

# **The Lisbon Treaty Evaluated: Impact and Consequences**

**London, 31 January - 1 February 2011**

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

**[www.uaces.org](http://www.uaces.org)**

## **Constitutional Expectations and the European Union: The issue of executive opacity in the Union's continuous constitutionalisation process**

Lars Hoffmann<sup>1</sup>

### **Introduction**

'The democratic deficit is a concept invoked principally in the argument that the European Union and its various bodies suffer from a lack of democracy and seem inaccessible to the ordinary citizen because their method of operating is so complex.'<sup>2</sup> This entry on the Commission's website glossary continues to explain that 'the Maastricht, Amsterdam and Nice Treaties have triggered the inclusion of the principle of democratic legitimacy within the institutional system by reinforcing the powers of Parliament with regard to the appointment and control of the Commission and successively extending the scope of the co-decision procedure.'<sup>3</sup> Of course the Lisbon Treaty continued on this path (the glossary still awaits updating following the Lisbon Treaty). The reforms undertaken have clearly improved the Union's democratic credentials; yet, the year-old smell caused by the perceived lack in democratic legitimacy still follows the EU like a tail. In this paper I offer the argument that the cause of this is not so much actual democratic shortcomings but rather the shortfall of the EU's institutional structure vis-à-vis our constitutional expectations; especially with regard to its opaque and dispersed executive functions.

The first section will assess the EU's incremental constitutionalisation. I argue that the political forces driving the EU's constitutionalisation has led a convoluted institutional system at the EU level. Then I will turn to the on-going problem of a shortfall of democratic legitimacy at the EU level, giving an overview of the existing literature and arguing that it is a direct – and almost inevitable – result of aforementioned political constitutionalisation process. Following this I will turn to the concept of constitutional expectations. This concept is borrowed from Richard Primus who applied it to the US constitution. I will explain how it is also applicable to the EU and elaborate on why the Union does not live up to our constitutional expectations. The paper turns to the separation of powers and I argue that we 'expect' a constitutional system to feature three distinct branches of government: legislative, executive and the judiciary. However, the Union does not have a clearly defined executive and least of all an accountable government. Finally, I will

---

<sup>1</sup> University Lecturer at the University of Maastricht Law School; this paper is part of the work for the ERC-funded EuNaCon Project.

<sup>2</sup> Accessible at [http://europa.eu/scadplus/glossary/index\\_d\\_en.htm](http://europa.eu/scadplus/glossary/index_d_en.htm).

<sup>3</sup> Accessible at [http://europa.eu/scadplus/glossary/index\\_d\\_en.htm](http://europa.eu/scadplus/glossary/index_d_en.htm).

propose a possible if unlikely solution to the problems that I have laid out: the formation of a new institutional set-up at the EU level, meeting our constitutional expectations and leading the way out of the democratic legitimacy trap. This proposed set-up acknowledges that an EU government is unfeasible if not inappropriate for the governance of today's Union and thus tries to fulfil our constitutional exceptions by re-organising the EU's legislative branch.

### **Incremental Constitutionalisation and a cumbersome institutional structure**

The European Union's constitutional structure is not a kafkaesque construct that just metamorphosed overnight from a treaty-based intergovernmental organisation into an indefinable legal-political institution with its own legal personality. Rather it is the result of a long, sometimes tedious, sometimes fascinating, and seemingly open-ended process, driven forward by political institutions and courts.

Craig has argued that that 'constitutionalisation expresses the movement towards attainment of [...] the features associated with a constitution' (Craig 2001: 127). From this one can deduct that it can refer to both an initial, short constitutional moment as well as a continuous, drawn-out constitutional process. The moment refers to the point in time when the founding constitutional document of a state is signed or ratified, i.e. the birth of the constitutional polity. Such a document is meant to withstand the test of time whilst upholding the basic norms and principles of its society such as human rights, the rule of law and the separation of powers (see, e.g. Henkin 1994). In such a case Craig's 'movement towards attainment [...] of constitutional features' takes place in a short and defined period of time. One might also refer to this as 'hard constitutionalisation'. The drawn-out process then describes constitutionalisation over a longer period of time, undertaken by judicial and political actors. The purpose is to strive for a constitutional balance by incrementally filling the legal gaps or political shortcomings that the aforementioned moment had left behind. Constitutional amendments are the main mechanism for addressing issues politically – such as the abortion amendments in Ireland<sup>4</sup> or the decision to reduce the President's term to five years in France.<sup>5</sup> The legal cavities are usually filled through the continuous constitutional jurisprudence of the courts. This allows the revision of previous interpretations to adapt the constitution to evolving social standards – such as abortion rights in the United States<sup>6</sup> or limits to the constitutionally guaranteed artistic freedom in the Germany.<sup>7</sup>

The European Union fits this general concept only partly in that it can look back on a long process of constitutionalisation but it lacks a founding *constitutional* moment. Many would agree that the soft constitutionalisation process was started by the European Court of Justice (ECJ) in its 1963 landmark decision *Van Gend & Loos*.<sup>8</sup> Here the Court developed the principle of direct effect and held that the Union is 'a distinct legal order'. Since then, the Court has developed the legal principles of primacy

---

<sup>4</sup> See Eighth Amendment of the Constitution of Ireland

<sup>5</sup> See amended Article 6 of the French Constitution.

<sup>6</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>7</sup> See BVerfGE 30, 173 – Mephisto (1971).

<sup>8</sup> Case 26/62, *Van Gend & Loos*, [1963] ECR I.

and state liability and developed fundamental rights protection at the EU level. In 1986 the Court even referred to the Treaty as a ‘basic constitutional charter’.<sup>9</sup> Thus, from a jurisprudential point of view, the Union’s constitutionalisation process is recognisable. Over time, the European Court of Justice has developed basic norms to fill the legal gaps by ‘addressing legal problems overlooked by the authors of the Treaties or by the Union legislature’ (Lenaerts and Gutiérrez-Fons 2010: 1631). From a legal viewpoint, constitutionalisation has thus been a piecemeal solidification of the EU’s legal anatomy (see also Weiler 1991).

