

Intertwined sovereignties and the problem of legitimate opposition in the European Union*

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1. Introduction

Every member state of the European Union (EU) must be a democracy, or it will not be allowed to join in the first place. In a democracy, an alternative government with alternative policies is seen as a *legitimate* option. Parties currently in opposition must have a chance to defeat the incumbent government in the next election. Such a shift in power must be possible, moreover, without it being necessary to change the constitution first.

In the case of the European Union, however, the member states and their sovereignties are *intertwined*. As a consequence, the idea of legitimate opposition is waning.² At the level of the Union, there is no practical alternative to the broad coalition made up by the governments of the member states. Furthermore, the core institutions of the European Union, like the European Commission and the European Court of Justice, are supposed to continue their operations untouched by any changes in the composition of the majority in the European Parliament.

Political scientists are accordingly debating³ whether the waning of opposition at the European level is acceptable. Can there be a different and better combination of member-state and European constitutionalism?

My own argument in this debate proceeds in three steps. I start by describing the actual living constitution of the European Union, in light of the difference between member-state and European constitutionalism. I then proceed to clarify three major recommendations offered by

* This is a slightly revised version of my chapter 'European transnational constitutionalism: end of history, or a role for legitimate opposition?', in E. Özdalgı and S. Persson (eds.), *Contested sovereignties – forms of government and democracy in Eastern and European perspectives* (Tauris, London, 2010) at pp. 211–222.

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² Seminal references are O. Kirchheimer, 'The waning of opposition in parliamentary regimes', 24 *Social Research* (1957) at pp. 127–156 and P. Mair, 'Political opposition in the European Union', 42:1 *Government and Opposition* (2007) at pp. 1–17.

³ Helpful overviews can be found in: J. H. H. Weiler, 'The political and legal culture of European integration – an exploratory essay', 9:3–4 *International Journal of Constitutional Law* (2011) at pp. 678–694; P. Anderson, *The new old world* (Verso, London, 2011), and a symposium on that book with interventions by P. Schmitter, A. Supiot, J.-W. Müller, P. Anderson and W. Streeck, 73 *New Left Review* (2012) at pp. 19–71.

political scientists on how to address the current constitutional predicament. Finally, I pose what I consider to be the core normative question of legitimate opposition as an alternative to accountability avoidance and end by restating my argument.

2. Member State and European constitutionalism – what is the difference?

Historically, constitutionalism was a politically neutral affair, and it only pertained at the level of the member state. “We the people” organised ourselves in such a way that the *procedure* was plain by which “we” could acquire a new parliament, an alternative government, and a different head of state. In addition, the constitution laid down rules safeguarding civil rights: *e.g.*, freedom of association, freedom of religion, and freedom of speech. In some countries, there were also constitutional provisions for the protection of ethnic and cultural minorities.

But in the transnational context of the European Union, as it manifested itself from the 1950s, the concept of constitutionalism took on a further meaning. Now it came to mean that the member state governments – as a consequence of their Union membership – imposed a collective straitjacket on themselves as to the *content* of public policy. The effect of this collective straitjacket is to hamper the pursuit of social and economic policies which are not in accordance with the general European Union clause prescribing freedom of movement for capital, goods, services, and labour.

The governments of the member states did not, however, change their national constitutions so as to accord with the general clause on freedom of movement. As a result, the EU is only able to implement European law sporadically, and in spheres where national resistance is moderate or non-existent. Hence, the impact of the living constitution of the Union is less foreseeable than it ought to be according to the principle of predictability. Indeed, it is notoriously difficult to know whether European law is applicable in a given case or not.

What we got, in practice, was a constitutional system which is transnational *and* biased in favour of market liberalism. Before EU membership, member state constitutions were considered to be politically neutral rules of the game. In the case of European transnational constitutionalism, however, neutrality does not apply. Political content and constitutional procedure are looked upon as two sides of the same coin. Or, to put it differently, the distinction between *ordinary* politics and *constitutional* politics is blurred.

Without simplifying too much, we can say that there is fundamental agreement about how to describe and explain the actual workings of the present-day European constitutional system. The debate is not so much on the empirical as on the normative side. Is the present order to be preferred to its alternatives? Or do the best available arguments rather point in the direction of constitutional reform? And if the latter is the case, in what way and in what direction should the intertwining be changed?

Most political scientists are in basic agreement about how the European Union actually works, and about what factors give life and history to the real (as opposed to the formal)

European constitution. The empirical aspect is certainly worth discussing. However, it is far less controversial than the normative issue. By contrast, researchers are very far apart on what to recommend when it comes to constitutional reform.

Empirically, there are two sorts of tension at work here. We might refer to the first as the *horizontal* one: *i.e.*, the tension between left and right. The second is the *vertical* one, *i.e.*, the tension between Union precedence and member state self-determination.

