

## **Legitimacy, governance and participation in a post-crises EU: how to improve after Brexit?**

*Abstract:* The panel takes a look at different mechanisms and challenges for legitimacy, governance and participation for an EU recovering from of still struggling with multiple crises. Brexit offers both an urgent reminder that we need better mechanisms, but perhaps also an opportunity to reflect and improve the system. This panel looks at different options and challenges in the new governance proposed for the EMU and a Fiscal Union, the Citizens' initiative, the use of national parliaments and the role of the Committee of the regions.

### **Paper 3: Recapturing popular sovereigns after Brexit: towards a compound parliamentary construct**

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#### 1. Escaping sovereigns, populism and the challenge of referenda

Brexit is only the most recent example of the democratic challenges facing the EU. Against a background of general distrust in public institutions, the legitimacy of the EU is increasingly challenged. In that challenge, referenda are becoming a weapon of choice for those opposing integration. Referenda enable such groups to claim the 'sovereign' authority of 'the people' to overrule 'the elites', which by now include the very parliaments designed to represent the people. As the string of lost EU referenda demonstrates, the EU and its individual Member States are struggling to deal with this new challenge.

And indeed, despite decades of discussion on and multiple attempts to increase the legitimacy of the EU, dangerous gaps in the legitimacy and participatory structure of the EU remain. With Trump in the White House, Brexit underway and Le Pen in the second round, moreover, it is increasingly urgent to find *structural* solutions that address the rational worries enabling irrational populism. Faced with fundamental democratic en political-emotional challenges such as 'taking back control', the EU needs equally fundamental solutions: Lower roaming charges or the portable Netflix accounts will not suffice, and rightly so.

This paper aims to contribute to developing such solutions in two ways. First, it suggests one *hidden cause*, especially of the increased challenge from referenda. The core argument is that globalization and regional integration have opened up the national constitutional structures that contained the national sovereigns. Questions of sovereignty and ultimate

authority that had been pacified within national systems re-emerge as integration alters national constitutional structures and adds another layer of government. Consequently, European integration helped awaken the national sovereign leviathans that are now being manipulated by populists through direct democracy. It is no coincidence, therefore, that Brexit largely revolved around the concept of sovereignty, as populists were telling the people to take back control, not just from Europe, but from their own representative institutions as well.<sup>1</sup>

If the EU is indeed facing a prison break of sovereigns, the challenge becomes how to *recapture* sovereign power so as to prevent the destabilizing effect of directly exercising sovereign powers. The second part of the paper therefore explores how to best recapture sovereignty. It builds on the increasingly shared intuition that *national parliaments* need to be involved more. As will be further argued, this intuition is basically correct but its application is too limited. More far-reaching and structural steps are needed. National parliaments will and should remain the primary source of legitimacy and participation in the EU. This means we should design a compound parliamentary construct that *starts* from the primary legitimacy of the national parliaments. Such a *bottom-up approach* includes redesigning the national constitutional systems to incorporate the reality of European integration. So instead of haphazardly plugging national parliaments at the EU level, we must take national parliaments as the starting point, allowing them to recapture their national sovereigns by serving them at the national and the EU level. Once the national parliamentary system has been adapted to better incorporate European integration, we can then link and connect these national systems to create a compound European system. Such a compound system would not threaten national democracy and legitimacy, but would reinforce and update it for our new global reality. The EU would then become a real tool to take back control over a globalizing reality, removing the need for nationalistic mirages based on childish concepts of sovereignty as unfettered power unaffected by reality. For tearing down the EU would not undo globalization, it would only destroy our best hope of politically controlling it.

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<sup>1</sup> One further, cynical side effect was of course that the Scottish people might now decide to do the same thing by seeking independence from the UK. A possible course of events that illustrates the instability that erupts once sovereignty comes into play directly.

To support these claims the argument in this paper is developed in six steps. To begin with, a brief discussion of the conception of popular sovereignty used is in order (par. 2), as well as the way in which constitutional systems both serve and contain the raw political force of the sovereign (par. 3), leading to a convergence between the sovereign and the constitution in a nation-state (par. 4). With this framework in place, the paper subsequently argues how globalization and European allowed the national sovereigns in the EU to escape their national constitutional holding cells (par. 5), and the challenges and risks this leads to in terms of legitimacy and direct democracy (par. 6). The paper then discusses why attempts to strengthen legitimacy at the EU level may have been misguided (par. 7), before suggesting that a compound parliamentary construct may be more a more suitable selection to serve and contain the sovereign Member Peoples.

