Democratic Aspirations in Europe*

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Abstract

Democratic instances in the European legal system are part of the ongoing development of the European system, even though the process towards a European Constitution is slowing down. The article will analyse possible solutions to solve the lack of democracy and participation in the European context, in order to understand if philosophical and economical sciences could contribute effectively to the legal system.

A. Introductory Remarks

> Democratic market societies control their economies through the decision making process of the market and the coordinative process of the price system. Their political systems are guided by the voting process and the coordinative process of participatory formation of a common will. The market and the democracy are individualistic-discoursive decision-making systems which make decisions involving the economy and politics (individual and social choice) in accordance with individual preferences or statement of opinion of both consumers ('consumer sovereignty') and the voters ('sovereignty of the people'). The market and democracy necessarily refer to one another in their common goal of discoursive mediation between individual freedom of choice and general social-political choice.[1]

This quotation from an article by Koslowski shows all the ingredients necessary for the research of the 'lost democracy' in the EU system. These are so fundamental that they should be considered before embarking on a comparative study of the different EU Member States' law systems.[2]

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* For those interested to read about the predictions concerning the outcome of the convention, see G. Amato, *The European Convention: First Achievements and Open Dilemmas*, 1 (2) International Journal of Constitutional Law 355 (2003).

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1 P. Koslowski, *Market and Democracy as Discourses. Limits to Discoursive Social Coordination, in* P. Koswloswki. (Ed.), Individual Liberty and Democratic Decision-Making. The Ethics, Economics, and Politics of Democracy 59 (1987). On democratic issues in Europe *see* A. von Bogdandy & J. H. H. Weiler (Eds.), European Integration – The New German Scholarship (2003), with contributions by A. von Bogdandy, R. Ürpmann, F. Mayer, S. Kadelbach, J. Bast, A. Wiener, N. Walker, W. Schroeder & R. A. Wessel, Jean Monnet Working Paper 9/03.1.

2 The Treaty of Rome does not mention the term 'democracy', which has been used in the EEC

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The first aim of this article is to understand the interrelationship between economics, law and politics; the second aim is to reveal certain hidden mechanisms in the decision-making process, with the assistance of economic notions.

Europe is a good example of a stage in which all these components play a role; and, I should add, fortunately at this moment, it does not take place in a 'static' setting, but rather in a dynamic one, characterized by different trends and changes. Over the past decades, two separate and apparently opposing trends have occurred in the development of the European system:

> the first reflects the internationalisation or globalisation of government in certain spheres, with an increasing number of issues being allocated to or addressed by international and supranational levels of authority; [...] a second trend at least within western political systems is that localisation, in the sense of emergence of stronger local and regional politics, with a renewed interest in more direct democratic participation under the influence of republican and communitarian political theories.[3]

Consequently, a 'third trend', maybe more latent and invisible, but all the same considerably strong, might be discerned within the context of the decreasing central role of the State, dealing with the dissolution of boundaries between private and public spheres of regulation and control: "it concerns the evolution [...] of a concept of governance which transcends the more traditionally conceived private/public divide and which challenges previous [...] assumptions about the locus of political and economic authority."[4]

The tendency towards internationalism, towards regional politics and the vanishing barriers between the public and the private domain are therefore the guidelines to follow if we want to combine economic issues, such as the rules of the market, with the mechanism of representation and participation of citizens in the decision-making process.

It is worth focusing on the problem of the circulation of models in the EU system, particularly at this moment when it seems to be necessary to restart the

since the direct elections of the EP in 1979. About this aspect and the development of this principle in case law, *see* A. Peters, *European Democracy after the 2003 Convention*, 41 Common Market Law Review 69, at n. 120 (2004). On that troubled matter that is the future of democracy, *see* P. C. Schmitter & A. H. Trechsel (Eds.), The Future Of Democracy In Europe. Trends, Analyses and Reforms (2004), in particular the Introduction, referring to the statement of Popper – Democracy is the word for something that does not exist –:

> For something that does not exist, democracy has certainly been much talked about recently. Moreover – at least in Europe – 'real-existing' democracy seems to have a promising future, although it is currently facing an unprecedented diversity of challenges and opportunities. The issue is not whether the national, sub-national and supranational polities that compose Europe will become or remain democratic, but whether the quality of this regional network of democracies will suffice to ensure the voluntary support and legitimate compliance of its citizens. For there is abundant evidence that the citizens of Europe – while they may not agree on its existent practices or even know what 'it' really is – will not tolerate non-democracy.

[3] G. De Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, Harvard Jean Monnet Working Paper, 7/99 (2000), at 2.

[4] De Búrca, *supra* note 3, at 3.

process of a European identity, which has been somewhat compromised after the failure of the EU Constitution[5] and the difficulty to create a more effective democracy:[6]

> [...] the EC professes democracy without being democratic. Thus the fragility of its political institutions, inherently perilous, necessarily reflects on the legitimacy of its legal order, while the constitutional balance intrinsic to the separation of powers ideal is dangerously absent. In other words, while in every Member State the administration law system forms part of a working system, this is not the case in the Community.[7]

The present article will analyse the European dynamics: as a first step, in order to comprehend the inner motivation of the actual crisis, it will be necessary to outline the conception of democracy, its origins deeply rooted in economic ground, through a new perusal of its content as an instrument of the 'social contract'. Secondly, the analysis will concentrate on two models of cooperation: the network system and the Habermasian idea of deliberative democracy, which, from an abstract point of view, may be exactly what is needed to guarantee a correct exchange of information in the European decision-making process. Thirdly, the analysis will deal with the pillars of administrative power in Europe: subsidiarity and proportionality, and, subsequently, their practical effects.
Finally, some preliminary conclusions will be drawn, perhaps calling into existence new trains of thoughts.

B. Democracy and Economics: Is There a Relationship?

As the Koslowski article underlines, it is possible to find more than one common aspect between the dynamics of markets and those of a democracy; *a fortiori ratione* in the EU context, whose pillars are, above all, economics:

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[5] The Treaty establishing a Constitution for Europe (TCE), commonly referred to as the European Constitution, is an international treaty intended to create a constitution for the European Union. Despite its name, it only covers the European Union. On 29 October 2004 it was signed by representatives of the Member States of the Union, and was subject to ratification by all Member States. However, in 2005 French (on 29 May) and Dutch (on 1 June) voters rejected the Treaty in a referendum. Had it been ratified, the Treaty would have entered into force on 1 November 2006.

[6] For an analysis of the democratic deficit in Europe, *see* D. Beach, The Dynamic of European Integration. Why and When EU Institutions Matter 258 *et seq.* (2005), where the author affirmed that one of the solutions to the democratic deficit is to use Conventions to prepare future intergovernmental negotiations on treaty reform. But the author underlined also the paradox of a wider participation in the Conventional decision-making:

> [...] the Constitutional Treaty is much clearer and simpler [than the existing treaties], which could have the disadvantage of providing strong ammunition to Eurosceptics and opponents in coming referendums. This is the democratic paradox of the treaty reform process, and could perhaps prove to be the Achilles heel of the Convention method.

A prophecy that unfortunately came true.

[7] C. Harlow, *European Administrative Law and the Global Challenge*, *in* P. Craig & G. De Búrca (Eds.), The Evolution of EU Law 266 (1999).

> Every form of coordination which allows the indirect enforcement of one need's upon the supplier through the giving and taking away of business can be understood as a market. In general, the concept of marketing is the entirety of a business's actions and strategies to both sell its product through meeting consumer demand and to defend itself against consumer abandonment and the competition of suppliers through market research and adjustment for supply.[8]

But there is a neuralgic point imposing to find a solution:[9] in the market, a consumer knows exactly what he is going to buy, he can choose from a variety of products, and he can change his opinion according to his preference. In a democracy, however, a citizen gives his preference to what he thinks to be more convincing, but, if he is not satisfied, he has to accept any result all the same, and wait for the next chance to come to an agreement. The way in which politics may differ from economics is that the election system may lack an immediate positive feedback, with the risk of unintended outcomes.

Thus, which is the best answer to the question about the possible relationship between democracy and economics?

Democracy and liability concern Governments and Parliament choices, but they seem more and more conditioned by the competitiveness imperative of a global market. Hence, there are many fields in which decision-making lack democratic control. This could mean that there is no democractic control on the future of millions of people in the world, such as stakeholders, employees, citizens and immigrants. If politics, in a new model of democracy, wants to play a role in this change, it should be interconnected with financial powers, that sometimes could transcend national boundaries and State sovereignty. To face this revolutionary perspective, how can citizens regain the option to participate?

