

- Χρειάζεσαι μια ευρωπαϊκή identity και στοιχεία της εθνικής identity.
- Χρειάζεσαι μια κεντρική και βουλοική identity στοιχεία αυτήν που ορίζονται στο εθνικό κράτος
- Χρειάζεσαι μια ευέλικτη διαδικασία εαυτούς της ευότητας ως

Legitimacy, Democracy and Diversity in the European Union

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υπάρχει στο εθνικό κράτος και ως χαρακτηριστικά στοιχεία, δράσεις, υποκειμενική ή μη ~~πολιτική~~ ή γλώσσα και πολιτικές φιλοσοφίες.

Taking the European Union's motto as its point of departure, the paper argues that even in a Europe in which the historical record seems to have made important segments of the citizenry relatively immune to the temptations of a relapse into an exacerbated nationalism, to be "united in diversity" in a substantial sense requires much more than a combination of good will and sophisticated constitutional engineering. While celebrating diversity in very broad and abstract terms, Europe's constitutional process has failed to specify the concept's proper meaning in the context of transnational polity-building. First, the impact that diversity has on Europe's political architecture is assessed, maintaining that the EU can be conceived of as a multinational polity that combines consociational and federal elements; it may also be considered, to some extent, to constitute a post-sovereign order, which departs from former models of national integration. At the same time, however, the politics of diversity in the Union is largely constrained by the dynamics of intergovernmentalism. This entails two major problems: biased recognition and a deficient input legitimacy. Their interplay is leading to a situation in which neither deeper political unity is achieved nor diversity properly protected. The paper finally claims that overcoming this impasse will be contingent upon a constitutional politics which actively confronts the task of redefining the basis of a common European citizenship without violating diversity.

~~Diversity είναι~~
Diversity δεν υιοθετείται από την ενσωμάτωση των υποκειμενικών ή μη ~~πολιτικών~~ ή γλώσσας και πολιτικών φιλοσοφιών.

Since the rejection of the Treaty establishing a Constitution for Europe in the referenda held in France and in the Netherlands in spring 2005, the European Union finds itself in an uncomfortable stalemate, and the view is increasingly shared that the previous political rationale of the integration process will have to be modified. From the perspective adopted in this paper, what became manifest with the turbulences of May and June 2005 were the symptoms of a crisis of political legitimacy that had been more or less latent for a longer period of time. The crisis is closely related to the failure of an approach which I call *first-order* constitutional politics. Using this concept, I refer to a constitutional politics whose focus is basically twofold: it defines rules for institutional decision-making, and it aims at



integrating by designing political institutions in a narrow sense. Relying on such an approach implied that the architects of the emerging European polity neglected the challenges of a *second-order* constitutionalism. A constitutional politics of such a kind would have to concentrate on setting the foundations for a European community of citizens giving support to Europe's institutional order.

My analysis sticks to the premise that in contemporary Europe, as elsewhere in the world, political legitimacy must be grounded on democratic principles. Moreover, I think that to maintain democratic priorities does not imply abandoning the perspective of a deeper political integration beyond the realm of the established nation-states. Yet, if I am right, the current developments make it highly recommendable to reconsider the work of pioneers of integration studies such as Karl Deutsch (1966, 1976), who attributed a paramount role to the question of the sociocultural embeddedness of processes of integration when assessing their political dynamics. From the corresponding angle, the democratic legitimation of the European polity is hardly conceivable without consolidating the structures of a European civil society. Ultimately, the precarious character of these structures reflects the difficulties experienced when it comes to constructing a *Europe of the citizens* as a counterweight to the *Europe of the states*. In the present context of European politics, one aspect of the problems related to the making of a Union of citizens seems to be particularly relevant: it refers to the question of how to constitute political unity – be it conceived of as a democratic collective subject or as an integrated sphere of political communication – under conditions of pronounced cultural diversity.

When we look at European history, reconciling citizenship and diversity is not a minor challenge. In general terms, the processes of constructing nation-states and creating citizens in Europe were hostile to diversity. State-building elites saw diversity essentially as a problem for political integration. Typically, mainstream versions of state theories formulated in the European tradition have postulated that a state should have a uniform identity, a single source of sovereignty and a unitary conception of the rights and obligations of "its" citizens. They thus have generally presupposed societies which are culturally homogeneous (Parekh 2000). We must not forget that the units of the state system that evolved in modern Europe were frequently formed in a context of intense and protracted conflict. Often enough, these conflicts culminated in open military clashes between neighbouring units. In a Westphalian world, cultural uniformity within a given unit was meant to increase the loyalty of the population towards the state, a state eager to protect or even expand a territorial sovereignty constantly threatened by the sheer existence of other sovereign states.

Against this background, it has often been held that European integration is the result of an ambitious attempt to overcome the legacy of nationalism or, at any rate, to contain its negative effects. Thus, the official discourse of integration establishes a close link between the concept of European citizenship and the protection of diversity. The understanding of European identity that permeates the Constitutional

Treaty, for example, revolves around two main axes: while, on the one hand, a catalogue of common political values defines the normative framework for European unity, cultural diversity, on the other hand, is assigned a central status within this framework. The Union's official motto, as included in the constitutional document, reads "united in diversity". The normative relevance of the principle of diversity for European polity-building is strongly emphasised in several sections of the Constitution.

At first sight, such normative claims seem to be confirmed by an empirical analysis of the institutional structure of the EU, which indicates that the Union shares some important features with political systems of a consociational and a federal type. In several respects, the EU might even be characterised as a multinational federation of a novel kind. One of the main normative challenges this emerging polity has to confront, then, would consist in creating an institutional frame for transnational integration which allows a "transcending" of cultural differences without negating them. Nevertheless, the EU faces serious constraints when it deals with this challenge: its ways of coming to grips with the multinational moment are marked by contradictions, and its approach to diversity management is dominated by the rigid imperatives of intergovernmentalism.