Clearly the argument presented covers a lot of ground, most of it contested. Building on previous research, the key aim here, however, is to develop an overarching narrative that may then inspire more detailed research in the different steps and solutions suggested.<sup>2</sup> In addition, it is suggested that the analysis of the underlying cause, i.e. the awakening of the national sovereigns, can be separated from the solutions proposed. Even if one prefers a solution that focuses on the EU level, such as a full political union or federation, the challenge of recapturing sovereignty therefore has to be acknowledged and addressed as well.

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<sup>2</sup> See for a more elaborate analyses of some of the elements discussed here A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples, Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, (Diss. Leiden), Zutphen: Wöhrmann 2013), A. Cuyvers, 'The confederal come-back: Rediscovering the confederal form for a transnational world' 19(6) *European Law Journal* (2013), 711, and A. Cuyvers, *The Aristocratic Surplus*. In: Kinneging, A.A.M. (Ed.), *Rethinking Europe's Constitution*, (2007, Wolf Legal Publishers), 117.

## 2. The form and functions of sovereignty: the sovereign Member Peoples

First, it is necessary to outline the particular conception of sovereignty used, and the different functions sovereignty plays.<sup>3</sup> This paper assumes that, in light of its constitutional nature, the EU should be based on the concept of internal, popular sovereignty.<sup>4</sup> This means that, within each Member State, ultimate sovereignty lies with the different Member Peoples, not the Member States. These Member Peoples first delegated their sovereign authority to the different national institutions of their respective states. With European integration, parts of this sovereign authority were then re-delegated to the EU as well, even though the Member Peoples remained the ultimate sovereigns.

One of the functions that the concept of internal, popular sovereignty fulfills is to provide the ultimate authority, or Grundnorm, for government. Sovereignty answers the question where legitimate power comes from and who has the power to make the ultimate decision when a conflict or exception occurs.<sup>5</sup> In a sense, popular sovereignty can therefore be seen as the ultimate power source of legitimate government. From this perspective, it is also not surprising that the actual bearer of internal sovereignty has shifted over time. From Gods to crowns it has now largely shifted towards 'We the People', who, at least in most Western

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<sup>3</sup> Clearly sovereignty is a complex and highly contested concept. See amongst many others the still impressive contributions in N. Walker (ed), *Sovereignty in Transition* (Hart Publishing 2006), as well as N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999), R. Jackson, *Sovereignty: The Evolution of an Idea* (Polity Press 2007), S.D. Krasner, *Sovereignty, Organized Hypocrisy* (Princeton University Press 1999), B. De Witte, 'Sovereignty and European Integration: the Weight of Legal Tradition' (1995) *Maastricht Journal of European and Comparative Law*, 146, F.H. Hinsley, *Sovereignty* (CUP 1986), or H. Lauterpacht, 'Sovereignty and Federation in International Law' in: E. Lauterpacht (ed.) *International Law, Being the Collected Papers of Hersch Lauterpacht*, vol. 3 (CUP, 1977). For a more detailed development and defense of the conception used here see Cuyvers (2013).

<sup>4</sup> The EU is after all 'founded' on the value of democracy (Art. 2 and 10 TEU), which requires it to respect the ultimate authority of the member peoples which underlies the national democracies. This duty is confirmed by the 'strict observance and the development of international law, including respect for the principles of the United Nations Charter' required by Article 3(5) TEU, which includes the right to self-determination.

<sup>5</sup> See the powerful analysis by Schmitt, who in one sense reduces the sovereign attributes set out by Bodin to the ultimate attribute of deciding *on* the exception.<sup>5</sup> C. Schmitt, *Political Theology: Four chapters on the concept of sovereignty* (trans. G. Schwab, University of Chicago Press 2005). See on the development of sovereignty in this context also J. Bartelson, *A Genealogy of Sovereignty* (CUP 1995).

democracies, are considered to be the ultimate source and purpose of all political decision making.<sup>6</sup> All legitimate authority, therefore, somehow has to be derived from or connected to this ultimate authority of the people.