Similarly, the political process of amendments has been clearly visible at the EU level in two ways: implicit constitutionalisation through everyday politics and explicit constitutionalisation through treaty changes. The former has significantly contributed to ‘practical constitution-building’ (see de Witte, 2002: 52-3) and as Christiansen and Reh point out, this has occurred on numerous occasions. For example, the European Political Cooperation that was launched in 1970 but was only incorporated in the treaty with the Single European Act (SEA) in 1986 (see Christiansen and Reh 2009: 56-61). The latter took place through intergovernmental negotiations surrounding the five treaty revisions that we have seen from the 1986 Single European Act to the 2009 Lisbon Treaty. The textual changes to the treaties have been significant. This is understandable as competences and scope of the Union increased the institutional and legal structure needed significant amending. Usually, these amendments were meant to cure the ailments of the day – single market, single currency, institutional preparation to accommodate new members, need to incorporate the Charter of Fundamental Rights etc. Yet, it was not until the 2002/3 Convention on the Future of Europe that any of these treaty reform processes was undertaken as an explicit constitutionalisation process. Although the ‘outcome of the Convention [was] never [meant to] be a finality’ (Shaw 2003: 52), its approach to treaty reform was much holistic than that of any preceding intergovernmental conference (IGC). Meaning that it was in many ways the first attempt at a constitutional moment for the EU (see also Walker 2003 and Fossum and Menéndez 2005).

While the EU’s soft and incremental constitutionalisation – both legal and political – has been well documented,<sup>10</sup> the EU had no hard constitutional moment as described above. It is here that it differs from the constitutionalisation experience of nation states. While the soft, incremental constitutionalisation process was able to provide the Union with human rights protection, democratic participation and the rule of law, it did not provide for another key aspect of constitutionalism: separation of powers. It is this, the organisation and limitation of state powers that is one of the key features of any constitutional moment: the establishment of the legislature, executive and judiciary as well as their inter-institutional checks and balances. As the Union was not conceived as a state and has no founding constitutional moment, it was not set up with such a system. Instead, the continuous increase in the Union’s economic, political and social competence as well as its growth in membership meant that institutional reforms became necessary. Yet, due to the Union’s nature, these changes were subject to intergovernmental negotiations among member state governments. Over time, legislative

---

<sup>9</sup> See *Les Verts* ...

<sup>10</sup> Although this viewpoint is not uncontested, see Hartley 2001.

powers were dispersed among the European Parliament, the Council and the Commission. Executive powers were vested in the Commission and the Council and, with the Lisbon Treaty, also the European Council. This is not the place to discuss why powers were dispersed nor to make a normative assessment about the efficiency of such a system. It shall suffice to say that leaving institutional design to a large number of actors, all equipped with absolute veto powers, is not the most efficient way to allocate political powers. The lack of a constitutional moment meant that the EU's institutional design, and thus the lack of a separation of power, is by default the result of a piecemeal political constitutionalisation process.

### **Problems in terms of democracy and legitimacy**

The European Union's democratic deficit has long been a scholarly focal point that has led to a fascinating and diverse analysis amongst scholars. Some analyses have concluded that there is in fact no lack of democratic legitimacy at the European Union level. Their argument is that the EU, designed by the member states, only deals with issues of low electoral salience and moreover, it 'employs two robust mechanisms: direct accountability via the EP and indirect accountability via elected national officials' (Moravcsik 2002, p. 611). Thus, the EU's limit area of political competence and the dominant role of the member state governments (who in themselves are legitimatised through national elections) – in combination with the directly elected European Parliament – provide a sufficient level of democratic legitimacy. It is especially the latter point that have led scholars to point out that 'a deficit of democracy will remain endemic to the [EU] as long as the Member States remain, for their people, the principle focus of collective loyalty and the real area for democratic politics' (Majone 1998, p.14). Others have rebuked this viewpoint, arguing forcefully that low saliency of policy issues does not justify 'no democracy, as long as it may equally well be the result of lack of democratic arenas for contestation' (Follesdal and Hix, 2005). Lamenting further that 'the processes of electing national politicians and even the Members of the European Parliament are not contests about the direction of EU policy' (Follesdal and Hix, 2005). Halberstam, similarly rejects Moravcsik's analysis, arguing instead that 'European integration reaches too broadly and too deeply into the national policymaking arena to rely on Member State government control of the European policymaking process as a substitute for the broader democratic engagement that would otherwise occur at the national level' (Halberstam 2005, p.778). Meaning that increasing political contestation and salience will lead to an increase of popular interest in European politics and, thus, emphasising that 'government of and by the people' is not possible simply because the EU lacks the attributes necessary to constitute its own demos (see Schmidt 2006).

Hix produced a fascinating monograph on the democratic shortcomings that picks up on Follesdal and his argument. In the book he argues strongly in favour of a politicisation of Europe, calling for 'limited democratic politics' in the EU. 'More politics', Hix argues, become inevitable 'as the redistribution outcomes of EU policies become more apparent' but they would be limited by the checks-and-balances of the [in-place] EU system' of Commission, Parliament and Council (Hix 2008, pp. 107-108). Therefore, by making Europe matter more and injecting some political competition – directly electing

the Commission President or granting larger parties more political clout in the European Parliament (see Hix 2008, p. 140 and Chapter 9).

Other, prescriptive analyses focus on the newly created Citizens Initiative as a remedy for the Union's democratic shortcomings. Warleigh-Lack argues that this new mechanism, established under Article TEU, could 'help develop citizens' senses of political identity in a cross-border, more 'European' way, through iterated instances of deliberation and cooperation' (Warleigh-Lack , p.69). The source of the perceived lack of democratic legitimacy lies in its make-up as a web of governance practices is of the utmost importance. The idea of institutional changes, such as a directly elected Commission President (see Hix 2008) or a greater parliamentarisation of the EU – without actually changing the treaties – by using the European Parliament's power and influence under the current treaties to force a Commission President candidate upon the European Council (Jakab 2010).