A first, preliminary answer can be given by looking back at the past, and consider the idea of the social contract that originated at the end of the 17th century: "Cooperation can replace conflict only if the different components of interests, held with varying intensities by persons, can be traded off or compromised with the results expressed, actually or symbolically, as a *social contract.*"[10]

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[8] Koslowski, *supra* note 1, at 60. The author uses the image of the discourse in order to explain the analogies between the market and the electoral process, that are both

> forms of discoursive mediation because they arrive at decisions by the consumers' dollar votes and the electorate's political votes, i.e. 'passing through' single statements of opinion without the anticipation of universality *in* this statement. The word 'discourse' is derived from the Latin verb *discurrere*, to pass through, to run through. The discourse 'market and voting' pass through the preferences of individuals without altering them. Votes are counted not weighed. Through the discourses 'market and democracy', the western democratic societies join a form of rationality which acts in a discoursive and non intuitive manner.

[9] In this regard, it has been said that the democracy of the market is not the democracy that Plato spoke of in his *Republic* as "a charming form of government, full of variety and disorder, and dispensing a kind of equality to equals and unequals alike." *See* W. H. Peterson, *The Meaning of Market Democracy*, 23(12) Free Market 12 (2003).

[10] J. M. Buchanan, The Economic and the Ethics of Constitutional Order 64 (1991), who adds

> the contractarian response requires a recognition of the distinction between the constitutional and the incostitutional or postcostitutional levels of political

When the Enlightenment discovered ancient *polis* institutions, the concept of democratic citizenship developed further. Hence, the discussion about equality and liberty, the principle of democracy, the distinction between negative and positive liberties started. As far as the 20th century is concerned, sociology offered a new perspective of citizenship, by defining it as a progressive achievement of rights along the history of modernity. At first, civil rights were recognised, secondly, political rights, and subsequently, social rights, in which formal and substantial equity are so strictly interconnected.[11]

Even if, as has been said, market rules and participatory rules cannot be perfectly superimposed, it is beyond any doubt that today an economic conception of democracy prevails: the citizen casts his/her vote as well as he/she decides to purchase. This is exactly what Koslowski means when he speaks about discoursive social decision-making systems:

> the action and reactions of the participants, in the discourses correspond with the discourse 'market and voting'. Interaction within economic and political context is able to adopt the form of individual 'marketing' or 'participation' on the part of those who act and can adopt the reaction of 'exit' or 'voice' on the part of those effected.[12]

Despite inevitable differences amongst economic and participatory models, it is useful to understand what the most appropriate system is to deal with those side effects – in Coase's terminology known as "negative externalities"[13] – such as lack of transparency and participation. A fair exchange of consensus, in order to

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> interaction, a distinction without which any normative justification for political coercion could not exist, at least for the normative individualist. Conflict, coercion, zero-sum or negative-sum relationships among persons – these interactions do indeed characterize political institutions, as they may be observed to operate within a set of constitutional rules, that is, within a given constitutional order. The complex exchange model that embodies agreement among many participants in the political 'game' is clearly inapplicable here. But if the analysis and attention are shifted to the level of rules, among which choices are possible, we can use potential and actual agreement among persons on these rules as the criterion for normative legitimacy. And such agreement may well produce rules, or sets of rules, that will operate so that, in particularized sequences of ordinary politics (single plays of the game) there may be negatively valued results for some of the participants;

see also, J. M. Buchanan & G. Tullock, The Calculus of Consent (1962).

[11] *See* A. Casiccia, Democrazia e vertigine finanziaria. Le avventure del cittadino in una società proprietaria 10 (2006). On democracy *see ex multis* B. A. Ackermann, Social Justice in Liberal State (1980); B. Barber, Strong Democracy (1984); R. A. Dahl, A Preface to Democratic Theory (1956); J. Burley (Ed.), Dworkin and His Critics With Replies of Dworkin (2004); J. M. Buchanan, *Social Choice, Democracy and Free Markets*, 62 Journal of Political Economy 114 (1954); Buchanan & Tullock, *supra* note 10; P. Koslowski, Gesellschaft und Staat. Ein unvermeidlicher Dualismus. Mit einer Einfürung von R. Spaemann (1982); G. Tullock, *Public Decisions as Public Goods*, 79 Journal of Political Economy 913 (1971).

[12] Koslowski, *supra* note 1, at 64.

[13] R. H. Coase, *The Problem of Social Cost*, 3(1) Journal of Law and Economics 32 (1960):

> furthermore, there is no reason to suppose that the ... regulations, made by a fallible administration subject to political pressures ..., will necessarily always be those

realise a social contract, where all the parties participate on the same level, because they have the same access to information, for example, could be a solution to the lack of democracy. In the fight against obscurity, it is clear that participation, and more generally, discussion amongst citizens, play a very decisive role.

And for this reason, the next step is to understand which discourse leads to better decisions.

C. Integration and Democracy: Two Sides of the Same Coin

Several discussions about the most suitable model to face that stagnant situation in which Europe seems to find itself in the last few years, still persist, attracted by two opposite poles: integration theory on the one hand, and democratic theory on the other hand.[14] Scholars have observed:

> Integration theory and democratic theory both have an important role to play in our understanding of the nature of the Community. We should not, however, ignore the lessons which one might have for the other. Theories of integration are often premised, explicitly or implicitly, on assumptions about human motivation and preferences which have significant implications for issues of democracy and legitimacy. Our very concerns with democracy and legitimacy cannot be considered in isolation from the integration forces which have generated and shaped the Community. The debate about the nature of the Community will doubtless continue, as it properly should. It will be all the richer if the participants in the two discourses cross the green line dividing the room more often.[15]

> which increase the efficiency with which the economic system operates ... But equally there is no reason, why, on occasion, such governmental administrative regulation should not lead to an improvement in economy efficiency.

On the problem of politicization of market failure, *see* Buchanan, *supra* note 10, at 67.

[14] *See, for instance*, T. Risse, *Neofunctionalism, European identity, and the Puzzles of European Integration*, 12 (2) Journal of European Public Policy 291 (2005). The author underlines the difficulty to combine integration with democracy, also considering the balance in the EU's constitution-building between supranational and intergovernmental institutions:

> if national processes and collective understandings are crucial to understanding the Europeanization of national identities, this will lead to uneven and varied degrees to which Europe can be embedded in collective identities. Federal states with respective constitutional traditions change their collective understandings more easily to include Europe and orientations toward supranationalism than unitary and centralized states.

This study is expressly founded on Haas's idea that transferring loyalty to Europe and the EU is possible without giving up one's national (or regional or local or gender) identities. *See, for instance*, E. B. Haas, The Uniting of Europe: Political, Social, and Economic Forces 1950-1957 (1958); E. B. Haas, Beyond the Nation-State. Functionalism and International Organization (1964). More recently, P. M. Haas & E. B. Haas, *Pragmatic Constructivism and the Study of International Institutions*, 31(3) Millennium 573 (2002). *See also* T. A. Börzel, *Mind the Gap! European Integration between Level and Scope*, 12(2) Journal of European Public Policy 217 (2005).

[15] Craig & De Búrca, *supra* note 7, at 50. *See also*, S. Andersen & K. Eliassen (Eds.), The European Union: How Democratic Is It? (1996); J. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan (1975); P. Craig & C. Harlow, Lawmaking in the European Union (1998);

The two opposite forces are well represented by two images: the network, to justify the necessity of integration, and the image of the discourse, to represent the form of participative democracy, shaped on the Habermasian idea of a deliberative democracy as the ideal development of Kant's conception of Perpetual Peace.[16]

D. Integration (Through Networks) and Democracy (Through Discourse) and Their Common Terrain (Legitimacy)[17]

As said, it is possible to find at least two conceptions of cooperation, the network classification and the communicative power:

D. Curtin, Postnational Democracy, The European Union in Search of a Political Philosophy (1997); R. Dehousse (Ed.), Europe: the Possible Status Quo (1997); G. Majone, Regulating Europe (1996); A. Stone Sweet & W. Sandholtz, *European Integration and Supranational Governance*, 4 Journal of European Public Policy 297 (1997).