As to the horizontal aspect, all member states consider themselves to be mixed economies or welfare states. Within each member state, moreover, the fundamental pattern is the same. As voters, citizens decide who is to represent them in parliament and exercise legislative and executive power on their behalf. As consumers of goods and services (including media services), they decide for themselves. As investors and trade-union members, they decide the distribution of market powers – a distribution that functions in a countervailing fashion *vis-à-vis* the preferences expressed in general elections based on universal suffrage and freedom of information.

The optimal mix between left and right is not written into the formal constitution. It is the concrete result of the continuous struggle between political forces. The real constitution is “living” in the sense that citizens are never entirely satisfied in any of their respective roles: not as voters, not as consumers, not as investors. They accept the actual policy outcome as something second-best – as the result of a striking of an acceptable balance.

Citizens on the left do not find all of their preferences fulfilled. Nor do citizens on the right. Irrespective of where they stand on the spectrum, however, they feel they can live for the time being with the temporary equilibrium which has emerged. They accept the constitution as something given, and continue pushing for a different balance – by lobbying persons in power, by seeking to influence public opinion, and by working for a different result in the next election.

As to the vertical tension between the suprastatist principle of freedom of movement for capital, goods, services, and labour on the one hand, and the principle of national self-determination and democracy on the other, the political predicament is of another kind. In theory, the suprastatist principle has precedence: it could be used to trump every conceivable piece of national legislation, and every single instance of fiscal redistribution. In practice, however, the European Union does not work that way.

It is true that most markets for capital and goods have been made European, in the sense set out in the formal Union treaties. The markets for services and labour, however, have not been treated in the same way. In practice, the suprastatist principle is applied to them only partially. This is because the markets for services and labour are much closer to the individual needs and preferences of citizens and families.

The legislation promulgated by the member states is based on universal suffrage; accordingly, freedom of information and freedom of organisation cannot be suppressed by the free trade doctrine as easily as the various regimes for capital and goods can be. In obvious defiance of the suprastatist free trade regime, member states have license-financed public service media, tax-subsidised public housing, tax-subsidised public and private hospitals, public selling of liquor and pharmaceuticals, public control of rents, and national policies for the production of nuclear energy. The four freedoms have only been adopted up to a point. In areas where European law is unable to reproduce its own legitimacy, they yield to other considerations.

In other words, what we have is a living European constitution in two dimensions. Within that two-dimensional construct, the many different actors continuously strike a reasonable balance. That balance is struck between left and right, on the one hand, and between national self-determination and a constitutionalised free trade regime for capital, goods, services, and labour on the other.

Individuals, firms, politicians, trade unions and administrators act and argue in terms of what jurists call *proportionality*: *i.e.*, the question is whether a certain piece of national legislation – when it is contrary to the general European Union clause on freedom of movement – stands in reasonable proportion to what is to be achieved in terms of social protection and citizenship.

In its vertical dimension, the living constitution of the European Union is ruled by what we might call “a constitutional balance of terror”.⁴ The European Court of Justice, and the EU’s legislators too, realise perfectly well that they can destroy the trust of citizens in the Union by applying too rigorously the precedence of freedom of movement for capital, goods, services, and labour. The electorates and governments of the member states can only be expected to acquiesce to the precedence of European law if the suprastatist regime respects the principle of national self-determination in areas which are politically sensitive – such as foreign policy, labour legislation and welfare provision.

The practical and everyday import of the constitutional balance of terror is that much of ordinary politics is handled in terms of proportionality. A wide range of political issues – whether central laws or secondary legislation – are discussed in terms of what is to count as a reasonable and proportionate national interest capable of balancing the general clause on freedom of movement formally stipulated in the Union treaties. In practice, it is this kind of semi-political and semi-juridical contestation that gives life and history to the actual constitution of the European Union.

According to this standard interpretation, the European Union general clause on freedom of movement is not to be implemented within a larger sphere than that within which it can

⁴ S. Gustavsson, ‘The living constitution of the EU’, in B. Kohler-Koch and F. Larat (eds.), *Efficient and democratic governance in the European Union* (Mannheim Centre for European Social Research, 2008) at p. 332.

reproduce its own legitimacy.⁵ Its application is restricted by an informal pact of mutual confidence, or, put differently, by a constitutional balance of terror. One cannot predict European law simply by studying treaties and constitutions. In practice, namely, the interpretation given it depends on a delicate and shifting political balance. Loyalty towards the Union on the one hand, and respect for national autonomy and democracy on the other, work as countervailing powers in a way which tends to be detrimental to the need for clarity and predictability.

To sum up my argument so far, what distinguishes the national from the transnational living constitution is how *ordinary* politics is related to *constitutional* politics. At the national level, left and right agree on procedure and disagree on policy substance. The European living constitution, by contrast, is a system where the horizontal issue of left and right is not kept separate from the vertical issue of where European rather than national law should apply.

At the European level, the procedural and substantive aspects are blurred. Consequently, the living constitution of the Union – as compared with those of its member states – tends to make public decision-making less predictable. Intertwining sovereignties makes it more unclear who governs what, when, how and for what purpose.

