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The democratic legitimacy of the European Union and its laws: theoretical challenges and practical examples

introduction

The issue of the democratic legitimacy of the European Union holds significant importance due to its implications for democratic principles, transparency, accountability, citizen empowerment, and the mitigation of Euroscepticism. Democratic legitimacy is a fundamental tenet of the EU, and the perceived democratic deficit raises concerns about decision-making processes and the representation of European citizens, which necessitates their active involvement. The problem of democratic legitimacy also has implications for European laws, including their validity, compliance, enforcement, potential legal challenges, and the need for reform. The democratic deficit may undermine acceptance and compliance with European laws, leading to legal complexities and uncertainties. Ensuring legitimacy in EU decision-making processes is also essential to overcome Euroscepticism, which exploits the democratic deficit narrative, including in Poland. The intention of this article, addressed to Polish readers but also perhaps mainly to an audience from the countries of Central and Eastern Europe, is to draw attention to the issue of the democratic deficit and the legitimacy of European institutions, and, consequently, the law they create. The article reflects on the EU as a special type of international organization and its related problem of legitimacy. Theoretical issues of the democratic deficit and legitimacy are discussed, enriched with a comparative presentation of the views of two outstanding intellectuals, one from each side of the Atlantic. The following part of the article presents practical attempts to respond to the problem of the democratic deficit and

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legitimacy of the EU, undertaken both in the European Parliament and by European institutions and member states, in the form of the recently completed Conference on the Future of Europe (CoFoE).

The European Union as a special type of organization and the problem of the legitimacy of international institutions

It is worth starting with a reminder that this year marks the 30th anniversary of the entry into force of the Maastricht Treaty, which is commonly seen as a turning point in the history of European integration. The years since then have been full of qualitative changes and the accompanying institutional and procedural improvements to arrive at the EU as we know it today. The years since the signing of the Maastricht Treaty in 1992 have been characterized by a seemingly unrelenting expansion in the scope of EU activities. In the post-Maastricht period, the EU has not only completed the transition from single market to monetary union and expanded from 15 to 28 members (now 27); it has also increased its involvement in socioeconomic governance, justice, and home affairs. The EU now has a common foreign and security policy, its own foreign policy representative, and a European diplomatic service (albeit, as the critics would say, *in statu nascendi*). From social policy to the environment, virtually all aspects of government policy in Europe today are in some way shaped by the EU.² The result of numerous compromises, the Treaty on European Union (TEU) was supposed to respond to many challenges, including the democratic deficit that threatened the legitimacy of European construction and the role of the EU on the international scene after the fall of the Berlin Wall. In Maastricht, the political elites agreed to widen the Union's field of action to a series of new areas, most of which were at the heart of national sovereignty, such as economic and social policies; without, however, allocating new powers to supranational institutions. Since then, European integration has become more politicized and contested. On the political level, the TEU opened the way to a progressive democratization of decision-making at the European level. It could also be observed that the Treaty marked the start of a new, more intergovernmental phase, due to the increased reluctance of national governments to pursue integration through supranationalization, especially through the jurisprudence of the Court of Justice of the EU. It was believed at the time that the Maastricht Treaty was not only a point at which the empirical reality of integration changed profoundly, but also the moment when integration through law as the normative end of integration ceased

2 Christopher J. Bickerton, Dermot Hodson, Uwe Puetter, The New Intergovernmentalism: European Integration in the Post-Maastricht Era, *Journal of Common Market Studies*, vol. 53, issue 4, p. 703.

to be self-evident.³ Even if the so-called pillar structure now belongs to the past, it can be said that since then, there has been an ongoing discussion over the intergovernmental and supranational ways of taking decisions; the model observed in practice has been labelled as new intergovernmentalism.⁴ Also, in the global arena, although it began as a regional trade association of nation-states, the EU has gone much further than any other such association toward a formal governance system with jurisdiction over a wide range of issues and areas. Among regional associations, only the EU has developed a single currency, a single market, a single voice in international trade negotiation, a single anti-trust authority, and common policies on environmental protection, worker safety, health, and other matters.⁵ This institutional and programmatic change has been variously characterized in the literature: the EU has been described as “less than a federation, more than a regime”;⁶ “*un objet politique non-identifié*” (an unidentified political object), in the words of former Commission President Jacques Delors;⁷ and as something which may be “the first truly postmodern international political form.”⁸ Nonetheless, even if most governments were very enthusiastic about integration, public opinion back in the 90s was very much concerned about where it would eventually lead. Since then, we have clearly seen a recurring discussion on the democratic legitimacy and/or democratic deficit of the EU. This term refers to the perceived lack of democratic accountability and transparency within the EU’s decision-making processes; as such, it is not a new issue. It is part of a reflection on the legitimacy of international institutions that has been going on for years; a complex and multifaceted issue, comprising inter alia the subjects of representation (whether international institutions represent the interests of their member states and ensure fair participation; institutions that have broad membership and inclusive decision-making processes are generally seen as more legitimate), effectiveness and efficiency (the extent to which

3 See for example: Deirdre M. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, *Common Market Law Review*, vol. 30, Issue 1 (1993) pp. 17–69.

4 See for example: Christopher J. Bickerton, Dermot Hodson, Uwe Puetter (ed.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford, 2015.

5 Vivien A. Schmidt, *The European Union: Democratic Legitimacy in a Regional State?*, IHS Political Science Series Working Paper 91, September 2003, https://irihs.ihs.ac.at/id/eprint/1515/1/pw_91.pdf (14.05.2023).