Sovereignty, therefore, provides the ultimate source of raw political energy. In that sense, it can be compared to nuclear fusion: it is incredibly powerful and can provide nearly limitless energy, but is also extremely dangerous and in need of secure containment. In its naked, uncontrolled form, sovereignty is highly unstable and can be very destructive, as history has shown. This potency and danger also leads to the two key functions of a constitutional and political system concerning sovereignty: to serve and contain.

### 3. To serve and contain: the dual function of constitutions

Once we understand the function and nature of sovereignty as the *Grundnorm* and raw energy of political authority, we can also understand how a political and constitutional system is designed to both serve and contain the raw political force of the sovereign.

First, as normative authority derives from the sovereign, one key function of the constitution and the institutions it creates is to *serve* the interests of the sovereign, as well as the objectives laid down by the sovereign in the constitution.<sup>7</sup> Now of course in reality 'the people', as the sovereign or *pouvoir constituant*, are only a single entity in their theoretical or semi-mythical reality.<sup>8</sup> To serve the interest of the actual people in daily reality, we have developed a political system that 1) first aims to accumulate and aggregate the different interests of different citizens, 2) then balances them against each other, and 3) translates

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<sup>6</sup> See also A. Jakab, 'Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentations before European Integration and since' 2 *European Constitutional Law Review* (2006), 375.

<sup>7</sup> Of course these objectives in the constitution may conflict with the short term interest or will of the people as such, which creates the entire conundrum of the sovereign limiting itself within the context of the constitution, for example via fundamental rights.

<sup>8</sup> Although unlike crowns (and dare I add, gods), the people can turn into a physical reality when they reclaim the constituent power, for example when adopting a new constitution. Cf in this regard the adoption of the US Constitution as well as the finding of the German *Bundesverfassungsgericht* in its Lisbon judgment that the German people, through a sovereign act, could adopt a new constitution that violated the old one (BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*). This capacity of the people to become the constituent power is also one of the reasons why referenda can be so authoritative, see further below.

the balance found into concrete action. Within this system the people, as the electorate, are part of the *pouvoir constituée*, not the *pouvoir constituant*.

It is of course already on this level that populism makes a dangerous mistake, or a conscious linguistic ploy depending on your view. In claiming to act on behalf of the sovereign people, it assumes that the semi-symbolical entity of 'the people', the *pouvoir constituant*, is always an actual and acting reality, which may inter alia be consulted via referenda. Consequently, populism can claim to speak on behalf of the sovereign people directly, claiming ultimate normative authority over all other representative institutions and even the constitution itself. This faulty logic is dangerous, in part because it also denies the second function of the constitution, namely to *contain* the raw power of the sovereign and to make it manageable in daily practice.

For, as indicated, sovereignty, by its very nature, is very dangerous as well. The raw force of naked sovereignty can be incredibly destructive. Whilst necessary at foundational moments and as a theoretical backstop, sovereignty is not an instrument for daily use. The raw force of sovereignty must therefore be contained, divided and translated into instruments that are safe for daily use.

In addition to serving sovereignty, therefore, a second key function of the constitution is to contain or harness the sovereign power on which it is based, and to transform it into more manageable grants of authority to different institutions. It is due to this second function that doctrines such as the *Trias Politica* and checks and balances make perfect sense. These doctrines take the sovereign authority, which remains absolute and unitary itself, and quickly divide it over multiple actors with diverging interests and institutional incentives. Such a division, moreover, not just protects against abuses of power, but also protects the sovereign people itself from any one actor usurping its sovereignty.

Crucially, the concept of representative democracy is one of the constitutional mechanisms designed not just to serve, but also to contain sovereign power. In addition to its many other functions, representative democracy aggregates and filters the will of the people through multiple representatives. Firstly, this *divides* the will of the people into the will of multiple

factions.<sup>9</sup> So instead of a semi-mythical unity, the will of ‘the people’ is broken up and divided into different opposing factions.

