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## FROM BALANCE TO CONFLICT: A NEW CONSTITUTION FOR THE EU

Mark Dawson & Floris de Witte\*

As the crisis (and the Union's response to it) further develops, one thing appears clear: the European Union post-crisis will be a very different animal from the pre-crisis EU. This article offers an alternative model for the EU's constitutional future. Its objective is to invert the Union's current path-dependency: changes to the way in which the Union works should serve to question, rather than entrench, its future objectives and trajectory. The paper argues that the post-crisis EU requires a quite different normative, institutional and juridical framework. Such a framework must focus on reproducing the social and political cleavages that underlie the idea of authority on the national level, and that allow divisive political choices to be legitimised. This reform project implies reshaping the prerogatives of the European institutions. Rather than seeking to prevent or bracket political conflict, the division of institutional competences and tasks should be rethought in order to allow the EU institutions to internalize within their decision-making process the conflicts reproduced by social and political cleavages. Finally, a reformed legal order must play an active role as a facilitator and container of conflict over the ends of the integration project.

### INTRODUCTION

For the first time since the start of the Euro-zone crisis; proposals, visions and agendas are being discussed about how to redesign the integration project in order to structurally overcome the weaknesses that the crisis has exposed. One thing appears clear: the European Union *post-crisis* will be a very different animal from the *pre-crisis* EU. In previous articles, we have analyzed how the management of the crisis has undermined (or at least exposed the existing problems with) the substantive, institutional and spatial balance that was laid down in the Treaties. In doing so, we argued that the Union risks destabilizing its commitment to the values of individual and collective self-determination, which are indispensable for its legitimacy.<sup>1</sup> We have also argued that the different proposals for the future of Europe that are currently being discussed all fail to incorporate these values or articulate them in a way that strengthens, rather than weakens, the EU's legitimacy and stability.<sup>2</sup> What these proposals have in common is their presumption that significant changes to the Union's set-up are necessary in order for the Union to meet its objectives.

This article offers an alternative model for the EU's constitutional future. Its objective is to invert the Union's current path-dependency: changes to the way in which the Union works should serve to *question*, rather than entrench, its future objectives and trajectory. Our conceptual starting point is (as

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<sup>1</sup> Mark Dawson and Floris de Witte, "Constitutional Balance in the EU after the Euro-crisis", (2013) 76 *MLR*, at 817.

<sup>2</sup> Mark Dawson and Floris de Witte, "Self-Determination in the Constitutional Future of the EU" (2015) *ELJ* forthcoming.

in our previous articles) a commitment to self-determination. Self-determination offers a richer framework than the concept of democracy (often used in the context of the EU), as it is able to articulate the importance of the citizens' actual capacity to *affect* the economic, social, and moral texture of society (rather than limiting its demands to those of *formal* voice in the decision-making process). As will be discussed below, this distinction has important consequences for the way in which we should think about the Union's future. Ironically, in fact, it is often domestic commitments to formal democracy that stand in the way of a meaningful European project of self-determination.

After briefly outlining how the Union's response to the Euro-crisis has undermined the concept of constitutional balance – the EU's pre-crisis structure of self-determination (section 1) - the paper will argue that the post-crisis EU requires a quite different constitutional framework. Such a framework must focus on reproducing the social and political cleavages that underlie the idea of substantive balance on the national level, and that allow divisive political choices to be legitimised (section 2). This reform project implies reshaping the prerogatives of the European institutions. Rather than seeking to prevent or bracket political conflict, the division of institutional competences and tasks should be rethought in order to allow the EU institutions to internalize within their decision-making process the conflicts reproduced by social and political cleavages (section 3). This, primarily, requires a shift in power from executive and technocratic institutions towards representative bodies. This normative and institutional re-alignment also requires a rethinking of the question of political equality that underlies spatial balance in the EU. Rather than balancing the equality of states and citizens *within* existing institutions, it is argued that we should move towards two separate institutions – one intergovernmental and one supranational – that respect and reflect the full equality of their constituents. The recent trend, we argue, that understands national parliaments as the bulwark of democratic authority in the EU threatens, rather than protects, the concept of self-determination in Europe (section 4). Finally, in establishing and securing these values, we see an important role for law. A reformed legal order would play an active role as a facilitator and container for political deliberation over the ends of the integration project. It would in this sense leave important substantive questions to the *political* sphere instead of trying to steer policy choices within formal legal discourse (section 5).

This reconstitution of the EU's normative, institutional and legal dimensions are necessary for it to further the project of self-determination. Rather than *entrenching* certain conceptions of 'the good life', or a particular balance between politics and the market; the EU must serve – as any political project ultimately must – to *question* these conceptions. Without such drastic changes, the integration project is likely to continue to generate the despondency and lethargy that are as much a cause as a symptom of its legitimacy crisis.

## **1. CONSTITUTIONAL BALANCE AND ITS DISINTEGRATION DURING THE EURO-CRISIS**

In a previous article, we argued that the stability and legitimacy of the Union has been undermined by the Member States' responses in containing the Euro-crisis.<sup>3</sup> We argued, in general terms, that any

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<sup>3</sup> Dawson and De Witte, *MLR* 817-844, *supra* note 1.

defensible form of European integration must be able to forward the project of individual and collective self-determination. This centrality of self-determination forms the normative core of the idea of constitutional balance, which was further substantiated, within the Treaties, in three different domains. First, it found expression in the substantive balance between what the EU can do and what Member States should do – seeking to insulate the capacity of Member States and their citizens to decide on salient policy questions such as redistributive policies. Second, it was expressed in institutional terms by linking the voices of different interests as represented by different European institutions – in order to ensure that the diverse views of citizens find expression in the decision making process. Finally, the idea of balance was expressed in spatial terms by ensuring equality between Member States regardless of size, in order to protect the spaces for self-determination and political contestation as they exist on the national level. Overall, we argued these three dimensions of the constitutional balance upon which the EU was premised were fundamental to its functioning in so far as it allowed citizens to control the norms that guide their societies. Constitutional balance thereby attempted to ensure that the norms decided by the EU strengthened, rather than challenged, the citizens’ capacity for self-determination. This commitment to constitutional balance, we concluded, was what stabilized and legitimized the Union.

As many scholars have argued, this commitment was challenged in different ways in the decades leading up to the Euro-crisis. Scharpf, Menéndez and Streeck have all highlighted how judicial decisions, institutional constraints, macro-economic processes and political compromises have, in different ways, challenged the diverse ideas of balance that could be read into the Treaties.<sup>4</sup> Our contention is that this process of erosion of the Union’s commitment to self-determination has sped up and become both more pronounced and more problematic in the aftermath of the crisis. On the one hand, the Euro-crisis has made explicit and visible the many fault-lines in the structure of the integration process that were already present.<sup>5</sup> The tension implicit in the choice to create a single monetary policy with the retention of national competences in the area of economic and fiscal policy is perhaps the most obvious. On the other hand, the erosion of the Union’s commitment to self-determination has become more problematic since the euro-crisis began, in the sense that the Union is now openly and often bluntly engaging in redistributive politics. Such politics presuppose a much thicker commitment to self-determination than the Union’s institutional set-up can currently garner.

The Union’s response to the Euro-crisis, we argued, has undermined all three dimensions of the concept of constitutional balance. The crisis’ undermining of the idea of *substantive balance* is closely connected to the EU’s increasing inroads in Member State autonomy in redistributive, fiscal and budgetary matters. This is most dramatically visible, of course, in the conditionality criteria that debtor states must accept in return for financial support, which explicitly demand labour market reforms, liberalization of public services, cuts to old-age pensions and the privatization of public property.<sup>6</sup> Even in solvent

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<sup>4</sup> F. Scharpf, ‘After the Crash: A Perspective on Multilevel European Democracy’ (2015) 21 *ELJ*, forthcoming; A. Menéndez, ‘The Existential Crisis of the European Union’, 14 *German Law Journal* (2013), 453; C. Offe, *Europe Entrapped* (Polity, 2015), especially chapter 2; W. Streeck, *Buying Time* (Verso 2014), 97-164.

<sup>5</sup> See for a good overview A. Menéndez, ‘The Existential Crisis of the European Union’, 14 *German Law Journal* (2013), 453.