[16] I. Kant, Zum ewigen Frieden. Ein philosophischer Entwurf (1795), *reprinted in* Kant gesammelte Schriften Vol. VII (1912). *See also* V. Gerhardt, Immanuel Kants entwurf "Zum Ewigen Frieden", Eine Theorie der Politik (1995). About the influence of Kant's conception of perpetual peace and Habermas theories, *see* R. Alexy, *Basic Rights and Democracy in Habermas's Procedural Paradigm of the Law*, 7(2) Ratio Juris 227 (1994); N. Bobbio, *Scienza del diritto ed analisi del linguaggio, in* U. Scarpelli (Ed.), Diritto e analisi del linguaggio (1976); G. Bongiovanni, Teorie "costituzionalistiche" del diritto. Morale, diritto e interpretazione in R. Alexy e R. Dworkin (2000); for an interesting comparative analysis between Habermas's and Dworkin's conception of democracy, *see* C. Rahm, Recht und Demokratie bei Jürgen Habermas und Ronald Dworkin (2005). *See also* W. Penn, Essai d'un projet pour rendre la paix de l'Europe solide et durable (1986).

[17] *See* P. Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy, in* P. Craig & G. De Búrca (Eds.), The Evolution of EU Law 1 (1999), who considers integration, democracy and legitimacy, the three souls of the nature of the Community:

> The room was not difficult to find. The label 'Community: Nature of' shone brightly above the door and the room itself nestled aptly between 'International Society: Governance of' and the 'Nation State: Nature of.' The room bore all the signs of recent redecoration, and the discerning eye could detect the changes in style which covered nearly half a century. A number of friends and acquaintances nodded and returned to their animated discussions. All the 'usual suspects' were there as well as new faces eager to listen to or to partake in the dialogue. I paused for a moment to take in geography. It quickly became clear that there were two main groups. This was confirmed by the helpful Community receptionist who asked whether I was here 'for integration' or 'for democracy/legitimacy', rather in the mode that one might inquire whether one was with the bride or groom at wedding. I decided to circulate, and followed her suggestion that 'integration' might the best place to start.

As the author then explains, it is probably not a matter – to be for integration or for democracy/ legitimacy – that can be so rigidly bound and determined, but, on the contrary, the two conceptions should be interrelated.

> in der Diskussion stehen vornehmlich zwei konzepte: zum einem die Beschreibung des auswärtigen Verselbständigung mit Hilfe der Kategorie des Netzwerks (*network*), sowie zum Zweiten ihre demokratietheoretische Rechtfertigung durch eine deliberative Demokratie theorie (*deliberative democracy*).[18]

The exchange of information as way of regulation into a network system has been first studied by A. M. Slaughter.[19]

The phenomenon originated from the European Community foundation, in 1957, when Member States were requested to transfer government powers to central European institutions, but chose to leave the implementation and the enforcement of European norms to their national administrations.

More and more, international cooperation is occurring through networks of government regulators who exchange information, develop common regulatory standards and assist one another in enforcing such standards:[20]

> die Netzmetaphor ist augenscheinlich vieldeutig, ihr entscheidendes Charakteristiken für den rechtswissenschaftlichen Gebrauch besteht aber darin, dass bestimmte in den Rechtswissenschaften gebräuchliche Unterscheidungen durch sie unterlaufen werden.[21]

As a result, the transgovernmental network is a system in which power is not located in a hierarchical system: "a set of relatively stable relationships which are of non-hierarchical and interdependent nature between a variety of corporate actors."[22]

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[18] C. Möllers, *Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme trasnationaler administrativer Standardsetzung*, 65(2) ZaöRV 351 (2005); about networks policy system, *see* H. Heclo, *Issue Networks and the Executive Establishment*, *in* A. King (Ed.), The New American Political System (1978); P. Kenis & V. Schneider, *Policy Networks and Policy Analysis: Scrutinizing a New Analytical Toolbox*, *in* B. Marin & R. Mayntz (Eds.), Policy Networks. Empirical Evidence and Theoretical Considerations (1991); R. A. W. Rhodes & D. Marsh, *New Directions in the Study of Policy Networks*, 21 European Journal of Political Research 181 (1992).

[19] A. M. Slaughter, A New World Order (2004), at 40, 43. *See also* E. Chiti, *The Emergency of a Community Administration*, 37 Common Market Law Review 329 (2000).

[20] F. Bignami, *Transgovernmental Networks vs. Democracy: the Case of the European Information Privacy Networks*, 26 Michigan Journal of International Law 807 (2004-2005).

[21] Möllers, *supra* note 18, at 371; C. Möllers, *Netzwerk als Kategorie des Organisationsrechts*, *in* J. Oebbecke (Ed.), Dezentrale nicht-normative Steuerung (2005); *see also* C. Joerges, K. H. Ladeur & E. Vos (Eds.), Integrating Scientific Expertise into Regulatory Decision Making (1997); R. Wolfrum, *Vorbereitende Willensbildung und Entscheidungsprozeß beim Abschluß multilateral völkerrechtlicher Verträge*, *in* Festschrift Rauschning, 407 (2001).

[22] T. Börzel, *Policy Networks – A New Paradigm of European Governance?*, EUI Working Papers, RSC 97/19 (1997), at 5; Chiti, *supra* note 19, at 339; F. Van Waarden, *European Harmonization of National Regulatory Styles?*, *in* J. A. E. Vervaele *et al.* (Eds.), Compliance and Enforcement of European Community Law 95 (1999), in which the author underlines that there are several forces which favour the realization of this option:

> First of all, at the national level the style of consultation, negotiation, cooperation with and persuasion of the subjects of regulation is gaining in popularity as the limits of the traditional command and control style become more evident. Secondly, the internationalisation of markets and regulation increases the number of actors involved in a policy community which have all their own spheres of authority and autonomy – more governments, firms, interest associations – and this increases the

The perspective offered by networks underlines five different aspects:

1. the concept refers to bodies that exercise both private and public powers;
2. the level of institutionalisation in the network system is low;
3. at the heart of a network system are the links between the various bodies;
4. networks are institutions regulating the interactions among subjects;
5. networks facilitate the development of behavioural standards and working practices.[23]

It has been said that the general optimism for the network system coexists with a certain level of frustration: first, there is really no agreement on how to define policy networks. Second, it seems difficult to utilize the concept to move beyond mere description and into the more interesting field of policy explanation.[24]

There seems to be general agreement in the literature that the strength of the concept lies in its descriptive value and there are serious shortcomings when it comes to explaining policy change, because such networks are but one component to explaining policy outcomes:

> as a descriptive category, the network concept is useful because it indicates the hybridity of transnational administrative cooperation between formalization and informality, between consensus and majoritarian decisionmaking of the participant states, and between public and private law mechanisms. But more than an analytic framework cannot be delivered by the network concept.[25]

As seen above, a second model of cooperation, deeply connected with the first one, is inspired by Habermas's discourse theory on democracy.[26] The Habermas

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> necessity for interactive governance thorough network-like structures. Thirdly, the maintenance of implementation responsibilities at the national level for regulations that are enacted at a supranational level increases the mutual dependence between governance levels and hence the necessitates at the very least contacts and information flows, enhancing networks as well.

[23] Chiti, *supra* note 19, at 329. *See also* M. M. Atkinson, *Strong States and Weak States: Sectoral Policy Networks in Advanced Capitalist Economies*, 3 British Journal of Legal Studies 2 (1989); R. Dehousse, *Regulating by Networks in the European Community: The Role Of European Agencies*, 42 Journal of European Public Policy 246 (1997); G. Majone, *The New European Agencies: Regulation by Information,* 42 Journal of European Public Policy 262 (1997); K. Hanf & L. J. O'Toole, *Revisiting Old Friends: Networks, Implementation Structures and the Management of Inter-Organizational Relations*, 21 (1/2) European Journal of Political Research 163 (1992); G. Jordan & K. Schubert, (Eds.), Policy Networks, ivi, 166 (1992); *see also* S. Amorosino, *Le funzioni dei pubblici poteri nazionali nell'era delle reti, in* S. Amorosino, G. Morbidelli & M. Morisi (Eds.), Istituzioni Mercato e Democrazia. Liber Amicourm per gli ottanta anni di Alberto Predieri (2002), at 32.

[24] J. Blom-Hansen, *A "New Institutional" Perspective on Policy Networks*, 75 (4) Public Administration 669 (1997), according to whom: "defining policy networks seems to be a never-ending story."

[25] Möllers, *supra* note 18, at 387.