The experience since Maastricht shows that the making of a political community of Europeans "united in diversity" will not be the result of a process whose focus is primarily on constitution-making as legal politics. Moreover, Europe's constitutional crisis has made it impossible to ignore that the bases of a common European identity cannot simply be created "from above", in a top-down process. Collective identities will hardly become "Europeanised" along lines similar to those which were typical of political integration in the nation-state. Although European identity may ultimately reflect an overlapping of cultural orientations in the Union, it may express a moment of enduring tensions between alternative identity options as well. Hence, when the catchy concept of "multiple identities" is used to point at the sociocultural foundations of a European transnationalism, it should not be forgotten that, in many cases, the intertwining of different dimensions of collective belonging entails a potential for conflict. Obviously, to a varying extent, this last observation also applies to other "diverse" political systems characterised by consociational or federal features.

The core argument developed here is that even in a Europe in which the historical record seems to have made large segments of the political public relatively immune to the temptations of an untamed nationalism, to be "united in diversity" requires much more than a combination of goodwill and skilful constitutional engineering, if the motto is not to be taken only as a simple rhetoric formula. While celebrating diversity in very broad and abstract terms, the constitution-makers have remained silent about the more specific meaning to be given to the concept in the process of European polity-building. All in all, for reasons discussed below, the EU has thus far not been able to live up to its normative potential and to develop an innovative

frame sustaining a European politics of "deep diversity".¹ This contribution begins with a brief empirical assessment of the impact that diversity has on Europe's political architecture. It is argued that the EU can be conceived of as a multinational polity that combines consociational and federal elements; it may also be considered, to some extent, to constitute a post-sovereign order, which departs from former models of national integration. At the same time, however, the intergovernmental "capture" of diversity in the Union entails two major problems: biased recognition and a deficient input legitimacy. Their interplay is in fact leading to a situation in which neither deeper political unity is achieved nor diversity properly protected. The weight of intergovernmentalism in the EU institutional structure leads to a combination of a quasi-consociational power sharing with technocratic rule that ultimately works against democratic principles. Finally, I claim that overcoming these problems requires a constitutional politics that actively confronts the task of redefining the basis of a common European citizenship without violating diversity.

1. The European Union as a Diverse Polity

In day-to-day political discourse, it has almost become commonplace to speak of the European Union as an institutional order characterised primarily by its diversity. Diversity is a category frequently used when social structures, levels of economic development, welfare provisions or state traditions are compared across EU territory. Most often, however, the term refers primarily to *cultural* diversity, i.e. to the diversity of the basic patterns of identification that frame collective orientations within Europe's citizenry, thereby affecting the structures of interaction and the information flows both *within* given societies and *between* different societies. Ethnicity, religion and language are generally assigned a central role among such patterns. It is important to bear in mind that, when it is employed in this sense, the concept of diversity points at forms of difference that must be tolerated or even protected, in contrast with differences reflecting social inequalities which may well be considered unjust and, accordingly, should be overcome. Thus, in Europe's "official" political discourse – articulated in treaties, charters and other legal documents – diversity is not just supposed to describe an empirical reality characterised by the pluralism of cultures, languages, customs and historical legacies; it rather is introduced as a normative commitment to respecting the patchwork of different collective allegiances which result from that pluralism (Kraus 2004).

When we turn to the more specialised realm of academic political analysis, the EU is often portrayed in similar ways and classified as a polycentric, segmented or

¹ To apply a concept introduced by Charles Taylor (1994: 183) in the debate on Canadian federalism to the European context.

heterogeneous political system.² The Union's system of multilevel governance is generally regarded as a complex system of negotiations taking place within a variegated set of policy arenas; these arenas exhibit specific territorial and functional characteristics, but are nevertheless interconnected. This makes for a particularly high level of institutional complexity, which frequently leads social scientists to view the EU as a political order *sui generis* (Grande 2000: 12, 14). To define the EU as a highly complex polity does certainly not imply to make a controversial statement. Nor does it seem too risky to maintain that a good deal of the complexity of the European system of multilevel politics is caused by the need to deal with structural diversity in transnational decision-making. However, the use of the *sui generis* label for categorising the Union fosters the tendency to turn the analysis of EU politics into a highly specialised subdiscipline, and is perhaps more questionable. In the manifold universe of comparative politics and political sociology, the case of the EU may be not quite as unique as the *sui generis* classification would have us believe. Ultimately, the EU shares some distinctive features with exponents of "complex" and non-unitary forms of statehood; as a multilevel or multiform polity it offers interesting points of comparison both with federations and with consociations.³

Let us start with the federal aspect: although it is true that the EU should not be viewed as a state in the sense of a union of individual citizens into a political association, this does not mean that it is better understood as constituting primarily an alliance of states. Its institutional development seems to be located somewhere between the realms of federal and confederal polities. Although it does not exhibit too many graspable state-like qualities, it does share several important features with political systems of a federal type, as Burgess (2000: 29, 41) has argued:

- European decision-making relies on mechanisms of cooperation and co-decision which comprise both the intergovernmental and the supranational level.
- The European Parliament is elected in direct elections; the parliament represents the voters not just as members of single states, but also as citizens of the European Union as a whole.
- The European Court of Justice holds an institutional position which is remarkably strong, and its ruling trumps national law.

² See, for example, Hooghe and Marks (2001: 66), Lepsius (1999: 220), Preuß (1999: 165). For a more detailed elaboration of the argument sketched out in the following sections see Kraus (2007: ch. 3).