6 W. Wallace, *Less than a Federation, More than a Regime: The Community as a Political System*, in Wallace, H. et al. (eds.) *Policy-Making in the European Community*, 1983, pp. 403–436.

7 See for example: P.C. Schmitter, *Examining the Present Euro-Polity with the Help of Past Theories*, in Marks, G., Scharpf, F., Schmitter, P. and Streeck, W. (eds) *Governance in the European Union*, London, 1996, pp. 1.

8 J. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, *International Organization* 47(1), 1993, p. 139–140.

international institutions are effective in achieving their stated objectives and efficient in their operations), accountability and transparency (towards member states and the broader international community; this includes transparency in decision-making, mechanisms for oversight and evaluation, and avenues for addressing grievances or complaints), legitimacy of norms and values (the perceived legitimacy of an institution can be tied to the extent to which it aligns with widely shared values and principles), and finally, representativeness and equity (a more equitable representation of diverse perspectives and interests can contribute to the legitimacy of an institution).

The democratic deficit of the European Union

Comparing the above to the special type of organism, which is the EU today, one can recall the basic objections related to the democratic deficit. One of the primary contributors to the EU's democratic deficit is the complexity and opacity of its decision-making procedures. The EU's institutional framework consists of multiple layers, including the European Commission, the Council of the European Union, the European Parliament (EP) and the European Court of Justice. This intricate system often alienates citizens, who find it challenging to comprehend how decisions are made and who is responsible for them. The lack of transparency can erode trust and accountability, undermining the democratic legitimacy of the EU. The second problem is the EU's democratic deficit in decision-making: its decision-making processes have been criticized for being removed from the direct influence of citizens. The EP is the only directly elected institution, and it holds limited powers compared to the unelected European Commission and the Council of the European Union, composed of member state representatives. The nature of these institutions raises concerns regarding the representation and democratic mandate of decision-makers within the EU. The democratic deficit is further exacerbated by the limited opportunities for citizen participation in EU affairs. The EU's size and diversity make it challenging for citizens to engage effectively with the decision-making process. Traditional mechanisms, such as elections, are insufficient to bridge the gap between citizens and EU institutions. As a result, citizens often feel disconnected from EU processes, leading to apathy and a lack of identification with the EU project. A final critical factor contributing to the democratic deficit is the limited media coverage of EU affairs. National media outlets primarily focus on domestic issues, neglecting the EU's activities. This lack of information hampers citizens' understanding of EU policies, making it difficult to hold EU institutions accountable. Effective communication and media coverage are crucial for fostering public engagement and enhancing the democratic legitimacy of the EU. These criticisms have been developed in the public debate for many years and also affect the institutions of the EU. For example, the European Commission

is a non-elected institution which, it is said, enjoys too much political power. Although the Commission does not obtain its legitimacy from the people, it has a significant and effective role in the decision-making process. The EP is the only elected body, but it is widely criticized due to its imbalance between representation and power. Theoretically, representation and power should be proportional, and an institution that is not commissioned to represent people should never have greater power than one that is. However, the EP has less power in lawmaking than the EU Commission; this has led to a wave of criticisms that it cannot protect or guard people's rights and entitlements. Also, there is a lack of linkage between the logic of domestic politics – which is viewed as democratic – and the logic of EU politics, which is viewed as elitist and technocratic, with too much authority being entrusted to experts and bureaucrats, coupled with extensive lobbying activities often considered as illegitimate. Criticism has been directed at the European Council and the Council, whose members are not directly elected, for their role within the EU. The members of the Council represent the “national” interest rather than the “partisan interests” of their electoral constituency, as in domestic politics. It is also said that the qualified majority voting in the Council is undemocratic for outvoted publics. Recently, the European Court of Justice, which is described in the literature as one of the actors of European integration, has also not been spared from criticism: the Court has continuously expanded its own power, usually to the delight of commentators, including scholarly ones.⁹ In this context, it is worth noting the disputes over ultra vires activities in the EU.¹⁰ For example, the recent case law of the CJEU has introduced the concept of “European constitutional identity,” the scope of which is still unexplored, but with great potential effects for the EU when linked or compared with one of the values enshrined in Article 2 and specified in Title II (TEU): the “principle of democracy.” This often-cited principle is part of European

9 In this context, the following excerpt from a recent Polish scientific publication deserves attention: “The uncritical assurance that the Tribunal’s activities fall within the framework of the principle of separation of powers is probably intended to protect them against attacks by EU opponents. The aim of scholarship, however, is not to defend just causes, but to discover the truth about the nature of things. Researchers who even accept that the jurisprudence of the Tribunal plays a law-making role, usually assume *a limine* that it is lawful. However, such an assumption is unacceptable. When examining the Union, and in particular the Tribunal, we cannot be guided by sympathy, just as a cartographer cannot expand the territory of his homeland for patriotic reasons. Similarly, one must not limit oneself to the mere analysis of the activities of the Tribunal. This method is praiseworthy and brings excellent results in examining, for example, the freedoms of the internal market, but not in examining the court itself. The activities of the Court determine its jurisdictional claims, but it is the lawyer’s task to assess these claims. The fact that judgments are issued that aspire to establish general norms does not imply their legality, which should be examined.” Paweł Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warszawa, 2015, p. 19–20.

10 See for example: Jerzy W. Ochmański, *Spory o działania ultra vires w Unii Europejskiej*, Warszawa, 2023.

identity, but lacks any precise development. In this respect, the political genesis of the rule of law conditionality mechanism shows how the democratic principle is not only structurally downgraded in European treaties but has been further restricted by European institutions.

