Citizenship and Solidarity in the European Union

From the Charter of Fundamental Rights to the Crisis, the State of the Art

Alessandra Silveira, Mariana Canotilho
& Pedro Madeira Froufe (eds.)

EUROCLIO STUDIES AND DOCUMENTS

P.I.E. Peter Lang

This book attempts to address an important question: where is the European project going?

As Europe struggles with the most profound economic and social crises in recent history, what happens to the promises of freedom, democracy, equality and respect for the inviolable and inalienable rights of the human person proclaimed in the Preamble of the Treaty on European Union? How does the European Union intend to demonstrate its commitment to fundamental social rights at a time of widespread deregulation and an increasingly precarious labour market? How can we further enhance the democratic and efficient functioning of European institutions when there is a growing distance between citizens and political elites?

This publication is based on papers given at the international conference "Citizenship and Solidarity in the European Union – from the Charter of Fundamental Rights to the Crisis: The State of the Art", which took place in the School of Law at the University of Minho, Portugal, in May 2012. The line-up of contributors includes scholars from southern and northern Europe and Brazil, and together the papers constitute a lively and productive debate about the future of Europe.

Alessandra Silveira is Professor of European Law at the University of Minho, Portugal, where she also directs the Centre of Studies in EU Law (CEDU) and the Master's degree in EU Law. She holds a Jean Monnet Chair linked to the project "Citizenship of rights: European citizenship as the fundamental status of nationals of the Member States".

Mariana Canotilho has been Legal Adviser to the President of the Portuguese Constitutional Court since January 2013, and Assistant Professor of Public Law at the University of Coimbra, Portugal, since 2003. She is a member of CEDU (the Centre of Studies in EU Law) at the University of Minho, Portugal. She also collaborates with the Peter Häberle Research Centre on Constitutional Law at the University of Granada, Spain.

Pedro Madeira Froufe is Professor of European Law at the University of Minho, Portugal, where he is also a member of the Centre of Studies in EU Law (CEDU). He is the Coordinator of the Master in Judiciary Law at the University Jean Piaget (Luanda, Angola). He is the author (and co-author) of several texts on European Law, Competition Law and Consumer Credit Law, and he also lectures frequently on the same topics in Portugal, Spain and Brazil.

ON.2 O NOVO NORTE
PROGRAMA OPERACIONAL REGIONAL DO NORTE

QREN QUADRO DE REFERÊNCIA ESTRATÉGICO NACIONAL
PORTUGAL 2007.2013

UNIÃO EUROPEIA
Fundo Europeu de Desenvolvimento Regional

P.I.E. Peter Lang
Brussels

CITIZENSHIP AND SOLIDARITY IN THE EUROPEAN UNION

FROM THE CHARTER OF FUNDAMENTAL RIGHTS TO THE CRISIS, THE STATE OF THE ART

P.I.E. Peter Lang
Bruxelles · Bern · Berlin · Frankfurt am Main · New York · Oxford · Wien

EUROCLIO is a scientific and editorial project, a network of research institutions and researchers, and an ideas forum. EUROCLIO as an editorial project consists of two aspects: the first concerns studies and documents, the second concerns tools. Both are aimed at making the results of research more accessible, and also at opening up paths through the history of European construction/integration/unification.

The EUROCLIO series meets a dual objective:

- to provide reference tools for research,
- to provide a platform for this research in terms of the publication of results.

The series thus consists of two sub-series that satisfy these requirements: the STUDIES AND DOCUMENTS series and the REFERENCES series. These two series are aimed at general libraries and/or university history departments, teachers and researchers, and in certain cases, specific professional circles.

The STUDIES AND DOCUMENTS series consists of monographs, collections of articles, conference proceedings, and collections of texts with notes for teaching purposes.

The REFERENCES series consists of bibliographies, guides and other tools. It thus contributes to the creation of a database making up a "Permanent catalogue of sources and bibliographies on European construction".

Edited by
Éric Bussière, Université de Paris-Sorbonne (France),
Michel Dumoulin, Louvain-la-Neuve (Belgique),
& Antonio Varsori, Universitá degli Studi di Padova (Italia)

CITIZENSHIP AND SOLIDARITY IN THE EUROPEAN UNION

FROM THE CHARTER OF FUNDAMENTAL RIGHTS TO THE CRISIS, THE STATE OF THE ART

Alessandra SILVEIRA, Mariana CANOTILHO,
Pedro MADEIRA FROUFE (eds.)

Euroclio No. 77

Financial support was provided by FEDER (QREN – Programa ON.2 – Comissão de Coordenação e Desenvolvimento Regional do Norte).

Éditions scientifiques internationales
Brussels, 2013
1 avenue Maurice, B-1050 Brussels, Belgium
pie@peterlang.com; www.peterlang.com

ISSN 0944-2294
ISBN 978-2-87574-109-7 (print)
ISBN 978-3-0352-6385-5 (eBook)
D/2013/5678/110

Printed in Germany

CIP available from the British Library, UK and from the Library of Congress, USA.

"Die Deutsche National Bibliothek" lists this publication in the "Deutsche Nationalbibliografie"; detailed bibliographic data is available on the Internet at <http://dnb.de>.

Contents

Introduction

Mariana CANOTILHO

This book was born out of a question: where is the European project going?

What happens to the promises of respect for the inviolable and inalienable rights of the human person, freedom, democracy and equality proclaimed in the Preamble of the Treaty on the European Union under the current scenario of the deepest economic and social crisis of the last decades? How does the EU intend to show its attachment to fundamental social rights, in this time of an increasing precarious labour market, blurring of boundaries between employment and self-employment and demands of labour market deregulation? How can we further enhance the democratic and efficient functioning of the European institutions, when there is a growing distance between citizens and political elites? How is it possible to achieve the strengthening and the convergence of European economies and to promote economic and social progress, when all we hear from the European politicians are proposals of austerity programs that do not seem to be working?

Our first attempt to answer these questions took place in May 2012, at the International Conference on "Citizenship and Solidarity in the European Union – from the Charter of Fundamental Rights to the Crisis, the State of the art", which took place at the School of Law of the University of Minho, Portugal.[1] This publication includes the papers in which the oral interventions were based and a conclusion based in the transcriptions of the questions posed by the debaters. The panels and panel members of the Conference included many well-known and respected scholars, from Southern and Northern Europe, as well as Brazil, in what turned out to be a vivid and fruitful debate about Europe, the European integration process, the attacks to the European social model and the economic and social crisis.

In the present crisis scenario, European multilevel democracy is at a crossroads. The European Union has been accused of having a democratic

[1] See the Conference website *http://www.cedu.direito.uminho.pt/Default.aspx?tabid=14&pageid=102&lang=en-US*.

deficit for decades, and now that it has become evident that the Euro problems may only be solved at supranational level, that deficit could undermine national democracies. Vital decisions need to be given back to citizens, or they risk loosing all legitimacy. Legal perspectives and legal challenges of the multilevel democracy in the context of the crisis must be discussed. At the same time, recent sentences of the ECJ have started to develop the concept of a citizenship of rights; this process confronts the European legal order with the meaning and scope of citizenship: is its purpose only to support the economic freedom of movement of economically active citizens, or does it correspond to a uniform catalogue of rights and duties, typical of a Union based on the rule of law, in which fundamental rights perform an essential role?

Trying to answer some of these questions about European democracy and citizenship, Emilios Christodoulidis writes about democracy, solidarity and crisis, in a careful consideration of the meaning of the terms "citizenship and solidarity" in the current moment. He also asks what democracy do we want in Europe and how does the current crisis in the Eurozone help us to think about some of the proclaimed goals of European integration. Teresa Freixes tells us about the citizens' legislative initiative, in an attempt to draw attention to the legal instruments that may help us build an effective citizenship of rights and Jonathan Tomkin tries to understand how it is possible to reconcile integrationist aspirations with budgetary realities. Dora Kostakopoulou describes the anatomy of civic integration in Europe and, finally, José Rubens de Moraes reflects about some of the similarities and differences between the European Charter of Fundamental Rights and the bill of rights of the Brazilian Constitution.

The crisis we are now facing started as a financial and economic crisis, it is not possible to think about solutions without addressing questions about competitiveness and development models. The problems that the European Union faces impose new challenges to the integration process, mainly in relation to the dimensions of citizenship and solidarity introduced by the Charter of Fundamental Rights. The European Union awakes to the necessity of economic governance based by principles of budgetary, financial, fiscal and social security convergence, aiming to promote competition and a unified and sustainable development of its regions, assuring the livelihood of the European social standard – something that a purely (and only) monetary governance cannot do. It seems inevitable the deepening of the federative components of the European integration – but through which instruments? Therefore, it is relevant to discuss, bearing in mind the basic notions of European citizenship and European solidarity, the sustainable solutions for the complexities of the problems we are facing, "without ever mistaking hardships for failures" – as wisely taught by Jean Monnet.

Trying to address some of these problems, Raúl Trujillo Herrera speaks about the questions raised by the free movement of workers in times of crisis, and Elaine Dewhurst warns us about the difficulties that will arise in an ageing Europe, and the need to encourage the full participation and citizenship of older people by re-writing age discrimination legislation. Nuno Piçarra poses the question of whether an area of freedom, security and justice may be regarded as a factor of development and competitiveness, and Marcílio Franca-Filho draws our attention to the relationship between these aspects and global administrative law. Analysing what have been the results of the monetary union so far, João Rodrigues makes a critique of the European political economy and, finally, Katarzina Gromek Broc writes about the prospects for social Europe.