3. Three normative recommendations

Within the broad menu of conceivable *normative* recommendations regarding this loss of predictability, there are two theoretically pure – and in a pragmatic sense extreme – positions. The first is federalism; the second is confederalism. According to both, the fundamental structure of the Union is unstable, and in the long run unsustainable.

The proponents of these two pure positions are highly critical of the constitutional balance of terror that characterises the living constitution. They take particular aim at what we may call the *double* asymmetry of the Union. The first asymmetry is the procedural democratic deficit: *i.e.*, the fact that the power to legislate is centralised while electoral accountability is not (at least not to the same extent). The second asymmetry, which is intertwined with the first, relates to political content: policies for the market and the currency are centralised, while those for positive integration are not. Positive policies are those aimed at mitigating the social consequences arising from the free movement of capital, goods, services, and labour. The four freedoms form part of the basic treaties; social policies do not. The latter are much more difficult to handle at the European level than are regulatory policies for a negative integration marked by deregulation and the creation of a single market.

In the view of full-fledged federalists, social and fiscal policies should be made supranational too, and the European Parliament should be given the same constitutional status as the German Bundestag. Consistent confederalists, for their part, make the same analysis, and

⁵ S. Gustavsson, 'Putting limits on accountability avoidance', in S. Gustavsson, C. Karlsson and T. Persson (eds.), *The illusion of accountability in the European Union* (Routledge, London, 2009) at pp. 41–45.

stake out an equally pure position. The suprastatist parts of the living constitution, as they see it, must be re-nationalised, thus making the Union symmetrical through movement in the opposite direction. In other words, full-fledged federalists and consistent confederalists are in full agreement that democratic accountability and actual decision-making ought to take place on the *same* constitutional tier – either at the national level or at the federal level. One might call this the either/or criterion.

As judged by the either/or criterion, EU decision-makers are not held to account on the appropriate level. Exponents of the two purist critiques take aim, from both ends, at defenders of the constitutional *status quo* in the middle. These defenders make a wide variety of policy recommendations. However, they have one thing in common. In practice, that is, they favour retaining the established asymmetrical solution to the problem of how national self-determination is to be combined with partial federalism.

Within this broad area between federalism and confederalism, three schools of thought can be fruitfully distinguished. All of them refuse federalism as well as confederalism. From a less radical point of view, they are all concerned with what to do about today's living constitution – with its double asymmetry, monetary union without fiscal union, and constitutional balance of terror. In a compressed and stylised way, the core assumptions of these three schools may be described as follows:

3.1. *This is the end of history!*

According to this first of these three intermediary views, the founding fathers of the Union created something admirable, and there is nothing to be worried about. Such is the basic attitude of end-of-history champions of the living transnational constitution of today. The tension built into the constitution does not cause these scholars to lose any sleep. On the contrary, they consider it to be a real hit, historically and globally speaking.

According to Giandomenico Majone⁶ and Andrew Moravcsik,⁷ namely, we should emphasise the fact that, historically speaking, Europe has been highly innovative. In the course of one hundred years, Europe has produced two political innovations of great historical importance. The first is the mixed economy, in the horizontal dimension; the second is the mixed polity, in the vertical one.

The mixed economy enabled us to avoid totalitarianism, and the mixed polity made it possible to combine a truly free market with democratic arrangements in respect of social legislation and fiscal redistribution within each member state. The mixed economy, furthermore, works

⁶ G. Majone, *Dilemmas of European integration – the ambiguities and pitfalls of integration by stealth* (Oxford University Press, 2005); G. Majone, *Europe as the would-be world power – the EU at fifty* (Cambridge University Press, 2009).

⁷ A. Moravcsik, 'The European constitutional settlement', 3:1 *The World Economy* (2008) at pp. 157–182; A. Moravcsik, 'The myth of Europe's "democratic deficit"', 6 *Intereconomics* (2008) at pp. 331–340; A. Moravcsik, 'Europe after the crisis', 91:3 *Foreign Affairs* (2012) at pp. 55–68.

best when it is paired with a mixed polity; while the mixed polity finds supreme expression within the doubly asymmetrical living constitution of the EU today – with its Europe-wide constitutionalisation of the free market. From the standpoint of market liberalism, namely, the protections afforded the free market by the Union offer a much better solution than does the risky business of a mixed economy country by country.

In other words, double asymmetry, monetary union without fiscal union, and a constitutional balance of terror are not to be considered problematic. Instead, we should be happy to have found such a well-functioning constitutional settlement. The only risk over the long run is the one posed by the tendency of European intellectuals and politicians to discuss the issue in terms of a democratic “deficit”. The underlying criterion of that idea is basically out of touch with today’s political realities in the Western world.

By global and historical standards, the *status quo* works well. It should not be disturbed by theoretical and philosophical considerations pointing in another direction. We should rather concentrate on understanding the Union the way it has been constructed, with an eye to making it work even better and to demonstrating its advantages to the rest of the world. In practice, this means that we should not believe in the possibility of transferring the welfare state to the European level. That is a “mirage”⁸ to be avoided.

