

The European Public(s) and its Problems -- On alleged lacking foundations of democratic legitimation in the EU and its legal system(s)

Axel Mueller, Northwestern U & Universität Flensburg

In the context of the current crisis, the fact that EU policies to save the financial integrity of the Euro have had deep-reaching consequences in the social fabric and policies of some member states towards their populations while not in others has put, as Habermas says, the question anew on the agenda of the relationship of democracy and economy in the EU¹. That the measures had a motivation as reactions on the pressures of the global financial markets is as little in doubt as that the speed and energy with which the effects of the financial crisis could transform a debt crisis into a sovereign debt crisis has everything to do with the efficient neoliberal streamlining of Europe into a single market that is free from political interference into or against the socially insensitive demands of global capital. There is little doubt among social scientists that the process of EU-integration over the past 30 or so years was significantly framed by the globalized attempt –or “frivolous experiment”²-- of transforming the former state embedded market economies into market-embedded states³. The prime example for this is the introduction of the market-accelerating common currency EURO without simultaneously embedding it in a EUROzone-wide network of coordinated EUROzone-wide social, fiscal and economic policies with guarantees of sharing, or at least controlling the social risks of this homogenization of the market justly among equal member states and among all EU-citizens⁴. If creating a single free market and dismantling the political constraints with which players in the economic arena had to calculate earlier⁵ was the purpose of the elaboration of the EU by the member countries, they have done good work. But they uncoupled market-integration from political integration in the relevant areas

¹ Verfassung Europas

² Polanyi (1977/1944), Streeck (2011)

³ Streeck, Brunkhorst, Offe

⁴ An excellent analysis of the details of the consequences of this uncoupling of currency and social and fiscal policy is offered in Offe (2003) *before* constitution- and credit-crisis, and still more poignantly with the facts in by Streeck 2013.

⁵ Dismantling of European social model: Offe (2003)

and thus fostered the political divisions within the Eurozone and between the Eurozone and the remaining EU-member states to a degree that threatens to jettison the previous advances in the political integration of the EU as a supranational organization. One reason for this was, for sure, that the unwillingness to develop a proposal for a EU-wide social, fiscal and economic policy that would be handled by the EU and intervene in the national parliamentary competences would have required (and still does) presenting the proposal to the entirety of the national citizenries with the purpose of adapting their corresponding constitutions accordingly. Premising the success of economic unification on the uncertain outcomes of protracted discussions of principles among the extremely complex variety of stakeholders with often dilemmatic directions of pull in their interests in an extremely heterogeneous collection of national economies and social systems arguably would have doomed the very idea to failure. That the very idea was good was beyond doubt as long as it didn't show its costs. Now it does, and the extreme strain of the social systems in the loser countries brought home the heterogeneity of economic capacity and interests among those forcibly treated homogeneously by the guardians of the global currency- credit- and exchange markets and the guardians of Euro-stability. Once again, now under the pressure of social movements responding to the unjust distribution of risks between social groups and groups of nations, the wisdom and legitimacy of imposing constraints stemming from a decision made at the supranational level on national governments who normatively are in charge of protecting their populations from degradation and undue inequality of opportunities with other member-states returned to the agenda with a vengeance.

In the relevant field, social scientists and economists had long been averting to the facts of heterogeneity and complexity in the ways in which social, fiscal and economic systems were linked in the various member states to ensure a functioning distribution of wealth and welfare among the citizenry. Not putting the requisite political part of the Eurofication on the agenda on the part of the EU-decision makers was in this sense an adequate expression of a consciousness of the non-existence of a single European social space. However, what is not put up for public debate in the first place and yet decided⁶ clearly has dubitable

⁶ (because aggregatively speaking, there is of course a EU-wide social space, but not a coordinated one, hence none that would allow concerted political action –and in this sense, the mothers and fathers of the Euro did decide to exclude coordinate influence of politics on the market-imperatives governing the Euro in the global financial markets)

standing as to whether it meets the standards of *democratic* decision-making and thus, whether it can count as legitimate according to the standards expected from each of the member states by EU-law itself.⁷

But, as I said, the extent of the current crisis has forced to the fore even more profound questions, since intelligent inquiry into the structures responsible for the rampaging loss of social safety cannot exclude at the outset that the causes lie deeper. Are there any *general* lessons from the *particular current* crisis to be learnt about the relationship of democratic legitimacy and supranational institutions? The complaint seems to be that the introduction of the Euro and the imposition of political constraints on national parliaments by the EU-institutions in charge of steering the Euro should have been given a chance for the democratic review that the objective matters at hand –viz., that the introduction of a currency inevitably affects social, economic and fiscal aspects of sovereign government activity-- would have required. But doesn't that complaint respond to circumstances that are merely a symptom for a more principled unresolved issue? After all, the complaint presupposes that it *could have been* democratically justified to decide an arrangement of supranational institutions and regulations that bind the democratically justified national governments and parliaments. But the real problem is perhaps that there are reasons why supranational organizations *in general* must not legitimately interfere with democratically legitimized national governments and legal orders, or at least reasons *when* such interference isn't legitimate, such that evaluated in light of these reasons, the EU meets one of such legitimacy-disabling conditions. This type of question will be the topic of my discussion.

I will present three versions –Grimm, Offe and Streeck—of a general argument that is often used to establish that the EU-institutions meets such a legitimacy-disabling condition, the so called “no demos” argument (II). Before doing this, it will be necessary for an adequate appreciation of its pull to mention some of its reasonable motivations by embedding it in the context of the notorious “democratic deficit” suspicions against the legal system and practice of the EU (I). After quickly examining the logical structure behind the no-demos intuition considered as an argument (III), I will then present principled reasons by Möllers and Habermas that show why the “no demos” argument fails to have bite in discussions of

⁷ Common joke that the EU wouldn't be allowed to join the EU –check*

the legitimacy and status of the supranational level in the multi-level EU-architecture, complemented by another principled reasons arising from John Dewey's conception of the "public" as a clearer alternative for the "popular" requirement of democratic legitimation (IV). I will conclude that all three conceptions together suggest that the hunt after pre-politically existing peoples as foundations of democratic legitimacy expresses, in spite of the theoretically elaborate apparatuses utilized to pump the no-demos intuition, no more than methodological nationalism without any footing in the material requirements of democratic legitimation. Given the absence of a principled problem with the legitimacy of the priority and interference of supranational EU-law in the national legal and political orders, there are also no principled reasons to abandon or discredit the European project in the absence of a European nation or society.