³ For contributions comparing the EU and federal models see, among many others, Burgess (2000), Koslowski (1999), Nicolaidis and Howse (2001) and Scharpf (1994). Interpretations of the EU based on the consociational approach are offered by Chrysochoou (1998), Schmidt (2000) and Taylor (1990). A synthesis of the two views, which applies the "consensus" model of politics to the EU, can be found in Lijphart (1999). For a recent critical overview of consociational interpretations of the EU see Bogaards (2002).

- The introduction of citizenship of the European Union in 1992 has created a common legal and political status which transcends national borders.

The concepts of confederation and federation do not delineate empirical realities of a substantially different political quality; they are rather to be considered as dynamic manifestations of an overarching “federal moment” or “federality”, if such a term were accepted.⁴ In addition, when we focus on patterns of institutional interaction, the EU does come close to the federal universe even if we are not prepared to classify it as a federation according to strict formal criteria (Kosłowski 1999: 563). Despite the absence of federal statehood in a definite sense, political relations may well follow a federal rationale.

Another recurrent point of departure for comparative analyses of the European Union’s institutional framework has been the concept of consociation.⁵ Political arrangements of a consociational type developed in societies that were split into distinct sociocultural segments. In general, their *raison d’être* was to reinforce modes of decision-making which had to fulfil the criteria of, on the one hand, being functional for the reproduction of the polity as a whole, while, on the other, preserving the autonomy of particular communities linked to different societal segments. In this respect, there obviously is an overlap between consociationalism and federalism, as Lijphart (1999) has acknowledged by subsuming the two forms of dividing up power under the category of consensual politics. Consociations are characterised by the following features (Schmidt 2000: 41):

- In those areas where political issues of common concern are at stake, power is shared consensually between the sociocultural segments.
- In all other areas of political regulation, the segments largely retain the autonomy to make their own decisions.
- In the fields of political representation and public administration, the principle of proportionality applies.
- The segments have veto capacities in those policy areas of concern for their existential interests.

It has to be added that – to the extent that the consociational label is applicable – consociationalism in the EU is of a very peculiar kind, as the segments which compose the overall polity are represented by nation-states (Bogaards 2002: 364).

⁴ Cf. the argumentation in Elazar (1998: 308) and Stepan (2001: 320–23).

⁵ The concept of *consociatio* goes back to Johannes Althusius and his *Politica Methodice Digesta* [1603, 1610, 1614]. It was introduced into contemporary comparative politics through the work of Arend Lijphart, who distinguished consociational democracies from majoritarian systems (see e.g. Lijphart 1977). Lehmbruch (1983) uses the category *Konkordanzdemokratie* in similar political contexts.

Accordingly, segmentation would have to be considered as institutionally more entrenched than in the case of typical former or contemporary exponents of consociational politics, such as Belgium, the Netherlands or Switzerland. Moreover the consociational structures in the EU have not developed in correspondence with the principles of democratic sovereignty. For this reason, Schmidt (2000: 34) classifies the EU not as a democratic, but as a bureaucratic consociation. One may even go further and speculate about a possible antithesis between consociationalism and democracy in the EU, considering the setback the constitutional referenda have implied for a process of constitution-making widely marked by a consociational approach. Still, it can also be argued that, being composed of democratic subunits, the Union is facing an increasing pressure to reform its institutional framework according to democratic criteria.

In spite of the peculiarities the EU has a “complex” polity, which is not – and which is unlikely to become – a state in the proper sense of the term, it seems sensible to use well-established comparative concepts in order to better understand some important elements of Europe’s political architecture. Due to differentiated integration, which makes for varying degrees of Europeanisation of specific policy areas across the member states,⁶ politics in the EU has significant points in common with politics in asymmetrical federations. In addition, the federal moment overlaps with consociational imperatives which protect the political autonomy of the segments constituting the Union, i.e. the member states.

Against this background, I argue that there is one aspect that should possibly be stressed more explicitly when we adopt a comparative view of EU politics. It is an aspect that remains somewhat neglected in current approaches to the dynamics of European integration: the European Union is a *multinational* polity. In fact, its federal and consociational features largely correspond to its multinational character. Let us briefly point out some indicators of the impact that the multinational factor has on the Union’s institutional framework. In this respect, it may be helpful to begin with a general overview⁷ of the major characteristics which can be regarded as typical of multinational democratic states of the West (such as Belgium, Canada, Spain or the United Kingdom):

- A multinational democracy is a constitutional association which consists of two or more nations or “peoples”. These nations are supposed to possess an equal status vis-à-vis the state and its institutions.
- The association of “peoples” generally combines both confederal and federal features. The structures of political participation and representation reflect the variegated (multi)national identity patterns within the citizenry.

⁶ The establishment of the Eurozone, which has not been joined by all EU member states, is a striking case in point.

⁷ The criteria used in the overview are taken from Stepan (2001: 323–28) and Tully (2001: 2–6).

- The national units composing the multinational association and the association as a whole are all committed to maintaining the principles of democracy and the rule of law.
- Multinational democracies are also to be seen as multicultural polities, which host significant proportions of migrant populations. In this sense, the nation does not have a normative monopoly as the sole legitimate platform for articulating sociocultural identities.
- Conflicts over the political interpretation of freedom and self-determination in a multinational context may imply that the constitutional rules regulating the accommodation and recognition of diversity are subject to continuous negotiations. The institutionalisation of reciprocal recognition is an open process that resists being "frozen" into a "conclusive" agreement.
- Regarding the political status and the competences of the subunits, the criterion of asymmetry tends to play a prominent role in the constitutionally sanctioned vertical division of powers within multinational federations.

Neither can the EU be considered a state, nor does it qualify as a democracy. Hence, the list of features defining a multinational *and* democratic state cannot be used without reservations in the context of analysing politics in the EU. Nonetheless, Europe's institutional system has more and more become the target of political pressures of a kind which might well be called "protodemocratic". Thus, the reform of the system of European governance envisaged in the process of constitution-making might ultimately also have implied moving the Union closer towards the universe of multinational democracy.