The debate over these two European values continues in the scholarship. It is said that the unresolved question of the principle of democracy at the European level is the basis for two problems: a) the “*Europa-Streit*,” the dispute over what the EU is (“an advanced species of the genus international law” or a “*sui generis* political community”); and b) the burning issue being addressed by the *Bundesverfassungsgericht* with its famous decisions.¹¹ Several judgments underline that the EU is, in democratic terms, a derivative of its member states, seeing it as an international organization whose further democratization or constitutionalization would damage nationally based democracy. Therefore, to try to address the principle of democracy is to answer the challenge of the future of European integration: What is democracy for the EU? What will be the relationship between European democracy and national democracies?

Summing up this section, we can reiterate that the significant qualitative acceleration of European integration since Maastricht paved the way for the “democratic deficit.” Part of the problem seems to spring from the fact that the EU has an opaque institutional design and ends up being dominated by technocrats. The EU has led to the “deparliamentarization” of the democratic process, also due to the EP’s lack of sufficient influence. EU elections are therefore “second-order”: they do not convey sufficient information to European voters, nor do they make it possible to hold legislators to account. Arguments of this kind have been augmented by the often-raised alleged pro-capital bias of European institutions. Above all, however, a more fundamental concern is raised: there is no European “demos,” and hence no real European democracy is possible.

The EU’s legitimacy problem

A legitimacy problem refers to a situation where an individual, organization, or system lacks widespread acceptance or recognition as being valid, lawful, or authoritative. It arises when there are doubts or scepticism regarding the

¹¹ “Ultra vires acts of institutions, bodies, offices and agencies of the European Union violate the European integration agenda laid down in the Act of Approval pursuant to Article 23 sec. 1 sentence 2 of the Basic Law and thus also the principle of sovereignty of the people (Article 20 sec. 2 sentence 1 of the Basic Law). The ultra vires review aims to protect against such violations of the law,” Judgment of 21 June 2016 – 2 BvR 2728/13, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html (21.05.2023); see also Russell A. Miller, Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration, 54 Va. J. Int’l L. 579 (2014), p. 581.

authority, fairness, or credibility of a particular entity or its actions. In various contexts, legitimacy can be associated with governments, political systems, leaders, institutions, or even social movements. When these entities are perceived as lacking legitimacy, this can lead to challenges, conflicts, or a loss of trust among the people they are supposed to represent or govern. There are several factors that can contribute to a legitimacy problem:

- Lack of popular support: legitimacy often derives from the consent and support of the people. When a government or authority loses the trust and backing of a significant portion of the population, it can be seen as lacking legitimacy.
- Illegitimate origins or actions: if an entity comes into power through undemocratic means or engages in corrupt, oppressive, or unethical behaviour, this undermines its legitimacy.
- Perception of unfairness: when people perceive a system or authority as unjust, favouring certain groups or interests over others, this can erode its legitimacy.
- Failure to meet expectations: if an entity fails to fulfil its promises or meet the needs and expectations of the people it serves, this can lead to a loss of legitimacy.
- Lack of transparency and accountability: when there is a lack of transparency in decision-making processes or a lack of accountability for actions, this can diminish legitimacy.

Legitimacy problems can have significant consequences, including social unrest, protests, or even the collapse of a government or institution. Rebuilding legitimacy often requires addressing the underlying concerns, engaging in open dialogue, implementing reforms, and demonstrating a commitment to fairness, transparency, and accountability. The EU stands as a remarkable experiment in regional integration, aiming to foster cooperation and solidarity among its member states. However, the EU has long been plagued by a persistent concern known as the legitimacy deficit. This term refers to the perceived lack of legitimate accountability and transparency within the EU's decision-making processes. While the EU has made significant strides in promoting legitimacy, the existence of a legitimacy deficit remains a subject of contention. The EP and the Commission, as the two major EU institutions, have long been the subjects of scrutiny and criticism regarding their legitimacy and the perceived democratic deficit within the EU.¹² Critics argue that these institutions suffer from a lack of direct democratic accountability, leading to concerns about their legitimacy and the EU's overall democratic

12 See for example: Ylva Gustafsson, *The European Union and Its democratic deficit(s) a descriptive idea-analysis*, <http://www.diva-portal.org/smash/get/diva2:1662540/FULLTEXT01.pdf> (21.05.2023), p. 1,25; Jens-Peter Bonde, *The European Union's Democratic Deficit: How to Fix It*, *The Brown Journal of World Affairs*; Vol. 17, No 2, (Spring 2011): p. 149; Giandomenico Majone, *Europe's "Democratic Deficit": The Question of Standards*, *European Law Journal*, vol. 4, no. 1, 1998, p. 5.

functioning. This issue has been at the forefront of debates over the EU's governance structure,¹³ highlighting the need for greater transparency, citizen participation, and institutional reforms to address the democratic deficit and enhance the legitimacy of the EP and the Commission.

