can Be Fixed* (Positive Money, 2013); J. Huber, *Sovereign Money in Critical Context* (Positive Money, 2014), both available at http://www.positivemonet.org.

[45] The point needs more reflection than I can provide here (cf F.W. Scharpf, *above*, n 30): Before the crisis, EU legitimacy had depended on low political salience. It was ensured as much by the outputs the EU avoided (policies challenging salient citizen interests and preferences) as by the generally welcome outputs ascribed to it (eg, Europe-wide mobility and exchanges). Under these conditions, the lack of input legitimacy was more of an academic concern than a political issue. But the crisis has changed that, and the institutional and policy reforms that will be required could not possibly succeed in the absence of input legitimacy and effective democratic accountability.

[46] This is not meant to deny the basic tension between 'responsive' and 'responsible' government (cf P. Mair, 'Smaghi versus the Parties: Representative Government and Institutional Constraints', in A. Schäfer and W. Streeck (eds), *Politics in the Age of Austerity* (Polity Press, 2013), at 143–168. But for the tension to be resolved in the 'well-understood' interest of the governed, governing elites must be made to depend on the political support of non-elites.

ration federalism' in the US, where the federal government and the states have separate areas of legislative competence, separate tax resources and separate administrative agencies. The EU, however, shares some of the crucial aspects of German 'joint-decision federalism', where the federal government depends on the Länder for the implementation of its laws, whereas Länder governments participate in federal legislation.[47] In such structures, the ideal of democratic autonomy at both levels of government is difficult to realise. If it is to be approximated in Europe, it depends on the spirit and the practices of mutual accommodation, where Member States must defer to democratic majorities at the European level, whereas European majorities must respect the legitimate diversity of democratic Member States.

A A European Demoi-cracy?

At the empirical level, the need to accommodate diversity is reflected in long-standing discussions and the unsystematic and quite limited practices of 'differentiated integration' and 'enhanced cooperation'.[48] At the normative level, a growing number of contributions to the theory of a European *demoi-cracy* have come to challenge the unitary bias of standard democratic theory as well as 'messianic' political beliefs[49] that treat European integration as a value that is lexicographically superior to all other concerns.[50] The original intent of these contributions was to defend the legitimacy of the EU against challenges asserting the lack of a common European *demos* and a 'democratic deficit' because European institutions did not resemble majoritarian democracies at the national level. Treating legislation by the Community Method as paradigmatic, the theory of *demoi-cracy* denies the assumption that political legitimacy presupposes the existence of a unitary European *demos*. Instead, EU governance is assumed to be legitimated by the multiple *demoi* of its constituent polities—whose citizens are represented individually and as 'states-peoples' at the level of the Union. Being part of a common polity, however, these *demoi* must be aware of their increasing interdependence. Hence, they must accept not only the need for mutual accom-

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[47] F.W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', (1988) 66 *Public Administration Review* 239–278; A. Stepan, 'Federalism and Democracy: Beyond the US Model', (1999) 10 *Journal of Democracy* 19–34; K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001).

[48] K. Holzinger and F. Schimmelfennig, 'Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data', (2012) 19(2) *Journal of European Public Policy* 292–305; D. Leuffen, B. Rittberger and F. Schimmelfennig, *Differentiated Integration. Explaining Variation in the European Union* (Palgrave Macmillan, 2013).

[49] J.H.H. Weiler, 'Europe in Crisis. On "Political Messianism", "Legitimacy" and the "Rule of Law"', (2012) *Singapore Journal of Legal Studies* 248–268, available at http://law.nus.edu.sg/sjls/articles/SJLS-Dec-12-248.pdf; 'In the Face of the Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825–841.