An appropriate understanding of the federal and consociational dynamics at work in the Union's institutional order would require, then, that the multinational dimension of European politics is taken into account too. The multinational moment finds its most pronounced expression in those institutional domains dominated by the logics of intergovernmentalism. Here, being a nation-state carries a particularly strong weight in terms of having political "voice". Thus, in a European Union with (prospectively) 27 member states, Germany, whose population is approximately 82 million (that is 17 per cent of the EU total), is assigned 29 votes in the Council (8.4 per cent); in the case of Luxembourg, one of the smallest member states, the corresponding figures are 429,000 (0.09 per cent) and 4 (1.16 per cent). Evidently, the distribution of voting powers in this organ (as in the European Parliament) strongly reflects the general fact that in the political system of the European Union the principle of equality of states trumps the principle of equality of citizens.

The multinational moment also plays a significant role within those European institutions whose supranational orientation should outweigh the constraints of the system of intergovernmental bargaining. This applies, in the first place, to the European Commission, an organ which is supposed to act in the general interest of the Union. In the enlarged (and still enlarging) EU, the criterion of parity between states continues to be an important aspect for choosing the commissioners; all member states are to be granted at least a symbolic presence in the Commission. In principle, the same rule holds when it comes to appointing the members of the European Court of Justice, regardless of this organ's commitment to underlining the supranational quality of European legislation.

Moreover, the multinational factor is accorded great symbolic weight in the body of European treaties sustaining the process of integration. Documents such as the Charter of Rights of the EU, which has been integrally subsumed into the Constitutional Treaty, identify the "peoples of Europe" as the subjects of unification. Although the identity of the European peoples is not specified, it can be reasonably assumed that the term refers to the peoples as represented by the member states.

The multinational dimension is a salient feature of EU political structure, and also occupies a prominent place in the institutional discourse on integration. In the emerging European polity, collective interests continue to be predominantly defined as national interests, i.e. as the interests of nation-states. Although there are institutional discourses and practices that refer to other kinds of Europe, be it the Europe of the citizens, the Europe of the regions or the Europe of organised interests, the EU has evolved as a Union of nation-states in the first place. Hence, the protection of their more or less "frozen" identities – to apply a concept taken from the famous analysis of the cleavage structures of European societies put forward by Lipset and Rokkan (1967) to the EU – is deeply embedded in the Union's semi-constitutional architecture.

At the same time, however, it must be conceded that the multinational factor in EU politics is articulated in ways that contrast the Union with multinational states of a more traditional type. This also has important implications for the institutional articulation of the EU's consociational and federal elements.

First, the EU lacks a hegemonic integrating force. It is a multinational polity without a titular nation. As there is no structural majority, even the identities embodied by larger nation-states are to be considered minority identities in the EU (Lepsius 1999: 219). Neither is the making of Europe controlled by a hegemonic force, nor does the process involve geopolitical coercion (Marks 1997). In contrast with the historical experience of the paradigmatic cases of nation-state building, European polity-building is free from the use of violence and the forceful incorporation of minorities; in Stepan's terminology, *coming together* aspects clearly prevail over *holding together* imperatives (Stepan 2001: 320).

Second, and to a great extent as a reflection of the lack of particular hegemonic aspirations within its realm, the EU has a political structure that is markedly polycentric. In spite of Brussels, which may be seen as Europe's unofficial capital, political, economic and cultural power in the EU is dispersed among many centres. If we apply the terminology introduced by Stein Rokkan (1999), we have to classify the EU as a polycephalic (multi-headed) polity. Its polycephalic character is explicitly acknowledged in the geographic allocation of the Union's institutions and administrative bodies as well; they are distributed among a great number of European cities.

Third, the EU has developed on an open and flexible constitutional basis; this makes it particularly difficult to conceive of it as a "state". The increasing significance of differentiated integration accentuates the institutional multidimensionality of the European project. Openness and differentiation make it hard to predetermine the "finality" of the integration process. At the same time, the process can go on notwithstanding the divergence of member state priorities regarding its ultimate direction.

For these reasons, the EU appears to be a multinational polity of a novel kind. The political dynamics of Europeanisation have transformed the meaning of sovereignty within and among the member states. As the EU does not claim to become a super-state with a strong identity of its own, the nation-states constituting the Union are not compelled to stick to their old aspirations to be the exclusive or, at any rate, the hegemonic channels for the institutional articulation of collective identities. Accordingly, for some observers the European project bears a considerable normative potential, as it entails an ambitious attempt at overcoming the legacy of nationalism on the Continent. From such an angle, the EU may even be seen as the harbinger of an approaching postnational age.⁸ In addition, integration has contributed to loosening up the strong interconnections of political and cultural identities that were characteristic of sovereign statehood in Europe. The bulk of the member states seem to be abandoning a rigid view of former prerogatives regulating the representation of collective identities, while the EU itself has no claims to obtain prerogatives of its own in the corresponding domains. In this regard, minority protection in the EU may well have a normative quality that goes beyond traditional consociational standards. Hence, the development of the Union has been interpreted in terms of the making of a post-sovereign polity, a process which would indicate a straight departure from national forms of rule.⁹

Nevertheless, the trends culminating in Europe's constitutional crisis reveal that the Union might ultimately not be functioning according to the high normative expectations often associated with transnational polity-building. A closer look at the realities of day-to-day intergovernmental bargaining may well have sobering effects for those who are hoping for smooth transition to a postnational age in the

⁸ For different versions of the postnational view see Habermas (2001) or Beck and Grande (2004).