<sup>6</sup> The second Greek Memorandum of Understanding, for example, requires privatization to the tune of *at least* EUR 50 billion by late 2015. See Article 2 (5)(k) of Council Decision 2011/734/EU.

Member States, the excessive deficit procedure, the macro-economic imbalance procedure and the country-specific recommendations within the context of the European Semester have increasingly limited national autonomy over redistributive, fiscal and budgetary matters. It was our contention that such limits pose a problem for the stability of a Union that does not possess the institutional and socio-cultural resources that enable it to legitimately make such salient and divisive political choices.<sup>7</sup>

The response to the crisis equally undermined the concept of *institutional balance*. The relationship between the Union institutions is a delicate and sophisticated one, which functions to ensure that different and diffuse interests can voice their concerns within the decision-making process. As such, this wide and varied access through different institutions ensured that the Union, despite the lack of strong democratic credentials, remained responsive to the desires of Member States *and* citizens. Since the start of the euro-crisis, we have seen a drastic change in the EU institutional structure towards executive dominance. Agenda-setting has shifted from the Commission to the European Council – with the Commission increasingly playing an enforcement role in monitoring compliance with its political choices, while the European Parliament (and national parliaments) have been all but sidelined from the new structures for economic and monetary governance. These changes, we argued, further decrease the stability and legitimacy of the Union by removing choices over binding norms away from representative institutions, which serve to mediate between different conceptions of the ‘good’ in society and as such, help to legitimize the policy choices they make.<sup>8</sup>

Finally, the response to the crisis also challenged the idea of *spatial balance*, which sees to the equality between Member States, and which in turn seeks to protect spaces for self-determination and political contestation on the national level. Since the inception of the crisis, many of the instruments that sought to preserve this spatial balance have been undercut. Two of the most notable examples are the requirement that all Member States agree to Treaty amendments, which has been bypassed by way of the use of international law for the ESM and Fiscal Compact; and voting rights in the ESM, which reflects the Member States’ respective financial contributions rather than their status as equal and sovereign political spaces.

Overall, we argued, these shifts significantly undermine the capacity of the EU to produce stable and legitimate norms – pushing it in ‘executive federal’ or ‘authoritarian liberal’ directions.<sup>9</sup> It might be objected that such rebalancing of the EU was inevitable (*‘alternativos’*, as the German Chancellor once put it). After all, the Union has now certainly moved from being a regulatory polity (if it ever really was) to being a (re)distributive one: it creates clear winners and losers. This shift certainly entails that new competences be transferred from the national to the Union level, that the institutional settlement be re-aligned, and that the division of decision-making power between states and citizens needs to be rethought. Our contention is not that such rebalancing is problematic *per se*, but rather that the way in which it has happened has *further limited*, rather than promoted, the idea of the Union as a project of self-determination.

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<sup>7</sup> Dawson and De Witte, 823-828, *supra* note 1.

<sup>8</sup> Dawson and De Witte, 828-836, *supra* note 1

<sup>9</sup> See, among others, Michael Wilkinson, “The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union”, (2013) 14 *German Law Journal*, 527.

The difficulties of such re-balancing is evident when considering the first range of proposals concerning the future direction of the EU post-crisis. These proposals are diverse – ranging from commitments to further entrench ‘executive federalism’ to advocates of significant differentiated integration within the EU. While we have discussed the benefits – and limitations – of these approaches in a further article, their common premise is their concern with deepening and legitimising the EU project, but without contesting the substantive goals the EU seeks to pursue and their embedding in the EU’s legal order.<sup>10</sup> In this sense, the reform proposals advanced to date are not designed to create a European structure that is capable of answering the basic question that underlies any polity: ‘what type of society do we want to live in?’ Instead, they largely attempt to sideline this question by constitutionalizing and embedding current policy preferences.

A more fruitful approach may be to consider how we can reform the EU in a way that allows it to problematize its increase in coercive force, while respecting the structural principles of self-determination that are vital for its stability and legitimacy. How can we conceptualise self-determination in the Union, and how can we remedy the evident social and political limits to the Union’s current trajectory? Or, in even simpler terms: how can we ensure that - if we are to have austerity under conditions of a deepened Economic and Monetary Union - it is at least Europe’s citizens’ choice?

Only by creating a framework in Europe that offers its citizens a chance to answer these questions directly on the European level can we *both* move beyond the limitations to the scope of the integration process that the ‘old’ constitutional balance in Europe produced *and* build a constitutional order for Europe that takes the promise of self-determination seriously. In order to do so, however, it is argued that we need a drastic re-formulation of our current institutional, normative and legal understanding of the EU. More specifically, we will argue that we need to (a) recreate on the European level the social cleavages that underlie the idea of substantive balance on the national level; (b) alter the role and prerogatives of the European institutions, in a way that manages to internalize the conflict produced by social cleavages within European decision-making; and (c) openly face the question of political equality that underlies spatial balance. Only such a structure may be capable of allowing citizens to retain the capacity to answer the most basic political question: ‘in what type of society do we want to live?’

## 2. FROM SUBSTANTIVE BALANCE TO SUBSTANTIVE CONFLICT

The idea of substantive balance speaks to the need for the balance of powers between the EU and its Member States to be struck in such a way that the citizen retains the capacity to realize himself both as an individual and, together with fellow citizens, collectively as a political community.<sup>11</sup> To put it in simple terms: the social, economic and moral fabric of society must be traceable back to the desires, wishes and preferences of the electorate.

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<sup>10</sup> See in depth, Mark Dawson and Floris de Witte, “Self-Determination in the Constitutional Future of the EU” (2015) 21 *ELJ* (forthcoming).

<sup>11</sup> A. Somek, “Epilogue: What is at Stake?” in E. Chiti, A. Menendez and P. Teixeira (Eds.) *The European Rescue of the European Union* (Oslo, ARENA, 2012), 503.

Until recently, this entailed that Member States retained autonomy over the most salient policy areas, such as fiscal and redistributive policies, and that the decision-making process in the EU was consensual, and not majoritarian.<sup>12</sup> Increasingly, however, the EU (whether out of economic necessity or political expediency) is describing how we are to live together, and what ‘common good’ we are to strive for.<sup>13</sup> Such redistributive and allocative decisions invariably have very clearly identifiable winners and losers, and challenge the paradigm of the EU as a polity based on consensual decision-making.<sup>14</sup> Redistributive discussions, in the current EU, cannot be made in the context of a conflict of interests between (say) banks and pensioners. The ‘logic of the system’ articulates redistribution as being a conflict of interest between states (say, Germany versus Greece).<sup>15</sup> Such ‘national’ cleavages are deeply problematic, not only for the Union’s legitimacy, but also for its capacity to be a project of self-determination.

Indeed, for the Union’s engagement with redistributive questions to reflect a commitment to self-determination we need a radical overhaul of the Union’s decision-making process. Rather than *bracketing* social and political conflict (as the Union has done so far),<sup>16</sup> and channeling it to the narrative that pits Member States against each other, the EU will need to *foster* and *channel* new forms of social and political conflict, so as to allow for common control of citizens over the conditions of life, and so as to mediate between different conceptions of the ‘common good’. Current domestic and supranational electoral methods do not suffice. Such conflicts, after all, are indispensable not only in finding the appropriate answer to political questions, but also in legitimizing and enforcing the answer. Scholars have long analysed the positive properties of social conflict as a precondition for democracy and for the emergence of political solidarity.<sup>17</sup> Dani has highlighted that social conflicts can enhance the *dynamism* of a polity by injecting an element of passion and aspiration; they can enhance citizen *participation* in, and identification with the polity by fostering a sense of solidarity and community among individuals that share a common conception of the ‘good’; and they enhance the *stability* of the polity by internalizing and proceduralising aggression and disagreement,<sup>18</sup> as well as producing sites for the recognition of diversity.<sup>19</sup> Chalmers adds a fourth element, which goes to legitimizing policy choices, given that “conflicts make politics bearable for the disempowered as they enable interests to organize

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<sup>12</sup> F. Scharpf, “Legitimacy in the Multi-Level European Polity” in P. Dobner and M. Loughlin (Eds.) *The Twilight of Constitutionalism* (OUP, 2010), 93.