[50] This literature requires and deserves a more thorough discussion. See K. Nicolaidis, 'The New Constitution as European Demoi-cracy?', (2003) 7 *Critical Review of International Social and Political Philosophy* 76–93; 'The Idea of European Demoicracy', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012), at 247–274; F. Chevenal and F. Schimmelfennig, 'The Case for Demoicracy in the European Union', (2013) 51 *Journal of Common Market Studies* 334–350; R. Bellamy, '"An Ever Closer Union Among the Peoples of Europe": Republican Intergovernmentalism and *Demoi*cratic Representation within the EU', (2013) 35 *Journal of European Integration* 499–516; P. Lindseth, 'Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration', (2014) 15 *German Law Journal* 529–568.

modation among each other, but also the need for common policies to avoid negative externalities and to facilitate cooperation for common purposes. What is crucial, however, is that common policies must not undermine their own bases of legitimacy—hence, they must respect the integrity of the multiple *demoi*. In spite of various imperfections, therefore, European legislation by the Community Method is seen as approximating the normative ideal.[51]

Demoi-cracy is attractive as a normative concept. What is problematic, however, is the implicitly affirmative interpretation of the present state of the Union. By focusing on European legislation, authors tend to downplay the constraints imposed on the plural *demoi* through negative integration and the supranational euro regimes, as well as the constraints imposed on effective political action at the European level through the multiple-veto system of the Community Method. In order to approximate its normative aspirations, therefore, the theory of *demoi-cracy* would require a substantial reversion of governing powers to the level of EU Member States, and at the same time a substantial strengthening of the capacity for European political action on problems that cannot be resolved through the horizontal self-coordination among states-peoples. What is lacking, in other words, are discussions about the ways and means through which the normative aspirations of the theory could be realised in practice.

B Ground Rules for a Multilevel European Democracy

As a contribution to such discussions, I will suggest a set of basic decision rules for a European constitution that responds to *demoi-cratic* aspirations for Member State autonomy while it at the same time facilitates political action and opportunities for politicisation and democratic accountability at the European level. As will be obvious, however, such rules could not possibly be realised through path-dependent incremental reforms within the present institutional framework. Hence, they are here presented as suggestions from the perspective of the morning after the crash.

1. De-constitutionalisation of European law
   In comparison to the present Treaty, the coverage of a European constitution should be greatly reduced. In addition to rules for the organisation and procedures of European governing institutions and the allocation of legislative competences between the Union and its Member States, the constitution should ensure the protection of individual civic and civil rights, but it should not include rules amounting to an economic constitution.
   All other rules of the present Treaty and the *acquis* should remain in force but would lack constitutional status.
2. Multiple legislative initiatives
   Not only the Commission but also qualified minorities in Parliament and Council should be able to introduce legislative initiatives.

[51] In this regard, *demoi-cracy* differs from the position of Habermas (*above*, n 31, especially at 62–69). He also asserts a dual identity of individuals as citizens of their respective states and of the Union, but in his view this dualism justifies majoritarian democracy at the European level in order to break the stranglehold of intergovernmental veto players under present rules of the Community Method. See also, D. Gaus, 'Demoi-kratie ohne Demos-kratie—welche Polity braucht eine demokratische EU?' in O. Flügel-Martinsen, D. Gaus, T. Hitzel-Cassagnes and F. Martinsen (eds), *Deliberative Kritik—Kritik der Deliberation. Festschrift für Rainer Schmalz-Bruns* (Springer, 2014), at 297–322.

3. Majority rule
   Ordinary European legislation should be adopted by majority votes in Parliament and Council.
4. Member State opt-outs
   Individual Member States should have the right to opt out from ordinary legislation.
5. Opt-outs denied by qualified majorities
   Legislation that proposes to exclude opt-outs must be adopted by absolute majority in Parliament and by qualified majority in Council.
6. Conditional opt-outs from the *acquis*
   One or more Member States should be able to initiate legislation even if it contravenes parts of the *acquis*. Such initiatives must be notified to the Commission. They may be denied by joint majorities in Parliament and Council.

The rationale of the rules suggested is to enlarge, at the same time, the action spaces of national and European political processes and to reduce the constraints imposed by non-political domination.

