



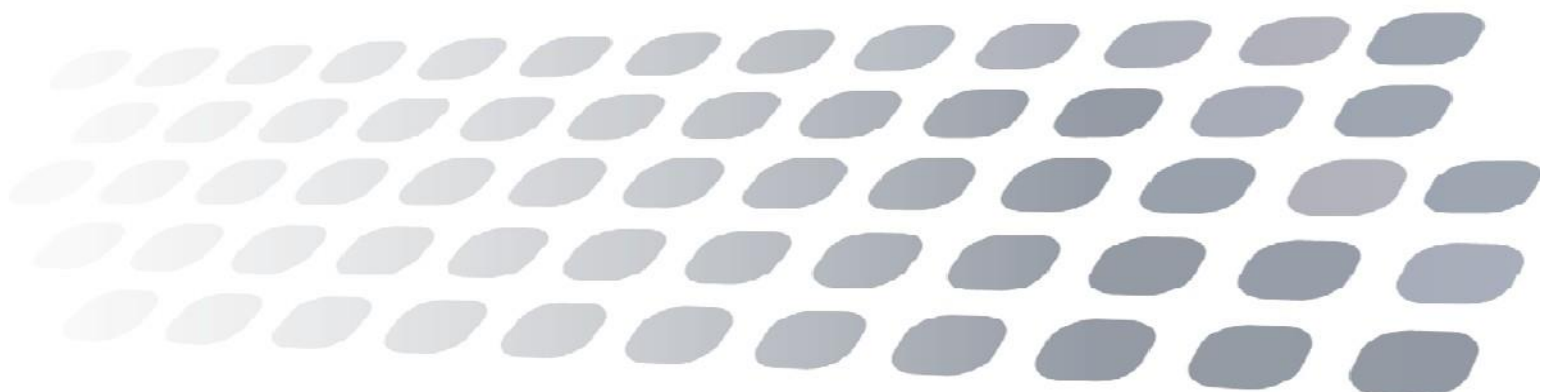
**CENTRO STUDI SUL FEDERALISMO**

**PERSPECTIVES ON FEDERALISM**

**VOLUME 5**

**ISSUE 3**

**2013**





ISSN: 2036-5438

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ISSN: 2036-5438

# The politicization of the European elections and its potential effects on the EU

by

Roberto Castaldi

Perspectives on Federalism, Vol. 5, issue 3, 2013



## Abstract

A first attempt at politicizing the European elections occurred in 2014. Its main pillar was the selection and indication of party candidates to the post of Commission president by the main European political parties and groups. If the Parliament obtains that the first nomination be given to the party candidate of the group with the most seats in the EP, namely Jean-Claude Juncker, it would probably also rally behind that candidate and ensure his election. This would have long-lasting short-, medium- and long-term effects on inter-institutional relations and European integration that need to be considered. The nomination of the next Commission President is thus a fateful choice. It will not only have very significant political and institutional consequences, but will also set up or prevent a social and political dynamics towards the democratization of the EU.

## Key-words:

European Union, 2014 European elections, politicization of the EU



A first attempt at politicizing the European elections occurred in 2014. Its main pillar was the selection and indication of party candidates to the post of Commission president by the main European political parties and groups. The selection procedures were significantly different from one party to another. Eurosceptic parties preferred not to have a candidate. This is coherent, as the very fact of having one points to the transformation of the Commission into a true EU government and gives political and democratic salience to the European election and Parliament – all developments they oppose.

There were some debates among the various candidates, some bi-lateral ones among those by the two largest European parties, and one broadcasted live into all EU countries. Notwithstanding the excitement by EU scholars and practitioners, in several countries the media paid relatively little attention to these debates, and some national parties in different countries did not exploit, or even mention, their candidate for Commission President. Therefore, it was a very partial politicization. Still, it proved enough to invert the constant decline in turnout figures since the first direct election of the EP. The 2014 election showed participation by slightly more voters than in 2009, thus reversing the declining trend, if only by a fraction.

The fact that citizens and media paid relatively little attention can be explained by two important factors. On the one hand, politicization happened for the first time, and the mental habitus takes time to adapt to new realities. On the other hand, many observers believe this a useless exercise, because the European Council would claim the power to choose the Commission president, as usual, and not let the European parties and Parliament impose a candidate.

Therefore, the result of the struggle between the European Parliament and the Council will be particularly fateful. According to Art. 17.7 of the Lisbon Treaty, “Taking into account the elections of the European Parliament and after having held appropriate consultation, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate, who shall be elected by the European Parliament following the same procedure”. This mechanism resembles very much that of a



parliamentary systems without a direct election of the Prime Minister, but with the election by the Parliament on a designation by the Head of State (president or monarch) based on the electoral results.

If the Parliament obtains that the first nomination be given to the party candidate of the group with the most seats in the EP, namely Juncker, it would probably also rally behind that candidate and ensure his election. This would have long-lasting short-, medium- and long-term effects on inter-institutional relations and European integration that need to be considered.

In the short-term, such a choice would provide the Commission with a strongly legitimised leadership, potentially able to take bold initiatives - renovating its role as agenda-setter, rather than as a further secretariat of the Council - and in a substantial alliance with the Parliament. This would probably push for a change in EU economic policies as the supra-national institutions in the past legislature demanded more investments and growth-oriented policies, while the national governments in the Council decided for an austerity strategy which proved disastrous in both economic and social terms. It would also show that the European citizens' vote does matter, and that the innovations of the Lisbon Treaty did actually start a European democratic process of accountability, notwithstanding the limits of this first experiment.

In the medium-term it would imply an upgrading of the Parliament vis-à-vis the all-powerful European Council. This was a potential result of the Lisbon innovations that some national governments would like to ignore, putting into questions the principles of the rule of law and *pacta sunt servanda* that are so essential for democracy. In other words, it would alter the current (im)balance of power in the inter-institutional dynamic by strengthening the supranational institution in their relationship with the inter-governmental one.

However, the most important effects will be long-term. First, all political leaders aspiring to become President of the Commission will be forced to participate in their European party selection procedure and become the party candidate. This implies that more transparent and democratic selection procedure will probably be set up, producing a significant strengthening of European parties in political and organizational terms. Second, parties will presumably tend to select political leaders with an appropriate linguistic knowledge. At an individual level of analysis of political elites, this will also create an



incentive for politicians active at the European level to learn several European languages to be able to campaign effectively in the main countries and increase their chances of being selected as party candidate. Third, all this will probably produce a much higher level of political competition. In other words, top-class and highly visible leaders will probably be selected as party candidates to increase the chances of the party. Fourth, eventually this will produce much higher citizen and media attention towards the European elections, the candidate debates etc. helping to create a European public space, today still in an embryonic form. A process towards a more democratic and accountable European leadership would be set in motion.

If these are the pros, several commentators also see the cons of such an option. Many on the political left consider Juncker to be an old-fashioned supporter of austerity, not suited to steer the needed change in terms of economic policies. Others are afraid that this would result in a politicization of the European Commission, which also has delicate functions of control not suitable to party partisanship. Others still complain that this democratic process reduces the number of potential candidates available, depriving the EU of potentially excellent presidents of the Commission simply because they were not party candidates.

Those ideas are essentially flawed and do not take into account the reality of European politics. I will analyse the first two objections together. The EU is a multi-party political system with an essentially proportional electoral system in all member states, at least as far as the European elections are concerned. The political offer differs quite significantly from country to country: for example, there is no People's party affiliate in the UK. All this implies that it is currently impossible for any European party to get a parliamentary majority. This has consistently been the case since the first direct election in 1979, and even before, and is not going to change unless a different electoral system is put in place. Since 1979, unsuccessful discussions have been held to set up a uniform proportional electoral system. If it was impossible to agree on that, it is even more difficult to agree on a strongly majoritarian system – the only one that could possibly change the described situation, and only so in the long run. Therefore, the politicization of the leadership will help to create a European debate about the main policy options, provide a clearer picture of citizens' preferences, and give stronger legitimacy to the Commission president, increasing his/her



ability to exercise an effective leadership, but it would not substantially alter the bi-partisan composition of the Commission as a collegial body.

This applies to Juncker, too. To get a majority in the EP, he will have to develop an alliance with several other political groups, at least the socialists and the liberal-democrats, possibly also with the greens. This is coherent with the fact that most European legislation is negotiated for a long time and eventually usually approved by a vast bipartisan majority in the EP. It is unequivocal that the election results show that European citizens want to change the EU economic policy and Juncker's allies will keep reminding him about this. Furthermore, it should not be forgotten that Juncker was one of the four Presidents asking for banking, fiscal, economic and political union and complained about the resistance on that path when he left the post of Eurogroup president. So he is aware of the limits of the current EU governance structure and of the need to reform it in order to overcome the crisis.

The third idea deserves a separate analysis, as it is essentially non-democratic. Not to have party candidates increases the possible choices by the national governments in the Council on the one hand, but it provides no choice at all for the European citizens when they vote. It is a well-established practice in Western democracies that parties select their candidate for the post of Prime Minister before an election. A notable exception was Italy between 1945 and 1994, and this resulted in a series of very short-lived governments which very rarely lasted as much as the legislature, and which in the literature are usually taken as an example of weak and inefficient government. Furthermore, this happened within a system of blocked democracy, in which the largest opposition party, the Partito Comunista Italiano, could not enter the government. Today such a system would not be possible, not even in Italy. Similarly, it is a well-established practice that the nomination for Prime Minister goes to the leader of the largest party, unless coalitions were presented before the election - and in that case the winning coalition leader is nominated, even when the largest party is in the losing coalition. Again, even in Italy after the last elections, which produced no majority in the Senate, the President gave Bersani, as leader of the Chamber's winning coalition, an exploratory mandate to try to build a majority in the Senate, too. Only his failure in this attempt opened the way to Letta's nomination. In Britain, no party got a parliamentary majority after the last election, and a coalition was created between the





Tories and the Liberal-Democrats, but there was little discussion, if any, about the fact that Cameron, as leader of the largest parliamentary group, became Prime Minister.

Let us now consider the consequences of the European Council nominating somebody else than Juncker. The first short-term consequence will be the diffusion of a public perception that in the EU, citizens' votes do not matter. Notwithstanding the fact that the European parties – including the parties of the national government – presented official candidate to the presidency of the Commission, the decision is taken by national leaders acting in the European Council as a European political elite, putting aside all that was said in the electoral campaign, as well as the citizens' votes. This would constitute a fatal blow to the EU and the Parliament's legitimacy. The outcry against the democratic deficit and the political class, and the self-centredness and auto-referentiality by euroskeptic parties, would be massive and well-received.

Such a choice would be an explicit challenge to the Parliament. For the nominee it would then become extremely difficult to get a majority in the Parliament. The institutional interest of the Parliament as such would be to reject the nominee, signalling to the European Council that it cannot ignore the Parliament. If the European Council was to nominate anybody different from Juncker, it would actually be starting an inter-institutional conflict. The most likely result would be an impasse, and a further push of European citizens away from the EU institutions, seen as unable to cooperate, even in the definition of EU leadership. A long round of negotiations would then start to find a compromise solution which would probably be perceived as everybody's – and especially Europe's – defeat. The end-result would then be a Commission president with a very weak legitimacy and low political capital.

Some think, or hope, that if confronted by the European Council, the Parliament would give in. For the sake of avoiding an inter-institutional stalemate and a political impasse, it would vote for the Council nominee. Why should the Parliament be responsible if the national governments in the Council are not and start a conflict? It seems very unlikely that an ethics of responsibility, against its own institutional interest, can prevail in a collective body of over 750 members, if it cannot in a collective body of 29! But even in the unlikely case that the Parliament accepted the European Council's imposition, the legitimacy of the new Commission President would be low, and there would be few



chances for an alliance with, and a cooperative attitude by, the Parliament, thus making the EU decision-making process particularly difficult.

In the long-term the nomination of anybody different from Juncker would make it extremely difficult to convince European citizens to go to vote at the next European elections. If the European parties were again to present their own candidates, citizens would not believe them. Media would not pay attention, expecting the next Commission president not to be picked from among them. Top-class political leaders would not be available to run as party candidates on the same assumption. The possibility to strengthen European parties, the European public space, and the democratic accountability within the EU through the European elections would be lost.

The nomination of the next Commission President is thus a fateful choice. It will not only have very significant political and institutional consequences, but will also set up or prevent a social and political dynamics towards the democratization of the EU. This is the reason why Stefan Collignon, Simon Hix and myself have promoted the Appeal “Europe’s Democratic Momentum” (enclosed), that was signed by some of the most prominent European intellectuals such as Zygmunt Bauman, Ulrich Beck, Lorenzo Bini Smaghi, Paul De Grauwe, Anthony Giddens, Jürgen Habermas, Christian Lequene, Gianfranco Pasquino, Kostantinos Simitis, Hans-Werner Sinn, Mario Telò, Nadia Urbinati and many academics and think-tank directors of different EU countries. There is more than just the next Commission President at stake in the choice to be made. The very possibility of a European supra-national or post-national democracy is at stake.



### Europe's Democratic Moment

When proposing a candidate for the Commission President, the Lisbon Treaty instructs the European Council to "take into account the elections to the European Parliament" and states that the Commission President "shall be elected by the European Parliament". When the EU governments added these words to the Treaty it was widely seen as a significant break from the past, as from now on the choice of the most powerful executive office in the EU would be done in a more open and democratic way.

We find it disingenuous to claim, as some heads of government have done, that these Treaty changes have no meaning. They believe that as Heads of States and Governments they have the right to choose the President of the Commission and the European Parliament should ratify. In this interpretation, the Parliament can veto, but not take initiatives.

The alternative view, taken by the main political parties before the European elections, claims that the Council must take into account the outcome of the elections. European citizens therefore have a word to say about who leads the European Commission, which alone makes proposals for European laws.

The first approach has contributed to the perception that distant "Brussels" takes decisions over which citizens have no control. The second approach aims to return sovereignty to the citizens of Europe. It seeks to balance the excessive power of the Council by the democratically elected European Parliament.

In the spirit of the new Treaty, Europe's party families have nominated candidates for the Commission President before the election. The candidates fought a rigorous campaign, criss-crossing the continent. There were several live TV debates between the candidates and the media have covered the candidates' campaigns. And, crucially, the candidates have argued about the direction of the EU. In short, this was the birth of democratic politics in the EU.

We acknowledge that the system is not perfect. Nevertheless, this was an encouraging start, and in time this process has the potential to enable European citizens to engage with EU level politics far more than they have been able to do up to now.

We hence urge the Heads of Government not to kill this new democracy process at its birth. We urge the members of European Parliament to rally around the candidate who got most seats. The European People's Party has emerged from the elections as the largest group. The European Council should therefore now propose the candidate of the EPP: Jean-Claude Juncker.

This would follow the spirit of the new Treaty and also be consistent with the way the chief executive is chosen in most of our national constitutions: where after an election the president or monarch invites the candidate of the largest party to have the first go at demonstrating that he or she has the support of a majority. Proposing someone other than Juncker would be a refusal to recognise the changes in the Treaty. It would also further undermine the shaky democratic credentials of the EU, and play into the hands of the Eurosceptics across the continent.

The Appeal is open to further adhesions: to sign please contact [Roberto.Castaldi@cesue.eu](mailto:Roberto.Castaldi@cesue.eu) or sign at [www.cesue.eu](http://www.cesue.eu)



ISSN: 2036-5438

**Deferential dialogues between the Court of Justice and  
domestic courts regarding the compatibility of the EU  
Data Retention Directive with (higher?) national  
fundamental rights standards**

by

Ioana Pelin-Raducu\*

Perspectives on Federalism, Vol. 5, issue 3, 2013





## Abstract

This article examines the nature, purpose and effect of constitutional dialogues between the Court of Justice of the European Union and constitutional courts taking as example the difficulty encountered in the implementation of the 2006 Data Retention Directive in several Member States. The cooperative relationship, called “deference”, is based on the autonomy and voluntary willingness of national courts to ask for a preliminary ruling by the Court of Justice. Avenues of “silent” dialogue, as happens when constitutional courts do not send for a preliminary ruling while still following the Court’s precedents, are also explored. The case-law where constitutional courts exercised their competence to indirectly review the validity of EU legislation is discussed in light of the constitutional pluralism paradigm. Finally, in the particular field of personal data retention, the judicial activism of the Luxembourg Court in upholding the validity of EU legislation is heavily criticized in light of the protection of fundamental rights. For the judicial dialogue to function properly, both the Court of Justice and constitutional courts should show “deference” to each other's sensitivities in light of the principle of loyal cooperation entrenched in the EU Treaties.

## Key-words

Protection of privacy rights, personal data retention, constitutional dialogue, CJEU, deference, preliminary reference procedure



## 1. Introduction

For the last years, European integration has faced mostly legitimacy challenges. The constitutional endeavour to set a clear balance of powers between Member States and the European Union (hereinafter, EU) was not successful even if the main institutional changes foreseen by the Treaty establishing a Constitution for the European Union saw the light with the adoption of the Lisbon Treaty. In spite of the efforts deployed to set the division of powers, the current treaties do not contain a clear-cut federal catalogue of competences of Member States and the EU, nor do they clarify the nature of the EU's legal order. The principle of primacy of EU law over national laws applies since the *Costa* decision,<sup>I</sup> however the primacy clause has so far not been included in the body of EU Treaties. Instead, a declaration was attached setting out the primacy of the Union but it did not address the key question of European constitutionalism, such as “who has the last word in Europe?”, raised by constitutional courts during the ratification process of the Lisbon Treaty<sup>II</sup>.

The still disputed claim of EU law primacy and the unsettled division of powers between the EU and its Member States raise legitimacy concerns when the European Union has the competence to adopt legislation concerning data retention that potentially affects the everyday life of millions of European citizens. The issue at stake is that appropriate checks and balances have to be further implemented in order to legitimize the legislation adopted at supranational level, especially concerning restrictions on fundamental rights. Once legislation is enforced, the citizens' only option is to bring action in front of domestic and supranational courts. Thus, the adjudication process has also regulatory power and has gained a considerable influence in the European decision-making process. The Court of Justice of the European Union (hereinafter, CJEU and the Court) has the exclusive competence to review the legality of EU legislation in light of the respect of fundamental rights. The Court is called to strike a balance between the protection of the fundamental right to privacy that data retention by public authorities may affect and the objective pursued, such as the prosecution of a serious crime. However, domestic courts' decisions on the 2006 Data Retention Directive<sup>III</sup> challenged the CJEU's competence as they indirectly questioned EU legislation by invalidating the transposing acts of several



Member States. Under the pressure of national courts, EU legislation on data protection is currently under revision and the future regulation has to uphold a higher standard of protection of privacy rights.

The present paper assesses the importance of the deferent dialogue between constitutional courts and the Court of Justice and what it can bring in terms of legitimizing supranational legislation, such as the 2006 Directive on Data retention at issue. I discuss how the interactions between courts could bring order into the unsettled relationship of domestic and EU legal orders and will plead in favour of establishing a long-standing and fully-fledged judicial dialogue as the only reasonable choice to address the constitutional question on who has the final authority in the European Union<sup>IV</sup>. The first part of the paper is theoretical and does not solely address the changes in domestic constitutional settings under the effect of incorporating EU law, but also gives an account of the legitimacy concerns with regard to the CJEU's case-law, raised mainly by constitutional courts. The European multi-level adjudication system, composed of constitutional courts and the Court of Justice, thus remains decisive in accommodating competing interests stemming from different legal orders, that is both domestic and supranational. The value of *dialogue* does not imply an optimistic view of the relationship between courts, but comes with pragmatic advantages for both the EU's and domestic legal orders. Through a dialogue between courts the risk of contradictory jurisprudence and overlapping competencies for the protection of individual rights on the European continent can be significantly reduced.

By taking into account the concerns voiced by constitutional courts, the CJEU injects legitimacy into its decisions in order for EU legislation to be correctly implemented by domestically legitimated courts. The acceptance of the Court's decisions increases the legitimacy of the EU *polity* as a promoter of the respect for human rights, rule of law, and democracy. At the same time, constitutional courts gain influence to shape the supranational adjudication process because the safeguards linked to the respect of national "constitutional identity" are now "listened" to by the Court of Justice of the EU<sup>V</sup>. The Luxembourg Court ultimately pretends at upholding the specific, European understanding of constitutional and national identity. The recognition of national constitutional identity operated by the CJEU and the national margin of appreciation operated by the European Court of Human Rights (hereinafter, ECtHR) in light of the European Convention on



Human Rights (ECHR) proves that there is no supranational usurpation of the role that legitimately belongs to national courts: to identify and protect national constitutional identity. By contrast, supranational courts gain influence by safeguarding the level of protection of fundamental rights, the respect for rule of law and the democratic rationale of domestic legal systems. Constitutional arrangements are modified as well, following the ratification of the EU treaties. Thus, the paradigm of deferent dialogue tries at best to accommodate the neuralgic “who decides who decides?” question and brings coherence to the motto “unity in diversity” of the European project.

In the second part of this article, the question of the compatibility of the 2006 Data Retention Directive with higher domestic constitutional standards of the protection of human rights is discussed as an important example of the risk of clashes between the EU and domestic legal systems. The path of collaborative dialogue between courts shall be thus tested.

## **2. The normative value of dialogue between the Court of Justice and constitutional courts**

This chapter deals with the ability of judicial dialogue to bring coherence and solve conflicts between different levels of the European multi-level system. The interpretation of the notion of “constitutional identity” enshrined in Article 4 §2 of the TEU is directly linked to the jurisdictional policy deployed between constitutional courts and the Court of Justice. Behind the question of the CJEU’s competence lies the concern to secure a proper level of protection of human rights and to ensure the access to justice and incorporate standards for judicial review. The EU’s respect for the autonomy of the national constitutional identity, as stated in article 4 §2 of the TEU, testifies of the constant negotiations between national and European levels over “Who has the final word?” in view of avoiding the clash of overlapping authorities.

For that reason, even if a comparison with constitutional-federal arrangements such as the US can be drawn in some respects, the manner in which the competences of each level is allocated in the EU does not fully satisfy the characteristics of a federal system<sup>VI</sup>. In the European multi-level system, the Court of Luxembourg is *together with* the national courts called to accommodate competing sources of authority stemming from both





national and EU legal orders. The monist/dualist constitutional theories have sought, without widespread success so far, to address the question of who is the last owner of sovereignty<sup>VII</sup>. The major dilemma is to find the proper level of review in order to achieve the “unity in diversity” goal, namely to preserve the coherence of the European legal order and at the same time to preserve the constitutional and national identity wherein the specificity of each national legal order is anchored.

The underlying question is whether the CJEU has the authority to review the national constitutional identity that enters within the scope of EU law or whether it is up to the courts of last instance at national level and/or constitutional courts to protect what belongs to the core of domestic constitutional issues. Some constitutional courts have already interpreted the substantive constitutional conditions for participation in the European Union with regard to ratification of the European treaties. Thus, the Italian Constitutional Court (*Corte costituzionale*) developed a doctrine of fundamental principles that the European Union should respect, called the doctrine of *contro-limiti*<sup>VIII</sup>. Furthermore, the jurisprudence of the German and Czech constitutional courts concerning the ratification of the Lisbon Treaty puts into light the need for a comprehensive constitutional theory applied to the relationship between the EU and Member States' legal orders.

The revision of constitutions allows for the incorporation of EU law in the national legal orders. Also, the EU treaty constitutionalized the national reservations related to national identity, the protection of human rights, the democratic system etc. Some constitutional principles are thus revised as a consequence of the membership in the EU, for example in the case of Italy,<sup>IX</sup> and are inserted like clauses of openness of the national constitutional system (Albi 2007, Sadurski 2008). However there are core principles of the Constitution, such as the protection of fundamental rights or democracy<sup>X</sup> inserted therein that cannot in any way be violated. In terms of adjudication, the CJEU deals with competing claims over who the last owner of sovereignty is; every claim is derived from constitutional sources and each of them enjoys equal normative value. The relationship between the EU treaties and national constitutions is not solved in favour of one or another source of authority, but the latter also become sources of EU law, by means of mutual recognition. The constitutional pluralism theory is not about the *Kompetenz-Kompetenz* question: the answer to “who decide who decides?” remains open, the tension between competing sovereignties is not to be solved. Dialogue is thought to take place



between equally autonomous partners, so the paradigm of dialogue leaves open the “who decides who is the final authority?”-question. The unsettled nature of hierarchy within the EU is to be preserved as such according to these ideas of “constitutional pluralism”<sup>XI</sup>, “multi-level constitutionalism”, “composed constitutionalism” or “co-operative constitutionalism”. In legal terms, this structure translates into a relationship of heterarchy between the domestic courts of last instance and the CJEU, corresponding to the constitutional pluralism theory according to which there is no formal hierarchy between the domestic and the EU's legal orders.

The interface between the national and the EU legal orders is ensured mainly by the dialogue between judges. As such, the domestic courts of last resort, especially constitutional courts, which usually have the power to review statutory legislation under national law, can reconcile the imperative to ensure the application and supremacy of EU law over national legislation with “the desire to keep integration under control by preserving an at least hypothetical last word for the Member States and, thereby, the notion of national sovereignty” (Dyevre 2013). In this vein the German Constitutional Court stated that it would refrain from reviewing secondary EU legislation as long as EU law does not transgress the boundaries fixed by the TEU<sup>XII</sup>. Similar concerns with regard to the protection of fundamental rights by the EU were raised by constitutional courts with regard to the implementation of the Framework-Decision on European arrest warrant in Member States. The Polish Tribunal<sup>XIII</sup> and the Czech Constitutional Court<sup>XIV</sup> proved not as reluctant as the German Constitutional Court<sup>XV</sup> to the creation of a European criminal space, thus constitutional amendments lifted the prohibition of extradition of Member State citizens. And it was the Belgian Court who raised concerns regarding the application of the Framework-decision of the European arrest warrant<sup>XVI</sup>, so that the CJEU had the opportunity to deal with these concerns raised by different courts regarding the legality of the European arrest warrant.

The “deal” between constitutional courts and the CJEU if the former were to recognise EU law supremacy was for the EU to ensure the same level of protection of human rights, rule of law and democratic principles as in domestic legal orders. This deal conveys a presumption of the equivalence of protection of fundamental principles between EU law and national law which can however be reversed. Thus, constitutional courts see this agreement with the CJEU as the best way to keep the final word if EU law no longer



respects domestic constitutional principles. In case of a contradiction between national and European norms, domestic courts should operate a “test of reason” or a “balancing act” between two competing principles, protecting the legal certainty of the national legal order or award precedence to EU principles.

The CJEU’s deference shown towards national courts implies that the latter are afforded more discretion to protect national interests. It implies that the interpretation of EU law, in light of its compatibility with national measures, is in fact not the Court’s task but “a joint exercise of the Court of Justice and the national courts”<sup>xvii</sup>. The CJEU has shown more deference insofar as, in some cases, it left the task to decide if a measure aims to protect a fundamental right that is given constitutional importance at national level to the national courts that had referred the preliminary questions<sup>xviii</sup>. This attitude invests in the Court of Justice with the image of respecting national constitutional values even if such norms harm EU law.

In order to face the challenges of the EU legal system, deference is presented as a paradigm of collaboration between courts. This model of judicial deference overcomes the shortcomings of other classical constitutional theories that try to settle, once and for all, the question of “who decides who decides?”. Thus, the idea of judicial dialogue does not necessarily translate into conflicts between courts, nor does it invalidate either of the courts’ authority. Deference implies more than an “interpretative” dialogue, it means a procedural way of judicial dialogue via the preliminary ruling procedure. M. Maduro proposed four principles of “contrapunctual law” in order for the Court of Luxembourg to take into consideration the concerns of other legal orders (Maduro 2003). J. Baquero Cruz also acknowledges the advantages of the “Discursive European Pluralism” that takes the position of other actors into account (Baquero Cruz 2008). However, the theory of deference goes one step further than the arguments used by courts in their decisions: through the characteristics of autonomy, voluntariness and interdependence, deference builds up the procedural constitutive aspects of judicial dialogue in a step-by-step manner. Besides, as explained further on, the theory of deference is based on a specific understanding of the principle of sincere cooperation that integrates judicial dialogue, through the preliminary ruling procedure, in every internal constitutional system of remedies. It shall also be noted that the word “deference” is not a reference to the margin of appreciation doctrine or to theories of judicial restraint, but is instead based on a specific



understanding of European loyal cooperation. This theory of deference can also be applied to the relationship between the ECtHR and the CJEU, instead of using the presumption of «equivalent protection» of human rights<sup>XIX</sup>. Deferent dialogue also potentially applies to the relationship between national courts and other international adjudicative bodies<sup>XX</sup>.

A “deferent dialogue” in practice really means for national courts to interpret national law in a consistent manner with EU law while observing the substantive and procedural constraints originating from their own legal order. One court's practice to make cross-references to another court's decisions does not always imply that the latter has really taken into consideration the concerns of the other legal system. At the same time, a “silent”<sup>XXI</sup> dialogue, such as a substantial respect of the other court's case-law without quoting it in the reasoning of the decision, can be more relevant for a deferent judicial dialogue than a formal reference to another court's jurisprudence. Moreover, from the point of view of constitutional courts, the *comity* towards EU case-law should not result in a reduction of the protection of an individual's rights. The underlying principle of the deferent dialogue is the specific and autonomous understanding of the principle of loyal (sincere) cooperation between judicial authorities under the Article 4 §3 of the EU Treaty<sup>XXII</sup>. The respect of the principle of sincere cooperation should solve conflicts over competing claims of authority from constitutional courts and the CJEU. According to this principle, neither a national authority nor the Court of Justice can unilaterally decide to change the nature of their relationship but they are bound to decide together.