<sup>13</sup> The Court’s case law can be understood as making similar claims. See F. De Witte, ‘Justice in the EU: The Emergence of Transnational Solidarity’ (OUP, 2015).

<sup>14</sup> O. Cramme and S. Hobolt, “A European Union under Stress” in O. Cramme and S. Hobolt (Eds.) *Democratic Politics in a European Union under Stress* (OUP, 2014), 18; G. Majone, *Rethinking the Union of Europe Post-Crisis*, (CUP, 2014), pp. 236-9.

<sup>15</sup> See for a critique of this ‘national’ cleavage C. Offe, ‘Europe Entrapped: Does the EU have the Political Capacity to Overcome its Current Crisis?’ (2013) 19 *ELJ* 595.

<sup>16</sup> See J. Komárek, “Waiting for the Existential Revolution”, (2014) 12 *ICON* 190.

<sup>17</sup> M. Wenman, *Agonistic Democracy* (CUP, 2013); C. Mouffe, *The Democratic Paradox* (Verso, 2000). See for an alternative view, which advocates consociational (or consensus-based) democratic systems, A. Lijphart, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice* (Routledge 2007).

<sup>18</sup> M. Dani, “Rehabilitating Social Conflicts in European Public Law”, (2012) 18 *European Law Journal* 5, 623-4.

<sup>19</sup> D. Chalmers, “The European Redistributive State and a European Law of Struggle”, (2012) 18 *European Law Journal* 5, 672.

and seek change whilst still claiming allegiance to the political settlement.” In other words, “the presence of conflicts simultaneously articulates the presence of dominance and problematizes it”, opening the way for future political change.<sup>20</sup> The existence of clearly defined conflicts, engendered by different conceptions of the ‘good’, finally, also enhances the citizens’ capacity for self-determination: they help the individual to order and understand political questions within the polity, forcing them to better understand themselves, articulate their obligations towards fellow citizens, and engage in the overall normative project of the polity.<sup>21</sup> Or, to put it from the perspective of the development of the polity: the internalization of social conflicts help to ensure that citizens productively engage in the construction of society.

If the EU wants to offer its citizens a space through which to realize themselves, understand themselves as part of a common political project, and participate in the creation of binding rules, it will not only require institutional reforms (on which more below).<sup>22</sup> As Bartolini has forcefully argued, the structuring of a polity that is strong enough to engender, sustain and channel political conflict requires much more sophistication than the Union currently possesses.<sup>23</sup> Open social and political conflict without the support of processes of centre formation, system building and political structuring will not lead to the strengthening of the EU, but to political rupture.<sup>24</sup> If anything, this is precisely the reason why the Union has historically been careful in avoiding the institutionalization of open political and social conflict, and has instead opted for a consensual model of decision-making.<sup>25</sup>

For conflict about the direction of the EU to be a *positive* rather than a disintegrative force, three prerequisites are required. First, we must move beyond understanding conflicts in the EU as being, again in blunt terms, about German interests versus Greek interests. Not only is nothing gained by articulating conflict in the EU as such, but it also obscures the much wider and pervasive *functional* cleavages and conflicts that undergird the Union’s future trajectory. The stickiness of the ‘national cleavage’ is, ironically enough, often presented and defended as the result of a commitment to democracy. Scharpf’s assessment of the evolution of European democracy in the aftermath of the crisis, for example, argues that it is (and must be) an inevitable result of the consensual nature of decision-making in the EU.<sup>26</sup> The logic, here, presumes that the German position in support of austerity and the Greek position rejecting austerity are both domestically democratically legitimated. In consequence, the Union becomes a forum for the mediation between these two diverging *national* positions, rather than a forum through which the functional tensions between, say, public sector workers and bankers in the EU are mediated.

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<sup>20</sup> D. Chalmers, *ibid*, 673.

<sup>21</sup> See in more depth: F. De Witte, “Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law”, (2013) 50 *CML Rev.*, 1545.

<sup>22</sup> See below, section 3.

<sup>23</sup> S. Bartolini, *Restructuring Europe* (OUP, 2005), pp. 354-370.

<sup>24</sup> S. Bartolini, *ibid*, 408. See also F. Scharpf, ‘After the Crash: A Perspective on Multilevel European Democracy’ (2015) 21 *ELJ*, 14 (of manuscript)

<sup>25</sup> G. Majone, *Rethinking the Union of Europe Post-Crisis* (CUP, 2014), pp. 236-9.

<sup>26</sup> F. Scharpf, ‘After the Crash: A Perspective on Multilevel European Democracy’ (2015) 21 *ELJ*, 18 (of manuscript)



While we agree with many elements of Scharpf's analysis, his understanding of the interaction between national democratic forces and the politicization of the EU is problematic, it is argued, in two ways. First, it is based on a very formalistic understanding of democracy, which would suggest that the German position and the Greek position – even if they are diametrically opposed – are both democratically legitimate. Such a formalistic understanding is unsatisfactory because it does not conceptually account for the *capacity* of the Greek and German electorate to *actually affect* the social, economic and moral conditions of their life. To put it as simply as possible, the outcome of the mediation process in the EU cannot both favour *and* reject austerity. While the electorate is offered a formal chance to voice their preferences domestically, such a voice is only marginally connected (for most Member States' electorate) to their capacity to *actually affect* the social, economic and moral conditions of life, which are dictated by the other factors: relative economic strength, technocratic predictions, legal limitations and the preferences of supranational actors. Understanding the EU from the perspective of *self-determination*, instead, suggests that what is central is not the electorate's capacity for voice, but the capacity to *affect* one's conditions of life. As long as we remain captured by the 'nationalist' cleavage, and understand those preferences as being the result of a democratic process, we cannot guarantee that the citizens' needs, desires and preferences are central to the conditions of social, economic and moral life in the EU. The second problem with the predominance of the 'national' cleavage is that they are self-reinforcing. They encourage citizens to think and identify in terms of positions that do not match their preferences, needs and desires as individuals. An end to austerity might well be in the interests of public sector workers and manual labour workers in both Greece and Germany, but the national cleavage shields their common affinities. In other words, the dominance of the national cleavage both promotes an idea of democracy that has little to do with self-determination and prevents the emergence of cleavages that *can* articulate the individual's preferences, needs and desires on the European level.

It is argued that we should recreate 'functional' cleavages in the transnational arena, including transnational political parties that produce and channel political voice,<sup>27</sup> and thereby stabilize and legitimize authority can help the Union to overcome this impasse.<sup>28</sup> This requires sophisticated structures that manage to structure, channel, collect and voice different preferences, needs and desires that different groups in society have. Traditionally, this role is played by political parties, civil society, media, grassroots movements (at times pursuing a single goal), trade unions, and NGOs, which serve to organize, group, and articulate the conflicting political claims in society. The traditional political cleavages, as identified by Lipset and Rokkan, can be traced in the EU.<sup>29</sup> It is not difficult to point to new challenges thrown up by the integration process to the centre-periphery, urban-rural, capital-labour, or church-state cleavages.<sup>30</sup> Certain cleavages have even been created, skewed, or their saliency exacerbated by the Union – one can think of generational conflict in the aftermath of the crisis, the

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<sup>27</sup> See also J. Komárek, *supra*, note 16.

<sup>28</sup> S. Bartolini, *supra*, note 23, 41.

<sup>29</sup> S. M. Lipset and S. Rokkan, *Party Systems and Voter Alignments: Cross-National Perspective* (The Free Press, London, 1967), p. 6.

<sup>30</sup> Consider budgetary negotiations, the CAP, the free movement provisions and their interpretation by the Court, and the elaboration of a catalogue of fundamental rights as foremost examples.

balance between the genders, the conflict between creditor and debtor states, or the conflict, increasingly visible in national welfare regulation, between mobile and immobile citizens.<sup>31</sup> Some of these cleavages are starting to produce structural platforms for their articulation on the transnational or European level<sup>32</sup> – but for such cleavages to displace the ‘nationalistic’ cleavage, the EU needs to do much more to encourage this process.<sup>33</sup> This is not easy: cleavage construction requires mobilization – which may be even more difficult in a transnational setting, where linguistic, cultural or historical cues might make such mobilization less straightforward. At the same time, as Tilly convincingly argues, , the reconstruction of trust networks, and their incorporation within party politics, is absolutely essential for the democratization of a polity.<sup>34</sup> The disintegration of national cleavages and political allegiance and their reconstitution on the transnational level is thus crucial to ensure that political conflicts are played out *within* the Union’s political system, and serve to build the trust and loyalty that stabilize political projects, rather than fostering resistance *against* the Union.<sup>35</sup> As will be discussed below, this requires a serious overhaul of the EU’s institutional structure.