I. "Democratic deficit" in the legal system and practice of the EU

To begin with, the agreements and treaties forming the EU in the process of European integration over the past 60 years have been decided by democratically elected officials of the member states in unanimous concert authorized to take such decisions. After the landmark decisions of the Court of the European Union in the early 1960s *VanGeld* and *Costa*, it is established legal opinion that the treaties expressed the will of the associated states to treat all of their subjects uniformly, and in this sense, to acknowledge EU regulations as a voluntarily accepted constraint on national jurisdiction and legislation, and since the fusion of TEU, TFEU and the Charter of Fundamental Rights of the EU into the Lisbon Treaty, the legal form of the EU can arguably be considered to be that of a *de facto* constitutionalized supranational institution. Given that the Lisbon Treaty contains the requirement that the EU accede as a subject to international law to the European Convention on Human Rights, guarantees all the liberal-democratic subjective and civil rights to all EU-citizens and prescribes liberal democracy under the rule of law as the only legitimate form of government, the process of constitutionalization of the EU can be seen as largely accomplished, and as having created a regional regime of democratic guarantees in the territory comprised by the territories of its member states. As with growing integration, more and more functions and policies of the democratically legitimized legal orders of the

national states that EU-citizens belong to come under the influence of decisions made at the level of the EU-institutions, suspicions of “democratic deficits” of the EU have not become less but rather more pronounced downstream. Talk of “Eurocrats”, “Monster Brussels”⁸ and no-comment quotations of the applicability of the regulations regarding teleferics to Holland⁹ are expressive of these reluctancies.

Although there are manifold reasons for this diagnostic, the fact that the EU forms a multi-level system of governance with very complicated and partly flawed flows of accountability between its outputs and civic input seems to play a large role in most of them. No less complicated and often diffuse are the flows of civic participation in decision making processes. Weightier than concerns about complexity and the corresponding decrease in transparency vis-à-vis the citizen are concerns about certain routine ways of decision making at the EU-level in which access of civic control to the process seems to be positively blocked out. The main focus of attention in this regard is on the prevalence of intergovernmental decision-making by way of closed-door negotiations by the Council of Europe, i.e. the periodic summits of the leaders of the executives of the member states, in many fields of policy making that affect large parts of the population which, unsurprisingly, demand more influence either directly or indirectly via the national parliaments on the outcomes of these negotiations. The decisions made at the summits in intergovernmental agreements between national executives become, at the level of the EU, directives to be implemented by the respective national legal systems. Given the pressures connected with non-compliance with EU-directives that are exercised on the national legislatures, the latter in most cases deliberate with a foregone conclusion, and not open-endedly. The best term for this intergovernmental form of governance would be federal executivism, since it virtually marginalizes parliamentary control and thus, mediately, control by the representatives of the people. That this intergovernmental mode of decision-making causes legitimacy deficits becomes clear in those fields where the Lisbon treaty does not require a further check on the decisions made in the Council of Europe by the European parliament, for example fiscal, social and economic policy. In these fields, a national executive who feels that the national legislature would not accept a legislative initiative and then gets the

⁸ Enzensberger

⁹ Cf. Reference in article on Democracy deficits

universal approval by her colleagues in the Council of Europe, thereby acquires a binding EU-regulation that the national parliament has to adopt on pain of EU-sanctions. If we distinguish between representative, accountability and participatory demands on democratic legitimacy, the only demand met by those decisions is that an elected official representing her national population was involved in making the decision, but –given that the risky proposal was not discussed in the national parliament—neither participatory deliberative nor –given that the directive from Brussels has to be implemented on pain of sanctions by the EU against the dissenting nation—accountability for the acceptance of the decision by the national executive is safeguarded. For all intents and purposes, the control of executive activity by the people or their representatives is reduced to an unnoticeable minimum. To make matters worse, in those fields where each member of the elected national governments used to have a functional veto power in the European council (of ministers), now majority decisions have an extended use, so that it becomes possible to bind even dissenting nations to the decisions that pass both legislative branches, and via the so-called “Passarelle” mechanism, the council can itself decide to declare a subject that was deemed to require unanimous decisions subject to majority-decision, thereby obviating the resistance of national parliaments that wouldn’t allow their governments to go along. This entails the danger of a cold transfer of competences of control from national parliaments to the intergovernmental decision-making at the EU-level in the council of ministers, i.e. members of the national executives that eliminate parliamentary control. At the conclusion of both processes, the EU-rule is to be implemented at all national levels irrespective of further deliberations in their parliaments. Consequently, many warnings emerged in the discussions about the Lisbon treaty that Brussels was “seizing powers from us”,¹⁰ and that the rationale of intergovernmental decision making clearly is not legitimacy but expediency.

This diagnostic of an institutionally unresolved democratic deficit is correct, and it is also true that the thus intergovernmentally acquired decisions suffer from a legitimation-deficit because the chain of legitimation from the people through their representatives to the decision as much as any public discussion and deliberative elements in the procedure have been sacrificed in favor of intergovernmental negotiations. Moreover, it is also true that the field still placed by the Lisbon treaty under this type of governance at the EU-level are

¹⁰ Scholz, Herzog/Gellert

crucial for the political, social and economic well-being of the populations. But one also has to underscore that in a growing number of fields, the Lisbon treaty requires what is known as the “ordinary legislative procedure” in which proposals by the Commission, i.e. the EU-executive authorized by the EU parliament, or by the Council of Europe through the European council have to pass parliamentary review and approval by the European Council (i.e. the part of the legislative representing the national interests through the competent ministers). That is, although there are serious institutional democratic deficits to be removed, the development of political integration of the EU appears to point in many fields towards an increasing democratization of governance also at the level of EU decision making itself. In those fields where this is the case it would also appear that EU-regulations disclose to themselves their own source of democratic legitimation flowing from the totality of EU citizens represented as members of the totality of all national member states represented in the EU-parliament, and represented as members of their respective nations by the democratically authorized members of the executives EU-nations in the European Council.¹¹ Given that the treaties’ allocation of competences assigns most fields except for the decisive ones of social, economic and fiscal as well as exterior policy already now to the possible purview of ordinary legislative procedure, a densification of democratization seems to be a concern for the EU on its own. On the other hand, if, as the case may be, there are principled problems with purely intergovernmental decision-making at the supranational level, then the presence of pockets of purely intergovernmental and intransparent decision-making might even serve as a good indicator of places where “democratization”-efforts ought to put their priority in future renegotiations of the Lisbon treaty.

II. Three versions of the no-demos argument

This diagnostic of institutional democratic deficits and the corresponding demands for institutional innovation –even if it were to require a change in the treaties and correspondingly a EU-wide constitutional discussion about principles and the allocation competences— can only convince those who believe that the two-layer legislative structure

¹¹ Unsurprisingly, the EU-parliament itself denies the existence of democracy deficits in a publication on itself and points to the unwillingness of the national executives to use the ordinary legislative process open to them in most questions by tartly remarking that this behavioral pattern of national leaders who profess their engagement in reducing supposed “democracy deficits” much rather looks like an “honesty deficit”. (Demokratiedefizit)

of the EU-administration can be understood as undergirded by a two-layer structure of appropriately legitimizing constituencies. For, the decisions at the EU-level authorized by the EU-parliament can only thereby also count as democratically legitimized, i.e. as having been approved by a body of representatives whose decisions can be understood as expressing what the deliberatively performed decision-making process among the people whom they represent would have wanted. Given that EU-parliamentarians are elected in EU-wide elections, the relevant deliberating public represented by them would have to be the totality of EU citizens considered irrespective of their nationalities. Thus, to be short, the legitimacy of EU-regulations seems to depend on the assumption that the totality of EU-citizens forms an articulate people capable of deliberating and of reflectively forming its own will as a result of discussions among free and equal citizens, as well as of wanting the results of such will-formation be implemented EU-wide as efficient law that applies with coercive backup equally to everyone everywhere through national governments that retain the coercive powers. The assumption that there is such a European people has been contested not only by nationalistic populists¹² (for whom the assumption is a definitional falsehood), but also by social scientists and legal scholars such as Claus Offe and Dieter Grimm and others.