Deference facilitates the cooperation between courts and does not invalidate the authority of last instance domestic courts. Deference is based on the structural convergence of values and principles between legal orders and the willingness of procedural collaboration amongst courts. The relationship between courts is not characterised by a competitive principle but by mutual recognition and reciprocal dependence (interdependence) (Canivet 2003). Yet, what happens if there is no deference between courts and the EU jurisdictional system is faced with extreme cases of non-compliance with EU law by judicial actors? Judicial liability is difficult to place at the right level as the jurisdictional system faces, in practice, a dissolution of liability jurisprudence for non-compliance with EU law. In other words, the liability doctrine for courts' non-compliance with EU provisions is not satisfactory. The CJEU stated that national courts are responsible for enforcing EU law, however practice shows that in order to achieve



better EU implementation, the Court of Justice of the EU has to endeavour a cooperative relationship, triggering the voluntary commitment of domestic courts toward its position. So far, the dialogue between courts can be classified as follows: direct, implying the use of the preliminary ruling procedure by some Constitutional Courts (Belgian, Austrian, Spanish), but also indirect (with references to the CJEU's jurisprudence) and silent (no direct follow-up of the Court's case-law), such as the Polish Tribunal or the *BverfGe*. In view of this contrasting constitutional situation in the Member States, it is indeed preferable that at least the national courts of last resort make fair use of the preliminary ruling procedure.

The paradigm of deference also relies on the integration of the procedure laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU) in domestic legal orders that might help to put an end to the patent conflicts between supreme courts of different legal orders. In addition, the ratification of the EU Treaties by Member States implies the obligation to integrate into the domestic legal orders the duty of sincere cooperation laid down in Article 4 §3 of the TEU. The obligation to send a preliminary reference to the Court becomes a legal domestic requirement to be respected by every national judiciary. Thus the preliminary ruling procedure is integrated in every internal constitutional system of remedies that has to respect Article 19 §1, second sentence, of the TEU<sup>XXIII</sup>. For instance, the Spanish, German, Czech and Austrian Constitutional Courts have already sanctioned the decision of non-referral for preliminary rulings by their respective courts of last resort as a consequence of the violation of the domestically protected right to access to justice<sup>XXIV</sup>. The Slovak and Romanian Constitutional Courts have also declared themselves ready to function as *de facto* enforcers of the last instance ordinary courts' duty to submit a request for a preliminary ruling.

However, the German, Czech, Polish, Slovak and Romanian Constitutional Courts themselves, with a few notable exceptions, repeatedly refused to ask for a preliminary ruling of the CJEU. The constitutional courts' justification for their non-referral is the fact that matters of European law are to be dealt with by ordinary judges in concrete disputes<sup>XXV</sup>. The Czech Constitutional Court thus upheld the "decentralised" review of compatibility of national law with EU law, stating it to be a matter for the ordinary courts which, if necessary, will declare void national law. However, a number of Constitutional courts, such as the Austrian, Italian<sup>XXVI</sup> and Spanish Constitutional ones as well as the



French *Conseil Constitutionnel*<sup>XXVII</sup>, realised that the constitutional judge encountered the risk of being left aside by the evolving process of EU law, thus they have sent preliminary questions to the Court of Luxembourg.

For that reason, the deference model subsists in both of the two types of dialogue between constitutional courts and the Court of Justice: in the “silent” one, because most often there is no direct communication between constitutional courts and the CJEU: and in the “direct” dialogue, when a preliminary ruling is lodged by the highest domestic courts. Thus even if no preliminary question was asked, this does not necessarily mean that judicial deference no longer exists. Deference disappears only when it lacks a common ground for dialogue. When there is no such dialogue between courts, one may choose to use the remedy of judicial liability in case of the non-respect of EU law<sup>XXVIII</sup>. Engaging such liability represents the extreme case of an interrupted dialogue. It also might represent an *in extremis* attempt to bring harmony between contradicting legal orders.

The “constitutional conversations”<sup>XXIX</sup> between domestic courts and the CJEU are a key part of the deferent dialogue that can be observed at different stages of preliminary ruling procedure: does the constitutional court refer for a preliminary ruling and/or does it wait for the Court of Luxembourg to pronounce itself upon the question? By answering this first question in the affirmative, one can observe whether a direct dialogue has been established. In order to conclude if there is a deferent dialogue, one has to wait for the end of the procedure as to analyse the final wording of the domestic court. The second step of the dialogue implies answering the preliminary question: does the Luxembourg Court allow the preliminary question and does it take into consideration, in the answer provided, domestic concerns expressed by the constitutional court? The third step concerns the behaviour of national courts after the Court of Justice has rendered its preliminary ruling: do constitutional courts, even if not always the ones to have referred the question for a preliminary ruling in the first place, respect the position of the CJEU? Only if all of these questions receive an affirmative answer can we conclude that a deferent dialogue has been established. As mentioned before, that even a “silent”<sup>XXX</sup> dialogue can be established between courts does not reverse the conclusion according to which a deferent dialogue was put into place.



The principles of deference are laid down as follows: the *autonomy*, the *voluntary* principle and the *interdependence* of the judicial function. These characteristics shall briefly be explained in the following lines.

The *autonomy*<sup>XXXI</sup> of courts reflects their power of choice with regard to their collaboration with EU judges. As previously explained, there is no effective legal remedy in order to constraint national courts to send for preliminary rulings. Indeed, the CJEU held that national courts are responsible for enforcing EU law in spite of the fact that the case-law on the liability doctrine for the non-compliance of national courts with EU provisions has not been duly implemented in all legal orders (Coutron 2014). The autonomy of the judicial function is upheld by the empowerment of ordinary courts and the CJEU's interpretations that have stimulated their desire to enforce the supremacy and direct effect of EU law. The various levels are thus intertwined: ordinary judges have emancipated themselves from the authority of the supreme courts that usually dictate the precedent to follow<sup>XXXII</sup>.

Second, the *voluntary* principle implies the willingness of domestic courts to collaborate with the CJEU, as well for the latter to take into account the place and concerns voiced by domestic courts. Several legal and political science studies have already tackled the effect of the CJEU's institutional action upon national legal orders and the reasons behind national judges' willingness to collaborate with supranational courts.

Third, the *interdependence* principle, or the mutual dependency of courts on one another, coexists with the characteristics of the autonomy of the judicial function (not only of the supreme courts but also of the ordinary judges) and the voluntary principle. Interdependence relies on the extent and scope of the devolution of adjudication between national judges and EU courts. The decentralisation of the latter is often asymmetrical: the Luxembourg Court decentralises the competence of “abstract” as well as of “concrete” review of the compatibility of national laws with EU law, but the intensity of review differs from one country to another. Deciding to what extent national courts take into consideration EU jurisprudence was usually considered a question that depended on the degree of the intervention of the CJEU into the domestic legal order. The Court's maximum approach, or what is called the “judicial activism” doctrine, is to strengthen the principle of effectiveness of EU law<sup>XXXIII</sup> and enhance the protection of EU rights in domestic procedures.



Practically, the argument of *interdependence* relies upon the application of the proportionality principle which guides the intensity of EU law review. This implies the extent of margin of discretion left by the CJEU to national authorities. It ranges from a strict judicial review to a very broad one<sup>xxxiv</sup>. This approach might irremediably affect the sensitive equilibrium between courts reached through the “test of reason” or “balancing act” between two competing principles. Thus the deference of the CJEU towards national courts implies that national courts are afforded more discretion to protect national interests. That means that the interpretation of EU law is in fact not the CJEU's job alone, but that it is “a joint exercise of the Court of Justice and the national courts”<sup>xxxv</sup>. The CJEU has shown more deference if a measure aimed to protect a fundamental right that is given great importance at national level<sup>xxxvi</sup>. This leads to the Court's respect of national constitutional values even if such a norm harms EU law. The respect of the principle of deference implies an overlapping of jurisdictional functions: for example, domestic judges are stepping in by applying their “reality” filter in cases involving European norms. Therefore, the distinction between interpretation and application of EU law becomes blurred.

The use of the proportionality principle is thus necessary. The usual analysis of the European case-law is that the Court of Justice analyses, for instance, whether a national measure that contradicts EU law is allowed in light of a legitimate aim pursued by the State, or if the State could achieve the same aim by taking a measure that is more respectful of EU law. Thus, the Court of Luxembourg has to make a choice: to operate the proportionality test itself, which implies a direct and an active intervention in the national legal order, or to leave the proportionality tests entirely up to national judges. By this second choice, the CJEU merely assists the national judges in the process of interpretation of EU law. It is thus for the national judge to translate EU legal requirements into their respective national legal orders<sup>xxxvii</sup>.

Considering the singularity of the EU jurisdictional system that is integrating national procedures, the relationship between the CJEU and national courts exerts a heavy influence on the functions of the latter as gatekeepers for their legal order and on their position within the domestic judicial hierarchy. In conclusion, it should be underlined that deference is based on the mutual trust between judges operating in different systems as





they enjoy the confidence that each legal system shares a similar standard of access to justice and a similar standard for securing rights to individuals<sup>XXXVIII</sup>.

### 3. The deferent dialogue applied to the case-law regarding the 2006 Data Retention Directive

In this part I analyse whether the paradigm of deference still applies with regard to the contested case-law of domestic courts, raised by the implementation of the 2006 Data Retention Directive. The **comity** or **deference** of constitutional courts towards EU objectives relies on the use of the method of “consistent interpretation” of EU law (Komarek 2007:16). In the Evaluation Report on the 2006 Data Retention Directive (Directive 2006/24/EC) sent to the Council and the European Parliament,<sup>XXXIX</sup> the Commission evaluated the implementation of the Member States’ obligations for providers of publicly available electronic communications services or public communication networks (hereafter, ‘operators’) to retain traffic and location data for a period of between six months and two years for the purpose of the investigation, detection and prosecution of serious crime.

The Czech<sup>XLI</sup>, German<sup>XLI</sup> and Romanian Constitutional Courts<sup>XLII</sup> annulled the law transposing the Data Retention Directive as unconstitutional. The courts framed the conflict of authority in a manner to protect themselves against allegations that they had overstepped the CJEU's competences by pronouncing upon the legality of the Data Retention Directive. If constitutional courts were to openly acknowledge that they enjoyed the competence to strike down incompatible national implementing measures with regard to EU law, they would *de facto* have become bound by EU law and, subsequently, by the case-law of the Court of Justice. Hence, the Czech, German, Polish<sup>XLIII</sup> and Romanian Constitutional Courts stated that they were only competent to review the compatibility of domestic laws with the national Constitution. On the one hand, they thus preserved their competence to review the legality of domestic acts, while, on the other hand, this makes cases of a similar sort unpredictable in terms of whether or not the constitutional courts will review the transposition acts.

In its decision 1258 of 8<sup>th</sup> October 2009, the Romanian Constitutional Court decided that the provisions of Law 298/2008 concerning the obligation of telecommunication



companies to retain the private character-data generated or processed by the public electronic communications service providers for six month were unconstitutional. That Law implemented the controversial Directive 2006/24/EC on Data Retention. Thus, the Constitutional Court considered that the implementing domestic law on the duty of data retention was not in conformity with the right of protection of private life and family under Article 26 of the Constitution and Article 8 of the ECHR and the freedom of expression guaranteed by Article 30 of the Constitution and Article 10 of the ECHR. Personal Data Retention is not automatically unconstitutional. However, it is not structured in a manner adapted to the principle of proportionality used for the limitation of fundamental rights by the ECHR. Data-retention does not extend to the contents of the communications, however connex-data may be used to draw content-related conclusions that trespass on the private sphere. The direct and continuous use and collection of the data is also unconstitutional regardless of whether the persons are under any serious suspicion for having committed a criminal act. The safeguards for opening the criminal prosecution against suspected persons are not sufficient; the legislation under scrutiny no longer confines itself to the use of data to prosecute serious criminal offences, but goes far beyond in the collection of personal data. The Romanian Constitutional Court was thus using a balance test between two contradictory interests: defending the public interest or restricting individual rights. However, the Court applied ECtHR case-law stating that any measure of surveillance taken without proper legal guarantees destroyed the aim of protecting the democratic rule of law. In the same line, the Romanian Constitutional Court clearly indicated that the control of constitutionality of any domestic act should take due account of the ECtHR's case-law<sup>XLIV</sup>. The provisions of the Constitution were interpreted in a way corresponding to the ECHR's analogous provisions<sup>XLV</sup>. It was not the first time Constitutional Courts accepted to examine the compatibility of domestic law implementing EU measures with ECHR provisions<sup>XLVI</sup>. The Romanian Constitutional Court did not base its reasoning solely on ECtHR judgements either, it also made reference to domestic constitutional provisions. Thus the Romanian Constitutional Court indirectly reviewed the Directive's provisions with regard to its own Constitution and ECtHR jurisprudence. The interpretation of the Court's decision reveals a clash with the CJEU's competence to review secondary EU law. Along with the question of conflict between courts it is also important to mention that in case of a conflict between rights stemming from the EU/ECHR, the



ECHR takes precedence in the domestic legal order. Indeed, the manner used by national judges to interpret national law in a matter consistent with EU law clearly showed the pattern of deference towards the ECHR. National judges are also under the duty of consistent interpretation of national procedures and norms as regards EU law<sup>XLVII</sup>. The Czech Constitutional Court invalidated national provisions that failed to safeguard the integrity and confidentiality of the retained data and to prevent access by (non-state) third parties. Domestic law has failed to clearly and precisely define the purpose to retain data and particularly to rectify the vague *serious crimes* language of Directive 2006/24/EC. Such failure contradicts the requirements laid down in both the Charter of Fundamental Rights and in the national Constitution.

The Austrian Constitutional Court sent a preliminary question to the CJEU asking about the compatibility of the 2006 Data-Retention Directive with Articles 7, 8 and 11 of the European Union Charter of Fundamental Rights<sup>XLVIII</sup>. Furthermore, the Constitutional Court underlined the importance of interpreting the provisions of the Directive 2006/24 on data retention in light of the ECHR, considering that the latter had the rank of a federal constitutional law in the domestic legal order. One of the questions asked by the Austrian judges concerned the interpretation of Article 52.3, paragraph 5 of the Preamble, as well as the comments on Article 7 of the Charter, corresponding to the rights set up in Article 8 of the ECHR. The Court of Justice will have to provide an interpretation of the Charter in conformity to the ECHR while also protecting the Austrian constitutional interest with regard to the protection of personal data. The High Court of Ireland also challenged the validity of Articles 3, 4 and 6 of the 2006 Directive on Data Retention with regard to the limitation of the rights of the applicant with regard to mobile telephony and its compatibility with Article 5(4) TEU, Article 21 TFEU and with Articles 7, 8, 11 and 41 of the Charter of Fundamental Rights<sup>XLIX</sup>. In the same vein, the Spanish Constitutional Tribunal, in a decision of 30 November 2000, quoted Article 8 of the Charter of Fundamental Rights as an essential element for the existence of the fundamental right of the protection of personal data.

Before that, the CJEU had already answered a similar preliminary question regarding the interpretation of Directive 95/47/CE<sup>L</sup> in *Österreichischer Rundfunk e.a.*<sup>LI</sup> sent by Austrian Constitutional Court. Austria had transposed the Directive on Data Protection through a Federal Act concerning the Protection of Personal Data<sup>LII</sup> that entered into force on 31<sup>st</sup>



December 1999. The Court of Luxembourg answered the question in the same terms as the ECHR with regard to the justifications allowed for derogations from the right to a private life, set in Article 8 §2 of the ECHR. The Court of Luxembourg left a margin of appreciation to national authorities. It is for domestic judge to operate the proportionality test between a State's interest to guarantee an optimum use of public funding and the gravity of the threat to the right of private life of concerned persons. Thus, the deferent dialogue between the European Courts (the CJEU and the ECtHR) and domestic (constitutional) courts is challenged by the cases related to the implementation of the Data Retention Directive<sup>LIII</sup>.

Austria is under close monitoring of the European Commission for the non-transposition of the 2006 Data Retention Directive. The CJEU has found both Austria and Sweden in violation of their obligations under EU law for the non-transposition of the Data Retention Directive and an infringement procedure for failure to transpose the Directive in question is also pending against Germany<sup>LIV</sup>. Other Member States have also considered how to re-transpose the Directive in a manner consistent with domestic constitutional law: Bulgaria revised the transposing national act following the Supreme Administrative Court's decision; and so did Cyprus and Hungary<sup>LIV</sup>. European institutions, especially the Commission, will take due account of the concerns raised by domestic case-law in the Member States when drafting the proposal for revising the EU legislation on Data Protection.

As a general conclusion on the relationship between supranational and national adjudication processes, what should however be underlined is the increased judicial deference of domestic courts towards the jurisprudence of supranational courts, both the CJEU and the ECtHR. This trend considerably changed the traditional legal approach to the integration of International/European law into domestic legal orders. In terms of adjudication, the CJEU deals with competing claims over who is the last owner of sovereignty; every claim is derived from constitutional sources and each of them enjoys equal normative value. For the time being, the paradigm of deference, based upon a specific understanding of the European principle of loyal cooperation, offers the most pragmatic solution to solve conflicts between norms stemming from different legal orders. The devolution of the judicial function to interpret EU law from the Court of Justice towards domestic courts is a notorious reality, since domestic judges are acting as the EU's



first instance court. In view of the crucial role played by the national courts in the EU adjudication system, the case-law of several domestic courts that have delayed or even invalidated the transposition of the 2006 Data Retention Directive in light of (higher) constitutional safeguards related to human rights protection, also in light of the ECHR's obligations, poses serious legitimacy concerns as regards the EU decision-making process. Once the European Union ratifies the Convention, the EU institutions might be liable (also, possible jointly with Member States) for the non-respect of human rights by EU law. The relationship between the CJEU and the ECtHR still needs to be clarified in terms of contradictory obligations arising for national courts<sup>LV1</sup>. The key to a deferent dialogue lies in the hands of domestic courts. Normative values underlying the principle of sincere cooperation between judicial authorities at both the national and European level should be at the heart of the dialogue between courts. The most important idea emerging from this study is that conflicts between norms, stemming from different constitutional sources, do not necessarily translate in conflicts between courts. The deference paradigm, through the wise use of the preliminary ruling procedure, is likely to be the most effective path to addressing conflicts between norms from different legal orders - in this way it is also possible to leave aside the question of who is the final legal authority inside Europe.

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<sup>I</sup> *Flaminio Costa v ENEL* [1964] ECR 585 (Case 6/64).

<sup>II</sup> See for example the famous distinction between 'supremacy' and 'primacy' of EU law made by the Spanish Constitutional Tribunal, case 1/2004 *Constitutional Treaty*, declaration of 13 December 2004, with case note by Castillo de la Torre 2005; BVerfG, 2 BvE 2/08, judgment of 30 June 2009, [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html); Czech CC, case Pl ÚS 29/09 Treaty of Lisbon II, judgment of 3 November 2009. For an English translation of the most important sections see Komárek 2009: 345.

<sup>III</sup> Directive 2006/24/EC and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. The Directive is currently under revision by EU institutions together with Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector - Directive on privacy and electronic communications as the EU intends to harmonize the level of protection of personal data including by amending the information exchanges based on the principle of availability set out in the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data in the framework of police and judicial cooperation in criminal matters, OJ L350 60-71, December 30, 2008.

<sup>IV</sup> For the purposes of this paper, the model of deferent dialogue between courts has a specific focus on constitutional courts. For a more extensive study on the dialogue between ordinary courts and the CJEU, see Raducu (forthcoming).



<sup>V</sup> Article 4 paragraph 2 of the TEU entrenches the recognition that the EU must respect the national identities inherent in Member State's political and constitutional fundamental structures, see CJEU, *Giersch* (2013), Case C-20/12, not yet reported.

<sup>VI</sup> See “constitutional heterarchy” in Halberstam 2009: 326.

<sup>VII</sup> Grimm (2012), 275.

<sup>VIII</sup> ICC, decision n° 170, *Granital*, 5 June 1984. The Italian Court's position was nuanced over time as when it accepted to analyse the compatibility of a regional law with a European directive, making as such small steps to a more integrated multi-level legal order in Europe, see CCI, decision n° 406, 24 October 2005.

<sup>IX</sup> According to Article 11 and Article 117 of the Italian Constitution [State and Regional Legislative Power] “Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European union law and international obligations”. This provision resulted from the 2001 Italian constitutional reform that was depicted as paving the way for the constitutional acceptance of European law primacy and led to the change into a deferential position of the Italian Constitutional Court towards the CJEU, see more on the context of the decision in Martinico and Fontanelli 2008: 14.

<sup>X</sup> Article 23 of the German Constitution provides for the transfer of powers to the European Union, subject to the approval by the national Parliament, but these provisions do not allow for the absolute primacy of the Treaties. According to constitutional courts, EU law must be interpreted in light of the Constitution, which determines the limits of the possible transfer or limitation of EU powers.

<sup>XI</sup> See N. MacCormick and Walker's definition of “constitutional pluralism” (Maduro 2003: 504).

<sup>XII</sup> *Solange II* (22 October 1986) *BVerfGE* 73, 339 2 BvR 197/83, Headnotes pt.2. Later on, in *Honeywell* the Federal CC has set up important procedural and substantive limits to the exercise of *ultra vires* review in Germany, Case 2 BvR 2661/0, order of 6 July 2010, paras 58.

<sup>XIII</sup> *Trybunał Konstytucyjny* (Polish Constitutional Court), ruling 27 April 2005 (P 1/05). The Polish Tribunal has suspended the application of the law waiting for the revision of the Constitution, however it did not repeal the law taking due account of international obligations of Poland towards EU treaty. The Polish Tribunal could not establish a dialogue with the CJEU directly via a preliminary ruling as its country did not accept the Court's jurisdiction in the former third pillar.

<sup>XIV</sup> The Czech Constitutional Court did not find national implementing measures incompatible with the national Constitution, Pl. ÚS 66/04, 3 May 2006.

<sup>XV</sup> *BverfGE*, 18 July 2005 (2236/04) repealed the national law implementing the arrest warrant as a whole. The Court did not ask for a preliminary ruling.

<sup>XVI</sup> *Advocaten voor de Wereld* Case C- 303/05 [2007] ECR I-03633.

<sup>XVII</sup> Claes 2006: 141.

<sup>XVIII</sup> Case C-36/02, *Omega* [2004] ECR I-9609, 14.

<sup>XIX</sup> The ECtHR has already stated that a State will be presumed not to have departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of an international organisation which provides equivalent protection to that afforded by the Convention. The Court has thus found that, where they implement EU law without being left any margin of discretion, Member States comply with the Convention in so far as the EU legal order ensures a level of human rights protection that is “equivalent” to their obligations under the Convention as regards both the substantive guarantees offered and the mechanisms controlling their observance, ECtHR, *Bosphorus c Irlande*, 30 June 2005, n 45036/98, 165. However, deference ceases where human rights protection at EU level is “manifestly deficient” (in which case the presumption is rebutted) or where Member States do in fact benefit from a margin of appreciation when they implement EU law (in which case the presumption is simply not applicable). Recent jurisprudence shows the will of the ECtHR to limit the presumption of «equivalent protection» between the EU and the ECHR systems. In *Porse v Austria*, 18 June 2013, n 3890/11, Article 8 was not infringed by Austria as the Court reiterated that the contracting State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion, and the presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. Austrian courts had not been exercising any discretion when they ordered the enforcement of the return orders in contrast with the position of national authorities in *M.S.S. v. Belgium and Greece*. Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in European Union law by asking the CJEU for a preliminary ruling (contrast the position in *Michaud v. France*, 6 December 2012, no. [12323/11](#), §114). A receiving State might be obliged to cooperate “blindly” under EU law, while the Strasbourg approach would prescribe an individual assessment followed by a refusal to cooperate if it appears that the Member State of



origin cannot be presumed to comply with its conventional obligations.

<sup>xx</sup> This issue will not however be dealt with in the present contribution, Cassese 2010.

<sup>xxi</sup> On the “silent” dialogue, see Sarmiento 2012.

<sup>xxii</sup> “3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

<sup>xxiii</sup> Article 19 § 2, second sentence of the TEU imposes to Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

<sup>xxiv</sup> VfSlg, 14.390/1995, according to Austrian judge the refusal to send a preliminary question constitutes a violation of the domestic competencies of the ordinary judge that includes the observance of the Article 267 TFEU; Ústavní soud, 08.01.09, II. ÚS 1009/08, www.nalus.usoud.cz.

<sup>xxv</sup> Bobek 2008.

<sup>xxvi</sup> Ord. 103/2008, the Italian Constitutional Court partially gave up its well-established jurisprudence by admitting that it is a last instance court under Article 267 TFEU for reviewing direct (*principaliter*) proceedings and thus bound to send for a preliminary ruling, however in case of an indirect constitutional review of norms (*incidenter proceedings*) the Italian constitutional judge remains the only one to review the case. The technique of “dual preliminary” allows the Italian Constitutional Court to maintain both its dialogue with the CJEU as well as its authority over ordinary judges, see more in Cartabia 2007 and Martinico and Fontanelli 2008.

<sup>xxvii</sup> 4 April 2013, Decision 2013-314P QPC of *Conseil Constitutionnel*: the question was referred during the priority constitutional review (*Question prioritaire de constitutionnalité*) regarding the transposition in national law of the Arrest-Warrant Decision. Article 88-2 of French Constitution regards the conformity of transposition with EU law. However, the constitutional judge still holds the right to examine the conformity of national legislation with fundamental rights that constitute part of French constitutional core (“bloc de constitutionnalité”).

<sup>xxviii</sup> Case C-224/01, *Köbler* [2003], ECR I-10239. Bernard Hofstätter shows how “the barking dog of State liability for judicial acts does not bite in the instant case, which should ensure acceptance in the Member States”, Hofstätter 2005.

<sup>xxix</sup> See more on this concept in Claes et al 2012.

<sup>xxx</sup> For a wider overview of the techniques used by the ICC to open a ‘hidden dialogue’ with the CJEU, see Martinico and Fontanelli 2008.

<sup>xxxi</sup> This is a specific feature of preliminary ruling procedure as a court-to-court procedure that do not impose to take into account the parties’ opinions. On the limits of the principle of party autonomy, see Meij 2011: 263.

<sup>xxxii</sup> On the ‘empowerment’ of ordinary judge and the reticence of superior courts linked to the doctrine of direct effect and supremacy of EU law, see Slaughter, Stone and Weiler 1998; Claes 2006; Mattli and Slaughter 1996: 10.

<sup>xxxiii</sup> Tridimas 2006: 422.

<sup>xxxiv</sup> Canivet 2007.

<sup>xxxv</sup> Claes 2006: 141.

<sup>xxxvi</sup> In *Omega*, the CJEU acknowledged that there is no European definition on the principle of human dignity so it left it to national court to decide on the necessity and appropriateness of a particular national measure.

<sup>xxxvii</sup> For an example of judicial restraint, see case C-391/09, *Runevič-Vardyn* (2011), ECR I-03787, whereas the CJEU upheld the respect for the constitutional statute of language of Member States.

<sup>xxxviii</sup> CJEU, Case C-101/08, *Audiolux* (2009), ECR I-0982.

<sup>xxxix</sup> Brussels, 18.4.2011, COM (2011) 225 final.

<sup>xl</sup> Judgment of the Czech Constitutional Court of 22 March 2011 on the provisions of section 97 paragraph 3 and 4 of Act No. 127/2005 Coll. on electronic communications and amending certain related acts and Decree No 485/2005 Coll. on the data retention and transmission to competent authorities. See also, *Ústavní soud*, 31.01.2012, ÚS 5/12 (Slovak Pensions XVII – application of the Agreement between the CR and the SR on Social Security, obligations in international and EU law), the Constitutional Court ruled that it will not apply a CJEU judgment because the Court has exceeded the scope of the powers transferred to the EU and



hence acted *ultra vires*.

<sup>XL.I</sup> *BVerfGE*, 2 March 2010, 1 *BvR* 256/08. the German law was declared unconstitutional and void by the German Constitutional Court as the implementing law was contrary to the constitutional right of privacy and the restriction of freedoms was not proportional to the objectives declared.

<sup>XL.II</sup> Decision no 1258 from 8 October 2009 of the Romanian Constitutional Court, Romanian Official Monitor No 789; 23 November 2009.

<sup>XL.III</sup> The Polish Constitutional Tribunal goes further in reviewing the conformity of the EU regulation with human rights enshrined in the Polish Constitution. *Trybunał Konstytucyjny*, 16.11.2011, Ref. No. SK 45/09, <[http://www.trybunal.gov.pl/eng/summaries/documents/SK\\_45\\_09\\_EN.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf)>, which led to an ambiguous result that goes beyond the German CC's statement: any future complainant would thus have to "make probable that the challenged act of EU secondary legislation causes considerable decline in the standard of protection of the rights and freedoms" in the EU.

<sup>XL.IV</sup> ECtHR, *Rotaru v. Romania* 2000, *Sunday Times v. UK* 1979 and *Prince Hans-Adam of Liechtenstein v. Romania* 2001.

<sup>XL.V</sup> In case of a clash of competence between domestic norms and supranational norms protecting human rights, the Constitution settles the superiority of interpretation in favor of the ECHR, see Article 20, par. 1 of Romanian Constitution: "Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to".