Secondly, the representative system also ensures that the will of ‘the people’ is *mediated* through representatives. Before the advent of the Internet and smart phones, this mediation was also practically necessary: it was the only feasible way to aggregate the will of the people, however indirectly. Yet this mediation also has an important containment function. It assumes that representatives will be better informed and may have better understanding of the (long term) interest of their factions than the people themselves. This assumption also leads to the well-known tension for representatives between doing what their voters want and telling their voters what they should want (alternatively known as leadership or arrogant elitism).<sup>10</sup>

Through instruments such as representative democracy and the division of powers, the constitution therefore not only serves, but also contains the raw political force of the sovereign. No direct use of sovereign power is necessary, or possible, any more, as all the different actors only exercise limited, delegated authority. From this perspective, we can then understand the rise of the nation-state as an effective political power plant that was capable of first creating and then harnessing the raw force of popular sovereignty. The nation-state first created the semi-mythical entity of ‘the people’, only to then quickly divide the sovereign authority of these people over different institutions and factions. Similarly, we can understand some of the challenges we face today as a consequence of the weakening capacity of the national constitution and nation-state to serve and contain the popular sovereign.

#### 4. The capture of sovereignty by the nation-state

From the perspective sketched above, we can understand the development from Westphalia onwards as a process whereby increasingly sophisticated constitutional and political

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<sup>9</sup> See the still relevant discussion of this process in J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers* (originally published between 1787 and 1788, Penguin 1987).

<sup>10</sup> Through an Aristotelian lens one could also see this as an element of mixity, where the purely democratic element is balanced by an aristocratic element of representation. See further and A. Cuyvers, The Aristocratic Surplus. In: A.A.M. Kinneging, (Ed.), *Rethinking Europe's Constitution*, (2007, Wolf Legal Publishers), 117.

mechanisms were developed to serve but also lock-up the popular sovereign inside the construct of a nation state.<sup>11</sup> Through improved political and social mechanisms, as well as improved institutional design, a system was developed where one people, or in some cases multiple peoples, delegated all their sovereign power to a multitude of institutions via their constitution. In this process, the sovereign was contained and completely encapsulated in the constitution. This encapsulation was so far-reaching that in many systems sovereignty as such became relatively unimportant, or even irrelevant, to the daily political reality. As the constitutional mechanisms became more developed and accepted, sovereignty receded to the background, as its authority was no longer necessary to justify daily decision-making.<sup>12</sup>

In fact, the symbiosis between sovereignty and the state became so absolute that many even started to treat the question of internal sovereignty (who has the ultimate authority *within* the polity) and that of external sovereignty (who represents the sovereign authority *externally*) as two sides of the same coin, even though they entailed two different sovereigns: internally the people were sovereign, whereas externally it became 'the state'. The conjunction between state, constitution and sovereign had become so complete, however, that these two different sovereigns seemed almost synonymous.<sup>13</sup>

It is this high level of conjunction, this symbiosis between popular sovereign and nation-state, and the complete containment of the sovereign within the constitution, which we should take as a starting point to understand the impact of globalization and European integration, and the gradual 'escape' of the sovereign from the national constitutional containment they caused.

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<sup>11</sup> Cf. E.S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton 1988).

<sup>12</sup> Cf. C. Schmitt, *Political Theology: Four chapters on the concept of sovereignty* (trans. G. Schwab, University of Chicago Press 2005), as well as C. Schmitt, *The Concept of the Political* (Translated by G. Schwab, University of Chicago Press 2007). Also see B. De Witte, 'Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands', in: N. Walker (ed), *Sovereignty in Transition* (Hart 2006), 351.

<sup>13</sup> Cf Cuyvers (2013), ch. 9 for a step-by-step analysis of this confusion over time.



## 5. Globalization, European integration and the partial escape of the sovereign

The almost complete containment of the sovereign within the national constitution is partially based, however, on the capacity of the national system to serve the sovereign. Only where its interests are sufficiently served (or perceived to be served) will the sovereign accept its containment. The containment of the sovereign, therefore, partially depends on the capacity of the constitutional system to serve.

In turn, the capacity to serve depends on the capacity of the nation-state, under its constitution, to sufficiently determine outcomes in the relevant areas. And for a long time, the scale and level of the nation state was an appropriate one to aggregate interests and determine the relative outcomes. Discussions on the optimal or right sizes of republics aside, the nation-state was able to determine outcomes in areas such as safety, health, social security, economic policy and education.

Globalization, however, has fundamentally undermined the capacity of the nation-state to unilaterally determine outcomes in many areas that are of direct relevance to its people.<sup>14</sup> On multiple key terrains such as immigration, the environment, economic policy, trade, or international relations most states and are no longer able to determine or sufficiently influence outcomes.<sup>15</sup> The loss of the capacity to determine outcomes, however, also affects the capacity of the nation-state to legitimately contain the sovereign it serves.