The second element that is required before social and political conflict can be a *productive* force in the EU is the opening up of the policy objectives of the integration process. The main element in strengthening the emergence of cleavages in the European political settlement lies in the capacity of the new transnational actors to *actually change* the course of integration.<sup>36</sup> The different choices about the type of integration that we may prefer must be meaningful, and must relate to different understandings of basic premises of shared life.<sup>37</sup> Without this, political and social mobilization will remain a pipe dream: whichever sophisticated institutional model of democracy is adopted will fail without the possibility to *change* the social and economic structure of society.<sup>38</sup> As Scharpf has put it, “politicization without the possibility of autonomous policy choices is more likely to produce frustration, alienation, apathy or rebellion, rather than democratic legitimacy”.<sup>39</sup> Overcoming this impasse entails some institutional change, as discussed below, but also, importantly, it requires loosening up the Treaty objectives to encourage contestation about the Union’s objectives and direction.<sup>40</sup> The Treaty prevents such contestation in different ways. As Garben and Davies have recently noted, the purposive (or functional)

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<sup>31</sup> See, for example, S. Hix, “Democratising a Macroeconomic Union in Europe” in O. Cramme and S. Hobolt (Eds.), *supra*, note 11; N. Fligstein, *Euro-Clash: The EU, European Identity and the Future of Europe* (OUP, 2010).

<sup>32</sup> See H. Kriesi and E. Grande, “Political Debate in a Polarizing Union”, in O. Cramme and S. Hobolt (Eds.), *supra*, note 11.

<sup>33</sup> C. Offe, “Europe Entrapped”, (2013) 19 *ELJ* 5, 610.

<sup>34</sup> C. Tilly, *Democracy* (CUP, 2007), p. 96.

<sup>35</sup> In particular, as Bartolini argues, because domestic cleavages do not nicely translate when opened up to transnational political choices. See S. Bartolini, *supra*, note 23, 309.

<sup>36</sup> D. Chalmers, *supra*, note 19, 674.

<sup>37</sup> M. Höpner and A. Schäfer, “Integration among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU”, MPIfG Discussion Paper No. 12/5, 25; and R. Dahl, “Can International Organisations be Democratic? A Skeptic’s View” in I. Shapiro and C. Hacker-Cordon (Eds.) *Democracy’s Edges* (CUP, 1999), p. 20.

<sup>38</sup> S. Bartolini, *supra*, note 23, 39 and 378. See also G. Davies, “Democracy and Legitimacy in the Shadow of Purposive Competence” (2015) 21 *ELJ* 6.

<sup>39</sup> F. Scharpf, ‘After the Crash: A Perspective on Multilevel European Democracy’ (2015) 21 *ELJ*, 18 (of manuscript)

<sup>40</sup> We are indebted to Marco Dani for this idea.

nature of the Union's competences mitigate against the existence of an open process of contestation about the policy orientation of EU norms.<sup>41</sup> In addition, in many domains, at the moment, the policy preferences of the Union are constitutionally entrenched.<sup>42</sup> This, again, is a reflection of the understanding of the integration process as mediating conflicts between *Member States*, rather than conflicts between its *citizens*. Examples abound: monetary policy is geared towards 'price stability' instead of 'full employment',<sup>43</sup> energy policy focuses on competitiveness and energy security instead of democratic access<sup>44</sup>, non-discrimination policy fosters labour market access over dignity in the workplace,<sup>45</sup> the Court's interpretation of Article 125 TFEU entails that financial assistance must be based on conditionality instead of solidarity,<sup>46</sup> the excessive deficit procedure prefers austerity over Keynesian solutions, and the free movement provisions themselves already express a very particular understanding of the interaction between state and market.<sup>47</sup> Even in the absence of legislative intervention, these policy preferences find expression in case-law. The Court has been well-known for its willingness to read such objectives into primary and secondary EU law.<sup>48</sup> This is not to say that in each of these policy areas the alternatives might be more attractive or feasible, but simply to say that for the EU to be able to legitimize such choices as an act of self-determining citizens, it needs to allow for their social and political contestation.

The third and final precondition for the emergence of 'functional' rather than 'national' cleavages is a placation of territorial and cultural cleavages in the EU. Many scholars have warned that opening up the EU to the full force of social and political conflict risks "creating disruptive political conflicts and radical anti-European opposition" that could well signal the end of the integration process.<sup>49</sup> The logic here – eloquently articulated by Bartolini – is that democratization leads to political rupture if the territorial and cultural questions are not settled.<sup>50</sup> This means, in simple terms, that if we open up the EU to social and political conflict, the only conflict that will emerge is whether a particular group, region, state, linguistic, cultural or ethnic space *should* be part of the EU. Every policy initiative would not be discussed on its merits (and as such represent the traditional 'functional' cleavages), but only in territorial or cultural terms. The risk, in such a scenario, is not only that this brings us even further from the idea(l) of

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<sup>41</sup> S. Garben, 'Confronting the Competence Conundrum: Democratizing the European Union through an Expansion of its Legislative Power' (2015) 35 *OJLS* (forthcoming); G. Davies, "Democracy and Legitimacy in the Shadow of Purposive Competence" (2015) 21 *ELJ* 2.

<sup>42</sup> Bartl calls this the 'horizontal substantive democratic deficit'. See M. Bartl, "The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit" (2015) 21 *ELJ* 23.

<sup>43</sup> Article 127 TFEU. Compare with the mandate to the Federal Reserve in the US, which lists full employment, sustainably growth *and* prize stability.

<sup>44</sup> Article 194 TFEU.

<sup>45</sup> E. Muir, *EU Regulation of Access to Labour Markets* (Kluwer, 2012).

<sup>46</sup> See Case C-370/12, *Pringle*, (not yet reported), para. 137.

<sup>47</sup> See M. Poiares Maduro, "Three Models of a Social Europe", in M. Hesselink (Ed.) *The Politics of a European Civil Code* (Kluwer Law International, The Hague, 2006). Somek, for example, suggests that Europe's history demonstrates a preference for *limiting* rather than *integrating* markets. See A. Somek, *supra*, note 11, 161.

<sup>48</sup> G. Davies, "Democracy and Legitimacy in the Shadow of Purposive Competence" (2015) 21 *ELJ* 14; F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 *ELJ*, 14 (of manuscript).

<sup>49</sup> F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 *ELJ*, 14 (of manuscript).

<sup>50</sup> S. Bartolini, *supra*, note 23, pp. 386-390.

self-determination, but also that it recasts the ‘national’ cleavages in an even more explosive format. In order to prevent such territorial and identity politics from emerging, and protect and stimulate the role of the EU as the forum through which socio-economic choices pertaining to the way in which European citizens want to live their lives are articulated, we need to insulate the Union’s political process from such challenges. Two ideas present themselves. First, a new Treaty could bracket a number of salient policy choices in the cultural domain (such as rules protecting languages) and in the moral domain (such as rules pertaining to drugs or euthanasia). Such choices, the new Treaty could argue, are not to be harmonized, leaving it open to cities, regions, or states to regulate such matters. Alternatively, a new Treaty could entrench a commitment to cultural diversity. Second, territorial tensions could be placated (at least in the short-term)<sup>51</sup> by referendums in all Member States before the new Treaty structure, detailed below, is adopted. Such a referendum, to be held on the same day across the EU, would offer a clear question (in or out?), a clear reversion point,<sup>52</sup> and would reconstitute a ‘coalition of the willing’ while addressing the territorial question.<sup>53</sup>

The idea that substantive questions pertaining to what constitutes a ‘good life’ should be decided by individual citizens - insulating such questions on the national level where sophisticated political structures, shielded from the intrusion of EU law, guarantee that such choices reflect the desires of citizens – no longer holds. The EU makes increasingly divisive and invasive political choices in the aftermath of the crisis, but does not dispose of the traditional political and institutional mechanisms that can link such choices to the preferences of citizens. In fact, while contestation of the EU’s current austerity drive has been omnipresent in Europe for the last five years, it is only slowly emerging within the EU’s decision-making process itself. This creates a serious problem not only for the legitimacy of the Union’s policies, creating alienated and disaffected citizens, but also for the Union itself. As acutely observed by Mair, without the possibility for contestation *within* the EU, dissatisfaction quickly translates into contestation *of* the EU.<sup>54</sup> A more stable alternative may be a move towards a culture of political and social conflict that can serve to challenge, mediate, prioritise, and, ultimately, legitimize what constitutes the ‘good life’ in the EU.