The third part of the book is dedicated to questions related to multilevel constitutionalism and the European political identity. The expression "multilevel" in the European Union context, refers to the reflexive interaction of different legal orders living in the same political space – and it implies a systemic network to solve the common problems. This is an interconnecting model which derives from the trans-nationalization/trans-territorialisation of the legal problems and unfolds into a multiplicity of perspectives concerning the solution of those problems. This phenomenon is more visible in the field of fundamental rights, because their protection at the European Union level is dragged to the sphere of action of Member States whenever they apply EU law – and that standard of protection will co-exist with the standards of national Constitutions and of the European Convention of Human Rights, giving origin to a kind of "multilevel protection of fundamental rights", that is directed by the principle of the highest level of protection (Article 53 ECFR). Therefore, the EU multilevel system is more sophisticated than other current federative systems. Then, being true that the "bills of rights" have consequences on the "federalizing process" (because it promotes the equalization of the citizens' legal positions in the whole system), it is important to discuss if we are in the presence of an European political identity, able to mobilize the European citizens beyond the State.

With these subjects in mind, Bruno de Witte discusses the tensions in the multilevel protection of fundamental rights, namely the meaning of Article 53 of the EU Charter, while Francisco Balaguer warns us about the importance of reinforcing European constitutional law, which is part of the European identity, in order to effectively deepen citizenship and build a better model of integration. Leonard Besselink revisits the "maximum standard", in a reflection about multiple political identities and Eva-Maria Poptcheva presents the right to consular protection as an example of the multilevel context of Union citizenship. Finally, in a more "global" approach, Marcelo Neves drives us through his theory of transconstitutionalism, with special references to Latin America.

Part four of the book is about equality and solidarity, the most forgotten promises of the integration process in this crisis framework. In fact, the principles of equal treatment and non-discrimination are at the heart of the European Social Model. They represent a cornerstone of the fundamental rights and values that underpin today's European Union. The European Union has known significant achievements in the field of equal treatment and non-discrimination and its legislation has significantly raised the level of protection against discrimination and has acted as a catalyst for the development of a more coherent, rights-based approach to equality and non-discrimination. However, there is a huge dimension of equality that is usually forgotten in the European discourse on non-discrimination: economic (in)equality. In 2009 (and therefore not reflecting all the consequences of the austerity policies that followed the sovereign debt crisis), the overall at-risk-of-poverty rate for the EU-27 was 17%, but more than 28% of single females and 25% of the households composed of two adults and three or more dependent children were in that situation. The problem would be far worse without social transfers. For this reason, the debate on poverty has to be a debate on equality and solidarity policies, largely affected by the measures imposed to fight the economic crisis, which have seriously wounded fundamental rights and made income inequality skyrocket.

The authors challenged to think about these questions have chosen to address several different dimensions of social policies. Catherine Barnard writes about dismissal and EU law, while Donatella Loprieno describes many of the problems faced by migrants in (ir)regular situations during the economic crisis. Tamara Hervey debates health equality and human rights in the EU today, and Francine Mestrum makes interesting considerations about solidarity, poverty and social policies in the Europe of the 21st century. Dimitry Kochenov poses important questions in need of an answer about European citizenship, and José Castro Caldas examines the political economy of European deconstruction.

The book's final part is about culture and diversity, which are fundamental elements of the European project and identity. According to the Treaties, the EU contributes to the development of culture(s) in Member States, respecting their national and regional diversities, but highlighting their common cultural background. There is an underlying idea of a common cultural matrix that allows for very different singular expressions. In this context, it is important to respect cultural diversity, while combining it with the construction of a unity that identifies Europeans. Maybe the biggest challenge is to know the other: surprisingly, Europeans know very little about each other. Therefore, getting to know other mentalities and behaviours is absolutely necessary to avoid undesirable nationalism. But how can we build a common feeling of belonging in Europe? Can

the European cultural policy be mobilizing enough? Through what kind of concrete cultural policies? On the other hand, and in what regards the issue of culture, it is also necessary to discuss the question of immigrants and their integration. The EU lacks a serious and common immigration policy that faces all the difficult questions. It is urgent to develop alternatives to the actual state of affairs, namely to measures that are serious violations of human rights, like the detention camps. What migration policies for the Europe of the 21st century?

Thinking about these questions, Domenico D'Orsogna writes about cultural diversity, citizenship and migration flows. Jesus Prieto de Pedro describes cultural diversity as both a political and legal challenge and the basis for humanism in our era, while Franco Gaetano Scoca examines the Italian model for the protection of diversity and the legal treatment of foreigners. In a more philosophical approach, Willis Guerra addresses the problem of hostile diversity in the contemporary world society and, finally, António-Carlos Pereira Menaut makes sharp remarks about European constitutionalism in 2012. Times are tough again, he warns us. May the papers and debates transcribed in this book foster and contribute to democratic debate, because only democracy and constitutional limits to the exercise of political and economic power will guide us out of these turbulent waters and allow us to recover the promises of the European project.

PART I

DEMOCRACY/CITIZENSHIP

Democracy, Solidarity and Crisis

Some Reflections on the State of Europe

Emilios Christodoulidis

University of Glasgow

We are invited to think about the European Union in the throes of crisis; or perhaps, from a legal-theoretical point of view, through the prism of crisis. What does "citizenship and solidarity" mean in the current moment? What democracy? And how does the current crisis in the Eurozone, from which we appear incapable of emerging, help us to think about solidarity and democracy?

So let us begin with *crisis*, and take it seriously, not, that is, as the *opportunity* it is with increasing frequency referred to, opportunity to "get our house in order", or more grandly to rethink European citizenship, but as the human catastrophe it has visited to the people in the Southern States of Europe, and as a Greek citizen speaking in Portugal, this appears to me to have a double resonance. "Greece heading for a clash with its lenders" read the Editorial of the *Financial Times* the morning of this lecture, as Greek stocks fell to a 20 year low in the wake of the inconclusive Greek election. The unlikely recipient of the mandate to form a government, the young Euro-communist leader Alexis Tsipras, suggested that the Greek vote had declared the "barbarous austerity programme" imposed on the Greeks "null and void". If in government, he said, his party would abandon the bailout agreement, default on the debt, or at least call a moratorium on repayment, reverse the appalling recent labour reforms, and put the banking sector under State control. This did not go down well with the champions of neoliberal austerity. The editorial of the *FT* reads: "The EU has gone as far as it can to try and help Greece. If there is not the political will in Athens to do what is necessary … it is pointless to continue".

Let us remain with this invocation of "political will" and its lack. Since Rousseau at least the democratic expression of the general will and the political representation of a people are constitutively linked. What

does it mean to seek "political will" outwith the democratic expression of a people who, in the May election at least, overwhelmingly voted to oppose the worst austerity programme in the post war history of Europe and to defeat a government that had committed them to it? What this other "political will" brings into the picture involves no demos; the references (in the *FT* at least) is to the "forbearance of the creditors". However that is understood the invocation is to a political will that circumvents the national demos and the expression of its democratic mandate.

I do not want to delve too long in this, although I will pick it up again briefly in the next section. But I raise it because it poses serious questions about democracy in the political and constitutional imaginary of Europe in the early 21st century. The customary entry point for constitutional theorists to talk about democracy is through the concept of *constituent power*. Constituent power is about the possibility of a people of initiating something new. On the one hand then, the notion of constituent power marks our ability, as a people, to break with what is already *constituted*. On the side of the constituted is provided the means to "recognise" that "break" with the situation as it stands. Somewhere along this paradoxical articulation, along this founding asymmetry, lies the "democratic" impulse as a moment of "self-definition".

Now, self-definition may appear a million miles away from our current stunned impotence before the financial meltdown. As the Continent reels in the throes of crisis, its precarious pact is threatened by successive democratic elections. A legally enshrined fiscal pact has been "agreed", that curbs the budgetary sovereignty of elected governments. The economic prescription of the governing class of Europe has repeatedly come up against popular anger and the opposition of the electorates. In the Netherlands, in the Czech Republic and in France, those who rammed through the austerity programmes faced electoral defeat. Additionally, in the past two years, as a result of the debt crisis the governments of Ireland, Portugal, Spain, Greece, Finland, Slovakia and Italy have fallen. And yet, even where the opposition has been most vocal and most vehement, a strange sense of democratic defeatism prevails. There are many ways to thematise these developments. I would suggest that there has occurred a striking split in Europe's democratic imaginary. On the one hand we have an alarming *subjection of the political to the economic*, in terms of measuring the 'success' of political societies in terms of satisfying rating agencies and financial investors. We will say more about the split in what follows. On the other hand the recent agitation has brought to the fore a different form of direct democracy, one that becomes increasingly hard to contain in formal political transactions, one that directly expresses hostility to the political system as such and finds expression in anti-institutional forms. As Stewart Motha (2012, 3) put it in a recent article:

> A common feature of recent political protests from Syntagma Square in Athens to Zuccotti Park in New York has been the refusal to be "political" in the conventional sense of protesting under the banner of established political parties, or organising through established movements with corporatist ties to the state such as trade unions. … In what terms might we re-articulate the problem of being political arising out of these political movements?

