Contribution to the EP – Committee on Constitutional Affairs – Hearing on

CITIZEN PARTICIPATION

A European Union of, by and for the citizens

How can Europe provide better possibilities for the participation of its citizens?*

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PANEL 1: Participative democracy concepts, conditions and challenges for the European Union

The debate on European democracy has intensified enormously since the European Citizens’ Initiative was institutionalized. Unfortunately, the new debate is primarily defensive. This is because the financial crisis and the praxis of crisis management in the Euro zone has become the prime concern of European debates and of citizens who are not only afraid to loose their social entitlements or tax money but who are also concerned about the threats to democratic governance which the efforts to tame the crisis entail. We are today living at a crossroads between technocratic crisis management and democratic governance in the Union. This is not just a financial crisis, it is, at the same time and by the same token, an institutional crisis and an acid test for the democratic credentials of the European project. In a way, the steps towards new forms of democratic participation which were undertaken with the institutionalization of the ECI are more important than ever. But it does not make sense to abstract discussions on the future of democracy in the Union from today’s very uncomfortable and disquieting context.

Here is how I will proceed more mundanely in three steps:

1. As an inveterate lawyer, I will start with black letters: a textual analysis of the pertinent treaty provisions.

2. I will then comment briefly and critically upon two recent suggestions for a strengthening of the democratic involvement of EU citizens, one developed by a group of colleagues at the EUI, the other one contained in a manifesto signed, i.a., by Jürgen Habermas.

* A more demanding assignment than the present one is hardly conceivable. I would like to thank my gratitude to four colleagues -- Michelle Everson, London, Josef Falke, Bremen, Johannes Pollak, Vienna, Florian Rödl, Frankfurt/M. – and to Chris Engert, Florence for the editing of my English. The usual disclaimer applies.
3. Upon this basis, or in contrast with these suggestions, I will present my own views on the tensions between crisis management and democracy, and illustrate their implications.

I.

Step 1: What does the Treaty tell us about participatory democracy?

I need not carry coals to Newcastle and will hence be very brief in my remarks on the Treaty provisions. “The Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.” This is how the European Convention, in its Article I-46 No. 1 has elucidated its commitment to the new “principle of participatory democracy”. The Lisbon Treaty has modified and complemented this explanation. ¹ There was no grand theoretical design behind this innovative move from which we could infer how we should understand the relation between the new principle and the commitment to representative democracy in Article 10 TEU. What we can safely assume is that the principle of representative democracy cannot claim exclusive validity and that we have to come to terms with the tensions between the two principles.

Let me hence recall the famous or infamous pertinent pronouncements of the German Constitutional Court in its Lisbon judgment of 30 June 2009: ² Democracies require “free and equal elections. This core content may be complemented by plebiscitary voting on factual issues.”³ “[E]ven after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body created in equal elections… [T]he European Parliament is not a representative body of a sovereign European people”. It is instead “designed as a representation of peoples”.⁴ And the Court left no doubt that, in its view, the new principle of participatory democracy and its mechanisms were not sufficient to compensate the lack of direct representation according to the principle of electoral equality.⁵ Has the Court therefore led the integration process into a dead-end alley? The Union is a multilevel system of governance with interdependent semi-autonomous actors. It is simply impossible to organise decision-making in that polity according to the requirements of representative democracy.

Fortunately enough, the German Court typically operates with “yes-but” arguments. The Lisbon judgment uses the same strategy: Yes, “it is true that the merely deliberative participation of the citizens and of their societal organisations in the political rule … cannot replace the legitimising connection based on elections and other votes”. But, “such elements of participative democracy can … complement the legitimation of European public authority”. … “[D]ecentralised participation” has a potential to render “the primary representative and democratic connection of legitimation more effective”.⁶