If the Union “ain’t broke, don’t fix it”. That is the basic notion behind the end of history position. There is simply no other need for reform than the continuous small improvements which are needed in order to bring about a better public understanding.

3.2. *We must politicise!*

Alternatively, the founding fathers of the Union made an historic mistake. Two distinct positions can be found among political scientists who do not buy the notion that present constitutional arrangements represent the end of history.

According to the first of these two critical positions, the solution to a wide range of social, economic, and cultural tensions is *politicisation*. Cleavages based on religion, class, culture, and ethnicity can only be overcome by recognising them as legitimate, and by allowing the intellectual and political differences associated with them to be fought out in terms of a basic and clear-cut left and right controversy.

Due to the weak political contours of European institutions, however, it is far from obvious where European law applies; nor is it obvious in what areas the member states can decide for themselves. Unless European legislation is adopted after a regular confrontation along party lines at the European level – in the same way as it currently takes place nationally – citizens will be unable to trust it. Thinking and acting in terms of basic left and right controversy is

⁸ Majone, *Europe as the would-be world power*, *supra* note 6, at pp. 128–150.

suppressed at present, but under the political surface it does indeed exist. It should be brought out into the open.⁹

In his book, *What's wrong with the European Union and how to fix it*, Simon Hix presents a programme for encouraging a “limited democratic politics” at the Union level. His main points include a “winner-takes-more” model in the European Parliament, with the president of the Parliament being chosen on a full-time basis for five years, and the purely proportional system for the allocation of committee chairs being replaced by a system giving larger political groups a greater number of chairs.

Similarly, the European Council should be transformed into a proper and fully transparent legislature. There should also be an open contest for the Commission presidency, with candidates having declared their political affiliation in terms of left and right. Taken together, Hix argues, such changes would have a dynamic effect, and be followed by a trend over the long run towards a totally politicised European Union. If the “life” component of its living constitution came to resemble that of national level politics more closely, the system as a whole would work much better.

3.3. Take every conceivable precaution in order to avoid a constitutional meltdown!

According to proponents of this second type of critique against the end of history hypothesis, the assertion that the founding fathers of the Union made an historic mistake is also a reasonable value judgment.

The appropriate response, however, is neither enthusiasm nor democratic activism, but rather *extreme constitutional caution*. Such an attitude is necessary if devastating outbreaks of right-wing nationalism and populism are to be avoided. This is the second main position among researchers who are critical of the end of history hypothesis. Unlike Jürgen Habermas and Simon Hix, however, they do not think that politicisation is the way to go. Experiences with fascism and right-wing populism in Italy and Germany form the especial historical backdrop for some of the most prominent representatives of this school.¹⁰

When Stefano Bartolini and Fritz Scharpf defend the constitutional *status quo*, they do so on the basis of an analysis diametrically opposed to that of the market liberals and the democratic activists. The combination of double asymmetry, monetary union without fiscal union, and a

⁹ J. Habermas, *Zur Verfassung Europas – ein Essay* (Suhrkamp, Berlin, 2011); S. Hix, *What's wrong with the European Union and how to fix it* (Polity Press, Cambridge, 2008).

¹⁰ S. Bartolini, *Restructuring Europe – centre formation, system building, and political structuring between the nation and the European Union* (Oxford University Press, 2005); S. Bartolini, *Should the Union be 'politicised'? – prospects and risks*, Notre Europe, Paris, Policy Papers 19, 2006; S. Bartolini, 'Taking "constitutionalism" and "legitimacy" seriously', in A. Glencross and A. H. Trechsel (eds.), *EU federalism and constitutionalism – the legacy of Altiero Spinelli* (Lexington Books, Lanham, MD, 2010) at pp. 11–31; F. W. Scharpf, *Governing in Europe* (Oxford University Press, 1999); S. Bartolini, *Community and autonomy – institutions, policies and legitimacy in multilevel Europe* (Campus Verlag, Frankfurt am Main, 2010) at pp. 317–391.

constitutional balance of terror does not fill their heart with joy. However, they see no feasible alternative to this unstable constitutional equilibrium. Nothing else is available which is better or as good. One could say that these scholars argue in a way well-known from environmental policy. That is, they plead a *precautionary* principle designed for the vertical aspect of the transnational living constitution. We should not think only in terms of costs and benefits, they argue. We must also keep a worst-case scenario in mind.

In the national-level living constitution, to be sure, left and right vie for the mastery. In practice, however, both sides benefit from an element of mutual trust which – within the historically given borders and the commonly accepted rules of the game – is self-reinforcing. But, Bartolini and Scharpf caution us, a politicisation of the vertical dimension will probably not work that way. The chances are that, as soon as a common European solution to a problem cannot be presented as Pareto-optimal, citizens will start asking a politically sensitive and potentially explosive question: why, and on what grounds, are people living in “other” countries entitled to legislate on “our” behalf?

