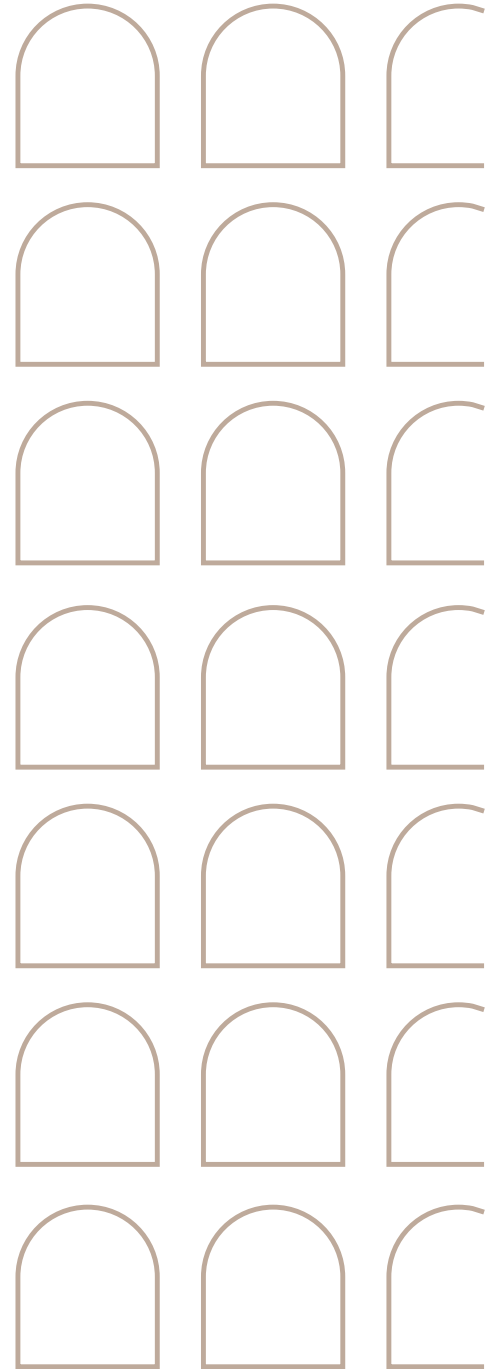# POLICY BRIEF

EUROPE AS A CONSENT CONSTRUCTION

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EXECUTIVE SUMMARY

The European Union is the most polyarchical political institution in the world. This complex constitutional arrangement best explains both its the unique values and difficulties. In order to properly understand the European Union and its unique model of legitimacy, accountability and democracy, it is necessary to leave the viewpoint of the nation-state, and adopt a multiple and innovative viewpoint, which encompasses heterogenous interests, focusses on shared power, shared limitation and seeks to avoid hegemonies. With this understanding of Europe as a consent construction, it is possible to best propose policies which would advance democracy without undermining or undoing the transnational innovation in politics the EU represents.

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1. INTRODUCTION

The more advanced a system and the more democratic its political culture, the more indeterminate its ultimate definition of power, supremacy, identification of responsibility, the centrality that makes everything intelligible, the originating source of authority, or whatever we want to call it. This has been the motive for multiple discussions that have articulated the dispute over supranational institutions' supremacy, constitutional pluralism or control of democraticity. The European Union (EU) is the *polity* in which this ambivalence is best revealed because it is the most polyarchical political institution in the world.

This idea of the EU as a polyarchy best summarizes, in my opinion, its values and its limitations as a model of complex government, where unity and diversity are, with corresponding difficulty, combined. If this were not the case, if the European project had been attempted as a plan for homogeneity and centralization, the Union would not have been able to achieve greater integration, incorporating in a common project societies that are as diverse as their interests or democratic trajectories, that act united without being one (Nicolaïdis 2013, 351); but this absence of a hierarchical centre also explains many of its setbacks, the exasperating possibilities of veto and slowdowns, in short, the difficulties of any process of integration that simultaneously attempts to decide together and to respect the pluricentrality of the political space.

2. A POLITICAL ENTITY WITHOUT A CENTRE

From the point of view of its political ontology, the EU is a political entity without a centre, a "political community with different levels of aggregation" (Schmitter, 1996). European institutions are strongly interconnected but lack a clear hierarchical order. The system combines supranational and intergovernmental principles in a multilevel and pluralist structure, more consensual and cooperative than antagonistic and hierarchical. There is not an "Archimedean point" from which all legal and political authority is deployed (Schütze 2012, 211). The EU presents a defiant change of paradigm in the face of legal monism and the hierarchical logic that stems from the state-centric tradition. European practices of governance are "heterarchical"; authority is not centralized or decentralized but shared (Neyer 2003, 689). That is the reason for the profusion of expressions like "governance without government" (Rosenau, Czempiel, Zürn), "law beyond the state" (Volcanseck, Neyer), or "constitutionalization of international politics" (Stone) to attempt to identify a model of governance that relativizes the monopoly of the representation of own's own interests in the context of complex multilevel structures within transnational networks that overlap without forming hierarchical structures that are similar to state structures.