At its clearest, Dieter Grimm states the argument as follows:

“Ein europäisches Staatsvolk, dem die Hoheitsgewalt zugerechnet werden könnte, ist gar nicht in Sicht. (...) Der Maastrichter Vertrag stellt die Weichen auf einen europäischen Bundesstaat, ohne dass diesem ein europäisches Staatsvolk (...) entsprechen könnte. (...) [Da] es für Meinungsbildung und Interessenartikulation [in Abwesenheit europäischer Parteien, Medien, einer gemeinsamen Sprache, Erziehung und Kultur] wieder in nationale Partikel zerf[ällt], [ist das] europäische Demokratiedefizit strukturell bedingt und kann nicht durch institutionelle Reformen behoben werden.“¹³

The challenge posed by *this* kind of objection to recognizing a binding priority for EU-regulations is far more fundamental because if it were true the very idea of allowing EU-regulations to constrain the sovereign national legislator would be entirely misguided

¹² Münch Demokratie ohne demos

¹³ Grimm (Spiegel 43/1992)

because they could not possibly have the same degree of legitimacy as the national legislator's decisions¹⁴. Therefore, the acceptance of EU-regulations as part of the legal order of the national member-states --in particular as binding the decisions of the National Supreme Courts as guardians of the national democratic constitutions in which these regulations do not appear-- is tantamount to accepting heteronomous imperatives ("Fremdbestimmung"). Conversely, strengthening the EU-parliaments' role in the EU-level legislative processes would not lead, in spite of the member of parliaments' unimpeachable credentials as directly democratically elected representatives, to a decrease of democratic deficits but on the contrary exacerbate them. After all, members of parliament who cannot represent anyone in particular for lack of either a people or a functioning EU-wide public discussion and deliberative process of will formation preceding the elections or both are essentially free-floating agents with powers to decide matters that bind all national parliaments with sufficiently entrenched democratic credentials.¹⁵ It is in the context of these competitive considerations of whose decision-making power is greater than it should be that the relatively simple no-demos pattern actually becomes highly relevant and a worthwhile subject of reflection.

Claus Offe (until his recent unequivocal pro-European turn¹⁶) directs our attention to cultural, linguistic, social forms of socialization of enormous heterogeneity, but most importantly to the diversity and paradoxes of intra-European interest formation in the economic realm, together with the profound differences in the traditionally grown structures of their respective welfare, social and labor regimes. From there, he convincingly derives the expectation that there are inevitably irresolvable inequalities among the risks that societies in the weaker economies of the EU would have to shoulder common supranational social, economic and fiscal laws and concludes that there is no reasonable expectation anytime soon that there could be a rationally equally distributed interest among the citizens of the member states in EU-regulation and –integration. Since there

¹⁴The default priority would always lie with the national parliament's decisions as long as, to be sure, the EU would not re-constitute itself as a sovereign state on its own (this is why Dieter Grimm could easily switch from asserting on the basis of one and the same reasoning (!) that the EU was unconstitutionalizable, given the absence of a people, to demanding that the EU needs a constitution, as such a constituting act, and only such an act, would create, by the very fact, the requisite people). As a matter of fact, both are sides of the same, nationalistic coin.

¹⁵Strohmeier und Konsorten, Herzog, Scholz

¹⁶Europa in der Falle

would be winners and losers, the fabric of civic solidarity needed for compromise and the acceptance of majority decisions would not possibly emerge as a priority over the defense of nationally anchored interests in defending the achievements and entitlements of one's own national welfare system. Given that there is no replacement at the EU-level that would be equally or more desirable, accepting EU-regulations over national ones would be counter to one's best considered judgment and therefore less the product of a free reflective will formation process than of caving in under the pressures of globalization. Thus, the legitimacy of EU-level regulations speeding the process up tends to enjoy less deliberatively motivated rational backup across the stakeholders in all associated nations than the national ones. Therefore, the formation of a European public with *rational* common and therefore universalizable interests that could legitimize EU-level decisions would appear as a ideologically not innocent dream without political basis.

To be fair, Offe's version of the "no demos" argument tends to appear in the context of cautionary tales designed to remind fans of speed in EU-integration of the interest-groups behind such pressures to accelerate, and to issue warnings about the nationally unevenly distributed risk patterns connected with simply going along without interventions from one's own best, i.e. anti-power-elite constituted interests that are often intertwined with the continuity-assumptions built into the social services structures gained in the conflicts over the welfare state. All the while, Offe does not exclude that there could be a situation in which the best considered interest in the continuity of welfare and redistribution policies might be better served when it becomes equipped with adequately democratized European structures that are designed to coordinate and consolidate the multifarious stakeholder interests at a larger scale that is capable of efficiently facing the conflict with globalized economic players.¹⁷ He just used to think such a situation was far out of sight. Wolfgang Streeck, in his most recent book, radicalizes the argument by portraying the EU as a sophisticated, through and through "postdemocratic" "Liberalisation machine" that was always and still is exclusively aimed at and supported by the long-term intent to rid the world of the contingencies of normative civic contestation and interest articulation for the benefit of a neoliberal "Depolitization of the economy as a whole"¹⁸. Given this anti-political

¹⁷ Recently, he has reversed his conclusions from the analysis of the place of European stakes in the context of globalizing neoliberal crisis-responses in "Europa in der Falle".

¹⁸ Gekaufte Zeit. Vgl. auch Crouch The Strange Non-Death, Crouch Post-democracy

nature of the EU-project, the regulations at the EU level are to be seen as responses to a different logic than the legal orders at the national level that at least pretend, and are bound by the constitutional order to be democratically justified norms. The national political and legal orders represent, in this sense, the interests common to the people submitting to their laws, to whom they are accountable, and upon whose deliberating interventions and participation their content relies. In contrast, the regulations at the EU-level respond to what Streeck polemically calls the “Market-constituencies”, i.e. the shareholders and their profit-orientation. If this is so, then EU-regulations neither represent, nor reflect the participation of stakeholders like you and me, and therefore no interests of the people at all. They are non-political in nature, and lack any democratic motivation, left alone legitimacy. In unmasking the EU-regulations as in this way democratically vacuous, Streeck wishes to deflate the perceived dangers stemming from dismantling the EU-institutions that allow market operations to have such drastic effects on member-states, and in this sense, to kiss the project of a deepening political union good-bye once and for all. For Streeck, we have to realize that it is a fundamentally naïve mistake to see EU as part of a possible solution to the problems caused by the crisis instead of as part of the problem. As there are and can be no costs to any of us in point of democratic legitimacy because the EU-institutions were not designed to represent any of us anyway, good riddance.