From one perspective, regional integration offers one possible solution to this challenge. By bundling certain powers at a regional level, public authorities may still sufficiently control or at least influence an increasingly global reality.<sup>16</sup> Where multinationals may escape the control of individual states, for example, regional blocks can be better placed to regulate or tax them. Regional integration then becomes one tool to take back control over a reality that is escaping national confines.

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<sup>14</sup> Cf also N. MacCormick, 'Beyond the Sovereign State', 56 *Modern Law Review* (1993), 1 as well as N. MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State' 44 *Political Studies* (1996), 555.

<sup>15</sup> In this context the law of the German *Bundesverfassungsgericht*, demanding that the key areas of political formation remain with the state, is both telling and problematic.

<sup>16</sup> Cf also J. Habermas, *The Post-national Constellation* (MIT Press 2001).

Yet from another perspective European integration only contributes to the growing incapacity of the nation-state to individually determine outcomes and contain the sovereign. In fact, by transferring what the CJEU not accidentally termed 'sovereign powers' to the EU, the complete conjunction between the sovereign and the state was broken.<sup>17</sup> The state, therefore, both lost the capacity to determine outcomes and the monopoly on delegated sovereign authority. As a result, the containment of the national sovereign within the national constitutional structure was opened up.

At the same time, however, the EU did not receive or develop a sufficient capacity to contain the different national sovereigns itself. Article 20 TFEU captures this inability of the EU nicely by indicating how national citizenship remains primary, and EU citizenship remains a derived status.<sup>18</sup> This secondary relation is just one illustration of the fact that the constitutional structure and legitimacy of the EU is not sufficient to contain a national popular sovereign. For example, it would be unimaginable for the EU to deny the sovereign decision of a Member People, for example expressed via a referendum, to leave the EU. Only full federation, like for example in the US, would enable the EU to do so. The current, essentially still confederal, constitutional foundation of the EU, however, cannot take over the task of containing the different national sovereigns.<sup>19</sup>

If the developments above are combined, the challenge of free roaming sovereigns emerges: Driven by globalization, European integration loosened the national hold on the popular sovereigns, without re-containing these sovereigns at the EU level. The national constitutional structures that jointly contained the sovereign were opened up. Through the many cracks and gaps in the still evolving EU constitutional structure, the national sovereigns escaped, and re-emerged as potential actors. In other words, the raw political force of sovereignty was no longer shielded and neutralized, but became available again for political use, *inter alia* via referenda.

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<sup>17</sup> See famously already Case 26/62 *Van Gend en Loos* [1963] ECR 1 as well as Case 294/83 *Les Verts* [1986] ECR 1339.

<sup>18</sup> Obviously the CJEU has since declared EU Citizenship to be destined to be the primary status of EU citizens, but this does not ultimately derived and therefore secondary status of EU Citizenship. See *inter alia* Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-135/08 *Rottmann* [2010] ECR I-1449.

<sup>19</sup> Cf. D.J. Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield, 1998), and for a detailed analysis Cuyvers (2013).

## 6. Playing with sovereign fire: Populism and direct democracy

Based on the analysis above, the EU finds itself in a dangerous, perhaps transitional, situation. On the one hand, the sovereign has escaped the nation-state, which can no longer completely serve its needs, nor completely contain it. On the other hand, the different national sovereigns have not, and cannot, be contained at the EU level either.

It is suggested that this 'escape' of the popular sovereigns from their national holding cells is one of the root causes and enablers of populism and the increase of direct democracy we see today. Populists as Trump, Le Pen, Farage, Wilders, but also Orban and Kaczyński realize that the sovereign is no longer fully contained, and that they may seize its mantle of unlimited authority. Perhaps intuitively, they understand that the naked force of the sovereign, if unleashed, cannot be resisted, and can therefore be used to overcome any constitutional or legal obstacle to their own power.

The key Brexit slogan of 'taking back control' fits perfectly with this analysis. The people are essentially reminded of their sovereign power and asked to demolish the existing constitutional system that presumably no longer serves them but 'the elites'. The request then is to entrust the new populist champions of the people with the sovereign authority they need to overturn the very system itself.