Rule (1) is an attempt to reduce the domain of constitutional law in the EU. As has often been noted, the Treaties are much more extensive than national constitutions, regulating in great detail questions that in constitutional democracies would be settled by political legislation.[52] Under the ECJ's doctrines of 'supremacy' and 'direct effect', these rules and their judicial interpretation take precedence over the laws and constitutions of EU Member States. By itself, this is not remarkable—federal law will override state law in federal states as well. And even if a reformed Treaty would approximate the ideal of a 'lean constitution', Member States and private actors would of course continue to be bound by the present *acquis*.

What would matter, however, is the removal of constitutional constraints on European legislation—which under the ECJ's extensive interpretation of Treaty law is often reduced to enacting mere codifications of the case-law (Martinsen 2014). Instead of being bound by petrified European law, political legislation could then remove existing legal constraints on Member State political action, and it could adopt European policies that might conflict with the 'economic constitutionalism' of the present Treaties as interpreted by the Court and the Commission.

Rule (2) would eliminate the Commission's monopoly of legislative initiatives.

Rules (3) and (4) represent the constitutional core of the proposal. The capacity for political action at the European level will increase as the stranglehold of the multiple-veto system will be loosened. At the same time, Rule (1) will open the de-constitutionalised *acquis* for political reconsideration, and Rule (2) will widen the opportunity for legislative initiatives. As a consequence, one should expect a broader range of politically more salient issues to be introduced and debated on the European agenda.[53] And as European politics would lose its boring

[52] D. Grimm, 'Treaty or Constitution? The Legal Basis of the European Union after Maastricht', in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds), *Developing a Constitution for Europe* (Routledge, 2004), 70–89; D. Grimm, *above*, n 13.

[53] Since a 'lean constitution' would reduce the ever widening domain of the Court's teleological interpretation of the Treaties, I am not sure how much more would be gained by additionally insisting on a range of substantively defined 'reserved powers' of Member States (D. Grimm, *above*, n 13, 1057). In principle, the political dynamics of majority rule plus opt-outs could favour decentralisation as well as further

character,[54] media attention is likely to increase and political parties and parliaments in the Member States are more likely to debate the significance of European options from national and perhaps also from European perspectives. Such debates will gain in salience by the perception that it is more likely than before that politically controversial legislation might actually be adopted at the European level, rather than being bogged down in endless bargaining.

At the same time, of course, straightforward majority rule would raise the political salience of the *no-demos* and persistent minorities issues. As a consequence, political conflict and protests might de-legitimate political action at the European level. For this reason, the proposal would replace the protection of legitimate diversity that is presently provided by the Community Method with the possibility of national opt-outs.[55] This would eliminate the persistent minorities problem. Whether it will also remove the *no-demos* issue (which I have not discussed here) is less certain. But if the opt-out enables decisions by a 'coalition of willing *demoi*', the no-*demos* issue would lose some of its normative salience.[56]

What would matter instead are the political processes by which national *demoi* decide about the use of opt-out options. In effect, they would be faced with Albert Hirschman's three moral options:[57] They could mobilise political resources to influence the outcome by exercising *voice*—which also would increase their involvement in and commitment to political processes at the European level.[58] If unsuccessful, they could manifest their *loyalty* by accepting the outcome of majority rule in European as in national politics. And if the outcome should indeed violate highly salient national concerns, the possibility of an opt-out would provide them with an *exit* option that should defuse potentially explosive opposition.

Rule (5) needs some elaboration. It is meant to respond to constellations where uniform application throughout the Union is considered essential. In the normative context of *demoi-cracy*, of course, the uniformity of European law as such will cease to be treated as a value by itself. It may often be desirable for reducing transaction and mobility or supervisory costs, but in cases of disagreement proponents of change will consider these in relation to the purposes they hope to advance. These may differ significantly in their vulnerability to opt-outs, and such differences may be clarified by reference to some analytical distinctions.

Where benefits and costs of European action will only affect the participating Member States, there is no reason to insist on Europe-wide uniformity. If the benefits

centralisation. What would matter more, in my view, would be the possibilities of challenging the existing *acquis* (Rule 6).