<sup>XL.VI</sup> See in a comparative perspective the Polish Tribunal's judgments: judgment of 10.05.2000, K 21/99 (proceedings of issuing the security certificates in the Act on the protection of secret information); judgment of 10.04.2002, K 26/00 (statutory prohibitions of political party membership); judgment of 7.03.2000, K 26/98 (provision prohibiting trade unions for professional soldiers).

<sup>XL.VII</sup> Further on the attitude of Romanian courts towards EU/ECHR law, see Raducu 2010.

<sup>XL.VIII</sup> 28 November 2012, VfGH, G 47/12-11 G 59/12-10 G 62,70,71/12-11, [www.vfgh.gv.at/cms/vfghsite/attachments/5/9/4/CH0007/CMS1363700023224/vorratdatenspeicherung\\_v\\_orlage\\_eugh\\_g47-12.pdf](http://www.vfgh.gv.at/cms/vfghsite/attachments/5/9/4/CH0007/CMS1363700023224/vorratdatenspeicherung_v_orlage_eugh_g47-12.pdf).

<sup>XL.IX</sup> Preliminary ruling still pending, C-293/12, *Digital Rights Ireland*.

<sup>L</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 31-50, November 11, 1995. This instrument adopted under the EU internal market competence harmonizes the standards of protection of personal data within the Member States and provides for a higher level of protection than the one guaranteed by Article 8 ECHR and operates full harmonization of the national laws.

<sup>L<sup>1</sup></sup> The CJEU stated that the directive also applies to purely internal situations in *Rechnungshof v. Österreichischer Rundfunk*, joined cases C-465/00, C-138/01 et C-139/01, 20 May 2003, [2003] ECR I-4989, preliminary ruling sent by the administrative Court (*Verfassungsgerichtshof*) and Supreme Court in civil and criminal matters (*Oberster Gerichtshof*) regarding to the processing of personal data — Directive 95/46/EC — Protection of private disclosure of data on the income of employees of bodies subject to control by the *Rechnungshof*. See also, CJEU, Order, 19 february 2009, *LSG-Gesellschaft zur Wahrnehmung v Tele2 Telecommunication GmbH*, C-557/07, on the protection of confidentiality of electronic communications on the Directive 2002/58/EC.

<sup>L<sup>11</sup></sup> *Datenschutzgesetz* 2000 (DSG 2000), BGBl. I Nr. 165/1999. On Strasbourg side, see *Leander v. Sweden*, judgment of 26 March 1987, App. No. 9248/81, Series A 116-22; *Amann v. Switzerland*, judgment of 16 February 2000, App. No. 27798/95, EHRR 2000-II; *Halford v. United Kingdom*, 25 June 1997, App. No. 20605/92, EHRR 1997-III and *Rotaru c. Roumanie*, judgment of 30 November 2006, App. No. 29683/02, EHRR 2000-V.

<sup>L<sup>111</sup></sup> See on the general relationship between EU law and ECHR, Martinico:2013.

<sup>L<sup>1V</sup></sup> CJEU, *Commission v Austria*, Case C-189/09 and *Commission v Sweden*, Case C-185/09. Sweden was brought for a second time to the Court for failure to comply with the judgment in Case C-185/09, requesting the imposition of financial penalties under Article 260 of the TFEU, following a decision of the Swedish Parliament to postpone the adoption of legislation for 12 months. See also, *Commission v Germany*, Case C-329/12.

<sup>L<sup>V</sup></sup> Bulgarian Supreme Administrative Court, decision no. 13627, 11 December 2008; Supreme Court of Cyprus Appeal Case Nos. 65/2009, 78/2009, 82/2009 and 15/2010-22/2010, 1 February 2011; the Hungarian constitutional complaint was filed by the Hungarian Civil Liberties Union on 2 June 2008.

<sup>L<sup>VI</sup></sup> In *Kamberaj* (2013), Case C-617/10, not yet reported, the CJEU refused to pronounce upon the





relationship between domestic legal order and the ECHR, see further Martinico 2013 and Raducu 2014.

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ISSN: 2036-5438

# Thinking ahead of disasters. The role of risk regulation in the European Union

by

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Perspectives on Federalism, Vol. 5, issue 3, 2013





## Abstract

The need to reduce the vulnerability of society against disasters has fostered the introduction of regulatory instruments which can anticipate protection before a danger is imminent and an emergency phase starts. Disaster risk regulation has therefore become a significant field of legislation aimed at complementing and supporting disaster relief measures through precautionary action.

It however represents a specific issue of disaster management: given the low probability of high impact disasters, it is difficult to assess related risks, so their regulation involves balancing different rights and interests at stake with uncertain scenarios. The need to rationalise such precautionary protection requires regulatory instruments that take into account the very nature of disaster risks (low probability, high impact) as well as other competing situations of rights and interests which can be affected by regulatory measures.

Moreover, in view of the aim of reducing vulnerability, disaster-related policies aim at achieving resilience against disasters. Being resilient means having the abilities to resist, adapt to stressful changes and to bounce back to the original structure. In a resilience-oriented context, what disaster risk mitigation should do is to facilitate the process of adaptation under stress by anticipating impact scenarios and the instruments of protection.

This article examines the European Union's (EU) approach to the regulation of risks of potential catastrophic impact by framing it in the context of resilience. In so doing, it argues that this approach is shaped by the multilevel interdependencies that exist between the EU, national administrations, and private parties. These relationships, which govern the functioning of the EU legal order itself, impact on how protection against disaster is designed, shape the nature of regulation and create a number of challenges for regulators. The modes which disaster risk regulation follows in the EU are therefore analysed as a key issue for enhancing the understanding of this complex regulatory approach.



## Key-words

Disaster risk regulation, resilience, emergency, European Union, administrative law, standards, proportionality principle, subsidiarity principle, command-and-control, agreements



## 1. Introduction

The complexity of today's society is reflected in its increasing vulnerability to natural as well as man-made threats which can involve catastrophic impact scenarios. Broadly speaking, the increase of vulnerability to events different in nature, but characterised by the same potentially disastrous impacts, depends on the extreme interconnection between needs and resources, on the one hand, and national economies and policies, on the other hand. Natural disasters (such as floods, earthquakes, tsunamis...), pandemics, industrial accidents, terrorist attacks, and economic shocks are examples of national emergencies which not only prejudice the expected living standard of the population hit, but which can also have negative cross-border externalities on the ordinary functioning of other States. In Europe, this is particularly evident, since nearly all national States are members of that supranational legal order which is the European Union (EU). This means that if the transboundary externalities of disasters are not addressed in a supranational framework, legal ties can become a double-edged sword for the protection of individual States as well as for the functioning of the whole system.

In a view to the aim of reducing vulnerability, policies need to approach what is commonly called resilience against disasters. Resilience is a rather new concept, which conceives the capability of coping with and recovering from highly critical situations of possible catastrophic impact (Geis 2000: 151-160). Being resilient against disasters means having the abilities of resisting, adapting to stressful changes and bouncing back to the original structure.

More concretely, resilience-building policies identify a flexible approach to disaster management, so that the differentiation of the instruments to respond to disasters can reduce the impact of the disaster itself on the society and make the recovery less heavy to be sustained. Because of the involved domino effects, the management of interdependencies is essential for facing up to disasters and the correct implementation of resilient policies at national levels can significantly limit the transboundary impact of disasters.

By improving the ability to resist to disasters, risk regulation plays a significant role in the process of building a resilience-oriented society. By enhancing the preparedness and the



capacity to respond to disasters, what disaster risk mitigation policies do is to facilitate the process of adaptation under stress, by anticipating impact scenarios and the instruments of protection. The importance of risk regulation in the process of building resilience has also been recognised by the recent communication from the EU Commission on the EU approach to resilience: the resilience paradigm has been conceived of as ‘a multifaceted strategy and a broad systems perspective aimed at both reducing the multiple risks of a crisis and at the same time improving rapid coping and adaptation mechanisms at local, national and regional level’<sup>I</sup>.

Risk mitigation policies are at the basis of any strategy aimed at enhancing the strength of the system against disasters as well as at reducing the impact of a disaster on that system. The *ratio* of risk regulation, however, should be contextualised within the broader set of challenges that resilience presents to society. The content of disaster risk mitigation policies should be shaped in a way that sustains resilience and does not constrain the capability to react to disasters. On this ground, the adaptation need that the concept of resilience entails has to be developed in coordination and coherence with risk mitigation policies.

In doing so, these policies face the problematic nature of catastrophic risks, which have only a low probability of occurring and are related to a high level of uncertainty<sup>II</sup>. This means that if their possible elevated casualties and losses call for a certain level of regulation, the uncertainty of their occurrence makes it difficult to review evidentiary scientific justifications, the assessment of costs and benefits, as well as the means through which the goals of protection are going to be pursued.

Against this backdrop, what public powers can reasonably do is to provide policies aimed at minimising disaster-related risks’ negative impact on the life and health of its population, as well as additional negative effects on the supply of services and goods. The legal understanding of this precautionary approach to disaster risks revolves around the question of how legal instruments can reasonably cope with disaster mitigation.

The traditional public law approach to disasters is based on emergency regulation, while legal research on the mitigation of these low-probability, high-impact risks is still at an early stage. Even if this regulatory issue was already present in the scholarship (de Sadeleer 2002a), only recently have scholars started to focus on the instruments and challenges of regulating low-probability risks (Black and Baldwin 2012; Simoncini 2010).



Until now, the European literature on risk regulation has basically focused on non-catastrophic risks and the compatibility between the voluntary and identifiable introduction of a risk, on the one hand, and the public interest in the protection of human health and the environment, on the other hand. This way, European scholars have focused on the application of the precautionary principle, which allows assessing the tolerability of risks by shifting the burden of proof onto those parties that would like to take it (Majone 2002; de Sadeleer 2002b; De Leonardis 2005; Fisher et al. 2006; Fisher 2007; Alemanno 2007).

By following this almost new strand of research, this article aims to analyse the central issue of how regulation addresses disaster risk challenges as a preliminary condition for developing resilience against disasters. In pursuing this goal, this article focuses on EU disaster risk governance as a significant case-study to show how a multilevel system needs to cope with such regulatory challenges if it wants to preserve its own functioning.

Since the consequences of catastrophes may affect the functioning of the whole system and because they may also be distributed unequally throughout the European territory, EU governance of the risks of a possible catastrophic impact is extremely important in order to preliminarily design the capability of the EU system as such to resist, respond and recover from catastrophes. But it is only by taking into account the institutional interdependencies that govern the functioning of the EU legal order that a full understanding of the challenges of EU disaster risk regulation can be achieved. The implied effect of this approach is that disaster risk governance contributes to enhancing the cohesion of the EU legal order as such, and that it thus pushes the goals of integration forward.

When addressing EU disaster risk governance, this article focuses on the modes of disaster risk regulation as a key perspective for understanding the functioning and challenges of this regulatory framework. By analysing the regulatory interaction between different levels of government, on the one hand, and between public and private parties, on the other hand, the administrative face of such multilevel governance of disaster risks is outlined. In so doing, the manner in which these modes impact on risk regulation and on the resilience-building process is pointed out, with the aim of showing how the nature of regulation is shaped and which challenges regulators need to meet.

In order to develop this reasoning, the aim, content and specificity of disaster risk regulation is presented first. Based on this, the EU approach to disaster risk regulation is analysed and the core of EU regulation is identified in the setting of regulatory standards;





subsequently, the national ways to implement these standards are addressed. In line with the distinction between traditional command and control powers and market-based instruments, two main types of adjudicatory measures with regulatory effects are considered: prescriptive authorisations, on the one hand, and agreements between public and private parties, on the other hand. The aim is to point out the critical role of the principle of participation in the design of adjudicatory instruments. The final remarks underline and conclude on the principles and structure of EU disaster risk governance.

## 2. The scope of disaster risk regulation

In today's society, the search for safety is critically linked to the reasonable control of unacceptable risks. Since risks as such cannot be eliminated but can only be mitigated, the trade-off between risks and safety is associated with risk management. The goal of public policies then is to set this trade-off at the appropriate level, so that an acceptable standard of safety can be guaranteed within the interested community. Safety is, therefore, the result of a rational management of risks and, from a legal point of view, consists in the identification of those legal instruments that can capture this undetermined legal concept of safety in the most effective way.

Traditionally, when dealing with disasters the public goal is to tackle crises when they are about to occur, through preventive measures, as well as when they are actually occurring, through contingency actions. Public law has met disasters by introducing emergency regimes and regulations aimed at managing such unpredictable situations with flexibility. In national states, civil protection has traditionally delivered this governmental action through extraordinary measures aimed at preparing and responding to disasters as well as recovering from their occurrence (Fioritto 2008).

Since the '80s, the EU as well has been developing civil protection cooperation between its Member States, aimed at supporting national action in case of disasters; to this end, it introduced the Civil Protection Mechanism (CPM) and the Civil Protection Financial Instrument (CPFI)<sup>III</sup>. These instruments allowed for the development of a solidarity network between Member States and the EU against disasters with the goal of enhancing the capacity to prevent, prepare for and respond to disasters (Wiharta 2008; Wendling 2010)<sup>IV</sup>. To this end, the European Commission established an operational unit,



the Monitoring and Information Centre (MIC), which coordinates the assistance to Member States (as well as to third countries) hit by catastrophic events through the Common Emergency Communication and Information System (CECIS), an integrated, web-based platform which sends and receives alerts, registers the details of assistance required, makes offers of help and monitors the development of an ongoing emergency.

However, this emergency approach merely allows containing the impact in the advanced phase of the manifestation of the danger. The need to reduce vulnerability and prevent catastrophic impact scenarios from occurring, however, calls for further stages of mitigation. Risk regulation can help address those dangers whose occurrence can have catastrophic effects by keeping the related risks under control, with the aim of avoiding or at least better preparing for emergency situations.

The specific issue of regulating catastrophic risks consists in the difficulty of assessing such risks. The consequence is that both the probabilities of such risks and the related impact scenarios can be over- and/or underrated. In this precautionary approach, regulatory choices might be twisted by public perception and fear as well as ignorance (Sunstein 2005: 39-41 and 80-81) and there is the concrete possibility of recourse to an instrumental political uses of catastrophic scenarios. These circumstances threaten the rationality of regulation and favour the introduction of measures prone to pay ‘emotion premiums’ (Sunstein and Zeckhauser 2010 and 2011). More generally, these circumstances pose the problem of how to rationalise precautionary protection against disaster risks and how to identify the suitable level of safety. The main regulatory issue is, therefore, to what extent one should regulate the risks with a possible catastrophic impact.

The specificity of regulating disaster risks might consist in the definition of regulatory standards aimed at fixing *reasonable* levels of safety on the basis of the identification of a “significant” risk. This is the key concept on which the system of protection is built. It refers to the toll of victims that can be accepted within a determined timeframe and in a given territory (Comar 1979; Ricci and Molton 1981: 1096-1097; Breyer 1993:11-19; Majone 2005: 133-135; Alemanno 2008: 33-36).

This means that faced with the impossibility of preventing disasters, regulation should engage in the reduction of their possible impact to the extent that costs do not exceed benefits, that is in a proportional way. If resistance against catastrophic risks is not able, by itself, to protect against disasters, this implies that to some extent adaptation to the



consequences of disasters is necessary and unavoidable. When recognising that mitigation can address only certain – significant – risks, disaster risk regulation therefore questions the capability of the precautionary principle to protect against disasters. In the context of disaster management, risk regulation should therefore be designed in a resilient fashion. The proportionality principle represents the legal recognition that mitigation policies should be accompanied by other policies and actions aimed at pursuing resilience.

In a case-by-case analysis, risk regulation should therefore consider the severity of a threat for human health, the degree of reversibility of its effects, the possibility of delayed consequences, and the perception of the threat based on available scientific data (Sunstein 2005-2006: 893-894). As a result, the notion of tolerable risks pertains to a ‘regulative concept’ (Fisher 2003: 456) which conveys a *de minimis* protection achieved through minimum harmonisation standards. This model of protection thus tackles the (measurable) uncertainty by balancing rights in a special context: in light of the proportionality principle, the reasons of precautionary action are balanced out with other competing rights (such as economic rights) in the measure that is considered strictly necessary for avoiding negative impacts and preserving the expected living standards.

### 3. The EU’s regulatory philosophy on disaster risks

The need to regulate disaster risks applies with even greater force to multilevel legal orders such as the EU, where different regulatory philosophies may clash with negative effects on the functioning of the internal market and an unequal impact across Europe. In fact, the search for a transnational response to disaster risks has its very roots in the assessment of possible negative impacts that disasters can have on the interdependencies between Member States and their common objectives within the EU.

This is main the reason that, alongside Civil Protection cooperation, the EU legal order has developed a common approach to disaster risks in an attempt to both rationalise protection against these threats and make it as effective as possible. This approach is built upon the system of multilevel governance, which shapes the EU legal order and strengthens the institutional interdependencies between the different levels of government.

EU disaster risk governance needs to take into account the competences of States on the protection of public safety within their own territory in compliance with the



subsidiarity principle and the current distribution of competences within the EU. According to the principle of subsidiarity, in fact, the intervention of the EU in the regulation of disaster risks is justified only by reason of scale and effects of actions. In the current distribution of competences, disaster risks can affect many areas of shared competence between the EU and the Member States: from environment to transport, and under the most general label of ‘general common safety concerns in public health matters’ (Art. 4 TFEU).

The EU regulatory philosophy is based on the constant interaction and coordination between the EU and national regulators: the EU sets the general framework of protection by defining the common regulatory objectives, while it is then left to the Member States to implement EU rules in the most effective way. This generates tension between the need to provide common regulations at EU-level for enhancing the protection at national levels, and the counter-need to preserve the national responsibility over disaster risks. This tension is endogenous to the EU multilevel legal order, but it can also contribute to pushing European integration forward. In fact, the reallocation of the regulatory function at EU-level has the effect of fostering the process of integration by shaping and harmonising the safety requirements of Member States.

This reallocation should however be driven by the test of necessity in the choice of both the regulator and the content of regulation itself. On the one hand, this means that EU risk regulation should not go beyond what is strictly necessary to achieve the goals which cannot be reached by individual States on their own. On the other hand, according to the proportionality principle (Fromont 1995; Emiliou 1996; Ziller 1996; Galetta 1998; Sandulli 1998; Tridimas 2006:136-241; Harbo 2010; Craig 2012: pp. 590-640), the content of EU action needs to focus only on those risks that are not tenable for the EU legal order.

The regulatory result of this assessment of multiple interests is the definition of standard levels of protection against unacceptable risks: by setting minimum thresholds, the EU determines the limits beyond which the European legal order does not want to run a particularly significant risk. In line with this reasoning, corresponding alert mechanisms are set in order to adequately tackle the case when these thresholds are reached.

This way, the standard-based methodology allows for fixing and gradually controlling the level of risk that is to be considered unacceptable for the legal order. In so doing, standard-setting is based on the use of mapping, monitoring and reporting instruments as



well as on information sharing (Black and Baldwin 2012: 9), which can help control the state of risk and maintain the expected level of safety.

This regulatory philosophy has been applied to many different sectors in the area of shared competences that are exposed to dangers which may have catastrophic impact on the European population as well as on the functioning of the internal market: from the control of major incident hazards of certain industrial activities (through the so called Seveso directives)<sup>V</sup>, to nuclear safety regulation<sup>VI</sup>, and even to aviation safety (enhanced through the establishment of the Single European Sky)<sup>VII</sup>.

In order to achieve its disaster mitigation goals, the EU legal order has also specifically developed a more comprehensive approach to natural disasters, which has been implemented in the key legislation concerning floods<sup>VIII</sup>. This legislation identifies significant flood risks through a process of mapping and by building flood risk management plans on maps of hazard and risk according to statistics and previous experiences. At present, this model provides the most workable instruments for protection, whose rationale can also be employed to tackle other disaster-related issues: It is not by chance that this rationale has also been implemented to the management of the volcanic ash crisis, which was tackled by a coordinated use of mapping and ash concentration thresholds (Fioritto and Simoncini 2011: 120).

This EU strategy strengthens both the existing legislation, policies and programmes and the research and development on disaster risks<sup>IX</sup>. This means developing clear methodologies of risk standardisation that can rationalise the management of these low-probability, high-impact risks. Along with these objectives, in the long-term the EU Commission is thinking about the introduction of a framework directive for natural disaster prevention, as a further pillar of disaster management that would integrate preventive action and civil protection with the aim of prioritising hazards, mapping risks, and managing emergency plans<sup>X</sup>.

This EU regulatory framework aims to make the system of protection against such risks more coherent, by focusing on the goals of protection as a whole and by redirecting both public and private organisations and functions towards the objectives of prevention and mitigation (A.M. Sheehan 1984: 630-631, with reference to the Seveso directive). The setting of EU regulatory standards, however, assumes the reliability of mapping, monitoring and reporting instruments, so that the continuous control over threats can



contain uncertainty. Clearly this rational reduction of risks cannot guarantee the effectiveness of the provided solutions. On the contrary, technology can fail, leading to a consequent inefficiency of standards with (possibly) catastrophic effects. Standards can fail as well, as when assessing a risk and misunderstanding the reliability of data and technology.

Building upon this regulatory philosophy and its limits, any legal attempt to reduce vulnerability can therefore not ignore the importance of being prepared to face emergencies as well as availing itself of further regulatory instruments which socialise risks by transferring their undesired effects to those parties who are in the best position to bear them. If the latter instruments cover the area of possible remedies against the failure of safety systems and are related to the distribution of risks that cannot be prevented<sup>XI</sup>, the former set of emergency measures is still part of a strategy of facing and mitigating disasters.

Since structurally risk regulation cannot prevent disasters from occurring, emergency plans and communication networks aimed at early warning from a critical level of risks need to be developed to reduce the impact of a disaster when it occurs. This is the reason why the EU Commission – with the help of a number of specialised EU agencies and committees – has been working on mitigating uncertainty through a rational control over the whole disaster management cycle, from prevention to recovery. The goal is to enhance the general safety by defining a comprehensive strategy against disasters which coordinate risk mitigation policies with emergency intervention and thereby improve the organisation and procedures of both risk regulation and emergency planning.

#### **4. The national modes of implementing EU regulation**

The EU necessity of anticipating protection against disasters impacts on the Member States' own approaches to disaster regulation. In fact, EU regulation provides Member States with binding legal standards and methodologies for addressing disaster-related risk assessment and management that should be implemented by the individual States according to their own legal framework. This means that according to art. 2 (2) TFEU, after the EU has set the “necessary” level of protection, it is then up to its Member States to identify concrete ways to implement these EU regulatory standards.



This introduces a systemic approach to catastrophic risks with a recognised transboundary impact, which aims to contain negative externalities and protect the ordinary functioning of the EU system as such. What the EU legal framework concretely does is setting, within a coherent system, the minimum binding safety conditions which are enforceable by EU institutions.

The importance of sharing a common legal basis between the EU Member States clearly appears in the case of nuclear safety, which has significantly changed the European framework with regard to this issue: before the introduction of the EURATOM directive in 2009, every Member State could develop its own management of nuclear safety<sup>xii</sup>, simply by taking into account both the international convention on nuclear safety and the International Atomic Energy Agency's (IAEA) standards and principles. This means that when disputes occurred on the starting up of nuclear power plants between neighbouring Member States, these could not be solved by the European judiciary, but only through the negotiation of bilateral agreements, which politically settled the case with the introduction of international instruments<sup>xiii</sup>.

In compliance with the general principle of institutional autonomy, however, national regulators can choose their own way to develop both risk management and emergency plans required by EU regulation. National regulatory variations are therefore presumed to be the operative instruments of EU integration and the political science literature on the impact of EU policies on national legal traditions has clearly addressed both its reasons and effects (Knill 1998; Héritier and Knill 2001; Knill and Lehmkuhl 2002; Radaelli 2003; Versluis 2004).

When developing such plans, Member States need to take into account some significant issues and, above all, consider the costs and benefits of action<sup>xiv</sup>. In order to provide the most effective instruments to implement EU regulatory standards, this consideration is particularly relevant not only in the light of the EU's regulatory philosophy of disaster risks, but also with regard to the balance that national authorities have to perform when assessing and managing these risks.

The choice of the regulatory mode shapes the process of risk mitigation and presents different sets of challenges both for regulating and regulated parties. Broadly speaking, plans can contain both traditional measures of administrative law and market-based instruments (S.A. Shapiro 2003: 401). This means that in order to enact EU regulatory



standards, public administrations can both exercise traditional command-and-control powers and develop incentive mechanisms based on the functioning of the market<sup>xv</sup>. National laws are therefore able to fix the level of convenience for resorting either to unilateral administrative legal powers or to contractual instruments which exploit economic transactions' externalities.

Regulatory choices affect the feasibility of achieving protection itself and, more specifically, the distribution of burdens for achieving the expected level of protection among the actors involved in the mitigation process. In order to decide how to distribute such burdens, the participation of public and private parties in the regulatory process becomes the central issue, which shows how the interaction of different interests at stake is necessary for arranging a feasible regulation of disaster risks. At this level, enhancing resilience means providing effective regulatory solutions aimed at strengthening protection, so that resilience itself assumes and develops its legal feature.

In order to understand the importance of this interaction between public and private parties in resilience-building against catastrophes, the following paragraphs focus on the most prominent instruments with an adjudicatory nature that national administrations can use to mitigate disaster-related risks by involving private parties at different stages. When developing this analysis, the main issues related to the corresponding modes of regulation will be pointed out.

## 5. Administrative powers for disaster-related regulation

At national levels, disaster risk regulation involves the use of ordinary administrative powers with a view to contributing to make the necessary trade-off between risk and safety tenable. Since public administrations are usually required to balance competing rights in the pursuit of the public interest, this ordinary decision-making process has been applied even to the special situations of (disaster) risks with the precautionary goal of enhancing public safety. In this case, when balancing competing rights – generally speaking, the right to health and safety *vs.* economic rights – administrative procedures would result in unilateral decisions that set the nature, range and conditions of the public protection against risks.





Since the goal of *ex ante* mitigating disaster impact and externalities cannot exclude the provision of preventive instruments for managing emergencies, the measures of disaster relief still represent the complementary instrument for implementing a comprehensive strategy against disasters based on mitigation. As a consequence, risk mitigation responsibilities should continue to be accompanied by contingency tasks.

The EU legislation concerning disaster risk mitigation itself requires Member States to adopt emergency plans in order to enhance their preparedness and reduce the damage from disaster occurrence. The importance of this obligation clearly appears from the European Court of Justice (ECJ) case law on the national implementation of EU chemical legislation under the Seveso directives<sup>XVI</sup>. When nationally competent authorities fail to draw up general emergency plans (so called external emergency plans), based on information gathered from the power plants' emergency plans (so called internal emergency plans), Member States should respond for infringement of EU law<sup>XVII</sup>.

The full range of administrative powers is therefore put at the service of protection against disasters. This engages public administrations in a constant relationship with both private parties and other public authorities, in order to regulate and control those activities which can affect public safety, on the one hand, and which can be affected by catastrophic events, on the other hand.

When setting both risk management and emergency plans, public administrations are challenged by the need to get to the right identification of the public interest, that is the setting of a tenable trade-off between risk and safety. Information exchange is critical for identifying risks and mitigating these effectively. As in other domains of administrative action, the participation of both public and private parties interested in the administrative procedure is therefore fundamental for facing this challenge.

Within the administrative procedure, public and private interests are actually competing in the pursuit of public goals. On the one hand, cross-checking with private parties helps administrations to obtain information related to specific areas of expertise, while still guaranteeing individual rights during the proceedings. On the other hand, infrastructural coordination with other public interests within the competence of other public administrations is necessary in order to make the variety of public domains coherent in the development of public policies (Merusi 1993: 21-24). For instance, land use planning is essential for reducing vulnerability: in order to decide where a power plant is going to be



built or where other activities are to be developed, it is important to know the conditions of that territory, namely its exposition to floods, the vulnerability of the population of that area, the cultural heritage in that area etc.<sup>XVIII</sup>

Participation is therefore a key principle for the development of administrative action and the findings of such an examination shape the content of regulation itself. For this reason, the administrative powers and instruments which cover the administrative responsibility for setting a fair balance between competing rights and interests are extremely important for understanding what the expected level of safety is and how this can be achieved.

### 5.1. Prescriptive authorisations as regulatory measures

A specific control over private economic activities whose exercise can to some extent prejudice the public interest in safety is achieved through their submission to *ex ante* adjudicatory procedures of authorisation. These procedures allow administrations to limit the exercise of these activities to the possession of a series of requirements and therefore to control the compatibility of these dangerous activities with the law before these activities can even start.

Member States deal with these administrative measures through different legal regimes, but all these adjudicatory measures produce regulatory effects. Since through these measures access to the market is subordinated to further requirements, a legal barrier is introduced with the specific aim of protecting other public goods (namely safety) in the market domain. All the operators who want to carry out an economic activity that entails some risks for public safety should demonstrate the possession of some specific characteristics which alone can guarantee the expected safety standards.

The issue of these administrative measures is being able to mitigate the concerned risks by creating a relationship of control between the (controlled) private party and the (controlling) administration, which begins due to the purpose of starting a potentially dangerous activity and lasts for the entire duration of such an economic activity. This involves constant public supervision over those activities whose exercise can entail harm for the community.