¹ Article 11 TEU reads: “1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.”
³ Para. 270.
⁴ Para. 280.
⁵ Para.s 290-292, 272.
⁶ Para. 272.
We can infer what we know from the theoretical literature on representative and participative democracy, anyway. These are not alternative, let alone contradictory, notions. Elements of participatory democracy can be identified within constitutional states. Both of them can be read in the perspectives of deliberative notions of democracy. To cite a famous philosopher: “Democratically constituted opinion – and will formation depends on the supply of informal public opinions that, ideally, develop in structures of an unsubverted political public sphere.” However, “although power of public discourses originates in autonomous public spheres, it must take shape in the decisions of democratic institutions of opinion- and will-formation” with, i.a., “clear institutional accountability”. It seems plausible to assume and to argue that the adoption of the notion was meant as an “anti-stealth” appeal, against complacent portrayals of the “average citizen as lacking the time, interest, expertise, direct stake, as well as appropriate forums needed to contribute meaningfully to collective decision-making”.

Rather than digging deeper in the theoretical literature or criticising the German Court for erecting barriers to integration and complaining about the opaqueness of its pronouncements, I conclude that our task is to understand how democratic will-formation can be promoted and organised in the European constellation. To be more specific: Can we understand participatory democracy, in particular, its procedural dimensions as defined in Article 11 and the ECI as a democratically-valid response to the structural specifics of the Union? Yes, we can, I will argue. But in order to render my argument transparent and strengthen its plausibility, I will take a detour.

II.

Step 2: Two recent suggestions for a strengthening of democracy in the Union

The two recent proposals which I am going to sketch out and discuss are miles apart. It is unsurprising that they both concern the financial crisis. They both strive for responses to the tensions between crisis management in and democratic commitments of the Union. I will not try to define their positions in the wider context of the agenda of the present hearing, but confine myself to, and focus on, contours which should help me to explain the species of my own views.

1. Democratisation through parliamentary involvement in the election of the President of the European Commission

The first proposal was developed by Miguel Poiares Maduro, formerly AG at the ECJ and now professor at the European University Institute (EUI), and Mattias Kumm, Professor at NYU School of Law, Research Professor at the Social Science Research Center and the Humboldt University in Berlin, Visiting Professor at the EUI, in a policy report on the “democratic governance of the Euro”, which was presented on 10 May at a high-level policy conference.

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seminar in which the Commission President participated. President Barroso has confirmed only very recently, in an interview with the Frankfurter Allgemeine Sonntagszeitung of 16 September 2012, is support of that proposal.

Two elements of the reasoning in this report are of crucial importance in our context. The first concerns the structural limitations to autonomous democratic decision-making on the part of the Member States of the Union. The report subscribes to the so-called “argument from external effects”, which I have defended in principle for many years: the decision-making in one Member State of the Union tends to affect the concerns of its neighbours. European law has the vocation to see to it that such “foreign” concerns are taken into account in domestic politics. The policy report applies this argument to the sphere of fiscal policy – and radicalises it dramatically: where “national politics is not able to incorporate the existing European interdependence” and hence “cannot, itself, provide appropriate and legitimate democratic solutions”, the resolution of “that democratic problem requires developing instruments of governance to prevent those externalities and, if necessary, impose particular economic and financial policies on some States”. This is a radical extension of the argument as it is known to date. The extension has both a legal and a theoretical dimension. The legal aspect: the report pleads for European interference within core spheres of national politics regardless of the limits to European competences and the principle of enumerated powers. To add a more theoretical query: Can one cure democracy failure by measures outside the framework of Union law? The report insists that the cure of democracy failures must - in itself - be democratic – and provides us with a kind of deus ex machina. In the electoral campaign for the European Parliament, the parties (or rather, groups of parties) should present candidates for the Commission presidency in their campaigns. “If the election campaign focussed on this, the European Council would, in practice, have to appoint the winning candidate.” To put this slightly differently: Union citizens shall, via election of the European Parliament, concomitantly select the President of the Commission as their leading figure who will gain a growing measure of authority to tell Member States and national citizens exactly which of their democratically-legitimated policies are acceptable to the Union and which are not.