One of the primary concerns regarding the legitimacy of the EP is the perceived democratic deficit within the EU. Critics argue that the EP lacks the democratic mandate and accountability necessary to claim legitimacy. Low voter turnout in EP elections¹⁴ and the disconnect between citizens and EU decision-making processes contribute to this challenge. Additionally, the complex and opaque nature of EU decision-making can make it difficult for citizens to understand how the EP represents their interests. Another legitimacy challenge lies in its representativeness: the distribution of seats among member states is not proportional to their population size, leading to concerns about underrepresentation and unequal influence. Smaller member states may be overrepresented, while larger ones may be underrepresented. This imbalance raises questions about the EP's ability to accurately reflect the diversity of European citizens and their interests, impacting its legitimacy. Critics argue that the EP's decision-making processes lack transparency, making it difficult for citizens to hold their representatives accountable. The influence of lobbyists and the lack of transparency in negotiations between political groups and the executive branch can further erode the perception of legitimacy. The limited legislative powers of the EP also pose a legitimacy challenge. While it has gained more authority over the years, it still shares legislative power with the Council (of the EU), consisting of member states' representatives. This arrangement can lead to perceived democratic deficits, as decisions are not solely in the hands of directly elected representatives, potentially undermining the EP's legitimacy. Finally, the EP represents a diverse linguistic and cultural landscape, which presents challenges for effective communication and engagement. Language barriers and the lack of accessible information can hinder citizens' understanding of the EP's work, limiting their ability to engage with the democratic process. This linguistic and communication challenge further exacerbates the perceived democratic deficit and diminishes the EP's legitimacy. In conclusion, the EP plays a crucial role in the democratic governance of the EU. However, legitimacy challenges persist. Addressing the democratic deficit, enhancing representativeness, improving transparency and accountability, strengthening the EP's powers, and addressing language and communication barriers are key areas that require attention. By actively tackling these challenges, the EP can enhance its legitimacy, foster citizen

13 Already in 2001 the European Commission acknowledged that there was a democratic deficit problem in the book *European Governance A White Paper*, Commission of the European Communities, Brussels, 25.7.2001, COM(2001) 428, https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_10 (21.05.2023).

14 45.47% in 2004, 42.97% in 2009, 42.61% in 2014, 50.66% in 2019.

engagement, and ensure its effective representation of the diverse interests of European citizens.

The second most important institution – the European Commission, as the executive body of the EU – faces various legitimacy challenges as well. Critics argue that the Commission lacks direct democratic accountability since its members are not directly elected by European citizens. The Commission President is nominated by the European Council and confirmed by the EP, but the individual Commissioners are appointed by their respective national governments. However, the EP can approve or reject the composition of the Commission by a majority of the votes cast, and if the EP rejects one or several candidates for members of the Commission, this results in the rejection of the whole composition of the Commission. To a certain extent, this system, based on the principle of dual legitimacy,¹⁵ was challenged by the introduction of the *Spitzenkandidaten* in 2014, but this was abandoned in 2019. It remains unclear which institution will dominate in 2024 as the two approaches continue to compete in an uncertain institutional environment.

In recent years, the Commission has faced criticism regarding its decision-making processes, which are often seen as opaque and lacking transparency. It has been noted that important decisions are made behind closed doors, limiting public scrutiny and accountability. Also, the Commission has been accused of having a technocratic image, meaning it is perceived as an elite group of unelected experts making decisions without sufficient input from citizens. This perception further contributes to the democratic deficit, as it can be seen as detached from the realities and concerns of European public opinion, especially if the Commission is pushing forward policies that are disconnected from the needs and preferences of member states or citizens. Increasingly, some member states and their citizens express concerns about the potential erosion of national sovereignty due to the Commission's expanding powers. This issue often arises when the Commission seeks to harmonize policies across EU member states or when it intervenes in national decision-making processes. One significant recent challenge for the Commission was the withdrawal of the United Kingdom from the EU (Brexit). The negotiations and the subsequent management of the transition period posed various difficulties for the Commission,¹⁶ as did the COVID-19 pandemic, where the Commission was criticized for incompetence and a scandalous response to the crisis, especially its failure to meet the challenge of vaccine procurement.¹⁷ The third recent testing area for the European Commission

15 See Armin von Bogdandy, *A Disputed Idea Becomes Law; Remarks on European Democracy as a Legal Principle*, in: Beate Kohler-Koch, Berthold Rittberger (ed.), *Debating the Democratic Legitimacy of the European Union*, Plymouth, 2007, p. 37.

16 See for example: David Coen, Alexander Katsaitis, *Lobbying Brexit Negotiations: Who Lobbies Michel Barnier?*, *Politics and Governance*, 2021, Volume 9, Issue 1, Pages 37–47.

17 Gideon Rachman, *Why the European Commission failed the vaccine challenge*, <https://www.ft.com/content/6bd192b4-6f7a-4df1-a484-1853bb054ba5> (21.05.2023).

was the migration crisis, where the EU, in general, faced ongoing challenges related to migration and asylum policies.¹⁸ The management of irregular migration flows, burden-sharing among member states, and the reform of the Common European Asylum System have been key issues. Connected to these are economic disparities, which the European Commission has been working to address, between EU member states, particularly those related to the Eurozone crisis. Persistent challenges include ensuring sustainable economic growth, reducing unemployment rates, and promoting cohesion among member states.¹⁹ Finally, in the last few years, the Commission has been dealing with concerns over the rule of law and democratic values in some member states. These have led to debates and discussions on potential measures to safeguard the independence of the judiciary, media freedom, and the functioning of democratic institutions. By some, especially those from the censured governments, the procedure of examining the rule of law in member states has become the crowning proof of the illegal usurpation by European institutions of competences that they never had. As one author states: “The European integration is based on a usurpation, with constituted powers operating as de facto constituent powers. As executives and courts shape the EU in a largely self-referential manner, citizens are deprived of a crucial dimension of political autonomy.”²⁰

Intellectuals on the democratic shortcomings and legitimacy of the European Union

Among the multitude of books and articles on this subject in contemporary scholarship,²¹ I would like to highlight two authors who present different

18 See for example: Marco Scipioni, Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis, *Journal of European Public Policy* 25(3), 2017, p. 1–19.