III. The structure of tacit assumptions behind the “no demos” argument

To investigate the merits of the “no demos” pattern underlying all three of these otherwise very different rejections of the democratic legitimacy of the priority of EU-level regulations vis-à-vis the national level, I would first like to switch gears and see in a more formal way where in a legitimation-structure the “no demos – no democracy” inference has its justified place. According to the requirements on the political realization of communicative justification for collectively binding action norms, it is indeed necessary for any community with democratic and deliberative majority decision procedures to bind the losers in such legitimating discourses reasonably to the rules they actually reasonably reject. More generally, if social integration under conditions of free and equal contributors to justificational discourses should not be jettisoned by disagreements, one needs some

background solidarity or concern for the integrity and permanence of the group that is engaged in regulating itself in these reflective discourses. Thus, the no demos argument is motivated only insofar as it reminds us of an empirical presupposition of the self-regulation through discourses allowing disagreement, viz. the existence of a community that is socialized robustly enough to prioritize the fact of being the self-regulating community one is over the possibly adverse outcomes of discursive collective will-formation.¹⁹

The question is whether this is substantive enough to decide over the right and legitimacy of EU law vis-à-vis national decision-making. After all, this empirical presupposition as such does not speak of national (as opposed to, e.g. regional or municipal, or even global) communities, only of communities; likewise, it recruits solidarities and social cohesions of a more robust sort than those founded merely on agreement in one's normative opinions, but not necessarily such that are determinable by pertinence to the legal, cultural and economic community of a nation-state.

I would also like to distinguish sharply between democratic deficits and legitimacy deficits. The former affect the organization of decision procedures with a view to the possibility of citizens to count as participants in the decision-making processes as constituted in the treaties, whereas the latter concern the normative question whether the type of decisions taken at the supranational level in an institutional design such as the EU can be taken as sufficiently and independently justified enough according to some democracy principle to enjoy the priority over or at least equality to national legislation that the treaties and standard EU legal positions attribute to them. If we draw this distinction, it becomes clear that the continuously reiterated facts about diversity and heterogeneity across the EU in cultural, linguistic, historical, economic, welfare systematic, banking traditions, what have you respects all pertain only to the empirical conditions of democratic politics, like the assumption that people who deliberate have to understand one another, or that welfare systems to be combined into European welfare regimes with a view to social justice and thereby universal acceptability have to avoid duplicating bureaucracies and thus eating up all the money supposed to go to the stakeholders etc. The mere fact that the public organized by the laws it is supposed to be the author of is multilingual and complicated in its family histories and weird customs does not as such disable it to be one that can organize

¹⁹ Möllers, Habermas Faktizität und Geltung etc., others

itself as author of its own laws.²⁰ With regard to the annoying and inflated reference to linguistic diversity as an obstacle to forming a people in the sense of democratic theory, I recommend augmenting the budget for recruiting translators and looking to India and the US for methods to safeguard some inclusion to people with different languages and limited literacy. The same applies to the other issues I mentioned; they present difficulties, sometimes conundrums and apparent lose-lose scenarios²¹, but no principled normative problem about legitimizability.

Of course, both questions are also intimately connected, but nonetheless distinct. Democracy deficit talk in the context of the relationship between the legal and political orders of the EU-level and the national level concerns rather traditional questions of the participatory involvement of citizen in decision making processes and the accountability of their officers to them for purposes of the exercise of public autonomy in the form of controlling the governing activities of publicly elected officials. In contrast, the question of a legitimacy deficit of EU-rules relative to the fixed legitimacy of national legal systems concerns the non-traditional question of how priority and legislative competence can be construed as democratically justified in a multilevel system of governance such as the EU that explicitly rules out in its statutes that it is a hierarchically organized federal system. It is with regard to this type of question that I want to evaluate the merits of the no demos argument.

To further gauge the preconditions under which the no-demos argument can unfold its pull, it is instructive to realize that the no demos ploy represents a truncated inferential pattern. The inferential rule is: no demos, therefore no democracy, therefore (in case of institutions associating actors at a no-demos level that issues in decisions that pretend to bind the democratically constitutes associates even in case of conflict with their established legal orders) no legitimacy of the decisions made at the no-demos level. What is contrasted here with respect to legitimacy is the unquestioned legitimacy of democratic nation states

²⁰ If this were enough, India and Switzerland could not count as democracies. Some would add Spain.

²¹ For an insight into the difficulties of rationally aligning the various reasonable motivations of the European stakeholders in light of the purpose of establishing European structures, cf. Offe (2000), and for the still more tangible and consequential complexities involved in “harmonizing the EU economic, financial and fiscal systems”, cf. Offe 2003.

integrated by established legal, social, historical and cultural identity, with the legitimacy claim of supranational organizations.

To gauge the force of the no-demos argument, it is further necessary to quickly recall the basics of supranational organizations. They are organizations to the outcomes of whose multi-nation-dependent decisions in certain matters of common concern the individual member states oblige themselves to bind their own decision making and judicial activities, but without thereby giving up their own national sovereignty. Supranational rules enjoy in consequence a priority that accrues to them through a practice of application²² in which their uniform realization across all member states and towards each individual citizen is ensured by virtue of the full sovereign powers of each member state even in cases where the result of applying the supranational rule conflicts with national regulations. In these cases, by default²³ the national rule impeding the uniform realization of the supranational rule has to be changed.

The no-demos argument pattern therefore has to make reference to *pre-existing, underlying* or otherwise *given* social identities and integrations with permanence-conditions independent of the social integration taking place in the pragmatic processes involved in discursive legitimation if it is to be able to undermine the presupposed legitimacy claims of supranational decisions. Only then can they find that, for the case of the supranational regulatory activity, *such* identities are nowhere to be found, and conclude that therefore, no democratically generated legitimation can take place. The no demos ploy now becomes visible as an utter triviality in the EU-context. To be proved is that the EU-level regulations have less legitimacy than the national ones. The relevant pre-existing identities are, unsurprisingly and correctly, the sovereign nation states under international law that existed in Europe before the EU. Among these, the EU was absent. As being a nation state before the creation of the EU is necessary for legitimation, the nation states organized in the EU are the only source of legitimation. We might as well say that the old European nation-states are natural and the EU is artificial. This feels like plain bias, not like a substantive theory of the conditions presupposed in functioning legitimation processes.

²² Curtzenius

²³ (i.e. unless the existence of the national rule –e.g. a social protection of citizens-- indicates an infraction of some supranational-level principle by the rule)

IV. Three interlocking defeaters of the no-demos ploy

I will now try to contrast the traditional metaphysical view behind the no demos ploy with more pragmatic and dynamic conceptions of the audience of legitimation to re-evaluate the non-traditional genuinely open question of whether there are sufficient social resources for EU-level regulations to attain the legitimacy necessary for accepting their superiority of application vis-à-vis national rules.²⁴ I want to focus on three ways of defusing the compellingness of no-demos type arguments proposed by Möllers, Habermas and Dewey.

The gist of the following analyses of necessary conditions for legitimacy for supranational regulations within the framework established in the EU is this: Suppose the demos were either co-constituted or even only anticipated by or as a function of the legitimation processes themselves at which end a regulation stands that forms a binding rule for the demos. Then there would be, for every rationally and reflectively self-regulating process of cooperative decision-making, some demos. Sure, the problem of social stability under serious disagreement remains. It might just be a matter of the individual members of that demos to look for motivational resources among their social, affective and other relations to all the other members of the demos, to look for creative affiliations and emotional concerns, or even for good old general *values each finds themselves equipped with* or transnationally occurrent class interests that allow them to discover, in the face of an unwelcome decision, whether the value of continuing the whole project is smaller or not than getting one's way in this case.

