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The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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PART III

TOWARDS A DEMOCRATIC UNION OF SOVEREIGN MEMBER PEOPLES: APPLICATION AND CONCLUSIONS

1 APPLYING CONFEDERALISM: THE DEMOCRATIC PROCESS AND
THE EMU CRISIS

So how do we put the confederal approach into practice? It is with this task in mind that part III turns to the *application* of the confederal approach to two central challenges posed by that nemesis of theory: Reality.

The first challenge this chapter engages is the need to adapt the democratic process to a confederal distribution of sovereign authority. How to make sure that the people can indeed extend their democratic control beyond the state, and fulfil the confederal potential for a positive democratic narrative set out above? For it is of little use to establish a confederal-conceptual bond between the EU and the sovereign member peoples if this bond is not properly institutionalized and operationalized within the democratic process.

The second challenge is provided by the EMU crisis. Chapter 13 applies the confederal approach to this crisis, which literally strikes at the EU's confederal core by simultaneously pressuring several of the confederal Achilles heels identified in part I. As such the value of understanding the EMU crisis as a perfect confederal storm will be illustrated, and some confederal responses will be explored.

If possible these two challenges lead us into even more complex territory than the contested terrain we have already crossed. The EMU crisis, for example, is constantly developing, and raises several political and economic questions on which precious little agreement exists. The concept of democracy, or the best way to achieve and maintain democratic government, have been contested since inception, and this contestation might even be part of their essence.

The ideas and suggestions developed below are, therefore, to be considered as highly tentative and exploratory. A caveat that applies most of all to some of the concrete proposals made, which primarily serve as instruments of exposition: they illustrate the general confederal approach suggested, and some of the ways and directions in which the confederal approach might be constructively developed in the future. As such they may also serve as an inspiration for further research, that could go far deeper into the required detail of particular confederal applications. The suggestions made below, therefore, certainly do not intend to provide any complete or even sufficient

answers to the challenges identified. They are fully conscious of the shifting and complex reality they engage, and the sacrifice of analytical purity this sortie into actuality entails. A cost, however, that is deemed acceptable to test and explore the potential contributions of the confederal approach to the current challenges facing the Union and its member peoples. For it is in such bridges between theory and reality that constitutional theory must eventually prove its worth, even if it entails the risk of falling into the very fissure it hopes to span.

2 A CONFEDERAL EVOLUTION OF THE DEMOCRATIC PROCESS

Our first challenge in a sense reflects the central challenge posed by the *Bundesverfassungsgericht* and the statist camp more generally: How to retain a sufficient democratic process whilst delegating significant sovereign authority outside the state, and therefore outside the full control of the national democratic system?

To help meet this challenge this chapter first establishes its confederal root cause. Instead of the declining power of the state, a confederal analysis points to the inadequate incorporation of European integration at the national level, and the resulting inability of the member peoples to control the sovereign powers they have delegated via the national democratic process (section 3). Subsequently, building on the ideas developed in part I and II, some tentative proposals will be developed to improve this incorporation at the national level, and establish a national political process that allows for democratic control over EU affairs (section 4). Section 5 then explores how some changes at the EU level might support this confederal evolution of the national democratic process, before section 6 provides a brief conclusion, and we continue to the challenge of the EMU crisis in the next chapter.

3 CONFEDERAL CAUSES: THE LACK OF A NATIONAL PROCESS TO CONTROL

Statists rightly point out that the democratic woes of the EU relate to the declining and changing role of the state.¹ Yet from a confederal perspective this decline of the state is only a symptom, and not the root cause.

If we once again start our analysis from the member peoples instead of from the member states, another more fundamental challenge becomes apparent: The fact that the extensive delegation of sovereign authority outside the state has not yet been properly translated into the national constitutional level. As a result no sufficient national mechanisms have been created to allow the member people democratic control over the powers they have

1 See chapter 8, section 4.3.

delegated to the EU, or over the way their own national institutions behave at the EU level.

Two related issues have to be appreciated and further analyzed in this regard. First, how the delegation of sovereign authority to the EU means that no single national democratic system has full control any longer over the exercise of this authority. As such no single national democratic process can fully determine the political outcome in these delegated fields, causing these processes lose some of their traditional content. And what is the point of a political process if it cannot determine outcomes?

Second, there is the important new role which integration has bestowed on national institutions as representatives and guardians of outsourced power. A role which has not yet been properly integrated into the national constitutional system or democratic process. Yet it is precisely this new role for national institutions that might be valuable in providing new content and meaning to the national democratic process, and to help establish a stronger link between the national electorate and the EU. Let us look at both issues in some more detail.

3.1 *The democratic disconnect: An irrelevant national democratic process?*

As discussed, part of the genius of the American evolution in popular sovereignty lay in its capacity to dovetail sovereignty with democracy and federalism. By encasing the popular sovereign in a single state, furthermore, it was ensured that the *pouvoir constitué* overlapped with the *pouvoir constituant*. In other words, the sovereign people delegated power to the state, which was in turn controlled by the people, albeit not in their role as sovereign but in their role as the electorate. In this way a double democratic legitimacy was achieved.

First, power *derived* from the people, and the people could alter the delegation of powers if they so desired. They could do so either by instigating a constitutional amendment, or more radically, by going outside the system of the existing constitution and, as the *pouvoir constituant*, establish a new constitution altogether.²

Second, within the system established by the Constitution, the people controlled the *exercise* of the power they had delegated as the electorate. At least to the degree that elections equal control, the people could thereby determine the use of these powers, or at least sanction this use afterwards.

2 Cf. the power of the German people to do so as recognized in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* par 228, as well as the beautiful discussion of such events by J. Finnis, 'Revolutions and Continuity of Law', in: A. Simpson (ed), *Oxford Essays in Jurisprudence, Second Series* Clarendon Press 1973, 44 et seq.

Importantly, the EU affects both these links between the people and the authority they have delegated.