Democratic Simulation

What is perhaps more troubling than the existence itself of the perennial "democratic deficit" in Europe is how easily we have come to live with it, and how passively we have received its gradual radicalisation. Take for example the recent debacle, when the Greek Prime Minister suggested he seek a democratic mandate from the Greek people regarding the terms of the "bailout", and after an unprecedented humiliation at the Cannes G20 summit in November 2011, was "removed" by Europe's directorate, having been forced to retract his suggestion. Leaders were "understandably alarmed," adds one commentator, "at the mere mention of a referendum: the EU had scarcely escaped unscathed from popular consultations of this kind, held in immeasurable better conditions than those of Greece".[1]

What does it mean to think about the common good in Europe (and the expression of its people's political will) as reconcilable with such degrading, to come to accept it as inevitable, if not *in extremis* actually as legitimate? In the broader picture, it is undoubtedly the case that the coordinates of legitimation have shifted away from their grounding in democracy and closer to the language of efficiency or "steering", though again "steering" too appears to have come unmoored from the societal dimension, circuited instead to the shoring up of financial markets. We have here, then, a double slippage: from democracy to steering and from steering to maximising financial returns in global markets. For now let us stay with the first slippage, the loss of the language of democracy.

Perhaps the first question to ask about it, is what exactly was *lost*? In his important book *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (2011), Jan-Werner Műller reminds us that European attitudes towards the political role of "the people" have been marked by ambivalence throughout the last century, and especially since the war. As he summarised it recently:

> I want to advance the historical argument that insulation from popular pressures and, more broadly, a deep distrust of popular sovereignty, underlay not

[1] He adds: "'Papandreou's humiliation at the Cannes G20 summit of Nov 3 – unprecedented for a European leader – was the logical consequence of this false, although undeniably overdue, democratic naivety." (Kouvelakis, 2011, p. 25).

> just the beginnings of European integration, but the political reconstruction of Western Europe after 1945 in general. (Műller, 2012, 40)

This mistrust was played out spectacularly in the misadventure that was the ratification of the Constitutional Treaty, where the logic of democratic simulation reached its climax, and where the emphatic "no's" of the referendums translated into an a different form of constitutionalisation by treaty of a different form.

If Műller makes the argument against democracy, or at least direct or popular democracy, on grounds of Europe's history and dominant cultural background, Giandomenico Majone famously makes it on grounds of efficiency and of maximising performance. The transferral of power to unelected bodies, chiefly to committees of experts, and his emphasis on steering and outcomes, is well known. Unconcerned with democratic input and in fact gaining its legitimacy from efficiency rather than democratic participation, Majone has consistently analysed the political evolution of the EU, at all levels of authority, toward the development of a regulatory state (Majone, 1996; 2009). The EU is simply the culmination of this generic process whereby the imperatives of economic efficiency under conditions of capitalist competition compel political actors to delegate power to agencies composed of experts, independent of political parties or legislative interference. But as commentators have recently noted, a growing "politicization" of the EU's activities has thrown into question Majone's comforting notion that "non-majoritarian" decision-making among enlightened, independent, growth-promoting technocrats would suffice to legitimate its existence. And it is not unfair to say that in recent work (2009) Majone himself appears increasingly unsure of whether the model does indeed ensure efficiency.

Customarily at the antipode of such technocratic thinking stood the democrats of the "deliberative turn" with Habermas at the helm. But even with Habermas we now see a convergence which would initially have seemed unimaginable. Against the instrumental systemic steering mechanisms of the technocratic imagination, Habermas had famously argued for a deliberative public sphere, and this stance, with its grounding in the "deliberative turn" that guaranteed at once both political participation and the truth of its deliberative outcomes, was endorsed by proponents of European integration, of global democracy, of the various forms of cosmopolitanism, etc. He had argued this against Luhmann in their important exchange in 1971, a debate that he was largely seen as having won, and which largely made his reputation in Germany. And yet, even this champion of democratising the public sphere has now significantly lowered the threshold for what counts as democratic.

How to understand this trajectory of Europe's foremost democratic theorist? Habermas's suggestion for a constitution as the consolidation of

a European legal order is substantively premised on *(i)* a particular political culture; *(ii)* a mode of communication: as public sphere imbued with transparency and democracy; and *(iii)* a social post-war social democratic inheritance: commitment to welfare, rights, personal security. At least that is how things stood in 2006. But since then we have had *Ach, Europa* in 2008[2] and, hot off the press, *Zur Verfassung Europas* in 2011. Anderson comments that where in the 2008 Habermas had attacked the Lisbon Treaty for failing to redress the democratic deficit of the EU, "or offer any moral-political horizon for it", once the Treaty was pushed through he has been "trumpeting" it as "no less than the charter of an unprecedented step forward in human liberty, its duplication of the foundations of European sovereignty in at once citizens and peoples of the Union, a luminous template for a parliament of a world to come". (Anderson, 2012, 51)

If the Treaty of Lisbon was indeed rammed through to circumvent the negativity of the expression of popular will, it is still "blazing a trail to the cosmopolitan community of tomorrow". (Anderson, 2012, 52) But there is a more insidious side to this argument, a kind of spill-over of economic into political capital. It relates to a "Hegelian moment" in the most recent book, when the evils of maximising financial returns for capital at the expense of peoples' livelihoods and lives, is taken to be related in the twists and turns of the "cunning of economic reason" (in Habermas, 2011, 77) to a certain cosmopolitan awakening. I do not want to make too much of this. But I still want to insist on asking: why this telos for Europe, and this teleology? A teleology that takes as milestones of the route to political union the non-negotiable priority to entrench the protection of needs and secure the profit margins of financial-asset owners. In the slippage from politics to economics, in the measuring of the former against the latter in terms of performance indicators and market confidence ratings, lie the seeds of a new severe crisis of democratic legitimacy.

The question that motivates this line of questioning is the question about *constituent power*, and the slippage we tracked above is precisely a trajectory of the loss of the democratic or the constituent. Is it reasonable to claim, as Miguel Maduro does, "a low intensity constitutionalism" for Europe as concession to the absence of "a true *pouvoir constituant*" understood as "the power of the polity to define its own destiny"? (Maduro, 2005, 336) As a question of conceptual analysis, then, can constitutionalism in a "low-intensity form" survive the disarticulation of its constitutive distinction (its guiding distinction) and the sacrifice of the "constituent" pole? Let us be clear that it cannot. Constitutionalism is the achievement of the holding together of a political and a legal register,

[2] Which appeared in English in 2009 as Europe: a faltering project, enhanced with three important essays.

where the former involves precisely what Maduro denies his "low intensity" variety.

Economic Solidarity

As Europe watches over the pauperisation of the its peoples of the periphery (the four faltering countries sometimes grouped in the literature under the acronym 'PIGS') with renewed dispatches of austerity measures, what remains of the aspiration of economic solidarity that once was seen as underlying the common plight of the peoples of Europe? And if, for a moment we assume the oversight is benign, what forces of solidarity could be marshalled under current conditions of functional differentiation and the gaping growth asymmetry between northern and southern states? The refusal to "pay for the Greeks" becomes the populist motto that underlies political accountability (as in Germany), or wins elections (as in Finland). The flip side of this nationalist politics is the rise of an unprecedented hostility of the indebted toward their debtors. What is remarkable in all this is how quickly the much-agonised over creation of a *European demos* has come undone.

I would suggest however that although the effects of the undoing are currently felt more keenly than ever, there is something about the architecture of the European Union that undermined economic solidarity from the outset.[3] In the genealogy of Europe's constitutionalism there are two key moments of what Karl Polanyi would identify as the "disembedding" of the economy from (European) society (Polanyi, 1944). The first is the separation of the "economic" from the "social" as a structural feature of the set-up of the European Community. The second involves the post-Maastricht neo-liberal turn. From the very beginning the economic constitution was conceived as supra-national and the social constitution as national. In that sense the states of Europe were given the task of providing protection to the exposure to the market system run at supra-national level. With the neo-liberal turn, and despite the loud proclamations about the "social market", there has been an acceleration of commodification and a hollowing out of social protection whose radicalisation has generated waves of "Europhobia" across the Continent. In the process "action plans", the Social Charter, any form of meaningful "social dialogue", etc., have been gradually undercut.

When it comes to the "social" question, there will always arise the question over the now seemingly lost opportunity to claim a unity for Europe on the back of a common commitment to social democracy and welfarism which was undercut *ab initio* by the decision to fast-track

[3] See Giubboni, 2006, and Streit, 1995.

capital integration at the expense of social protection. Fritz Scharpf, so thoughtful amongst many other observers of European integration, reflects on the separation of economics from social policy as foundational premise of the genesis of the European community and asks: "Where would we be now if in the 1956 negotiations leading to the treaties of Rome and the creation of the EEC [the French line had prevailed] making the harmonisation of social regulations and fiscal burdens a precondition for the integration of industrial markets"?[4]

The relevance of this missed opportunity for a social-democratic Europe has acquired a new urgency. While with Article 3 (3) TEU the (highly competitive) "social market economy" was formally introduced into Europe's constitutional parlance to "correct" the neoliberal tilt in the constitutional project,[5] the possibility of a social Europe, or a "re-socialised" one, remains painfully unattained and increasingly unattainable. As the Continent now reels in the throes of a crisis that drives some economies "productively" while devastating those of the periphery, one has to ask whether purportedly aspiring to build Europe, as so often stated in the past, on the ideal of economic solidarity was ever actually seriously entertained.