As far as catastrophic risks are concerned, this regulatory approach is particularly effective in the case of industrial activities involving the use of dangerous substances, for



which industrial operators are required to regularly produce a report on the safety conditions of installations and the predisposition of an updated internal emergency plan<sup>XIX</sup>. But it is also clear in the legislation on the safety of nuclear installations, which requires the possession of a licence in order to exercise a nuclear power plant: by virtue of this licence, the holders is in charge of the primary responsibility for the safety at the nuclear installation<sup>XX</sup>.

In order to focus these administrative instruments on further enhancing safety through compliance with safety standards, such measures may not be limited to the control of some predetermined requirements, but can also contain prescriptions that operators need to implement in order to continue to maintain their authorisations. These prescriptions push the administrative function of control forward, by adding a further regulatory content to the measures, which involves a normative function of command.

Such further prescriptions can be required by the EU legislation itself or they can be introduced by national authorities for better fulfilling or enhancing the safety standards<sup>XXI</sup>. It is also possible that the EU gives some directions and that it is then up to the Member States to identify concretely which further prescriptions are needed to comply with the safety requirements.

Since the definition of a safety level establishes a legal barrier to access the market, this further contribution by public authorities to the identification of the content of safety is not without challenges for the functioning of the EU legal order. The regulatory impact of prescriptions is able to affect competition in the internal market if such a barrier turns out to be an unjustified obstacle to trade. Prescriptions should therefore be the result of a fair balance between the reasons of protection and the goals of the internal market. The related measures therefore need to pursue safety according to the principle of proportionality, so that these measures do not affect individual economic freedom more than is strictly necessary to achieve the public goal of protection.

The certification of air navigation services is a clear-cut example: if appropriate, besides the common requirements that all the Member States should ensure the provision of air navigation services, national supervisory authorities can attach additional conditions to certificates which can only be related to a list of further prescriptions provided by EU regulation itself<sup>XXII</sup>. According to this EU regulation – and in line with the general EU approach to the introduction of barriers to economic freedom – this is possible only when



such further prescriptions are ‘objectively justified, non-discriminatory and proportionate and transparent’<sup>XXIII</sup>. This means that when enhancing safety, Member States cannot use prescriptive measures as an instrument for developing protectionist policies concealed behind the need for precaution. European case law clearly requires Member States to comply with the proportionality principle by demonstrating that safety goals cannot be achieved through other instruments which are less restrictive of freedom. Through the necessity test, European courts review the adequacy of restrictive measures themselves, with the aim of preventing them from becoming intolerable burdens for accessing the (common) market<sup>XXIV</sup>.

When enhancing the safety level through further prescriptions, risk assessment re-emerges and distinguishes on a territorial basis, taking into account the local and concrete needs of the interested community. In order to avoid that, from being a tool for enhancing protection, this subsidiarity-based distinction becomes a discriminatory measure on the market, a legal procedure helps test the compatibility between the pursued protection against (not only) catastrophic risks and economic freedoms: the impact assessment procedure to which industrial projects are submitted ascertains not only the effectiveness of administrative measures, but also the reasonableness of the sacrifice requested by individuals.

EU legislation has established a common framework for impact assessment procedures and leaves it to the Member States to further develop the instruments in specific fields. A clear example is offered by the Environmental Impact Assessment (EIA) procedure, which is mandatory for a series of projects and optional for another class of projects, for which the final decision lies with the Member States, which can also rely on further criteria and/or thresholds for making the decision<sup>XXV</sup>. The underlying idea is that administrative harmonisation at the European level should go hand-in-hand with flexibility and subsidiarity, so that it can be prevented from becoming a boomerang which decreases safety levels. From this point of view, ECJ has pointed out that the autonomy granted to Member States aims at facilitating the examination of the projects’ characteristics without ossifying procedures, but that it should not turn out to be an improper instrument for exempting certain classes of projects from EIA obligation in advance<sup>XXVI</sup>.

Impact assessment procedures have gone further and in the EU approach these can also include not only single projects, but also plans and programmes (Strategic



Environmental Assessment, SEA),<sup>xxvii</sup> on the one hand, and further considerations other than environmental issues, on the other hand<sup>xxviii</sup>. The use of regulatory impact assessment (RIA) is today the main legal instrument for advance testing of and for supporting policies, by identifying the main options for achieving policy goals and their likely impacts in the economic, environmental and social fields (Renda 2006; Wiener 2006; Kirkpatrick and Parker 2007; Meuwese 2008). Through public participation, the regulator can *ex ante* search for better outcomes and performances in regulation and highlight potential trade-offs between risks and benefits<sup>xxix</sup>.

## 6. The market for disaster-related regulation

Even if administrative regulation based on command and control functions critically requires the participation of public and private parties, the final decision by the public administration has a unilateral nature. When dealing with a specific issue, public participation in fact has been focused on plugging gaps in the administration's comprehension of the (risk) circumstances at stake. However, information asymmetries represent a significant burden for administrative action and result in significant collective (administrative) costs of regulation.

In order to enhance the effectiveness of risk mitigation, administrative regulation can be assisted by other market-based legal instruments that introduce collaborative modules with private parties with the aim of reducing information asymmetry problems by spreading the responsibilities for risk mitigation. In fact, private parties working in specific regulatory domains have technical knowledge in their activity's sector at their disposal that public administrations, which simply deal with the legal issues of such domains, cannot have. Where traditional administrative action cannot address all the technical issues involved in regulation by itself, adjudication can resort to co-regulation modules with the aim of finding better regulatory solutions<sup>xxx</sup>.

To capitalise on this sectorial knowledge of private parties, regulators need to identify which private parties are in the best position to bear the risks at stake and then to create a system of incentives and/or disincentives which stimulate them to mitigate such risks. By exploiting the functioning of the market, private parties are made to share responsibilities for identifying the ways to achieve safety goals: if they realise that they can attain their own



interest in the pursuit of the public goal, they will assume a share in the responsibility in risk mitigation and reduce the costs of regulation.

In line with this reasoning, market-based instruments can acquire different features according to the specific way in which the private interest is stimulated. The common starting point should however be the nature of private interests as distinct from (and often conflicting with) public ones (Ledda 1993: 152; De Benedetto 2008: 54 and 90), which is at the roots of the introduction of private participation into the administrative proceedings and should be the condition upon which a collaboration between private parties and administrations is built. Collusions among interests and phenomena of maladministration can otherwise take place with the effect (among others) of reducing the effectiveness of regulation itself (Cassese 1992).

The identification of possible incentives and the definition of contractual instruments for regulating the relationship between public and private parties, as well as that between private parties operating on the market, however, pose significant challenges to regulators which can affect the effectiveness of the cooperation itself. When illustrating this further mode of disaster risk regulation, the criticalities of designing such agreements will be analysed in the following paragraph.

### **6.1. Agreements between public and private parties**

In order to boost the collaboration with private parties and achieve the goals of public policy, public administrations can establish different kinds of agreements with private parties. By setting up a contractual framework for the relationships between private parties and public administration, the enforcement of risk mitigation policies can potentially be favoured by the engagement in a co-regulatory process of both the parties. This kind of co-regulation can play a key role in the building of resilience against catastrophes, since responsibilities (and the related risks of failure) can be shared among public and private actors and both the parties are interested in mutual control over the enforcement of their agreement (Burnett 2007).

Cooperation is crucially based on information sharing, which finds its roots in the information asymmetries across public and private sectors and helps improve protection and response by reducing information gaps and by coordinating priorities (Boyer et al. 2011: 10-12)<sup>XXXI</sup>. This context generates benefits for both the parties who can better



understand the risks at stake and who can optimise the use of their resources by sharing risks and possible damage in accordance with their respective competences. This contracting develops around performance standards which set the expected level of protection against disaster risks: risk management plans consider the development of market-based instruments for the management of disaster risks as a means for implementing regulatory standards.

A clear example of this is provided by the EU discipline of performance plans for air navigation services: in the elaboration of performance plans, national authorities are required to identify not only the entities accountable for meeting the performance targets and their specific contribution, but also the incentive mechanisms to be applied to these entities to encourage the achievement of performance targets<sup>xxxii</sup>.

As in the case of administrative measures, these incentives should be developed according to the general principles of non-discrimination, proportionality, and transparency in order to be compatible with competition rules and not to become an unjustified obstacle to the development of the internal market of air services. Within this category, the use of the incentives for the implementation of safety standards is peculiar and different from other performance standards provided by the regulations for air services, because safety incentives cannot have a financial nature. These incentives shall consist in action plans or measures associated with the implementation of the common requirements for the provision of air navigation services<sup>xxxiii</sup>.

This regulation clearly means to introduce market-based incentives through the development of agreements with concerned entities and is aimed at shaping safety in concrete ways by identifying the most cost-effective solutions through a contractual process. However, currently neither national performance plans nor functional airspace blocks' performance plans provide any specific incentive of this kind for safety targets. If it is true that safety standards have been introduced in the SES regulation only recently, this absence clearly shows the actual difficulties that regulators face when identifying incentive mechanisms based on the assessment of information asymmetries and establishing effective partnerships in this domain.

In highly technical sectors, in fact, the development of incentive mechanisms can be a real challenge for regulators and the inability to implement such mechanisms can prevent the effective regulation of risks. The potential benefit inherent to the contractual scheme



can be nullified by the costs of searching for such an agreement and making cooperation effective.

A consolidated reference model for safety-related agreements can however be found in the EU environmental agreements, which engage both public and private parties in partnerships aimed at effectively implementing environmental policies (Rehbinder 1997; Bailey 1999; Casabona 2008). In environmental issues, this collaboration is achieved both through self-regulation, as when private parties voluntarily decide to comply with EU regulation, and co-regulation, as when public and private parties negotiate a binding agreement which helps achieve environmental goals<sup>xxxiv</sup>.

Recently, agreements in the form of public-private partnerships have been applied in security-related domains as a sector of critical infrastructures, with the aim of enhancing resilience against catastrophic risks. This is especially the case for those facilities that are considered critically important to economic and social life (such as in the sector of transport, but also in other public utility domains), the harm to which can involve major consequences for organised society (Dupré et al. 2011). In principle, by distinguishing and sharing responsibilities between the private parties – who are interested in gaining financially from the awarding of the public contract – and the public authorities – who are interested in the achievement of policy objectives – different kinds of contractual agreements are entered into and some *force majeure* risks can be mitigated.

These contracting procedures force private parties to consider the long-term costs of operations and maintenance against disasters and to implement enforcement mechanisms for achieving the expected protection. Since private parties are made responsible for the whole life cycle of the infrastructure, they can be remunerated from its use only when it is effectively working. This means that if a disaster occurs and the infrastructure cannot work anymore, private parties cannot take revenue from the facility (Boyer et al. 2011: 11 and 13-19). By this reasoning, private parties may also be stimulated to invest in cutting-edge technology in the facility design, since it is much more expensive to adjust an already built infrastructure to large changes.

If in principle this generates a virtuous cycle in disaster mitigation by spreading (measurable) risks among the involved actors, this focus on long-term costs (and uncertain risks) involves higher short-term expenses and therefore requires higher attention to risk assessment in concrete circumstances. Since risk assessment becomes a supporting tool for





the decision making process, the low probability, high impact nature of disaster risks make the possible risks and losses difficult to be predicted by single operators and this increases transaction costs. National risk registers have therefore been implemented as a further regulatory tool which may support such still difficult regulatory choices and develop a transparent approach to risks and responsibilities. In fact, these registers detect and monitor the possible risks for the concerned infrastructure and are based on the basic tools and methodologies used for setting standards<sup>xxxv</sup>.

In order to make the partnership really effective in its purpose of mitigating risks and enhancing resilience, the importance of interdependencies between services and infrastructure should also be taken into account when a disaster occurs (Boyer et al. 2011: 16-18; Cabinet Office 2011: 41-50). However, contracts are barely able to cover all these aspects, since information asymmetries and the related transaction costs make it difficult to set objectives and provide effective instruments of coordination and mutual control (Ménard 2013).

Considering that information asymmetries make the protection guaranteed through risk management agreements still problematic, again emergency regulation appears to be the necessary completion for enhancing resilience. When looking at the contractual modules of regulation, emergency agreements represent an interesting instrument for emergency management. When these agreements are negotiated before the occurrence of a particular disaster, the main contingencies can be covered in the aftermath through multiple agreements<sup>xxxvi</sup>. Emergency contracting is more developed than risk management agreements and Europe presents many interesting domestic experiences<sup>xxxvii</sup>.

Since the EU only retains supplementary competences in the area of civil protection, it can only help Member States carry out actions of risk prevention and respond to natural or man-made disasters within the Union, but is prevented from introducing any harmonisation of the laws and regulations of the Member States in this area (art. 196 TFEU). Since Member States retain jurisdiction over the sovereign domain of civil protection in emergency situations (art. 6 *f*) TFEU), cooperation within the CPM and bilateral cooperation between Member States are the only means of cross-border assistance. As a consequence, the partnership's framework in this domain is fragmented across Europe.



This fragmentation however does not help reach EU performance standards throughout Europe, nor does it foster the enhancement of resilience across Europe. From this point of view, networking and information exchange are critical instruments for supporting early interventions and for reducing the impact of disasters. Contingencies are covered through the functioning of the MIC and the CECIS, on the one hand, and through the provisions laid down in bilateral agreements between Member States, on the other hand (British Institute of International and Comparative Law 2010: 17-22<sup>xxxviii</sup>).

In the area of disaster relief, resilience faces the legal challenges of coordination and the development and sharing of best practices across Europe would help each State to improve its performance when facing a disaster and to contain externalities. Even if harmonisation is prevented in this sector, the integration process and the interdependencies it creates make a common understanding of disaster relief essential for enhancing the resilience of the EU legal order. The implementation of cooperation within the EU framework makes each State aware of the main issues and criticalities of disaster management, as well as enabling them to learn from the best experiences in a peer environment. Only in this common framework does the necessary national diversity not become a systemic risk for, or at least a potential weakness in, the resilience-building process.

## 7. Final remarks

The need to reduce the vulnerability of society against disasters has fostered the introduction of regulatory instruments which can anticipate protection before the imminent danger/emergency phase. Disaster risk regulation has therefore become a significant field of legislation aimed at complementing and supporting disaster relief measures with precautionary action. The need to rationalise such a precautionary protection requires regulatory instruments to take into account the very nature of disaster risks (low probability, high impact) as well as other competing situations of rights and interests the exercise of which can be affected by regulatory measures.

When examining the EU approach to the regulation of risks of potentially catastrophic impact, this article pointed out the fundamental regulatory role played by the EU in the rationalisation of protection. By setting minimum harmonisation standards and reserving to Member States the fundamental responsibilities in the implementation of protection within



their own territory, the EU has developed a complex regulatory framework shaped by the complexity of the EU multilevel legal order itself.

EU disaster risk governance mainly falls within the areas of shared competences and regulation hinges upon the search for common supranational rules and the recognition of national regulatory variations. Being caught between EU standardisation and national variations, this constitutional tension within the EU legal order is based on the proportionality of EU action and finds its limits in the competition rules and the preservation of the internal market's coherence<sup>xxxix</sup>. When searching for a European response to disaster risks, it is the same functioning of the internal market that is at stake. By reducing the cross-border externalities of national regulations, beneficial effects can be achieved in the management of risks; and at the same time, this pushes towards further integration.

Mitigation policies, in fact, foster the European integration through the harmonisation of legislation in areas of shared competence. The whole SES legislation on air traffic management is a clear example of the efforts to make air safety a cross-border issue that cannot be governed on a mere national basis any longer, but which needs a supranational approach within the EU – actually, based on the recognition of functional airspace blocks – in order to meet the near future challenges of increased traffic (both for movement of persons and goods) in the EU air transport sector<sup>xl</sup>. In this sector, safety and efficiency needs have actually boosted the integration process and competences are partially, but relentlessly lifted to the supranational level. This case also shows the actual functioning of the pre-emption mechanism which, according to art. 2(2) TFEU, governs the exercise of shared competences (Craig 2012: 379).

On the grounds of the subsidiarity principle, EU governance of disaster risks requires loyal cooperation between the different levels of government to be effective. National measures aimed at implementing and enhancing safety levels, in fact, can have potential impacts on the market and can create significant barriers to European trade. This is the reason why public administrations, when implementing mitigation policies, need to find the right balance between the reasons of protection and the preservation of antagonistic rights (such as economic rights). The right measure of the protection against disaster risks should therefore be identified in a fair and impartial administrative procedure which takes into account the rights and interests of private parties. This means that competition and the



correct functioning of the internal market are ensured only when developing due process and the connected right (of private parties) to good administration (as stated in art. 41 of the Charter of Fundamental Rights). The principle of proportionality is the cornerstone on which the legitimacy of regulation should be founded. As a consequence, the ordinary rules and procedures of administrative law are made to be the ground for the good governance of special situations such as disaster risks.

Within this institutional context, private parties are expected to play a key role in the mitigation of catastrophes, since the occurrence of these untenable events can affect their own private goods as well as be caused by the unsafe management of private activities. Cooperation between institutions and private parties therefore becomes necessary in order to mitigate and possibly prevent disastrous impacts. This is particularly clear in disaster prevention and relief: imminent risk communication and early warning systems, emergency intervention as well as the recovery phase are critically based on the timely and effective exchange of information as well as on efficient and effective cooperation. At this level, disaster risk mitigation and disaster relief are strictly intertwined; together, these activities contribute to boosting resilience.

Cooperation is also fundamental in disaster risk regulation. Since the triangular relationship between the EU, national administrations and private parties shapes risk mitigation policies, the principle of participation contributes to founding both the legitimacy and effectiveness of regulation. As participation means cooperation between different levels of government (namely, loyal cooperation) as well as between public and private parties, it is necessary to identify, monitor, and control risks as well as to effectively govern these risks in view to reducing their impact.

The substantive necessity of participation stems from information asymmetries that divide public authorities and private parties on the grounds of their different expertise and responsibilities. But if the participation of private parties is a key instrument for achieving resilience against disasters, the same information asymmetries, however, make the results of participation problematic. As can be seen, in fact, in the regulatory process, participation helps regulation to be much more focused on the real safety concerns, to spread costs and to commit the whole society to the mitigation of disaster risks. However, information gaps can be closed only in partial ways, that is either within the rationality of the public



administration, when command-and-control schemes apply, or with ambiguous results about the effectiveness of cooperation, when contractual modules apply.

Nonetheless, the interdependencies between administrations and private parties make participation an unavoidable premise for framing the legal response to disaster risks. The interdependencies which connect all the institutional and non-institutional actors constitute the inescapable background condition which should be taken into account by any tool which aims to mitigate risks. The contribution of law to preserve the expected living standards within the EU multilevel legal order against possible disaster scenarios should therefore cope with these interdependencies – at the same time, it is itself fed by such interdependencies. Broadly speaking, the interdependent relations between the EU, national administrations and private parties create a number of challenges for regulators and this is the reason why different regulatory modes help understand the EU approach to disaster risk mitigation.

Only by considering such interdependencies and the ways they are embedded in disaster risk regulation can the system be effectively resistant to disasters. In the perspective of resilience-building, this means becoming aware of the system's vulnerabilities, considering how to reduce structural weakness by addressing the significant risks of potential catastrophic impact, and encompassing most of the areas where negative externalities are felt.

In the EU, this has meant shaping disaster risk regulation according to the multilevel relationships that take place between the EU itself, national administrations, and private parties. This triangular relationship is therefore at the heart of disaster risk governance in Europe: the more effective the regulatory process between these parties and the more it works in an integrated and systemic way, the more it contributes to making the EU resilient against disasters. The result is that the more integrated the EU is, the more it can be resilient against disasters. But integration sustains resilience-building in a biunivocal relation: like in a continuous cycle, the more resilient against disasters (of cross-border impact) the EU wants to become, the more integrated it is going to be. For this reason, when pursuing the goal of resilience-building, disaster risk regulation can actually and strategically be used for achieving more integration.



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<sup>I</sup> Communication from the Commission to the European Parliament and the Council, COM (2012) 586, *The EU approach to resilience: Learning from food security crises*, 4-5. Even if this communication refers to resilience building in the Sahel Region and in the Horn of Africa, the main principles it provides can be extended and considered significant for achieving resilience within the EU as well.

<sup>II</sup> See the model of the ‘Swiss cheese’, which shows how a series of interlocking events, at different levels, are usually required to make an accident of catastrophic impact occur. This means that the causation chain therefore originates due to the alignment of all the necessary ‘windows of opportunity’ (the holes of the cheese) at all levels in the organisation, thus leading to the occurrence of a particular accident (Reason 1992 and 1997).

<sup>III</sup> EU law on civil protection cooperation has been kicked off by a ministerial meeting in Rome in May 1985; the six resolutions which followed that meeting over the next nine years formed the framework of the current Civil Protection Mechanism (CPM), established by the Decision 2001/792/EC, EURATOM of 23 October 2001 [2001] OJ L 297 and recast by the Council Decision 2007/779/EC, EURATOM of 8 November 2007 [2007] OJ L 314, and the Civil Protection Financial Instrument established by the Council Decision 2007/162/EC, EURATOM of 5 March 2007 [2007] OJ L 71.

<sup>IV</sup> This system can be considered an implementation of the solidarity clause laid down by art. 222 TFEU, which introduces an obligation of assistance on both the EU and each Member State (upon request) to the Member States that face disasters. Since its creation in 2001, the CMP has been activated for over 150 times, for very different types of disasters (ECHO 2012), including the Tsunami in South Asia (2004/2005); Hurricanes Katrina and Rita in the USA (2005); earthquakes in China (2008), Haiti (2010), Japan (2011); floods in the Balkans (2010); forest fires in Greece (2007, 2012); civil unrest in Libya (2011); and explosion at a naval base in Cyprus (2011).

<sup>V</sup> See Council Directive 82/501/EEC on the major accident hazards of certain industrial activities [1982] OJ L 230 (Seveso I Directive); Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances [1997] OJ L 010 (Seveso II Directive); Directive 2003/105/EC amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances [2003] OJ L 345 (Seveso III Directive).

<sup>VI</sup> See Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations [2009] OJ L 172/18.

<sup>VII</sup> See Commission Regulation 691/2010, as amended by Commission Implementing Reg. 1216/2011, laying down a performance scheme for air navigation services and network functions [2010] OJ L 201/1.

<sup>VIII</sup> Directive 2007/60/EC on the assessment and management of flood risks [2007] OJ L 288.

<sup>IX</sup> See Communication COM (2009) 82, *A Community approach on the prevention of natural and man-made disasters*. By setting disaster prevention in the short-term, this communication implements EU strategy against disasters by focusing on the development of knowledge based disaster prevention policies at all levels of government, the coordination among the relevant actors and policies throughout the disaster management cycle and the effective improvement of the already existing policy instruments.

<sup>X</sup> European Commission DG Environment, 2008, *Assessing the Potential for a Comprehensive Community Strategy for the prevention of Natural and Manmade Disasters. Final Report 2008*: 18-19 and 85-90.

<sup>XI</sup> Liability regimes as well as insurance measures vary across sectors and across countries and open a set of challenges for both regulators and regulated parties about the nature of damage that can be repaired, the possible cap to the compensation in case of catastrophic events, the legal risks that parties faces when developing an activity which involves risks for safety (for a sectorial study of the liability issues in Air Traffic Management in the Single European Sky, Simoncini 2013).

<sup>XII</sup> Before 2009, there was only a Euratom directive introducing safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation, which applied to all practices involving a risk from ionising radiation, but did not provide nuclear power plants with specific safety rules. See directive 96/29/EURATOM of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation [1996] OJ L 159.

<sup>XIII</sup> An example of the international settlement of these disputes is the conflict that occurred in 1998 between Austria and the Czech Republic (that was not a Member State yet) concerning the installation of a nuclear power plant in the latter. The Commission acted as mediator between the two States and in 2001 the two States signed a bilateral agreement settling the conflict (Stanič 2010: 157-158, on the case and more in general



on the importance of harmonising nuclear safety in the EU through the establishment of a common regulatory framework).

<sup>XIV</sup> See art. 7 Directive 2007/60/EC; art. 10 Regulation 691/2010/EC.

<sup>XV</sup> In this regard, law and economics literature has distinguished legal orders according to their degree of confidence in the market: the more confident legal orders resort to public regulation only in specific case of intangible goods' protection, whereas the less confident ones shape the system of legal relationships on public regulation provisions (Calabresi 1970).

<sup>XVI</sup> See art. 11 directive 96/82/EC.

<sup>XVII</sup> See ECJ, C-289/08, *Commission v. Luxembourg*, 2009 ECR I-31; ECJ, C-342/08, *Commission v. Belgium*, 2009 ECR I-33; ECJ, C-401/08, *Commission v. Austria*, 2009 ECR I-55; ECJ, C-30/09, *Commission v. Portugal*, 2009 ECR I-170; ECJ, C-392/08, *Commission v. Spain*, 2010 ECR I-2537.

<sup>XVIII</sup> To this end, according to art. 7 (3) of directive 2007/60/EC, 'flood risk management plans may also include the promotion of sustainable development land use practices'.

<sup>XIX</sup> See art. 9 directive 96/82/EC.

<sup>XX</sup> See art. 6 directive 2009/71/EURATOM of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations [2009] OJ L 172/18.

<sup>XXI</sup> In this regard directive 2009/71/EURATOM is emblematic, since its art. 2 'does not prevent Member States from taking more stringent safety measures [...] in compliance with Community law'.

<sup>XXII</sup> See art. 7 and Annex II of Regulation 550/2004/EC of 10 March 2004 on the provision of air navigation services in the single European sky [2004] OJ L 96, as amended by Regulation 1070/2009/EC of 21 October 2009 [2009] OJ L 300/34.

<sup>XXIII</sup> Art. 7 (4) of Regulation 550/2004/EC as amended by Regulation 1070/2009/EC.

<sup>XXIV</sup> On the limits to the definition of risk acceptability see ECJ, 178/84, *Commission v. Germany*, 1987 ECR 1227, paras 28 and 35; ECJ, 188/84, *Commission v. Francia*, 1986 ECR 419, paras. 13-17; ECJ, C-205/89, *Commission v. Grecia*, 1991 ECR I-1361, para 8.

<sup>XXV</sup> See art. 2 and art. 4 directive 85/337/EC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175, as amended by directive 97/11/EC of 3 March 1997 [1997] OJ L 73 and directive 2003/35/EC of 26 May 2003 [2003] OJ L 156.

<sup>XXVI</sup> ECJ, C-133/94, *Commission v. Belgium*, 1996 ECR I-2323, paras 42-43; ECJ, C-72/95, *Kraaijeveld and others*, 1996 ECR I-5403, para 53; ECJ, C-301/95, *Commission v. Germany*, 1998 ECR I-6135, paras 35-46; ECJ, C-435/97, *WWF and others*, 1999 ECR I-5613, paras 42-43; ECJ, C-87/02, *Commission v. Italy*, 2004 ECR I-5975, paras 41-42.

<sup>XXVII</sup> See directive 2001/42/EC of 27 June 2001 [2001] OJ L 197.

<sup>XXVIII</sup> See Commission Communication COM (2002) 276, *on impact assessment*; Commission Communication COM (2005) 97, *Better Regulation for Growth and Jobs in the European Union*, which suggests a procedure aimed at testing the sustainability of policies (sustainability impact assessment); Commission Communication (2009) 15, *Third strategic review of Better Regulation in the European Union*, which improved the quality of regulation; Commission Communication (2010) 543, *Smart Regulation in the European Union*; Commission Communication COM (2012) 746, *EU Regulatory Fitness*.

<sup>XXIX</sup> RIA can be considered 'a type of meta-policy targeting the governance of the regulatory process' which can be a sort of constitutional method of administration (Radaelli and Meuwese 2008: 1, 8, 10).

<sup>XXX</sup> The necessity to collaborate with private parties is an application of the economic principle of make or buy, which recommends that when a subject (namely, an administration) is not able to produce by itself the good or service at stake (namely, risk regulation) it can buy it from others who are able to produce it (namely, private parties who have a specific knowledge on the functioning of the sectors interested by the mitigation policies); (Shapiro 2003: 390-395).

<sup>XXXI</sup> The "need to share" information as a method to build resilience is also stressed in the Sir Michael Pitt review of the flooding emergency that occurred in UK in 2007 (Cabinet Office 2008: 292).

<sup>XXXII</sup> Art. 10 (3), lett. g) and b), and art. 11, Reg. 691/2010/EC.

<sup>XXXIII</sup> Art. 11 (2), Reg. 691/2010/EC.

<sup>XXXIV</sup> See COM (96) 561 and COM (2002) 412. Environmental agreements in Europe can however be only additional to primary legislation, so that they can alternatively find their legal basis either in EU legislation or in national legislation implementing EU law. See ECJ, C-347/97, *Commission v. Belgium*, 1999 ECR I-309; ECJ, C-261/98, *Commission v. Portugal*, 2000 ECR I-5905. In these cases, the ECJ pointed out that voluntary agreements cannot constitute a sufficient legal basis for the implementation of EU law, since the voluntary



nature cannot guarantee the necessary general compliance and the effective enforcement of the rights and obligations provided by EU law. This limit is basically due to the necessity to preserve the coherence and the effectiveness of EU law and aims to avoid anticompetitive fragmentation in the internal market.

<sup>xxxv</sup> In this regard, the UK has an interesting experience of monitoring the range of emergencies that might have a major impact within the country and since 2008 has developed a national risk register (NRR), lastly updated in 2012, which is aimed at informing the public on the Government's current assessment of the likelihood and potential impact of civil emergency risks and on how the UK and emergency services prepare for these emergencies. This is the public version of the National Risk Assessment, which is a confidential assessment conducted annually drawing on the expertise from a wide range of departments and agencies of government. However, it should be noted that NRR focuses only on mid term risks, since it considers only risks that are likely to happen in five years (Cabinet Office 2012).