Both steps of this argument are fatally flawed. There is no constitutional reason conceivable which would justify the correction of democratically-legitimated national politics by some supranational executive or guvernative or intergovernmental authority. The electoral suggestions which are meant to supply legitimacy for such transnational governance not only

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13 Kumm, ibid. (note 8).
lack any legal basis, but their factual expectations and assumptions also lack any basis in the real world. Neither is this a step towards participatory democracy nor can it claim to be compatible with the requirements of representative democracy. We refrain from pursuing this suggestion any further and turn to Jürgen Habermas.

2. Time for referenda and a constitutional convention?

One cannot be more passionately committed to the European project than Jürgen Habermas as a social philosopher and a political theorist. This passion explains the tone of his countless interventions during the last years, which is becoming ever more intense, and shifting in its emphasis from institutional deficits to the failure of the institutional personnel and politicians: Habermas sees Europe on the road to “executive federalism” driven by a “technological (mis-) management”, which is threatening democracy, the rule of law, and the legitimacy of the European project. As radical as this critique of the European praxis are the suggestions in the manifesto of 4 August 2012 which was co-authored by the economist Peter Bofinger and the philosopher Julian Nida-Rümelin. It can safely be assumed that Habermas has masterminded the most challenging sections of this manifesto, which build upon his idea of a European citizen with the “twin capacity as a directly participating citizen of the reformed Union on the one hand, and an indirectly participating member of one of the participating European nations on the other”. We read: “As the representative of the biggest donor country in the European Council, the Federal Republic should take the initiative and table a resolution for summoning a constitutional convention”. It does not need a federal state to establish a collective government with the power to “impose effective fiscal discipline and guarantee a stable financial system”, to ensure “closer coordination of financial, economic

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14 Mattias Kumm, however, in a contribution for the online edition of the Frankfurter Allgemeine Zeitung of 10 August 2012 went so far as to infer from Article 23 of the Basic Law a duty of the German government to support in the Council the election of the candidate nominated by the European Parliament; see http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-ein-signal-fuer-europa-11848587.html.

15 See in more detail Christian Joerges and Florian Rödl, “Would the election of a Member of the European Parliament as President of the Commission make democratic sense?”, available at: http://verfassungsblog.de/election-member-european-parliament-president-commission-democratic-sense.


and social policies in the member countries, with the aim of correcting the structural imbalances within the common currency area”. Such quests are in line with Habermas’ lifelong engagement for democracy, his more recent praise of the Irish after their “No” to the Lisbon Treaty and his later critique of Europe’s post-democratic practices which the Greek Left Review was happy to (re-) publish.20

But one may, of course, wonder how welcome German leadership really is. We will have to observe “the markets”, political elites and the less well-off especially in the South of Europe. Furthermore, Habermas’ democratic commitments have to be contrasted with the praxis of Europe’s crisis management. Only four weeks after the publication of the manifesto, the ECB has decided to purchase government bonds in unlimited quantities. The bank has added, however, that its supportive activities will be accompanied by the imposition of the type of austerity politics which Ireland, Portugal and Greece have experienced. This type of conditioned “solidarity” is anything but democratic. I do not assume that Habermas is as complacent in that respect as the policy report of Kumm and Maduro.21 Last but not least, the expectation or hopes of the manifesto with regard to the potential of Europeanised governance seem unrealistic. Together with so many advocates of a transfer of new powers to European institutions, Habermas seems to assume that strong regulatory powers and stringent policies will overcome the steadily deepening socio-economic, political and cultural diversity in the Union. He does not take into account the core insight of economic sociology. The economy is a polity; markets are socially-embedded institutions.22

The systematic neglect of that “normative fact”, together with the reliance of the integration project on a “one-size-fits-all” philosophy has led to inefficiencies in European politics and caused social disintegration.23 At this point, we can finally turn to my own visions.