[26] *See* J. Habermas, Discourse Ethics: Notes on a Program of Philosophical Justification 65 (1990). The essential implications of this theory can be summarized as follows: equal participation of all who are affected; the postulate of unlimitedness, i.e. the fundamental unboundedness and openness concerning time and persons; the postulate of freedom from constraint (*Zwangslosigkeit*), i.e., the

'principle of democracy' (or 'democratic principle') is a particularization of the discourse principle. Whereas the discourse principle addresses the justification of the action norm in general, the democratic principle concerns only the justification of the legal norms that are to govern a particular community: "the democratic principle states that only those laws may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted."[27]

In this context, Habermas has developed a notion called "communications concept of power."

The explanation of this conception can be found in an interesting study of H. Baxter, in which he observed that the precondition of the so-called "jurisgenerative" power of the citizens[28] is the existence of "undeformed public spheres of political discussion that are linked to the formal institutions in which law is made. In turn, the precondition for undeformed public spheres is a 'vibrant' civil society, or network of voluntary associations that are autonomous from state control."[29]

In this sense, Habermas's idea of democracy involves much more than formal governmental institutions and periodic voting rituals. It requires broad, active, and ongoing participation by the citizenry.

By means of participation, it is possible to influence the exercise of administrative power. Also legitimate law, in Habermas's view, is both the product of democratic law-making and the mechanisms that define the structures of official command and obedience that Habermas calls "administrative power".

Law, in other words, is a mechanism for effecting and regulating "the conversion of communicative into administrative power": legitimate law is generated from

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freedom, in principle, of discourse from accidental and structural forms of power; and the postulate of seriousness or authenticity (*Ernsthaftigkeit*), i.e., the absence of deception and even illusion in expressing intentions and in performing speech acts.

[27] J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996), at 111; J. Habermas, Etica del discorso 66 (1989); J. Habermas, Dopo l'utopia. Il pensiero critico e il mondo d'oggi (1999), at 99:

> Se ho conservato un resto di utopia, essa consiste soltanto nell'idea che la democrazia – e l'aperta discussione nelle sue forme migliori- possa tagliare il nodo gordiano di problemi che appaiono insolubili. Non dico che ci riusciremo. Non sappiamo nemmeno se potremmo riuscirci. Ma poiché non lo sappiamo, dobbiamo almeno tentare. Le atmosfere apocalittiche consumano energie di cui si potrebbero nutrire tali tentativi. L'ottimismo e il pessimismo, in questi contesti, non sono categorie appropriate.

[28] H. Baxter, *Habermas's discourse theory of Law and Democracy*, 50 Buffalo Law Review 266 (2002). The terms 'jurisgenesis' and 'jurisgenerative', he says, are most closely associated with the work of Robert Cover. *See* R. M. Cover, *Nomos and Narrative*, 97 Harvard Law Review 4, at 11, 25 (1983). Both Habermas and Cover emphasise the role of associations and groups outside of official state institutions in producing law. Habermas, in particular, is interested in how argumentative speech outside formal state institutions influences the production of state law. Cover is focused on the production of non state law, believing that formal state institutions are 'jurispathic' as well as jurisgenerative, that is to say, armed law tend to impose imperial power over competing bodies of law that develop in smaller communities.

[29] For Habermas's conception of civil society as a network of voluntary associations, *see* Habermas, Between Facts and Norms, *supra* 27, at 175, 358, 359, 367.

communicative power and the latter in turn is converted into administrative power via legitimately enacted law."[30] In such a context, the general discourse principle operates differently in different kind of discourse: moral, ethic and pragmatic.[31]

From the point of view of the "ethical political discourse", the content of the discourse theory is to require no consensus as to the substantive norm in question, but instead, discourse as to the lawmaking procedures through which discourse is to take place.

The natural objection to this second model is: how to guarantee rights and democratic accountability in practice, that is to say in a system based on government by bureaucrats?

Both the network theory and the discourse theory risk to remain on a virtual level, because they have not been effectively applied in practice.[32]

Hence the attempt of European democracies to put into practice the aspiration of a democratic model.

The quest for legitimacy can be satisfied by means of a legislative chain, filling the gap between the virtual model of participation and practical measures to guarantee it.[33] In this sense, law can be considered "a sort of sensitive seismograph, set close to the conflicts, yielding rich, even if often encoded, messages from 'reality'."[34]

Through legislative instruments it is possible to enforce participatory rights, and more generally, democratic instances:[35]

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[30] *Id.*, at 169.

[31] J. Habermas, *In the Pragmatic, Ethical, and Moral Employments of Practical Reason*, in C. P. Cronin (trans.) Justification and Application: Remarks on Discourse Ethics, at 50 (1993).

[32] It is worth saying, however, that the network model has had good results in the cooperation between competition authorities. *See* G. Roebling, S. A. Ryan & D. Sjöblom, *The International Competition Network (ICN) Two Years On: Concrete Results of a Virtual Network*, 3 Competition Policy Newsletter 37 (2003).

[33] *See* Bignami, *supra* note 20, at Foreword, at 2:

> Nevertheless, it is important to keep in mind that the descriptive characterization of the emerging system of European networks, collaborative administrative proceedings, European agencies, Commission administration, and Court of Justice and Ombudsman review is done with an eye to answering the further question of whether this apparatus satisfies certain criteria of legitimate public authority.

[34] C. Joerges, *"Deliberative Supranationalism" – Two Defences*, 8 (1) European Law Journal 133, at 134 (2002); P. Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration*, *in* J. Isensee & P. Kirchhof (Eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. VII (1992), at 855; B. Kohler-Koch, *The Evolution and Transformation of European Governance*, *in* B. Kohler-Koch & R. Eising (Eds.), The Transformation of Governance in the European Union (1999), at 14; K. H. Ladeur, Die Autonomie der Bundesbank – ein Beispiel für die institutionelle Verarbeitung von Ungewißheitsbedingungen, Staatswissenschaften und Staatspraxis 4 (1993), at 486; K. H. Ladeur, Das Umweltrecht der Wissensgesellschaft (1995); K. H. Ladeur, *Towards a Legal Theory of Supranationality: The Viability of the Network Concept*, 3 European Law Journal 33 (1997).

[35] E. D. Kidney, The Emerging Field of International Administrative Law and Justice Working Papers 1 (2001); C. Möllers, Internationales Verwaltungsrecht (2005); C. Möllers, *Verfassunggebende Gewalt – Verfassung – Konstitutiolisierung*, *in* A. Von Bogdandy, Europäisches Verfassungsrecht 50 (2003).

> the National and European law engaged in governing Europe is confronted with the same challenge faced by all institutions of European decision-making: under conditions of reasonable pluralism, the law is required to dampen conflict and promote efficacious problem solving absent a unitary (coercive) sovereign. In contrast to other institutions, however, law must find the answers to this challenge with a careful eye to the maintenance of its own normative coherence.[36]

In other words, law may really play a mediating role between theory and practice, "operating as some kind of mediating role between system of pivot or transmission belt. Law institutionalises the channels (in the form of binding norms) through which the results of the deliberative processes can become socially binding and effective."[37]

Once the fundamental 'practical' role of law has been recognised in giving content to the instance of participation, it is important to underline that law is not the only protagonist. Scholars have insisted on a degree of discretionary power in those 'institutionalised channels' in which law itself operates, describing the search for certainty through rules as a mirage.[38] In other words, there is no doubt that legislative instruments cannot alone fill the void created by the absence of democratic politics:

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[36] Joerges, *supra* note 34, at 155, who adds:

> In this context and in this sense, I have also repeatedly talked of 'good governance', particularly because the term 'Verwaltung' (administration) does not capture that (inter-) governative element that is essential to the management of the Internal Market, because the formula of 'good' governance at least expresses a normative claim intended to raise governance in the Internal Market above mere strategic negotiation-though, admittedly, without claiming to decipher conclusively the metaphor of good governance, and/or Ambrogio Lorenzetti's famous picture.