Möllers

This is the basic thrust of Christoph Möllers' indeterminist conception of the identity of the subject of political formation. Against the traditional conception of acts of democratic sovereignty as representing an antecedently determinate autonomous will of a well-defined population much like the action of an individual may be said to represent her intentions, Möllers answers the question for the "subject of public autonomy" or self-rule deflationistically with reference to the equal legal status of all actual agents of the will

²⁴ But before a quick cautionary remark: "legitimacy necessary for a certain function of priority" does not necessarily entail "more" legitimacy. It just requires the right kind.

formation of any public, viz. the individual persons associated by the discursive practices with the possible outcome of finding that a proposed norm is equally well acceptable to all those affected. These individuals and their perspective on the matter at hand constitute the audience and the deliberatively reflective decision-making agency responsible for the normative acceptance of a proposed coercive norm, and therefore the proper source of democratic legitimacy. From the perspective of individual participants who are socialized or at least embedded in complex multicultural and pluralistic societies with multiple allegiances, sympathies, interests and evaluative attitudes to be navigated as resources in reflective judgments regarding the correctness and acceptability of norms as coercive rules on everyone else's behavior, identifying the adequate perspective from where to take one's evaluative stand is a complex task with many indeterminacies and trade-offs that make a result a priori indeterminate. As Möllers states, "From the perspective of a citizen, it is impossible to prescribe which membership, which political identity is of most significance to him or her (...) It may (...) be the case that a citizen wishes one particular level to play a dominant institutional role."²⁵ The latter is significant, since in a procedural setting with majority principle, a citizen may find herself systematically outvoted at one level of association, but not at another and demand sub-national autonomous institutions the assembly of which is required to follow more stringent methods of decision making (up to unanimity) and interacts with the assembly of the whole to fine-tune the democratic will formation to adequately reflect preferences of sub-national identities. Such a citizen would have good reason (and a good idea of implementation) not to find any act of the whole legitimate before having had a say in this way. By parallel reasoning, it follows that "there is no imperative priority for the preference not to be outvoted by other Europeans over the preference to be represented as a Scot or Catalanian above the level of the state".²⁶ By still more parallel reasoning, there is also no imperative priority to declare as second rate procedures in which one participates *represented as a EU-citizen* over those in which one is represented as a national citizen. Similar to Sunstein,²⁷ Möllers reminds us that the legitimatorily relevant political identity one has a reasonable claim to be represented in as individual citizen is as much a matter of concern and the need of perspective taking in the

²⁵ Multi-Level Democracy, 250

²⁶ Ibid., 253

²⁷ Free Markets and Social Justice

process of deliberation over the justice of a norm to be applied to a certain audience as it is a matter of available levels of representation and decision making and their relationships. In this interactive co-constructive process, “procedures define subjects of legitimacy that adopt and modify these procedures –or not.”²⁸ This conception shows that the delimitation of an adequate audience of legitimation very much varies with the topic, context and the regulatory capacities that individuals in political processes are offered. In a multilevel system, there is therefore no way to exclude that citizens affected by certain questions claim with good reasons to have a say in the decision-making processes at the supranational level.²⁹ If so, then the shape and limits of the demos among those associated by the applicability of the law to them –whether directly or through nation states is immaterial—is variable, not a priori bound to any level in particular in the context of multi-level systems of decision making, and subject to reasonable assessment in light of concerns, and therefore a priori indeterminate. In sum, a EU-people in the sense relevant to legitimation of EU-wide norms, such as it is assumed and acknowledged in the institution of a EU-parliament as a “forum of European political contest”³⁰ and other EU-level institutions, as well as by the fact that the treaties address their claim to the “citizens and peoples” of the EU is already in place wherever EU-citizens deliberate and decide, as well as demand accountability from their officials from the perspective of the interests common to EU-inhabitants at large in an institutional environment that allows to give such deliberations adequate expression by representation at the EU-level.

Habermas

Habermas’ sophisticated conception of multi-level citizenship and legality as he articulates it in his recent writings on the developments and needs of European democratic government takes a constructivist stance like Möllers’ for the investigation of the normative status of decisions at the national and EU-levels, and in this sense also utilizes the perspective of the democratic sovereign in the legal sense, but completes the survey of relevant perspectives

²⁸ Ibid. 260

²⁹ Cf. Christiano, but with the opposite tendency in his conclusions

³⁰ Ibid. 262; cf. also, with regard to the need for the formation of an intraparlimentary, intra-institutional, non-anti-European opposition to normalize the EU-level decision making procedures: Nassehi, Armin, „Europa braucht eine echte Opposition“, *ZEIT* 15.05.2013.

involved in the decision-making processes behind the coercive rules applying to all EU citizens. Like Möllers and unlike the no-demos proponents, Habermas identifies in the intricate system of accountabilities and traces of civic participation opened in the European institutions –with the egregious exception of intergovernmental decision-procedures through the Council of Europe that has the potential to threaten the legitimacy potentials accomplished by the remaining institutional arrangements if routinely employed for more efficient policy making-- a highly innovative notion of possibilities of organizing genuinely supranational legitimation practices democratically beyond the familiar structures of federal states or international organizations among sovereign nation states. I will have to restrict my attention here to a very small part of Habermas' extremely fascinating reflections that is relevant in the current discussion.

Habermas construes the relationship between member-states and the totality of EU-citizens as that of two participants in a legitimating discourse with symmetrical entitlements and a common commitment to ensuring the legitimacy of *all* regulations affecting each of them. The supranational level organizes the compound interests, concerns and will of the totality of all EU-citizens and in this sense forms a democratic sovereign on its own which is, however, not superordinate to the nation-states but merely coordinate with them. At the national level viewed aggregately, the same set of persons is represented as citizens of their respective democratic national states with all the rights, entitlements and acquired statuses that their respective national state grants them in virtue of its legal system. That is, at the national level there is no exact homogeneity among legal subjects on the territory of the EU, since the rights, entitlements and acquired statuses they enjoy may vary from member-state to member-state, just as the institutions safeguarding these statuses constitutionally and legally in the respective nations may have widely varying structures which, however, each in their own way are to be seen as an instrument protecting the democratically legitimized rights and entitlements of its own citizens. At the EU-level, in contrast, each member of some nation state that is member of the EU enjoys exact equality in civic status and legitimacy relevance with every other EU-citizen irrespective of each other's nationality. Thus, when the question of the legitimacy arises, the coordinated individual EU-citizens can judge the proposal from the perspective of associated individuals to whom the corresponding norm would apply and would exact effects across the board equally, by

deliberatively taking all relevant perspectives into account that support or undermine the proposal's claim to be equally in the interest of all those affected by the coercive norm instituted when the proposal is accepted. As citizens of their respective nation states, the same persons examine then whether the implementation of the norm would result in a loss of democratically achieved and thus legitimate status relative to their statuses before implementation. In this way, legitimate nationally articulated interests constrain the exercise of EU-wide accepted norms while conversely legitimate EU-wide norms can legitimately constrain national legislative and judicial activity as long as this is not perceived by the citizens of that state as an unfair impairment on their statuses.