Which Europe?

Let me end with a disquieting suggestion, but also by alerting to an opportunity that arises now, first to appreciate the gravity of the crisis, then to put to question and to think anew.

The disquieting observation is that, crisis-prone, bereft of ideals, limping from social to democratic deficit and back, driven by a vision of economic growth without economic solidarity, and somehow *despite* its best theorists' best efforts, the European constitutional project *nevertheless* appears to have been successful in fashioning itself as a *constitutional* settlement *a posteriori*. The crisis appears on a certain register and level as productive in that sense. For those who entertained a different vision for Europe the problem becomes how to deal with this "success" of a Europe whose constitutional settlement appears not only to withstand the crisis, and to fuel its resolve to push the neo-liberal agenda even further. Could it be that our political vocabularies ill-equip us to deal with the consolidation, where the categories at our disposal are either *constitutively complicit* with the crisis or at least *exhausted* to the point where they can no longer deliver us from it? That is what the discussion of constituent and constituted power is ultimately about. And that question is

4 Scharpf, 2002, 645–6.

5 Joerges, 2011.

what the spectre of crisis throws into relief; and why crisis might still be an opportunity. More urgently than before, it alerts us to the limits of attempting to resist the situation within given modalities and economies of representation.

Above all it raises the question insistently of whether the course that we have been so relentlessly set on allows for any pause, reflexivity or reversal. There are of course very different questions, and very complex ones, and I can only hope to raise them in a preliminary way here.

Take the latter first: reversal. Will acts of resistance to the European project, simply be markers on what, unavoidably, will have been the route *to* it? What of the "no" of the referendums, the agitation of the *enragés* of the periphery? Acts that locate themselves at the point of coupling between the peoples of Europe and "their" Constitution, and by extension of the coupling of politics (constituent) and law (constituted)? Up to this point, though of course one cannot predict what popular agitation may produce in the near future, protest has had little effect, ruptures have been sealed over through a silencing of democracy and the displacement of representational structures (in Italy and Greece) and no departures are envisaged from the intractable, directional, inescapable route towards the European economic Constitution, as over-determining integration, understood exclusively in its market form. A certain messianic logic undergirds it and guarantees the unity of the process.

What of reflexivity? What possibilities are available for scrutiny of the type that might allow the project to turn back upon itself to query its foundational presuppositions, in the face of catastrophic consequences? It may be that such a form of reflexive thinking is the victim of the crisis as a consequence of what systems-theorists have recently called the "darker side of functional differentiation".[6]

The last point about pause I borrow from Hartmut Rosa's fascinating *Speed of Global Flows and the Pace of Democratic Politics*. Rosa argues that the speed of change, or the dynamics of society, has to be slow enough for democratic and deliberative political processes of will formation and decision-making to actually be effective, or for politics to actually control (or steer) social developments and set the pace. Beyond a certain temporal threshold, the forces of society are too strong for democratic political self-determination, and undercut collective will-formation, deliberation and action. Drawing on both John Dewey and Sheldon Wolin, Rosa argues that:

> today, ironically and most significantly, if the distinction between left and right has retained any discriminatory power at all, "progressives" tend to

[6] See Kjaer *et al*., 2011.

sympathize with the advocates of deceleration (stressing political control of the economy, democratic negotiation, environmental protection, etc.), whereas "conservatives" have become strong defenders of the need for further acceleration (embracing new technologies, rapid "free" markets, and fast administrative decision-making). Progressive politics clings to the idea of a political shaping of society and therefore tries to slow down economic and technological change, whereas so-called conservative (or neo-liberal) politics is advocating further social acceleration by renouncing the idea of political (or bureaucratic) control of societies. Thus, speed today has become a center of ideological battle, with neo-liberals and neo-conservatives accusing social democrats and leftist liberals of pursuing backward oriented, anachronistic and protracting policies, while "progressives" very often explicitly call for a slowdown of the pace of social life and change.

"How can a public be organized, we may ask, when literally it does not stay in place? Without abiding attachments, associations are too shifting and shaken to permit a public readily to locate and identify itself", noted John Dewey in 1927. This then is a plea for slowing down. It is a demand that the growth compulsions of an economic system running amock be reined in in the name of deliberation and democracy. We could raise the stakes even more. Formulated in philosophical (and abstract) terms: social acceleration entails a condensation of our episodes of action and experience that undercuts our capacity to relate the flux of "experience" to a sense of being in history, of the continuity of identity and, in the present context, of the Europe we find ourselves in and the one that it is becoming.

Bibliography

Anderson P., "After the event", *New left Review*, 73, 2012, pp. 47–60.

Dewey J., *The Public and Its Problems*, Swallow Publications, 1957/1927.

Giubboni S., *Social Rights and Market Freedom in the European Constitution: a Labour Law Perspective*, Cambridge: Cambridge University Press, 2006.

Habermas J., *Ach Europa. Kleine politische Schriften XL*, Frankfurt am Main: Suhrkamp, 2008.

– *Europe: a faltering Project*, Cambridge: Polity, 2009.

– *Zur Verfassung Europas: Ein Essay*, Frankfurt am Main: Suhrkamp, 2011.

Joerges C., "Will the Welfare State survive European integration?", *EurJSocL*, 1, 4, 2011.

Kjaer P., G. Teubner and A. Febbraj, *The Financial Crisis in Constitutional Perspective: the dark side of functional differentiation*, Oxford: Hart, 2011.

Kouvelakis S., "The Greek Cauldron", *New Left Review*, 72, 2011, pp. 17–32.

Maduro M., "The importance of being called a constitution Constitutional authority and the authority of constitutionalism", in *IntJConL*, 3, 2005, p. 316.

Majone G., *Regulating Europe*, London: Routledge, 1996.

– *Europe as a Would-be world power*, Cambridge: Cambridge University Press, 2009.

Motha S., "The debt crisis as crisis of democracy", in *Law, Culture and the Humanities*, 2012, pp. 1–8.

Müller J.-W., *Contesting Democracy: Political Ideas in Twentieth-Century Europe*, New Haven, CT: Yale University Press, 2011.

Polanyi K., *The Great Transformation*. Boston: Beacon Press, 1944.

Rosa H., "The Speed of Global Flows and the Pace of Democratic Politics", *New Political Science*, 27/4, 2005.

Scharpf F. W., "The European Social Model: Coping with the challenges of diversity", *Journal of Common Market Studies*, 40, 2002, pp. 645–70.

Streit M. E. & Mussler W., "The Economic Constitution of the European Community: From Rome to Maastricht", in *European law Journal*, 1, 1995, pp. 5–30.

Citizens' Legislative Initiative and Citizenship of Rights[1]

Teresa Freixes

Universidad Autónoma de Barcelona

I. Introduction: The Inclusion of the Citizens' Legislative Initiative in the Treaty of Lisbon

The debate about the relations between civil society and parliaments is at the core of the establishment of new bodies of participation in most current states. The participation of civil society in the legislative procedure is a major goal that must be accomplished in the next few years.

This debate is not new in the political science and European legal theory. In ancient Greece, citizens' assemblies played an important role in the adoption of decisions. However, it arose mainly from the debates that took place in the elaboration of constitutions, such as the American in 1787[2] or the French[3] of the revolutionary period 1978–91,[4] when full scope was given to citizens' participation in the legislative procedure.

At the time, the discussion was mainly about the difference between representative democracy and direct democracy. Representative democracy implies the election of representatives who are given power to decide (by being granted a mandate). This mandate can be mandatory, in cases

1 This paper was written before the Republic of Croatia's accession to the European Union.

2 The Federal Supreme Court has stated the unconstitutionality of direct consultation of the people (referendum) within the State framework, not within a federal framework. Pacific States Tel. and Te. Co C. Oregon (223 U.S. 118, 1912). At a federal level, representative democracy was imposed.

3 Article 6 of the 1789 Constitution provides that, given that "the law is the expression of the general will", "every citizen has the right to participate personally, or through a representative, in its creation." On the other hand, the 1793 Constitution, attributed great importance to direct democracy and it was adopted in a referendum (although it was never applied.), following Rousseau's idea.

4 The traditional idea of participation as an organization of power (typical of the first liberalism) was complemented by the concept of participation as an instrument of legitimacy (N. Luhman, 1985, pp. 11–21).

where the citizens can guide the decision that the representative has to take, or, once elected, the representative can decide freely, whereby it then becomes a representative mandate. This latter idea was the one that finally got imposed and adopted in almost every European country, making the representative's will the maximum authority.

Despite not being established as a general form of decision making, the principle of direct democracy, where citizens' could decide in an assembly or through direct vote, remained in some places, such as Switzerland (particularly in the Swiss cantons).[5] Another form of direct participation that exists in many states is the referendum, or public consultation, which can be binding or advisory, where the result can serve as guidance but without being an obligation.[6]

The relationship between parliament and civil society has gained strength in recent years within the European Union, mainly through consultations of civil society organized by the European Parliament for the preparation of the text of the European Constitution, and what finally gave rise to the Treaty of Lisbon.

However, the idea of providing European citizens' with the right of initiative is not new. The European Parliament had already proposed the introduction of this tool in 1988 and 1993. A few years later, at the Amsterdam Intergovernmental Conference, the ministers of foreign affairs Wolfang Schüssel (Austria) and Lamberto Dini (Italy), proposed the right of submission to the European Parliament, but the conference rejected it.