First the powers of the EU still derive from the member peoples, at least under the confederal approach developed above. If they choose to do so, furthermore, the people can reclaim all powers delegated.³ As we saw in part I, however, national constitutional legislators cannot themselves amend EU treaties or determine the scope of the powers delegated to the EU. Such changes require unanimous assent from all other sovereign member peoples or the ECJ. At the same time the EU treaties do form an integral part of national constitutions.⁴ As a result, the member peoples have lost full control over one part of their own constitutional structure, except for the extreme, and perhaps unrealistic, option of leaving altogether. Although the people remain the original holders and delegators of power, therefore, they have lost the (relative) control that constitutional amendment offers.

The EU also impacts on the second link, i.e. the power that the people retain as the electorate. After all, before European integration, the state, however composed, held a virtual monopoly of all delegated sovereign powers. As a result, the entire machinery of exercising and controlling these powers was developed within the state as well, and could rely on the coherence this brought.⁵

Outsourcing sovereign powers to the EU changes this picture. The exercise of authority is no longer fully controlled by the system developed within the national state. As rightly pointed out by the statist, this also means that the national democratic process no longer fully controls the exercise of these delegated powers.⁶ At the same time the member peoples have not received an equivalent democratic control at the European level. At this EU level they only represent one of many voices. Unlike in the US, therefore, the people, as electorate, no longer directly control all the power they delegate as sovereigns. They have lost final control over a large and increasing chunk of sovereign competences that derive from them, or at least their control at the EU level does not match the level of control they have over authority that is delegated to the state.⁷ The result seems a democratic disconnect between the people and their authority.

Of course one could argue that the aggregated EU powers are in the end democratically controlled by the representatives of the member peoples jointly, as well as by the European Parliament. Yet this deceptive statement

3 Art. 50 TEU. See more elaborately chapter 2, section 2.5.3.

4 See chapter 10, section 7.

5 See chapter 9, section 6.3 and 7.2.

6 See chapter 8, section 4.

7 Of course the level of actual control within the national system should not be exaggerated either, yet clearly exceeds the situation pre-delegation.

fails to distinguish between two meanings of the term democratic control. For on the one hand, there is indeed the fact that all individuals who exercise power in the EU are under some form of democratic control: Political power in the EU is not wielded by unelected despots. A true but relatively irrelevant conclusion, as the same would be true if we delegated all EU authority to the Swiss.

The second meaning of democratic control compares the amount of control a people has at the EU level with the control they would have over a purely national competence. Clearly, under this more relevant standard, the electorate has lost some control. From this perspective the fact that the ministers and MEP's that have a say over your future have all been democratically elected by *other* member peoples is – apparently – of little relevance or comfort to most citizens.⁸ Expecting the Bulgarian people to feel as represented by a Danish minister or a Spanish MEP as by a Bulgarian representative implicitly assumes precisely the federate bond between member peoples that is lacking in a confederal system.

From the confederal perspective, which starts from the member peoples, a loss of democratic control over the exercise of authority does, therefore, occur once a power is delegated to the EU. A loss, furthermore, that occurs even where unanimity is required for the exercise of this competence. For though a requirement of unanimity prevents the initial use of the competence against one's will, it still removes the national capacity to decide on the *positive* use of a competence. In addition, once legislation has been adopted, changing that legislation will again require unanimity, reducing the capacity of a member people to effectuate a change.⁹ Consequently a veto may offer some level of control as long as no action has been taken at the EU level. But once the competence has been used the veto tends to *reduce* the political capacity of a single national electorate to change the EU measure. The root causes of the democratic challenge, therefore, go deeper than just qualified majority.¹⁰

8 Cf also Von Bogdandy (2000), 50, concluding that the EU still relies on the national systems for primary democratic legitimization.

9 What is more, where a shared competence is concerned the Member States will be preempted from acting nationally as well, whereas any remaining national competences will have to respect the action taken at the EU level. Where a competence has been delegated as an exclusive EU competence, furthermore, Member States will not be able to act at all, and therefore become fully dependent on agreement at the EU level for action to be taken.

10 Here the BVG, therefore, is mistaken where it deems the requirements of German democratic control satisfied where unanimity is required. See BVerfGE 89, 155 (1993) *Maastricht Urteil* and BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*.

This mismatch between the powers delegated by the people and the controlling capacity of the national democratic process is problematic, and contributes to the much debated democratic deficit of the EU.¹¹ It also leads to a conundrum: EU integration is so far-reaching that it undermines national democratic control. Yet it is not far-reaching enough to establish full democratic control at the EU level. As with sovereignty, somewhere in the process of integration, democracy seems to have left the building.

To a certain extent such a mismatch between delegated powers and the different constituent powers should simply be accepted. It is the price to be paid for desiring far-reaching cooperation without creating a European people and giving up one's national sovereignty. For retaining this sovereign position means relying on reciprocally delegating powers, and therefore shared central government.

It must also be recognized that, even without the EU, national electorates would have lost the *de facto* capability to determine outcomes in many of the fields now under EU control.¹² Globalization has undermined any such power in areas such as economic policy, trade, environment and security.¹³ The Swiss example is illustrative here: Staying outside the formal decision-making process of integration does not protect national autarky, but only limits your voice in decisions that will ultimately control your own actions anyway.¹⁴

Lastly, it must also not be overlooked that *even full federation would not increase the actual controlling influence of the different member peoples*. Just as the influence of the Virginians or the New Yorkers at the federate level did not equal their control within their respective states, so the influence of the Belgian or Slovak people on the use of EU authority would not be increased by European federation. Federation would, therefore, not repair the loss of control outlined above. Federation would only declare this loss to be democratic, as these groups would have become part of one European people. A declaration that would ring hollow as long as it does not represent social reality.¹⁵

11 Cf also J. Tully, 'The Unfreedom of the Moderns in Comparison with the Ideals of Constitutional Democracy', 65 *Modern Law Review* (2002), 204.

12 Craig (1999), 26.

13 Also see W. Wessels, 'The Modern West-European State and the European Union: Democratic Erosion or a New Kind of Polity?', in: S. Andersen and K. Eliassen (eds), *The European Union: How Democratic is It?* (Sage 1996), 84 et seq.

14 I am grateful to Professor Christa Tobler, who is uniquely qualified to assess this dynamic, for her thoughts on this topic.