Democratically accountable politicians will find it hard to give a good answer to that question. It is for this reason, Bartolini and Scharpf argue, that European legislation and adjudication should remain apolitical. Horizontally (*i.e.*, within each member state) citizens are prepared to accept majority rule, because the minority took part in the preceding legislative preparations, and their parties can imagine becoming a majority after the next coming election. Vertically, however, citizens cannot be active in the preparation of legislation in the same way.

Since the most important legislative issues – especially the trumping principle of freedom of movement – are constitutional ones, citizens will not so readily consider majority decisions to be legitimate. This is why Bartolini and Scharpf are so afraid that a system of European majority rule will provoke outbreaks of devastating right-wing populism in the electorate.

Such tendencies will arise, in their view, if the suprapstate goes too far towards legislating and adjudicating in a way that is detrimental to feelings of national self-respect. It is therefore critical, in connection with vertical European legislation and adjudication, that we never lose contact with the underlying informal principle that vertical loyalty upwards is bought at the price of respect for national self-determination downwards.¹¹

4. Why is legitimate opposition preferable to accountability avoidance?

The end of history position is under double attack. On the one hand we have those who advocate politicisation as a way of making the precedence of European law more accepted. On the other hand we have those who advocate an extreme caution in order not to provoke a

¹¹ F. W. Scharpf, ‘Autonomieschonend und gemeinschaftsverträglich – zur Logik einer europäischen Mehrebenenpolitik’, in F. W. Scharpf, *Optionen des Föderalismus in Deutschland und Europa* (Campus Verlag, Frankfurt am Main, 1994) at pp. 131–155.

constitutional melt-down.

There are basically two lessons to be drawn from comparing these three positions in the debate on the future of the European living constitution. One first lesson is that our understanding of the living constitution of the European Union is enhanced if we interpret the question as a *two dimensional* issue. Considering the elements of life and history in the constitution *both* vertically and horizontally enables us to see the main options in the debate more clearly. It is not to be taken for granted that the juxtaposition of European law and national self-determination is of the same kind as the traditional confrontation between left and right within each member state.

The horizontal dimension bears on the tension between capitalism and democracy – a matter over which a balance can be struck without the losers becoming negative to the overall constitution. The vertical power struggle, on the other hand, refers to the tension between national self-determination and the suprastatist regime of free movement for capital, goods, services, and labour. The losers in this conflict might easily, as Bartolini and Scharpf argue, turn their opposition to particular outcomes into opposition to the system as such.

A second and equally important lesson is that the concept of *opposition* has a different meaning in the living transnational constitution of the EU than it has within the established democratic context of the member states. Vertically, opposition does not have the same within-the-system **confrontatory** meaning as it has within a national living constitution. At the national level, the confrontation between left and right proceeds without undermining support for the constitution. Opposition is regarded as legitimate.

By contrast, the suprastatist principle of free movement (which is only partially applied) leaves citizens with an unclear perception of who is ultimately in charge. This is why there are greater obstacles to instituting democratic accountability in the vertical dimension than there are to instituting it horizontally, *i.e.*, within each member state.

Horizontally and within each country, opposition takes a classical form, in the sense identified by Otto Kirchheimer: as expressive of the *legitimate* “right of the defeated group to publicly maintain its principles after they were rejected by the majority to be the foundation of the opposition’s functioning”, provided that “the participants in the political game consist of moderate elements”.¹² Vertically, the debate between Hix on the one hand and Bartolini and Scharpf on the other – about the legitimacy of federal rulings by the institutions of the European Union – calls into question the classical premises that Hix takes for granted. Instead, Bartolini and Scharpf warn us that politicisation in the vertical dimension will bring about Kirchheimer’s two alternative types of opposition: at first an “opposition of principle”, which then calls “cartel” arrangements into being, aimed at the “waning” of opposition.¹³

¹² Kirchheimer, *supra* note 2, at pp. 128 *et seq.*

¹³ *Ibid.*, at pp. 134–136.

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Majone and Moravcsik, for their part, see no difference between controversy in the vertical dimension and what takes place in the horizontal dimension within each country. A mixed polity, in their view, is basically the same thing as a mixed economy. Hix, by contrast, concedes there is a difference between the dimensions. He believes, however, that it can be overcome by European party politics. If left/right controversies are let loose in the vertical dimension as well, he argues, confrontatory activities of a moderate kind will flourish.

Bartolini and Scharpf take an entirely different view. Instead of pointing to the possibility of ignoring or overcoming the difference, they *emphasise* it. They see a fundamental difference between, on the one hand, classical debate, opposition, and power struggles in the horizontal dimension within each country, and, on the other, what the result is likely to be if the vertical dimension is politicised. Within each country, they argue, parties and people can fight each other in a moderate way, because their mutual opposition is considered legitimate. It takes place within the same borders, and in accordance with the same national constitution.