This reality is at the heart of the complaints about such apparently diverse matters as the EU's lack of intelligibility and transparency, difficult accountability or weak leadership. In general, politics in shared systems, with separation of powers, has little transparency, poor decision-making capacity and uncertain answerability. A plurality of decision-making centres tends to lead to disperse public attention. We must also consider "the problem of many hands" (Thompson 2004, 11-32) and the disadvantages that this tends to entail when it comes to responsibility.

3. DEMOCRATIC SUCCESSES OF AN AMBIGUOUS CONSTRUCTION

Behind the deficits mentioned in the previous section, there are without a doubt shortcomings that should be corrected but also attributes that, from a certain point of view, could even be considered democratic successes. It is true that the lack of transparency of any form of government that responds to political interdependence that the Germans call '*Politikverflechtung*' increases the impossibility of holding any single person or party responsible for a positive or negative performance (Höreth 1998, 17). However, perhaps we are judging this question from the matrix of the nation state when we should, instead, take advantage of this circumstance to consider a more complex and less personal idea of responsibility, ways of making shared power intelligible and accountable. Let us also consider the positive side of complexity, which is a state of affairs that is more republican than democratic, to the extent that it impedes domination since it makes it difficult, for example, to form permanent hegemonic coalitions, and, especially, it is a system that is "anti-unilateralist" (Fabbrini 2007, 197). "The dispersion of governance across multiple jurisdictions is both more efficient than, and normatively superior to, central state monopoly" among other things because "it can better reflect the heterogeneity of preferences among citizens" (Marks / Hooghe 2004, 16).

The lack of centrality and the multiplicity of levels in the EU match the diffuse leadership, scant polarization and not very well-understood greater collegiality. There are those who interpret this as a political deficit, but it can also be seen as an advanced stage in the evolution of politics, when the personalization of sovereign power has been left behind. "The problem is not so much that it is impossible to provide a clear picture of European types of policy-making, it is rather that it is impossible to trace those processes to a set of identifiable authors and thus to deal with the intelligibility problem whose democratic figure is the accountability problem" (Leca). Leadership is lacking not so much (or not only) because of the personality of European leaders, but because the current set of institutions, rules and conventions do not allow for such a role. In this sense, Europe is a good example of this "empty place" that, according to Claude Lefort, defines the locus of power in democratic societies, a space still too monarchically occupied today, even if it is only because of the nostalgia for hierarchies, personalized leadership, foundational moments, retained or recuperated sovereignties and aspirations to assure *Kompetenz-Kompetenz*, in other words, the ability of a tribunal to rule on the question of whether it has jurisdiction. In the EU, there is no central power that must be conquered in a competition between political parties, and policies are not determined by a majoritarian government, but by negotiations between the Council, Parliament and the Commission. In this context, the language of state democratic politics—government and opposition, competition among parties, responsibility to voters—would be completely unintelligible (Majone 2009, 33).

4. CONSTITUTIONAL PLURALISM AND THE INSTITUTIONAL EQUILIBRIUM OF THE EU

Republican-inspired constitutional pluralism can help us understand the institutional equilibrium of the EU, the coexistence of communitarian law and state constitutions and international law in a non-hierarchical fashion (Zetterquist). We could say that it is better to replace constitutional metaphysics with pragmatic metaphysics. Constitutional practice can be more truthful than the traditional hierarchical model. Some

constitutional pluralists take this idea to the point of believing that the question of an ultimate constitutional authority remains open in EU law (Kumm 2005; Maduro 2003 and 2012). From this point of view, the "heterarchy"—understood as the network of elements in which each one maintains the same horizontal position of power and authority—is considered superior to the hierarchy as a normative ideal when there are competing constitutional claims. Against the classic idea of "supremacy", we must now think about the relationship between legal systems in a mode that is pluralist, rather than monist, interactive rather than hierarchical (MacCormick 1995, 265), which means moving toward a more modest and constrained conception of primacy, as was suggested, for example, by the Spanish constitutional court in its ruling against the Constitutional Treaty (DTC 1/2004).

There is a long discussion about how communitarian law's principle of supremacy should be understood or, conversely, how limits to the state delegation of sovereignty should be ensured. For some people, this means that "there is no nucleus of sovereignty that Member States can invoke, as such, against the Community" (Lenaerts 1990, 220), which would always keep an argument of subordination or a *Kompetenz-Kompetenz* in reserve. In recent years, this conditioning has become more settled, which we can see clearly, in the first place, in certain rulings of the states' constitutional courts (especially in the case of Germany). It is also true that this holding back would not in any case be rigid, but a *resistance norm* that would function as a soft limit (Young 2000, 1594). It is not certain that the constitutional courts have adopted a position contrary to the idea of the primacy of communitarian law. Generally, they have adopted an intermediary position, trying to afford the best comprehension of rival principles that are in play (Kumm).