### 3. THE INSTITUTIONALISATION OF CONFLICT

A renewed emphasis on political and social conflict also requires, of course, a different institutional set-up; one able to ‘translate’ conflict into political action. Traditionally, the institutional set-up of the EU sought to secure institutional *balance*, which sees to the incorporation of diverse interests within the decision-making process. In particular in a multi-level polity such as the EU, it was considered important that different forums and institutional structures exist that manage to incorporate citizens’ viewpoints

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<sup>51</sup> S. Bartolini, *supra*, note 23, pp. 35-36; 403.

<sup>52</sup> See S. Hobolt, *Europe in Question: Referendums on European Integration* (OUP 2009) 241 on the importance of a clear reversion point.

<sup>53</sup> On the feasibility of the proposal, see the conclusion.

<sup>54</sup> See P. Mair, “Political Opposition and the European Union”, 41 *Government & Opposition*, 7 (2007); M. Berezin, “The Normalization of the Right in Post-Security Europe”, in A. Schafer and W. Streeck *Politics in the Age of Austerity* (Polity Press, 2013), p. 239; and M. Dani, *supra*, note 18 p. 621.

through diverse channels, and offer multiple spaces for participation. The Union's current institutional balance is justified by its capacity to *prevent* conflict and foster *consensual* decision-making by creating a super-majority, to be agreed on by three different institutions (each with a different majority), for the adoption of policies.<sup>55</sup> It is clear, however, that the Union's increasing engagement with salient and redistributive issues, and suggested focus on the generation and incorporation of social and political conflict within the EU, requires a radical reconfiguration of the EU's institutional structure. At the moment, as Sarah Hobolt has demonstrated, "while citizens increasingly hold the EU responsible for economic outcomes, they cannot hold European politicians to account for their responses to the crisis, and this leads to declining levels of trust in the institutions."<sup>56</sup> At the same time, "while citizens increasingly see the EU as part of the problem when it comes to the management of the economic crisis, they also consider it to be part of the solution: inside the Eurozone the EU is still considered to have greater capacity than national governments to solve the economic problems of the day."<sup>57</sup> Allowing for the EU to fulfill this role and become the forum through which citizens can engage with policy choices, requires, however, two fundamental institutional changes.

The first change concerns the shift from consensual decision-making to political contestation within the different institutions. The idea here is that such contestation will foster holistic thinking,<sup>58</sup> facilitate the distillation of the appropriate policies, serve to filter out inaccurate, biased or unreasonable arguments,<sup>59</sup> legitimize policy enforcement, and offer much better tools for citizens to both control whether policies match their preferences and hold individual politicians to account.<sup>60</sup> In simple terms, democratic contestation operates as a safety valve through which politicians are made sensitive to the demands of the citizenry. At the same time it encourages citizens to think through their personal preferences as well as their preferences in respect of the common good.<sup>61</sup> The second fundamental change concerns a shift in power from the executive towards representative institutions; or, more generally, from executive power to constituted power. This is particularly pressing in the current structures of economic governance, which are decided almost exclusively by the executive branch, without input or control by representative institutions.

All this entails significant changes within the different institutions, and in the relationship between them. It is proposed that such changes take place in two steps. First, the salient policy choices that are currently made within the context of the EDP, MEIP, European Semester, and in the negotiation of conditionality agreements need to be immediately 'communitarised'. The wall of executive control that currently surrounds such decisions, and that allows the Member States' executive branch to control

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<sup>55</sup> Dawson and De Witte, *supra*, note 1, 817; G. Majone, *Rethinking the Union of Europe Post-Crisis* (CUP, 2014), pp. 236-9.

<sup>56</sup> S. Hobolt, "Public Attitudes towards the Euro Crisis", in O. Cramme and S. Hobolt (Eds.), *supra*, note 11, p. 109.

<sup>57</sup> S. Hobolt, *ibid*, p. 109.

<sup>58</sup> S. Hix, "Democratizing a Macroeconomic Union in Europe", in O. Cramme and S. Hobolt (Eds.), *supra*, note 14, p. 246.

<sup>59</sup> C. Lord, "The Democratic Legitimacy of Co-Decision", 20 *JEPP* (2013), 1063.

<sup>60</sup> S. Hix and A. Follesdal, "Why there is a Democratic Deficit in the EU: A Reply to Moravcsik and Majone", 44 *JCMS* (2006), 533.

<sup>61</sup> M. Wenman, *Agonistic Democracy* (OUP, 2013), p. 53.

both the setting of general policy direction (through the European Council), and its detailed implementation and enforcement (through ECOFIN), must be torn down.<sup>62</sup> Instead, questions pertaining to economic policy adjustment in Member States, the assessment of measures to be taken to counteract divergent macro-economic trends in different Member States, the exact terms and conditions for conditionality agreements, or the potential use of the ‘big bazooka’ of outright monetary transactions should be decided upon using the traditional set-up, whereby the Commission proposes, and the EP and Council co-decide. This presupposes a radical break from the current set-up of the ECB, and suggests that supposedly technocratic decisions that make significant winners and losers require the backing of political authority.

All of the measures listed above are subject to significant contestation. Whereas some scholars argue in favour of more centralised EU enforcement, others argue that such ‘one size fits all’ policy-making underestimates the depth and even benefits of structural economic divergences between Member States. The purpose of ‘communitarisation’ would not be to resolve this debate one way or another but rather to make its resolution open to political contestation. The scope and ends of EU economic governance require political scrutiny in order to ensure that the process remains sensitive to the diverse interests that the stability of the integration process relies upon.

In the longer run, a commitment to self-determination requires a more radical re-alignment of the EU institutions. Let us briefly outline the direction in which the EU needs to be transformed if it is to *promote*, rather than restrict, the citizens’ capacity for self-determination. First of all, this requires a decrease in the diversity of actors that are engaged in the law-making process. The participation of an independent Commission, national parliaments, national governments and the EP is traditionally seen as ensuring multiple sites of access for the individual to engage with the EU and its decision-making process. In an EU based on social and political conflict, however, such institutional diversity and disparity of access points inhibits the processes of centralized contestation that legitimizes salient political choices. In other words, we need to create an institution that has the *monopoly on voice* (that is, on political contestation).<sup>63</sup> The EP appears to be the most natural forum for this role of collecting, channeling and mediate between the different conceptions of the ‘good’ that citizens in the EU might have, while allowing for the creation of transnational alliances that piece together the different cleavages that emerge in the national and transnational public space.<sup>64</sup> The EP elections, however, need to be altered to allow for this – they must be based on European lists of transnational political parties (so as to force clear electoral competition, and discussion (of policies) across borders), forego the quota of MEPs per Member State, and be based on a system of proportionate representation across the EU. This would mean that EP candidates are not elected on the basis of their capacity to protect the interests of citizens of Hackney, or London, or South-East England, or England, or Northern Europe – and must instead present themselves as a candidate with a transnational agenda. This will allow the EP to be a forum for the citizen *qua* European. The EP would obtain strong structural mechanisms of *ex-ante* and

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<sup>62</sup> See above, section 2.

<sup>63</sup> Thanks to Damian Chalmers for raising this point. See also S. Bartolini, *supra*, note 23, 385.

<sup>64</sup> See also C. Fasone, “European Economic Governance and Parliamentary Representation. What Place for the European Parliament?”, 20 *European Law Journal* (2014), 167.