With this construal, Habermas succeeds in subsuming the relationship between the claims coming from the EU-level and its institutions and those coming from the national level under the interaction-model of communicatively associated free and equal participants in a legitimation discourse that is familiar from national legitimation. Given that the claims coming from the EU-level are thus in principle subject to deliberative consideration and negotiation among the legally constituted affected perspectives, the acknowledgment of EU-wide regulations claiming uniform application throughout all national governments associated in the EU is no more than the exercise of the same competent civic deliberative competences as the acknowledgment of national legislation. Thus, there is no principled sense in which EU-citizens are not in the position of the democratic sovereign vis-à-vis coercive norms stemming from EU-institutions³¹. The status of a community capable of granting or revoking legitimacy to proposed decisions depends on *functional* places in the legal network constituting the two-layer structure of the EU, not on the contingent reference to pre-political identities.³² As Habermas expresses it, the innovative interlocking of legitimation flows can be construed as a "shared sovereignty"³³ between EU-citizens and nation-states. But precisely because of this, it is simply incorrect in light of the analysis of

³¹ In consequence, those cases in which citizens and their representatives accept a regulation at the EU-level that they know to apply to themselves when implemented just as to every other EU-citizen uniformly throughout the EU are cases in which the EU-wide legitimation audience reflectively accepts a rule with the priority features vis-à-vis the national legal orders characteristic of decisions at the supranational level.

³² In agreement with Habermas, the Europarechtler Thomas Schmitz remarks critically of the Verfassungsgerichtsentscheidung regarding the Lisboa treaty: „Das Gericht setzte sich nicht mit der Möglichkeit auseinander, dass die Bürger der Mitgliedsstaaten als Bürger der Union eine eigene Gemeinschaft bilden könnten, die auch ohne Staatsvolk zu sein, die erforderliche Legitimation spenden kann.“bpb: Das Grundgesetz und die Europäische Integration“, §4.

³³ Zur Verfassung Europas

the flows of legitimation instituted in the treaties that the supranational level lacks the legitimation relevant relationship to the deliberatively assessing audience addressed by its regulatory activities in the form of proposals for enforceable rules.³⁴ We could say that the EU-citizenry appears in this model as constituted by the treaties as a supranational sovereign constrained by an institutionalized respect for the democratic accomplishments of its members that are represented equally as deliberative interlocutors of the institutions representing the entirety of EU-citizens in the institutions representing each member state's national interests, and protected in their integrity by the provisions at various levels in the decision process that invalidate those supranational decisions that manifestly alter or damage the constitutional order of a member state without its express consent.³⁵ In this sense, the interests of the collectives forming nation-states in the EU can be safeguarded in the same way that interests of individual citizens are safeguarded by the democratic procedures in national legitimation practices.

Like Möllers, Habermas challenges the no-demos ploy at its core by parallel reasoning. If the deliberative model is able to normatively vindicate the legitimacy claim of democratic will formation procedures at the national level by reference to their nature as perspective coordinating communicative processes, and if the same model applies to the coordination of the relationship between the decision-making agencies at work in the two-level European supranational system, then it is utterly unclear how we should dispute the claims to legitimacy of supranational norms made in this system without at the same time discrediting the claim to legitimacy at the national level. According to Habermas, democracy and statehood are linked historically, not normatively. They can be detached and reassembled in innovative ways if complex structures of coordination and integration

³⁴ *The whole in these constructions includes the whole, territorially seen, as equal part of the democratically legitimized legislative actors, but, precisely because it is no more than one among equals in the perspective of legal and regulatory competence, its degree of sovereignty is best described as "shared with" or "limited by" the member states and their potentially independent will. But because the decisions reached by the same whole that at the input side appears as a part are an output that binds each and every subject of each and every part of the legislative system (because it binds each and every subject of the EU, i.e. all EU citizens, and each and every subject of the nation-states associated by the treaties, and because this double counting is legitimatorily not redundant), the sharing of the legislative competence ("sovereignty") does not result in a fragmentation of the legal order determined in this way (i.e. the popular will expressed by the acceptance of these laws is consolidated at the level of application, i.e. legal practice).*

³⁵ By the described innovative interlocking networks of responsibility, representation and accessibility to participatory activity of the citizenry that is subject to EU-wide rules when they are implemented, the treaties give pragmatic substance to the commitment to constitutional democracy under the rule of law expressed in the ambitious preambles and the relevant Articles of the Treaties.

among complex systems of associated individual citizens so require without loss of democratic legitimacy and without the need of an additional or pre-existing constitutive act supplying them with a well-defined demos by converting the emerging supranational structure into a hierarchically ordered federal nation-state. This combination of national citizenship and immediate association as citizens of organizations that coordinate decision-making among larger numbers of states is precisely what Habermas regards as the most promising learning effect to be gathered from the European model for the elaboration of a cosmopolitan global order with differentiated democratic systems of governance encompassing more than one nation-state.

Of course, none of this means that the actual practices in the EU-decision making chambers already realize the ideal of democratic justification allowed by the treaties already at the supranational level. On the contrary, precisely because parts of the EU-wide decision-making *does* satisfy very ambitious demands on legitimation, those parts that don't, mostly found in the intergovernmental mode of decision and its institutions, become all the more criticizable as normative *incoherencies*, i.e. failures to comply with one's own realizable normative standards. But none of this is able to support wholesale discreditations of the democratic legitimacy of the supranational level of the EU and its priority in application.

In a third step of his "constructivist" construal, Habermas then proceeds to indicate ways in which the remaining task, the constitution of a legitimation-capable public sphere of communicating citizens, could be solved. In these reflections, he draws on earlier work on the place, structure and requirements that a public sphere has to satisfy in order to allow understanding the formation of any opinion on matters of common policy as a rational and cognitive process, or as an "epistemic process" that is only responsive to the forceless force of the better argument and excludes distortions from other, non-epistemic and non-doxastic sources.³⁶ To a certain extent, Habermas is here taking up the challenge posed by Grimm's and Offe's versions of the no-demos argument that suggested that under the conditions of so much heterogeneity in so many epistemically relevant dimensions (cultural background understanding, normative orientations, rational instrumental reasons, acquired statuses, etc.) and so much complexity, it would be sheer dreaming without factual warrant

³⁶ Faktizität und Geltung, „Ist die Herausbildung einer europäischen Identität nötig, und ist sie möglich?“, „Three models of democracy“, etc.

to postulate the existence of a EU-wide public sphere apt to allow normal legitimation-enabling communication conditions comparable to those we find in existing, naturally grown national publics. Habermas' main point here is that the difficulty in establishing the right kind of learning processes does not exclude the local functioning of information flows that are sufficiently rational for the acknowledgment of the results of the relevant discussions as normatively as binding as on the national level. His impressive and unprecedentedly elaborate conception of the flow of information and of legitimation in complex multi-level systems illustrates what it would take for the no-demos argument to go through beyond a mere prejudice.³⁷ It also allows Habermas to make much more precise than the no-demos proponents where one would have to stimulate which kinds of learning processes and new institutional structures for the growth of a European public sphere. These are extremely important and worthwhile reflections that demonstrate how one side's *modus ponens* is the other side's *modus tollens*: given that the European public sphere is not yet nearly as developed to allow a civic public sphere for the seamless and effortless communication of legitimation questions, the no-demos argument concludes that EU-wide regulations decided on the background of such a dysfunctional public sphere must "structurally" lack legitimacy. Habermas, on the other hand concludes that, given that legitimation is possible but imperfect due to the dysfunctionality, the dysfunctionality needs to be addressed and removed.