In principle, the debate on the extent of the democratic deficit at the EU-level seems to depend on whether one wants to hold up the Union to the same democratic standards as a traditional parliamentary democracy of a Westphalian-type nation state. Most agree the EU ought to be held up to these standards. Thus, there remains a strong sentiment that the EU's institutions 'must be brought closer to its citizens' as citizens 'do not always see a connection between those goals and the Union's everyday action' (Laeken Declaration 2001). Those scholars agreeing on the existing of a lack of democratic legitimacy vary in their prescriptions yet they all agree that raising the political stakes is the only way to increase participation and interest and thereby increase democratic legitimacy. This is because from an academic viewpoint the current institutional structure might be cumbersome but it makes sense: the Commission represents the Union's interests, the Council the member state governments and the Parliament the EU citizens. Each of the stakeholders is adequately represented so the only thing missing is public participation and interest. Yet, the EP's significant increase in legislative powers over the past 25 years has done nothing at all to remedy the perceived lack of democratic legitimacy. I find it hard to believe that linking the position of the Commission President even closer to the EP elections as is the case today will make a significant difference.

Rather I would like to link the issue of democratic legitimacy to the concept of constitutional expectations. Specifically, I argue, the aforementioned lack of a functional concept of separation of powers at the European Union level prevents any proposed remedy to overcome its perceived democratic deficiencies. Without solving this perceived lack, no other remedy, such as a parliamentarisation, or a politisation of the EU will have any remedial effect.

### **The underlying problems of expectation**

Richard Primus, in a forthcoming article of the Michigan Law Review, argues convincingly that our understanding of constitutional law is much more a question of what he describes as 'constitutional expectation' rather than textual reality. The simple but powerful argument is started off by describing the 'constitutional crisis' that arose when US President Obama, took his inauguration oath in January 2009, during which he, upon a prompt by Chief Justice Roberts, swore to 'execute the Office of President of the United States faithfully' – thereby misplacing the word 'faithfully'. This syntax error,

as Primus explains, though without legal implications, caused uproar by pundits, press and public and led to a repeat of the oath the following day in the Oval Office. The President, this time placed the word 'faithfully' as prescribed by Article II of the US Constitution, however he started his oath with the words 'I, Barack Hussein Obama, do solemnly swear ...'. As Primus rightly clarifies, Article II of the US Constitution certainly does not say 'I, Barack Obama, do solemnly swear...', nor does it say 'I [insert name], do solemnly swear ...' (see Primus, 2011). Yet, the same people who had complained that the first oath had violated the Constitution deemed the second one flawless. Primus argues that is to do with the fact that educated people have a certain expectation about how the US Constitution works and so what is considered constitutional and what is not – and this expectation sometimes is at odds with the actual text. Every President since Roosevelt has used his name (Primus 2011), thus inserting one's name into the presidential oath has become part of a shared constitutional expectation. Primus guides his readers in the remainder of his paper through his argument that only constitutional expectation, not textual restrictions, prevent Washington D.C. from electing a member to the House of Representatives. In the remainder of this paper, I would like to borrow Primus' terminology and use the notion of constitutional expectation shed some light onto the democratic legitimacy dilemma that surrounds the European Union.

If we think about our general constitutional expectations what does a constitution contain? Many would point to the aforementioned constitutional principles. Also, a categorisation of the general state organisation can be expected from a constitutional text: is the country a parliamentary republic, a federal republic, a monarchy, a commonwealth or even, as is the case in China, 'socialist state under the people's democratic dictatorship' (Chinese Constitution, Article 1). Moreover, we expect from a constitution to define the different state powers: how they are elected, nominated, how they function, interact and what their competences are. The first three articles of the US Constitution deal with Congress, the President and the Judiciary; titles two to four of the French Constitution deal with the President, the government and the parliament and title seven with the country's highest court; even the Chinese constitution in Chapter Three deals with the structure of the state (articles 57-92). In other words, we expect our constitution to explain the basic structures of the legislature, the executive and the judiciary: how parliament is elected, how the head of state and/or the head of government is selected, how a government comes into place and what powers the courts have. I contend that it is this tripartite of institutions: parliament, government and the judiciary that form a core constitutional expectation for all of us, and, crucially, that is missing at the European level.

Of course this constitutional expectation has its roots in Montesquieu's separation of powers theory, which, 'in modern times, has been [...] most significant, both intellectually and in terms of its influence upon institutional structures' (Vile 1998, p.2). Montesquieu of course did not formulate the theory by himself – he drew heavily on Locke, Boudin and others, and his thinking was developed further in the 250 years since the publication of his *De l'Esprit des Loix* in 1748. In fact, he sought to define a just system of government, stating explicitly that 'when the legislative and executive powers are united in the same person [as would be the case in an absolute monarchy], or in the same body of magistrates, there can be no liberty [...]' (Montesquieu, 1748). This was echoed by Madison in the Federalist 47

where he states that ‘the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny’ (Madison, "Federalist 47). Neither Montesquieu, nor Madison, and least modern constitutional thinkers, however, believe in an absolute and pure doctrine of the separation of powers. Montesquieu ‘combined with it the ideas of mixed government and checks and balances’ (Vile 1998, p.99). Scholars agree that ‘the hermetic division of governmental functions’, i.e. of the legislature, executive and judiciary, is ‘impossible to achieve’ (Carolan 2009, p.19). Thus, I am not advocating the separation of powers theory as a constitutional theory that should, in the sense of a ‘pure doctrine’ be adopted within the European Union. Rather what I would like to elaborate on is the argument that the separation of powers theory has become a constitutional expectation and the EU’s current constitutional system is not fulfilling this core expectation.