⁹ Such an interpretation is offered by MacCormick (1999); cf. also Preuß (1999).

wake of the European Union. The intergovernmental perspective evidences that a “thin” version of nationalism has permeated the EU’s institutional framework from the beginning, as integration was never supposed to challenge the continuity of the nation-states involved in the European project. At any rate, the popularity that the formula of a “federation of nation-states” enjoys even with the advocates of moving towards “deeper” forms of integration must raise some doubts about the impact postnational intentions have actually had on Europe’s political architecture. The way intergovernmentalism has been institutionalised in EU politics has important consequences for the articulation of the different layers of cultural diversity that make for the European identity mosaic. Diversity in the EU is politically framed, in the first place, as diversity of, and diversity between, states. This has significant consequences for all attempts at strengthening a European demos, as the “coming together” at the top levels of the Union’s institutional system is not balanced by a dynamic of social integration at the level of the citizenry.

2. Biased Recognition and Lacking Input Legitimacy

In central areas of European Union politics the multinational factor is translated into the methods of intergovernmental decision-making. Intergovernmentalism also is the main stronghold the principle of state sovereignty retains in the EU. To a significant degree, a “thin” version of nationalism¹⁰ continues to shape the politics of cultural identity in the European Union. The interplay of intergovernmentalism and the multinational moment creates a situation in which cultural diversity becomes all but synonymous with the diversity of the national cultures of the member states. It is true, as pointed out, that the respect of diversity – which, in the Union’s institutional setting, has primarily to be understood as linguistic diversity – plays a salient role in Europe’s official political discourse. Here, on the one hand, the recognition of cultural diversity is expected to act as a normative safeguard against potential hegemonic pretensions within the EU, which could lead to conflicts hampering the project of integration. On the other hand, the intercultural sensibility the EU claims to adopt in its dealing with the issue of diversity, which finds its most salient expression in the Union’s embracing of multilingualism, is frequently presented as a normative plus when Europe is compared to other poles of regional integration in the world.

Nevertheless, the European “politics of recognition” is not exempt from significant contradictions.¹¹ Recognition is biased towards the identities embodied by nation-states. Subnational, transnational or intercultural and “hybrid” patterns of identification play a clearly subordinate role in the institutional approach taken by

¹⁰ The term “thin” is meant to mark a contrast to a “thicker” and ideologically loaded nationalism. “Thin” nationalism thus comes close to the banal nationalism of everyday politics lucidly analysed by Billig (1995).

¹¹ For a critical assessment of the relationship between cultural pluralism, recognition and language policies in the EU see Kraus (2007).

the Union when it confronts diversity. It is true that European legal bodies, when elaborating transnational right standards in the name of the European Union, the Council of Europe or the Organization for Security and Co-operation in Europe, have made considerable efforts to secure an independent status for cultural rights, including linguistic rights, as a necessary complement of civil, political, economic, and social categories of human rights. A new discourse on rights and recognition, which establishes a close connection between issues concerning the material dimensions of citizenship and questions related to the field of symbolic representation and cultural identity (Fraser and Honneth 2003; Pakulski 1997), has had a great impact on the redefining of the legal status of minorities all over Europe. Up to now, the main targets of the regulating activities of European organs have been the autochthonous groups who are "officially" entitled to be considered as regional or national minorities.¹² Yet it appears to be increasingly difficult to draw a clear-cut line of delimitation between the claims of collectivities of this kind and, for instance, the claims of migrants who are firmly established in their host countries. Accordingly, it is hard to see how a spilling over of rights from "old" to "new" minorities should ultimately be avoided. Thus, Europe is certainly facing a growing pressure to include immigrant groups in its transnational minority rights regime.

However, regardless of the increasing importance of extending cultural rights to different types of minority groups, it must be remembered once more that the recognition and protection of cultural diversity in the EU refers primarily to those cultural identities which are institutionally embodied by nation-states. A consequence of this situation is that the pressure to recognise minorities is particularly strong when the status of these minorities is an issue of inter-state relations in Europe. The language regime applied in European Union institutions is another case in point in the same context: Officially, it grants an equal status to all state languages, irrespective of demographic, economic or sociolinguistic criteria. Such status equality is only granted to languages that are the languages of states. Accordingly, the speakers of Maltese (approximately 340,000) or Estonian (1 million) enjoy a privileged position in comparison with the members of linguistic communities such as the Welsh (500,000) or the Catalans (7 million), whose languages have an official status on (a great part of) their respective territories, but are still not the languages of states.

As a result of the statist bias in the recognition of diversity, cultural identities often enter the political stage as tactical devices, and are primarily used to underpin the articulation of nation-state interests in a system of protracted and tough intergovernmental bargaining. Identity politics then take the stage as a sublime surrogate for what otherwise would be considered plain national interest politics, as has sometimes been criticised with regard to the French calls to defend the *exception culturelle* in the field of audiovisual policies, for example. Ultimately,

¹² Such as the Saami in Finland and Sweden, the Tyrol Germans in Italy, the Hungarians in Slovakia or the Russian-speaking groups in the Baltic Republics; see Toivanen (2001: 211–50) for a general account.

the Union's institutions seem overwhelmed by the dilemma involved in finding a balance between the protection of diversity and the development of a common framework of political identification for European citizens. The resulting institutional inertia, however, will not provide a proper defence of diversity against the dynamics of "negative" integration. The term has been coined in order to describe the tendency that, due to the absence of explicit political deliberation and regulation, the norms of political accountability are replaced by the "soft" mechanisms of economic governance, or matters of collective concern end up becoming the object of "invisible" market forces. As long as the institutional mechanics of intergovernmentalism keeps on obstructing a proper *political* debate on the concrete meaning to be given to diversity in the Union, Europe will not be able to realise its normative potential for elaborating innovative responses to the great challenge of fostering overarching civic commitments while at the same time embracing cultural pluralism.