Brexit equally demonstrates how direct democracy is the preferred tool to tap into the authority of 'the people' directly. A referendum gives populists a tool to let the people speak, and hence assume their sovereign authority. Once the people have spoken, the argument then goes, there is no institution, including parliament, legitimate enough to stop them or obstruct their sovereign command. The tabloid-outrage after the Miller judgment of the UK High Court provides a good illustration.<sup>20</sup> Since the people had spoken, it became 'undemocratic' to give Parliament, the very institution presumed to represent the people, a vote. Similarly, Geert Wilders openly attacked the Dutch Parliament as a 'fake parliament' (*een nep parlement*), since only he represented the 'real' will of the Dutch people. For this

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<sup>20</sup> See for the final judgment in appeal R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant); Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review, [2017] UKSC 5.

same reason he rejected the authority of the Dutch courts to judge him on counts of discrimination and incitement to hatred: Because he represented the ultimate authority of 'the people', the courts should bow to his superior authority and legitimacy. Obviously Trumps attacks on any institution, including Congress, the media and judges, that oppose him follow a similar logic as well.

As history has rather convincingly proven by now, however, sovereignty is a drink best served diluted. Again like a nuclear reaction, the brute force of sovereign power is too dangerous and unstable to wield directly. There were good reasons, therefore, to develop national constitutional system that could contain the sovereign power, and could turn it into a controllable, reliable form of political energy. By now, however, the very process of European integration is contributing to the escape of sovereign power, and with it the very risks of populism, nationalism, and instability that the EU was designed to address. At the same time, a return to nationalism will of course not recreate the desired level of control or service that is still associated with the nation state system. As indicated above, and as the UK seems intent on demonstrating, globalization does not stop when you leave the EU.

New solutions, going beyond mere nation-states, are therefore required to serve and contain the national sovereigns. So far, however, it seems that the EU has been looking for these solutions at the wrong level: that of the EU itself.

## 7. The wrong solutions

Obviously, concerns surrounding EU legitimacy and democracy as such are not new. The literature decrying or denying the democratic deficit by now span decades, even if many of the justified warnings may only now acquire their deserved sense of urgency and importance.

So far, however, solutions to the democratic woes of the EU were primarily sought in boosting democracy at *the EU level*, and then primarily by strengthening the European Parliament. By now it should be acknowledged that these attempts have failed. Despite enormous increases in the power of the European Parliament, which is now truly a co-legislator, EU legitimacy has not increased. If anything, there seems to be an inverse relation between the power of the European Parliament and EU legitimacy.

From the perspective developed in this paper, it is logical that these attempts failed. They essentially boil down to an attempt to serve and contain the different national sovereigns at the EU level. As already discussed above, however, the EU currently lacks the capacity to fulfill this role, unless it takes a probably ill-fated leap into full federation. What is more, such attempts at empowering the European Parliament only decreased the capacity of national actors, including national ministers in the Council of Ministers, to control outcomes. Giving more power to the European Parliament, therefore, cannot solve the problem, but can only increase it.

Following the failure of empowering the European Parliament, there seems to be an increasing consensus that the role of national parliaments in the EU should be increased. The actual way to do so, however, often remains conspicuously vague.<sup>21</sup> The steps that have been taken in this direction, moreover, also seem rather limited, and not yet very effective. Neither the yellow or the orange card, for example, nor the increased power of national parliaments to invite Commissioners seem to have contributed much. In the case of the yellow and orange cards one can even wonder if they may not have had the opposite effect of estranging national parliaments. This could for example be the case where the Commission rejects or ignores the views of national parliaments because they do not concern subsidiarity in the strict sense, but rather relate to proportionality or other political considerations that may logically concern national parliaments.

Again the failure of these attempts appears logical from the perspective developed here. For even though these attempts focus on national parliaments, their aim is to subsume these national parliaments at the EU level, not to recognize the normative primacy of the national level. Instead of assisting the national level to recapture the popular sovereigns, these attempts again try to strengthen the EU level, only further undermining the capacity of the national level to serve and contain the national sovereign. What seems more logical from the current perspective, therefore, is to re-design the *national constitutional system* for functioning in a global reality. The EU, in other words, should enable the national constitutional and political system to serve and re-capture their popular sovereigns again.

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<sup>21</sup> Cf for example the Five Presidents' Report as well as the White Paper on the Future of Europe, as also discussed in <http://verfassungsblog.de/author/armin-cuyvers/>

Only once the national systems are sufficiently robust and redesigned for our global reality can they become a solid foundation for the EU as well.