Vertically, in the view of Bartolini and Scharpf, it is a question not just of politics but of *constitutional* politics. People of various views have to answer a more difficult question here: namely, “why should people living in ‘other’ countries be entitled to legislate in ‘our’ country?” When the living constitution is flexible and unclear (as it is in the vertical dimension), striking a reasonable balance is likely to be trickier and more explosive than it is when the task is to balance political forces within a single mixed economy or welfare state circumscribed by a nation-state constitution of the historically given democratic kind.

This leaves us with the puzzling question that Peter Mair confronted us with in his well-known article on political opposition in the European Union.¹⁴ Why are EU affairs outsourced from national politics into special referenda and elections to the European Parliament? Why is it that these matters are not part – as ideally they should be – of the regular public debate and regular national election campaigns in any of the member states?

The explanation, as Mair sees it, is that national politicians think intuitively along the same lines as Bartolini and Scharpf. It is too explosive to let constitutional politics loose in national political affairs.

Majone and Moravcsik, for their part, would say there is no need for outsourcing. There is nothing to fear, they would likely argue, from mixing regular politics with constitutional politics. Hix would probably give a similar answer. He believes very strongly in the ability of European political parties not only to overcome the tension between left and right, but also to overcome the tension between national self-determination and the precedence of European law. Indeed, he seems to believe that such tensions can be overcome even when the policy is implemented top down, and no room is left for legitimate opposition or disobedience.

¹⁴ Mair, *supra* note 2, at pp. 1–17.

This brings us to the core issue. After all, *why* is legitimate opposition more desirable than constitutionally guaranteed accountability avoidance?

As to the general question of accountability avoidance versus accountability promotion, we take the side of those who stress the importance of legitimising opposition and holding power to account. Politics shorn of disagreement will undermine our belief in democracy, which is a system for choosing between different policies and office-holders.

From this point of view, the two positions at the extremes of the spectrum – full-fledged federalism and consistent confederalism – are both unproblematic. By definition, their proponents solve the problem through symmetry. In the case of federalism, power and accountability both are situated at the European level; in the case of confederalism both are lodged at the national level.

One could say, however, that the federalists and confederalists are only successful because the situation addressed by their arguments is not the one found when the European “ship” is on “the open sea”, but rather the one that presents itself when it is in a “dry dock”¹⁵. In the latter case, nothing unforeseen can happen, because the ideal union is being modelled from scratch, and according to principles that are theoretically sound by definition.

The problem in the real world is usually of a different kind. Politicians have no choice but to rebuild their “ship” on “the open sea”. The founding fathers of the Union made their “mistakes” long ago. Their followers have refrained for generations from adopting a stringently federal or confederal point of view. On account of this lack of clear principles, the Union is marked today by the above-mentioned combination of double asymmetry, monetary union without fiscal union, and a constitutional balance of terror. This particular status quo is seen positively by the end of history theorists; it is viewed as a potential powder-keg by informal pact of confidence theorists; and it is regarded by democratic activists with a rather hopeful eye.

Preferred by the author of this chapter is the informal pact of confidence approach. For one thing, we consider that the approach taken by the end of history theorists is too cynical, and will have the effect of undermining popular belief in democracy. For another, we believe that the democratic activists underestimate the potential negative consequences of dynamically mixing up the politicisation of left/right issues within the member states, on the one hand, with the constitutional issue of why the Union should be entitled to legislate and adjudicate in controversial matters, on the other.

Only the proponents of the informal pact of confidence position are sufficiently sensitive to the obvious risk of letting aggressive nationalism loose in Europe. They are realists who do *not* – and we consider this the heart of the matter – lose sight of the element of deliberate

¹⁵ S. Gustavsson, ‘Designing European federalism’, 13:1 *Swedish Economic Policy Review* (2006) at pp. 163–183.

choice and democratic accountability. In our view, their specific combination of realism and normative sensitivity is exemplary.

The Union's institutional set-up today – with its mixture of double asymmetry, monetary union without fiscal union, and a constitutional balance of terror – does not fill the heart of an informal pact of confidence theorist with joy. However, there is no feasible alternative in the short term. There is nothing else immediately at hand which is better. The argument here is familiar from the field of environmental policy. In that other context it is referred to as the *precautionary* principle. We should not just consider what would be ideal; the worst-case scenario must be kept in mind as well. Constitutionalism and legitimacy must indeed be taken seriously.¹⁶ But accountability and opposition deserve serious consideration too.

As informal pact of confidence theorists, we need to clarify why legitimate opposition is preferable to accountability avoidance. Why should the basic freedoms of religion, speech, and organisation be defended? Why must equal rights to take part in elections be upheld?

Why do we consider it to be a mistaken policy to let opposition *wane* and to allow it become an *opposition of principle*, as Otto Kirchheimer would have said? This is done continuously in the European transnational context by ostracising opposition through naming and shaming it under the heading of “Euroscepticism”. It is done in order to defend the long-term political stability and sustainability of the transnational constitution defended by end of history theorists. Nevertheless, we see this as a mistaken policy. Based on what rational argument can we *simultaneously* defend the precautionary principle and that of legitimate opposition?