III.

Step 3: Unity in diversity: an alternative perspective

How likely is it that the crisis will generate a new democratic energy and alternatives to the austerity programmes through which the European crisis management is transforming the integration project? Rather than oscillating between anxieties and hopes, I would like to sketch out a conceptual perspective which seeks to respond to the socio-economic state of the Union and integrates the arguments of both the Kumm/Madura policy report and the Habermas manifesto. Its normative reference-point is the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty - “Unity in Diversity”.24 This normative appeal of this formula rests on solid grounds in the real world. To be sure, the Member States of the

19 In Süddeutsche Zeitung, 17 June 2008, 7.
21 See Section II.1 above.
European Union are no longer autonomous; they are, in many ways, inter-dependent and hence dependent upon co-operation. It is also true, however, that Europe’s socio-economic diversity is deepening, that the potential and/or willingness to pursue objectives of distributional justice, to respond to economic and financial instabilities, are anything but uniform. Kumm and Maduro are right when they underline that decisions taken unilaterally by one Member State of the Union will often impact upon the neighbouring polities and that European law should help to compensate for such external effects. They are going much too far, however, when they conclude that the inter-dependencies within the Union justify the establishment of transnational regulatory powers. The fallacy here is twofold: the differences in political preferences, socio-economic conditions, the political and social embeddedness of markets and institutions, all militate for diversity in the governance of Europe. Equally important, the quest for centralised powers grossly over-estimates the capacities of the regulatory machinery which Europe can establish and which tend to foster technocratic uniformity. There is a trade-off between centralisation especially when guided by the one-size-fits-all philosophy, on the one hand, and socially and economically adequate responses to regulatory issues, on the other. Europe should neither camouflage its socio-economic, political and cultural diversity nor turn a blind eye to the conflicts generated by these differences. It should search for ways to deal constructively and fairly with such conflicts and thereby turn its plurality into an asset.

How should this be reflected in the institutional configuration of the integration project? I now repeat and complement what I said in the 2011 conference on the ECI. The constitutionalisation of Europe should realise two principles and aspirations:

(1) It should compensate for the deficiencies of nation-state democracies, which stem from their inability to realise a “normative order in which those who are subject to binding legal norms should also be the normative authority that deliberates and decides on these norms in an active sense in the context of a practice of justification”.

(2) It should respond to the eroding potential of nation states to cope autonomously with the concerns of their citizens not through uniform regulatory provisions but through co-operative problem-solving.