Nongovernmental associations and civil societies have been asking for instruments of direct democracy for the past fifteen years.

The first move for the ECI finally took place in June 2003, when the Convention for the future of Europe decided to include it unexpectedly in the Treaty on the European Constitution (Article 47.4). However and because of the negative results of the referendum in France and Holland, the ratification process of the Constitutional Treaty, and therefore the implementation of the ECI had to be disrupted.

At last, the Treaty of Lisbon, conceived to replace the Treaty on the European Constitution, was signed on the 13th December 2007 in Lisbon by the heads of Government or State of 27 Member States. This reopened the door to the possibility of European citizens submitting proposals directly to the European Commission.

---

5 Regarding direct democracy R. Sánchez Férriz & M. V. Garcia Soriano, *Suiza. Sistema político y Constitución*, 2002, pp. 82–98.

6 In Spain, the Government can submit "political decisions of especial transcendence" (Article 92 of the Spanish Constitution) to an advisory referendum. The result is not binding on the Government. On the other hand, any referendum to approve Constitutional or Autonomy Statutes amendment is binding.

Certainly, the Treaty of Lisbon consolidated the classical citizen' rights that arose under the Treaty of Maastricht, when it created the coveted European citizenship (remember the Spinelly Project), in Articles 20 and 23 of the Treaty on the Functioning of the European Union, regulating the right of movement and residence, the right of being elected and elect in the municipal and European elections in the State of residence, the right of diplomatic and consular protection and the right to petition. But, furthermore, the Treaty of Lisbon includes, in the II Title, on "Provisions on Democratic Principles", the possibility for a group of at least a million citizens of the European Union, nationals of a significant number of Member States, to take the initiative of inviting the European Commission, within the framework of its powers, to submit a suitable proposal on matters that these citizens consider require a legal act from the Union for the purposes of application of the Treaties (Article 11 TEU, within the framework of participative democracy). At the same time, the same Second Part of the aforementioned Treaty, under the label "No discrimination and Union citizenship", refers to the adoption of a European regulation adopted by the European Parliament and the Council, to regulate the procedure that should govern the carrying of such initiatives (Article 24 TFEU).

Under the Treaty of Lisbon, the citizen legislative initiative is set as a joint interpretation of Articles 11 TEU and 24 TFEU, a new right of citizenship which broadens classical rights of citizenship, creating at the same time a citizenship of rights.[7]

As we shall see, the provisions of the Treaty of Lisbon have been specified in Regulation 211/2011 of 16th February 2011 of the European Parliament and the Council, from which the procedural aspects of the exercise of this new right unfolded. However, as we have stated at the beginning of this paper, the European Union's Member States have similar figures that constitute the antecedents of this European regulation, the most significant aspects of which we will analyse below.

II. Popular Legislative Initiative in the European Union Member States

Because this participation instrument is not the same in every European State, first it is appropriate to distinguish the different types of legislative initiatives.[8] Each of the States take into account their own legal tradition,

[7] A. Silveira, *Princípios de Direito da União Europeia*, Quid Juris, 2011.

[8] For a more complete analysis T. Freixes y E. Poptcheva, "Iniciativa legislativa popular: estudio comparativo de la situación legal en los Estados miembros de la Unión Europea y previsión de su futuro desarrollo a nivel de la UE", *Pliegos de Yuste*, No. 9–10, 2009.

projecting it in the organization of their legislative procedure and, consequently, in the regulation of the popular legislative initiative.

1. Types of Popular Legislative Initiative

a) Generic Types

The analyses of the legislation of the Popular Legislative Initiative of the European Union Member States allow two generic types of Popular Legislative Initiatives to be distinguished:

- Popular Initiative to adopt a law by the legislative power (Parliament) (Popular Legislative Initiative *stricto sensu*).
- Popular Initiative to propose a law for its possible adoption by the citizens within a referendum context (legislative proposal referendum).[9]

b) Special Types

In addition to the aforementioned generic types of Popular Legislative Initiative, there are other special types, such as:

- The Popular Initiative to amend the Constitution by a Popular Legislative Initiative or legislative proposal Referendum.

This is a very special legislative initiative, as it affects the constituent power. Through this Popular Legislative Initiative it is possible to request amendment of a country's political Constitution, therefore it is a mechanism allowed in very few countries.[10]

- Popular Initiative to propose a subject (not necessarily a legislative proposal) to the Parliament for consideration.

In this case, it is a way of participating in political decision making, aimed at encouraging Parliament to make a statement, refer a mater to the Government, etc.[11]

---

[9] The right to propose a national referendum is foreseen in Hungary (Article 28/C of the Hungarian Constitution states that "A national referendum can be arranged to reach a decision or to express an opinion. At least 200,000 voters are necessary to request a national referendum."), Portugal (Article 115 of the Portuguese Constitution and Article 16 of the Organic Law on the Referendum Regime, No. 15-A/98 3rd of April: "A referendum must be arranged as a consequence of the initiative of at least 75,000 citizens who have presented a request to Parliament."), Slovakia (Article 95.1 of the Constitution: "The President of the Republic arranges the referendum if requested by at least 350,000 citizens."), Slovenia (Article 90.2 of the Constitution states that the National Parliament must arrange a legislative referendum if requested by at least 40,000 voters.).

[10] Only possible in Lithuania [Initiative for Constitutional amendments, Article 169 I of the Seimas Regulation (Lithuanian Parliament)] and Slovenia (Article 168.1 of the Constitution).

[11] Hungary (Article 28/D of the Constitution: "The object of the national popular initiative is to force Parliament to put on its agenda a subject being such part of the

- There is also a negative method of legislative proposal Referendum, the Derogatory Referendum, which consists of a referendum started by citizens to proceed with the derogation of certain laws.[12]

2. European Union Member States in which the Popular Legislative Initiative is Available

About half of the European Union 27 Member States' Constitutions, or their Parliaments' Procedural Regulations, provide one or more types of the above mentioned types of Popular Legislative Initiative. These are: Austria, Germany (only at a *Länder* level), Hungary (Referendum Initiative and Popular Initiative for consideration in the Parliament), Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia (only Referendum Initiative), Slovenia, Spain, Holland and the United Kingdom.

3. Common Requirements for the Popular Legislative Initiative and the European Union Member States

Despite there being differences in the implementation of the Popular Legislative Initiative in each Member State, the general concept is common to all of them. Most of the requirements to be taken into account when starting a process of this kind are the same for all Member States with this type of specific legislative initiative.

a) Holders

The right to present a Popular Legislative Initiative belongs, generally, to the citizens' of the corresponding State. The question then arises, which people have authorization to present an initiative of this kind? Absolutely all Member States establish in their own regulations that the initiators must be citizens' entitled to vote in the Parliamentary election. The background of this requirement is the need to ensure some legislative consistency, the usual legislative initiators being Government and Parliament, democratically entitled by the citizens' votes, which are also entitled to submit legislative proposals. Those same citizens'

Parliaments competence. The Parliament must rule the object set by the national popular initiative."). Land Nordrhein Westfalen (Germany) (Article 67a. 1 of the Land Constitution: "Popular initiatives can be directed to present a subject to be considered by the Parliament"). France (in March 2003, limited and local initiative was introduced in the French Constitution within the decentralization law framework (Article 72–1, référendum d'initiative locale). This initiative allows only the presentation of a subject to the local assembly agendas (collectivité territoriale). The local assembly must decide if the subject must be submitted or not to a popular referendum.).

12 Possible only in Italy (Article 75 Italian Constitution: "If requested by 500,000 electors or five regional councils, a popular referendum must decide on the total or partial repeal of a law or another act of similar legal value.").

who elect their Parliament representatives and, indirectly, also the Government, are allowed in some cases to "reclaim" their political will in the form of the right of legislative initiative. This ensures that the legislative initiatives are always initiated by the electorate, either directly (Popular Legislative Initiative) or indirectly (Government or Parliament Legislative Initiative).

The regulation of the Popular Legislative Initiative at a regional level sometimes represents an exception to the general principle that it is the citizens of a territory (State, Region, etc.) who have legitimacy to submit a legislative initiative within that territory. For example, in the Autonomous Community of Cataluña, in Spain, Spanish citizens, community citizens and those who belong to the EU but with legal residence in Spain, are allowed to submit a legislative proposal to the Table of the Catalan Parliament.[13]

b) Number of Signatures Required

The second of the common requirements for the Popular Legislative Initiative is the collection of a number of signatures to support the initiative.

In this respect, it is of special importance to pay attention to the connection between the number of required signatures and the population of the different Member States: in Austria, 1.20% of the population, in Germany, the 3 Länder who start the initiative must have between 8 and 16% of the electorate, in Hungary 0.49% of the population for a legislative initiative and 1.98% for a referendum initiative, in Italy 0.084% of the population for a legislative initiative and 0.84% for the referendum initiative, in Latvia 10% of the electorate, in Lithuania 1.48% of the population, in Poland 0.26% of the population, in Portugal 0.33% of the population, in Slovenia 0.24% for a legislative initiative (1.48% to amend the Constitution) and 1.98% for a referendum initiative, in Spain 1.10% of the population, in Holland 0.24% of the population, and in the United Kingdom signatures are not required, any citizen may submit an initiative.