*ex-post* political control and accountability that we associate with strong parliaments on the national level, which should make it clearer to voters which individuals and parties are responsible for which policy decisions. Such a reconfiguration of the EP and the electoral process would ensure that the representative institutions, with their potential to channel social and political conflict and their capacity to mediate towards the ‘common good’, guide the EU’s political trajectory; and that citizens have clear structures of participation and control over the structures that shape their life.

The leader of the party winning the election (or the leader of a coalition that holds a majority in the EP) will be asked to lead the EU’s central executive, the Commission, which has the tasks that are associated with the government on the national level. A College of Commissioners will be chosen on the basis of the electoral result.<sup>65</sup> The Commission in this sense could no longer carry the pretense of acting as a purely ‘neutral’ regulatory actor (a function in any case increasingly over-taken by the EU’s use of agency structures). The Commission would be fully politically accountable for its decisions (reflecting the significant distributive consequences its existing decisions in the economic field carry).

The Council, it is suggested, could be transformed into an upper legislative house, a sort of European Senate.<sup>66</sup> Each Member State would send two representative of their national parliament and two representatives from the government as permanent members of the European Senate.<sup>67</sup> Their task is similar to the EP’s – in so far as they participate in the legislative process (based on simple majority voting) and serve to control the Commission. They would be supported in this task by COREPER and COSAC, and have to meet the criteria of transparency and accountability that are associated with representative institutions, and are currently lacking in respect of the Council. The European Senate would represent the citizen not *qua* European (as the EP does), but *qua* national citizen. It would allow for a structural link between national parliaments and the EU’s legislative process, strengthen the communication between national parliaments and national governments, force Member States to negotiate openly and substantively on policy proposals rather than hide behind national interests, and allow for much better control of citizens over the way in which their Member State representatives vote.

The proposed shifts in power – away from executive control and its practice of consensual decision-making, and towards political contestation within the European Parliament – would go a long way towards allowing citizens to control the integration process and enhance the project of self-determination. Principally, it would create an institutional monopoly on political contestation within the European Parliament, which would channel and further strengthen the emergence of the social and

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<sup>65</sup> See also, M. Poiras Maduro, “A New Governance for the European Union and the Euro: Democracy and Justice”, *RSCAS Policy Papers* No. 11, 2012, 18-19; M. Kumm, “What Kind of a Constitutional Crisis is Europe In and What Should Be Done About it?” *WZB Discussion Paper* SP IV 801, 2013, 19.

<sup>66</sup> See for a proposal in the same direction, N. Berggruen and N. Gardels, “The Next Europe” *92 Foreign Affairs* (2013), 134.

<sup>67</sup> Due to space constraints we cannot engage in more practical questions about the exact number of representatives (the number chosen here is largely exemplary) and the models of election of these members. For our purposes, the most important elements are both that Member States are equally represented, and that the ES is composed of members of both national governments *and* parliaments.

political conflicts that lie at the centre of any project of political self-determination. It offers the possibility to prevent 'national' cleavages from determining the Union's trajectory, offering a real possibility for Europe's citizens to affect the social, economic, and moral fabric of the society in which they live.

#### 4. SPATIAL BALANCE AND THE QUESTION OF POLITICAL EQUALITY

The idea of spatial balance, in short, relates to the question of political equality. Self-determination of a collectivity is based on the very basic premise that all citizens are moral equals, and as such have an equal say in the rules that bind them.<sup>68</sup> Political equality, in this sense, legitimizes the norms a polity generates, their coercive effect and situates the polity as the appropriate site for the settling of conflicts.<sup>69</sup> In the European context, this has always posed a challenge, and now more than ever. Should we think of political equality as operating primarily on the national or on the transnational level?<sup>70</sup> Should all 500.000.000 European citizens be represented equally, or should all 28 Member States be represented equally, given that each of these Member States is internally committed to the idea of political equality and self-determination? Is a Maltese veto and the Maltese overrepresentation in all institutions, with a population that represents 0,1% of the European citizenry, a *protection of or affront to* the values of political equality and self-determination? Until this point in the integration process, a commitment to these values has entailed ensuring national vetoes, over-representing smaller Member States, and protecting policy outliers so as to protect their *internal* domestic space for self-determination in salient policy areas.<sup>71</sup> National actors have long had a monopoly on questions related to the 'common good', and any conflict was played out and mediated between *national* actors.<sup>72</sup>

Upholding this logic now seems both a fiction (Member States are no longer equal since the crisis, and may not have ever been)<sup>73</sup> and, more importantly, would stand in the way of re-configuring the Union as a space that furthers the project of self-determination. If we want citizens to contest and direct the course of integration, we must acknowledge that the objects of integration are citizens, and not (only) Member States. As discussed above, any reconfiguration of political rights that prioritises Member States as the relevant unit may well guarantee certain levels of democracy, but it cannot guarantee self-determination. Scharpf's recent proposals to rethink the Union's institutional set-up are a good example. Scharpf suggests that the Council is to vote on all matters by majority rule, and that all Member States can decide to opt-out of specific legislative proposals *unless* a qualified majority of

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<sup>68</sup> See e.g. A. Walton, "Federalism, Pan-European Parliament and Against Article 50: A Comment on the EU's Democratic Deficit", in R. Bellamy and U. Staiger (Eds.) *The Eurozone Crisis and the Democratic Deficit* (2013) UCL European Institute Paper No. 18; C. Lord, *supra*, note 59, 1063.

<sup>69</sup> C. Offe, "Whose Good is the Common Good?", *Philosophy & Social Criticism* (2012), 680.

<sup>70</sup> See S. Kroger and D. Friedrich, "Democratic representation in the EU: two kinds of subjectivity", 20 *JEPP* (2013), 174.

<sup>71</sup> Dawson and De Witte, *supra*, note 1, 817.

<sup>72</sup> R. Bellamy and D. Castiglione, "Three Models of Democracy, Political Community and Representation in the EU", *JEPP* (2013), 206; C. Offe, *supra*, note 69, 680.

<sup>73</sup> Dawson and De Witte, *supra*, note 1, 817.



Member States opposes the opt-out.<sup>74</sup> Scharpf's proposal has the merit of cutting through some veto-players, and of potentially limiting the pervasive effect of negative integration. It does remain, at the same time, sensitive to the need to generate consensus between the different *demos* (on which, in Scharpf's view, the Union's legitimacy is dependent). As such, it does little to offer the Union's citizens any meaningful method for self-determination: it strongly reiterates the 'national' cleavage that stands in its way, and does not conceptually account for the capacity of citizens to actually *affect* the choices that influence their lives. To reiterate the point made above: strong protection of democracy 'at home' (and the articulation of democratic preferences as being tied to different *national* interests) structurally prevents any meaningful sense of functional self-determination in the EU.

One should also mention in this regard the possibility of Scharpf's proposals overlooking inequalities of power between Member States. As argued in our previous article<sup>75</sup>, Member States may not in practice be equally free to 'opt-out' of EU arrangements (particularly where dependent on financial assistance). They also may carry a highly un-even ability to ensure the outcomes of national democratic processes are truly reflected in EU policy. Finally, the current understanding of spatial equality presumes that the needs and desires of German citizens are uniform, and does not allow for the more sophisticated view that the crisis (and its responses) also divide citizens between those that 'lose' and those that 'win' domestically, or those that want 'more' or 'less' of a particular policy (whether that be austerity or another political course). This does not mean that the principle of equality *between* Member States has to be renounced *per se*, but it means that its expression has to be counterweighed by a conception of equality *across* the Member States.

In line with our suggestions above, the idea of political equality of all Member States would find expression in the creation of a European Senate in which all Member States have an equal number (and weight) of votes.<sup>76</sup> Such a distinction between full political equality of *citizens* (in the EP) and full political equality of *Member States* (in the ES) is, to use Somek's words, "a mode of managing dual membership that reconciles negative political self-determination with its positive counterpart. It allows people to confront and transcend their local identity".<sup>77</sup> This structural partition of citizens into, on the one hand, EU citizens and, on the other hand, national citizens has also been suggested by Habermas as a mechanism to bridge the individual's self-understanding with the different normative projects that she engages in.<sup>78</sup> To put it simply, it ensures that citizens do not have to choose between being 'a national' and being 'European', and, more importantly, it allows citizens to articulate different needs, desires and priorities given the relative institutional capacities of the different levels of government. This

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<sup>74</sup> F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 *ELJ*, [forthcoming](#).