The other example of national conditioning of European politics is the introduction of national parliaments into European governance with the Treaty of Lisbon. We should not interpret this aspiration as the intent to return to a Europe controlled by the states; it is better to understand it as the rejection of the conception of "an autonomous and hierarchical legal order", but not as a repositioning of a hierarchical relation of another kind (Maduro 1998, 8). As can be verified, the question of ultimate sovereignty is not presentable in the EU in its traditional format, with hierarchical security, but through a series of reservations that make it "weak" or contested, in other words, not very sovereign.

Therefore, from the perspective of constitutional pluralism, communitarian primacy does not establish a type of suprastate sovereignty, but only regulates the interaction between the levels that constitute the institutional framework of the European Union. In any case, we can say that either the EU has not found a solution to the question about who has the competence to determine to whom competence corresponds (Schilling; Weiler / Haltern) or else it has stopped considering it relevant. This would be its principal innovation: the possibility of constituting a political community by setting this question aside.

5.   A POLITICAL CULTURE OF LIMITATION

Let us examine the issue anew, from a practical perspective. The EU's peculiar structure—its complex rounds of decision making and implementation—is what makes the power appear weak and indecisive. Without a doubt, there are many aspects of it that can be improved, but we cannot lose sight of the fact that when the formal instruments of power are weak, ensuring agreement is an essential part of their

decision making. It may be that we are judging the political quality of the European Union based on categories that come from the nation state, and we classify its peculiar form of governance as weak because we are too accustomed to perceiving any example of shared or semi-sovereign decision making in that way. Good proof of this is the fact that the emphasis on the state monopoly of violence underestimates the effectiveness of noncoercive procedures of governance (Mitchell; Zürn).

In complex Europe, we can find a manifestation of this "decentring of democracies" with which Pierre Rosanvallon indicates the pluralization of ancient popular will—personified in the king or represented in parliament, ritualized in the moment of elections—toward a deconcentration of sovereignty that is diversified in moments, instances, levels and functions. "A reasonably effective democracy is characterized by a degree of ambiguous and unstable centralization, the norm is fluctuation. Depending on the political entity, the issue and time [...], the intricate interaction between actors tends to generate oscillations between the concentration of power in the centre and its repositioning in the individual components of the system" (Donahue / Pollack, 117). That is why the consolidation of European democracy should not be considered with the *pathos* from which nation states emerged, which visualized the sovereign people without divisions; our objective would focus more on the less heroic task of guaranteeing the level of complexity and the political culture of limitation, mutualization and cooperation between diverse levels and actors.

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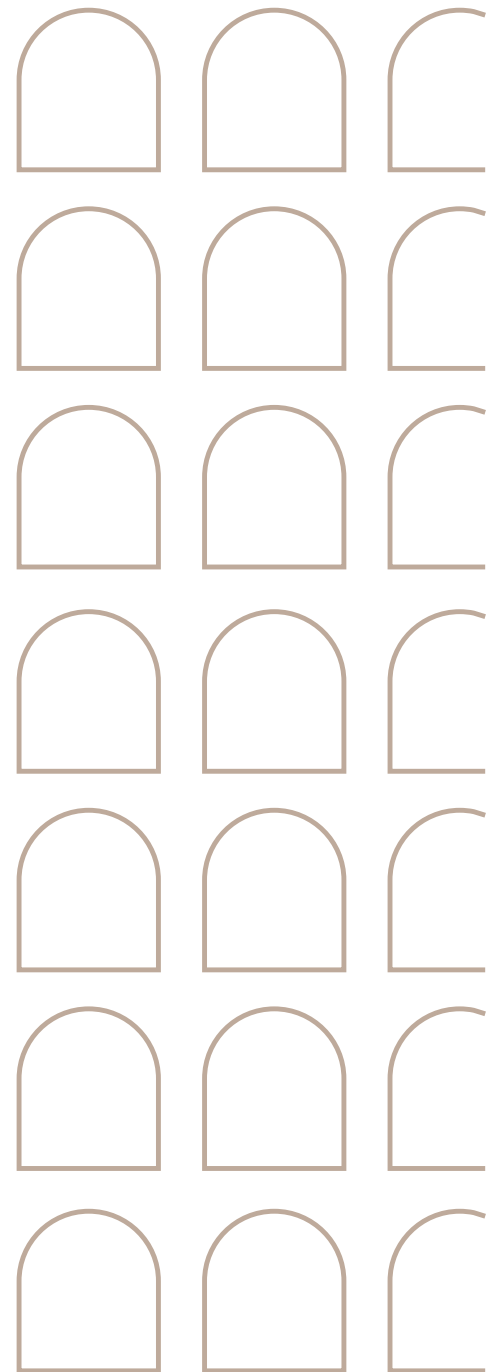Email: stg.publications@eui.eu

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