<sup>xxxvi</sup> The Japanese experience is very significant in this regard, since it has indeed developed emergency agreements between public authorities and some private parties aimed at reserve the private specific expertise to cover specific aspects when occurring a disaster.

<sup>xxxvii</sup> For example, see the case of Italy, where the Civil Protection Department and single Regions signed emergency agreements with providers of essential services (telecommunication and the media for providing information and coordinating the communication system; water and food suppliers; rescue and assistance). Another interesting example is the UK' current development of a system of Advance Purchase Agreements (APAs) for the supply of pandemic-specific vaccine, in order to make the vaccine available as soon as it is developed (Cabinet Office 2012: 11).

<sup>xxxviii</sup> This same study at Annex III offers an overview of the bilateral agreements in force between EU Member States.

<sup>xxxix</sup> According to art. 101(3) TFEU, any agreement which limits competition should be justified by effective improvements in the goods, in the technical or economic progress, and it should allow consumers a fair share of the resulting benefit.

<sup>xl</sup> See Regulation 1070/2009/EC (SES II package) which amended reg. 549/2004/EC, 550/2004/EC, 551/2004/EC and 552/2004/EC (SES I package) with the aim of improving the performance and sustainability of the European aviation system.

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ISSN: 2036-5438

# European Citizens... Mind the Gap! Some Reflections on Participatory Democracy in the EU

by

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Perspectives on Federalism, Vol. 5, issue 3, 2013





## Abstract

Since 1957, the European Economic Community (EEC) has undergone profound constitutional changes, dictated by the geographic and functional expansion of the EU, but also by the need to heal its original sin: the “democratic deficit”.

Despite these innovations, the “democratic deficit” still exists as a deficiency with regard to “input legitimacy”, i.e. as a “discrepancy between the pervasive effects of the regulative power of the EU and the weak authorization of this power through the citizens of the Member States who are specifically affected by those regulations”.

Even though the democratic value of the involvement of people and civil society in decision-making remains contentious, more than a decade after the publication of the 2001 White Paper on European Governance, the method of increasing “input legitimacy” still means the improvement of citizens’ participation, in compliance with Art. 11 TEU.

This essay, building on the extensive academic scholarship on participatory democracy, discusses channels for citizen and civil society participation in the EU. It attempts to critically contrast and compare formal participatory tools, i.e. those provided for in the Treaties or regulated by secondary EU legislation, with soft or informal channels (e.g. consultation, work fora, platforms) for citizens’ involvement and their actual contribution in terms of “input legitimacy.” In particular, drawing inspiration from Smismans’ discourse on “decentralism”, this essay confronts the issue of multifold horizontal (non-territorial) participation, focusing on the involvement of CSOs, i.e. of transnational, non-territorial “organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens”, as well as multi-level territorial (vertical) dimensions of participation. It then contrasts the role of (horizontally or vertically) organized civil society’s participation with the participatory role of EU citizens *uti singuli*.



## Key-words

Participation, participatory democracy, civil society organizations, citizens, European Citizens' Initiative, European Economic and Social Committee, Committee of the Regions



## 1. Introductory Remarks

Since 1957, the European Economic Community (EEC) has undergone profound constitutional changes. The “institutional triangle” composed of the Commission, the Council and the European Parliament (EP), already enshrined in the foundational Treaties, has remained intact. However, the architecture and practice of EU governance have been substantially modified. These changes have been dictated by the geographic and functional expansion of the EU, but also by the need to heal its original sin: the “democratic deficit”.

David Marquand first used the term “democratic deficit” in 1970 (Mény 2003). Then, for over forty years, scholars, journalists and politicians have claimed that the EU suffers from such a deficit, making it an ambiguous *cliché* (Pech 2008: 93), but the substance of the “democratic deficit”, its profound reasons and the ways to eliminate it have been differently theorized.<sup>I</sup> The “democratic deficit” has mostly been identified as a disjunction between power and electoral accountability (Craig 2011: 30) or, as recently expressed by Raphaël Kies and Patrizia Nanz, is primarily (although not exclusively) conceived as the “discrepancy between the pervasive effects of the regulative power of the EU and the weak authorization of this power through the citizens of the Member States who are specifically affected by those regulations” (Kies and Nanz 2013: 1). This essay embraces this view and contends that the “democratic deficit” denotes a lack of procedural or “input legitimacy” (Scharpf 1999: 7), which can be identified as the participatory quality of the procedure leading to laws and rules as ensured by the “majoritarian” institutions of electoral representation.<sup>II</sup>

The EU has explored different and complementary strategies to reduce the abovementioned “discrepancy” and to improve its input legitimacy. The relative weakness of the EP, which is the only directly legitimated European institution, has progressively been reduced. The Lisbon Treaty has further increased the EP’s power in the law-making process through the extension of both the co-decision procedure, renamed “ordinary legislative procedure”, and the political control over the Commission (Lupo and Fasone 2012). In addition, the Lisbon Treaty has given formal recognition to national parliaments’ contribution to “the good functioning of the Union” (Art. 12 of the Treaty on European Union, TEU). It has also provided for an involvement of national parliamentarians in the



ordinary legislative procedure through the “Early Warning System”, whereby national parliaments are to check for and enforce compliance with the principle of subsidiarity in EU legislative proposals.<sup>III</sup>

The expansion of the EP’s competences and the enhanced role of national parliaments went hand in hand with the development of various forms of participatory democracy.<sup>IV</sup> In line with a global trend, the EU has made the participation of civil society to in the decision making process a key objective of its action and a constitutional principle (Cuesta López 2010; Ferri 2012).

In 2001, participation was recognized as one of the pillars of “good governance” in the notorious Commission White Paper on European Governance (hereinafter “White Paper”).<sup>V</sup> The White Paper highlighted the importance of a wide participation throughout the whole policy chain to ensure the quality, relevance and effectiveness of EU policies. That same year, Declaration No. 23 on the future of the Union annexed to the Treaty of Nice addressed the democratic challenge of the EU and acknowledged “the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States”. Finally, even though, in line with the Court of Justice of the European Union’s (CJEU) case law,<sup>VI</sup> the Lisbon Treaty affirms that the EU is founded on representative democracy,<sup>VII</sup> it also introduced several references to participation. Art. 10(3) TEU explicitly recognizes that “every citizen shall have the right to participate in the democratic life of the Union”. Art. 11 TEU makes clear that the EU institutions must give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of EU action and that they must “maintain an open, transparent and regular dialogue with representative associations and civil society”. Furthermore, Art. 11(3) TEU adds a legal dimension to the existing and extensive practice of consultations by providing that the European Commission “shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent”. Art. 11(4) TEU provides for the European Citizen Initiative, and confers to EU citizens the power of inviting the European Commission to present a legislative proposal. Art. 15 of the Treaty on the Functioning of the European Union (TFEU) also mentions civil society and prescribes that “in order to promote good governance and ensure the participation of civil society, the



Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible".

Despite these innovations, the EU is still a democratically legitimate entity with democratic shortcomings (Pech 2008: 94).

On the one hand, the conferral of larger powers on the EP and national parliaments has been accompanied by the consolidation of intergovernmentalism in a sort of "schizophrenic" institutional evolution (Dehousse and Magnette 2006: 33). On the other hand, the overall idea of solving the "input legitimacy" problem by giving more powers to the EP "rests on a fallacious analogy with the institutions of parliamentary democracy at the national level" (Majone 2010: 151). Regardless of contrary predictions advanced by EU Commissioner Viviane Reading,<sup>viii</sup> the EU is not a state (not even a quasi-federation or federation *in statu nascendi*) (Sadurski 2013: 43). EU democracy is not founded on the principle of popular sovereignty, usually proclaimed in national constitutions and inspired by the social contract tradition. The German Constitutional Court, in its renowned decision of 30 June 2009 on the constitutional profile of the Treaty of Lisbon and its ratification in Germany, clearly stated that, even with the new Treaty, the EU retains its identity as a complex organisation, its character of *Staatenverbund*.<sup>ix</sup>

Moreover, there is a growing disaffection with supranational integration, well shown by a declining turnout in European elections. This negative trend, likely to be confirmed in the forthcoming 2014 vote, can be explained by the fact that the process of political representation does not operate properly within a supranational context (Cuesta López 2010: 123; Monaghan 2012: 290). Therefore, the more general concern of representative democracy in the national context can be seen as an additional factor of poor participation in the European elections (Cassese 2012: 606). From this perspective, the enhanced role of national parliaments does not represent a solution to the "democratic deficit", as defined above.

Even though the democratic value of the involvement of people and civil society in decision-making remains contentious, more than a decade after the publication of the White Paper, the main method of increasing "input legitimacy" is still the improvement of citizens' participation, and the implementation of Art. 11 TEU.

Building on the extensive academic scholarship on participatory democracy in the EU, this contribution aims to discuss, in light of Art. 11 TEU, the channels for citizen and civil





society participation in EU governance. For the purpose of this analysis, participation is the deliberative process by which interested or affected individual citizens and civil society organisations (CSOs) are involved in decision-making processes before a political decision is taken (*Inter alia* Alemanno 2014; Mendes 2011a; Nanz and Dalferth 2010).

Drawing inspiration from Smismans' discourse on "decentralism" (Smismans 2004),<sup>x</sup> this essay confronts multifold horizontal (non-territorial) participation, focusing on the involvement of CSOs, i.e. transnational "organisational structures whose members have objectives and responsibilities that are of general interest and who also act as mediators between the public authorities and citizens", as well as multi-level territorial (vertical) dimensions of participation. It then compares the role of (horizontally or vertically) organized civil society participation with the participatory role of EU citizens *uti singuli*. Having characterized the democratic deficit as a "weak authorization" of EU powers, this contribution also aims to evaluate how different forms of citizen involvement contribute to foster "input legitimacy."

First, the role of the European Economic and Social Committee (EESC, or simply the "Committee") is examined (Section 2), then informal mechanisms for CSO participation are analysed (Section 3). This analysis does not include new modes of governance (e.g. the Open Method of Coordination), and does not consider the participation of civil society within EU agencies (although agencies have put in place interesting participatory channels). Second, this essay discusses the multi-level territorial (vertical) dimension of participation, focusing on the involvement of regions and other sub-national entities in EU governance, in particular the role of the Committee of the Regions (CoR) (Section 4). It then examines the role of EU citizens *uti singuli* regardless of their territorial belonging (Section 5).<sup>x1</sup> Finally, a few concluding remarks are provided.

## 2. The Role of the European Economic and Social Committee in enhancing Civil Society Organizations' Participation

The involvement of trans-nationally organized civil society occurs mainly through a permanent and institutionalised advisory body, the EESC, and through informal channels. This section focuses on the EESC, highlighting its features as a transnational participatory forum, trying to infer whether the EESC is likely to increase the EU's "input legitimacy".



It is well known that the EESC was created by the Treaty of Rome as a body with advisory functions, and that it still maintains its character as advisory body composed of members of the civil society. Currently, according to Article 300(2) TFEU, the EESC consists of representatives of organisations of employers and employees as well as of other representatives of civil society, notably from socio-economic, civic, professional, and cultural areas. Since Croatia has joined the EU in 2013, the EESC has 353 members drawn from economic and social interest groups, nominated by national governments and appointed by the Council of the European Union (Art. 302 TFEU). The EESC's members are divided into three main groups: (I) employers' organisations; (II) trade unions; and (III) various interests. The Employers' Group brings together businesspersons and representatives of entrepreneurs and associations working in industry, commerce, services and agriculture in the Member States. The Workers' Group comprises representatives from national trade unions, confederations and sectorial federations, the vast majority of them affiliated with the European Trade Union Confederation (ETUC).<sup>xii</sup> In line with Art. 300 TFEU, Group III is made up of "other representatives and stakeholders of civil society, particularly in the economic, civic, professional and cultural field". The wide formulation of this provision implies the involvement of a large variety of categories: farmers' organisations, small businesses, the crafts sector, the professions, social economy actors (mutual societies, cooperatives, foundations and non-profit associations), consumer organisations, environmental organisations, and associations representing the family, women and gender equality issues, youth, minority and underprivileged groups, persons with disabilities, the voluntary sector and the medical, legal, scientific and academic communities.<sup>xiii</sup> Group III seems to mirror the increased complexity of contemporary society, including a patchwork of minority interests.

Although the members of the EESC are nominated by national governments and appointed by the Council of the European Union, the territorial dimension remains "hidden" in the EESC's internal organization. National groups are disaggregated and re-aggregated on the basis of the interests they represent. Fascinatingly, the EESC includes business interests alongside "weaker interests" and/or "non-economic interests", in line with a trend well established at the national level.<sup>xiv</sup>

One could argue that the EESC is a representative body in the sense that it represents citizens' interests (even though it is not elected). By contrast, we include it in the



participatory discourse: as mentioned above, this body is an institutional setting for CSOs to participate in the EU governance. According to Article 304 TFEU, the EESC must be consulted by the EP, by the Council or by the Commission where the Treaties so provide, or in all cases in which they consider it appropriate. In addition, the Committee may issue an opinion on its own initiative. Hönnige and Panke (2013: 454) underline that the EESC is consulted in nearly all market-creating and market-correcting policies (which include areas such as the internal market, environment and sustainable development, agriculture, employment, social policy, cohesion policy, youth and education, vocational training, research and innovation, culture, health, transport and energy, consumer policy and trade). Legislative proposals are dealt with in six sections (similar to parliamentary committees) structured according to connected policy areas.

Since 1999, when it adopted its own-initiative Opinion on “The role and contribution of civil society organisations in the building of Europe”,<sup>xv</sup> the EESC has claimed to be the primary forum of civil society and to play a legitimacy function through the involvement of social and economic players to effectively shape EU decisions.<sup>xvi</sup> Currently, Group III is the driver of a more participatory EU: being itself composed of CSOs, it has set itself the task of supporting the development and democratic function of CSOs. It should not appear naïve that Group III’s motto is “Achieving real participatory democracy in the EU, through civil dialogue”.<sup>xvii</sup>

Escaping the rhetoric which surrounds EESC’s talks, the EESC is a participatory tool in the sense that it allows CSOs to participate in EU decision-making and synthesises different components of European society. It plays the role of intermediary between citizens and EU institutions. However, even though it is undoubtedly pluralistic, it is not open, since members are pre-selected at national level.

As regard the question whether and how (and how much) the EESC influences the EU decision-making process, it is hard to say. Recently, Hönnige and Panke attempted to measure, through an empirical analysis, the influence of the EESC and the Committee of Regions and concluded that both of them do have influence on policy-making, even though their recommendations are not binding on the addressee (Hönnige and Panke 2013). They nevertheless concluded that this influence is still restricted.

On 5 February 2014, the EESC has opted to “move closer” to the European Parliament and to consolidate its relations with the Committee of the Regions through an



inter-institutional agreement.<sup>xviii</sup> The aim of this agreement is to reinforce the “democratic pillar” of the EU, achieving two objectives: ensuring that legislative action is more effective, and making the best possible use of available resources. In practice, the agreement should nurture a “cooperation upstream”, through own-initiative opinions, and a “downstream” consisting in assessments of the impact of European directives and programmes on the ground. The vague idea behind the agreement is to counter-balance the weight of the Commission and the Council in the legislative process, and to remedy the “weak authorization” of EU powers through the CSOs, i.e. to increase the EU’s “input legitimacy”. Indeed, the ambiguous language of this document alludes not only to input legitimacy, but also (and probably even more) to output legitimacy. Although it is unclear what (legal) effects (if any) the agreement will display, more “visibility” for the EESC should produce more intelligent outcomes: by giving the EESC a stronger role in EU decision making, EU legislation should benefit from their expertise and information.

Reading through the text, what is even more evident is the administrative component in terms of coordination in translation, research and documentation services. While this component is relevant in terms of efficiency and can, to a certain extent, improve transparency, it is not *per se* increasing input legitimacy, nor output legitimacy.

The enhanced role of the EESC in conjunction with the EP and the Committee of the Regions combines all of the institutionalized electoral and non-electoral forms of citizen participation. It also encapsulates, in a sort of institutional circle, horizontal and vertical dimensions of citizen participation, but it is too early to predict its effects. All we can do is to monitor the tangible developments that this agreement will bring about.

### 3. “Informal” Channels of Participation for Civil Society Organizations

Art. 11 TEU prescribes that EU institutions must give CSOs the opportunity to make known and exchange their views on EU action, as well as maintain within them an open, transparent, and regular dialogue. In addition, the Commission must consult parties affected by a decision concerned.

It has been underlined that Art. 11 TEU does not contain a systematic and coherent set of norms and seems to be a “shopping list” where the participatory traits of current EU governance are included (Mendes 2011b: 1851). This probably is true, but the provision is



clear and wide enough to allow the Commission (and other institutions) both to continue using well-rooted instruments, such as the “civil dialogue” and consultations, and to experiment with other participatory tools.

Indeed, after the entry into force of the Lisbon Treaty, CSOs’ involvement still sticks to dialogues and consultation as core channels. In addition, any such involvement is primarily a monopoly of the Commission. The reasons behind this monopoly are two-fold.

First, the Commission has tried to gain in legitimacy itself. As noted by Greenwood, “the Commission’s focus on interest groups as potential agents of input legitimacy historically developed in the time when the European Parliament was an assembly without popular election or extensive powers, when the traditional strengths of interest groups as checks and balances on both political institutions, and upon each other, could provide another contributory avenue of popular legitimation” (Greenwood 2007: 343).

Secondly, the Commission has been the most important target for lobbying activities since the very beginning, due in particular to the control of legislative initiative, and it has tried to handle the pressure of lobbies through instruments which itself “directs”, such as dialogues and consultations (Tasanescu 2009: 55).

The “civil dialogue” is a practice that the Commission has developed for more than two decades. The term “civil dialogue” was coined in 1996 by the Directorate General responsible for social policy to plead for increased interaction with CSOs, further to the “social dialogue” (with social partners). Whilst the social one has been strongly institutionalised since the Maastricht Treaty,<sup>xix</sup> the dialogue with other associations was envisaged in the Commission’s ‘Plan D’,<sup>xx</sup> but lacked formal recognition until the entry into force of the Treaty of Lisbon. Art. 11 TEU, however, does not give a clear definition of “dialogue,” nor does it define its scope, procedures, or players. It has been claimed that Art. 11 TEU should imply a certain evolution of current practice: the “civil dialogue” should become a widespread participatory channel used by all the institutions and would require more openness and clarity (Cuesta López 2010: 132). Even though this opinion can be shared, no relevant changes have occurred yet. The Commission continues to engage in informal, unregulated dialogues which vary considerably from one DG to another and whose effects are quite unclear.

The EP has also tried to set up civil dialogues, primarily through informal public hearings. Annex IX of the Rules of Procedures regulates the access of citizens and



members of “interest groups” to the EP and establishes a code of conduct to be respected. This internal regulation, however, neither grants regular contacts nor reciprocal communication. In addition, it is not clarified what effects these contacts would and should bring about.

The least open of all the EU institutions is still the Council of the European Union. Berger, in 2004, noted that CSOs were “kept beyond the crowd control barriers that protect Ministerial meetings” (Beger 2004). Only after ten years and in selected sectors only have some CSOs (usually from the social sector) occasionally been invited to Council meetings to enjoy speaking rights (Cuesta López 2010: 132).

Consultations, in turn, are soft tools mainly used by the Commission to receive technical knowledge and identify the interests and needs of interested parties before developing legislative proposals. Analogously to the dialogue(s), they pre-date the Lisbon Treaty.

Consultations are formally open to all stakeholders, interested parties and the wider public, allowing for a wide range of actors that include public authorities, businesses, associations of different kinds as well as individual citizens, but participation patterns and rates vary greatly from one consultation to another. However, Quittkat notes that there are also selective consultations which address well defined groups, handle mostly technical issues, and are especially used by DG Enterprise and Industry and DG Taxation and Customs (Quittkat 2011: 659).

Currently, in most cases consultations are carried out through an online forum created by the Interactive Policy Making (IPM) system.<sup>xxi</sup> Although online consultations have become almost regular instruments, not all DGs use them. The format of these consultations can vary considerably, but they often take the form of simple surveys or contain questions which are *in se* conducive to an answer. The impression is that the Commission demands approval for decisions which already have been taken, without offering adequate space and time to provide meaningful input. Standardized questionnaires *per se* hardly leave room for “qualitative or innovative input”, while flexible formats incentivize more complex comments.

Like dialogues, consultations have not undergone any relevant changes after Lisbon. However, there has been a steady and constant move towards a more extensive use of the IPM system and a considerable shift towards standardized consultations. As highlighted by



Quittkat, “[t]his development bears the risk of emphasizing participation (quantity) at the expense of input (quality) as there exists a trade-off between format and participation: the more open the format and thus the higher the probability to receive qualitative input, the lower the number of participants” (Quittkat 2011: 663).

From an overall perspective, in comparison to dialogues, consultations seem to produce more significant effects and contribute towards shaping a legislative proposal. What remains quite unclear is how much single contributions are taken into account (or disregarded), and how they are assessed (Quittkat 2011: 661). In addition, there are no legal criteria to weigh different contributions and to evaluate the representativeness of CSOs (Fazi and Smith 2006: 29).

A general observation that applies to both dialogues and consultations is that they aspire to involve a widespread number of (representative) CSOs in EU decision-making processes in view of increasing “input legitimacy”. Nonetheless, they fail to do so primarily because they are open and transparent only to a limited extent.

The composition of civil society that participates in dialogues and consultations at EU level is largely dictated by which groups and associations the Commission chooses to fund and, often, creates (Sánchez-Salgado 2007). A prominent example of the latter are European “platforms”, which are preferred interlocutors in dialogues. These are collective subjects composed of umbrella organizations which constitute fora for discussion and provide a synthesis of the positions of different actors in a specific field on a named topic. Platforms are not themselves participatory tools. Rather, they are networks of CSOs (Ferri 2012: 522). Indeed, platforms are not directly funded but at the very least incentivised by the EU, as the CSOs that form a part of them are heavily subsidized through EU funds. The European Social Platform (which is probably the first one to have been established) arose from the DG EMP’s activism and was created together with the European Parliament with a direct remit to campaign for a European civil dialogue and subsequently given an elevated status in funding (Greenwood 2007). Other platforms cover every range of activities and subjects: for example, the Platform for Intercultural Europe,<sup>xxii</sup> the EU platform for action on diet, physical activity and health,<sup>xxiii</sup> or the European Civil Society Platform on Lifelong Learning (EUCIS-LLL),<sup>xxiv</sup> to name but a few.

In a recently released booklet, Snowdon claims that citizens are not consulted directly, “but are instead ventriloquised through NGOs, think tanks and charities which have been



hand-picked and financed by the Commission”, and that, in return, these civil society groups frequently campaign for the EU to extend its reach into areas of policy in which it has no legal competence and lobby for their own budgets (Snowdon 2013).

The concept of civil society is rooted in the independence from political institutions, but truth be told the Commission’s efforts to create a trans-national civil society have ended up in undermining CSOs’ very independence.

Snowdon’s harsh reproach can be reinforced if we consider that there is nothing intrinsically democratic about CSOs, that no control on CSOs’ “internal democracy” is purported, and that the Commission has never formally (and explicitly) excluded a CSO on the basis of its lack of internal democracy.

This criticism is not even damped by the strong efforts that have been made towards increasing transparency through the “Transparency Register” (TR). The TR was set up in 2008 by the EP and the Commission through an interinstitutional agreement<sup>xxv</sup> and represents the latest initiative aimed at increasing the transparency of EU-CSOs contacts. It fits within the flow of action under the banner of the European Transparency Initiative (ETI)<sup>xxvi</sup> and contains information about organizations “engaged” in the EU decision-making process. It discloses which interests are being pursued by these organizations and what resources are invested in these activities. A Code of Conduct has also been approved to regulate communication between the institutions and CSOs. Registrants must agree to adhere to the provisions of the Code of Conduct, and breaches of the Code will result in an organization being temporarily suspended or excluded from the register.

Greenwood and Dreger note that registration is highly incentivised, and that these incentives include “the (in-theory) possibility to exclude non-registered organisations from selective consultation meetings, where there are other consultation opportunities (such as public consultations) in place; instructions to Commission staff to issue invitations to register in meetings; 12 months accreditation for a 1-day access pass to the EP; naming and shaming nonregistered organisations; and the option in the Register to sign up to consultation alerts for nominated policy fields” (Greenwood and Dreger 2013: 142).

However, registration remains voluntary and the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU)<sup>xxvii</sup> coalition pointed out earlier this year that thousands of organisations remain outside the voluntary lobby register.

With regard to the civil dialogue, it is unclear whether registration is a significant factor





to include a CSO. It is even more uncertain whether a CSO “excluded” from the dialogue, because unregistered or for a different reason, might experience some judicial protection. The institutions do not have any legal obligation to explain how and why they choose their interlocutors. This wide discretion could hardly be challenged in front of the CJEU. In addition, since the effect of the dialogue on the actual adoption of an EU act are minimal, it is more than unlikely that a CSO excluded from the dialogue challenges the final act in front of the Luxembourg judges on the basis of an infringement of Art. 11 TEU. Even in the event that a CSO should file such a case, the results are still uncertain. In this respect, it is worth recalling that the CJEU has ruled on the principle of democracy in the EU in different contexts and perspectives (*inter alia* Lenaerts 2013). However, it has never focused on CSO (or citizens) participation. If we do not consider the series of “Aarhus cases” in which in any event the Court had a different focus (and, in general, where the cases arose in the context of preliminary rulings), the CJEU came across a CSO’s claim only in *UEAPME*, and only with regard to the social dialogue.<sup>xxviii</sup> The CJEU has ruled extensively on the right to access to documents, driving general conclusions on the principle of transparency, but such case law does not offer a secure basis to ensure participation in the manner envisaged in this short contribution.

Consultations are virtually open, but they end up being dominated by the best resourced (regardless of registration), i.e. by those subjects that have been most generously financed by the Commission.

The road to improve the openness and transparency of these participatory tools is also the way to make them more effective in terms of increasing input legitimacy and inevitably seems to coincide with the enactment of a regulation which defines the procedures and rights of participants. This should happen beside a mandatory TR. In this respect, it must be noted that the EP Parliament reiterated its support for a mandatory TR several times. In February 2014, a few deputies working on the joint transparency register asked the European Commission to put forth a proposal to make it mandatory in 2016, after a resolution was presented in May 2011.<sup>xxix</sup> But the Commission seems reluctant to make serious efforts as regards reforming the register and regulating participatory channels, even in a mid-term perspective.



## 4. The Committee of the Regions

The Treaty of Lisbon has given a firmer recognition to sub-national entities. Article 4(2) TEU states that the EU will “respect regional and local self-government” when legislating, and Article 5 TEU refers to the need to consider local and regional competences. Under Protocol 2, the Commission is obliged, before proposing a legislative act, to take into consideration the regional and local dimensions of the envisaged act, and every EU draft legislative act must include an assessment of its potential impact upon local and regional levels. But despite the undoubted prominence of sub-national public authorities in the post-Lisbon constitutional framework, they are still conceived as “vertically” and territorially organized civil society to involve in European governance through channels of participation, rather than constitutional entities to include in the multilevel institutional decision-making process. These channels of participation are consultations and a dictated advisory body, the Committee of the Regions (CoR).

Quittkat underlines that sub-national communities play a pivotal role in European policy formulation via consultation processes: public authorities not only regularly participate in consultations, but they are also represented in it through a considerable number of associations like Eurocities, the Association of European Border Regions (AEBR), the Association of Finnish Local and Regional Authorities or the Local Government Association for England and Wales (LGA).

Despite this involvement in consultations, the Committee of the Regions has looked suspiciously upon informal participatory channels and upon a civil dialogue involving associations of regional and local authorities, trying to affirm its exclusive legitimacy as institutional discussion partner for local and regional authorities of the Union (Smismans 2003: 485). As a result, sub-national entities’ participation in EU governance (with regard to the EU side) is still relatively underdeveloped.

The CoR was established in 1993 by the Maastricht Treaty along the model of the EESC to strengthen the role of regions and local authorities within the EU decision-making process, to which they had previously not had access. Art. 13(4) TEU defines the role of the CoR as assisting the EU institutions in an advisory capacity. More precisely, the Commission, the Council and the Parliament must consult the CoR before adopting legislation in fields which touch upon local and regional competences. Analogously to the



EESC, the CoR can also voluntarily submit opinions in response to the Commission's legislative proposals. The CoR currently has 353 members from all the EU countries, appointed for a five-year term by the Council, acting on proposals from the EU Member States. The CoR's members are elected members in local or regional authorities or "key" political players in their home region.

This "mixed" composition is highly questionable because it creates uncertainty and internal imbalances. By contrast, it might be perceived as pluralistic and eventually (attempts to) mirror constitutional diversity. The internal organization and subdivision into political groups according to trans-national party orientations (e.g. the European Peoples Party, the Party of European Socialists (PES), the Group of the Alliance of Liberals and Democrats for Europe and the European Alliance) is also questioned. In this respect, Hönnige and Panke affirm that the CoR should be considered more as a sort of political committee, rather than as a participatory body (Hönnige and Panke 2013: 454). We contend, by contrast, that these trans-national political cleavages (as well as the fact that the CoR is torn apart into national delegations) do not alter the CoR's constituency and, consequently, do not distort its role as a participatory forum for territorially organized civil society.