15 Cf also Tully (2002), 204.

Nevertheless, the current loss of control is more than can be accepted, whilst EU authority is still increasing. Moreover, the EU should help to regain democratic control over the invisible hands now pushing national governments around.¹⁶ It should not, therefore, sacrifice democracy to the aim of simply establishing some control at all.

Yet how to address this gap between the constituent power and actual democratic control? How to democratically substantiate the direct but subsidiary link between the EU and the sovereign member peoples?¹⁷

One response, which might be perceived as pro-integration, would be to try and close the gap at the EU level. Such a response would entail creating a European democratic system that could compensate the democratic control lost nationally. As we saw however, an equivalent democratic control at the EU level would require fully federating in the sense of creating one sovereign European people, and would only solve the loss of control by a member people in name. As discussed, this is not a viable, desirable, or necessary option, and certainly does not fit with the current confederal reality in the EU.¹⁸

Consequently, the EU should not even attempt to create the primary democratic control required at the European level. The EU would position itself as a rival to the very same national political authority its confederal foundation relies upon. Indeed the failure of the 'Constitutional' Treaty, and the apprehensive reactions it inspired at the national level, demonstrate this all too clear.

As we also saw, however, the statist solution of retaining all powers that should be controlled by a democratic process at the national level is not feasible either.¹⁹ Such an approach leads to a defensive and inflexible position that traps the democratic process in the state. It tries to shut out global realities rather than addressing them. But if neither retaining powers at the statal level nor democratizing the EU seem feasible, what to do? A question which

16 See for the importance of integration in this regard Habermas (2001) and Habermas (1996).

17 See chapter 10, section 6 for a discussion of this link.

18 Compare in this regard also the, perhaps abrasive and cynical, but also realistic confidence of Mitterrand and Andreotti in the primacy of their own national legitimacy over that of the European Parliament. Mitterrand, talking to Major, stated that the European Parliament would not be legitimate 'in a hundred years' and that 'The Commission is zero, the Parliament is zero, zero and zero is zero', or Andreotti, who referred to the European Parliament as a 'demagogic' concession to federalist rhetoric. Obviously these statements are extreme, and deny the very real link that does lie between the member peoples and the EU. Nevertheless they do capture the ultimate political confidence, which befits a confederation, of the primary national political order. (Both quoted in Van Middelaar (2009), 169, my translation.

19 See chapter 10, section 4.3.

leads to the second issue indicated above: The new roles and functions that national institutions have acquired due to integration, and the failure to properly translate these into the national constitutional systems.

3.2 *The unconstitutionalized double role of the state*

As discussed in part I, the EU does not have a separate representational system of its own. Instead, the merged EU system largely utilizes Member State institutions.²⁰ Accordingly these national institutions have acquired important new tasks and powers due to integration. They now wield the power that has been received at the EU level, and that gives a voice in determining how the aggregated competences of the EU will be applied.

The national constitutional and institutional structures, however, have not been designed with these new tasks and powers in mind.²¹ Most were either established, or have evolved, under a situation of near statal monopoly on public authority. Nor have these systems been redesigned to incorporate the confederal reality of the EU.²² For example the *relation* between the two different roles – that of exercising national powers and controlling the ones delegated to the EU – is generally not well developed or institutionalized. Quite the opposite: Generally, EU responsibilities have simply been grafted on to an existing national institution without any changes to its organization, imbedding, or its electoral control.²³

20 See chapter 2, section 3.2.3.

21 M. Claes, *The National Constitutional Mandate in the European Constitution* (Hart Publishing 2006), 189.

22 There are significant differences between Member States as to how *within* the existing system control over EU delegation has been incorporated. The Danish parliament, for instance, plays a very active role through its existing powers of control over the government. Equally the British parliament also applies close scrutiny, where other parliaments do not. For the Netherlands see, for instance, the report by the Council of State on the consequences of the EU for Dutch state institution (Tweede Kamer, vergaderjaar 2005–2006, 29 993, nr. 27), The report by the *Wetenschappelijke Raad voor het Regereingsbeleid* (WRR) of 5 June 2007 on ‘Europe in the Netherlands’ and the final report of the Dutch Commission of State on the Dutch Constitution of 12 November 2010, especially part III. The argument here does not deny the differences in the Member States nor the progress made within some systems. The argument is that the changes caused by the EU require more formalized and explicit constitutional and institutional responses.

23 Obviously this is also due to the fact that the Treaties link certain powers directly to the national function. The point, however, is that the national constitutions have often not yet, or at least not yet more fundamentally, internalized or incorporated these EU powers. In this regard Maduro also rightly points out that one of the main impacts of the EU on competences is not a shift from national to EU competences, but: ‘Frequently what changes is the balance of representation and participation between different national actors in the definition of a certain policy and not so much the European or national character of the policies. (...) Strategic Europeanisation alters the national actors that dominate certain policies and in this way represents a difference challenge to sovereignty.’ (Maduro (2006), 520.

Consequently, the confederal foundation of the EU, which must necessarily rest on the national constitutional structures of its members, has not been refitted for its task. This rather remarkable fact has several problematic consequences. To begin with, it distorts the pre-existing institutional and political balance within national constitutions, which was calibrated for a monopoly position of the state. This distortion is especially acute where the impact of the delegation is asymmetrical on the different national institutions. The relative empowerment of the executive and the bureaucracy by European integration are well known in this regard.²⁴

Even more fundamentally, however, the effects of European integration have also not been translated into the national systems for *acquiring, exercising and accounting for* political power.²⁵ As a consequence, the national constitutional system, and the political process it structures, do not sufficiently take into account the crucial importance of the EU and the significant authority that is wielded at the EU level, also by national representatives.

No special offices, for instance, have been created to deal with the national dimension of integration, nor has the national electoral systems been changed to take account of EU membership. Political power is won in general national elections, and these elections are logically dominated by national issues. No separate system for awarding and controlling the EU dimension of national competences exists, nor is the EU very relevant to acquire national political power.²⁶ As a result there also *cannot be* a full national democratic process on EU issues: There simply are no national EU elections to win or EU powers to conquer. Instead EU power is included in the spoils of national political victory, like a complimentary cookie with your coffee.