19 “In November 2014 J.C. Juncker proposed an *Investment Plan for Europe* as a most needed solution to get Europe out of its economic sluggishness ... Results show that despite institutional acclamation (process success), the Plan felt short as regards external stakeholders’ initial views. Negative perceptions outweighed positive ones, with critics highlighting the poor design of the Plan and questioning feasibility,” Isabel Camisã, Paulo Vila Maior (2020) Failure or success: assessing the European Commission’s new strategy to foster EU’s economic recovery, *Journal of European Integration*, 42:2, p. 208–209.

20 Markus Patberg, *Why Constituent Power? European Integration and the Problem of Usurpation*, Oxford, 2020, p. 17.

21 See for example: Christine Neuhold, *Democratic Deficit in the European Union*, Oxford Research Encyclopedia of Politics, 2022; Tom Ward, *The European Union: A Crisis of Legitimacy?* *European View*, 2010, 9(1), p. 115–127; Svetoslav Malinov, *The Democratic Deficit of the EU: Breaking the Spell of a False Analogy*. *European View*, 2021, 20(2), p. 226–233; Beate Kohler-Koch, Berthold Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, Plymouth, 2007; Steven Blockmans, Sophia Russack (eds.), *Direct Democracy in the EU: The Myth of a Citizens’ Union*, London, 2018; Markus

points of view on the process of European integration: Jürgen Habermas and Andrew Moravcsik. Throughout their careers, both men have produced an impressive body of scholarly literature addressing one of the most contentious issues within the socio-political realm: the process of European integration. Despite their shared interests in topics such as the European constitution, the democratic deficit, and the establishment of a common European identity, there has been a dearth of comparative and interdisciplinary analyses of their work. The comparison between Moravcsik and Habermas²² underscores the notion that the EU can be approached and comprehended from various perspectives, each of which holds its own merit and contributes to the broader discourse on European integration. The profound impact of Habermas and Moravcsik on the debate cannot be overstated, and juxtaposing their viewpoints promises to yield novel and insightful understandings of the EU's functioning.

It is often said that much of the discussion of the legitimacy/legitimation crises originates from Jürgen Habermas's classic *Legitimation Crisis*, which discusses concepts and theories of legitimacy crises within states, even within historically particular forms of states.²³ Developed in many books, articles and statements,²⁴ Habermas's main thesis in his *Crisis of the European Union: A Response* is that now there is indeed a democratic deficit and that there should be ways to avoid what this world-famous philosopher calls "post-democratic executive federalism."²⁵ Habermas argues that the EU suffers from a perceived lack of democratic accountability and participation in its decision-making procedures. He contends that the EU's legitimacy should be based on the active involvement of European citizens in shaping European policies. In his *Crisis of the European Union: A Response*, Habermas proposes the idea of a "post-national constellation" in which European citizens would become actively engaged in political debates and decision-making processes at the European level. He suggests that the EU should develop a more robust system of deliberative democracy, where citizens can engage in informed and inclusive discussions on European issues. Finally, the EU's legitimacy could

Patberg, *Why Constituent Power? European Integration and the Problem of Usurpation*, Oxford, 2020; also see footnote 14 above.

22 See an outstanding scientific study: Quincy R. Cloet, *Jürgen Habermas and Andrew Moravcsik: A Dialogue on European Integration, the Nation-State, Democracy and Identity*, Thesis presented for the Degree of Master of Arts in European Interdisciplinary Studies, Academic year 2012/2013, https://www.coleurope.eu/sites/default/files/research-paper/bm_cloet.pdf?download=1 (21.05.2023).

23 Jürgen Habermas, *Legitimation Crisis*, Cambridge, 1973.

24 Read for example: Jürgen Habermas, *Wacht auf, schlafende Mehrheiten für eine Vertiefung der Europäischen Union – Ein Interview mit Jürgen Habermas*, 2008, available at: <http://www.perlentaucher.de/artikel/3795.html> (21.05.2023); Jürgen Habermas, *Why Europe Needs A Constitution*, *New Left Review*, Vol. 11, 2001, pp. 5–26.

25 Jürgen Habermas, *The Crisis of the European Union: A Response*, Cambridge, 2012.

be enhanced by strengthening the role of the EP and promoting a greater sense of European identity and solidarity among its citizens. It should be noted, however, that the concepts of democratic, participatory federalism are a consequence of Habermas's thesis about the rise and fall of the public sphere, which he has proclaimed since 1962.²⁶ Therefore, his proposal for creating a European public sphere where citizens can freely exchange ideas and opinions, transcending national boundaries, is not surprising.

Across the Atlantic, Andrew Moravcsik's doctoral dissertation about the importance of national interests during the negotiation of the Single European Act, eventually developed into the book *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, became one of the most widely read academic publications on European integration.²⁷ A few years later, in the article "The Myth of Europe's 'Democratic Deficit,'" Moravcsik tackles the widespread criticism of the EU's democratic deficit, finding it much exaggerated. He writes: "Such criticisms rest on a vague understanding of what the *democratic deficit* is, ignore concrete empirical data about whether one exists, and hold the EU to the impossible standard of an idealized conception of Westminsterian or ancient-style democracy – a perfect democracy in which informed citizens participate actively on all issues."²⁸ His analysis of six misconceptions reveals an empirical mismatch between facts and popularly accepted claims: the notion of a superstate is unfounded. EU policymaking is confined to approximately 10–20% of national decision-making, primarily concerning issues of lesser importance to voters, while national polities retain control over the majority of other, generally more significant matters. The EU, thus, is not a potent superstate encroaching upon the authority of nation-states to address the fundamental concerns of their citizens. Far from being an arbitrary technocracy, the EU operates under more significant limitations on fiscal, coercive, and administrative capacities. It is subject to transparency requirements, narrower checks and balances, and a broader range of national controls than the governments of its member states. Also, it has not been proven that EU decisions are made by unelected officials without meaningful democratic accountability. While certain European decision-making institutions enjoy an exceptional degree of insulation from direct democratic control, such as the European Central Bank, European Court of Justice, competition authorities, trade negotiators, and fraud investigators, this situation is not exclusive to the EU. National governments also typically shield these governmental functions from popular pressure. Overall, European institutions align with common Western constitutional practices. Furthermore, voting