Whether or not the CoR increases "input legitimacy" is a challenging question. As recalled above, Hönnige and Panke attempted to measure the influence of both the EESC and the CoR and concluded that they do have (limited) influence on policy-making. A different study, conducted by Neshkova, had already examined how often the Commission responded to subnational preferences by incorporating them into EU legislation, and arrived more or less at the same conclusions (Neshkova 2010). This author tracked 60 legislative proposals initiated by the Commission between 1996 and 2007 and estimated the change made in response to requests by the CoR. She found that, albeit subnational interests influence supranational regulation, this influence is quite unevenly split across policy areas. It is quite predictable that the Commission values the Committee's expertise more when it comes to regional issues, but overall it seems that the CoR slightly increases the EU's "input legitimacy".

According to Cygan, the CoR might play a more relevant role in the future through the assessment of the potential impact of a legislative proposal upon local and regional levels, but this does not offer a universal solution for improved legislative legitimacy (Cygan



2013). However, a supposed limited impact in terms of “output legitimacy”, such as that alluded to by Cygan, does not blur the CoR’s contribution in terms of “input legitimacy”, which might also be increased by the abovementioned inter-institutional agreement with the EP and the EESC.

## 5. “Informal” Channels of Participation for Individual Citizens

As mentioned above, Art. 11(1) TEU obliges the EU institutions to “give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”, and expressly pull citizens and CSOs along.

Mendes highlights that there is no definition of “public exchange of views”, and no clear boundaries can be traced between this exchange and dialogue and consultations, respectively provided for in Art. 11(2) and (3) (Mendes 2011b: 1852). Although from the legal point of view the difference (if any) between these participatory channels is unclear, it can tentatively be affirmed that Art. 11(1) TEU alludes to a patchwork of “soft” participatory tools, including consultations which, generally speaking, pre-date the Lisbon Treaty.

The “exchange of views” is now ensured through the website “Your Voice in Europe”, which is the “European Commission’s ‘single access point’ to a wide variety of consultations, discussions and other tools which enable you to play an active role in the European policy-making process”.<sup>xxx</sup>

As discussed in Section 3, consultations aim to include the interests of the addressees of policies and legislations and, although formally open to individual citizens, are substantially directed to, and “used” by, CSOs.

The website section labelled “discussions” redirects to EU blogs and social networks. Despite the inviting slogan of the session (“[h]ave your say in debates on the European Union and its future, discuss issues directly with leading figures and exchange views with other citizens interested in the same topics”), these instruments do not allow for participation in the meaning explained in the Introduction. Rather, they are informative channels to offer a “window” for looking inside the EU institutions, to know better Brussels’ bureaucracy. Citizens may acquire information, but they do not influence the decision-making process.



The section “Other Tools” redirects to advisory bodies (Committee of the Regions and the European Economic and Social Committee) and allows for other tools for contacting institutions. One of them is the European Business Test Panel (EBTB),<sup>xxxI</sup> a panel of companies regularly consulted on European Commission policy initiatives. None of these tools can be considered participatory, and the EBTB itself is essentially an online platform through which companies are required to respond to consultations.

Beside these online tools, between 2001 and 2009 (before the entry into force of the Lisbon Treaty) the European Commission, the technocratic body *par excellence*, has become an active advocate of “participatory engineering” (Abels 2009), creating what Mundo Yang refers to as Deliberative Citizens Involvement Projects (DCIPs) (Yang, 2013). The Commission funded and organized several projects to foster “public exchange of views” and, namely, the involvement of individuals. The Commission attempted to test which of the wide range of available methods<sup>xxxII</sup> would be best suited for transnational and multilingual participation. RAISE, a project funded by the European Commission in the 6<sup>th</sup> Framework Programme for Research, brought together 26 citizens from all Member States to develop a vision for tomorrow’s city. The participants were to represent the “average citizens” from the different countries of Europe and were selected among people who had submitted their application to participate through the RAISE website.<sup>xxxIII</sup> The European Citizens Panel on the role of rural areas combined several regional and one pan-European citizens panel.<sup>xxxIV</sup> At the regional level the panels, made up of citizens randomly selected, discussed rural questions and formulated recommendations for relevant regional public authorities. The panels were supported by the provision of wide-ranging and balanced information, supplied at the request of the citizens by witnesses and experts, and by professional facilitation of their debates and deliberations.<sup>xxxV</sup> At the EU level, 87 citizens from the regional panels met in Belgium for three days to discuss and debate – each in their own language – a large range of European challenges for rural spaces. A similar project, “European Citizens’ Panel – New Democratic Toolbox for New Institutions”, was conducted by a consortium of CSOs, financed by the Commission, in order to test methods of engaging citizens with the European Union.<sup>xxxVI</sup>

Most recently, taking into account the previous projects, and probably with the intention of more effectively implementing Art. 11(1) TEU, the DG for Communication of the European Commission has appointed a consortium of companies to carry out a study



on the establishment of a “European House for Civil Society”,<sup>xxxvii</sup> and to examine whether there is a need for such a “space” of participation by EU citizens.<sup>xxxviii</sup> The survey was completed in January 2014 and, ideally, from 2015 onwards the “European House for Civil Society” should be a focal point for citizens and CSOs not yet represented in Brussels, and should aim to engage “the unengaged” EU citizens.

The rather incomplete excursus provided above attempts to show that the soft tools available to individual citizens are only to a limited extent “participatory”, and that their contribution to the improvement of “input legitimacy” is quite doubtful. The online consultations are open to individuals, but are to a large extent a tool used by CSOs. In many cases, “ordinary citizens” are not knowledgeable enough to complete the questionnaires prepared by the Commission, especially when a consultation concerns niche areas or technical issues. Other tools (e.g. EU blogs) constitute a “way to be informed” about the EU, but are not participatory channels *strictu sensu*, as they are not aimed at including the will of the people in decision-making and then translate it into political decisions.

The participatory projects are extremely interesting in terms of revitalising democracy among EU citizens. However, they highlight the difficulties in transposing, in a supranational setting, participatory democracy methods and practices that have been used (even successfully) in local or national contexts. The questions that accompany every participatory process appear even more difficult to answer: Who participates? Are the participants to be selected randomly or recruited from different societal subgroups? Should the participatory arrangement remain open to all those who wish to attend? Should regional and local communities be included? How are discussions linked to policy action?

The fact that these questions are still unanswered is the reason why participatory projects represent single and distinct experiments. It is not yet clear whether they can be replicated on a larger scale, periodically, and on a broad range of topics. Their costs are uncertain and, in times of harsh economic crisis, it is not obvious that such participatory processes are sustainable. In addition, the actual influence on the decision-making processes by these participatory experiments has been negligible (Boussaguet and Dehousse 2002): it is safe to affirm that they have not increased “input legitimacy”. The “European House for Civil Society” is more of an idea than a concrete project and it is not even clear whether and how it will become a “stable” participatory tool.



## 6. The European Citizens' Initiative

In 2012, the European Citizens' Initiative (ECI), provided for in Article 11 TEU and regulated by Regulation (EU) No. 211/2011 (hereinafter “the Regulation”),<sup>XXXIX</sup> has become a concrete tool for citizens to instigate the adoption of legislation.<sup>XI</sup> Citizens cannot present a proposal to the legislative institutions (i.e. EP and Council), and cannot place a proposal directly onto the EU political agenda for debate and decision. However, they can request the Commission “to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties” (Art. 2(1) of the Regulation).

The European Citizens' Initiative (ECI) was first provided for in the Draft Treaty establishing a Constitution for Europe, and then included in the Lisbon Treaty.

Art. 11(4) TEU states that “[n]ot less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”.

According to Art. 24 TFEU, “[t]he European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come”.

On 11 November 2009, the European Commission published a Green Paper on the citizens' initiative<sup>XLI</sup> and launched a consultation in view of preparing a legislative proposal. Following this public consultation, the Commission submitted a proposal for a Regulation on 31 March 2010, which lays down the requirements and the procedure to submit an ECI. In February 2011, the European Parliament and the Council adopted Regulation 211/2011 (hereinafter “the Regulation”). Without exploring the content of that Regulation in great detail, it suffices here to briefly highlight the main steps to present an ECI.

The first step is the formation of a sort of multinational “organizing committee”: according to Art. 3 of the Regulation the organizers (natural persons who are Union



citizens and of the age to be entitled to vote in EP elections) must form “a citizens’ committee of at least seven persons who are residents of at least seven different Member States”. The organizers must then register their proposed initiative with the Commission (Art. 4). The request for registration must specify the title and subject matter of the ECI, its objectives, any relevant provisions of the Treaties, and details about both the citizens’ committee and their sources of support and funding. Within two months from its receipt, the Commission must register the proposed ECI, provided that four conditions are satisfied: namely that (a) the citizens’ committee has been formed and its contact persons have been duly designated; (b) the proposed citizens’ initiative does not manifestly fall outside the framework of the Commission’s powers; (c) the proposed citizens’ initiative is not manifestly abusive, frivolous, or vexatious; and (d) the proposed citizens’ initiative is not manifestly contrary to the values of the EU (Art. 4(3)). Following a successful outcome, the organizers may commence the collection of statements of support from individuals entitled to endorse the proposed ECI. All necessary statements of support must be collected within a maximum period of 12 months after the registration. The signatories of a citizens’ initiative shall come from at least one quarter of Member States (Art. 7). Art. 8 provides that after collecting the necessary statements of support from signatories, the organisers shall submit these statements, in paper or electronic form, to the relevant national competent authorities for verification and certification. Having obtained the certification, the organizers submit their ECI to the Commission and then have the opportunity to present their ECI at a public hearing organized at the European Parliament (Art. 11). After that public hearing, and within three months of having received the valid submission, the Commission has to “set out in a communication its legal and political conclusions on the citizens’ initiative, the action it intends to take, if any, and its reasons for taking or not taking that action” (Art. 10(1)(c)).

The ECI is certainly an open participatory tool. As highlighted by Dougan, the only restriction concerns age (Dougan 2011: 1820): “an age threshold was certainly not required under Article 11(4) TEU, but it can probably be seen as falling within the Union legislature’s discretion under Article 24(1) TFEU”, but doubts have been raised on the compatibility of this limit with the principle of non-discrimination (Ferraro, 2011: 282) and, in any event, a lower age limit would have been the occasion to involve younger citizens in EU governance. The regulation, however, in compliance with the TEU, includes an





element which reflects the supranational identity of the EU: signatories must come from at least 1/4 of Member States, although no particular geographic or demographic requirement is mentioned. According to Article 7(2) of the Regulation, signatories comprise at least the minimum number of citizens set out in Annex I to the Regulation and those figures correspond to the number of MEPs elected in each Member State multiplied by 750. Although scholars highlight the drawbacks of this system of “geographic” (re)distribution, it might be argued that no system is perfect and that, regardless of certain imbalances, the ECI allows for broad transnational citizen participation.

Though proceduralized, the ECI is relatively “user-friendly” (Bouza García 2012: 269). Criticism has been raised on a few requirements: for example, Szeligowska and Mincheva affirm that it is “restrictive, and overly formalistic, to require citizens to choose a particular structure for the initiation of an ECI rather than leave them the freedom to organise themselves in a different manner” (Szeligowska and Mincheva 2012: 276). These authors highlight that it is “overly burdensome and somewhat disproportionate” to conceive this organizational structure as a compulsory condition sanctioned by refusal of registration (Szeligowska and Mincheva 2012: 273). By contrast, however, the establishment of such a committee can be seen as a means of protection from ‘spamming’ and as a tool to prevent interest groups from denaturing the ECI (De Witte et al. 2010).

The concrete impact of the ECI in terms of “input legitimacy” is debatable. The ECI allows EU citizens to request the Commission to submit a proposal,<sup>XLI</sup> and the Commission has wide discretion on whether to register a proposed ECI and on whether to put forth a proposal. On the one hand, it seems highly unlikely that the Commission refuses registration of a proposal on the basis of its substance: the criteria laid down in Article 4(2) provide that there must be manifest incompetence of the Commission or that the ECI is “manifestly abusive, frivolous or vexatious” or “manifestly contrary to the values of the Union”. It is apparent that Art. 4(2) covers “extreme” situations, in which there is an evident contrast between the rationale of the proposal and the objectives and the values of the Treaty. On the other hand, it is undeniable that there is no obligation whatsoever on the side of the Commission to bring forward any formal proposals based on a valid ECI. The Commission might refuse to adopt any concrete action or cherry-pick certain elements of the proposed ECI whilst ignoring others, or might even react with measures other than those called for by the ECI (Dougan 2011: 1822). However, the fact



that the Commission must explain the reasons behind its choices constitutes a vital constraint on its discretion and, arguably, the decision of the Commission can also be challenged before the Court of Justice under Article 263 TFEU.

The ECI is “primarily an agenda-setting tool” (Kaufmann 2012), and both EU civil servants and CSOs do not expect it to have any meaningful impact on EU affairs and regards it as a weak device in terms of its capacity to oblige the Commission to act (Bouza García 2012: 259 and 269). At present, this rather pessimistic view cannot be contradicted, and whether or not the ECI ultimately strengthens EU democracy will eventually rest on how the ECI will be used. Certainly, the procedural warranties that constrain the Commission’s discretion seem sufficient to allow the ECI to display its potential and contribute to healing the EU’s “democratic deficit”.

At the end of December 2013, the Commission officially received the first successful ECI, with validated support from at least one million European citizens:<sup>XLIII</sup> the “Right2Water ECI” (Water and sanitation are a human right! Water is a public good, not a commodity!)<sup>XLIV</sup> invites the Commission to propose legislation implementing the human right to water and sanitation, as recognised by the United Nations, and to promote the provision of water and sanitation as essential public services for all. It will be interesting to see whether the Commission decides to propose a legislation or policy measure, or not to act at all.

For other ECIs, the period of collection of signatures is over, but they have not (yet) been submitted to the Commission. Interestingly enough, one of these concerns a “Central public online collection platform for the European Citizen Initiative [...] to enable all European Citizens to participate in the European politics” through a lower barrier which works instantly and without technical expertise.<sup>XLV</sup> This ECI demonstrates that there is a portion of citizens willing to make full use of this participatory tool, and willing to make it as open and accessible as possible. It is unclear from the proposal whether this is an attempt to further regulate the ECI or to amend Regulation 211/2011. It is likely that the organizer of this ECI just wanted the Commission to take a policy action. Hence, what the reaction of the Commission will be, whether the Commission will follow up on this ECI and whether it will pursue a legislative act, an amendment or, by contrast, whether it will proceed through policy action and soft law remains to be seen.



## 7. Tentative Conclusions

Despite the entry into force of the Lisbon Treaty, the dominant (although probably non majoritarian) picture of EU governance remains that of a “muddy” and technocratic process far removed from citizens. The recent economic crisis has contributed to reinforcing the idea of unpopular political decision taken regardless of the will of EU people, or even against the determination of citizens. This picture has been largely endorsed by the so-called anti-EU parties (mainly right-wing populist/nationalist parties), which claim that there is a huge and almost unbridgeable “democratic deficit”. This appears bold rhetoric. Whether one considers that the EU suffers from a “democratic deficit” depends on the factors one prioritizes when assessing the EU’s democratic legitimacy (Craig 2011: 30; Sadurski 2013). This paper is based on the assumption that there are democratic shortcomings in the EU, and that the democratic deficit still exists if we conceive of it as deficiency in terms of “input legitimacy”. It is also based on the postulation that a means of increasing “input legitimacy” in the EU is the improvement of citizens’ participation, and the implementation of Art.11 TEU (and Art. 10(3) TEU).

Relying on these assumptions, and building up on the wide and varied academic scholarship, this article has endeavoured to highlight a double paradox. First, while EU institutions have opened up to citizens and CSOs, the multi-centred and heterogeneous forms of participation in EU governance are still insufficient and somewhat questionable in terms of openness and transparency. Second, Art. 11 TEU has a great significance *per se*, and Art. 10(3) TEU, as highlighted by Alemanno, “has led to a Copernican change in the legal nature of the participatory component of openness” (Alemanno 2014). However, up to now, they displayed little effects in terms of advancing the system of participation, with the exception of the ECI which represents the only novelty among the available participatory tools.

Informal horizontal participation has been reduced to CSOs’ participation, but the brief discussion of consultations and civil dialogue has underlined these channels’ deficiencies. There is still a significant gap between what these informal participatory channels (should) pursue (i.e. open up the decision-making process to EU citizens and make them actors of EU governance) and what is actually achieved in terms of openness and transparency, and ultimately also in terms of “input legitimacy”.



To find the correct method to ensure an open and balanced channel of participation for citizens appears quite problematic, but it seems unescapable. As Medes underlines, “[b]y Treaty determination, participation is an aspect of democratic legitimacy. This postulates a normative shift in the way participation in EU law and governance is approached. Participation practices under Article 11 TEU can no longer be viewed only as a manifestation of participatory governance – which focuses on problem-solving capacities and on efficiency of regulatory decisions – but need to be assessed in the light of their broader democratic meaning.” (Mendes 2011b: 1859)

If we consider the right to participate in the democratic life of the EU as a fundamental right, EU institutions can no longer rely on consultations and on what Abels calls “democratic experimentalism” (Abels 2009). A legal framework should establish both clear procedures for public participation, thereby enhancing transparency, and predictable rules on the “effects” that participatory tools display.

Art. 11 TEU (unlike the ECI) does not require any binding law to regulate participation. It is also true that citizens’ participation requires a certain degree of flexibility and the use of different techniques and/or channels. But, even though “one fits all” does not seem a good solution, the soft mechanisms examined here fall short in terms of the requirement of openness and transparency. A legal framework, though leaving a certain degree of flexibility, should foster equal access to the public, specifying how and to what extent outcomes of participatory processes influence decision-making processes.

There has been a failure on the part of EU institutions in avoiding any opportunity to regulate these channels. The TR is a puzzling example of how the lack of any binding act and mandatory registration undermines the very objective of the registry itself.

Horizontal and vertical participation has also taken the form of advisory committees (CoR and EESC). These committees bring together civil society organizations and the EU: they are well-rooted bodies, but their contribution in terms of input legitimacy is still limited, though not negligible.

The ECI is the only channel that has been regulated and proceduralized. Leaving aside participatory experiments, it is also the first participatory channel really dictated to EU citizens *uti singuli*. Some scholars contend that the ECI will eventually empower more CSOs than citizens, because only CSOs have the resources and network necessary to produce the required number of signatures (Smith 2012: 289). This is not without truth, but “the ECI



does provide a new avenue for citizen engagement” (Smith 2012: 285). Regardless of any criticism that can be directed at Regulation 211/2011, if put into practice, the ECI has great potential to increase EU “input legitimacy”.

Overall, although, as affirmed by the German Constitutional Court in its Lisbon Treaty decision, the mere deliberative participation of citizens and CSOs cannot replace the legitimizing of connections based on elections and other votes,<sup>XLVI</sup> the lesson that could be learnt from all these participatory instruments is that they could and should complement representative democracy. EU institutions probably should engage more in creating participatory tools, not in continuing the democratic experimentalism but through building upon the experience gained, regulating where possible what already exists.

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I am grateful to Giuseppe Martinico and Paolo Addis for their support, and to the anonymous peer reviewers for useful comments. All errors are my sole responsibility.

<sup>I</sup> The literature on the EU’s “democratic deficit” is extensive. *Inter alia* see Majone 1998, Majone 2005, Majone 2010, Bellamy 2006, Decker 2002, Hix 2008. For a critical overview, among others, see Moravcsik 2002. For a critical review and assessment of most prominent literature see Piattoni 2013. For a general overview of the amendments introduced by the Treaty of Lisbon to heal the democratic deficit see Pinelli 2008. For a wider perspective on EU governance and regulatory theories see Bredt 2011.

<sup>II</sup> The concepts of output and input legitimacy as applied to the EU have their origins in the work of Fritz Scharpf: *inter alia* see Scharpf 1999: 7 ff. Although Scharpf found both input and output necessary for democratic legitimization, he concluded that, for the EU, the focus must be on institutional output, because the EU lacks not only the majoritarian institutional inputs (direct elections for a government) but also its constructive preconditions, a European demos. Schmidt has recently discussed the the concept of “Throughput legitimacy”: see Schmidt 2013.

<sup>III</sup> In particular, any national parliament may, within eight weeks of transmission of the Commission’s proposal to it, issue a reasoned opinion stating why such a legislative proposal does not comply with the principle of subsidiarity. This opinion must be taken into account by the EU institutions. If the responsible institution decides to maintain, rather than to amend or withdraw, the contested legislative proposal, it must respond to the “yellow card” by giving its reasons, thus increasing the overall democratic accountability of the EU. National Parliaments also participate in the Treaty revision procedure (via the Convention method which includes parliamentarians from the Member States in the drafting of treaty amendments), and in the simplified treaty revision procedure (each national parliament may veto a European Council decision to change a European legislative procedure; Art. 48 TEU).

<sup>IV</sup> In this contribution we do not indulge in the meaning and features of participatory democracy, nor in the difference between participatory and deliberative democracy. For a definition of participatory democracy we refer, among many others, to Allegretti 2006.

<sup>V</sup> COM (2001) 428 def. On the White Paper see, among others, Palermo 2009, Tiberi 2002, Armstrong 2002, De Schutter 2002.

<sup>VI</sup> CJEU Judgement of 29 October 1980 Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333.

<sup>VII</sup> Art. 10(1) TEU.

<sup>VIII</sup> <http://euobserver.com/political/123183>.

<sup>IX</sup> BVerfG, 2 BvE 2/08 of 30.6.2009. In this contribution, we do not dwell on the complexity of this decision. See on this judgement Palermo and Woelk 2009.



<sup>X</sup> Smismans combines a multi-level territorial (vertical) dimension and a transnational (horizontal) one. In Smismans' work, decentralism refers to the respect of the autonomy of lower or smaller decision-making levels, the procedures privileging these decision-making levels (subsidiarity), and the involvement of these decision-making units when policy-making is defined (and implemented) at a more central level. Vertical decentralism defines these processes with regard to territorial decision-making levels and actors. Horizontal decentralism consists in processes with regard to functional levels and actors, in particular CSOs and private organisations.

<sup>XI</sup> In line with Habermas's definition (Habermas 1996: 367), and with the notion adopted by the European Economic and Social Committee (EESC) ([1999] OJ C 329/30), we rely a wide conception of civil society which includes trade unions and employers' organisations (social partners), non-governmental organisations, professional associations, charities and grass-roots organisations (interest groups).

<sup>XII</sup> See at <http://www.etuc.org/>

<sup>XIII</sup> See at <http://www.eesc.europa.eu/?i=portal.en.group-3>.

<sup>XIV</sup> See for example the French *Conseil Économique et Social* (CES).

<sup>XV</sup> OJ C329, 17/11/99

<sup>XVI</sup> EESC, 'The EESC: a bridge between Europe and organised civil society', (2009) at <http://www.eesc.europa.eu/resources/docs/eesc-2011-08-en.pdf>.

<sup>XVII</sup> <http://www.eesc.europa.eu/?i=portal.en.group-3>.

<sup>XVIII</sup> Cooperation Agreement between the EP and the EESC at <http://www.eesc.europa.eu/resources/docs/cooperation-agreement-between-the-eesc-the-ep-and-the-cor.pdf>.

<sup>XIX</sup> Article 155(1) TFEU provides that '[s]hould management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.' Article 155(2) TFEU specifies that, in matters covered by Article 153 TFEU, at the joint request of the signatory parties, those agreements may be implemented by a Council decision on a proposal from the Commission.

<sup>XX</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. "The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate" COM(2005) 494 final.

<sup>XXI</sup> [http://ec.europa.eu/yourvoice/ipm/index\\_en.htm](http://ec.europa.eu/yourvoice/ipm/index_en.htm).

<sup>XXII</sup> <http://www.intercultural-europe.org/site/content/page/about-platform-intercultural-europe>. On this and other cultural platforms see Ferri 2011.

<sup>XXIII</sup> [http://ec.europa.eu/health/nutrition\\_physical\\_activity/platform/index\\_en.htm](http://ec.europa.eu/health/nutrition_physical_activity/platform/index_en.htm)

<sup>XXIV</sup> <http://www.eucis-lll.eu/>

<sup>XXV</sup> OJ L 191/29

<sup>XXVI</sup> COM (2007)127 def.

<sup>XXVII</sup> <http://www.alter-eu.org/>.

<sup>XXVIII</sup> CJEU Judgement of 17 June 1988, Case T-135/96, *UEAPME v Council* [1998] ECR II-2335.

<sup>XXIX</sup> <http://euobserver.com/institutional/123096>.

<sup>XXX</sup> [http://ec.europa.eu/yourvoice/index\\_en.htm](http://ec.europa.eu/yourvoice/index_en.htm)

<sup>XXXI</sup> See at [http://ec.europa.eu/yourvoice/ebtp/index\\_en.htm](http://ec.europa.eu/yourvoice/ebtp/index_en.htm).

<sup>XXXII</sup> Participation may be conducted by a vast array of methods which allow citizens to deliberate about collective problems: citizens juries, deliberative polls, consensus conferences or 21st century town meetings. These methods differ significantly in their organization and way of operating. On these methods see the King Baudouin Foundation's (KBF) publication *Participatory and Deliberative Methods Toolkit, How to Connect with Citizens, A Practitioner's Manual*, (2005) [http://www.ezd.si/fileadmin/doc/4\\_AKTIVNO\\_DRZAVLJANSTVO/Viri/Participatory\\_toolkit.pdf](http://www.ezd.si/fileadmin/doc/4_AKTIVNO_DRZAVLJANSTVO/Viri/Participatory_toolkit.pdf).

<sup>XXXIII</sup> <http://www.raise-eu.org/about.html>

<sup>XXXIV</sup> <http://www.citizenspanel.eu/>

<sup>XXXV</sup> [http://carpathianfoundation.eu/files/ECP\\_FINAL\\_REPORT\\_en.pdf](http://carpathianfoundation.eu/files/ECP_FINAL_REPORT_en.pdf)

<sup>XXXVI</sup> <http://www.ecas-citizens.eu/content/view/293/311/>

<sup>XXXVII</sup> <http://www.citizenhouse.eu/>

<sup>XXXVIII</sup> [http://ec.europa.eu/citizenship/news-events/news/18122013\\_surveyehcs\\_en.htm](http://ec.europa.eu/citizenship/news-events/news/18122013_surveyehcs_en.htm)

<sup>XXXIX</sup> Regulation (EU) No. 211/2011 of the European Parliament and of the Council 16 February 2011 on the citizens' initiative (2011) OJ L65/1.

<sup>XL</sup> Even though few scholars consider the ECI an instrument of "direct democracy" (see Dougan 2011), see



embrace the view that it is a “formalized” and fully regulated participatory tool. See Allegri 2010, Allegri 2012; Petraru 2011, Ferraro 2011.

<sup>XLII</sup> COM(2009) 622 final.

<sup>XLIII</sup> ECI are not limited to calls for the Commission to initiate a legislative procedure. The ECI may also call upon the Commission to submit proposals for the adoption of non-legislative measures or indeed any other form of Union legal act (such as non-binding recommendations).

<sup>XLIII</sup> <http://europa.eu/rapid/midday-express-23-12-2013.htm>

<sup>XLIV</sup> <http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003>

<sup>XLV</sup> <http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000011>; see also <https://www.openpetition.de/>

<sup>XLVI</sup> BVerfG, 2 BvE 2/08 of 30.6.2009.

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ISSN: 2036-5438

## How Can We Define Federalism?

by

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Perspectives on Federalism, Vol. 5, issue 3, 2013





## Abstract

While the study of federalism has in many respects reached an advanced stage today, there nevertheless remains a troubling absence of agreement as to the precise meaning of the concept. It is subject to multiple definitions, which overlap with one another in various ways and sometimes conflict. This leads to material negative consequences for both academic research and public policy, which can no longer be overlooked. The article confronts the problem by reviewing what the social science theory of concepts teaches for the construction of methodologically sound definitions of concepts. It employs the insights gained in the elaboration of a valid taxonomy of political systems, from which the definition of a federal political system can be inferred, and hence that of federalism. Rethinking the concept in this way points to the need to reject the currently fashionable ‘broad’ definition (following Elazar) in favour of a return to a ‘narrow’ differentiated definition (following Wheare). Further, it illuminates the existence of two distinct federal structures – the federal state and the federal union of states – where before only the former was known. It thus leads to identification of the presently unidentified or ‘*sui generis*’ European Union as an instance of the latter form.

## Key-words

Federalism, definition, meaning, concept, sovereignty, federal union



## 1. Introduction

The political science literature on federalism seems today to have reached a mature state of development. Sophisticated comparative analyses, global in scope, now yield a wealth of fruitful insights into the nature and functioning of federal systems of government.<sup>I</sup> Close inspection, however, reveals a concerning underlying theoretical fragility. Attempts over many decades at establishing a consensus on the exact meaning of the concept have thus far proved in vain. As Sbragia points out: ‘... scholars of federalism find it impossible to agree on a common definition’ (1992: 259).<sup>II</sup> They instead by default acknowledge the existence of ‘numerous overlapping definitions’ (Pollack 2010: 28), and in their analyses either adopt coping strategies for working within these constraints or skirt quickly around the matter, viewing the concept as unamenable to precise specification.<sup>III</sup> I contend that the limits of possible progress in the field have now been reached without addressing this critical foundational issue more effectively.