[54] A. Moravcsik, 'In Defense of the "Democratic Deficit": Reassessing the Legitimacy of the European Union', (2002) 40 *Journal of Common Market Studies* 603–634.

[55] The opt-out would have to be declared before the final vote. As a consequence, the rule in question would not apply to that Member State, and its Members of European Parliament (MEPs) and representatives in the Council would not participate in the vote.

[56] As majorities would achieve issue-specific gains of cooperation, democratic self-government would be realised at the policy level. But as different majorities are likely to form in different issue areas, they would not necessarily strengthen the sense of common identity and the democratic legitimacy of the European polity.

[57] A.O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press, 1970).

[58] In a later contribution, Hirschman noted that the possibility of exit may in fact increase the motivation to use voice, A.O. Hirschman, *Rival Views of Market Society and Other Recent Essays* (Viking, 1986), at 89.

are generally attractive, initially hesitant non-collaborators may join later—as was true of the *Schengen* Treaty.[59] And if collaboration is not generally considered desirable, opt-outs would accommodate legitimate diversity. They may be problematic if outsiders cannot be excluded from sharing benefits, whereas the costs of collaboration must be borne by participants. In that case, free-riders may reduce but probably will not destroy the benefits of cooperation. In still other constellations, however, non-collaborators might enjoy competitive advantages or otherwise reduce the benefits that collaborators hope to achieve. Where that is the case, the anticipation of opt-outs may well prevent potential beneficiaries from participating—think of the harmonisation of capital taxes.[60] In other words, while the possibility of opt-out should be the general rule, it should not apply everywhere.

But where it should or should not apply is a matter for political judgement. Rule (5) would thus allow promoters to propose legislation that will apply without exception. But in that case, democratic legitimacy would also require a return to decisions by qualified majorities in Parliament and Council.[61] It would then be for the promoters to assess the trade-off between a more easily adopted rule that is potentially vulnerable to opt-outs, and the delay, compromises and potential blockades that a generally applicable rule might face.

Rule (6), finally, addresses the fact that the 'petrified' *acquis* does include rules that would not now be adopted and may never have had political support. Rule (1) would allow existing non-constitutional law to be corrected by legislative majorities. But given the economic, institutional and cultural diversity of EU Member States, highly salient national interests and preferences may be too 'parochial' to mobilise majorities for a *general* revision. Under these conditions, there ought to be some kind of political recourse, but unilateral opt-outs—which might violate common values or impose negative externalities on other Member States—would not be the appropriate solution. Instead, it is suggested that Member States should notify the Commission of legislative initiatives that would conflict with existing European law. After being reviewed in light of the specific case, such initiatives could be denied by parallel majorities in Parliament and Council. In effect, the possibility of re-examining the *acquis* on a case-by-case basis should result in a more fine-grained pattern of

[59] R. Adler-Nissen, 'Opting Out of an Ever-close Union: The Integration Doxa and the management of Sovereignty', (2011) 34 *West European Politics* 1092–1113.

[60] That condition seems to be assumed by Martinsen *et al*. when they warn of a 'spiraling of opt outs' that might cause a far-reaching decline of integration. But these conditions do not apply everywhere, and the possible decline of integration must be seen in comparison to the gains of European action achievable through majority rule. Cf D. Martinsen and A.U. Wessel, 'On the Path to Differentiation: Upward Transfer, Logic of Variation and Sub-Optimality in EU Social Policy', (2014) 21 *Journal of European Public Policy* 1255–1272.