This system might perhaps have been a logical approach in the early days of integration, but has become increasingly unworkable with the growing relevance of the EU. The cookie is reaching rather epic proportions, and cannot remain complimentary. Politicians should be forced to fight for this power, and through such contests allow the member people to influence the way this power is used. After all, as long as politicians can only acquire and maintain political power in elections primarily geared towards national topics, we should not be surprised at politicians hiding or selectively representing their European record, refusing to explain or take responsibility for unpopular European measures, or even to invest in educating the electorate on EU issues.

24 Craig (1999), 24 or Weiler, Haltern and Mayer (1995), 32.

25 See on the importance for a matching system of accountability also Keating (2006), 206.

26 See for a discussion of this point, including a comparative perspective to the US, chapter 5, section 2.

The continuing, and often decried, failure of the national political debate to include EU affairs can, therefore, be linked to the relative lack of incentives to do so, and the lacking incorporation of European integration in national constitutional systems.²⁷ It poses a significant risk for the hollowing out of the national democratic process, and thereby the confederal foundation of the EU.²⁸ As long as national politics is not incentivized to incorporate EU issues, one should conclude, in a variation on the *Bundesverfassungsgericht*, that the value of a national vote is undermined: For what use is a vote on an irrelevant national competence? And what use is my vote if I cannot use it to directly indicate my EU preferences? If my national vote does not carry some real EU impact, I have truly lost part of its value.²⁹

To create a confederal democratic process, therefore, the constitutional systems of Member States should be better adapted to their new functioning within a confederal constitutional system. For even though many constitutions contain explicit clauses recognizing the constitutional importance of EU membership,³⁰ this confederal reality demands more far-reaching adaptation at the national level than has been realized so far.³¹

3.3 *The missing national link in confederal democracy*

As the preceding analysis shows, the real challenge for a viable confederal democratic process in the EU is twofold. First, to deal with the loss of ultimate control on political outcomes suffered by the member peoples, and the loss of traditional political content this causes. Second, to better incorporate the reality of European integration into national constitutional and democratic structures.

27 See in this regard also the repeated attempts by national constitutional courts to draft national parliament into the EU discourse, as for instance discussed in D. Piquani, 'Arguments for a Holistic Approach in European Constitutionalism: What Role for National Institutions in Avoiding Constitutional Conflicts between National Constitutions and EU Law' 8 *European Constitutional Law Review* (2012), 493, and Cuyvers (2011a).

28 See also S. Andersen and T. Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-Parliamentary Governance', in: S. Andersen and K. Eliassen (eds), *The European Union: How Democratic is It?* (Sage 1996), chapter 13.

29 BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*, for instance paras. 218, 226, 244 and 246, as well as BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, par. 98.

30 See for example art. 34 of the Belgian Constitution, art. 88 of the French Constitution, art. 23 of the German Basic Law, art. 11 of the Italian constitution, art. 90 of the Polish Constitution, or art. 93ff of the Spanish constitution, all *authorizing* delegation to the EU. As further discussed below, however, they do not sufficiently adapt their own systems to this delegation.

31 See also on this need to adapt the national level to support EU powers Lindseth (2010), for instance, 12-14.

As will be illustrated below it is this second challenge that might also hold part of the answer to the confederal democratic conundrum. By better incorporating EU integration into national constitutional systems and democratic processes, one could envision a more confederal notion of what democratic control and legitimacy should entail.

4 BUILDING BLOCKS OF A CONFEDERAL DEMOCRACY

Fully accepting the objections that can be raised to any such presumptuous exercise, and reiterating their primary function as tools of exposition, this next section proffers two confederal suggestions to meet the democratic challenges set out above.³² First, how the delegation of authority could provide an alternative substance for the national democratic process. Second, how to better institutionalize and embed EU integration at the national constitutional level, and create the incentives required to establish a national political process on such delegation of authority.³³ Though these suggestions will inevitably fall short, if only as this is not the place to fully develop them, they clarify and illustrate the kind of confederal exercise suggested, and the direction in which further research may look for further confederal solutions.

4.1 *Building blocks: Delegation as democratic substance*

The first suggestion points to the potential of delegation to provide new substance for national democracy.³⁴ Both decisions on *whether* authority should be delegated to the EU and decisions on *how* to exercise and control authority once it has been delegated should be developed into important content

32 In that regard it also responds to the challenge of Bellamy that 'Instead, attention should be focused on improving the EU's mixed constitution in ways that further enhance the reciprocal interaction and dialogues between its multiple *demoi* and levels of governance.' It does so, however, *within* the concept of sovereignty, and not of pre-sovereignty. More generally it is believed that the benefits his republican notion of 'pre-sovereignty' is designed to achieve can be better secured in a confederal model, which provides both dialogue and necessary stability. See Bellamy, (2006), 189.

33 Here a solution, therefore, is sought in improving the system of representation. An option believed to be more promising and realistic than a more radical shift towards participation as the basis for legitimacy. See for such a proposal J. Cohen and C. Sabel, 'Directly-Deliberative Polyarchy', 3 *European Law Review* (1997), 313. The benefit of staying within the scheme of representation, thereby, is that there actually are stable and self-constituted units to represent.

34 Cf also Van Middelaar (2009), 398: 'De opdracht aan de gezamenlijkheid is de stemmen van dit oude publiek – eerste de parlementen, dan de kiezers daarachter – in de Europese democratie te laten meeklinken. Dit is niet eenvoudig, maar veel keuze hebben de lidstaten niet.' Also see the (Schmittian) question that Huysmans correctly links to transnationalism when he talks about the '(...) re-emergence of the question of the political: that is, where, and what is politics?' Huysmans (2006), 216.

for national democracy. These decisions can then replace some of the substance of national democracy that is lost due to integration, allowing the content of the democratic process to evolve along confederal lines as well.

This suggestion refocuses part of the national democratic process on the new role and powers that national institutions have acquired due to EU cooperation. After all, these roles and powers more than deserve democratic scrutiny, and can provide new and important substance for democratic debate.³⁵ New substance that could also alleviate the fears of *inter alia* the *Bundesverfassungsgericht* that the national political process might be reduced to insignificance by integration. New substance that nevertheless remains on the national level, and thereby also avoids the many obstacles statisticians have identified for fully fledged democracy at the European level.³⁶ Instead of trying to create a primary democratic process at the EU level, this new substance utilizes the national democratic system, and relies on the preconditions for democracy that pertain in the national context.