At the frontier of research today, the scholarship is attempting to come to terms with a broader variety of intermediate political systems now occurring than the single traditionally-known mixed structure of the federation (or federal state). Such forms, sometimes seemingly entirely novel in character, appear to lie along the integratory pathway on the margins of the central ‘compound’ space either side. Here, at the interface where federalism meets other types of political order, definitional and conceptual ambiguity poses significant intellectual difficulties. There is particular uncertainty concerning how to characterize the modern European Union, which is from the less integrated end of the spectrum progressively moving in towards the middle zone. Is this multi-level polity already a federal system? The literature currently provides no clear answer to this question. Whilst some authors consider it to meet the requirements of federalism<sup>IV</sup>, an equal number do not.<sup>V</sup> If not yet federal, furthermore, it is not plain for the analyst exactly what additional step (or steps) would make it such. Against this murky backdrop, it is common to find the polity described in somewhat obscure (and possibly even conflicting) terms in scholarly writings: as ‘quasi-federal’ (Hueglin and Fenna 2006: 13; McCormick 2011: 34; McKay 2001: 9), as a ‘weak federation’ (Moravcsik 2001: 186) or ‘loose federation’ (Wallace 1996: 439), as an instance of ‘partial federalism’ (Piris 2006: 86) and as an instance of



‘federalism without a federation’ (Bomberg *et al.* 2008: 232). The root of the problem here would seem to lie in the lack of well-established contours to the federal concept at the present time.

Other cases of uncertain characterization, approaching the compound space from the opposite (more integrated) end of the integratory pathway, are seen in the arrangements of extensive devolution of powers of the United Kingdom and Spain. Both polities are today similarly described as ‘quasi-federal’ (Gamble 2006: 22; Hueglin and Fenna 2006: 138). They are also termed ‘*de facto* federations’ (Hueglin and Fenna 2006: 19; King 2012: 120). The former is considered an instance of ‘federal devolution’ (Bogdanor 2001: 287) and the latter a ‘federation in practice’ (Watts 2008: 13) and a case of ‘non-institutional federalism’ (Colomer 1998).

The lack of clear contours to the concept leads on to an awkward inconsistency of treatment among the basic taxonomies of political science. For example, despite a broadly shared analysis of its principal features, the EU is classed by Burgess (2006) and Elazar (1998) as a confederation, by Hueglin and Fenna (2006) as a federation, and by Watts (2008) as a member of a separate hybrid category combining elements of both forms. Similarly, while Keating (2009) considers Spain to be a system of devolved government within a unitary state, Anderson (2008) and Hueglin and Fenna (2006) class this polity as a federation. The deficiency further manifests itself in confusion of terminology in scholarly writings, which inevitably causes misunderstandings. Wallace, for example, appears to contradict his own characterization of the EU as a ‘loose federation’ (as just noted) when he emphatically asserts subsequently: ‘The EU is *not* a federation’ (1999: 518).<sup>VI</sup> The literature thus, overall, seems not yet sufficiently rigorous and systematic in its nomenclature and its treatment of intermediate forms of political system.

In particular, the terms federation and confederation do not appear to have attained precise and determinate meanings. These terms are often used interchangeably today by non-specialists, notably in relation to Switzerland and Canada, which (unhelpfully) due to historical legacy remain formally styled confederations while actually now both federations (Watts 1996: 20). Among specialist scholars who do make a differentiation, it is still unclear whether confederalism is to be considered part of federalism (as in the perspective of Elazar and Watts), or to be contrasted against it, its ‘antithesis’ (as in the interpretation of O’Neill, McCormick and Rosamond). Both problems have origins in the fact that



confederalism and federalism share the same root, their common early meaning being a simple league among states. The terms were, indeed, used synonymously in this sense right up to the late nineteenth century. Establishing the appropriate relation between the associated concepts remains a key outstanding challenge for political science today.<sup>vii</sup>

Though at source this is an intellectual problem, its effects are far from confined to the realm of the ivory tower. It has significant ‘real world’ consequences, with harmful repercussions for the clarity of communication in public debate concerning processes of regional integration and disintegration currently underway and for the development of public policy in relation to them. It impacts particularly strongly upon the European integration process, as this is the most advanced instance of regional integration occurring in the world today and thus the first to run into such difficulties. Here, it is seen to hinder both the identification of distinct possible models for future attainment and – equally if not more importantly – the clear determination of the construction’s present nature, the point of departure.<sup>viii</sup>

The lack of a complete appreciation of the meaning and definition of federalism thus represents a serious weakness that now requires urgent attention. In this article, I outline a path for tackling the problem, building upon my earlier research into the historical evolution of the concept and terminology of federalism (see Law 2012). This concluded by positing a suggestion for a revised understanding of the federal concept. I develop this proposal more formally here, showing how the definition of federalism can be derived from first principles within the context of a methodological and conceptual analysis. In so doing, I aim to demonstrate that the amended concept put forward has firm foundations from a theoretical perspective, complementing the historical rationale that led towards it. My approach comprises seven sections. Following this introduction, section two lays foundations by establishing what are the various alternative and competing definitions of federalism commonly seen in the literature today. Section three then turns to reflect upon what the theory of concepts tells us as to how sound definitions of concepts can be composed in the social sciences. Section four combines the insights acquired in this analysis with location of the key attributes of federalism to construct a valid definition of the concept. Section five critically appraises the several existing definitions in the light of this new thinking. Section six considers how it can assist the empirical analysis of political systems. Section seven concludes.



## 2. The several definitions of federalism in current use

The seminal attempt at defining federalism was made by Wheare in his 1946 work *Federal Government*. This forms the bedrock of the modern literature on the concept and remains today the most common point of departure for scholars working in the field (Bogdanor 2003; Burgess 2006; Galligan 2006; Laursen 2011; Vile 1961). Wheare based his ‘federal principle’ explicitly upon the pioneering example of what he termed ‘modern’ federalism seen in the United States of America: a compound polity in which two ‘co-equally supreme’ levels of government both acted directly on the citizen through their own law, under a written constitution. He was thus led to define it as follows:

‘By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent’ (1946: 11).

It was this formulation that constituted the main focus of scholarly criticism in the debate on the definition of the concept that followed in the 1950s and 60s (from the authors Livingston, Davis, Birch, Vile, Riker and Friedrich successively).<sup>IX</sup> Challenges to its validity were centred around two points. First, a growing overlap and mutual interdependence was observed between the levels of government of federal systems in the twentieth century in a constantly moving equilibrium (termed ‘cooperative federalism’), supplanting the firm separation of the nineteenth century (‘dual federalism’). This made the premise of independence appear no longer sustainable. Second, the premise of coordinacy likewise seemed untenable, since in many of the areas of now common concern the ultimate solution to conflicting policy approaches was in practice the ‘defeat’ of one level by the other (Vile 1961: 196; see also King 1982; Riker 1975). Wheare’s detractors, however, were themselves unable in these circumstances to come up with an alternative suggestion capable of withstanding close scrutiny (Vile 1977: 1).

Subsequent contributions to the literature reflected the need, in this situation of apparent blockage, to think laterally. Friedrich put forward a theory of ‘federalism as process’, in which he argued that it was possible to define federalism and federal relations ‘in dynamic terms’. In this approach, the concept would not be seen ‘... only as a static pattern or design, characterized by a particular and precisely fixed division of powers





between governmental levels'; instead it would be conceived as '... also and perhaps primarily the process of federalizing a political community' (1968: 7). Duchacek, on a second tack, retained the institutional focus but simply offered ten 'yardsticks of federalism' against which to assess by degrees the presence or absence of the concept (1970: 201-8). On a third path, Vile proposed the construction of a set of 'developmental models' against which to interpret the stage a particular federal system had reached at a certain moment in time. In this perspective, federalism was distinctive merely as a '... cluster of different techniques ... used to try to establish and maintain a particular kind of balance or equilibrium between two levels of government, albeit a moving, changing equilibrium' (1977: 2, 6).

Since this low-point of seeming despair in the 1970s, when the attempt at defining the concept in precise terms was more or less abandoned, scholars of federalism have gradually recovered their composure and have at various times and in various ways posited statements pointing to the essential distinguishing elements of the concept (or of its institutional manifestation, federation) as a political form – that is, they have posited potential definitions. Set out below in chronological order, for the purpose of comparison, is a selection of seven of the ones more commonly found in the literature today. It will be seen that they overlap and intersect with one another at a number of different points. It will also be noted that certain authors have drawn a distinction between 'federalism' as a normative ideology and 'federation' as a political institution, which some consider a helpful dichotomy but others, such as Forsyth, regard as simply 'pretentious' and a 'red herring' (Burgess 2000: 24; 2006: 47).

'Federalism is a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions' (Riker 1975: 101).

'... a federation may be conveniently defined as a constitutional system which instances a division between central and regional governments and where special or entrenched representation is accorded to the regions in the decision-making procedures of the central government' (King 1982: 140-1).

'Federal principles are concerned with the combination of self-rule and shared rule. In the broadest sense, federalism involves the linking of individuals, groups, and polities in lasting but limited union in such a



way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties' (Elazar 1987: 5).

'... federation ... is a distinctive organizational form or institutional fact which exists to accommodate the constituent units of a union in the decision-making procedure of the central government by means of constitutional entrenchment. ... let us ... take federalism to mean the recommendation and (sometimes) the active promotion of support for federation' (Burgess and Gagnon 1993: 7-8).

'Federalism ... refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule. ... Within the genus of federal political systems, federations represent a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e. each has sovereign powers derived from the constitution rather than another level government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers and each is directly elected by its citizens' (Watts 1996: 6-7).

'Federalism is an institutional arrangement in which (a) public authority is divided between state governments and a central government, (b) each level of government has some issues on which it makes final decisions, and (c) a high federal court adjudicates disputes concerning federalism' (Kelemen 2003: 185).

'In a federal system of government, sovereignty is shared and powers divided between two or more levels of government each of which enjoys a direct relationship with the people' (Hueglin and Fenna 2006: 32-3).

The last of these definitions points towards what might in fact be considered a further shorthand definition that seems to operate currently in mainstream academic exchange as common currency. This is that federalism means simply 'a division of sovereignty between two levels of government'. Scholars seem to have taken this meaning as implicit in the idea of a formal allocation of competences among two governing levels on a permanent basis by a common basic code. Each level is thought to be 'sovereign' within its allocated sphere, with the final say (Diamond 1961). Sovereignty is thus generally believed today to inhere in neither level exclusively under federalism, but to be the property – in part – of both. Bogdanor exemplifies this view when he states that federalism '... implies a constitutionally guaranteed division of legal sovereignty between two layers of government divided territorially. Sovereignty is thus not confined to one government, but divided or shared between two' (2003: 49). In similar vein, Heywood says: 'As a political form ... federalism



requires the existence of two distinct levels of government, neither of which is legally or politically subordinate to the other. Its central feature is therefore the notion of shared sovereignty' (2000: 240). It seems to be this essential conception of the nature of federalism, as reflecting 'divided' or 'shared' sovereignty, that represents the most common ground among authors at the present time (Burgess 2000; Dosenrode 2007; Downs 2011; Laursen 2011; Marquand 2006; Nicolaidis and Howse 2001; Piris 2006; Wallace 1999).

### 3. The theory of concepts

I follow here the classical approach to the theory of concepts, which might be considered a 'traditional' view of the subject (Margolis and Laurence 1999). It stems from the classical approach to logic, with roots in Plato's *Statesman* dialogue and Aristotle's *Categories* treatise. It received its fullest exposition in Mill's 1843 work *A System of Logic*. Despite somewhat falling out of fashion in the post-war period within the social sciences, it has been partially resurrected over more recent decades, principally in the writings of the political scientist Sartori.

This scholar's 'Concept Misformation in Comparative Politics' (1970) stands as a key formative article in its attempt to confront the issue of conceptual confusion within the literature (Collier and Gerring 2009; Goertz 2006). His focus is on re-establishing an understanding of the central importance of methodology to the conduct of valid social science, which he interprets as of essence concerning the logical structure and procedure of scientific enquiry. In a very crucial sense, he emphasizes, there is '... no methodology without *logos*, without thinking about thinking'. The tendency to neglect – even in some quarters disown – the classical approach to logic, therefore, together with its associated taxonomical framework of classification, is badly misguided. He states firmly: '... when we dismiss the so-called "old fashioned logic" we are plain wrong, and indeed the victims of poor logic' (1970: 1033-6). I share this perspective. For, as Sartori observes, we dispose of no other unfolding technique that 'unpacks' concepts, and as such it plays a '... non-replaceable role in the process of thinking in that it decomposes mental compounds into orderly and manageable sets of component units' (1970: 1038).

How, then, is the classical approach structured? The basic building block is the proposition, in which 'attributes' (or 'properties' or 'features') are either affirmed or denied



of a subject (Mill 1843). For example, in the proposition ‘lead is heavy’, the attribute ‘heavy’ is affirmed of the substance ‘lead’. Through testing against successive propositions, a record of the properties of a ‘thing’ (or ‘phenomenon’) can be established. To then say that this thing is an instance of a class of objects going under a certain general name, let us say ‘X’, is to observe that it shares certain key attributes with all other members of that class that are each necessary and together sufficient to bring an object within the scope of the class. These ‘necessary and sufficient conditions’ are the defining characteristics of the concept of ‘X’ and collectively go to constitute its definition.

We can visually represent this mental process of framing classes – and the associated process of concept formation which is implicit in it – through the use of a block diagram. This shows how a broad class of objects, or ‘genus’, can be divided into two ‘species’ through the application of a single further differentiating attribute, known as the specific difference. This is the taxonomical *‘per genus et differentiam’* or ‘by genus and difference’ treatment. As the relationship between genus and species is relative, the resulting species then become the genera of the next division, and so on (Copi and Cohen 1994; Mill 1843). In Figure 1 below, for example, the genus ‘human’ is first divided through application of the attribute of being male into two species, ‘male’ and ‘female’. These, in turn, are further sub-divided through application of the attribute of being mature to produce four species, ‘man’, ‘boy’, ‘woman’ and ‘girl’. When this approach is applied to a group of practical examples (in this case comprising a limited set of four instances: Hansel, Thatcher, Gretel and Mandela), the entire unorganized realm is sorted into an organized classification.



	<b>Human</b>			
	<i>Hansel, Thatcher, Gretel, Mandela</i>			
<i>Proposition 1: It is male</i>	<b>Male</b>		<b>Female</b>	
	TRUE <i>Hansel, Mandela</i>		FALSE <i>Thatcher, Gretel</i>	
<i>Proposition 2: It is mature</i>	<b>Man</b>	<b>Boy</b>	<b>Woman</b>	<b>Girl</b>
	TRUE <i>Mandela</i>	FALSE <i>Hansel</i>	TRUE <i>Thatcher</i>	FALSE <i>Gretel</i>

Figure 1: The classical approach to concept formation

Each specific instance of a human here is placed in its appropriate conceptual category or class by testing for the presence or absence of the two stated attributes. Hansel, for example, does exhibit the first attribute but does not the second, and thus falls into the ‘boy’ category. Correspondingly, the definition of the concept ‘boy’ would be: a boy is a human that is male and not mature.<sup>X</sup>

A firm grasp of the method of construction and operation of the classical taxonomical framework leads on to seven important insights, which follow logically and serve to sharpen our understanding of the nature of concepts. First, we see that concepts are really no more and no less than aggregated sets of attributes. Second, we observe that concept forming activity is also definition forming activity, since the two necessarily occur at the same time. Indeed, they are two sides of the same coin: for developing a concept of a thing depends on identifying that thing’s salient attributes, which then collectively go to comprise its definition. Third, in the vertical hierarchical or ‘tree structure’ of concepts we identify what Sartori termed the ‘ladder of abstraction’. This is either descended or ascended by, respectively, adding or subtracting attributes. As the ‘intension’ (or ‘connotation’) of a concept, which is its meaning, is increased by adding new attributes<sup>XI</sup> and the ladder



descended, the ‘extension’ (or ‘denotation’), which is its capture, is progressively narrowed and the number of instances caught accordingly reduced. Fourth, an infinite variety of concepts can be hypothesized, from high-level general ones to low-level highly specified ones. Fifth, each of these concepts can be assigned a name and it is the job of the social scientist to do so, wherever this is necessary. Mill tells us that we need a name for every ‘thing’ we wish to describe (1843: vol. II, 236). Sixth, we observe that the classical framework elaborates a contiguous series of ‘well-sharpened’ categories that are ‘mutually exclusive’ and ‘jointly exhaustive’. This has the strong virtue of allowing neither zones of overlap nor gaps to develop: any one practical instance thus falls into one, and only one, class. As Sartori points out, it is this feature that gives the mental system its powerful discriminating capacity and thereby provides the basis for collecting ‘... adequately precise information’ (1970: 1039). Seventh, it follows that concepts are discrete categories with clear and definite boundaries. This, therefore, disposes of the crucial misconception – in fact still widely held today – that concepts are somehow ‘fuzzy’, have ‘blurred’ boundaries or ‘shade off’ into one another.<sup>xii</sup> Sartori is firmly dismissive of this view, saying: ‘If our data containers are blurred, we never know to what extent and on what grounds the “unlike” is made “alike”’ (1970: 1039). The key to achieving and maintaining conceptual clarity, it would seem, is to ensure that our concepts and their constituent elements are at all times appropriately and fully specified.

We have now formed a clear perspective as to how methodologically sound definitions of concepts can be constructed in the social sciences. A valid definition of a concept, we have established, is a proposition that declares its meaning, that is, states its attributes or intension. With reference to the exemplar definition given above, the concept boy’s meaning is seen to be specified by the attributes of being (i) human, (ii) male and (iii) not mature. These are observed to represent boy’s *salient* characteristics, those that are necessary and sufficient to bring a thing within its denotation. Until we have a clear definition, we have seen, we cannot be said to have a clear concept; nor can we be said to have a true understanding of the latter’s meaning.



#### 4. Constructing a valid definition of federalism

I briefly summarize in what follows the principal findings of my earlier research. I then take forward their logical implications in the elaboration of a taxonomical unfolding of political systems following the classical method. From this a methodologically sound set of definitions of political systems can be established, which in turn allows inference of the definitions of a federal political system and of federalism.

The dominant view presently is that the modern concept of federalism implies divided sovereignty; and, further, that the United States, being the first ‘mixed’ or ‘compound’ construction in which two co-equal levels of government were established, represents the founding instance of this phenomenon. This is as reflected in the arguments advanced at the time of Philadelphia by James Wilson, James Madison and *The Federalist* (Law 2012: 544-6). McDonald captures the mainstream thinking in this regard: ‘Divided sovereignty was generally regarded as impossible, until Americans devised a way of doing it’ (McDonald 2000: viii). My prior investigation concluded that this is, in fact, not the right lesson to draw from history. Rather, its exact opposite is the case. For the Civil War some seventy years later did in the end show the division of sovereignty to be a misplaced notion. What Americans can be said to have achieved, I put forward, was the first constitutional division of powers (the powers flowing from sovereignty) between two levels of government – not the division of sovereignty itself. Sovereignty is an indivisible concept. It refers – in its core sense<sup>XIII</sup> – to the *final* and *absolute* source of political authority underlying a society, which alone is capable of arbitrating and giving definitive resolution to all internal disputes. As such, it can only be thought to lie in *one* place.<sup>XIV</sup>

A written constitution, I perceived, cannot be thought to divide sovereignty, in assigning separate spheres of competence to two levels of government (as has been generally believed to date), because of the unavoidable existence of gaps and zones of overlap creating grey areas requiring adjudication by a third party. The truth of this claim was found demonstrated by the events leading up to the Civil War, President Lincoln even pointing to the dilemma directly in his first inaugural address of 1861:

‘... no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length



contain express provisions for all possible questions. Shall fugitives from labour be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the territories? The Constitution does not expressly say. *Must* Congress protect slavery in the territories? The Constitution does not expressly say. ... From questions of this class spring all our constitutional controversies’.

Since the body charged with arbitration, the federal supreme court, is an organ of the general level of government, and thus cannot claim to be wholly independent of both levels, resort to the originating source of sovereignty underlying the political order, thought to be the ‘true’ source, is likely to occur in cases of severe dispute.<sup>xv</sup> This may result in conflict if the latter’s location has become obscured – as in fact happened in the American case, in the concurrently-held but ultimately irreconcilable beliefs in the existence of both one people (of the American nation) and many peoples (of the separate states), the former conception having been overlaid upon the pre-existing latter one.

In this light, we may with good reason, I suggested, locate sovereignty in modern democratic societies in the body of the people, the ‘political community’ or ‘body politic’ – but with this sharply defined as one distinct entity. Sovereignty is not found in governments, nor in the constitutions lying behind governments, but in the peoples lying behind constitutions (Merriam 1900: 179-80). There can be no ulterior source of political authority lying behind the people.

The touchstone of final authority, and hence sovereignty and statehood, for any political community embedded in a wider political order must be the formal legal right to reassert independence unilaterally, and thus to stand as a distinct political unit once again with a single shared destiny among its populus. This is found in the right of secession. From the other perspective, it is the absence of this right that in the final analysis establishes the territorial integrity of the wider order, the existence of a single political community and thus the presence of sovereignty and statehood in the wider entity. On this understanding – which was missing from the US Constitution (where the existence or not of a right of secession for the parts was, and remains to this day, unmentioned) – sovereignty and statehood are acknowledged to be unitary and tightly-related concepts. The latter, indeed, we may appropriately conceive as the institutional means for expression of the former.<sup>xvi</sup>





Our persistent failing to date, it seems, has been to not distinguish between sovereignty and the powers flowing from sovereignty; between centralisation of the final power and centralisation of all powers, both final and derived. Whilst the former must remain a unity, the latter can be dispersed according to a written constitution to higher and lower levels of government without problem. Indeed, the ‘federal revolution’ arguably underway since the end of World War II, as identified by scholars such as Elazar (1998) and Hueglin (1999), may be said to represent the belated realisation that just such decentralised systems of government can be achieved by constitutional means, after the over-centralisation of the ‘modern’ era. What still remains missing presently from this understanding, however, is the vital essence of sovereignty: the acknowledgement of the need to clearly maintain in parallel known sites of final authority within federal systems, for them to remain ordered peaceful and stable on a permanent basis. To equate sovereignty with centralisation and to reject them both, is to throw out the baby with the bath-water. Sovereignty has an important core of meaning that it is critical to retain. It is in this relation that I have argued that federalism and sovereignty, far from being incompatible notions, are in fact more properly understood as entirely complementary (Law 2012: 550). Statehood and sovereignty, understood in this light, may be ‘hollowed out’ concepts, wholly transformed from previous incarnations, but they are far from redundant. They remain central organising principles of modern political life.

We now turn to integrating these insights with those gained from review of the theory of concepts in the preceding section. We are concerned to identify the salient attribute that marks off the federal form from other political forms along the integratory pathway. In view of the above findings, this evidently can no longer be located in the idea of ‘a division of sovereignty’. So just what is the distinguishing characteristic of the federal form?

I propose that we locate this critical feature in the idea of ‘equality of status’, reflecting the key characteristic of the compound model of government first established in America in 1788. This is not intended to mean a perfect and permanent equality between the general and regional levels of government in all their dealings (as had previously been taken to be implied in Wheare’s concept of ‘coordinacy’). Rather, it refers to a more general underlying equality of rank, standing or constitutional status, viewed in terms of the essential structure of the political system.

It serves well to note that Wheare also perceived his coordinacy notion to imply



‘equality of status’ (1946: 260) and considered this idea central to the nature of federalism (he in fact mixed the two conceptions). In the respect that this remains a key characteristic of federalism, therefore, his approach seems to have been somewhat prematurely rejected. He says of his ‘federal principle’: ‘... the important point is whether the powers of government are divided between co-ordinate, independent authorities or not’. Of the contrast between such a balanced relationship and one involving the subordination of either one or other level, he emphasizes: ‘... This difference is what is fundamental, and this is the difference that provides the real distinction’ (1946: 13-5)<sup>XVII</sup>.

The framework of basic categories that he is led to develop from this understanding is a tripartite schema, in which two forms of association involving the ‘dependence’ or ‘subordination’ of one level are conceived as symmetrically surrounding the central zone of federalism. These structures he identifies as ‘confederation’ and ‘devolution’ respectively:

“That form of association between states in which the general government is dependent upon the regional governments has often been described as a “confederation” and the principle of its organization “the confederate principle”. ... The other form of association - that in which the regional governments are subordinate to the general government - is often described as “devolution” and the principle of its organization as “the devolutionary principle”” (1946: 31-2).

This is similar to the ‘confederal/federal/unitary’ typology commonly expounded in the literature today (as, for example, in Anderson 2008; Diamond 1961; Downs 2011; Hueglin and Fenna 2006; King 1982), if the unitary category is taken to involve some degree of decentralisation of powers to local or regional authorities – as is normally the case. It should thus be acceptable to most scholars. We may represent it here by means of a taxonomy of political systems, as set out in Figure 2 below. Three propositions are applied in this unfolding. The first of these, testing for the presence of one or many states, is seen now to introduce the discrete quality of sovereignty and statehood.<sup>XVIII</sup>



<b>Political system</b>						
<i>US, UK, EU, UN</i>						
<i>Proposition 1: It is composed of many states</i>	<b>Multi-state political system</b>			<b>Single state political system</b>		
	TRUE <i>EU, UN</i>			FALSE <i>US, UK</i>		
<i>Proposition 2: It exhibits a division of powers</i>	FALSE	<b>Multi-level political system</b>			FALSE	
		TRUE <i>EU, UN</i>				TRUE <i>US, UK</i>
<i>Proposition 3: It exhibits equality of status</i>	<b>Many small states</b>	<b>Confederation of states</b>	<b>Federal union of states</b>	<b>Federal state</b>	<b>Devolved government</b>	<b>One large state</b>
	N/A	FALSE <i>UN</i>	TRUE <i>EU</i>	TRUE <i>US</i>	FALSE <i>UK</i>	N/A

Figure 2: A taxonomy of political systems

The framework is argued to be adequate in the respect that it furnishes a set of precise and sharply-bounded categories that are mutually exclusive and jointly exhaustive. It thus appears appropriate to the task of classifying political systems.

It will be noted that a key novel feature here is the illumination of *two* distinct federal models – rather than just one. These forms, multi-state and single state, in which sovereignty is understood to reside in either the parts or the whole, in several peoples or in one people, may be termed respectively the ‘federal union of states’ and the ‘federal state’.<sup>xix</sup> Until now, it seems, we have by default assumed that the constitutional division of powers (wrongly framed a division of sovereignty) thought to lie at the heart of federalism must occur within the context of a single state, a federation or federal state – because this is the only model we have known and the idea of dividing sovereignty yields only one federal form. We see here, however, that there is no theoretical reason why this should be the case;



that federalism can equally well exist within a multi-state setting and the idea of dividing the powers flowing from sovereignty more properly yields two federal forms.

The diagrammatic representation of Figure 2 can be usefully compared with the illustration ‘A pathway of regional integration’, reproduced in the Appendix below, where the same six structures are elaborated (in fact five distinct forms). The heights of the pyramids in this illustration indicate the relative standing of the respective levels of government.<sup>xx</sup>

We may now establish definitions of the four intermediate political structures identified by abstracting the relevant attributes of each form, as follows:

A confederation of states is a multi-state political system in which there is a division of powers between two levels of government and the general government is subordinate to the regional governments.

A federal union of states is a multi-state political system in which there is a division of powers between two levels of government of equal status.

A federal state is a single state political system in which there is a division of powers between two levels of government of equal status.

A system of devolved government is a single state political system in which there is a division of powers between two levels of government and the regional governments are subordinate to the general government.

What does this analysis imply, then, for the definition of federalism? We observe that the concept of a federal political system encompasses the whole middle span of the integratory spectrum, embracing its two structural manifestations, the federal union of states and the federal state. It is thus seen to represent the higher level generic concept. In order to obtain its definition we therefore need to ascend the ladder of abstraction one level by omitting the number of states criterion from the definitions of the two federal forms, as this is no longer a distinguishing attribute. On this basis, we may define it as follows:

A federal political system is a political system in which there is a division of powers between two levels of government of equal status.

Since federalism refers more specifically to a form of government, we may define this concept, correspondingly, as follows:

Federalism is a form of government in which there is a division of powers between two



levels of government of equal status.

This definition seems technically accurate and complete. It does not require any further elaboration, I suggest. For the essential meaning of the concept is captured by the definition, through a statement of its salient attributes or intension.<sup>XXI</sup>

We noted earlier, however, that in order to achieve full clarity on the nature of a concept, both it and its constituent elements must be appropriately and fully specified. A key matter of further concern to us is therefore the exact meaning connoted by equality of status. I propose that we define this critical sub-concept through reference to three attributes: (i) constitutional protection of the regional governments, (ii) the direct effect of law of the general government, and (iii) majority-voting in the decision making process of the general government. Taken together, these seem to represent the necessary and sufficient conditions for a relationship of parity among the levels of government of an intermediate political system. The first attribute determines the *constitutional independence* of the regional governments. The second and third determine the *effectiveness* of the general government. Whilst these ideas appear on the surface to exhibit a certain asymmetry, an underlying symmetry is seen to exist in their common employment to test whether genuine second tiers of government are established at either level, possessing the characteristic of ‘autonomy’ (Burgess 2000; Laursen 2011).