---

[13] Article 62.1 of the Autonomy Statute of Cataluña (2006) and Article 2.2 *b)*, *c)* Law 1/2006, 16th February, on the Popular Legislative Initiative of Cataluña: "2. Besides what is mentioned in No. 1, people are entitled to exercise popular legislative initiative: people who aren't deprived of their political rights, are over the age of sixteen, are registered as residents of a Cataluña municipality and fulfill one of the following requirements:

a) Hold Spanish nationality.

b) Are a citizen of a European Union Member State other than Spain, or a citizen of Iceland, Lichtenstein, Norway or Switzerland.

c) Reside legally in Spain, according to the foreigner's law".

It is especially interesting to examine the differences between the percentages of signatures required in each of the European Member States. In this regard, a high percentage represents an obstacle to the exercise of the popular legislative initiative. A lower percentage, on the contrary, encourages these initiatives. Slovenia, Poland and Portugal are notable for requiring fewer signatures, and Austria, Spain and Latvia are the countries which require the highest percentage of signatures.

The United Kingdom, as we have already said, is the only real exception to the number of signatures required for the Popular Legislative Initiative procedure, giving the right to propose a law to only one person.

c) Form of the Legislative Proposal

The following requirement is that the citizens' proposal must be made in the form of a legislative proposal (including articles, etc.) and must include a justification of its motives. It is precise work, which requires legal knowledge and some experience in legislative technique.[14]

d) Field of Competence

Furthermore, the proposal must refer to a matter over which the Parliament has competence. This requirement is especially important in the case of federal States, such as Germany and Austria, and also for States which have Regional Assemblies with legislative competence, as in the case of Spain. In these cases (which are specific to federal States or those with strong regional decentralization), the people who promote a popular legislative initiative must ensure that their presentation takes place at a competent parliamentary level, which may be either the national parliament or the regional parliament.[15]

e) Representation

Due to the inability to inform individually all the Popular Legislative Initiative initiators during the procedure, representatives must be

[14] These technical demands also make the popular legislative initiative harder for individuals, because they must get in touch with (and sometimes hire) experts in the legislative technique in their parliament. Otherwise, if the presented text does not fulfil all formal requirements or contains regulations contrary to the Constitution, the Chamber's corresponding bodies will reject the initiative project.

[15] The distribution of competences distribution is very difficult to interpret in federal or regional states, where besides general Chambers; there are territorial Chambers (the Lander, the regions, etc.). However, it is absolutely necessary to present a legislative initiative, because it has to be done before the Chamber competent to receive it. To do so, in some cases it is not enough to follow what the Constitution establishes, it is also necessary to follow what the correspondent Constitutional Court has interpreted. This therefore makes the presentation of a legislative initiative even more difficult in these states.

appointed. In the cases of Spain and Portugal, representation is made by an appointed Promoting Commission,[16] and a Representative Commission.[17]

This Promoting Commission will be responsible for coordinating the entire procedure, from drafting the text to collecting signatures. The Promoting Commission can also undertake the defence of the proposal in the corresponding Parliament.

4. Excluded Subjects

Many States consider that some matters may not be submitted to Popular Legislative Initiative, and should be reserved only for the Parliament's or Government's initiative.

Thereby, in most cases, tax related subjects, state budgets, international relations, amnesties and pardons, etc. cannot be the subject of a Popular Legislative Initiative presented to the Parliament. Matters reserved to a special category of rules (organic laws, for example, in Spain), are also excluded from Popular Legislative Initiatives.

Some of the Member States also exclude other matters from the right of Popular Legislative Initiative:

In Spain, the implementation of Fundamental Rights recognized in the First Section of the II Chapter of the I Title of the Constitution, is an Organic Law and cannot be submitted to a Popular Legislative Initiative.[18] Constitutional amendments are also excluded from Popular Legislative Initiatives.

In the German Länder, public servants' wages cannot be the subject of a Popular Legislative Initiative.[19]

In Portugal, Constitutional amendments cannot be submitted to Popular Legislative Initiative.[20]

---

16 Article 3.2 *c)* of the Organic Law 3/1984 26th March, Popular Legislative Initiative Regulator states that the project must be followed by the list of people who form the Promoting Commission. In the Spanish case, the law does not determine the number of people who must compose it.

17 Article 7.1 Law 17/2003 4th June on the Popular Legislative Initiative (Portugal): "The initiators must assign a representative commission of at least 5 to 10 people."

18 Article 2.1 of the Organic Law 3/1984, 26th March, Popular Legislative Initiative Regulator and Article 81.1 of the Spanish Constitution.

19 Article 6.4 of the Land Baden-Württemberg Constitution; Article 68.1 of the Land Nordrhein Westfalen Constitution.

20 Article 3 of the Organic Law on the Referendum regime N 15-A/98 3rd of April.

5. Different Procedures

It must be highlighted that some Member States establish special procedures for proposed Popular Legislative Initiatives; different from the usual procedures applied to legislative initiatives from the Government and the Parliament. The differences often affect time limits, whether or not preferential treatment is given, specialties in parliamentary voting about its admissibility, etc.

6. Binding Nature

Another important matter is: if the text was prepared by those who promote the Popular Legislative Initiative, is it or is it not binding on the parliament? In some countries, the text may be modified or even rewritten.

A Popular Legislative Initiative has a binding nature in two cases:

- If the legislator is not authorized to modify or totally decline the original version of the proposal, or
- If the legislator cannot modify the original version of the Popular Law proposal, in the case of modification, it is necessary to hold a popular referendum regarding the adoption of that law.

The binding nature of this initiative is decisive so that the law created responds to the desires of those who promoted the initiative. If not, the law created by the Legislative Initiative could end up being different from the promoters' desires.

a) The Popular Legislative Initiative is not binding on the parliament, for instance, in Austria, Spain and Hungary. As a consequence, by approving amendments in the legislative procedure, the parliament can modify what those who promoted the law intended, or even approve a law the content of which is different from that planned by the initiative's promoters.

b) Instead, the Popular Legislative Initiative has a binding nature as the legislative proposal must be submitted to a referendum in case the Parliament refuses the proposal or adopts it with modifications, as in the case of Germany (*Länder*, which allows it)[21] and Latvia.[22]

c) Generally, the positive result of a referendum is binding on the Legislator.

---

[21] For example, Land Baden-Württemberg (Article 60.1 of the Länd Constitution), Land Nordrhein-Westfalen (Article 68.2 of the Länd Constitution).

[22] Article 78 of Latvia's Constitution.

III. The Citizens' Legislative Initiative under Regulation 211/2011 of the European Union

From the previsions of Articles 11 TEU and 24 TFEU, and taking into account the experience of Member States, whose internal law includes the popular legislative initiative, on the 16th February 2011, the European Parliament and the Council adopted Regulation 211/2011 regarding the Citizens' Legislative Initiative. This regulation was followed by the Implementing Regulation 1179/2011, of the Commission, of 17th November 2011 laying down technical specifications for online collection systems.

In fact, we have to remember that Article 11.4 TEU says, "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties." And Article 24 TFEU assigns the capability of regulating this matter to a Regulation adopted by the European Parliament and the Council.

What Are the Main Characteristics of the Citizens' Legislative Initiative in the Regulation Regarding the Citizens' Legislative Initiative?

Under the scope of Articles 11 EU and 24 TFEU, the initiative must be related to an issue submitted to the Union's competences by the Treaties and about an issue for which the commission had the competence of legislative initiative.

The Union's competence does not have to be exclusive, it may also be shared, or it may also be a competence to support, coordinate or complement the action of the Member States, or even a competence to take measures that grant the coordination of the Member States' policies, where the Commission is empowered to propose a legal act. To determine this competence, it is necessary to see if the subject is regulated, in the EU Treaties, through a legislative procedure (which can be an "ordinary legislative procedure" or a "special legislative procedure"), unless the text says the opposite (that is to say, in the specific cases in which the Treaties specify that the proposal must be made by a different Institution of the Union).

Furthermore, we should also understand that by legal acts we mean not only Hard Law but also Soft Law (e.g., recommendations).

Organizers: The Citizens' Committee

Regulation 211/2011 considers "organizers" to be the individuals who, organizing themselves as a "Citizens' Committee", are responsible

for the preparation of a citizens' initiative and its presentation before the Commission (Article 2.3).

This Citizens' Committee must be composed of at least 7 individuals (not organizations) residing in at least 7 Member States. They must be European Union Citizens (they must hold the nationality of one of the 27 Member States) and be old enough to vote in the European Parliament election, in their place of residence, according to the laws of the State of residence. Members of the European Parliament can be organizers, but not formally counted as such to be able to form the Citizens' Committee and cannot be included in an initiative's registration form. However, there is no limit on the components of the Committee, for purposes of registration, only the information regarding the seven members necessary for the correct formation of the Committee will be taken into account. Hence, it is important to select the members carefully, especially for the public effect of all subsequent acts and communications.

From among the members of the Committee, a representative and a substitute will be appointed, who will be the people in contact with the European Union's Institutions throughout the process, and they will be Committee's spokespersons.

The Citizens Committee must regularly report the state of the initiative, especially demonstrations of support and financial aid obtained.

As leaders of the initiative, the organizers may withdraw a registered citizens' initiative at any time before the submission of statements of support to the Member State responsible for verification. After this phase of the procedure, it is not possible to exercise this right.