If we consider that the problem of both representing and transcending diversity is one of the principal challenges to be tackled by all attempts at strengthening the links between the still precarious structures of a transnational civil society and the system of multi-level governance in Europe, we will also have to concede that, to a significant degree, the challenge also lies at the core of the question of democratic legitimacy in the EU. At this point, it may be worthwhile to recapitulate a line of argument elaborated by Fritz Scharpf. According to Scharpf (1999), democratic rule can be justified from two different perspectives. The first perspective focuses on input-oriented legitimation. At its core is the definition of democracy as "government *by the people*" (Scharpf 1999: 6, emphasis in original). Input legitimation means that the "authentic preferences of the members of a community" (ibid.) are articulated in an open process of participation. This requires that the community members share a strong collective identity which ultimately enables them to deal with the tensions that may be caused by intense political conflict. In contrast, the second perspective on legitimation is output-oriented. Output-oriented legitimacy "*is interest based rather than identity based*" (Scharpf 1999: 12, emphasis in original). In this case, it is the capacity of political institutions to find effective solutions to collective problems which translates into legitimacy as "government *for the people*" (Scharpf 1999: 6, emphasis in original). According to such a view, an effective problem-solving in correspondence with common interests does not have to rely on a framework of strong collective bonds. (Measures directed at reducing air pollution, which are in the interest of virtually everybody, may be taken as an example.)

Distinguishing these two perspectives plays a central role not only in the work of Scharpf but, be it directly or indirectly, in the work of other authors as well, when it comes to determining the normative basis of EU politics and policies. Thus, the point is often made that the resources for generating legitimacy on Europe's identity side are scarce. As the collective political identification with the Union across Europe remains weak, European policy cannot adopt the standards of

government *by* the people, but is to reflect the priority of the principle of government *for* the people.

In explicit or, more frequently, in implicit ways, the distinction between the two types of legitimation has attained great significance not only in the more or less specialised field of integration studies, but also in the factual context of Europe's institutional politics.¹³ Intergovernmentalists, on the one hand, generally hold that the lack of solid input-structures makes it necessary to keep up nation-state prerogatives in Europe, as "true" democratic legitimacy only obtains in the realm of the nation-state. Supranationalists, on the other hand, tend to expect that input legitimacy will successively materialise as a result of the political institutionalisation of the EU, or that it can be substituted by functional equivalents, as democratic authenticity is subordinate to the formation of political institutions, or is anyway to be seen as an obsolete category.¹⁴

From a normative angle, there is only limited plausibility in establishing a sharp dichotomy between input- and output-legitimacy. Nevertheless, it may be reasonable to use the distinction for analytical purposes. Such a strategy, then, leads us to a general assessment that could be summarised as follows: At present, Europe has major deficiencies regarding its democratic input-structures. In the long run, concentrating on its strengths on the output-side will not outweigh these deficiencies. Adopting such a strategy rather brings the danger that the input-problems end up shattering the output-structures. Hence, the EU has to respond to the challenges involved in giving its input-dimension a more graspable meaning by fostering processes of collective self-determination among European citizens.

There is growing evidence that the "permissive consensus", which had been carrying the dynamics of European integration for a long time, does not hold anymore. The turnout rates at the elections to the European Parliament have been falling since Maastricht, and reached an all-time low in 2004. The bulk of European citizens continue to express only little interest for European politics. The little concern a broad segment of the public shows for "European affairs" goes hand in hand with the weak commitment to a genuinely European identity component among EU citizens (Nissen 2004). Against this background, the argument that a primarily instrumental and benefit-oriented perception of what it means to belong to Europe is a sufficient basis for integration does not really eliminate the problem. Even predominantly utilitarian views of the EU will ultimately lose their persuasiveness if European identity components disposing of a normative grounding of their own continue to be weak. Up to the present, the Union's successes in constructing a stable framework for the formation of an overarching political identity among its citizens have remained quite limited. The weight of such an identity should certainly not be exaggerated by adopting a substantialist approach (as the discussions on the existence of a European "people"

¹³ In addition to Scharpf, see von Bogdandy (2000), Eriksen and Fossum (2000), Majone (1996), Moravcsik (2002), or Zürn and Joerges (2005), to mention just a few examples.

¹⁴ See Cederman and Kraus (2005) for a more systematic discussion of such positions.

sometimes seem to do). The point rather is to develop a dynamic and process-oriented understanding of identity, focusing in the first place on the structures of political communication and on a public sphere built upon diversity. Yet these very structures currently seem to demarcate one of the most problematic areas of European politics.

The example of the European Parliament shows the weak profile EU institutions have when it comes to the production and representation of transnational publicity. When we look at the realm of civil society, however, we realise that the problems we encounter at the level of the Parliament in Strasbourg are just the tip of an iceberg. In the realm of transnational mass communication, a discursively integrated public only exists in very rudimentary forms. The EU can hardly claim that it constitutes a vibrant intercultural space of political communication, thereby fulfilling the requirements of a critical public sphere.

Models of issue-specific public spheres formed by experts and interest groups (as they may apply in the domain of comitology) do not really tackle the problem, because they neglect the question of the overarching communicative context relating these particular public spheres to each other. Nor can a vertical shift of publicity (from bottom to top) be an adequate substitute for processes of horizontal communication within a European civil society. To the extent that such tendencies prevail, the normative force of the project of European integration is undermined. Ultimately, the integrative power of a political order has to rely on the fact that political developments taking place on the "public stage" are made comprehensible for a broad community of people by being presented in a symbolic-dramatic form (Geertz 1980). The "incomprehensibility" and the representative deficiencies of politics in the EU can be seen as important aspects of the developments that brought the constitutional process to a halt in 2005.