In the comparative-government literature more broadly defined – *i.e.*, the literature not dealing specifically with the problem of European transnational constitutionalism – there are mainly two arguments in favour of *not* letting loose legitimate opposition, majority rule, and democratic accountability.

One of these arguments is referring to the widely recognised need to facilitate *cleavage management*. Political procedure is the key, according to this reasoning. That idea applies not just to the EU but to every conceivable political system. It is founded in the notion that the fundamental purpose of political institutions is to achieve cleavage management and internal pacification.

From the viewpoint of cleavage management, the avoidance of democratic accountability and legitimate opposition offers a solution to the problem of deep-seated cleavages arising from class, religion, and ethnicity. Social fissures of that kind get politicised in a too easy and risky way. If “we” fear too much politics in a political system, “we” can use consociational, limited-government, devolutionary, and arbitral mechanisms in order “to resist decisions demanded by political majorities that would oppress minority rights, especially if [such

¹⁶ S. Bartolini, ‘Taking “constitutionalism” and “legitimacy” seriously’, *supra* note 10, at pp. 26–29.

mechanisms] enjoy widespread legitimacy”.¹⁷

The other basic argument for avoiding democratic accountability and legitimate opposition emphasises what procedure means in terms of political content. This argument takes its point of departure in the widely recognised need for policies which accord more closely with the *public interest* than do those which tend to result from systems characterised by political majoritarianism. The idea is that policies should be in the real and long-term interest of those affected. Voters do not always have the capacity to judge what is best for them.

Therefore, a broad and ill-informed popular majority should not be allowed – at least not in any effective way – to affect the functioning of the executive, legislative, judicial, or monetary authorities. As the end of history theorists see it, the public interest is better served by a market-preserving and asymmetrical order than by one in which a parliamentary majority is held to account in symmetrical fashion – whether at the national *or* the European level.

As democracy undergoes its historically necessary transformation, a market-preserving federalism based on transnational constitutionalism serves as a necessary straitjacket. The substantive policies thereby promoted accord with the precepts of market liberalism, which seems to be synonymous with the public interest in today’s end of history discourse.¹⁸

Both of these arguments – cleavage management and public good – for not letting democratic accountability and legitimate opposition loose have to be taken seriously. In practice, moreover, both of them – whether singly or in combination – are highly influential notions. That is not to say, however, that the reasons adduced for their tenability are convincing. From an intellectual point of view, it should not be taken for granted that a thesis is true just because it is widely embraced in the real world of power politics.

If we inspect the literature more closely, we can easily turn up impressive counter-arguments. These focus on the same major points as their counterparts. What they have to say about effective cleavage management and the promotion of the public interest, therefore, deserves to be taken just as seriously.

In relation to the public interest argument, it can and should be said that what history has taught us is the impossibility of knowing in advance what will happen. The idea of *trial and error*, as well as the need to be open to future intellectual improvements, would seem rather to enjoin us from positing any other substantive public interest than that upon which a political majority can agree on the basis of democratic accountability.

In other words, it is one thing to say that we should seek out the best available expertise for advice and implementation. It is quite another to think that it is advisable to institutionalise the ultimate decision-making of judges, economists, and other experts as ultimately built-in

¹⁷ R. K. Weaver, ‘Political institutions and Canada’s constitutional crisis’, in R. K. Weaver (ed.), *The collapse of Canada?* (The Brookings Institution, Washington DC, 1992) at p.15.

¹⁸ Gustavsson, *supra* note 5, at pp. 41–45.

Comment [T2]: Sooner? Consider another word. Revise.

elements of a “mixed polity”.¹⁹

A trial and error theorist finds this latter idea dubious. We have great need, to be sure, of administrative and juridical expertise. Guardianship, however, is quite another thing. It cannot and should not be taken for granted that the rule of law – as opposed to that of force, caprice, fancy, or whim – is best implemented in a system based on the rule of jurists, economists, and generals. It should remain an *open* question – to be settled by empirical experience – whether predictability is best achieved in a system founded basically on guardianship, or in one based essentially on universal suffrage and political freedom.²⁰

If there are deep cleavages – and indeed there are in most political systems – there is a vast literature in favour of not trusting the idea of an *a priori* conception of the public interest. According to that alternative argument it is majoritarianism, legitimate opposition, and accountability promotion (rather than accountability avoidance) which are more effective in fostering tolerance and moderation. An approach of this alternative kind is not only functional for avoiding stalemate; it also helps to ensure unity because it gives politicians “incentives to make appeals to voters across cleavage lines in order to build a majority or plurality of support”.²¹

In systems based on universal suffrage and political freedom, and within which many different cleavages are found in terms of religion, class, region, and ethnicity, politicisation serves to *promote* the emergence and maintenance of cross-cutting cleavages.²² In such a society, parties cannot get a majority by appealing to their own group only. They need to become “*Allerweltparteien*”, the pregnant German word for the important 20th century phenomenon of “catch-all parties”.²³ Such parties must appeal to many different groups. They accordingly create an institutionalised system of self-reinforcing cleavage management – a system which, be it noted, is opposite of and contrary to the idea of *not* making opposition legitimate.