We expect to see the allocation of state powers divided between legislature, executive and judiciary within any given constitutional system – rather than combined in the same body or, worse, person. Of course in some systems, the ‘demand for the establishment of harmony between legislature and government’ (Vile 1998, p.6) has in fact led to ‘practical problems of the control of government’ (Vile 1998, p.11). Yet, there is still an institutional, legal and political distinction between government and parliament that conforms to our constitutional expectation of the separation of powers. The formal differentiation – even in parliamentary democracies – between the legislative and the executive branch serves as an ubiquitous marker that helps us (the educated public) to understand how a legal-political system works. We intuitively expect to see a parliament, a government and a judiciary in our constitutional systems and our political realities. In fact, even the standard template for the constitution of accredited English sports clubs has a section on the management committee, the officers of the club and a section on discipline and appeal.<sup>11</sup>

Moreover, our constitutional expectation is mostly focused on the executive, i.e. the government. Even in parliamentary democracies, we are more concerned with the composition of government than that of parliament. In parliamentary democracies the government depends of course on the outcome of the parliamentary elections. Meaning that the party/ies with the most votes form a (coalition) government supported by a parliamentary majority. In this latter case, and this is true for all EU member states, even semi-presidential France, we – the educated people – vote not necessarily for a specific candidate in parliamentary elections. Rather our choice is guided by our preference of which party should be in government or even which person should be its leader. We expect that the party with the most votes will form the government and its leader will become the Prime Minister, Chancellor or Taoiseach. Thus, governments can rely on a stable and supportive majority in parliament – thereby undermining the pure separation of powers theory. The connection between government and parliament is often so strong that a government’s loss of a parliamentary is not only rare, but often equated with a governmental crisis.<sup>12</sup>

---

<sup>11</sup> See clubmark.org.uk – template available at

[http://www.clubmark.org.uk/files/resources/templates/cm\\_k\\_temp10\\_constitution.dot](http://www.clubmark.org.uk/files/resources/templates/cm_k_temp10_constitution.dot).

<sup>12</sup> See, e.g., ‘Blair defeated over terror laws’, in BBC News online, 9 November 2005. The article quotes then-Tory leader Michael Howard stating that “the vote had ‘so diminished’ Mr Blair’s authority that he should quit now.”

In fact, the reliability of governmental majority often means that general elections rather than daily parliamentary scrutiny count as the most effective form of government accountability. This explains why parliamentary elections are nowadays seen as ‘referendums’<sup>13</sup> on government performance or even proclaimed their ‘judgement day.’<sup>14</sup> Thus, the focus of election outcomes is not so much which MP won which constituency or which MP managed to be high enough on her party list to be elected to parliament. Rather we expect elections to determine which party has gathered sufficient votes so that it can form the next government and its leader become the next prime minister.<sup>15</sup>

It is not for me to discuss the merit of this peculiar political reality that has emerged.<sup>16</sup> I am simply pointing out that the government, the executive branch, has become if not the dominant branch of the different constitutional powers, then at least the focal point for citizens when debating political events and, crucially, casting votes.<sup>17</sup> We are happy with the government or unhappy with it. We think government should do more or less. We hope government will return to office or voted out. Our constitutional and political expectation of how our respective country is run centres around how we evaluate the performance of the government of the day.

Where does that leave us when we turn to the European Union? How is our constitutional expectation of separated powers and an accountable executive been met at the EU level? The answer is: not at all. Hence, in the following section I will examine the lack of separation of powers at the European level and analyse the impact of this lack with regard to our constitutional expectations as well as the perceived lack of the EU’s democratic legitimacy.

### **Why the EU does not meet our constitutional expectations**

The separation of powers theory, in the strictest sense, does not necessarily provide the means for a practical constitutional construct, but, as argued above, it is part of our constitutional expectation. It creates a framework that helps the wider public to recognise the locus of power and to identify the people responsible for political decisions that affect our lives. So, where does the EU fit into this neat separation of powers picture?

The Union’s legislative powers are divided between the European Parliament and the Council. The Parliament represents the citizens of the Union, whereas the Council represents the member state governments. Especially the EP fulfils our constitutional expectations at least to an extent: we elect a European Parliament every five years and it holds significant legislative powers, much like we expect any parliament to have<sup>18</sup> – so far so good. Yet, as pointed out above, the locus of our constitutional expectations is the executive branch. However, the European Parliament does not elect or nominate a

---

<sup>13</sup> See, e.g., ‘By-election will be D-Day for the Coalition, Clegg concedes’, in *The Herald*, 6 January 2011.

<sup>14</sup> See, ‘Tag der Abrechnung’, in *Süddeutsche Zeitung*, 07 September 2005.

<sup>15</sup> See, e.g., ‘Tory majority missed by a whisker’, *Sunday Times*, 9 May 2010.

<sup>16</sup> For a discussion about the increasing dominance of executive politics, see ...

<sup>17</sup> Another point in case here is the 2010 congressional election in the United States, which was seen as a vote on the performance of the Obama administration. See ‘Midterms 2010: Mitch McConnell says Americans scored Obama with ‘an F’’, in the *Daily Telegraph*, 4 November 2010.

<sup>18</sup> At least considering the overall political competence that are placed at the Union level.

government not is its election linked to the composition of any other EU institution. Our vote in the EP elections has thus not the same effect as our (EU member state) vote in national election – where we see even in semi-presidential France a link between parliamentary elections and government composition.<sup>19</sup> Thus, unlike our vote at the national level, we do not make a choice with an eye on the next European government. As others have pointed out before, ‘there is no electoral contest for political leadership at the European level’ (Hix 2008: 77). As pointed out before, some deduct from this that we should link the Commission President to the outcome of the EP elections (see Hix 2008 and András 2010). I will elaborate further below why I do not agree with this proposal.