C. Joerges, *"Good Governance" in the European Internal Market: Two Competing Legal Conceptualisation of European Integration and their Syntesis*, *in* A. Von Bogdandy, Y. Mény, & P. Mavroides, (Eds.), European Integration and International Co-ordination. Studies in Transnational Economic Law – Liber Amicorum Claus-Dieter Ehlermann (2002), at 219; C. Joerges & F. Rödl, *"Social Market Economy" as Europe's Social Model?*, EUI Working Paper (2004), at 8; C. Joerges, *Wurde Europa ein Großraum? Zäsuren, Kontinuitäten, Re-Konfigurationen in der rechtlichen Konzeptualisierung des Integrationsprojekts*, *in* M. Jachetenfuchs & M. Knodt (Eds.), Regieren in internationalen Institutionen 53-78 (2002); C. Joerges & J. Neyer, *Von intergouvernementalem Bargaining zur deliberativen Politik: Gründe und Chancen für eine Konstitutionalisierung der europäischen Komitologie*, *in* B. Kohler-Koch (Ed.), Regieren in entgrenzten Räumen (1998), at 207. C. Joerges & J. Falke (Eds.), Das Ausschußwesen der Europäischen Union. Die Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung (2000); C. Joerges, Y. Mény, & J. H. H. Weiler (Eds.), What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer (2000), also available at www.iue.it/RSC/symposium/; G. Majone, *The European Community. An "Independent Fourth Branch of Government"?*, *in* G. Brüggemeier (Ed.), Verfassungen für ein ziviles Europa (1994), at 23; F. Mayer, *Die drei dimensionen der Europäischen Kompetenzdebatte*, 61 ZaöRV 577 (2001); E. J. Mestmäcker, *Auf dem Wege zu einer Ordnungspolitik für Europa*, *in* E. J. Mestmäcker, H. Möller & H. P. Schwartz (Eds.), Eine Ordnungspolitik für Europa. Festschrift für Hans v.d. Groeben (1997), at 9; I. Pernice, *Maastricht, Staat und Demokratie*, 26 Die Verwaltung 449 (1993).

[37] In this regard, M. Murphy, *Between Facts, Norms and a Post-National Constellation: Habermas, Law and European Social Policy*, 12 (1) Journal of European Public Policy 149 (2005).

[38] *See* Harlow, *supra* note 7, at 281, about Goodin's conception on discretionary power:

> Rather, the political deficit has added judges to the neocorporatist network of actors – regulators, international businessmen, bureaucrats, and politicians – who dominate post-modern governance. Simply to reconstruct the trust society is not, of course, an option. Laying the foundations of a real political Community with a rich and plural political discourse will not be easy. It is, I believe, the only way forward.[39]

To sum up, if, from a theoretical point of view, both models of network system and deliberative democracy can be considered as incisive channels to spread the instances of participation and democracy, these two sources should be definitely integrated and intertwined through the instruments provided by the EC.

The heart of the problem lies exactly here: after having considered the relevant Treaty provisions in order to find the EC's programme of harmonisation of law, is it possible to say that they are still incisive in the "Europeanisation" process? According to the analysis of some scholars, harmonisation may mean less than it first appears to mean, in the sense that "legislative intervention at EU level cannot generate precise uniformity across the legal systems to the 25 Member States."[40]

From a more optimistic and mainly more constructive point of view, it is probably true that the instruments for harmonisation are still useful, but they should be better known and organised, in order to realise a multilevel constitutionalised system, which the protagonists of integration, EU institutions, Members States, but also citizens, aim for.[41] In this vein, Pernice has observed that national orders and the EU order are "elements of a single constitutional system, obtaining their

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> Yet Goodin describes the search for certainty through rules as a mirage. Rules cannot cure the ills of discretionary power; they replicate many and substitute others. And do we really wish to live in a juridified society where every relationship is governed by rules and where litigation is all-pervasive?

See also R. E. Goodin, *Welfare, Rights and Discretion*, 6 (2) Oxford Journal of Legal Studies 232 (1986), in particular page 233:

> 'Discretion' admits of two types of characterization, one positive and one negative. On the positive characterization, an official can be said to have discretion if and only if he is empowered to pursue some social goal(s) in the context of individual cases in such a way as he judges to be best calculated, in the circumstances, to promote those goals. The negative characterization of discretion is well-represented by Dworkin's remark that 'discretion' is 'like the hole in the doughnut', which does not exist except as an area left open by a surrounding belt of restrictions. On that negative analysis, 'discretion' is a residual notion, defined in terms of its opposite: viz, official outcomes, (typically, officials' decisions) being strictly determined by rules, and rules alone.

Furthermore, R. M. Dworkin, Taking Rights Seriously 31 (1977). For critical remarks, *see also* J. Waldron, *The Rule of Law as a Theatre of Debate, in* J. Burley (Ed.), Dworkin and His Critics with Replies by Dworkin (2004), at 319.

[39] P. Craig & G. De Búrca (Eds.), The Evolution of EU Law (1999), at 281.

[40] S. Weatherill, *Harmonisation: How Much, How Little?*, 16 European Business Law Review 533 (2005).

[41] I. Pernice, *Constitutional Law Implications for A State Participating in a Process of regional Integration. German Constitution and "Multilevel Constitutionalism", in* Walter Hallstein/Institut für Europäisches Verfassungsrecht (Ed.), Grundfragen der europäischen Verfassungsentwicklung, Forum Constitutionis Europae, Band 1 (2000).

respective legitimacy from the same (European) citizens and giving the authority for legislation and public action applicable to the same people." He calls this system *Verfassungsverbund* (union of constitutions) – an expression which underlines the constitutional nature of the European process and means in fact "multilevel constitutionalism."[42]

It seems therefore wise to first shed some light on EU principles in the mentioned multilevel integration before analysing the EU Member States systems.

Following this path, although note dealing with each principle extensively,[43] the article will now focus on the analysis of the subsidiarity principle, set out in Article. B TEU and Article 3b ECT, which is considered as a 'milestone' in European law. In any case, it is worth finding new viewpoints for democratic instances: for example, by studying the subsidiarity principle in relation to the proportionality principle.[44]

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[42] *Id.*, at 15.

[43] Amongst the most important clauses, Pernice recognizes Art. F II TEU as the basis of the Community legal order itself and, in addition to the subsidiarity principle, as the basis of the normative interaction between the EU level and the national levels, through

> general principles of Community law, of the fundamental rights and values as laid down in the European Convention of Human rights, of the fundamental rights and values as laid down in the European Convention on Human Rights and established by the common constitutional traditions of the Member States.

Moreover, he refutes the so-called "clause of effectiveness", in Art. F III TEU,

> requiring the Union – which is: the Member States and the Communities taken together under the Treaty of Maastricht and, namely, under the procedure of Art. N TEU – to provide itself with the means necessary to attain its objectives and carry through its policies – makes clear that the process of European integration, the dynamics of which are also expressed in Art. A II TEU, is an integrated constitutional process.

In the end, he considers the unity of the national and Community legal orders as the

> condition and the rationale of the doctrine of 'indirect effect' of community provisions on national law. Under this doctrine, mainly applied to directives, community provisions, even if not directly applicable, are to be taken into account by national courts, by interpreting national legislation.

For this purpose, the author refers to T. C. Hartley, The Foundations of European Community Law 222 (1994). On this aspect, *see* T. C. Hartley, Constitutional Problems of the European Union (1999).

[44] The mentioned principle is one of the main tools of judicial review in the field of the Community's 'administrative' law and it appears in Article 5.3 EC, as a constitutional principle, requiring that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." *See* D. U. Galetta & D. Kröger, *Giustiziabilità del principio di sussidiarietà nell'ordinamento costituzionale tedesco e concetto di "necessarietà" ai sensi del principio di proporzionalità tedesco e comunitario*, 1998 Riv. Ital. Dir. Pubblico com. 905, at 928, who underline the relationship between the two principles of subsidiarity and proportionality: the first one is a parameter for allocating competences, the second one works as a regulative standard to control if the competences have been correctly allocated:

> nell'ordinamento comunitario [...] il principio di sussidiarietà e quello di proporzionalità risultano strettamente correlati, ma certamente non si identificano.

E. A Response to Lack of Democracy: the Subsidiarity Principle, the Role of National Parliaments and the New Control of Proportionality

Subsidiarity has been enshrined in the Article 3b of the Maastricht Treaty, for the first time as a basic principle of the European Community, explicitly guaranteeing the right of the lower government levels to act, but implicitly determining a space for the activity and the expansion of EC competencies.