#### 8. Recapturing national sovereigns at the national level: towards a compound system

Obviously redesigning each national constitutional system to life in a globalized reality and a European Union is a Herculean task way beyond the scope of this paper or the capacity of a single author. The more limited aim here, therefore, is to suggest some directions in which solutions might be found, taking into account the problem analysis given above. The suggestions developed in this context should therefore be seen as tentative examples primarily aimed at exemplifying and concretizing the type of redesign envisioned, not as finalized turn-key solutions that can be copy-pasted into different national constitutions. If sufficiently convincing, a joint effort is required to systematically explore how in each constitution solutions might be developed that reflect the fact that nation-states are no longer stand alone systems, but also form part of a supranational system.

The primary aim of each measure should be to re-enable the national parliament to serve and therefore contain the national sovereign. As already indicated, however, national parliaments have lost the capacity to singlehandedly determine outcomes. Consequently, national politics cannot and should not remain exclusively about determining national outcomes. Instead, national politics must partially become about how to use one's national influence to affect decisions at the EU level. The possibility to influence EU decision-making, and the stance to be taken at EU level should therefore become a new part of the substance of national politics.

In turn, this requires that we redesign national electoral rules, institutional design and the political process to reflect the reality that deciding on one's national stance at the EU, or other international level, is of central importance. In fact, in hindsight it should be seen as almost incredulous that our national constitutional and political system has not been seriously redesigned even though more than 50% of all legislation is significantly affected or determined by the EU.

Again, specific modifications depend on the specifics of national systems, but one could for example look into possibilities to redesign the electoral process and the division of power in

such a way as to create better national incentives for national parties and Members of Parliament to engage with decision-making at the EU level and instigate a national political debate. One could imagine building on the Nordic examples and require national parliaments to give binding instructions to a minister in Council. In addition, one should seriously reconsider reintroducing the double mandate to reconnect national parliaments with the European Parliament. In addition, one could consider giving members with a double mandate more powers in the national parliament, for example when giving instructions to ministers, voting on Treaty change, dividing EU posts, or agreeing on the MFF.

An even more radical institution option might be create a special EU chamber dedicated to EU decision-making. Such a chamber should then remain essential for national decision-making as well, connecting the exercise of national politics with EU politics. Such an EU Chamber at the national level could then be directly elected, creating a national election fully centered around the EU, and the position that the Member State should take at the national level. Further powers could then be delegated to such EU chambers, including the power to elect the President of the European Commission, the European Council and the Euro group, the power to block legislation, the power to enforce EMU rules or to force the Commission to introduce new legislation.

In addition, more suitable tools of direct democracy may be designed, which could give the people as such a more direct say on EU affairs and which could contribute to a national debate on EU matters. The EU chamber described above, for example, could be given the power to organize a referendum on EU legislative affairs. Such referenda would allow for a national debate on EU affairs, would allow politicians to inform the electorate about the EU and would force them to come up with a more convincing and coherent vision on the EU. Instead of an uncontrolled use of absolute sovereign authority, which could threaten the EU's very existence, referenda would then become a perhaps useful addition to the system of representation, and therefore part of the constitutional system confining the sovereign instead of an uncontrolled channel to call on the naked sovereign power of the people.

Once such improved national systems have been set-up, moreover, we will have a sufficiently solid basis in each Member State to build a stronger EU constitution as well. National EU Chambers, for example, could be connected, jointly forming an EU senate.

Instead of trying to create a sufficient democracy at the EU level, a truly compound system could be designed which rests on the primary legitimacy and authority of national parliaments.

#### 9. Conclusion: refocusing on the national level

The examples given above are clearly very general and require tremendous work to flesh out, let alone to translate into constitutional reality in each individual Member State. Yet the argument set out above seems to indicate this is a challenge we must face. Due to globalization and integration sovereigns have escaped the confines of national constitutions, and nation-states will not be able to recapture them by themselves. Even if European integration would falter, therefore, national constitutional and political systems would still be faced with the necessity of international cooperation, in some way shape or form, to sufficiently influence outcomes. Consequently, European integration as it stands today offers the best option available to retain a meaningful control of public authority over our global reality. In turn, this means we need to re-design our national systems, and re-convince our national sovereigns that they should allow themselves to be encased again, but this time in a compound system that combines the national and the EU level.