26 Jürgen Habermas: *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*. 5. Auflage, Neuwied/Berlin, 1971 [1962].

27 Andrew Moravcsik, *The Choice for Europe, Social Purpose and State Power from Messina to Maastricht*, Abingdon, 1998.

28 Andrew Moravcsik, "The Myth of Europe's 'Democratic Deficit,'" *Intereconomics*, 2008, Vol. 43, Iss. 6, p. 332.

on European issues in referenda, EP elections, and national elections is not driven by an informed antipathy towards Europe. European political institutions generate as much or even greater popular trust than national ones, possibly because they are less participatory. Institutional reform would likely diminish the EU's public trust and popularity. Finally, it is not true that the European public fails to actively and intelligently participate in European politics due to disillusionment or disempowerment caused by existing EU institutions, and that, therefore, it is necessary to create institutional opportunities for increased participation. Non-participation and apathy result primarily from citizens' attitudes towards European issues. Voters do not engage in substantial deliberation regarding EU affairs not because they are impeded from doing so, but because they do not prioritize the EU's non-prominent issues enough to invest sufficient time and energy; in doing so, they rationally allocate their time and energy to other matters. From citizens' perspectives, EU politics is uninteresting. Since few Europeans are familiar with or concerned about the substantive content of the issues involved, encouraging more participation through uninformed debate is likely to be counterproductive unless the agenda and competencies of European institutions, including lawmaking, are enlarged to cover issues capable of mobilizing public organization and voting behaviour. These would include social welfare provision, pensions, healthcare, macroeconomic management, taxation, education, infrastructure spending, family law, law and order, immigration, defence spending, and the environment.

Habermas and Moravcsik diverge in their perspectives on the historical trajectory and future course of European integration. The German philosopher places significant emphasis on globalization as a transformative force that will ultimately give rise to a post-national constellation, wherein the EU serves as a transnational democracy or a constituted global society. In contrast, Moravcsik highlights the power dynamics and interests of member states within the integration process, and he foresees no substantial transformations in the near future, positing that the EU has reached a natural plateau. Habermas expresses concern regarding the executive powers assumed by heads of state and government, interpreting this power shift as a precursor to a post-democratic EU. Moravcsik exhibits far less apprehension about the potential democratic deficit, substantiating his stance through a comparative analysis of national democracies. Lastly, Habermas argues for the necessity of fostering a shared civic identity in Europe, while Moravcsik sees limited prospects for how such an identity could be effectively established. At the crux of the debate lies the question of whether a transnational (European) identity can be constructed within the foreseeable future.

From theory to practice – activities of European institutions

Not only in theoretical statements, such as the ones outlined above, but also in the practical dimension, European institutions have attempted in recent years to address the issue of the democratic deficit and the legitimacy of the EU. These issues are illustrated by the activities of the EP and the Conference on the Future of Europe (CoFoE). In its resolution of 26 November 2020 concerning the evaluation of European elections, the EP recommended that an examination of the following areas should be undertaken, with the aim of enhancing the European electoral process, particularly within the framework of the Conference on the Future of Europe:

- New remote voting methods for citizens during European elections in specific or exceptional circumstances.
- Common election admission rules for candidates and common campaign and funding rules.
- Harmonized standards for passive and active voting rights across member states, including a reflection on reducing the minimum age of voters in all member states to 16.
- Provisions on periods of absence for Members, for example, for maternity leave, parental leave, or severe illness.²⁹

The EP called on the member states to ensure that all individuals with the right to vote as their nationals, including EU citizens residing beyond their country of origin, homeless individuals, and prisoners who were granted this right according to national legislation, could exercise this fundamental democratic privilege.

By virtue of its position on the proposal for a Council regulation on the election of the Members of the EP through direct universal suffrage, adopted on 3 May 2022, the EP initiated a reform of the European Electoral Act. This reform aims to consolidate the 27 distinct elections and their disparate regulations into a single European election governed by unified minimum standards. In the proposed system put forth by the EP, each voter would possess two votes: one for the election of MEPs in national constituencies, and another for an EU-wide constituency consisting of an additional 28 seats. To ensure equitable geographical representation within these candidate lists, the member states would be categorized into three groups based on population size. The lists would then be filled proportionately with candidates sourced from these groups. European electoral entities, such as coalitions of national political parties, national associations of voters, or European political parties, would be responsible for submitting EU-wide lists of candidates. Other EP proposals included establishing 9 May as the common European voting day; unifying the right to stand for election to all Europeans aged 18 or over;

²⁹ <https://www.europarl.europa.eu/factsheets/en/sheet/21/the-european-parliament-electoral-procedures> (24.06.2023).