27 The standard formula is used by Rainer Forst, “Transnational Justice and Democracy”, RECON Online Working paper 2011/12, 10 f.; indebted to the same tradition and hence quite similar, e.g. James Bohman, Democracy across Borders. From Demos to Demoi, Cambridge MA: The MIT Press, 2007, 135 ff., who argues: “The crucial points at which democratic legitimacy is at stake in the EU have to do with the institutional distribution of normative powers of initiative and the institutional capacity of those regularized powers and initiative and reform to the claims made by communicatively free participants in various public spheres.” And shortly thereafter: The core of democratic constitutionalism is the “capacity to make the basis of democracy itself the subject of democratic deliberation of citizens” (at 156).
Habermas’ construct of a “twin capacity” of the European citizen participant in Union politics, on the one hand, and an indirectly participating member of one of the participating European nations on the other, mirrors these two dimensions of political will-formation in the Union quite well. We should acknowledge, however, that Europe’s diversity and the – relative – autonomy of the Member States will continue to generate areas of disagreement, and that, for such issues, no authority has a Kompetenz-Kompetenz which would legitimate a binding decision. The ECI, so I argued in my intervention last year, can, and indeed should, be understood in such perspectives; it has the potential to generate transnational political exchanges on issues which nation states must not handle autonomously. My example then was nuclear energy. The prime concern today is the fiscal crisis. There are structural affinities between these examples. Through the opening of the national economies and the establishment of Economic and Monetary Union, we have created inter-dependence with a dynamic which cannot be tamed within the legal framework of the Union. The current crisis management and the imposition of austerity measures are responses to this emergency. The risks which we incur are, however, enormous. Whether Europe’s crisis management will save the Euro remains to be seen. What we can see clearly is its social disintegrative impact on the European citizenry and also the damaging of democracy and the rule of law. Jürgen Habermas deserves every praise for his efforts to make us aware of these trade-offs. A lawyer from Germany can hardly refrain from mentioning our constitutional court and its decision of 12 September. The European political community, “the markets”, the German government, all felt relief: The Court did not foreclose the deepening of European integration; it did not interfere with the current crisis management – and managed to defend a democratic essential, namely, the budgetary powers of the Bundestag and its involvement in ESM decision-making. Yes, but I would like to add what the Court says in para. 274 “By virtue of its approval of stability aids, the Bundestag exercises the influence demanded by the Constitution and is a participant in decisions on the amount, conditionality and length of stability aids. It therefore determines the most important conditions for future successful demands for capital disbursements under Article 9, Para. 2 ESMS”. As a German citizen, I can feel relief. My democratic rights are taken care of. As a citizen of the Union I am not so sure. What about democracy for the rest of the Union? Why is budgetary autonomy not understood as a common European constitutional legacy? Is the German court petrifying a link between economic stability and social austerity? This dimension of the judgment is all the more disappointing as the Court in an earlier Paragraph of its judgment opened another and more constructive perspective: Departing from its much criticised de-contextualised reading of the “eternity clause”, Article 79 of the Basic Law, the Court now explains that “Article 79 (3) of those structures and procedures which keep the democratic process open and, in this context, safeguard parliament’s overall budgetary

28 Available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html.
29 The official translation is still incomplete. In view of its complexity and importance of this pronouncement, I add the German original: “Da der Bundestag durch seine Zustimmung zu Stabilitätshilfen den verfassungsrechtlich gebotenen Einfluss ausüben und Höhe, Konditionalität und Dauer der Stabilitätshilfen zugunsten hilfesuchender Mitgliedstaaten mitbestimmen kann, legt er selbst die wichtigste Grundlage für später möglicherweise erfolgende Kapitalabrufe nach Art. 9 Abs. 2 ESMV.“
That type of reasoning suggests that a resolution of the conflict between the exercise of budgetary powers must not be sought in prescriptions by an economic hegemon. As in the case of the conflicts over nuclear energy, the legitimacy must be anchored in political processes, indeed in “procedures which keep the democratic process open”. The German Court is the guardian of the German constitution, but not entitled to define the economic constitution of the Union. It would be equally questionable to assign that task to the CJEU. The reconstitution of Europe’s economic constitution is a highly sensitive political issue. The institutional actor with the vocation to defend the democratic legacy and commitments quality is first of all the European Parliament.

Para. 206 in the English extract, Para 222 in the German original. This fits precisely into my understanding of “conflicts law constitutionalism” as developed in the essay cited in note 26. Josef Falke and Claudio Franzius have made me aware of the quite spectacular changes in the jurisprudence of the Court, which contrasts so nicely with its one-sided and parochial pronouncements on Germany’s budgetary autonomy.

The judgment of the German Constitutional Court of 12 September was discussed in the concluding panels of the Deutsche Juristentag in München with Jürgen Habermas, Vasilios Skouris, President of the CJEU, and Andreas Voßkuhle, President of the Bundesverfassungsgericht. To my delight, Habermas has criticised the judgment with arguments which are at least compatible with those in the text, and left no doubt that view a strengthened economic governance in the Union must be democratically generated and controlled. – The debate was documented in the Süddeutsche Zeitung of 22 September; for Habermas’ intervention see http://habermas-rawls.blogspot.de/2012/09/habermass-talk-at-deutscher-juristentag.html.