3. Political Identity and Legitimacy in the European Union

Against the background sketched out here, it seems not exaggerated to argue that the EU is actually confronting the interplay of a crisis of political representation and a crisis of political identity.¹⁵ In the process of constructing the Union, the functional primacy of market integration made for an understanding of legitimation that saw the citizens mainly as consumers of political products, thereby "relieving" them of an active participation in the political process. One may well speculate about the elective affinities between such an understanding of citizenship and the obviously "top-heavy" consociational features of decision-making in the EU. Deriving legitimacy from great technocratic success stories rather than from the complex routes defined by the democratic process has been for a long time a characteristic feature of the politics of European integration (Weiler 2004). To adopt such a strategy has entailed nourishing the potential of an anti-European

¹⁵ As Manuel Castells (2004) succinctly put it in a newspaper contribution published before the rejection of the European Constitution in the French and Dutch referenda.

populism, as many citizens perceive the EU as a political order shaped by technocracy in the first place. Europe's legitimation problems touch in an elementary form upon the cognitive dimensions of the citizen status. Citizens who think that they lack possibilities to properly understand and influence the political process do not conceive of themselves as citizens in a full sense anymore. This creates the soil for feelings of deprivation and powerlessness that ultimately turn into anti-democratic resentment.

Such an argument does not necessarily lead to the conclusion that regulatory policies in the transnational realm cannot be justified at all as long as they are not based upon a strong democratic legitimation. The point I want to make here rather is that even if we adopt a plain functionalist and output-oriented approach to the transnational policy process, it will be difficult to deny that governing Europe by focusing primarily on the standards of effectiveness has become a more and more arduous task due to the lack of correspondence between the institutional patterns that may make the EU appear as a "technocratic consociation" and the "Europe of the citizens". In other words: the mechanisms of a decision-making dominated by intergovernmentalism have come under stress, and the legitimation deficits to be made out on the input-side are "spilling over" from the sphere of the normative into the realm of the functional.

At any rate, the developments since Maastricht indicate that there are good reasons to doubt that the collective identity of a European community of citizens will emerge more or less automatically, following the direction intended in strategies of institution-building devised "from above", as functionalists have sometimes tended to assume. It should be emphasised that this is *not* to say that democratic collective identities are inextricably linked to the nation-state. Political identities must not be conceived of as static categories. In the context of democratic politics they rather reflect processes of collective self-determination which define (and redefine) the status of being a citizen. The institutional framework of the EU can hardly be considered an exception in this respect. The opposite is the case: as I have argued earlier, the aim of constructing a novel form of political identity which supports integration, yet at the same time embraces diversity involves great challenges. Against this background, however, it must be questioned that the "freezing" of Europe's multinational moment at the level of a consociationalism of member states will contribute to fostering a new politics of diversity.

At this point, it may be worthwhile to briefly recapitulate an important strand of early modern democratic theory. For this strand of political thought, democracy constitutes, in the first place, a practical realm, which is shaped by the political activities of citizens.¹⁶ If democracy is viewed as field of collective activity, the specific conditions of political action become a central element for assessing the quality of democratic politics. From such an angle, securing the capacity of citizens

Sphere, domain

¹⁶ For a general discussion of *politics as an activity* versus *politics as a sphere*, an opposition that lies at the core of many past and present controversies on what politics ultimately is about, cf. Palonen 2006.

to act in an autonomous way is a key factor for providing the political institutions of a democratic society with solid foundations. Regardless of their otherwise contrasting positions on many substantial problems, both Rousseau and Tocqueville, to mention just two pioneers of democratic theory, shared a great concern for this issue.

For Rousseau, the fate of a democratic polity is largely contingent upon institutionally embedded processes of political socialisation, which enable individuals to act primarily as citizens when they act politically. Rousseau links democratic politics to a dynamics of continuous collective self-determination, whose prospects depend on citizens having the capacity to look beyond their particular interests and to relate their decisions to the common good.¹⁷ This is necessary for transforming the merely additive and pre-democratic *volonté de tous* into the democratically sound *volonté générale*. To protect himself from being accused of advocating an abstract utopianism, Rousseau stresses how important morals and customs are if the democratic approach to political socialisation he postulates is to succeed. These morals and customs are a reflection of specific social practices that serve as the ground on which citizens acquire the potential to deliberate freely on the general will. The preoccupation with democracy as a social practice explains a great part of Rousseau's interest in determining the proper size of a republic and his preference for establishing small political units.

Although Tocqueville certainly does not share many political priorities with Rousseau, he also places great emphasis on the civic dispositions and motivations of the individuals who constitute the demos, as they offer the best protection against popular sovereignty turning into the tyranny of the majority. Tocqueville shows a clear proximity to Rousseau when he argues that the manners (*mores*) of the citizens are a key for explaining the success of democratic rule in America. Such manners, as embodied in the tradition of the trial by jury, play a decisive role when it comes to sustaining a political culture in which democracy is primarily a matter of practical learning. Thus, the manners contribute even more than the laws "to the maintenance of the democratic republic in the United States" (Tocqueville 2000 [1835/1840]: 368). The extensive local freedoms are another important element that offers the Americans manifold incentives to develop a practical spirit of civic-mindedness. Finally, Tocqueville considers the web of associations covering the United States, a web which in the first half of the nineteenth century appeared to be particularly dense from a European perspective, a genuine school for learning democracy.