[61] In German federalism, the basic idea of conditional *Abweichungsrechte* had been first suggested in 1977. While still controversial in the debates leading to the reforms of 2005, it was cautiously accepted for a narrow range of issues. See F.W. Scharpf, *Föderalismusreform. Kein Ausweg aus der Politikverflechtungsfalle?* (Campus, 1999). Thus, Art. 84 (1) of the Basic Law allows Länder opt-outs from procedural regulations in federal statutes. If opt-outs should be excluded, however, the statute requires an absolute majority of Bundesrat votes. Art. 72 (3) also introduced the possibility of exceptions for a few items of substantive federal legislation. In a recent evaluation of post-reform practices, these 'world-wide unique' rules were assessed to be unequivocally successful in practice and to provide a model for the further evolution federal-Länder relations. See H.P. Schneider, *Der neue deutsche Bundesstaat. Bericht über die Umsetzung der Föderalismusreform I* (Nomos, 2013), 743–749.

European law that is based on a political assessment of the actual need for Europe-wide uniformity,[62] and it should eventually limit the body of binding European law to rules that serve a positive European purpose and that have the political support of current legislative majorities at the European level.

C Conclusion: Community and Autonomy

In combination, these rules would strengthen the capacity for democratic political action at both levels of the European polity.

They would protect the autonomy of EU Member States against legal constraints that are not effectively serving common European purposes in the considered political judgement of present European legislative majorities, and they would allow effective defences for the critical interests of 'persistent minorities'.

At the same time, they would liberate political initiatives at the European level from the stranglehold of overextended Treaty law and of the multiple-veto system of the Community Method. One should expect, therefore, that the combination of majority rule and the opt-out options would widen the potential agenda of legislative choices, and that it would also allow politically more salient European policy choices. Hence, media attention is likely to increase, and political parties and parliaments in the Member States are more likely to debate the significance of European policies (and the desirability of opt-outs) from national and perhaps also from European perspectives. Such debates will gain in interest as politically controversial legislation might actually be adopted at the European level, rather than being bogged down in endless bargaining. As a consequence of politicisation, the level of conflict over European legislation may well rise. But while conflict resolution through straightforward majority rule would generate severe problems of democratic legitimacy, the possibility of national opt-outs should avoid head-on confrontation. And as political involvement in European policy choices (and in decisions about opting out) would increase, such conflicts could also increase the political legitimacy of the multilevel European polity.[63]

In the present institutional framework of the EU and the Monetary Union, however, the rules suggested here would so clearly violate the constraints of political feasibility that responsible political actors would rightly refuse to promote them. And if the socioeconomic and political compulsions of the Monetary Union should

[62] For cognitive reasons, *general* legislation will always overgeneralise because it can never consider all potential case constellations. In federal systems, however, where it is combined with the supremacy of federal over state law, general legislation is bound to produce overcentralisation if both levels of government may legislate in the same policy area (which is true in Germany and in the EU, but not generally in the US).

[63] Exploring the possibility, the preconditions and the limits of political integration through political conflict must be left for another time: see, eg, R. Dahrendorf, *Class and Class Conflict in Industrial Society* (Stanford University Press, 1959); H. Dubiel, 'Konsens oder Konflikt? Die normative Integration des demokratischen Staates', in B. Kohler-Koch (ed), *Staat und Demokratie in Europa* (Leske & Budrich, 1992), at 130–137; G. Göhler, 'Konflit und Integration', in B. Kohler-Koch (ed), *Staat und Demokratie in Europa* (Leske & Budrich, 1992), at 138–146; M.T. Greven, 'Mitgliëdschaft, Grenzen und politischer Raum: Problemdimensionen der Demokratisierung der Europäischen Union', in B. Kohler-Koch (ed), *Regieren in entgrenzten Räumen* (Leske & Budrich, 1998), at 249–270; M. Greven, *Die politische Gesellschaft. Kontingenz und Dezision als Probleme des Regierens und der Demokratie* (Leske & Budrich, 1999); C. Mouffe, *The Democratic Paradox. London* (Verso, 2000).

continue, they would not make much of a difference even if they were adopted. But if a future crisis should shake up not only the present monetary regime but the EU as well, it would be useful to have well-explored ideas about the future shape of a democratic multilevel polity in Europe. It is in the spirit of this exploration that I am offering the present essay.