The Council is different animal, as it acts more secretive than the European Parliament, its decisions are not taken by super-majority (i.e. qualified majority) vote and the legitimacy link of the governments acting in the Council towards their citizens is much more tenuous than that of the Parliament. After all, whose electoral choice in their national parliamentary elections depends on one’s government’s legislative performance in the Council?

If the legislative branch is divided between the Council and the Parliament, where then do we find the executive powers at the EU level? Where is the government – the main focus of the political activity at the national level and the core of our constitutional expectations? Of course, there is no EU government, though that does not mean that the Union does not hold any executive powers. Rather, its compound executive functions (see also Trondal 2010) are not comparable to those of a nation state. The executive functions that, at the national, are neatly packed into the government and its ministerial departments are dispersed among the Commission, the European Council and the Council. This diversification of the executive functions means that our expectation of a visible, responsibility-assuming and accountable government, including its political leader, is not met at the EU level.

It is usually the Commission that is deemed to be the core of the European executive (see Hix 2005: Chapter). Of course, the Commission carries out mostly executive functions and it even resembles a government in the sense that it has something that is reminiscent of government departments or ministries: its Directorate Generals (DGs) headed by the twenty-seven Commissioners. Yet, for good reason the Commission is not to Europe what Her Majesty’s Government is to the UK. The Commission is not politically responsible, it does not depend on elections and it does not answer directly to the voters.<sup>20</sup> In fact, the power to shape political output, in a way that we expect a government to do, is not vested in the Commission. It alone holds legislative initiative at the EU level, but it does not command a legislative majority as we expect from governments in our national parliamentary systems. Though the pure separation of powers theorist might look unfavourable onto an executive that is involved with the legislative process, it is part of our political understanding, our

---

<sup>19</sup> The link may be less strong when the party of the President is also the majority party in parliament as this leaves a considerable amount of discretion to the President when selecting (or replacing) the Prime Minister. Under a cohabitation situation the President will have much less choice about whom to appoint. Still, the Prime Minister and her government will always come from the party with the most seats in the *Assemblée Nationale*.

<sup>20</sup> Even the newly established Citizens Initiative will not change this. Although it forces the Commission to propose certain legislation it does

constitutional expectation, that the government is elected by the people (albeit through parliament) and thus should be able to carry out their policy programme upon which they will be judged come next election. The Commission, however, is obliged to consult the viewpoints of the European Parliament and the member state governments, represented in the Council, when proposing legislation. But they have no influence over their voting behaviour the way that a government has in parliamentary democracies.

Furthermore, the Commission is not even the master of its own structure, it cannot simply increase or decrease the number of its DGs the way that a government can create or abolish ministries. Nor can its President sack, hire or re-shuffle Commissioners the way that a prime minister or chancellor can do within her cabinet. In addition, the Commission does not have the legal competence nor does it possess the administrative means to overlook and monitor the execution of EU legislation. This is left entirely to the member states, and only with the help of the judiciary can the Commission enforce the transposition of EU law into national law. So, the Commission might hold a considerable amount of executive powers but it is not – for good reason I might add – a government (see Curtain 2009, pp. 65-66). Thus, it does not fulfil our constitutional expectation of a democratically elected and accountable government.

In addition to the Commission we also find considerable executive powers with the European Council – which in fact provides much of the political leadership that we see a government assume at the national level. Article 15 TEU reads ‘The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.’ A strong resemblance to Article 65 of the German Basic Law cannot be denied: ‘The Federal Chancellor shall determine and be responsible for the general guidelines of policy.’ Undeniably, the Chancellor is the head of the German political executive. And, much like the German Chancellor, the European Council is the ‘most visible face of the Council today’ (Haynes-Renshaw and Wallace 1997, p.158). Even more so than a national government, the European Council, is not directly elected. However, whereas we cast our votes in national parliamentary elections with both eyes fixed on which party we would like to see in government, the performance of members of the European Council (i.e. that of national governments) is highly unlikely to make much impact on national voting preferences. In other words, the European Council might have a significant impact on the running of the European Union but its executive position is not comparable to that of a national government. It is not perceived the same way and it is thus not accountable in the same way. In addition, the selection of its president is made by its members without any connection to the electorate. In fact, the choice of the first (and current) president was probably linked to his low profile – a decision that is completely at odds with the rationale behind the selection of the leader of a national government. Therefore, it is safe to say that the executive functions that are performed in the European Union, as well as the composition and outlook of the institutions among which they are dispersed, do in no way correspond to our constitutional expectations that we have formed based on the legal and political reality at the nation state level.

It is thus little help that the EU’s political conduct is often more transparent than that of many member state governments – described by Hix as ‘the ‘gold standard’ for many national governments’ (Hix

2008: 74). The Commission as well as the Parliament have easily accessible websites containing extensive documentation and archives. Even the Council is opening up more of its work – although its transparency could be improved further (see Hix 2008: 149-155). Direct elections for the European Parliament and the EP's increase in legislative powers have meant that democratic participation of EU citizens has institutionally improved – the relatively low turn-out rates are regrettable but do not diminish the fact. Yet, 'traditional forms of hierarchical supervision by elected representatives' (Lindseth 1999, 634), i.e. a visible and thus accountable government is missing at the EU level. For this, a government, remains 'of paramount importance, providing the essential legitimating mechanism for the exercise of delegated normative power' (Lindseth 1999, 634). So without a government, the EU falls short of our constitutional expectations. After all, who is in charge? The apolitical Commission? The multilingual European Parliament? The secretive Council or the glamorous European Council? If there is political failure or political success at the national level, we know who is responsible for that: the government.

The Lisbon Treaty has provided the Union with a significant institutional overhaul. We have a more powerful European Council with a permanent President, a High Representative for Foreign and Security Affairs and a Commission President whose election is now linked to the EP election outcome. No doubt, the political scientist or legal scholar in us can explain and rationalise this institutional construct – maybe even to a layperson. Yet, we could not do so with the same speed and accuracy as we could explain and rationalise the UK's political system. The separation of powers that guides our understanding of the political process and the constitutional design at the member state level is not present in the EU.