establishing a mandatory electoral threshold of at least 3.5% for large constituencies of 60 seats or more; providing equal access to the elections for all citizens, including those with disabilities, and the option to vote by post; introducing mandatory gender equality through ‘zipped lists’ or quotas; and giving citizens the right to vote for the President of the Commission in a lead candidate (*Spitzenkandidaten*) system through the EU-wide lists. A new European electoral authority would be set up to oversee the process and ensure compliance with the new rules. In accordance with Article 223 of the Treaty on the Functioning of the European Union (TFEU), the legislative initiative put forward by the EP would require unanimous approval from the Council. Following this, it would be returned to the EP for MEPs to provide their consent before being ratified by all member states, in accordance with their respective constitutional requirements. Negotiations with the Council would commence once the member states had established their positions. The draft legislative act is presently under examination by the Council’s General Affairs configuration. On 18 October 2022, the Council conducted an initial policy debate regarding the proposal. Some member states have expressed reservations concerning the suggestions for an EU-wide constituency based on transnational lists, and certain aspects of the proposal that imply the harmonization of the electoral systems employed in European elections.³⁰

The notion of convening a conference with the primary objective of engaging in deliberative discussions on the future of the European project, wherein citizens are placed at the centre and their perspectives are actively sought, was initially put forth in 2020 by Emmanuel Macron, the President of France.³¹ In a written communication, he directly addressed European citizens, underscoring the significance of the European project within an intricate and dynamic context: “Never, since the Second World War, has Europe been as essential. Yet never has Europe been in so much danger.”³² Macron advocated for “a Conference for Europe in order to propose all the changes our political project needs.”³³ This proposition rapidly gained momentum, and the Conference on the Future of Europe (CoFoE) was expected to transpire between 2020 and 2022. In anticipation, several EU member states released various forms of preliminary documents outlining CoFoE’s objectives, institutional specifics, and limitations;³⁴ EU institutions also put forth their own

30 Ibid.

31 Ionuț-Mircea Marcu, *The Conference on the Future of Europe as a new framework of participatory democracy at the European Union level*, Institute of European Democrats, Brussels, 2022, p. 6.

32 Emmanuel Macron, 2019, *For European renewal*, <https://www.elysee.fr/en/emmanuel-macron/2019/03/04/for-european-renewal> (21.06.2023).

33 Ibid.

34 Franco-German non-paper, 2020, *Conference on the Future of Europe*, <https://www.politico.eu/wp-content/uploads/2019/11/Conference-on-the-Future-of-Europe.pdf> (21.06.2023); *Using the Conference on the Future of Europe to shape a real European*

suggestions and perspectives. In a January 2020 document, the Commission reiterated that the primary aim of CoFoE would be to provide an enhanced platform for European citizens to voice their opinions, stating, “The Conference should give Europeans a greater say on what the Union does and how it works for them.”³⁵

During the closing Plenary (29–30 April 2022), the 108 members of the citizens’ component presented their final position on the Plenary proposals. They stated: “Europe needs a more democratic Union. European citizens love the EU, but let’s face it: it is not always easy. You called on us to help you and asked us: How should European democracy look like in the future? And we answered to you: We citizens want a Europe in which decisions are made transparently and quickly, where the unanimity principle is reconsidered and in which we citizens are regularly and seriously involved.”³⁶ The plenary also proposed that the EU – in particular in its actions at the international level, including trade negotiations – should improve its accessibility for citizens through better information, education, citizen participation, and transparency. This would be done by 1) strengthening links with citizens and local institutions to improve transparency, reach citizens, and communicate and consult better with them about concrete EU initiatives, and at the international level; 2) stronger citizen participation in the EU’s international politics and direct citizens’ involvement events, similar to the Conference on the Future of Europe, organized on national, local, and European levels and with the active participation of organized civil society; 3) full support by all relevant stakeholders for citizens who choose to get involved in organized civil society organizations, as they did with COVID-19 and Ukraine; 4) a specific budget to develop educational programmes on the functioning of the EU and its values that it could propose to the member states, so that they could integrate them into their curricula (primary and secondary schools, and universities). In addition, a specific course on the EU and its functioning could be offered to students wishing to study in another European country through the Erasmus programme. Students choosing this course would be given priority in the allocation of the said Erasmus programmes; and 5) improving its media strategy by strengthening its visibility on social media, actively promoting its content, and encouraging innovation by promoting an accessible European social media.³⁷

political discourse, Italian non-paper for the Conference on the Future of Europe (2020–2022), https://www.esteri.it/mae/resource/doc/2020/03/paper_conf_futuro_europa_post_ciae_14_febbraio_-_clean.pdf (21.06.2023).

35 European Commission, 2020, Shaping the Conference on the Future of Europe – Questions and Answers, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_89 (21.06.2023).

36 Conference on the Future of Europe, Report on the Final Outcome, May 2022, p. 39.

37 Ibid, p. 65.

As observed by commentators, CoFoE concluded on 9 May 2022 with mixed results for democratic reform. EU officials worked hard to design an innovative process that gave citizens a voice in key debates over the EU's future. However, ambitious and wide-ranging follow-up will be required if the conference is to generate tangible progress toward democratic renovation.³⁸ CoFoE's ability to confer a significantly more substantive role to European citizens than initially anticipated is noteworthy, notwithstanding the fact that the implementation of the conference's proposals will ultimately be determined by governmental authorities. However, as noted, as the EU moves toward common debt, hugely increased financial transfers, new taxes, loosened fiscal rules, an incipient health union, and many other policy changes, the absence of deeper political reforms will overall leave it more democratically challenged than it was before CoFoE. Moves forward in policy integration are now significant enough to require a major leap forward in democratic accountability.³⁹