In order to give meaning to the prior participation of lower government levels, the role of National Parliaments has been highlighted, connecting the subsidiarity principle with the legitimacy of power.[45]

As subsidiarity plays a significant role in this process, in easing up tensions between the EU level and the decentralised level, it was duly enshrined in the new Treaty as a fundamental principle of EC law. Furthermore, emphasis to this principle was given by the Protocol annexed to the Amsterdam Treaty in 1997, concerning the application of subsidiarity and the related concept of proportionality as key elements of democratic legitimacy and flexibility.[46]

> La differenza sostanziale fra i due principi consiste nel fatto che, se il principio di sussidiarietà funge da parametro di riferimento per il riparto di competenze tra organi e poteri, quello di proporzionalità funge invece da regolatore di intensità degli interventi.

[45] R. Macrory & S. Turner, *Participatory Rights, Transboundary Environmental Governance and EC Law*, 39 Common Market Law Review 489 (2002). Subsidiarity is defined by Article 5 EC, which states:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

About the relation between the problem of the democratic deficit and subsidiarity, *see* I. Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 Journal of Common Market Studies 281 (2006), who observes:

> I acknowledged that my working definition of the democratic deficit as an 'insufficiency of parliamentary and public scrutiny of the EU legislative process' is a simplification of a much broader and more complex debate. Yet it identifies the essence of the problem: the general shift of decision-making to the European level has deprived national parliaments of much of their traditional oversight function and oversight function of the European Parliament does not adequately make up for loss. Furthermore, the public is largely inattentive to the going-on of the EU, due to the absence of a well developed European public sphere (or a fully fledged European *demos*).

[46] A. G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 Common Market Law Review 239 (1992). Recently, about subsidiarity: N. W. Barber, *Subsidiarity in the Draft Constitution*,

In this sense, it is worth noting that the European Constitution, although it has not entered into force,[47] contains several references to the application of the principle, recalling its role of pillar in a "healthy" democracy. For instance, Article 1-47, entitled "The principle of participatory democracy" is to provide:

> 1. The Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicity exchange their views

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11(2) European Public Law 197 (2005); N. W. Barber, *The Limited Modesty of Subsidiarity*, 11 European Law Journal 308 (2005); C. Millon-Delsol, Il principio di sussidiarietà (2003), in part. 103:

> il favore di cui gode quest'idea, recepita così confusamente, mette in luce anche i procedimenti e le investigazioni del pensiero contemporaneo alla ricerca di una forma di democrazia più rispondente alle sue attese. E' alquanto incerto che l'idea di sussidiarietà possa offrire alla società contemporanea il tipo di risposta che essa attende, o ancora, il genere di risposta che essa vorrebbe e che sarebbe in grado di concretizzare. Ma è chiaro che quest'idea richiama un tipo di democrazia alquanto diversa da quella che noi conosciamo attualmente;

P. Duret, Sussidiarietà e autoamministrazione dei privati (2004); P. De Carli, Sussidiarietà e governo economico (2003); P. Vipiana, Il principio di sussidiarietà "verticale", Attuazione e prospettive (2002); P. Vipiana, *Sussidiarietà e sovranità, in* A.A. V.V., Sopranazionalità europea: posizioni soggettive e normazione, n. 7, (2000), at 178; C. Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 Berkeley Journal of International Law 359 (2002); De Búrca, *supra* note 3; G. Strozzi, *Il principio di sussidiarietà nel Trattato di Maastricht*, 75 Rivista di diritto internazionale 376 (1992); H. Bribosia, *Subsidiarité et répartition des competences entre la Communauté et ses Etats membres. Commentaire sur l'article 3B du Traité de Maastricht*, 1992 Revue du Marché Unique Européen 165; L. Vandelli, *Il principio di sussidiarietà nel riparto di competenze tra diversi livelli territoriali: a proposito dell'art. 3 B del Trattato sull'Unione Europea*, 1993 Rivista italiana di diritto pubblico comunitario 379; K. Lenaerts & P. Van Ypersele, *Le principe de subsidiarité et son contexte: étude de l'article 3 B du Traité CE*, 30 Cahiers du droit européen 86 (1994); E. Vinci, *Sussidiarietà, democrazia e trasparenza nel Trattato di Maastricht*, 1994 Jus 353; V. Harrison, *Subsidiarity in Article 3b of the EC Treaty: Gobbledegook or Justiciable Principle?*, 45 International and Comparative Law Quarterly 431 (1996); G. Majone, *"Democracy Deficit": The Question of Standards*, 3 European Law Journal, at 5 (1997); G. Majone & M. Everson, *Institutional Reform: Independent Agencies, Oversight, Coordination and Procedural Control, in* O. De Schutter, N. Lebessis & J. Paterson (Eds.), Governance in the European Union, at 129 (1997); N. Emiliou, *Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition"*, 17 European Law Review 383 (1992); F. Mayer, Kompetenzüberschreitung und Letztentscheidung. Das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires-Akte in Mehrebenensystemen (2000). About "tomistic origins" of the principle, *see* A. F. Utz, Das Subsidiaritätsprinzip (1953), especially the chapter on Die geistesgeschichtlichen Grundlagen des Subsidiaritätsprinzip, at 7 *et seq.*, especially at 13 *et seq.*; J. Höffner, Christliche Gesellschaftslehre (1983), italian translation: C. Danna, La dottrina sociale cristiana 42 (1987); O. Von Nell-Breuning, Baugesetze der Gesellschaft, Solidarität und Subsidiarität 87 *et seq.* (1990); C. Millon-Delsol, Le principe de subsidiarité, 12 *et seq.* (1993). The principle can be found then in canon law: *see* A. Dashwood, *The Relationship Between the Member States and the European Union/European Community*, 41 Common Market Law Review 366 (2004), who recalls a famous formulation of Pope Pius XI in his 1931 Encyclical, *Quadrigesimo Anno*, where he wrote: "... it is an injustice, a grave evil and a disturbance of the right order, for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies", London, Catholic Truth Society, 1936, para 79, at 31.

[47] For this aspect, *see* more properly note 3.

> in all areas of Union action. 2. The Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. [...].

Moreover, an other interesting mechanism, unfortunately up to now in name only, is the so called "early warning system" (EWS), featured by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Constitutional Treaty.[48]

In this procedure, the Commission would send each new legislative proposal directly to National Parliaments for their consideration:

> Article 4. The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments. Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to National Parliaments. Article 5. Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in case of a European framework law, of its implications for the rules to be put in place by Member States, including, when necessary, the regional legislation. The reasons for including that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.[49]

If the National Parliament decides that a measure would violate subsidiarity, it can submit a 'reasoned opinion' to the Commission, whose task is to formally review that measure whether one third of all the votes allocated by National Parliament objects to it (Article 7).

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[48] 2. Protocol on the application of the principles of subsidiarity and proportionality, in OJ C310/207, 16 December 2004, also available on website www.eur-lex.europa.eu.

[49] *See* Peters, *supra* note 2, at 61, who seems to be doubtful about the effectiveness of the provision:

> On the whole, the Draft Constitution strengthens the legitimacy potential of the national parliaments with regard to European democracy. Nevertheless, national parliaments' direct involvement faces inherent limitations arising from the inevitable complexity of the legislative process. It remains to be seen whether national parliaments will have the capacity to deal more than a fraction of European legislation. Moreover, tighter integration of the national parliaments risks in turn aggravating the lack of transparency of the process as a whole. All in all, national parliaments can most likely function as European co-legislators and co-supervisors in only a quite limited way. Their duty remains first and foremost to hold their governments to account when they take decisions at a European level – a duty which have in the past not always been willing to fulfil.

The final part of this procedure gives jurisdiction to the Court of Justice to hear actions of annulment brought by any Member State for violation of the principle of subsidiarity:

> Article 8. The Court of justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution of Member States, or notified by them in accordance with their national Parliament or a Chamber of it.

Amongst the benefits that should derive from this mechanism, if it would enter into force, some authors point out the possibility of improving compliance with EU regulation and of alleviating the democratic deficit, denouncing in any case that there is one important element missing:

> it empowers national parliaments to review EU legislation for conformity with subsidiarity but not with proportionality, its "sister principle". On closer inspection, this omission is shown not only to be flat illogical, but also likely to inhibit the kind of argument which would make the EWS effective; it ought to be ratified.[50]

At present, subsidiarity, proportionality and the new mechanisms conceived to reinforce them, have been analysed from a normative point of view. In the final part of this article, their effectiveness will be discussed based on some examples taken from EU case law.