It should be noted that, even though legal persons cannot be "organizers" of a citizens' legislative initiative, they can promote and support it, provided that they do so with total transparency.

Signers

According to the Treaties, the Regulation provides for the collection of 1,000,000 signatures from ¼ of the Member States, i.e., from at least seven States. A minimum number of participants in each of the Member States is also established; annex 1 of the Regulation details the calculation of the number of signatures required for each one of them, obtained by multiplying the number of Members of the Parliament of each country in the EP by 750. The number of signatures required in each State is: Belgium 16,500; Bulgaria 12,750; Czech Republic 16,500; Denmark 9,750; Germany 74,250; Estonia 4,500; Ireland 9,000; Greece 16,500; Spain 37,500; France 54,000; Italy 54,000; Cyprus 4,500; Latvia 6,000; Lithuania 9,000; Luxembourg 4,500; Hungary 16,500; Malta 3,750; Netherlands 18,750; Austria 12,750; Poland 37,500; Portugal 16,500;

Romania 24,750; Slovenia 5,250; Slovakia 9,750; Finland 9,750; Sweden 13,500 and United Kingdom 54,000.

To support a European Citizens' Initiative, the signers must be EU citizens and be old enough to vote in the European Parliament election, without having to be registered on the electoral roll. It is necessary to complete in a specific statement of support form that may be in paper or electronic format. The signers are considered to be from the Member State responsible for verifying their statement of support.

Procedure

The Citizens' Committee must register the initiative on the website created by the European Commission for such purpose before starting to collect the signatures required to reach a million supporters. Once the initiative has been registered, the Committee has one year to collect the signatures.

The initiative can be prepared in any of the official languages of the EU States. The application form must have the title of the Citizens' initiative (a maximum of 100 characters), a summary of its purpose (a maximum of 200 characters), the objectives on which the Commission must decide (a maximum of 500 characters), and the Treaties' articles which give grounds for the petition. To be able to register the Initiative, the personal information of the mandatory members of the Committee (7 individuals) and funding worth more than € 500 per year and a sponsor must be provided. Where applicable, an annex with more information and an articulated draft of a legal act may also be included on the website of the initiative.

Within 2 months of application, the Commission will verify if the provisions of the Regulations have been fulfilled and register the initiative, making it public on its own web page. The Committee will then have secure access to its electronic management. After registration, the Committee may translate the presented initiative into any of the EU's official languages.

If, strictly for reasons of a legal nature, the Commission denies the registration, the Commission must inform the organizers of the reasons for denial and also all forms of action; both judicial and non-judicial, available to the organizers, including the possibility of action in the Court of Justice or the presentation of a complaint to the European Ombudsman.

Certification of the Online Support Statements Collection System

EU legislation allows the collection of statements of support, i.e., signatures, online. The Committee must create a webpage (which cannot be the Commission's webpage where the initiative is registered) with

an accessible and secure system that fulfills the technical requirements of Regulation 1179/2011, of the Commission, of the 17th November 2011, establishing specific techniques for collecting systems that use the Internet. Where the organizers want to use the system, they must obtain in their collection systems certification from the national authorities of the Member States where they will store the data, before the collection process starts. The Member States have already designated the certification authorities,[23] after verifying the fulfillment of all the requirements of the Regulations, must respond to the organizers' applications within one month. These security systems must ensure that only individuals can make a statement of support, and the data are only collected and used for the Citizens' initiative.[24]

The verification authorities will issue their certificates within three months, and may conduct random controls for the purpose.

Security and Data Circulation

Whether in relation to accessions or paper signatures or through electronic means, European and national legislation on data protection must be respected. As the data will be stored in each State and the promoters need to count them to verify the existence of signatures, Directive 95/46/CE of the European Parliament and the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data is applicable; this Directive contains the minimum standard that must be taken into account when storing the necessary data, the statements of support of Citizens' legislative initiatives in the Member States which fulfill the minimum standards, so that the necessary data circulation, within the framework of the Citizens' initiative, is guaranteed.

We must remember it is not a requirement that the signatures are collected in the 27 Member States, but it is necessary to collect signatures from at least 7 Member States. European law foresees the use of different forms in each Member State, although with the same content, which means that the data from each form, signed by the European citizen resident in the State of reference, must be transferred to the organizers, to be subsequently accounted for and presented to the Commission. It is up to the Member States to regulate the ways and procedures so that their nationals can sign the Citizens' legislative initiatives when outside

[23] Commission's webpage containing the following important information: *http://ec.europa.eu/citizens-initiative/public/authorities-online-systems*.

[24] Commission's webpage containing a list of national authorities competent to certify the statements of support: http://ec.europa.eu./citizens-initiative/public/authorities-verification.

European Union territory; for that matter, they must also regulate how to verify the support statements when issued in a third country.

Initiative's Presentation before the Commission

When the necessary signatures have been collected, a million in total, and the minimum established in each Member State has been reached, the Citizens' Committee can present an initiative to the European Commission. They must also provide information concerning any support and funding secured.

Within three months of presentation of the initiative, the organizers will get together with the Commission's representative to explain the proposal in detail. They can also present their proposal in a public ceremony before the European Parliament.

The Commission will issue an official document, specifying their position on the initiative, within the same three months, adopted by the College of Commissioners and which will be published in all official EU languages.

The Commission's Obligation to the Proposal

As happens in many Member States, once adopted, a Citizens' Legislative Initiative is not binding on the Commission. In fact, even the Treaties use the expression "invite" the Commission to adopt the proposal, which means the Commission is not obligated to do so.

If the Commission decides to go ahead with the initiative, an ordinary legislative procedure will immediately start: the Commission's proposal is sent, in general, to the European Parliament and the Council (in some cases, depending on the subject, only to the Council) and the European legislator will proceed within its legal framework.

If the Commission decides not to go ahead with the Citizens' legislative initiative, because it is not required to do so, the Commission must explain the reasons. There is no appeal against the Commission's decision.

A Final Reflection

It does not appear that the regulation provided in the development of the provisions of the European Treaties, through the aforementioned Regulations, facilitates the presentation or the success of the Citizens' Legislative Initiatives. It seems that the fear most Member States have of such tools of democratic participation has been transferred to the European Legislator, not due to the number of signatures and support, which is not excessive, considering the population of EU Member States, but due to the confusing procedure, and the fact that the proposal is not binding on the European Commission.

If what was envisioned in the Treaty of Lisbon, with the inclusion within it of what had already been included concerning participative

democracy in the unsuccessful European Constitution, was to increase the legitimation of EU decision making (at least, that was the argument used at the time to include this type of Legislative Initiative), the subsequent regulation seems to have diminished such expectations.

The Commission's webpage covering registrations of Citizens' Legislative Initiatives shows that, in 2012, seven initiatives were submitted, for which the deadline for collecting signatures ends in 2013. The subjects of these initiatives are:

- Stop vivisection (end vivisection in animal experiments).
- Let me vote (facilitate the right to vote for EU citizens residing in a Member State of which they are not nationals).

Uno di noi (end the financing of the destruction of human embryos).

- European Directive on the dairy cow welfare (increase the protection of these animals, in line with pigs and poultry)
- Access to water and sanitation as a human right. Water and sanitation are a human right! Water is a public good, not a commodity! (Granting the provision of water as an essential public service for all).
- Single Communication Tariff Act (end roaming rate to ease freedom of movement).
- Fraternité 2020 – Mobility, Progress, Europe (strengthen the European programs involving educational and scientific movement).

We will have to wait and see how they develop in order to evaluate the results obtained.

Selected Bibliography

Cuesta, Victor, "The Future of the European Citizen Initiative", in Kaufmann/Lamassoure/Meyer (eds.), *Transnational Democracy in the Making*, Initiative & Referendum Institute Europe, 2003, p. 74.

Efler, Michael, "European Citizens' Initiative, Legal options for implementation below the constitutional level", in *Democracy International*, December 2006, *http://www.democracy-international.org/fileadmin/di/pdf/papers/2006-12-eci-study.pdf*.

Freixes, T. & Poptcheva, E., "Iniciativa legislativa popular: estudio comparativo de la situación legal en los Estados miembros de la Unión Europea y previsión de su futuro desarrollo a nivel de la UE", *Pliegos de Yuste*, No. 9–10, 2009.

Luhman, Niklas, "Participación y legitimación: ideas y experiencias", in T. Freixes (coord.), *La Participación*. Promociones Publicaciones Universitarias, Barcelona, 1986.

Rehmet, Frank, "Volkspetitionen – Praxis und Wirkungen. Das Beispiel der unverbindlichen 'Volksbegehren' in Österreich", in Mehr Demokratie e.V.,

Diskussionspapiere und Untersuchungen, No. 16, 14.11.2003 (*http://democracy-international.org/fileadmin/di/pdf/papers/md-volkspetitionen-austria.pdf*).

RYTEL, Anna, "The Popular Initiative in Poland", in Mehr Demokratie e.V., *Democracy International*, 2006, p. 6, *http://www.democracy-international.org/fileadmin/di/pdf/papers/di-initiative-poland.pdf*.

SÁNCHEZ FÉRRIZ, R. and GARCIA SORIANO, M. V., *Suiza. Sistema Político y Constitución*, Centro de Estudios Políticos y Constitucionales, Madrid, 2002.