It has to be noted, however, that shortly before the conclusion of CoFoE, one of the political groups in the EP, the European Conservatives and Reformists, walked out in protest. The group exposed the Conference's shortcomings in terms of participation opportunities, legitimacy, and transparency, for example, in the formulation of conclusions, but also in financial terms. According to the Group, the organizers ruthlessly pushed the agenda of giving Brussels more powers by such means as a biased selection of citizen representatives and experts. The Group further noted a distortion of citizens' recommendations due to the two-stage nature of the conference, as well as an imbalance between the different components. CoFoE was also characterized by a lack of time and extremely low visibility among the European public, they said.⁴⁰ This was an unfortunate decision; yet, as commented in literature, the step change in democratic renovation requires a less instrumental approach to EU citizen participation. Among policymakers and analysts, there is still a tendency to judge democratic participation in terms of whether or not it triggers deeper EU integration and overcomes obstacles in the European Council; the assumption is that citizens will see participation as credible only if certain policy reforms toward deeper integration and "a stronger common European identity" are forthcoming.⁴¹

38 Richard Youngs, *EU Democracy After the Conference on the Future of Europe*, <https://carnegieeurope.eu/2022/05/12/eu-democracy-after-conference-on-future-of-europe-pub-87110> (21.06.2023).

39 *Ibid.*

40 European Conservatives and Reformists Group walks out of Conference on the Future of Europe, https://ecrgroup.eu/article/european_conservatives_and_reformists_group_walks_out_of_conference_on_the (30.04.2022).

41 *Ibid.*, note 38.

Conclusion

The democratic deficit of the EU remains a significant challenge to its democratic legitimacy. By addressing the issues of complexity, opacity, limited citizen participation, and insufficient media coverage, the EU can take important steps toward narrowing this deficit. Through enhanced transparency, increased citizen engagement, and media coverage, coupled with a stronger role for the EP, the EU can bridge the gap between its institutions and citizens, fostering a more robust democratic framework for the European project. It seems that the theoretical dilemmas presented above, and the practical activities of European institutions, may be especially interesting for the Polish reader. As far as views on European integration are concerned, one may get the impression that in recent years in Poland, these have been reduced to a highly politicized, zero-sum game. The arguments of the parties in this dispute, transferred alive from the level of national politics to the level of European politics, are often very general, not to say primitive.⁴² Therefore, one can legitimately ask: has there been any debate on the state of democracy and the legitimacy of European structures in our country since the decade preceding Poland's accession to the EU? I believe that in Polish scholarly life, there is a lack of theoretical reflection on the above issues. I also hold that in recent years, any intellectual ferment regarding the functioning of the EU has come from conservative circles – from institutions associated with the Polish political Right.⁴³ As Poland's presence in the EU came of age last year, this article is also intended to draw attention to the need for a serious, adult approach to both the advantages and limitations of European integration from the perspective of a Pole and a European.

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42 “Beloved, today is 1st of May, today is the 19th anniversary of Poland's accession to the European Union. Thanks to the Union, we have many cool things, we have Schengen, we have a common market, we have a community of values and we know that we want to be in this Union. But not all Poles think so, especially not all politicians. Some of them try to convince us that the EU is evil. That is why today let us show them that Poles really want to be in the European Union. Let's show them that Poland is here, the European Union is here and the future is here. Let's celebrate together!” (Member of the Polish Parliament, Platforma Obywatelska, source: Instagram).

43 Once again, the Centre for European Policy Research is the organizer of an international scientific conference. This year's theme is “New Europe.” The conference gathering experts, journalists and politicians will take place in Warsaw, on 20–21 September 2023, Centrum Badań Polityki Europejskiej, <https://cbpe.pl/2023/06/14/konferencja-new-europe/> (21.06.2023).

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The Democratic Legitimacy of the European Union and its Laws: Theoretical Challenges and Practical Examples

Abstract

This article discusses the issue of the democratic deficit and the legitimacy of European Union institutions, and, consequently, of the law they create. The text reflects on the EU as a special type of international organization and its related problem of legitimacy. Theoretical issues of the democratic deficit and legitimacy are discussed, enriched with a comparative presentation of the views of two outstanding intellectuals, one from each side of the Atlantic. The following part of the article presents practical attempts to respond to the problem of the democratic deficit and the legitimacy of the EU, undertaken both in the European Parliament and by European institutions and member states, in the form of the recently completed Conference on the Future of Europe (CoFoE).

Keywords: EU legitimacy, democratic deficit, conference on the future of Europe

Legitymizacja demokratyczna Unii Europejskiej i jej prawodawstwa. Wyzwania teoretyczne i przykłady praktyczne

Streszczenie

W artykule omówiono kwestię deficytu demokracji i legitymizacji instytucji Unii Europejskiej, a w konsekwencji tworzonego przez nie prawa. Podjęto refleksję nad UE jako szczególnym rodzajem organizacji międzynarodowej i związanym z tym problemem legitymizacji. Autor analizuje teoretyczne zagadnienia deficytu demokracji i legitymizacji, wzbogacone o porównawczą prezentację poglądów dwóch wybitnych intelektualistów pochodzących z obu stron Atlantyku. W ostatniej części artykułu przedstawiono praktyczne próby odpowiedzi na problem deficytu demokracji i legitymizacji UE, podejmowane zarówno w Parlamencie Europejskim, jak i przez instytucje europejskie oraz państwa członkowskie, których elementem była zakończona niedawno Konferencja w sprawie Przyszłości Europy (CoFoE).

Słowa kluczowe: legitymacja UE, deficyt demokracji, konferencja w sprawie przyszłości Europy