The same question remains: may an "*ex ante* verification" of subsidiarity given to National Parliaments reinforce that feeble European breath of democracy? The crucial deficit of democracy is, in my opinion, something difficult to eradicate, since it is intrinsic to the system itself. It has been acutely observed that in Europe

> ... there is no feeling of being a nation. There is no European public opinion, except perhaps among the narrow elite who actually run the Community. If there was a European Government responsible to the European Parliament, voters would feel just as alienated as they do at present. Each nation would regard itself as being in a permanent minority: there would be no sense of belonging. Voters would not feel that the European President or Prime Minister spoke for them: they would not regard the European Government as *their* government. This is the dilemma of European democracy.[51]

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[50] *See* Cooper, *supra* note 45, at 283.

[51] Hartley (1999), *supra* note 43, at 21, who outlines that this has been pointed out by a number of writers, for example A. Dashwood, *States in the European Union*, 23 European Law Review 201 (1998); *see also*, Dashwood, *supra* note 46, at 368, in which he does not hesitate to express his personal agreement for the described EWS system of the Constitution approved in 2004, where National Parliaments play a very important role in the law making process: "it was [...] in my view a correct insight of the Convention that the best way of giving teeth to the subsidiarity principle would be to reinforce the pre-adoption scrutiny of legislative proposals, by formally involving national Parliaments in the process." *See also* F. Capelli, *Il sistema istituzionale dell'Unione Europea come fondamento di una nuova forma di democrazia*, 2004 Diritto Comunitario e degli scambi internazionali 221.

F. Joined Cases C-154/04 and C-155/04 (Food Supplements): Are Subsidiarity and Proportionality Really Instruments for Decentralisation?

The main characteristics of subsidiarity and proportionality are well exemplified by the decision of the Court of Justice, Grand Chamber in Joined Cases C-154/04 and C-155/04 of 12 July 2005. The attitude of the Court towards the principles clearly emerges. Before briefly analysing the framework of the Decision, it is worth mentioning that this Decision is in line with the general tendency of the Court of Justice case law. In this regard, it has been pointed out that

> [...] while the justiciability of the principle cannot any longer be doubted, the case law indicates equally clearly that annulment of a measure on the grounds that it offends subsidiarity is likely to occur only in extreme circumstances. The Court of Justice is understandably reluctant to apply in a robust way a principle which is so heavily political.[52].

In other words, the author stresses how difficult the task of judges is, as they have deal with matters of a delicate and political nature.
Joined Cases C-154/04 and C-155/04 concerned the validity of Articles 3, 4, and 15 of Directive 2002/46/CE of the European Parliament and of the Council of June 2002 on the approximation of the laws of the Member States relating to food supplements.

According to the first recital of the preamble to the directive, there is in fact an increasing number of products marketed in the Community as foods containing concentrated sources of nutrients and presented for supplementing the intake of those nutrients from the normal diet.

In order to ensure a high level of protection for consumers and facilitate their choice, the product that will be put on to the market must be safe and appropriately labelled. This should have been the task of Member States: to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by July 2003.

The claimants (two trade associations representing around 580 companies, the majority of which were firms which distributed dietary products in the United Kingdom) maintained that the provisions of the Directive were incompatible with Community law and had consequently to be declared invalid. Amongst the reasons of invalidity, they pointed at the infringement of the principle of subsidiarity and of proportionality. In both cases, the claimants submitted that the provisions interfered with the power of Member States in a sensitive area involving health, social and economic policy.

But the Court firmly disagrees with this reconstruction, recalling – on the contrary the definition of subsidiarity, which is to provide

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[52] Dashwood, *supra* note 46, at 368.

> [...] that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[53]

Moreover, the Court adds that

> Paragraph 3 of the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty, states that the principle of subsidiarity does not call into questions the powers conferred on the Community by the Treaty, as interpreted by the Court of justice". Hence, the conclusion according to which "the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions of its establishment and functioning by eliminating barriers to free movement of goods and the freedom to provide services or by removing distortions of competitions.[54]

Thus, the reason behind the prohibition on marketing food supplements which do not comply with Directive 2002/46 may be found, according to the Court, in the "objective of removing barriers resulting from differences between the national rules, whilst ensuring a high level of human-health protection. Briefly, to leave Member States the task of regulating trade in food supplements, which do not comply with Directive 2002/46 "would perpetuate the uncoordinated development of national rules, and consequently, obstacle to trade between Member States"[55].

The objective pursued by Article 3 cannot be satisfactorily achieved by Member States and could be better achieved at Community level. Furthermore, the Court affirms that neither an infringement of the proportionality principle

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[53] Para 101.

[54] Para. 103. The leading case is: European Court of Justice, the *Queen v. Secretary of States for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, Judgment of 10 December 2002, Case C-491/01, [2002] ECR I-11453. *See* O. Fiumara, *La nuova normativa comunitaria sulla lavorazione, presentazione e vendita dei prodotti del tabacco (direttiva 2001/37/CE)*, 2002 Rassegna dell'avvocatura dello Stato 34; M. Selmayr, H. G. Kamann & S. Ahlers, *Die Binnenmarktkompetenz der Europäischen Gemeinschaft*, 14 Europäisches Wirtschafts- & Steuerrecht 49 (2003); B. Wägenbaur, *Tabak, Ende der Diskussion oder Diskussion ohne Ende?*, 14 Europäische Zeitschrift für Wirtschaftsrecht 107 (2003); T. Von Danwitz, Tabakwerbeverbot, die Zweite!? (2003); J. Gundel, *Die Tabakprodukt-Richtlinie vor dem EuGH: Zur Zulässigkeit der Nutzung doppelter Rechtsgrundlagen im Rechtssetzungsverfahren der Gemeinschaft*, 1 Europarecht 100 (2003); C. Würfel, *"Tabak" – zum zweiten Mal auf dem Prüfstand*, 2003 European Law Reporter 148; with a note of J. M. Belorgey, S. Gervasoni & C. Lambert, 2003 L'actualité juridique; droit administratif, at 380; A. Alemanno, *In margine alla sentenza British American Tobacco: continua la saga "Unión de Pequeños Agricultores-Jego-Quéré"?*, 9 Il diritto dell'Unione Europea, at 183 (2004). C. Hillion, *Tobacco Products in the Internal Market*, 63 The Cambridge Law Journal 297 (2004); F. Ippolito, *Sussidiarietà e armonizzazione: il caso British American Tobacco*, 9 Il diritto dell'Unione Europea, at 633 (2004). For a complete framework about proportionality principle in foodstuff matters, *see also* F. Spagnuolo, *Il principio di proporzionalità come parametro di legittimità nelle sentenze della Corte di Giustizia sulle normative nazionali relative alla circolazione delle merci e alla tutela dei consumatori*, 2003 Rivista it. dir. pubblico com. 1544.

[55] Para 106.

may be recognised, because the measures of Directive 2002/46 are "appropriate for achieving the intended objectives."[56] This decision does not differ from the Opinion of Advocate General Geelhoed delivered on 5 April 2005:

> 93. The question therefore is whether the objective of the Directive could be better achieved at Community level. 94. [...] the Directive's objective is to eliminate barriers to intra-Community trade in food supplements raised by existing differences of national rules regarding the composition, manufacturing specifications, presentation or labelling of food, whilst ensuring a high level of health and consumer protection in accordance with Article 95(3) EC. 95. Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as is also demonstrated by the many complaints received by the Commission and by the case-law of the Court.[57]

In this sense, European judges provide a screening which is perfectly in accordance with case law,[58] from which the caution of the Court emerges to manage these principles "so heavily political", under the cover of "coordination of development."