SILVEIRA, A. *Princípios de Direito da União Europeia*, Quid Juris, 2011.

VANZETTA, Alexa, "Non-binding citizen and regional initiatives in Italy from 1948 to 2005", in Mehr Demokratie e.V., *Democracy International*, 2006, *http://www.democracy-international.org/fileadmin/di/pdf/papers/2006-12-04-VI-Italy.pdf*.

Reconciling Integrationist Aspirations with Budgetary Realities

Citizenship and Solidarity in the Union legal Order*

Jonathan Tomkin

Trinity College

The European Union may be characterised as a dynamic legal order. The journey towards an "ever closer union" has been facilitated by successive amendments to the Treaties and ground-breaking judgments of the Court of Justice redefining the conceptual frontiers between the Union and its Member States.[1]

This journey is taking place against the backdrop of a variety of different and often competing forces. The prospect of an "infinitely proximate" Union has not found universal favour.[2] Even among Member States, divergences exist in relation to whether the Member States are already sufficiently close, or indeed too close, or whether further political and economic and monetary integration is desirable, particularly in times of financial crisis. Differences also arise in relation to size of the Union, it membership and character, and in relation to whether it is the Union or Member States that has, or ought to have, the final say on the legitimacy

* This lecture is based on a Chapter on Union Citizenship published in The First Decade of EU Migration and Asylum law (Martinus Nijhoff, 2012). The lecture retains points published in that paper, however, its scope and content has been revised and the case-law updated.

1 Case 26/62 van Gend & Loos [1963] ECR 1; Case 6/64 Costa v. E.N.E.L [1964] ECR 585; Case C-34/09 Ruiz Zambrano, 8 March 2011, not yet reported.

2 Eurobarometer 76 (December, 2011) reflects a decline in the image of the European Union. The proportion of the public saying that the EU conjures up a positive image is 31%, the lowest since 2006. While the proportion claiming that the EU conjures up a totally negative image has risen to 26%. Similarly, trust in the European Union has been declining steadily since September 2008 (50%) reaching 34% in autumn 2011, the lowest since 2004. It is worth noting, however, that national parliaments and governments have suffered comparable decline. *http://ec.europa.eu/public_opinion/archives/eb/eb76/eb76_first_en.pdf*.

and application of Union acts.[3] Such differences have sometimes been acutely reflected in judgments of Constitutional Courts of Member States.[4]

The Union is also subject to competing forces that may be considered structural in nature. In its present state, the Union is more than merely a regional economic organisation, but of course less than a federation. The Treaty aspires to create an area of freedom, security and justice[5] and an internal market in which the free movement of goods, persons, services and capital is ensured.[6] However, the vision of a single European Union space is projected onto territories that remain legally, politically and economically distinct, even if such differences are mitigated by the harmonization of laws, the creation of a single currency and high degree of political cooperation as between Member States. This gives rise to a certain tension between the Union's integrationist aspirations and the extent to which such aspirations can be realized in practice.

A tension of this nature is particularly apparent with respect to Union Citizenship. Already, at the time of its establishment by the Treaty of European Union in 1992, it was clear that there was a disparity between the term "Citizenship" and the limited rights actually enshrined in the newly inserted citizenship provisions of the Treaty. This tension further reveals itself in the case-law of the Court of Justice. The Court has frequently been required to balance the objective of ensuring migrant Union citizens enjoy equal treatment, and equal access to social benefits, with the reality that Member States' budgets, and underlying ties of fiscal solidarity, are limited. This paper will consider how the Court has sought to fashion a concept of Union citizenship that seeks to reconcile integrationist aspirations and budgetary realities.

---

3 Professor Miguel Maduro considers that the dialogue between the Constitutional Court of Member States and the Court of Justice of the European Union may be considered an integral and even welcome feature of European Union Constitutionalism. See Miguel Poiares Maduro, "Three Claims of Constitutional Pluralism" (publication pending).

4 Recently, see judgment of the Polish Constitutional Court in SK 45/09, 16 November 2011. *http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf* and of the Czech Constitutional Court, of 14 February 2012, file No. Pl. US 5/12. See also, *Solange I* (Internationale Handelsgesellschaft von Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 29 May 1974, BverfGE 37. 271; English translation in [1974] CMLR 540; *Solange II* (Re Wuensche Handelsgesellschaft, BVerfG decision of 22 Oct. 1986 [1987] 3 CMLR 225, 265); Frontini v. Ministero delle Finanze, [1974] 2 C.M.L.R. 372 (Corte Cost. 1974) (Italy).

5 Part III, Title V, Treaty on the Functioning of the European Union.

6 Part III, Title I, Treaty on the Functioning of the European Union.

Background

The establishment of Union Citizenship in Article 8 EC by the 1992 Treaty on European Union was the crystallisation of developments and initiatives that had been set in motion decades previously.[7] The drive to confer rights directly on Member State nationals as citizens reflected an increasing awareness of the presence of an emerging supranational structure in Europe and a corresponding demand for a formalisation, or at least a concretisation, of the relationship between the emerging European Union and Member State nationals.[8]

The first concrete steps in this context, may be traced to the 1974 Paris Summit which established a working group to consider the conditions and scope by which special rights could be conferred on the nationals of Member States as members of the European Community. In 1975, Belgian Prime Minister, Mr Leo Tindemans, published a report *Towards a Europe for Citizens*, which included a chapter about civil and political rights to be granted to nationals of Member States. A 1978 report by the European Parliament's Political Affairs Committee, under the chairmanship of Mr Mario Scelba[9] emphasised the importance of strengthening the ties of solidarity among "citizens of the Community" by granting special rights falling within the category of civil and political rights. The European Parliament considered that European Union "should lead progressively to profound changes in the civil and political status of Community citizens". It further affirmed its hope of the development of a Charter of rights of the peoples of European Community that would give the "peoples of the Community a sense of common destiny".

The concept of forging a "People's Europe" was central to the 1984 European Council meeting at Fontainebleau.[10] In the Presidency Conclusions, the European Council stated that the "Community should

---

7 For a detailed examination of the political and legislative context, see S. O'Leary, *The Evolving Concept of Community Citizenship – from the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer Law International, 1996.

8 See S. O'Leary, "The Options for the Reform of EU Citizenship", published in *Citizenship and nationality status in the New Europe* (Sweet & Maxwell, 1998), pp. 83–86. See also J. Shaw, "The Interpretation of EU citizenship", in *The Modern Law Review* (Vol. 6, May 1998, No. 3), p. 295. See also K. Neunreither, "Citizens and the exercise of power in the European Union", published in *A Citizens' Europe: In search of a New Order, eds. Alan Rosas and Esko Antola* (Sage Publications, 1995), p. 6.

9 Report by Mr Mario Scelba on behalf of the European Parliament's Political Affairs Committee, EP. Working Documents 1977–78, 25 October 77, Doc. 346/77. See also *http://aei.pitt.edu/33761/1/A319.pdf* and *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1977:280:FULL:EN:PDF.*

10 25 and 26 June 1984.

respond to the expectation of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world." The European Council proceeded to establish an *ad hoc* Committee to co-ordinate such measures. The Committee was set the task of examining, among others, suggestions relating to the symbols of the Community's existence, such as a flag and anthem, the formation of European sports teams, streamlining procedures at frontier posts and minting of a European coinage, namely the ECU.[11]

The Committee was known as the "*Ad hoc* Committee on a People's Europe" and was chaired by Mr Pietro Adonnino. The Committee published two reports, entitled "A People's Europe"[12] which sought to "propose arrangements of direct relevance to Community citizens and which would visibly offer tangible benefits in their everyday lives."[13] The first report focused on measures designed to enhance freedom of movement, including the possibility of expanding opportunities for employment and residence in the Member States. The second report considered topics such as the special rights of citizens, culture and communications, strengthening the Community's image and identity. Regarding the special rights of citizens, the Committee considered it desirable to increase the citizen's involvement in and understanding of the political process in the Community institutions.

In March 1990, the Belgian Foreign Minister, Mark Eyskens, issued a Memorandum to Member States advocating an Intergovernmental Conference aimed at strengthening the effectiveness and democratic character of the Community's institutional framework.[14] The Memorandum linked the achievement of a "People's Europe" with free movement of persons and a specific Treaty provision on human rights, as well as the accession by the European Community to the European Convention on Human Rights. The Memorandum further advocated the development of a uniform procedure for European Parliament elections which would enable all Community citizens living in the Community to take part in the

---

11 European Council Meeting at Fontainebleau, 25 and 26 June 1984, Conclusions of the Presidency. The specific work programme of the Committee was subsequently approved by the European Council Meeting in Dublin in December 1994. Available at: *http://www.cvce.eu/viewer/-/content/ba12c4fa-48d1-4e00-96cc-a19e4fa5c704/en*.

12 Bulletin of the European Communities, Supplement 7/85, "A People's Europe: Reports from the ad hoc Committee" available at *http://aei.pitt.edu/992/1/andonnino_report_peoples_europe.pdf*.

13 *Bulletin of the European Communities*, Supplement 7/85, "A People's Europe: Reports from the ad hoc Committee", paragraph 3.6.1. (2), p. 9.

14 *The Intergovernmental Conference on Political Union, Institutional Reforms, New Policies and International Identity of the European Community*, ed. Finn Laursen and Sophie Vanhoonacker (European Institute of Public Administration, 1992), p. 5.