Of course, the EU is not a state; it is not likely to become a state; it probably will not become a state. Its constitutional structure is the result, as argued above, of political negotiations rather than a constitutional moment. This explains its institutional cumbersomeness. Yet, there is, undeniably, an underlying rationale to this complex structure. The three main institutions represent the three levels of interest in the Union: the Commission is the defender of the Union interests, the European Parliament the those of the European citizens as a whole and the member state governments (who answer to their own electorate) defend their national interest, i.e. those of their own citizens. The fact that this system is so convoluted is thus a thing of necessity. The Union, due to its very nature, cannot fulfil our constitutional expectations. There cannot be a government in the way we – the educated public – understand it. Thus, we do not recognise the way that the Union is run and thus perceive it to lack democratic legitimacy. This perception is not necessarily based on constitutional or political facts. The same way that the UK public feels that any party that receives the most seats in parliament should form a government – irrespective how few people actually voted for it – is not based on rationality but on constitutional expectation. We expect to elect a government and to hold it to account with our vote. This is how we understand politics and that is how we recognise as democratic legitimacy. This deficiency of a detectable and accountable government at the EU level, might thus be the reason behind the deceived lack of democratic legitimacy and could explain why currently only 19% of EU citizens feel that the Union represents democracy (Eurobarometer 2010, p.17).

But since the EU is no state and its constitutional structure is fitted around its political needs, what can be done? How can the EU fulfil our constitutional expectations with regard to the separation of powers and thus improve our perception of democratic legitimacy? The following section will try to provide a potential, alas politically improbably, solution to the dilemma that is posed by the Union's in-built failure to fulfil our constitutional expectations.

### **A possible, if unlikely remedy**

As I laid out in the preceding paragraphs, we hold a constitutional expectation towards a constitutional system that at least nominally adheres to the separation of powers theory. Furthermore, we expect our vote in parliamentary elections to affect the composition of the government, thus creating an accountability connection between the political executive and the electorate. This expectation, however, is not met at the European level as Europe does not have a government and its executive powers are dispersed among different institutions.

So, why not establish a government at the European level? Why turn the European Commission into the EU's government? By giving the European Parliament the power to nominate and elect the College of Commissioners one would transfer to it the same powers of parliamentary investiture that exist – and are expected – at national level.<sup>21</sup> However, the EU is not a state and certainly not a nation state. Thus, transforming it into a parliamentary democracy seems to be a strange and contra-productive step seeing that the EU is not a state. Still, a number of scholars have suggested that linking the election of the Commission President to the European Parliament elections – either directly or indirectly – would be a solution to make said elections more salient and adding a face to its campaign and result (see Hix 2008, András 2010). This proposal might politicise the EP elections and certainly increase its political stakes, but it would be, of course, the first step towards full parliamentarisation as outlined above. Furthermore, directly linking the office of the Commission President to the Parliament elections also ignores the constitutional logic behind the institutional separation of the Commission and the Parliament. I would argue that the idea of an independent Commission is a European constitutional cornerstone that we should cherish rather than eliminate. It is a non-partisan institution that holds legislative initiative. In this it is resistant to political pressure and unfazed by populist matters of the day because legislative decisions are taken by Parliament and Council, who, in turn, are (directly/indirectly) accountable to their electorate. Politicising the Commission would decrease its independence and increase the opportunity to put political pressure on the direction of its work. After all, as Article 17(3) TEU states for a purpose that: 'In carrying out its responsibilities, the Commission shall be completely independent.' I maintain, therefore, that the advantages of an independent Commission outweigh any potential (yet by no means certain) gains in democratic legitimacy by politicising its composition and thereby its actions.

---

<sup>21</sup> Although some countries have no formal act of parliamentary investiture, it is nevertheless the case that a new government is put or kept into office by a majority of parliamentarians – minority governments excluded.

If we should not parliamentarise the Commission to create a European government, how then can we fulfil our constitutional expectation? I propose that we focus on the EU's legislative rather than its executive branch in doing this I will draw inspiration from the United States. The US Constitution asserts in Article 1, Section 3 that 'The Senate of the United States shall be composed of two Senators from each State'; adding, in the 17<sup>th</sup> Amendment that these Senators shall be 'elected by the people thereof, for six years; and each Senator shall have one vote.' It is these senators who take office in Washington and represent the interests of their states in the legislative process of the federation. This is much different from the German system where the *Länder* governments directly represent the state's interest at the federal level as part of the *Bundesrat*. In this, the Union currently resembles the German model. In fact, since the coming into effect of the Lisbon Treaty, the European Council has been promoted to full institutional status (see Article 13 TEU) and, thus, the member state governments are currently represented in two institutions. It seems peculiar why it is the governments that fulfil both the legislative role in the Council and the executive functions of the European Council. In addition, it is of course questionable whether the governments' actions at the EU level can ever be properly scrutinised at the national level (where they can rely on a parliamentary majority). Moreover it is even less likely that governments are held to account by the electorate for their performance in either the Council or European Council during national elections.<sup>22</sup> In the United States, however, the link between a Senator and her electorate is very clear. Senators have a very high political profile in their home states and their political power within the federal law-making process is remarkable – not least because of their relative small number.<sup>23</sup> Moreover, their elections provides for direct accountability in a much clearer and more transparent process than is the case in the German *Bundesrat*.