The ways in which delegation can be transformed into new substance for national democracy are many and depend on a multitude of national factors. At the core of any suggestion, however, should be the objective of ensuring that the national democratic process engages with two questions. First, which authority should be delegated to the EU. Should, for example, the EU regulate banks, social security, cross-border crime, healthcare, social housing, environmental pollution or coordinate defence and external policy? And if so, to what level and in what way? And if authority on these issues is not delegated, what scope is realistically left for national policy?

Second, how should national representatives operate at the EU level? Here a national process can never determine the outcome of a political decision at the EU level, but this does not mean that such decisions provide no substance for democratic debate. Especially not if the decision to delegate a certain power has first been democratically debated and decided as well: The electorate might care more for the use of a European competence if they themselves have supported delegating this competence to the EU level. With time and practice, furthermore, both the electorate and the political operators will become more informed and adept at discussing and deciding such decisions on delegation and EU manoeuvring.

Surely these questions deserve democratic debate, and surely they contain sufficient substance for such debate. At the same time such political debate on delegation *can* only take place where there are suitable procedures and fora, and they *will* only take place where there are sufficient incentives.

35 Cf. coming from a republican angle, Craig (1999), 40.

36 See in particular the statist critiques set out above in chapter 8, section 4, and especially the variant of Kirchhof (2010), 736 and Grimm (1995), 296.

From the confederal perspective, two complementary developments are, therefore, necessary as well to allow a confederal democratic process to develop and function, namely the national institutionalization of EU delegation, and the corresponding flexibilization of delegation at the EU level.

4.2 *Three guidelines for the national institutionalization of integration*

So how to remedy the current lack of constitutional and institutional embedding of European integration at the national level, and how to create the necessary incentives to ensure that delegation and the use of delegated powers become politicized?³⁷

Clearly any solutions on this point must heavily depend on the specifics of the national constitution involved. Imposing one uniform system would also go against the confederal nature of the EU, certainly as the required modifications concern vital political issues. The often intense battles over voting rights, voting districts, campaign finance or voting systems in general attest to the difficulty in changing such authority-allocating rules and the fundamental importance they carry for a constitutional system.

Nevertheless, three general guidelines or guiding principles could be formulated. Guidelines which contribute to creating an institutional home base for European integration at the national level, and providing the member peoples with a national handle on integration as a starting point for politicization and confederal democratization.

In line with the confederal approach, a first principle should be to ensure the fit of any institutional modifications with the national system and its unique characteristics. Ideally the modifications would build on existing institutions and their specific roles within the national system, which could then be refocused or amplified to take European integration into account.

Second, the primary aim of any modifications should be to create an institutional nexus for EU issues to which a national political process can attach itself. European integration should have a visible location and place in the national system where political battles can be fought. This requires that sufficient and real EU related competences are bundled in this institutional nexus, and that sufficient 'events' such as elections, important decisions and public procedures are created to allow for real political debate over these competences. These elements are absolutely vital: One simply cannot expect a political process to develop if there is no real power to fight over,

37 Cf in this regard also the intuition of Van Midellaar that, by introducing a blocking power for national parliaments in the passerelles, they in a sense also become part of the EU *pouvoir constitué*, a role which fits in the confederal model of popular sovereignty, yet needs to rest on a national constitutional mandate. Van Midellaar (2009), 180. Further see on this issue Besselink (2007), 17 et seq.

or if there are no venues to fight in. We need both a prize and an arena, and instead of blaming national politicians for not politicizing the EU on their own accord, we should create the constitutional sticks and carrots that would allow them to do so.

Thirdly, and closely related to this second guideline, control of this EU nexus should remain indispensable for the exercise of national political power. EU related powers should not be separated from the exercise of national authority, to the extent this is even possible. The objective must be to align and merge the national and the EU process, and to allow the EU political process to share in the energy and vitality of the national one. In addition to granting real powers to this EU nexus, the overall control of national government should therefore require control of the EU nexus as well.

By interlacing the national and EU in this manner, EU affairs are injected into the primary national political process. Acquiring and maintaining control of government will require winning at least one election that is primarily concerned with EU affairs, and thereby forces and rewards those striving for political power to establish a coherent and balanced narrative that encompasses both the national and the EU dimension. It allows the people to choose which of these narratives they prefer.

Of course these guidelines are far from conclusive or complete, yet they do capture what should be the primary focus of modifications intended to recalibrate national constitutional systems to their life in a confederal system. To further illustrate these guidelines it is useful to briefly, and again highly tentatively, provide one concrete example of how they might be implemented in a national system through the establishment of EU senates.

4.2.1 *EU senates*

In line with the first guiding principle the idea of EU senates starts from the different national equivalents of senates, such as the House of Lords, the *Bundesrat*, the Dutch First Chamber (*Eerste Kamer*), the Polish *Senat* or the *Senado de España*. Alternatively, for the 12 Member States that do not have an upper house, a larger modification would be required, or another public body, such as a council of state, could be upgraded to a level where it could function as a democratic EU nexus.³⁸ The central suggestion is to transform these senates into the required EU nexus by increasing their profiles as EU chambers.

Starting from these senates is logical since the primary national chambers cannot be transformed into EU chambers, and because precisely these national chambers are in need of an EU counterweight. Senates also tend

38 Bulgaria, Cyprus, Denmark, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Slovakia and Sweden do not have upper houses.

to have a certain aptitude for technical and legal EU affairs. This aptitude of upper chambers as EU nexus seems at least to be confirmed by the way in which some of them, like the House of Lords, have already started to play an increasing role in their national EU policy.³⁹ Such scrutiny, however, still depends on the use of pre-existing powers. It is not institutionally embedded or supported, for instance, via special powers or procedures, let alone that such EU roles have been incorporated into the electoral system, or other mechanisms to acquire political power.