<sup>75</sup> Dawson and De Witte, *supra*, note 1, 841.

<sup>76</sup> See Lord on why currently the EP and Council are not very good at guaranteeing political equality (whether in terms of citizens or Member States), C. Lord, *supra*, note 59, 1060-2; S. Kroger and D. Friedrich, *supra*, note 70, 172.

<sup>77</sup> And as such offers a suitable institutional structure for separating out the two most important questions in the EU: not only the question 'what *kind* of Europe do we want', that is usually answered on the left-right spectrum; but also the question 'how much Europe do we want', that presupposes a forum that is organised on the level of Member States – see more in section 6, below.

<sup>78</sup> J. Habermas, *The Crisis of the European Union* (Polity, 2012), pp. 36-43.

disaggregation of the citizen also acknowledges the fact that individuals in Europe *at once* populate an ill-defined and incipient transnational common space where they engage as equals and *simultaneously* populate smaller, more homogeneous territories where they “have distinct interests, make divergent rights claims and so differ over many public policies”.<sup>79</sup>

Finally, this renewed concept of political equality – based on the full equality of citizens in the EU – also suggests that the equality between Member States must be re-articulated *within* the EU’s institutional set-up, rather than outside of it. Many authors have suggested that the only way in which we can democratize the Union is by strengthening the role of *national* parliaments in controlling the executive branches of the Member State and the Union,<sup>80</sup> in remedying its democratic deficit,<sup>81</sup> or in engaging the Union’s legislative process.<sup>82</sup> We would contend that the commitment to self-determination and political equality counsel *against* such a process.

Again, this argument is based on a distinction between a commitment to democracy (which would argue in favour of an enhanced role for national parliaments) and a commitment to self-determination (which would argue against the role of national parliaments *unless* their role is *within*, rather than outside, the institutional system). Granting enhanced powers to national parliaments faces at least four problems. First, it creates significant democratic externalities. Allowing a *national* parliament (or court, for that matter) to decide on matters that affect citizens *across* the EU violates the very first principle of the liberal-democratic order, which equates subjects and objects of rule.<sup>83</sup> Casting the right of the German parliament to decide on the level of Portuguese pensions as *protecting* democracy in Germany is nothing if not parochial, myopic and a complete rejection of any semblance of self-determination.<sup>84</sup> The very structure of national politics, as explained by Bartolini, militates against the production of common goods that transcend the nation state.<sup>85</sup> Second, divesting such powers in national parliaments creates *unproductive* social and political conflicts. As elaborated above, conflicts can serve to clarify priorities and mediate disagreement only if they are bounded within a certain institutional setting that allows for mutual understanding of actors through communication. National parliaments are not embedded in

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<sup>79</sup> R. Bellamy and D. Castiglione, “Three Models of Democracy, Political Community and Representation in the EU”, *JEPP* (2013), 213.

<sup>80</sup> See e.g. F. Scharpf, “Political Legitimacy in a Non-optimal Currency Area”, in O. Cramme and S. Hobolt (Eds.) *supra*, note 12, p. 57.; D. Chalmers, “Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis”, Policy Network Paper, 2013; or F. Cheneval, “The Democratic Legitimacy of the EU: Is Federalism the Solution of the Problem?”, in R. Bellamy and U. Staiger (Eds.) *The Eurozone Crisis and the Democratic Deficit*, UCL European Institute Paper, 2013; K. Nicolaidis, “Of Bread, Games and Gladiators”, in the same issue.

<sup>81</sup> Bartl calls this the ‘horizontal substantive democratic deficit’. See M. Bartl, “The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit” (2015) 21 *ELJ* 41.

<sup>82</sup> D. Chalmers, “Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis”, Policy Network Paper, 2013.

<sup>83</sup> See also F. Scharpf, ‘Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability’, in A. Schafer and W. Streeck (eds.), ‘Politics in the Age of Austerity’ (Polity, 2013), 139.

<sup>84</sup> H. Deters, ‘National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court and the Disavowal of Conflict’ (2014) 20 *ELJ* 20, 215; and See also C. Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’ (2009) 10 *German Law Journal*, 1201.

<sup>85</sup> S. Bartolini, *supra*, note 23, 360.

such a structure. Third, placing the burden of democratizing the Union on national parliaments is a recipe for negative politics that have little to do with self-determination. National parliaments can block certain initiatives put forward by the Union's institutions (whether through their role in the early warning system, the Barroso initiative, or by controlling their executive), but cannot engage in discussion on amendments or collectively re-articulate what they think might be more appropriate policies.<sup>86</sup> At the same time, directing citizens towards national parliaments in their concerns over the functioning of the Union is also problematic because it prevents them from engaging in the transnational forum where such concerns *can* be internalized in the decision-making process. In other words, enhancing the powers of national parliaments strengthens 'national' cleavages rather than 'functional' cleavages. Fourth, insisting on the role of national actors or national safeguards in protecting democracy within the EU is not a commitment to political *equality* but a front to perpetuate the *status quo*. One only has to think of the difference between a Greek referendum on the conditions of the bail-out (which was dropped under pressure by Merkozy and cast as *challenging* democracy) and the dictates of the German constitutional court (which are heralded as *protecting* democracy).<sup>87</sup>

This is not to say that national actors cannot serve the project of self-determination and bolster the concept of political equality. It is simply to say that their role must be articulated *within* the EU's institutional settlement – via, for example, our suggestion of seating two national parliamentarians in a European Senate – rather than outside of it. In such a scenario, national parliaments would be able to structure their contributions (and opposition) to EU policy in a productive manner. Seeing national parliamentary democracy as a contributor to EU political self-determination requires, in simple terms, meaningfully including it within the EU's democratic machinery.

The spatial balance and the question of political equality within the EU has always been a difficult question. Our suggestion here is that, when looked at from the perspective of self-determination (rather than that of democracy), it might be useful to understand the idea of spatial balance no longer as a way to balance between the relative strength of Germany and Malta, but rather as a disaggregation between the European citizenry as a whole and the European citizenry as national electorates. This seems to be the most promising way of reconfiguring the Union's project as increasing, rather than hindering, the project of self-determination, fostering the political cleavages and structures of contestation that are indispensable for that project to succeed.

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<sup>86</sup> Which leads us to the status quo that is convincingly criticised by G. Davies, "Democracy and Legitimacy in the Shadow of Purposive Competence" (2015) 21 *ELJ* 2; and F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 *ELJ*, [forthcoming](#).

<sup>87</sup> M. Everson and C. Joerges, "Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?", LEQS Paper No. 63, 2013, 18. Others have argued that Germany as hegemon would be 'inherently unstable' under hegemonic stability theory, as it is based on too narrow a constituency, and exacerbated by domestic constraints articulated by the Federal constitutional court: S. Bulmer and W. Paterson, "Germany as the EU's reluctant hegemon? Of economic strength and political constraints", 20 *JEPP* (2013), 1400-1401.

## 5. THE LAW OF CONFLICT<sup>88</sup>

A new-look EU, as advocated in this article, requires not only new normative paradigms, a new institutional structure and a different understanding of political equality, but it also requires a new understanding of the function of law. Traditionally, law has been understood as both ‘object’ and ‘agent’ of EU integration.<sup>89</sup> As ‘agent’ law has been the vehicle through which the political goals of integration have been pursued, cutting through the resistance of national laws and policies in the process – never more than since the start of the crisis.<sup>90</sup> As ‘object’, law has been no mere instrument but part of the ends of integration itself: one of the heralded achievements of the EU has been the development of an autonomous EU legal order. Law has been used to limit the ability of national or transnational constituencies to contest political preferences laid down in the Treaties. A European law of conflict would involve challenging law’s de-politicising role. In this sense, EU law would no longer insulate and suppress conflict, but instead serve as a vehicle for the promotion and channeling of social conflict over EU integration’s substantive ends. In this sense, much like, for example, Habermas’ procedural conception of legality<sup>91</sup> - law does not serve to answer the question of what the ‘good life’ presupposes; but instead acts as a vehicle within which deliberation about those goals can take place. Law in this sense acts as a *container* for political and social conflict, allowing free deliberation while also guarding against the exclusion from the political process of weak or marginalized interests. Several elements of national public law could be seen as carrying forward this function. The establishment, for example, of political rights to freedom of expression and association, as well as the use of administrative law to demand basic standards of accountability and transparency in the political process can be seen as examples of law’s use, not to settle, but to channel and protect, open political conflict.