So, why not change the outlook of the Council by abolishing the presence of national governments in this mainly legislative body and restricting the national governments to their executive roles in the European Council? As radical as this suggestion might sound, a similar proposal was already brought forward by the Convention of the Future of European. Its Draft Treaty establishing a Constitution for European called for a radical reform of the Council. The current system of different national ministers participating in different legislative motions, depending on their expertise, would have been abolished. Instead, a legislative council was proposed in which one – permanent (!) – national representative would sit who could be accompanied by a national minister relevant to the legislative issue at hand.<sup>24</sup> The hope of the drafting Convention was that a single, permanent representative would increase the Council's legislative consistency and allow for great institutional and knowledge and cooperation among the national representatives. Alas, Article 22 was one of the changes that were made by the

---

<sup>22</sup> In contrast to Germany where *Länder* governments are often elected on the record of the federal government – either by voting for the federal government party/ies or the federal opposition party/ies. See also Völkl and Schnapp (2008).

<sup>23</sup> 2 per states (i.e. 100 in total) as opposed to 435 members of the House of Representatives.

<sup>24</sup> 'The Council of Ministers shall consist of a representative of each Member State at ministerial level for each of its formations. Only this representative may commit the Member State in question and cast its vote.' (Draft Treaty Article 22); 'In this [legislative] function, each Member State's representation shall include one or two representatives at ministerial level with relevant expertise, reflecting the business on the agenda of the Council of Ministers.' (Draft Treaty Article 23)

member state governments during the 2003/4 IGC that culminated in the Treaty establishing the Constitution for Europe. And when the treaty failed, the now-ratified Lisbon Treaty did not go back to the original Convention proposal because of a fear that such a permanent Council member might ‘go native’ and forsake national interests for European ones.

Rather than simply referring back to the Convention proposal, I would like to go one step further and propose the change of the Council into a US Senate-style legislative chamber with directly elected national representatives. The advantages of such a system are rather obvious in my view. It would allow for Europe-specific electoral campaigns at the national level – including one or several distinct (and most likely prominent) face/s. Similarly it would overcome the above-mentioned problems surrounding the direct link between EP elections and Commission President nomination. Campaigns for national representatives would also by-pass linguistic hurdles and cross-country recognition issues that have often been bemoaned when discussing European Parliament elections. Directly elected Council representatives would also create a much closer link between the European citizens and ‘their man/woman in Brussels’. The importance of this link has been a key argument, especially by smaller member states, against a reduction of the size of the Commission below the number of member states. Yet, rather than the apolitical and nominally unbiased Commissioners, the directly-elected Council representative would be able to fight national preferences and be directly accountable for their actions – much more so than is the case currently with the Council’s indirect ministerial representatives.

The collegiality that would inevitably be created among the Council members would prevent potential deadlock, yet, as the US example shows, the link to their electorate would prevent an overly strong pro-Europeanness of the representatives as their mandate will depend on the satisfaction of the voters come election time.<sup>25</sup>

A key institutional problem could be the organisation or the rotating presidency. Still, much like the majority and minority leader of the Senate, there are distinct political roles that could be based on nationality rather than political persuasion. But it must not be forgotten, that the main argument for maintaining the rotating presidency<sup>26</sup> was to maintain a distinct profile of the European Union within the different member states (especially the smaller ones).<sup>27</sup> With a directly elected high-profile Council member for each member state, this would be much less of an issue.

Like in the US, there is good case to be made for two representatives per member state and elections for these positions could be held separately – much like the US where two Senators from the same states are not up for re-election at the same time. This would mean that the outlook of the Council would change only gradually a situation much suited to the policy-style of the European Union.

The fact that the European Council has been lifted up to full institutional status also means that such a new directly elected Council would not prevent the representation of the national governments at the

---

<sup>25</sup> In fact, the problem of ‘going native’ was one of the main reasons why national governments were against appointed permanent representatives in the Council when discussing the Convention’s Article 22 during the 2003/4 IGC.

<sup>26</sup> Its abolishment was also much discussed during the Convention as well as the follow-up 2003/4 IGC.

<sup>27</sup> See Bunse and Nicolaidis (2007).

European level. Their leaders would still fulfil the duties under Article 13 TEU and maintain a central position within the EU's constitutional system and as they would be able to continue to wield significant influence on Union's political conduct.

Finally, returning to the main argument of this paper, I am convinced that such a US Senate-style Council would help a great deal in allowing the general 'us' to recognise better the different political powers that operate within the European Union because it would resemble much closer to our constitutional expectations surrounding the separation of powers. Although my proposal would not introduce a European government, it would create a clear and direct connection between the electorate and the political leadership of the Union. Rather than the election of the European Parliament – which, much like national parliamentary elections, results in a large number of unknown faces – the directly-elected Council representatives would allow for a much higher political (and media) profile. Thus creating a similar accountability-based linked as is the case for our national governments – and thereby fulfilling our constitutional expectation at the European level.