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[56] The case law about the proportionality principle and its interaction with the precautionary principle is numerous, for a detailed comment *see* K. Lenaerts, *"In the Union We Trust": Trust-Enhancing Principles of Community Law*, 41 Common Market Law Review 317 (2004), who recalls Case C-180/96, *United Kingdom v. Commission*, [1998] ECR 1-2265; Case C-352/98, *P. Laboratoires pharmaceutiques Bergaderm v. Commission*, [2000] ECR I-5291; Case C-3/00, *Denmark v. Commission*, [2003] ECR I-2643. *See also* Case C-236/01, *Società Monsanto Agr. It. c. Presidenza del Consiglio dei Ministri*, Dir. e giustizia (2004), at n. 4, 112 (s.m.); Ragiusan 178 (2004), n. 237-8, 178; IV Foro It. 254 (2004); P. Dabrowska, *GM Foods, Risk, Precaution and Internal Market: Did Both Sides Win the Day in the Recent Judgement of European Court of Justice?*, 5 www.germanlawjournal.co (2004), at n. 2. For further details, R. Pavoni, Biodiversità e biotecnologie nel diritto internazionale e comunitario 436 (2004); on respecting the principle of proportionality when the precautionary principle is applied *see also* R. Ferrara & I. M. Marino, Gli organismi geneticamente modificati (2003); F. Albisinni, *Voce "Sistema agroalimentare"*, 2003 Dig. Disc. Priv., Sez. Civ., at 1244; F. Albisinni, *Nuove regole di impresa nel sistema europeo di diritto alimentare*, 2004 Riv. Dir. Agrario; D. Gorny, L'autorità per la sicurezza alimentare, ivi (2004); L. Costato, (dir. da), Trattato di diritto agrario nazionale e comunitario (2003); L. Costato, *Dal mutuo riconoscimento al sistema europeo di diritto alimentare: il regolamento 178/2002 come regola e come programma*, 2003 Riv. Dir. Agrario 289; L. Costato, Compendio di diritto alimentare (2002); R. Vitolo, Il diritto alimentare nell'ordinamento interno e comunitario (2003); L. Marini, *Principio di precauzione, sicurezza alimentare e organismi geneticamente modificati nel diritto comunitario*, 2004 Diritto Un. Europea 16; A. Barone, *Organismi geneticamente modificati (Ogm) e precauzione: il "rischio" alimentare tra diritto comunitario e diritto interno*, 4 Foro It. 246 (2004); E. Rook Basile, *La sicurezza alimentare ed il principio di libera concorrenza*, 2004 Riv. Dir. Agrario 308; F. Macrì, *Tutela dei prodotti agricoli e libera circolazione delle merci nella giurisprudenza comunitaria,* 2003 Diritto Un. Europea; B. Mandeville, *L'Autorité européenne de sécurité des aliments: un élément clef de la nouvelle législation alimentaire européenne*, 2004 Riv. Dir. Agrario 142; F. Snyder, *Sécurité alimentaire et gouvernance de la mondialisation, in* J. Bourrinet & F. Snyder (Eds.), La sécurité alimentaire dans l'Union européenne, 7 (2003) & L. Azoulay, *La sécurité alimentaire dans la législation communautaire, in* J. Bourrinet & F. Snyder (Eds.), La sécurité alimentaire dans l'Union européenne, at 45 (2003).

[57] [2005] ECR I-1135.

[58] *Ex multis*, Judgment of the Court of 13 May 1997, *Federal Republic of Germany v. European Parliament and Council of the European Union*, Case C-233/94, [1997] ECR I-012405, with note of M. Dreher & K. Neumann, 1997 Entscheidungen zum Wirtschaftsrecht 159; S. Wernicke, 1997

It is remarkable how attentive the Court of Justice is not to invade the political sphere of subsidiarity, whose boundaries are set out in Article 3b ECT. For this reason I do not entirely agree with the apprehension about the role of the Court of Justice and the connected risk of a 'judicialization' of the concept, after the system has been instituted by the Protocol of Convention.

If the disaffection of large parts of European citizenry towards the European integration process is based on the lack of perceptible political issues,[59] this disaffection itself will not be cured by limiting judiciary power.[60] If it true that integration is based also on a citizen's trust in politics, it will probably not be undermined in case of intervention by the judiciary. On the contrary, it tends to be more objective and technical in verifying the effectiveness of the principles of the EU Treaty.[61]

G. Conclusions

By analysing all the factors which contribute to the establishment of the European system, it becomes evident that the creation of democracy has still to be defined as a 'work in progress', considering that a

> regime may, without abusing the term, be called democratic as long as the various interest groups have the opportunity to influence the process of decision-making at any of its various levels, and as long as various groups can trigger diverse mechanism of control of the government – even if government decisions may not be the expression of an electoral majority.[62]

Europäische Zeitschrift für Wirtschaftsrecht 442; M. Schoener, *Gesetzgebungskompetenzen der Gemeinschaft nach dem Urteil des EuGH zur Einlagensicherungsrichtlinie*, 1997 Europäisches Wirtschafts- & Steuerrecht 366; M. Volmer, *Das EuGH-Urteil zur Einlagensicherungsricht vom 13.5.1997 – Rs. C-233/94*, 1998 Europäisches Wirtschafts- & Steuerrecht 54; W.-H. Roth, *Case C-233/94, Federal Republic of Germany v. European Parliament and Council of the European Union, Judgment of 13 May 1997, [1997] ECR I-2405*, 38 Common Market Law Review 459 (1998); M. Van Empel, *The Directive on Deposit-Guarantee Schemes and the Directive on Investor Compensation Schemes in View of Case C-233/94*, 1998 European Financial Services Law 143.

[59] T. Koopmans, *Subsidiarity, Politics and the Judiciary*, 1 European Constitutional Law Review 115 (2005).

[60] *See* Galetta & Kröger, *supra* note 44, at 929. *See also* R. Caranta, Giustizia amministrativa e diritto comunitario 142 (1992).

[61] *See* Amato, *supra* note *, at 361, who offered a spectrum of the possible future role of ECJ:

> there has been discussion about the ECJ's role in monitoring the new separation of the Union's powers from those reserved for member states. Should the ECJ's control be political as well as judicial? And in the latter case, how should be structured? On the first issue, the initial debate within the convention has revolved around whether use of the principle of subsidiarity should be used primarily as a political tool in the hands of parliaments or of bodies in which they are represented; or, whether it should be deployed through judicial control as it is in the constitutional jurisprudence of many member states. The European Parliament supports this latter alternative on the basis of the Lamassoure report [...].

[62] Peters, *supra* note 2, at 41, who underlines that the label 'democracy' does not matter so much, but serves material objectives:

Economic analysis, philosophical and sociological principles, and most of all, the cooperation and interaction amongst EU institutions, Member States and citizens, are put to use in the decision-making process, in order to guarantee the highest standard of transparency and participation. And the development of democratic instances should go on, regardless whether the Constitutional Treaty will be ratified or not. In this light, the analysis offered by Professor Jürgen Schwarze is remarkable, as he urges trust in the Constitutional Treaty. He gives an example to support this hope, presented in a case before the European Ombusdman,[63] about the question as to whether the Council should meet in public whenever it acts as a legislative body:

> the complainants in this case [...] explicitly referred to Article 50(2) of the Constitutional Treaty not yet in force according to which the Council shall meet in public when considering and voting on a draft legislative act. This example reveals the importance of the Constitutional Treaty even though it has not been ratified.

That is to say, the Constitutional Treaty is already a source of interpretation of law:

> under all these circumstances there still seems to be hope for the Constitutional Treaty to succeed in one form or another. Therefore it is necessary to make an effort and improve the basic conditions, under which the Treaty could be ratified, for instance by the affirmative actions mentioned before. These measures might change the negative attitude of the European Public vis-à-vis the EU.[64]

In a certain way, the 'material' Constitution, based on the common core of the *acquis communautaire* has already entered into force.[65] Its role of source of interpretation of EU law certainly attests it.

Whatever label is given to the actual process of European integration, either economic democracy or multilevel cooperation, there is no doubt that it concerns a phenomenon that, although completely new in the institution's development, should not forget the teachings of the past, and be aware of standing on the shoulders of giants.

> the proposal to combine majority voting with consensual decision making and to supplement an inherently deficient parliamentary control by other, decentralized organisms of public control is intended to strengthen the moral autonomy and self-determination of the citizens, to deepen their understanding of public affairs, to protect individuals' and create a pool of expertise.

For a detailed reconstruction of Constitutional Treaty, *see* A. Von Bogdandy, *The Prospect of a European Republic: What European Citizens Are Voting on*, 42 Common Market Law Review 913 (2005).

[63] Special Report of the Ombusdman, 4 October 2005, complaint 2395/2003/GG.

[64] J. Schwarze, *The Treaty Establishing a Constitution for Europe – Some General Reflections on its Character and its Chances of Realisation*, 12 European Public Law 199, at 211 (2006), who ends his article with the hope of realizing that '*Paix perpétuelle*' drafted by the Abbé de Sainte Pierre, towards which J. J. Rousseau looked, in Estrait du projet de paix perpétuelle de Monsieur l'Abbé de Saint-Pierre (1762). This is not far removed from the Kant project of Perpetual Peace, which inspired the best writings of J. Habermas.

[65] On this aspect *see also* G. Palombella, *Whose Europe? After the Constitution: A Goal-based Citizenship*, 1 International Journal of Constitutional Law 357 (2003).