Starting from the national senates also creates a logical confederal mirror image of a federate system. Where in a federate system primary control of the central government lies at the federate level, in a confederal system this control lies at the national level. A confederation should then rely on multiple national senates instead of one federate senate at the central level, as it is on the national level that primary political authority remains.⁴⁰

4.2.2 Competences

In line with the second guideline, such EU senates should receive serious EU related competences. These competences should provide these chambers with real political power worth fighting over, or at least provide them with the constitutional tools to conquer this power nationally. In addition, by concentrating multiple EU powers in one body, a clear and visible hub for EU affairs will be created nationally.

Obviously the precise powers of such chambers should depend on the specific national context, but several possibilities can be envisioned. To begin with, these chambers could receive the *exclusive* power, or even obligation, to mandate the EU activities of national representatives such as ministers. The EU senate should determine which votes are important, provide binding voting instructions, and receive the capacity to sanction ministers that do not loyally ask for or follow instructions.⁴¹ In this manner, EU decisions could be politicized nationally. Similarly, the EU senate could be empowered to hear and instruct other high ranking representatives at the EU level, including members of COREPER I and II, or the different committees.

39 See, for example, the impressive reports on the Lisbon Treaty: House of Lords, European Union Committee, *The Treaty of Lisbon: an impact assessment* (London, HL, 10th Report, session 2007-08, 2008).

40 In those Member States that already have a federate system nationally this suggestion would have the additional benefit of better incorporating the different regions into the process of integration, countering the current risk that European integration undermines the national federate system.

41 Compare in this regard also the confederal habit under the Articles of Confederation to provide delegates to Congress with written instructions.

In addition, these EU chambers could receive the power, to the exclusion of the 'national chamber', to make EU appointments such as the European Commissioner. The national senates jointly could then appoint EU positions such as the President of the European Council, the President of the Commission, or the EU Ombudsperson. Going even further far-reaching, these senates could receive the power to instruct or elect the members of the European Parliament, or receive double mandates themselves.⁴² This option, of course, faces the objection that it removes the direct link between the citizen and the European Parliament. Yet in practice it may strengthen this bond, as creating a link between the European Parliament and a national chamber might bring the European Parliament closer to national citizens as well.

Most fundamentally, the EU senate could receive specific budgetary powers, the classic root of all parliamentary power. These powers could include approving the EU budget, instructing the national representatives to make specific budgetary proposals at the EU level, determining the way in which EU subsidies are used nationally (earmarking), or the method of collecting and financing EU obligations. More far reaching, EU chambers could also receive special powers in the national budget, for instance in relation to EU budgetary rules. Again much will depend on the specifics of such powers, which hide more than one devil, but the general objective should be to connect the EU chambers to this ultimate parliamentary power source.

Lastly, such EU senates could be interconnected, and receive certain joint powers at the EU level. For example, members of the respective senates could be awarded observer status in other national senates or at the European Parliament (where double mandates are not adopted). In addition, a certain number of senates could jointly receive a right of initiative at the EU level, or even receive the power to table Treaty amendments.

Clearly these are only some possibilities, and it will be for each national system to decide which particular competences to grant, and how to design each specific competence. What is crucial, however, is that a critical mass of competences is granted, and that these EU chambers become directly elected in separate elections, so that their use of these powers becomes subject to direct political contestation. There should be an open political process to compete for these powers, so that a political discourse can develop, political parties are forced and enabled to develop a constructive, or at least coher-

42 At least some of the traditional arguments against double mandates would not apply to such specific forms of mandating, and they would have the automatic benefit of linking the European Parliament to national politics, and ensuring that national political decision making would be better informed. See in this regard also the practice of the double mandate in the beginning of European integration under art. 20 ECSC, which dovetailed very nicely with the confederal conception of sovereignty. The Assembly was: 'composed of representatives of the peoples of the Member States of the Community.'

ent, vision on the EU, and the member people can choose which one they like best.

4.2.3 *Prerequisites for national control*

Lastly, and in line with our third guideline, EU senates are easily linked to the exercise of national power. Control of the Dutch senate, for instance, is necessary to securely govern in the Netherlands. Retaining control of the senate is, therefore, required to secure effective national political power, and to realize one's national agenda. In a similar fashion the consent of EU senates could be made a prerequisite for all, or a selection of, national legislation, including the budget.

As soon as control of the EU senate becomes necessary for national control, political actors are further incentivized to acquire control of the senate. This stimulates them to develop, promote and explain their positions on EU integration, even if only during elections for the EU senate. After all, losing a majority in the EU chamber would endanger the national agenda, and thereby what shall and should remain the primary focus of national politicians in a confederal Europe: National political power.

As a result of the interlinking between national and EU chambers the energy of the national political process is partially diverted to EU affairs, which helps to politicize the EU, and develop a confederal democratic process. For the EU will only become politicized where this is necessary to win and exercise national power.⁴³

Through this democratic process the member peoples will then be enabled to exercise democratic control on EU affairs at their own national levels. Via EU senates, and the options developed and propagated by the different political actors to acquire control of these senates, they can indicate their preference on the delegation of authority to the EU, and the use of authority that has been delegated. As a result their national vote will acquire more impact on EU affairs, and become more valuable because of it.

4.2.4 *Conclusions EU Senates*

Clearly, these proposals are highly underdeveloped, limited to only one option, and merrily gloss over a host of problems and challenges. For example, granting such far-reaching powers to a second chamber will have a significant impact on the overall balance of powers and the dynamics within a constitutional and political system. It rides roughshod over complex and finely attuned national systems and conventions, and may cause all kinds of new problems, such as stalemates between the national and the EU cham-

43 A thesis also supported by our US example. As we saw, after all, one of the key political reasons for supporting the move towards a US federation was the need for the former elites to regain political power. In other words, the drive for a federation was linked to, and fuelled by, clear political interests. See above chapter 5, section 2 and 3.

bers, or deadlock at the EU level because of purely national politics being played out in EU senates. Equally, the separation between national and EU powers may not be as logical as implied.