The first attribute firmly distinguishes the realm of equality of status from the more integrated side. It refers to constitutional entrenchment of the prerogatives of the regional governments; that is, to the absence of a right for the general government unilaterally either to abolish them or to reduce their powers. Such a right exists in a system of devolved government within a unitary state, but does not in a federal state. This feature is well established in the literature (Anderson 2008; Bednar 2009; Burgess 2000; Downs 2011; Hueglin and Fenna 2006; Wheare 1946)<sup>XXII</sup>. The second and third attributes mark out the zone of equality of status from the less integrated side. These two criteria would seem to be the requisite ones, from reference to the American and European cases of regional integration. The former instance, in the genesis of modern federalism under the move from the Articles of Confederation to the US Constitution in 1789, and in the corresponding creation of the first compound polity, established the direct application of the law of the general government as a critical feature (Hueglin and Fenna 2006; Wheare 1946).<sup>XXIII</sup> This element was achieved in Europe by the mid-1960s through the judicial activism of the



European Court of Justice, which established via its case law the principles of direct effect and primacy (the *Van Gend en Loos* and *Costa vs. ENEL* rulings, respectively). It has now been shown, however, to be a necessary but insufficient condition for equality of status. For the European example has demonstrated the existence of a further requirement: the use of majority-voting in the process of legislation itself, attained with the Single European Act of 1987. This is needed in order to make the upper tier fully operative as a second level of government. In acquiring this element, the blocking or ‘veto’ power of individual regional governments is ended within the common sphere of action and a significant measure of regional autonomy is sacrificed for gains in the efficiency of the general government. It thus represents the point when the general government ceases to be a dependent or subordinate entity, an agent of the regional governments, and comes into an equal relationship with them; and when the territory of confederalism is exited and that of federalism is entered.

## 5. Appraisal of the existing definitions

At this point in the analysis, we may usefully review with a critical eye the definitions of federalism in current circulation identified at the start.

Application of the second attribute in the unfolding of Figure 2, the existence of a division of powers, was seen to specify the realm of the multi-level political system. The relationship of this concept to federalism can now be fully appreciated. The latter is identified to be a species of the former. The two are not the same and should not be conflated – the latter being also defined by the additional attribute of equality of status. We in fact see emerge into daylight here a major source of the confusion dogging the literature presently, in the problem of ‘conceptual stretching’ (Sartori 1970: 1034). For Elazar’s definition of federalism as ‘self-rule and shared rule’ appears to fall into exactly this trap, by reflecting only the division of powers criterion. Burgess confirms this impression, observing that over the past half century ‘... Daniel Elazar has been the most vociferous advocate of widening both the scope and meaning of federalism’ (2006: 286). He notes that it seems to have been this author’s influence that also led Watts to construe ‘federal political systems’ as ‘... a broad umbrella concept’ (2006: 48).<sup>XXIV</sup> Elazar’s federal concept (in common with that of Watts) explicitly covers not only the central realm of the



compound polity, but also those of confederation and devolved government (1987: 33-79). In arguing that ‘... a wide variety of political structures can be developed that are consistent with federal principles’ (1987: 12), he has therefore gone too far and robbed the concept of its essential core of meaning, its differentiating capacity (Forsyth 1981: 6-7). So in order to return clarity and sense to the field of federal studies today, we need to reinstate the attribute of equality of status in the definition of federalism – and, in so doing, get back to Wheare’s narrower focus on the central zone along the integratory pathway.<sup>xxv</sup>

Hueglin and Fenna’s definition at first glance appears intuitively attractive, if the idea of sharing sovereignty is discounted. However, its salient attribute of each level of government enjoying a direct relationship with the people is not sufficiently discriminating. For whilst this correctly excludes the realm of confederation, it incorrectly includes that of devolved government. In the case of the UK, for example, the devolved Scottish, Welsh and Northern Irish administrations are directly elected by the people of Scotland, Wales and Northern Ireland and legislate directly for them. The UK thus would fall within the scope of Hueglin and Fenna’s federal concept when it should properly fall outside.

King’s and Burgess and Gagnon’s definitions suffer from the mirror image of this defect at the opposite end of the spectrum. Their common distinguishing attribute is entrenched representation for the regions in the decision-making procedure of the central government.<sup>xxvi</sup> This correctly excludes the realm of devolved government, but incorrectly includes that of confederation. In the latter type of political system, a central government decision-rule of unanimity among the representatives of the regional governments in council typically applies, and certainly for constitutional change, affording the constituent units a very high degree of protection from emasculation by the centre.

The solution, it would seem clear, is to combine the two approaches to demarcate the central zone of federalism from either side by applying both criteria.

Riker’s definition, also taken up by Kelemen, incorporates the attribute that ‘each kind of government has some activities on which it makes final decisions’. This seems initially promising – like Wheare’s earlier definition – in reflecting the idea of a constitutional division of powers inherent in federalism, under which each level of government has its own sphere of competence. In contrast with Wheare’s, Riker’s is intended to cope with overlapping and hence shared jurisdictions, a phenomenon which he observes in ‘function after function’ (1975: 104), by placing emphasis on the existence of remaining exclusive



jurisdictions. However, it does not appear precise enough on the size and scope of such competences required to merit the label ‘federal’, allowing ambiguity to enter. Although he states that one competence for the general government would be sufficient (‘The minimum is one category of action ... The maximum number of categories is all but one’ – 1975: 102), would a single exclusive power in, for example, issuing postage stamps really be enough for inclusion? It seems to have been Riker’s intention here to mark out the central zone of the compound polity through his selected criterion, and thus to target an equality of status implicitly. If this is the case, it would be better to do so directly as there is then no uncertainty present in the definition.

## 6. Implications for empirical analysis

We are now in a suitable position to assess the implications of this improved understanding of the nature of the federal concept for the empirical analysis of political systems.

The EU has for over two decades represented the leading instance of a perplexing ‘federal non-state paradox’: it looks in many respects federal, but is not a state – so it cannot be considered a ‘federation’ in the traditional sense (Burgess 2000; Nicolaidis and Howse 2001; Piris 2006). In this context, scholars have attempted to confront the dilemma of the uncertain relevance of the federal concept through generating modified or enlarged categories, such as ‘treaty federalism’ (Hueglin and Fenna 2006: 13), ‘compact federalism’ (Majone 2005: 209) and ‘partial federalism’ (Piris 2006: 86). We now see that in the light of the proper definition of federalism actually no such qualifications are necessary, as all of these terms are intended specifically to refer to one part of the realm of the compound polity: the more decentralized part, where sovereignty resides in several peoples (and thus may loosely be considered to flow from the ‘bottom up’). The federal non-state paradox in fact reveals itself to be no paradox at all once the concept of federalism is correctly understood. Some scholars appear to be on the right track here, Kelemen and Nicolaidis stating that the EU today inhabits the area of ‘multi-state federalism’ and will continue to do so (Kelemen and Nicolaidis 2007: 306). Indeed, federalism by treaty or compact (the ‘federal union’ or ‘federal union of states’) and federalism by constitution (the ‘federation’ or ‘federal state’) would seem to be the two halves of federalism.<sup>xxvii</sup> On this view, the





emerging trend of the scholarship over the past decade to employ the approach of comparative federalism to analyse together the EU and US (Fabbrini 2005; Menon and Schain 2006; Nicolaidis and Howse 2001) is seen to be a valid one – however, not on the basis that a broad all-encompassing definition of federalism is employed synonymous with the multi-level political system, but because both are federal forms in the narrow (and hence genuine) sense.

Scholars are in wide agreement that the EU represents a form ‘... less than a federation, but more than a confederation’ (Marquand 2006: 175; see also Laffan 2002: 10). It has on this basis up to the present day generally been considered a ‘*sui generis*’ political system falling into no known category, a characterization that most see inaugurated by the passage of the Single European Act to create the single market (Delors 1987; Fischer 2010; Magnette 2005).<sup>xxviii</sup> It has thus been understood to reside in a conceptual void, an unidentified and unnamed ‘black hole’, as illustrated in Figure 3 below. Appreciating the prior misformation of the concept of federalism allows us now to make sense of this formerly puzzling phenomenon.



Figure 3: The present incomplete framework of concepts

Nugent sees Magnette making the case for moving beyond this conventional thinking in which only two forms of general union between states are possible, confederation and federation, the *Staatenbund* and the *Bundesstaat*: ‘There is, he argues, something between these organizational forms, as the EU demonstrates’ (foreword to Magnette 2005: x). Magnette himself observes that scholars have endeavoured to forge new concepts in order to make sense of the EU, among which he highlights Beaud’s ‘federation of states’, Quermonne’s ‘intergovernmental federalism’ and Menon’s ‘institutionalised intergovernmentalism’ (2005: 192). Laffan also points to the German Constitutional Court’s novel employment of the term ‘*Staatenverbund*’ in attempting to capture an intermediate political form, ‘... a compound or dual system of nation states and a collective polity’ (2002: 27). Beaud’s formulation, taken up by successive Presidents of the European



Commission from Jacques Delors to José-Manuel Barroso as a ‘federation of nation states’, appears close to being valid; but it is handicapped by use of the word ‘federation’ which gives the strong impression of creating a state. For the word is in fact generally used as a synonym for ‘federal state’ in political science today.<sup>XXIX</sup> Thus, the formulation plainly risks conflation with this latter political structure. Another term is evidently needed. Magnette says: ‘... nothing in principle prevents us from ... creating a new concept ... a third term’ (2005: 5); and, as Mill was seen to highlight above, we need a name for every ‘thing’ we wish to describe – in other words, we should not hesitate to assign names wherever distinct conceptual categories are observed requiring identification. The term ‘federal union of nation states’ seems apt. What has been missing to date is the theoretical underpinning required for such a change, which I suggest the approach of rethinking the nature of the federal concept now provides.

The EU is widely conceived as having some of the characteristics of a confederation and some of a federation – whilst being itself neither (Magnetete 2005; Weiler 2001).<sup>XXX</sup> The use by some of the idea of a ‘hybrid’ concept to attempt to capture its elusive quality in this respect is understandable (McCormick 2011; Watts 2008), an approach taken to its logical limit in Kincaid’s fusion of the two terms in the concept of ‘confederal federalism’ (1999: 34). The methodological validity of such a path is doubtful, however, in view of the requirement established earlier that properly constructed concepts should have clear and sharp boundaries. Its deployment may seem a sensible route to take in the circumstance of an existing gap which requires bridging – but it is plainly a second best option compared to having a distinct category and term.

Bogdanor’s hybrid ‘federal devolution’ (2001: 287) at the other end of the integratory spectrum appears misconceived for similar reasons. For federalism supposes equality of status between the two levels of government of a political system, whilst devolution supposes that the regional governments are subordinate to the general government. Clearly, both characteristics cannot pertain simultaneously. In the case in question, the arrangements of devolved government now in place in the UK, Bogdanor observes a deep entrenchment of these structures such that in fact ‘... power devolved ... will be power transferred’ (2001: 291). However, he acknowledges that under ‘pathological circumstances’ devolved powers could be revoked unilaterally by the UK government at Westminster. A right of revocation, then, exists – and as long as it exists, the regional



governments must be considered subordinate to the general government, and the framework one of devolved government rather than federalism.

A similar analysis applies in the case of Spain. Anderson and Hueglin and Fenna therefore appear to be over-reaching in going even further and classing this country as a federation at this moment in time (Anderson 2008: 2; Hueglin and Fenna 2006: 56). As the former acknowledges, concerning the process of constitutional amendment there is ‘... no role for the autonomous communities’ (2008: 60).<sup>xxxI</sup> The powers of the regions could thus be withdrawn by the centre without their consent.

In both cases, the critic may claim that such revocation would be impossible to effect in practice; but this is to enter into the realm of speculation about what is or is not politically feasible at any one instant. This is vulnerable to the changing winds of political opinion, events and the passage of time.<sup>xxxII</sup> It is safer for the political analyst to stand on the firmer ground of constitutional exposition and give expression to the formal legal position in each political system in clear terms through employing appropriate concepts and terminology. Qualifications to reflect the practical realities prevailing at any given moment in time can then be made as a subsequent supplementary step. Any other path is liable to lead to confusion.

## 7. Conclusion

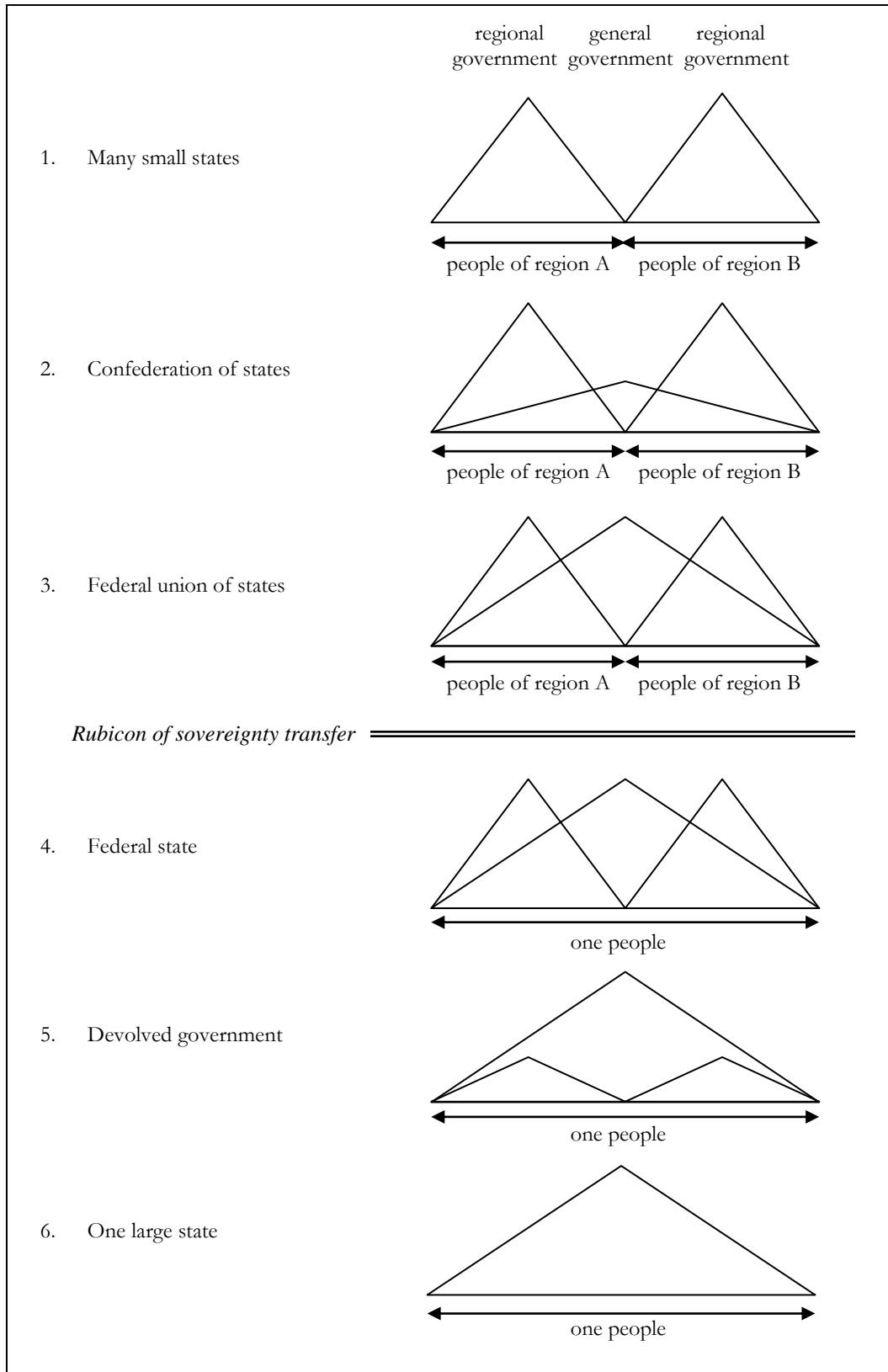
In this article, we have established the definition – and hence meaning – of the concept of federalism in clear and precise terms. The approach adopted is argued to be methodologically sound on the basis that the classical theory of concepts has been employed in a rigorous way in the construction of the concept. A federal political system, we may conclude, is a political system in which there is equality of status between its constituent levels of government. Where this characteristic is present, we observe an instance of federalism. Where it is absent, we do not. In the end, it seems, the matter of distinguishing the federal form from other intermediate political systems comes down straightforwardly to determination of the existence or otherwise of this critical attribute. In the UK and Spain, it has not yet been attained; and so reference to federalism concerning these two polities should be avoided at this stage in their development. In the EU, it has been attained for over two decades now; and so reference should be made to the concept



here. Arguably, in the latter case, it is inadequately formed concepts and terminology that prevents the establishment of a common appreciation of the ‘nature of the beast’ as already federal, and thus more coherent and rational discussion about possible future trajectories for the polity. A clear choice between two options would seem to present itself for the near to medium-term development of the EU, in the context of proposals for economic, fiscal and political union to buttress the already existing monetary union in the aftermath of the Euro-crisis: making the move to a federal state or strengthening the existing federal union of states.

### **Appendix**

The illustration below is drawn from Law 2012: 548, reproduced here with kind permission of *Political Quarterly* and Wiley-Blackwell.



A pathway of regional integration



\* Dr. John Law holds a BA from the University of Exeter, an MA from the College of Europe, Bruges, and a DPhil from the University of Oxford (email address: johnlaw2@yahoo.com). His doctoral thesis *Rethinking Federalism* is available online at the Oxford University Research Archive (<http://ora.ox.ac.uk/objects/uuid:a3357b7c-7f08-4074-b914-6f06ce6ce01d>). Support for this research was provided by the Economic and Social Research Council (grant number PTA-030-2003-00241). I would like to thank Kalypso Nicolaidis and John Pinder for their helpful guidance and consistent encouragement over many years.

<sup>I</sup> See, for example, Anderson 2008; Burgess 2006; Hueglin and Fenna 2006; Watts 2008.

<sup>II</sup> For further recognition of this point see Burgess 2006; Kincaid 2011; Laursen 2011; McKay 2001; Menon and Schain 2006; Morelli and Castaldi 2009; Rosamond 2000.

<sup>III</sup> Approaches of the former type are: tolerating alternative definitions in collaborative comparative work (Menon and Schain 2006; Nicolaidis and Howse 2001); adopting an editorial preference for a broad definition (Menon and Schain 2006); using the concept more as a metaphor, rather than predicating any distinct political structure (Nicolaidis and Howse 2001); and employing a minimalist definition (Kelemen 2003). Scholars following the latter path include: Filippov, Ordeshook and Shvetsova 2004; Trechsel 2006.

<sup>IV</sup> For example, Burgess 2000; Kelemen 2003; Laursen 2011.

<sup>V</sup> For example, Milward 1992; Moravcsik 2001; Schmitter 1996. Nicolaidis and Howse note that in relation to the EU, '... the language of federalism, the very term, continues to be highly contested' (2001: 8). The contentiousness of applying the concept in this context is confirmed by Trechsel, who says: '... the literature does not universally describe the EU as a federation or as constituting a federal arrangement' (2006: 3).

<sup>VI</sup> The latter statement is consistent with his earlier well-known designation of this political system as 'less than a federation, more than a régime' (1983: 403).

<sup>VII</sup> Elazar 1998; McCormick 2011; O'Neill 1996: 70; Rosamond 2000; Watts 2008.

<sup>VIII</sup> Corbett observes multiple conflicting understandings of federalism in use in political discourse on the EU. Fischer and Magette identify the absence of a clear conception of the EU's nature, in terms of a concrete political form, as a key reason for the difficulty Europeans have visualising and understanding the political architecture that has been built around them, and hence as a main source of the perceived lack of public engagement, trust and legitimacy. The former calls the EU 'one giant, incomprehensible question mark'. In his Humboldt University speech of 2000 when German Foreign Minister, he acknowledged having beforehand attempted to find a novel formulation of federalism appropriate to the EU in order to help clarify matters – but having admitted defeat and resigned himself to 'federation' as the term that best suited. Further reflecting this dilemma, Laursen sees a disjunct between widespread scholarly acknowledgement of clear federal traits in the EU's character and the fact that the word remains 'banned' from the formal treaties. Scholars, he says, are allowed to call a spade a spade. Corbett 2009; Fischer, 2000; 2010: 2; Laursen 2011: 17; Magette 2005.

<sup>IX</sup> For a comprehensive review of the debate see Burgess 2006, chapter 1.

<sup>X</sup> I acknowledge the intersex problem in this illustration, where a human has some characteristics typical of both genders. However, I argue that this does not invalidate my approach, which follows the consensus among the scientific community in recognizing only two sexes in the human animal species. There is no third sex. In the human embryo, the organs that produce gametes are initially capable of being either ovaries or testes. Thus, a suitable test for the attribute of being male is whether or not the human concerned has testes. I should also make plain that, in general, application of an attribute to a genus establishes positive and negative species: one with and one without the attribute concerned. Thus, in applying the first attribute of being male to the genus human, the second category specified is more strictly 'not male'. Since gender is a binary phenomenon in humans, however, this category can be labelled 'female' without problem. I do not intend to privilege one gender over the other. One could just as easily have begun by applying the attribute of being female to develop 'female' and 'not female' categories.

<sup>XI</sup> To form a new and different concept.

<sup>XII</sup> As, for example, is seen in the writings of Burgess 2006: 24-6; Goertz 2006: 29; Watts 2008: 8.

<sup>XIII</sup> For elaboration on the distinction between core (authority) and peripheral (power or effectiveness) meanings of sovereignty, see Malcolm 1991.

<sup>XIV</sup> I understand authority to be a legal notion: the right to command obedience in a political community. Of sovereignty as the idea of *final* right, John Calhoun argued powerfully and persuasively: 'There is no difficulty in understanding how powers appertaining to sovereignty may be divided; and the exercise of one portion delegated to one set of agents, and another portion to another ... But how sovereignty itself - the supreme power - can be divided ... is impossible to conceive. Sovereignty is an entire thing; - to divide, is, - to destroy



it'. Crallé 1851, vol. I, 146.

<sup>xv</sup> See Merriam 1903, chapter 7.

<sup>xvi</sup> This was the firm conclusion of the early American founders of political science in the late nineteenth century (scholars such as Lieber, Burgess and Woolsey - see Merriam 1903, chapters 7 and 8). Woodrow Wilson, then a professor of law at Princeton University, drew the same conclusion. There had clearly been, in the Civil War, he said, the '... virtual creation of a central sovereignty'. The states were no longer sovereign: they were '... unquestionably subject to a political superior, ... fused, subordinated, dominated'. The idea of dividing sovereignty he considered muddle-headed. Yet this understanding seems now to have been forgotten, perhaps due partly to the tenacious holding of the Supreme Court to the pre-war notion of a constitutional division of sovereignty that it considered implicit in the idea of 'dualism' between the federal and state governments - rather than, more accurately and to the same effect, a constitutional division of powers. As Bennett brings out, the further we have moved from these turbulent events, the more their clear lessons have tended to recede from view. Bennett 1964; Wilson 1893: 64, 91-4.

<sup>xvii</sup> Beaud, despite going down a misconceived path, in attempting to banish completely the idea of sovereignty in developing his notion of 'federation' as a wholly 'autonomous theory' distinct from the theory of the state, nevertheless correctly identifies 'federal parity' as a key animating principle of the form, alongside 'federal duality' and 'federal plurality' (2007: 13, 423).

<sup>xviii</sup> The taxonomy is, more specifically, a taxonomy of 'political systems founded on the state'. That is, the universe of political systems specified includes only those that incorporate a notion of statehood and sovereignty as described (ie. they have a known site of final authority). Thus, the response to the question *How many states are present?* can be either one or many - but not none. On this basis, a polity in which the location of final authority is ambiguous would not be encompassed; for example, the US in the period from Philadelphia to the Civil War. Arguably, what was intended to be built here initially was a federal union of states, Madison's 'compact theory' of the origins of the US governmental system supporting Calhoun's account. In the end, however, it was forged by force into a federal state (or in this way shown beyond doubt to have become such).

<sup>xix</sup> I follow here the nomenclature offered by Forsyth. It should be noted, however, that this author does not differentiate between the terms 'federal union' and 'confederation', instead considering them to be synonyms (1981: 2). I suggest that we should distinguish two concepts.

<sup>xx</sup> To be of practical use, the taxonomical framework should probably be further refined by extension of the block diagram to lower levels of abstraction through the application of additional propositions. For example, an 'extent' criterion could be applied to the division of powers of the second and fifth categories, 'confederation' and 'devolved government' respectively, to indicate the comprehensiveness of the delegation - either narrow or broad in scope. In this way, the former realm would be sub-divided into 'international organisation' and 'confederation' categories; and the latter into 'devolved government' and 'decentralisation' categories. In order of increasing integration, the eight classes would then be: (1) many small states, (2) international organisation, (3) confederation of states, (4) federal union of states, (5) federal state, (6) system of devolved government within a unitary state, (7) system of decentralisation within a unitary state, (8) one large unitary state.

<sup>xxi</sup> I resist adding the words 'or more' after 'two' for reasons of simplicity. I feel the definition as stated does not exclude the possibility of a third or further levels also of equal status. There exist presently no such examples. As Anderson notes, where a third level of government (the municipal or local level) has been 'constitutionalized', to date it has only ever been accorded a status subordinate to the regional level (2008: 17).

<sup>xxii</sup> It is general acknowledgement of this element as inherent in federalism, establishing 'own' spheres of powers, that seems to prompt use of the word sovereignty, as in 'sovereign' powers; but sovereign is not a synonym for proprietary. As argued above, two sovereign governments cannot co-exist for reasons of uncertainty in the grey zone between jurisdictions. Sovereignty is thus more properly understood as the single final authority alone capable of giving definitive resolution to any dispute arising: if one people, through majoritarian political action to alter the balance of institutions, in particular the supreme court, or to amend the constitution; if many peoples, through the last resort action of secession, if all other means of seeking fair treatment fail.

<sup>xxiii</sup> *The Federalist* was clear that the key 'defect' in the design of the Articles lay in the absence of federal law directly effective upon individuals, calling it the 'great and radical vice' in the system (Madison *et al.* 1788: no. XV, vol. I, 86-92).

<sup>xxiv</sup> See Watts' definition of federalism presented in section two.



<sup>xxv</sup> On this understanding, confederalism is seen to be properly conceived as a distinct political form from federalism, not part of it.

The rationale also has implications for the appropriate scope of *Publius: The Journal of Federalism*, the leading journal in the field of federal studies (started by Elazar). This currently appears too wide in its coverage, in incorporating studies of both confederalism and devolved government. Two options would seem to present themselves: (i) broadening the title of the journal, or (ii) narrowing its conceptual focus.

<sup>xxvi</sup> By this they intend the constitutional protection of the powers of the regional governments from being over-ridden or withdrawn by the centre, as their writing makes clear.

<sup>xxvii</sup> Seen in these terms, the attempt to give the EU its own ‘Constitution’ – failing in referenda in France and the Netherlands in 2005 – appears ‘jumping the gun’ and thus rightly rejected. Such a step would be more appropriate to the transition to a federal state. The original styling of the text ‘Constitutional Treaty’ was more fitting – but this was altered prior to acceptance of the final draft in the European Convention that prepared it.

<sup>xxviii</sup> Valéry Giscard d’Estaing, President of the European Convention, observed near the start of this body’s proceedings: ‘Europe’s answer to the question “federation or confederation?” is the acknowledgement that the Union is a unique construct which borrows from both models. The Convention will not change that answer: rather, it will formalise it in Constitutional provisions’. Giscard d’Estaing, Henry Kissinger Lecture, Washington, DC, 11 February 2003, cited in Kiljunen 2004: 20.

<sup>xxix</sup> For example, among others, in the usages of Bomberg *et al.* 2008; Burgess 2000; Heywood 2000; Laursen 2011; McCormick 2011.

<sup>xxx</sup> It has become something of a standard path in the literature to compare and contrast the models of confederation and federation, and to conclude by pointing to the EU’s intermediate qualities (see, for example, Dosenrode 2007; Kiljunen 2004; McCormick 2011). Burgess, likewise, observes a mixture of ‘federal and confederal elements’ in the EU’s nature. In responding to the identification problem highlighted, both he and Elazar adopt the strategy of explicitly strengthening the concept of confederalism, in the terms ‘new confederation’ and ‘postmodern confederation’ respectively. This seems similar to the concept I establish here of ‘federal union’, whilst leaving confederalism to refer to the inter-governmental model of a league of states. A key reason I prefer this option for nomenclature is that the term confederation appears to have strong historic associations with the latter form from the American experience under the Articles of Confederation – but more particularly from the European case, where political leaders such as de Gaulle, Mitterrand, Fischer and Verhofstadt have consistently linked the confederal option explicitly to full autonomy for the member states and the unanimous mode of decision-making among them (ie. only weak integration). It is thus regarded as a step backwards, a stage that has already been passed through. Breaking such entrenched mental associations would seem an impossible task, explaining Majone’s lament that the confederal option remains excluded from European discourse. Burgess 2000: 260, 269; Elazar 1998: 3-5, 50; Majone 2006.

<sup>xxxi</sup> The procedure requires simply special majorities of both houses of the Spanish parliament. The governments of the autonomous communities are only weakly represented in the upper house, the Senate, with about one fifth of the delegates. The remaining four fifths are directly-elected on a regional basis.

<sup>xxxii</sup> Colomer suggests that without the development of federal institutions fostering more stable relationships between the centre and the autonomous communities in Spain, decentralisation and territorial pluralism may be subject to reversals under a disciplined central political party with an absolute majority (1998: 51-2).

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