## Bibliography

- Ackerman, Bruce (2000), 'The New Separation of Powers', *Harvard Law Review*, 113,3, pp. 633-729.
- Bogdandy, Armin von (2010). "Founding Principles", pp. 1-54, in Bogdandy, Armin von and Bast, Jürgen (eds.), *Principles of European Constitutional Law*, Oxford: Hart Publishing.
- Brand, Constant (2010) 'Push for treaty change to bring in new MEPs', *European Voice*, available at <http://www.europeanvoice.com/article/imported/push-for-treaty-change-to-bring-in-new-meps/68051.aspx>.
- Bunse, Simone and Nicolaïdis, Kalypso (2007). The "European Union presidency": a practical compromise, *openDemocracy*, available at [http://www.opendemocracy.net/article/the\\_european\\_union\\_presidency\\_a\\_practical\\_compromise](http://www.opendemocracy.net/article/the_european_union_presidency_a_practical_compromise).
- Carolan, Eoin (2009), *The New Separation of Powers: A Theory for the Modern State*, Oxford: Oxford University Press.
- Christiansen, Thomas and Reh, Christiane (2009), *Constitutionalizing the European Union*, Basingstoke: Palgrave Macmillan.
- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2010), *Official Journal C 83*; available at <http://eur-lex.europa.eu/en/treaties/index.htm>.
- Craig, Paul (2001), 'Constitutions, Constitutionalism and the European Union', *European Law Journal*, 7, 2, pp.125-150.
- Curtain, Deirdre (2009), *Executive Power of the European Union*, Oxford: Oxford University Press.
- De Witte, Bruno (2001), 'The Closest Thing to a Constitutional Conversation in Europe', in Beaumont, Paul et al (eds.), *Convergence and Divergence in European Public Law*, Oxford: Hart Publishing, pp.39-57.
- Dicey, Albert V. (1915). *Introduction to the Study of the Law of the Constitution*, London: Macmillan.
- Elgie, Robert (2001), *Divided Government in Comparative Perspective*, Oxford: OUP.
- Follesdal, Andreas and Hix, Simon (2005), 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', *Journal of Common Market Studies*, 44, 3, pp.533-562.
- Fossum, John Erik and Menéndez, Agustín José (2005), 'Democratic constitution-making: Reflection on the European experiment', *ARENA Working Papers*, 18/05.
- Garton Ash, Timothy (2001), 'The European Orchestra', *New York Review of Books*, 48, 8.
- Halberstam, Daniel (2005), 'The bride of Messina: constitutionalism and democracy in Europe', *European Law Review*, 30, December, 775-801.
- Hartley, Trevor (20010), 'International Law and the Law of the European Union—A Reassessment', *British Yearbook of International Law*, 1.
- Haynes-Renshaw, Fiona and Wallace, Helen (1997) *The Council of Ministers*, Basingstoke: Macmillan Palgrave.
- Held, David (2006). *Models of Democracy*. Cambridge: Polity Press.
- Henkin, Louis (1994), 'A new Birth of Constitutionalism: Genetic Influences and Genetic Defects', in Rosenfeld, Michel (ed), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives*, Durham: Duke University Press.
- Hix, Simon (2005). *The Political System of the European Union*, Basingstoke: Palgrave Mcmillan.
- Hix, Simon (2008), *What's wrong with the EU and how to fix it*, Cambridge: Polity Press.
- Hobolt, Sarah Binzer (2007) 'Taking Cues on Europe? Voter competence and party endorsements in referendums on European integration', *Journal of European Public Policy*, 46, 2, pp.151-182.
- Jakab, András (2010), *Parliamentarisation of the EU without Changing the Treaties. Why We Should Aim for it and How It Can be Achieved*, VIIIth World Congress of the IACL, Mexico, December 2010.
- King, Anthony (2009), *The British Constitution*, paperback edition, Oxford: OUP.
- Lenaerts, Koen and Gutiérrez-Fons, José A. (2010), 'The Constitutional Allocation of Powers and General Principles of EU Law', *Common Market Law Review*, 47, 1629-1669.
- Lindseth, Peter L. (1999), 'Democratic legitimacy and the administrative charter of supranationalism: The Example of the European Community', *Columbia Law Review*, 99/3, pp.628-739.
- Madison, James (1961) "Federalist 47, The Particular Structure of the New Government and the Distribution of Power Among Its Different Part" in *The Federalist Papers*, ed. Clinton Rossiter, New York: New American Library.
- Majone, Giandomenico (1998), 'Europe's 'Democratic Deficit': The Question of Standards', *European Law Review*, 4, 1, pp. 5-28.

- Milward, Alan S. (1992). *The European Rescue of the Nation State*, London: Routledge.
- Montesquieu, *The Spirit of the Laws*, vol. 1, trans. Thomas Nugent (London: J. Nourse, 1777), pp. 221-237, passim.
- Moravcisk, Andrew (2002), In defence of the 'democratic deficit': reassessing legitimacy in the European Union, *Journal of Common Market Studies*, 40/4, pp. 603-24.
- Philpps, Leigh (2010) 'EU leaders agree to tweak treaty, keep bail-out fund unchanged', *euobserver*, available at <http://euobserver.com/?aid=31535>.
- Presidency Conclusion (2001), Laeken Declaration, SN 300/1/01/REV 1.
- Primus, Richard (2010), 'Constitutional Expectations', *University of Michigan Public Law Working Paper No. 173*; Michigan Law Review, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1498668>
- Schmidt, Vivien (2006), *Democracy in Europe: The EU and National Policies*, Oxford: Oxford University Press.
- Standard Eurobarometer 73 (May 2010), available at [http://ec.europa.eu/public\\_opinion/archives/eb/eb73/eb73\\_first\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb73/eb73_first_en.pdf).
- Trondal, Jarle (2010) *An Emergent European Executive Order*, Oxford: Oxford University Press.
- Trondal, Jarle, Martin Marcussen and Frode Veggeland (2005), 'Rediscovering International Executive Institutions', *Comparative European Politics*, 3, 232-258.
- Vile, M.J.C. (1998), *Constitutionalism and the Separation of Powers*, 2<sup>nd</sup> edition, Liberty Fund: Indianapolis.
- Völkl, Kerstin and Schnapp, Kai-Uwe et al (eds.) (2008), *Wähler und Landtagswahlen in der Bundesrepublik Deutschland*, Nomos: Baden-Baden.
- Walker, Neil (2003), 'After the constitutional moment', *Federal Trust Constitutional Online Essays*, 32/03.
- Walker, Neil (2009) 'Reframing EU Constitutionalism', in Dunloff, Jeffrey L. and Trachtman, Joel P. (2009) *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge: Cambridge University Press.
- Warleigh-Lack, Alex (2007), 'On the path to legitimacy? A critical deliberativist perspective on the right to the citizens' initiative', in Carlo Ruzza, Vincent Della Sala (eds.), *Governance and Civil Society in the European Union: Normative Perspectives*, Basingstoke: Palgrave Macmillan.
- Weiler, Joseph H.H. (1991), 'The Transformation of Europe', *Yale Law Review*, 100, 2403-2483.