The limited objective here, however, was merely to illustrate the direction in which confederal solutions could be sought to address the democratic gap outlined earlier. In line with the confederal approach developed here, these solutions should be primarily sought at the national level, and the establishment of national senates is one particular option in this regard that could be further explored. At the same time the focus on the national level does not mean that no improvements could be made at the EU level to support the development of a confederal democratic process.

5 EU CONTRIBUTIONS TO CONFEDERAL DEMOCRACY

This next section zooms in on two possibilities for the EU to support a confederal democratic process at the national level. First, it considers how the EU may help to create the political space required for national politics to engage with delegation as new substance. Second, it discusses some ways in which the EU can stimulate and support a confederal evolution of the national democratic process, including the gradual development of an obligation under EU law for Member States to realign their national constitutions with certain requirements of confederal democracy.

5.1 *Political space: De-constitutionalization at the EU level*

National politicization of the EU requires the *possibility* for normal, non-constitutional politics on EU matters. As far as the exercise of EU voting rights is concerned, this is not a problem. The national political process can fully determine the way a national representative will utilize the national voting rights, or any other EU influence for that matter.

When it comes to the actual delegation of powers, however, the situation is more problematic. This delegation is largely contained in the Treaties. As has been abundantly proven by now, these Treaties are hard to change. In addition, the question which powers have been delegated is ultimately determined by the Court of Justice, whose case law is entrenched by the same veto that protects the Treaties.

Rather than a flexible ebb and flow pattern, visible in federal systems,⁴⁴ delegation to the EU thereby acquires a one-off 'give them a finger lose the whole hand' character. The fact that delegation is part of a constitutional process,

44 Elazar (2006), Burgess (2006), or Watts (1999), even though the trend line is generally upwards towards more central powers.

is ultimately determined by a legal process and logic,⁴⁵ and this one way dynamic of delegation makes ordinary day-to-day politics concerning delegation almost impossible. For example, it becomes difficult to take back certain competences, or to arrive at a politically desirable but legally impossible compromise on which powers to delegate and which to retain. It also creates a general fear and distrust of further delegation. A fear that radiates from the Lisbon treaty, which almost seems to equate delegation with amputation, and abounds with repetitive and legally superfluous subsidiarity statements.⁴⁶

Two options to make delegation more flexible, and more of a two-way street, can be envisaged. One alternative would be to make changing the Treaties easier. An option that, though in a very limited way, is pursued by the Lisbon Treaty.⁴⁷ Nevertheless this option does not seem feasible on any significant scale. Real flexibilization of the amendment procedure can only take place by removing the requirement of unanimity. A move that would undermine the ultimate control of the different member peoples on delegation of powers, and therefore be a major step in creating a federate union.

The confederal nature of the EU, it seems, would be better served by another route. One which would reduce the *need* for Treaty change, and open the process of delegation up to more daily politics. This second option involves relocating competences and prohibitions from primary to secondary law, which is far easier to amend.

Relocating part of the allocation of competences from primary law to secondary law, and opening them up for politics, would also seem logical in itself, certainly for a more established EU. Which constitution, after all, contains a full set of rules on free movement that subsequently interfere with social issues such as labour rights or social security?⁴⁸ Which constitution contains the rules on agriculture, fisheries and tourism? Removing such issues from the Treaty, and organizing them via secondary legislation, would make it easier to alter and adapt these delegations of authority. Such changes will still require at least a qualified majority, and convincing the Commission, yet they at least make it more feasible to establish a national political debate on these issues, and to make delegation a continuous political process instead of a one-off event.

45 See above chapter 2, section 4.2.3 and chapter 3, section 2.4.3. on the expansive and entrenching effect of legal logic on this point.

46 Cf. typically the repetition in art. 5(2), 6(1) and (2), 48(2) TEU, Protocol 2 on the application of the principles of subsidiarity and proportionality, and art. 51(2) of the Charter of Fundamental Rights of the European Union. Also see Dougan (2008), 617 et seq.

47 See chapter 2, section 2.4.3. for a detailed overview.

48 The counter argument that normal constitutions do not need to remove national borders and barriers is acknowledged, but does not undermine the point being made.

Clearly, making it easier to take away competences from the EU creates the risk that the EU will be gradually dismantled, or rapidly cut to size in times of anti-EU sentiment.⁴⁹ Besides the safeguards in the Treaty and the general principles underlying the legal order, however, such a risk is the inevitable price for a truly political and democratic process, and therefore democratic legitimacy. For only if there are real decisions to be made, can a political process develop.

5.2 *Guiding and compelling national democratic evolution*

In addition to de-constitutionalizing delegation, the EU could also stimulate and support the confederal evolution of the national democratic process within its Member States. Several options can be envisioned in this regard, in addition to soft-law and non-binding guidelines.

To begin with, the criteria for accession as set out in Copenhagen and Madrid could be further developed to take these confederal insights into account.⁵⁰ These criteria could provide further guidelines on how the national democratic process is to be adapted to its inclusion in a confederal system. Yet the biggest challenge does not lie with new members but with the existing ones. Fortunately, even though the EU does not have the leverage provided by conditionality, and even though it should be very mindful of the primary legitimacy of the national constitutional systems, it could also play a post-accession role.

For the Treaties contain clear obligations for the Member States to respect and promote democracy. Article 1 TEU, for instance, requires decisions to be taken ‘as openly as possible and as closely as possible to the citizen’. Article 2 founds the EU on ‘democracy’, whereas article 10(1) bases ‘the functioning of the Union’ on ‘representative democracy’. An EU right for EU citizens to have sufficient national democratic influence could also be read in article 10(2) and (3), which hold that ‘Heads of State or Government and ‘governments’ are ‘themselves democratically accountable either to their national Parliaments, or to their citizens’, and that ‘every citizen shall have the right to participate in the democratic life of the Union.’

These Treaty inspirations could be further supported by the duty of sincere cooperation. Article 4(3) TEU requires Member States to ‘take any appropriate measure, general or particular, to ensure fulfilment of the obligations

49 Here an EU chamber, the political powers and interests of which are aligned with that of the EU, could also provide vital stability and countervailing force.