Why are the views expressed by Rousseau and Tocqueville some 200 to 250 years ago relevant for addressing the problems of legitimacy and diversity in the EU today? If I am right, a highly important point of departure for answering this question lies in the spatial dimension of democratic politics, and in the changes this dimension has been undergoing in recent times. The rise of democracy anticipated

¹⁷ See Rousseau (1968 [1762]); see also Fetscher (1993).

and analysed in the writings of the two classics was to a great extent concomitant with the rise of the nation-state and of collective affiliations of a national kind. In this sense, the civic "manners" and practices sustaining democracy emerged in a social context structured by national institutions, even if these institutions operated at the local level, as was the case in the America portrayed by Tocqueville. From the corresponding angle, civic communities evolve within specific worlds of experience, which are territorially bounded. In the age of transnational politics, however, this connection seems to have become increasingly problematic. As the case of the EU exemplifies, substantial domains of political decision-making have been "relocated" to a realm beyond the nation-state. The "direct effect" of EU politics thereby continues to have a very abstract character for a great number of European citizens. The situation is additionally aggravated by the limited democratic accountability of decision-making organs in the EU.¹⁸ Hence, the need to work towards more democratic structures of transnational governance has been a recurrent motive in the discourse of many advocates of a European Constitution. Yet ultimately, such a view also begs the question of the civic dispositions and identities that could be supportive of these structures.

What is at stake here is how "integration in diversity" could be achieved in combination with forms of a materially graspable collective experience involving large-scale horizontal communication and interaction among European citizens. This would imply to define mechanisms that could bolster at the transnational level a dynamic which, at first sight, might look similar to the processes of social mobilisation observable in the high time of nation-state formation (Deutsch 1966). Nonetheless, a substantial difference between the present and former historical periods is that the dynamic cannot operate on the basis of the rigid and rather static identity attributions which were characteristic of many variants of nationalism, and which still reverberated in the intertwining of a multinationalism of states with the quasi-consociational consensus strategies at work in the elaboration of the European Constitution.

The unfortunate constitutional process has shown that to the extent that it lacks solid civic supports, Europe's institutional order ultimately faces the risk of disintegration when confronted with a political crisis. Therefore, the mechanisms that can contribute to sustaining a European civic space must not be assigned less importance than the decision-making procedures in European institutions when it comes to assessing the consequences of transnational polity-building. Transnational communication and the construction of a European public sphere are bound to play a central role in the processes which constitute the political identity of Union citizens. Until now, the external communication of the EU suffers from the fact that the flow of information from the Europe of institutions to the Europe of citizens has had not produced an increase of popular political participation. There is only little exchange between the European political stage and the European public, as both the cognitive (generalised multilingual competence) and

¹⁸ See Schmitter (2000) for an overview of the discussion on the democracy deficit of the EU.

the technical (European media) infrastructure available for establishing a transnational community of communication remain weak (Gerhards 2000). At any rate, the EU is still far away from constituting an interculturally networked space of generalised political communication among European citizens.

Regarding the political architecture of such a space in a context of complex diversity, the patterns of identification required for deeper integration should not be seen as a simple addition of pre-established categories (with each member state supposedly representing one such category), but as an outcome of intercultural negotiations based on mutual recognition. On the one hand, the concept of recognition reminds us that the identities of citizens are socially and culturally embedded, and that this embeddedness must not be discounted when we are expected to act civically in public. On the other hand, recognition is a condition allowing citizens to act as reflexive subjects in the realm of transnational politics and bolstering the formation of an integrated public sphere, in which the protection of diversity and the definition of common standards of solidarity are no incompatible aims.¹⁹ Thus, to the extent that European institutions remain open for the articulation of plural identities, they may contribute to the making of a shared civic sphere, which at the same time respects and transcends diversity.

(recognition) approach

If the analysis sketched out here holds, "grand" constitution-making, whose failure we have just experienced, will not be the all-decisive factor in determining Europe's political future. At least as important will be a constitutional politics which operates at the micro-levels of integration and offers citizens options for breaking into new ground for self-determination. Only a "constitutional politics" of this kind can provide a basis for a transition from the permissive consensus to a more reflexive collective involvement in the process of European integration. Only a "second-order" constitutionalism will be able to base the integration of Europe on new forms of citizenship, thereby providing the Union with a legitimising potential which it bitterly needs, yet which it will not get if it relies on strategies of institutional engineering alone.

In the long term, a common political project which aims at more than at implementing market regulations and harmonising service infrastructures can hardly be sustained if it does not rely upon a shared identity. The balance of the institutional "identity politics" practised by the EU in the past two decades indicates that European identity cannot be successfully manufactured from above, by reverting to propaganda, ideology or mythology. What will count much more, in the end, are materially understandable collective experiences of communicating and of acting together. Against this background the legacy of one of the great pioneers of integration studies seems to be particularly relevant. In a vein that shows strong affinities with the approaches of Rousseau and Tocqueville, Karl Deutsch (1976: 14) argues that integration has to be understood primarily as a praxis-driven process of collective learning. In his view, a web of sociocultural

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¹⁹ This view of recognition obviously draws on the seminal essay by Taylor (1992).

relations provides the proper cement of political integration. It is this very web that ultimately decides on the success (or failure) of the institutions built in the integration process.

Therefore, if the structures of a citizens' Europe are to solidify, the main task to confront will consist in developing strategies for fostering an approach towards political integration that may serve as a "soft", i.e. normatively sound, equivalent to the processes of mobilisation typical of the age of nationalism, yet has still to be free of quasi-nationalist pretensions. The "grand" (and, as it seems by now, obsolete) master plan that was the product of complicated constitutional negotiations cannot provide a proper answer to the question of how the bases for large-scale political communication in the EU are to be properly organised. However, from the perspective of the "second-order" constitutionalism advocated here, finding innovative ways of dealing with cultural pluralism, ways conducive both to respecting and to transcending particular identities, must be considered one of the most challenging aspects of constructing a Union in diversity beyond the constraints of a quasi-consociational consensus of its member states.

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