The same circumstance –an extremely heterogeneous and complex social space encompassed by the applicability of EU law and EU-jurisdiction—thus does not wear its normative significance on its sleeve at all. As Habermas has a developed explanatory theory of why and how legitimation-relevant information is, in spite of appearances, capable of flowing throughout European publics and their diversity, it would be on the no-demos proponents to counter this with an explanation of why, in spite of the explanatory model, this is impossible. But we do not need to resolve this issue in our context, since we only need to understand how a public that is in the right kind of relation to the norms to be legitimized to be in a position of being entitled to participate in its legitimation is already now a matter of fact. That this is the decisive question is the case because only identifying such a position and finding it occupied with norm-responsive social agents enables saying

³⁷ „Hat die Demokratie noch eine epistemische Dimension“, Gespaltener Westen...

that, even though the public sphere for communicative purposes may be defective, accepting and legitimizing supranational norms can reckon on the same relevant structures as on the national level, and therefore it is already now false that there is a principled legitimation problem (apart from the technical one of establishing complicated communication tasks) for rules at the supranational level that disables accepting them as mandatory as those on the national level. It is here where Dewey's conception of the social and natural process of the constitution and selection of relevant groups as legitimation-competent "publics" is of indispensable help.

Dewey

Whereas Habermas' model of the position of legitimation-subjects exploits the potentials accruing from the ability to communicatively resolve assessment tasks that involve perspective taking and placing proposals into various normative contexts to judge their acceptability, Dewey's naturalist conception allows the identification of pragmatic structures of association that lead to the co-constitution of a public capable of legitimizing its own rules. It thus covers the same ground as the no-demos intuitions about pre-existing or underlying political identities but entirely deflates the conception of statehood underlying the notion of a political community as the subject of popular sovereignty. Thus, the existence of a legitimation-relevant demos comes too cheaply to remain unfilled for any moderately lasting habitual cooperation.

As Dewey observes, something like common interests are formed as a result of the desire to coordinate differential responses to the situation created by the appearance of secondary effects from agreements of some with each other to cooperate somewhere. Whereas the primary cooperators are trivially interested in the results of their agreement, now previously unaffected people face unexpected obstacles in the performance of their lives, collective action plans for the solution of problems can be formed in a rational way. In this sense, the public of associated stakeholders is created by the factual scope of problematic situations created by a certain type of coordinate action decided somewhere and the changes it induces, and in this sense "precedes" the communicative and reflective formation of intelligent collective responses to the range of problematic situations caused by the

intervention of this type of coordinate action. Dewey's Public is the human substrate that can become, if everything goes well, an articulate Öffentlichkeit but is already at its inarticulate inception in the functional position and in the normative competence to constitute those with respect to whose intelligent and informed assessments the normative evaluation of practical proposals for the solution of conflicts and problems needs to be justified. As Dewey puts it, "the greatest challenge for a public is to recognize itself."³⁸ Accordingly, he spends quite some time and care to explain the reasons why under the complex conditions like the one triggering his account --viz., the inchoate immigration-, post-civil-war, post-World-War society in the middle of an unprecedented explosion of technological innovation and economic expansion--, why this recognition of common exposure to secondary effects of primary cooperations at some place in the social fabric gets to be a formidable task requiring, as Habermas explained, very sophisticated instruments of organization and articulation of a competent public opinion. But the point is that even before forming something like a reflective consciousness of themselves and their position towards the problematic situation, everyone involved of a collective identity as a group glued together by being exposed to the causes and effects of a certain type of coordinate activity, the public exists at and enjoys the normative place of being the relevant audience for justification of the implicit and explicit rules underlying the cooperation by the mere fact of being in the right position to judge and have a say. The way in which this "say" is to be articulated to realize a rational assessment of everything involved is, like every intelligent problem-solving behavior according to Dewey a reflective and multiply articulated feedback procedure. But important for the purposes of the possibility of legitimation for the rules underlying the cooperation is less the how of articulation than the who underlying it.

This conception of "the public" illuminatingly explains in what sense the scope, impact and causal networks of objective problems that people are exposed to is one important factor in resolving the "most important problem of the public, to find itself". Another important factor is the extent and impact of the primarily non-political cooperative relationships with secondary effects that do have a political dimension. This can be in the form that they require redistributive policies or compensation, protections of human rights, etc. for those

³⁸ Public and its Problems

exposed to these effects, even though they were not part of the deal that constituted the agreement to cooperate. Both of these elements together constitute as a matter of fact forces of association and social integration into the group of all those who have a legitimate stake in the question.

We could call these two elements elements of involuntary political association by the effects of non-political cooperative agreements somewhere else. Once associated in this way, however, the corresponding groups acquire objectively the competence to be judge and an entitlement to participate in the normative assessment of regulations designed to bring the secondary effects under social control (e.g. in the form of a just distribution of the burdens, or equal protection of basic civil and human rights, etc. in the light of these secondary effects). Both elements are –other than in Möllers’ model– not entirely up to the associates to decide but rather to be taken as a given. For Dewey, it is a next to verbal question from which degree of incorporation in such cooperative associations for the purpose of regulating the secondary effects of the non-political action in question we wish to call it a state. Much more important and substantial is the insight in a new principle of identifying legitimatorily relevant political agents: wherever there is a demand that the circumstances impose on groups of individuals and a regulatory capacity, then there is a public that, if additionally there are democratic procedures, is in the right position of legitimizing a proposal of a rule no matter the level of political organization. Obviously, this is a general fact about the relationship of concerns and interests, social communities and their employment of, but also reasonable and defeasible respect for their self-regulation instruments. States are more on the means side than on the ends side, and so are the things constituted by nation states, Grimm’s “Staatsvölker”. The no demos argument gets things exactly the wrong way around. What preexists is the normative impact of cooperation somewhere the corresponding public, and what comes after as a contingent historical differentiation achievement is the structure of the nation state. Hence, there can be no principled legitimation deficit when there are cooperative associations on the transnational level. It is simply another contingent differentiation achievement. Since, given a legally constituted state or system of supranational cooperation, the corresponding laws are among other things also means of social coordination, this trivially applies to legislation and its effects as well. Supranational law thus already has a public to judge its credentials as soon as it is implemented as a

regulation of the behavior of each and everyone on the territory of the EU or with its citizenship. The hunt after the demos is, in this precise sense, futile for the explanation of the democratic legitimacy conditions of supranational regulations.

V. Analytic overview of the argument-structures

The semi-formal analysis of the structures of the arguments we have discussed so far could be summarized as follows: the no-demos argument proceeds in these steps, with the non-explicit or variable assumptions in square brackets.

(1) No demos = no nation-state –[State-philosophical principle³⁹]→no democracy.

(2) No democracy –[normative legitimation principle]→no legitimation.

(3) EU ≠ nation-state.

Therefore:

(4) On the strength of (3), (1), (2) [logical principle]: EU→no legitimation.