50 These now require that ‘the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (...). On the practical application see Kochenov (2008) and Smith (2003), 105 et seq.

arising out of the Treaties', and to 'facilitate the achievement of the Union's tasks and refrain from any measure

which could jeopardise the attainment of the Union's objectives.' As indicated above, the creation of a sufficiently stable confederal foundation is vital for the viability of the EU, and creating this foundation requires a confederal democratic process to substantiate the direct constitutional bond between the EU and the member peoples. In addition, as demonstrated in part I, stable member states are essential for a confederal system in any event.⁵¹ Ensuring this national stability, which includes establishing a sufficient national democratic process, could therefore also be considered a legal obligation arising from the duty of sincere cooperation.

Considering the vital importance of the stability of its Member States, the EU would also be more than justified in supporting and guiding the required evolution of the national democratic process. Taking into account the relative impotence of confederal systems to engage in direct and prolonged conflict with their members, it is also important that the EU does so pre-emptively, and before open conflicts arise.⁵² The EU would be further justified in undertaking action in this field by its direct responsibility towards the EU citizens.⁵³ As indicated above, the Treaties guarantee these citizens democratic government. And although the Treaties do not go as far as the US Constitution, which allows central intervention in the States to 'guarantee a republican form of government', art 7 TEU does provide at least a starting point for EU action in this field.⁵⁴

Although the EU would more logically act through non-binding suggestions and best-practices, and though the EU could never directly amend the primary national constitutions itself, some basis might therefore also be developed for binding legal action at the EU level. The infringement proceedings against Hungary provide one example of this possible development, although, as indicated, the EU would ideally act before such confrontations become necessary.⁵⁵

In this regard one could even imagine a more far-reaching development whereby EU law would grant a directly effective right to EU citizens to an effective democratic influence on EU affairs at the national level. This development could follow the logic of the *Rewe* case law. In these cases the Court of Justice held that the effectiveness of EU law also requires effective national

51 See chapter 4, section 3.4.

52 *Idem.*

53 See on the evolution of this direct bond above, chapter 10, section 3.3.

54 Art. 7 TEU refers to serious breaches of the values in art. 2 TEU, which include democracy.

55 See Press release IP/12/24 of 17/01/2012, and C-286/12 *Commission v. Hungary* [2012] nyr.

remedies, including state liability.⁵⁶ In a similar vein, it could be held that the democratic rights that the Treaties grant to EU citizens require effective democratic remedies, also at the national level. Whilst obviously recognizing a very broad national procedural autonomy, Member States could, for instance, be obligated to guarantee an equivalent and effective influence via the national democratic process on EU decisions. Alternatively Member State liability could be established where no such equivalent and effective national democratic remedies exist.⁵⁷

Clearly such an individual action remains highly theoretical at the moment.⁵⁸ They do form a nice illustration, however, of the potential of the confederal bond between the EU and its citizens. In addition, they provide an appealing symmetry with the logic of the *Bundesverfassungsgericht*. Where the German Court fears that integration might undermine national democracy, the Court of Justice could answer by turning EU law in an instrument to strengthen national democracy. This could lead to a similar dynamic as with the *Solange* cases and the subsequent development of fundamental rights in the case law of the ECJ.⁵⁹ The Court of Justice could then join the national constitutional courts in their current quest to improve the national democratic and political process as far as European integration is concerned.⁶⁰

6 CONCLUSION: THE DEMOCRATIC POTENTIAL OF CONFEDERAL RULE

Regional integration removes a significant amount of authority from direct national democratic control by the sovereign member peoples. By delegating sovereign powers to shared central rule, they necessarily give up exclusive control over the application of this authority. This loss of control, which is not compensated by equivalent control at the EU level, can logically be perceived as a threat to democracy.

56 Case 33/76 *Rewe*, and *inter alia* C-213/89 *Factortame*, C-479/93 *Francoovich* [1995] ECR I-3843, C-46/93 and C-84/93 *Brasserie du pêcheur* [1996] ECR I-1029, C-453/99 *Courage and Crehan* [2001] ECR I-6297, and C-453/00 *Kühne & Heitz*. For the clear limits of this logic also see C-432/05 *Unibet* [2007] ECR I-2271, and for its uncertainties and complexities M. Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004), 25 et seq.

57 A finding that obviously would have quite an impact seeing how a similar compensation could then be claimed by all individuals affected.

58 The vagueness of the democratic right, furthermore, could also form an obstacle to direct effect, at least where the Court so desires.

59 See the evolution running through case 4/73 *Nold* [1974] ECR 491, case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, C-185/95 P *Baustahlgewebe* [1998] ECR I-8417, C-112/00 *Schmidberger*, and Joined cases C-402/05 P & C-415/05 P *Kadi I*. For an attempt to discern some patterns in the relation between the BVG and the ECJ see Payadeh (2010).

60 See chapter 8 section 4.4. as well as Piquani (2012).

Yet, from a confederal perspective, such delegation also provides valuable new content for national democracy, and allows it to evolve alongside the confederal and globalizing reality it needs to control. To capitalize on this potential, however, the national democratic process should be structured and institutionalized properly. The new double role of the state in delegating authority to the EU and exercising the EU powers received in return should become part of national democratic substance. This requires anchoring and controlling the exercise of these national powers in the national constitutional and institutional structures.

In a confederal system like the EU this structure must logically form a mirror image of a federate system. To illustrate this logic, it has been shown how one potential way forward would be to anchor this new EU content of national democracy in EU senates, which would be based on independent and EU focussed elections. In addition, several modifications at the EU level could assist and guide the confederal evolution of national democracy. For example the delegation of competences could partially be relocated to secondary law, and the EU could actively step in by providing guidelines and incentives for Member States to modify their constitutional systems. More far reaching, one could even envision legally binding rules on a minimum of confederal democracy that should be guaranteed at the national level.

These suggestions, even if underdeveloped, do illustrate how the confederal form can be a means of safeguarding democratic control in a globalizing world by expanding the reach of democratic control outside the confines of the state, and thereby creating new content for an evolved democratic process. A potential that builds on the direct link between the EU and the member peoples enabled by confederal sovereignty, and fully utilizes the democratic potential of this link.

Having established at least this potential for a confederal evolution of the democratic process, we turn to the second challenge for the confederal approach: The EMU crisis.