Applying this procedural understanding of law to the Union would have two implications. The *first* is that policy objectives are to be deleted from the Treaty, as discussed above (or at least interpreted by the Court in a much more open fashion than evident in existing jurisprudence). The new European constitution should not be partisan (entrenching a certain policy direction) but should be pluralist (allowing and channeling contestation about policy direction).<sup>92</sup> Scharpf, among others, has also suggested this approach under the banner of the ‘deconstitutionalisation’ of EU law.<sup>93</sup> Our proposal, however, would go further. It would involve opening up not only the EU’s policy orientation but also the

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<sup>88</sup> Conflict law carries already a strong proponent in EU law in the form of Christian Joerges and his important work. Our use of this term carries some common elements but also must be distinguished: as will become apparent, law is to be used as much under our model to support and instigate productive forms of social conflict as defuse them (e.g. via a form of ‘deliberative supra-nationalism’). On the latter, see C. Joerges, “Deliberative Political Processes’ Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making?”, 44 *JCMS* 4 (2006).

<sup>89</sup> R. Dehousse and J. Weiler, “The Legal Dimension” in W. Wallace (Ed.) *The Dynamics of European Integration* (Pinter, 1990), p. 234.

<sup>90</sup> E.g. Treaty on Stability, Coordination and Governance, Art. 3(2). See more generally A. Menéndez, “The Existential Crisis of the European Union”, 14 *German Law Journal* (2013), 453.

<sup>91</sup> J. Habermas, *Between Facts and Norms* (MIT Press), pp. 388-446.

<sup>92</sup> M. Dani, “The Partisan Constitution and the Corrosion of European Constitutional Culture”, LEQS Paper No. 68, 2013, p. 8.

<sup>93</sup> F. Scharpf, ‘After the Crash: A Perspective on Multilevel European Democracy’ (2015) 21 *ELJ*, 20 (of manuscript).

*scope and nature of its competences* to contestation. This would, for example, require a rethinking of the principle of subsidiarity. That principle's function in the current Treaties is based, to use Davies' words, on a 'cheat'.<sup>94</sup> By operating primarily as a test of comparative efficiency, it tests the ability of different institutions to implement certain goals, without questioning the merits of these goals in the first place.<sup>95</sup> Powers are allocated according to which level of governance can act *effectively*; not according to political views on the part of citizens about the fields in which the EU should or should not act. This formulation of the principle of subsidiarity has led to a number of intractable problems<sup>96</sup> with the result that the allocation of 'shared competence' has often become an area of more or less unfettered executive discretion.<sup>97</sup>

A procedural approach of law in the EU would understand subsidiarity as a *political* rather than *legal* question. The balance between EU and national powers – of who is 'best' to regulate, and the degree and prescriptiveness of EU level intervention – would no longer be a legal or technocratic question but a legitimate political cleavage upon which different political groupings could take a position and for which the European institutions would be politically accountable. Institutions such as the Commission, under this model, would be reluctant to enact 'unnecessary' EU-level regulation not because of fear of judicial review but because of their need to politically defend and justify proposals in an arena where the decision to regulate at the EU level could be *politically* challenged. Law's role under this model would not be to adjudicate on the 'correct' application of the principle – according to objective 'efficiency' criteria - but rather to ensure the integrity of the political process through which the question of whether regulation is needed at EU level is resolved. Law's role is not to prescribe but to politicize.

This speaks to a *second* implication of understanding EU law as being about the generation and channeling of political and social conflict. If a commitment to self-determination implies that European law is structurally open as to the substantive goals that it pursues, that does not mean that every element of the legal order is up for grabs.<sup>98</sup> A law of conflict requires a hierarchy of norms, containing at least two levels. Constitutional (or Treaty-based) norms would protect the 'rules of the game' that are necessary to guarantee the political process between free and equal citizens. This would include at the very least fundamental rights and certain social-economic constitutional guarantees such as currently laid down in the Charter of Fundamental Rights and the European Convention of Human Rights, the provision of certain public goods, rules necessary to foster the formation of political cleavages and to protect free political exchange,<sup>99</sup> rules governing the territorial boundaries of the EU, and rules guaranteeing the cultural diversity of the Union. The inclusion of the latter, it is remembered, stems

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<sup>94</sup> G. Davies, "Democracy and Legitimacy in the Shadow of Purposive Competence" (2015) 21 *ELJ* 21.

<sup>95</sup> Art. 5(3) TEU. See generally Bartl calls this the 'horizontal substantive democratic deficit'. See M. Bartl, "The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit" (2015) 21 *ELJ* 23.

<sup>96</sup> See G. Davies, "The Subsidiarity Principle: The Wrong Idea, in the Wrong Place, at the Wrong Time", 43 *CML Rev.* 1 (2006).

<sup>97</sup> See e.g. D. Chalmers *et al. European Union Law: Cases and Materials* (CUP, 2010), 364-367

<sup>98</sup> The idea of EU law as a guarantor of the political process finds some favour among existing Court members. See e.g. K. Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) *College d'Europe Research Papers in Law* 1

<sup>99</sup> Chalmers, *supra*, note 19, 686.

from the need, discussed above, to prevent the politicization of the EU from engendering cultural (rather than socio-economic) conflicts and leading to political rupture, rather than political integration.<sup>100</sup> For all other legislative proposals, or revisions of existing legislation, the European Senate, like the European Parliament, would vote by simple majority. The legal framework of the EU, in other words, should complement the normative and institutional changes proposed above. It should open up for contestation the question of the appropriate depth, nature and direction of European integration, while protecting the political equality of the European citizens and their capacity to engage in European politics as an exercise in political self-determination.

## CONCLUSION

This paper has suggested that the current trajectory of the EU risks entrenching, rather than questioning, the current preference for austerity and its authoritative enforcement. This poses significant problems for the long-term stability and legitimacy of the Union, which relies on furthering, rather than limiting, the individual citizens' capacity for self-determination. Our proposal – to move from an idea of constitutional balance to an idea of constitutional conflict, with an institutional and legal framework to match – may seem unrealistic, and indeed it might be. It can be understood as a roadmap for change, as suggesting an evolutionary process rather than requiring a 'big bang' reform. Member State executives, after all, given their strong hold on the process of integration, are very unlikely to favour an approach that curtails their control over the electoral agenda and the direction of European integration. As we have argued, however, without the massive re-enfranchisement of citizens, the integration process is doomed to fail either way. As Scharpf has recently reminded us, unfeasible options become feasible possibilities once the institutional status quo can no longer make sense of society.<sup>101</sup> The social, political and economic limits of the current status quo of integration are all too apparent, as is the growing domestic resistance and institutional resentment it engenders. The EU creates despondency: it lacks the virtues of hope and joy that inspire passion, engagement and contestation. Only a drastic reorientation of the integration project as an instrument for self-determination has the potential to reverse this process.

This is the core of our normative aspiration. It is not to create a federal European superstate, but to create an institutional framework that is geared to answer that one political question that rules them all: how do we want to live together in this particular place on earth? The answer to this may lead to the unravelling of the integration process, or to 'ever further integration'. It would allow citizens to contest a particular normative manifestation of the EU, without simultaneously contesting the integration project as such. It might even lead to more austerity. At least, however, these choices will be made because Europe's citizens want them, with dissatisfaction harnessed as a *strength* of the process of integration, rather than a weakness. A constitutional order based on conflict may be the only available route to a constitutional order in which the destiny of the EU is in the hands of Europeans themselves. European

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<sup>100</sup> See above, section 2. A commitment to cultural diversity should not only be understood as a commitment to Member State autonomy in cultural matters, but also as a horizontal obligation to allow a negative space of cultural freedom for communities and individuals.

<sup>101</sup> F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 *ELJ*, [forthcoming](#).

citizens *can* affect the social, economic, and moral texture of the society in which they live – but only if they do so together.