Neither (2) (the democracy principle), nor (4) (logical principles governing deductive inference), nor the factual premise (3) are under dispute. The definitional first part of (1) cannot reasonably be under dispute because it is a definition. Thus, it is only the principle connecting the pre-existence of a demos that is identifiable as the population of a nation state with the existence of democracy that is disputed. This allows the following analysis that focuses on this question of detail.

The no-demos argument assumes as obvious or unproblematic that democracy requires a nation-state as legal infrastructure, i.e.

(a) Democracy → nation state.

³⁹ An enlightening debate about the deep reach of state-philosophical prejudice in German jurisprudence and legal scholarship can be found in Brunkhorst, H. „Mythos des existentiellen Staats“, in Brunkhorst, H. (2012), *Legitimationskrisen. Verfassungsprobleme der Weltgesellschaft*, Nomos, 369-85, with further references to key players.

Against this, the objection is that a weaker principle is required for the constitutive conditions of democracy, which is given by the sort of normative structures that guarantee uniformity of behavior, i.e. legal structure⁴⁰:

(a') Democracy → legal system.

Now it is true as a matter of standard legal theory that

(b) Legal system -/-> nation-state.

This is an utter triviality with regard to incorporated groups of people organized by legal provisions generally –such as unions, trade-regimes, sports-associations, etc.--, but it is only slightly less trivially obvious even when we focus on legal structures that constitute groups of people as subjects with rights that equip them with basic traits of civic existence.

Examples for legal systems fulfilling this substantive function that do not constitutively require nation-statehood are international law, human rights law, etc.

Given that there is no entailment-relation between legal system constituting citizen-like traits and nationhood, the challenge is then to motivate why –as opposed to the mentioned and other salient examples—specifically the EU supranational legal system should not count. If it does, then the question is why it excludes democratic legitimacy where neither international, nor human rights, nor national law does. This question asks for non-circular, non-question-begging reasons for the selective skepticism of the no-demos ploy.

Going a little farther, one might try if the no-demos ploy makes a tacit non-question begging assumption that, if spelled out, makes the question-begging at least shared with the defenders of the legitimacy of EU-supranationality. So, for example, another agreed principle is:

(c) democracy → *constitutionalizable* legal system.

If this is accepted, as is reasonable for many reasons amply known to the community of political philosophers of democracy, it would explain the preference for nation-states, since constitutions have mainly been used to establish nation states with their constituency, the

⁴⁰ Cf. Habermas' "democratic principle" and its relationship as a successive specialization on the moral principle (U) through the discourse-principle for the clarification of the method of justification for norms generally, (D).

national demos as legal systems. Insofar as such constitutions contained democratic principles, they present the familiar type of constitutional democracies. However, again, a weaker assumption that does the same work without the national-state bias reveals that even inserting this tacit assumption does not make the no-demos ploy more compelling, for:

(c') Constitutionalizable legal system -/-> national state.

Some scholars in the Kantian tradition would also count the institutionalized part of international law as constitutionalizable or even as already partly constitutionalized, but not all. An excellent example for a legal system considered by standard legal scholars and certified by the competent courts as a constitutionalized system –such that this status is one *de facto*, not *de faciendo*-- is precisely the EU supranational legal system presented in the treaties and relevant accompanying documents (protocols, etc.). Thus it seems that there is no good argument that would serve to support the no-demos ploy against the possibility of EU-supranational legitimacy in the least.

Let me move on to show that there is indeed, under unchanged conditions, very good support for the contrary view that the EU as constituted in the treaties (etc.) can be in the right position for legitimizing EU-wide constraints on the national legal structures of the member states. This is pretty straightforward. Beyond dispute, in spite of (3), are the following two points:

(5) EU=supranational legal system.

(6) EU constitution contains democratic principle.

It is important not to confuse (6) and the much stronger and unfortunately still false assumption that *all* mechanisms of decision-making in the EU are undisputedly conforming to ambitious democratic standards, as we saw in the discussion of the relatively feeble (albeit not entirely *inexistent*) democratic credentials of intergovernmental decision-making. For the purposes of undermining the no-demos ploy, we only need to show that EU-supranational legitimacy is *possible*, not that it is guaranteed (or the EU already a 'perfect union').

Now, if we put (5), (6) and (c) together, they entail that the EU has, with regard to the question of legitimation-requirements, the requisite features of a constitutionalized legal system with democratic principle. Applying the undisputed democratic principle of legitimacy (2), this means that it cannot be excluded that correctly formed and decided parts of the EU supranational legal system are legitimate. This non-excludability of legitimacy obviously encompasses the specific class of regulations that the no-demos argument is geared against, viz. those with *effects on the national legal systems*. The most one can avert is that these effects need to be monitored as to their intra-national legitimation when they affect democratically justified legal norms that are constitutive for the internal democratic structure of the affected nation-states. Such a monitoring requirement would be an innovation required by supranational legal structures vis-à-vis both national states and international agreements among nation states.

VI. Forget no demos

I conclude that none of the versions of the no-demos argument are compelling even on the most charitable readings. Therefore, the corresponding conclusions depending on it regarding the lack of democratic legitimacy either of the project of a continued political integration of the EU (Streeck) or of the priority of EU law over national law in those areas specifically delegated to the EU in the treaties have to be seen as depending on the problematic and not further supported assumption of a nation-state based perspective from the very start, i.e. a certain traditionalism in the analysis of the innovative features of multi-level governance such as the one realized in the EU institutions.

That this is a problematic assumption (i.e. one in need of independent support to be admissible in an argument) can be seen by the fact that there are a number of alternative ways of investigating the legitimacy of an additional and partly autonomous layer of supranational regulation that also binds the national legislative, seen from their standpoint, “from without”, but without forming an “external regime”. At least the three of these ways that I have presented⁴¹ reach the opposite conclusion, viz. that the integration process

⁴¹ (and there are others, such as a capacity based approach on legitimacy, that I have not even mentioned or thought about enough but predict would come to similar results)

reached through the process of maturation of the political nature of the supranational legislative level in the EU can be seen as having already now equipped the latter enough for it to count as *as legitimate as* the national legislative level, and as having the place of the legitimating public adequately occupied. Having reason to follow the recommendations of no-demos based accounts would therefore require further arguments that are independent of the nation-state bias built into them.

On the other hand, politically all three rebuttals of the no-demos ploy contain important indications of how exactly to confront the institutional democracy deficits in the Union decision procedures that every writer on these topics also acknowledges. Although Lisbon already has made much progress in some respects, it also made regress, e.g. in acknowledging the intergovernmental decision modality and its agent, the EU-Council. Similarly, permanent concerns about the transparency and accessibility to civic participation of the complicated decision processes at the EU will have to be addressed with innovative ideas if the formation and education of an informed and competent EU-citizenry is to be accomplished. As should be clear, these proposals only can be understood as normative demands accruing from the perspective of legitimation-requirements when the obvious is theoretically in the clear: that there is, in Europe, already right now a supranational public, and it is in the right position to legitimize or challenge regulations at this level or, for short: that EU-supranational legitimacy is possible, available, already exemplified, but, precisely because this is so, noticeably not yet everywhere realized. Like all known constitutional democracies, legitimizing EU-supranational regulations and their consequences democratically is thus an ongoing task, not a ready-made given.