Also from an exclusively utilitarian point of view, the arguments *for* legitimising opposition are at least as strong as those *against* the idea of letting politics loose. In addition, however, we should not forget that there is an issue of elementary historical identity at the very core of the matter. Two World Wars and a Cold War were fought to protect values that most citizens see as fundamental: the right to vote, the right to express oneself publicly, and the right of free association. The right to disagree without being considered disloyal is an integral part thereof.

¹⁹ G. Majone, *Dilemmas of European integration*, *supra* note 6, at pp. 46–49.

²⁰ R. Bellamy, *Political constitutionalism – a republican defence of the constitutionality of democracy* (Cambridge University Press, 2007) at pp. 143–263.

²¹ R. K. Weaver, *supra* note 17, at p. 11.

²² S. Rokkan, *State formation, nation-building and mass politics in Europe* (Oxford University Press, 1999) at pp. 275–302.

²³ O. Kirchheimer, ‘Der Wandel des westeuropäischen Parteiensystems’, 6:1 *Politische Vierteljahresschrift* (1965) at pp. 27–33.

5. Conclusion

From a Westphalian point of view, Europe's 20th century was an age of political failure. The system of national self-determination broke down. Yet the dreadful conflicts and confrontations of the era – two World Wars and a Cold War – resulted in a new insight at last. Politicians and concerned citizens concluded that sovereignties must be *intertwined* if the cycle of war and vengeance is to be ended. A new system was accordingly established – based on cooperation rather than conflict, and on free trade rather than protectionism. Constitutionally, such a system requires a less stringent application of the concept of national self-determination.²⁴

Thus arose the problem discussed in this chapter. It is best understood in a historical perspective. When the notion of sovereignty was established in the 17th century, it was conceived of as *royal* sovereignty. It was the hereditary prince of each country – not the population therein – who was the *principal*. Nor was there any mechanism for a peaceful change of government, save for that arising from the operation of inheritance within the royal family.

The French and American revolutions in the late 18th century led to a long-term shift in the conceptualisation of sovereignty. In whom, namely, does sovereignty reside? Who is the principal? Europeans started thinking in terms of the sovereignty of the *people*, rather than the sovereignty of the *king*. Elections based on universal suffrage and political freedom became the norm. In addition, a new method for regularising changes in government – by other means than through inheritance – emerged and became the rule.²⁵

These new notions spread all over Europe during the 19th century. The focus on the sovereignty of the people rather than the king raised the question of *legitimate opposition*. Then, upon the conclusion of the First World War, most European nation-states instituted freedom of information and freedom of association, and carried out free and fair elections on the basis of universal and equal suffrage. Practicing the new principles made it natural to suppose that elections can result in a different government with an alternative set of policies.

As I have stressed in this chapter, however, a subsequent constitutional shift – in the reverse direction – took place in the last decades of the 20th century. From the standpoint of legitimate opposition, the intertwining of sovereignties *rolled back* what had been achieved earlier within the separate nation-states. Public intellectuals then started asking why they should accept a progressive downsizing of the democratic sphere. Prior to the intertwining of sovereignties, after all, citizens had enjoyed broader opportunities to criticise prevailing policy, to oppose the government of the day, and to hold leaders to account. Is a reduction of

²⁴ For overviews, see E. Hobsbawm, *The age of extremes – the short twentieth century* (Michael Joseph, London, 1994); T. Judt, *Postwar – a history of Europe since 1945* (Heinemann, London, 2005); and J.-W. Müller, *Contesting democracy – political ideas in twentieth century Europe* (Yale University Press, New Haven, CT, 2011).

²⁵ For this fundamental shift in the notion of sovereignty, see R. Bendix, *Kings or people – power and the mandate to rule* (University of California Press, Berkeley, CA, 1978) at pp. 247–430.

the democratic space a necessary price to pay for ending the cycle of war and revenge? And, if not, by what means can effective democratic choice be restored?

In view of the arguments made in the ongoing debate, it seems obvious that public intellectuals in this area are faced with a dilemma. The one horn of the dilemma is the need for legitimate opposition; the other is the need for intertwined sovereignties, so as to stabilise the system of nation-states. Unless we mean to abandon the European Union to market-liberal authoritarianism,²⁶ we must grasp this dilemma by the horns and make a fundamental choice. We can take the *big leap* into a symmetrically organised United States of Europe, as Jürgen Habermas²⁷ urges us to do, or we can stick to the *informal pact of confidence*, as proposed by Stefano Bartolini²⁸ and Fritz Scharpf.²⁹ There is no third option, in my view.

²⁶ A. Gat, 'The return of authoritarian great powers, 86:4 *Foreign affairs* (2007) at pp. 59–69.

²⁷ Habermas, *Zur Verfassung Europas*, *supra* note 9.

²⁸ Bartolini, *Restructuring Europe*, *supra* note 10.

²⁹ Scharpf, *supra* note 10.