Hague Journal on the Rule of Law
https://doi.org/10.1007/s40803-023-00198-w

ARTICLE

EU Responses to the Democratic Deficit and the Rule of Law Crisis: Is It Time for a (New) European Exceptionalism?

Roila Mavrouli[1] · **Arnaud Van Waeyenberge**[2]

Accepted: 24 July 2023

Abstract

The European 'messianic' project was not particularly concerned with democracy or human rights, but rather sought 'legitimacy' in the nobility of its cause. However, when failure struck during the Euro-crisis, many sources of legitimacy suddenly collapsed. Similarly, failure struck the rule of law principle, demonstrating its precariousness and weak source of legitimation. The strong waves of de-europeanisation and the rise of illiberal democracies not only bolster the existing preoccupations of problematic democratic procedures, but further bring into question the continuity of the EU as a supranational entity. Interestingly, the European Union's answer to these issues furnishes a solution that, on the one hand, focuses on the enhancement of democracy, while focusing the safeguarding of rule of law on the other. Such an enhancement of democracy could be the result of the Conference on the Future of Europe, whereas, the rule of law crisis is meant to be addressed through financial and techno-managerial mechanisms. However, if the first mechanism aims to palliate or even mitigate the democratic deficit, the second one risks further alienating Union citizens by seeing in it another instance of European Union 'technocracy'. The solution to be foreseen is to reconnect democracy with rule of law as they have always been the foreign implants of European integration. Filling in these empty gaps of political messianism through an outright pairing of democracy and rule of law will rejuvenate the social legitimacy of European exceptionalism.

Keywords European law · Rule of law · Conference on the future of Europe · Techno-managerial mechanisms · Legitimacy of the EU · Political messianism

✉ Roila Mavrouli
roila.mavrouli@external.hec.fr

Arnaud Van Waeyenberge
van-waeyenberge@hec.fr

[1] PostDoc Research Fellow CNRS GREGHEC, Paris, France

[2] Associate Professor in European Union Law at HEC Paris, Paris, France

Published online: 14 August 2023

1 Introduction: Diminishing Legitimacy

A wide array of different theses has remarked on the future and continuity of the European Union, which at this moment is being affected by a rule of law crisis. Multiple interrogations focus on the existential crisis of the EU being hit with one crisis after another. Some scholars root these crises in the lack of procedural 'input' legitimacy, due to citizens' lack of influence, control and participation. Others oppose the lack of 'output' legitimacy due to mismatches between citizens' choices and politicians' delivery. Lastly, others focus on the lack of real political contestation of central EU-level policies and matters of institutional design[1] or uphold the results of European integration creating a legitimacy deficit within Member States who are no longer permitted or able to meet popular demands.[2] The purpose of this article is not to prove or disprove one or more of the above theses, but to start from the observation that there is a lack of legitimacy and to assess this lack of legitimacy from its results, meaning the crises. Thus, the Treaty of Maastricht marked the advent of a new era giving rise to an ongoing 'polycrisis'.[3] The term 'polycrisis', introduced by Jean-Claude Juncker,[4] originated in the failed constitutional treaty, the euro-crisis and the fear of Grexit, the refugee crisis, Brexit, and now the topical rule of law crisis. This article proposes a way through this "polycrisis" reflecting on possible lessons to be drawn from the discursive history of EU management.

If, until now, the United States of America has been known to possess a special role in solving global problems (leading to the notion of American exceptionalism),[5] the EU seemingly borrows several of those characteristics. American exceptionalism has always had important implications for foreign policy. Americans have always viewed their political institutions not as mere products of their history, tailored exclusively to the peoples of North America, but as the very embodiment of certain universal ideals and aspirations destined one day to extend to the rest of the world and their messianic project of promoting democracy around the world.[6] This idealistic tendency has been present in American foreign policy since the advent of the Republic, which perfectly reflects the American Founding Fathers' vision of the historical and universal significance of their own democratic experiment.

The messianic project of American exceptionalism is based on their uniqueness and differences from European nations, in that their country was more 'selfless', meaning it did not historically seek power or empire for its own sake but rather was motivated by the desire to free Europe from German or Soviet tyranny, for example.[7] If the legitimating discourse for the USA's global hegemonic power was to exert its power over other nations to ensure universal public goods such as order

[1] Van der Eijk and Franklin (1996).

[2] Scharpf (1999).

[3] Sternberg (2016).

[4] Speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV), 21 June 2016.

[5] Fukuyama (2005); Ignatieff (2005).

[6] Idem.

[7] Idem.

and security, we can attest a similar messianic vision in the EU's legitimating discourses. Similarly, if Americans tend to think of such engagement not as imperialism, but as a kind of universal public service that also serves American national interests, the EU's legitimating discourses seemingly envisaged a broad, idealistic mission, namely preventing war. However, if American exceptionalism is predicated on a high moral justification for war in the fight against terrorism, the EU seems to have adopted a similar engagement of exceptional vocation.

European exceptionalism[8] is namely about the initial and early legitimating discourses of the EU were focusing on the promise of peace and prosperity through European integration. They were however surprisingly silent on the matter of how the public may have felt about the integration project.[9] However, those foundational discourses made substantial claims about what people in post-war Europe supposedly needed and wanted in order to avoid war in the future and to recover economically. The aforementioned legitimating discourses were infused with silent assumptions and claims regarding the uncontroversial and uncontested nature of these ends and goals of integration; many even applied this assumption of 'uncontestedness' to the institutional and distributional choices that were inevitable in pursuing them.[10] The EU's legitimating discourses have profoundly changed however due to growing euro-scepticism and rejection, displaying signs of a pending crisis of legitimacy.[11] This compels us to analyse not only the causes but rather the relationship between such a rising legitimacy crisis and the EU's responses to the 'polycrisis'.

Those who defend the EU's rising legitimacy crisis have reached a growing consensus about the idea that a wider public sphere is crucial to strengthen the European Union's legitimacy, thereby bringing attention to the urgent need to reform the Treaties and to assess European economic governance. Although initially the legitimacy of the European polity was not perceived as a problem, it became more problematic as the EU gained further competences. The European democratic deficit became an important issue of debate only during the 1990s after the Maastricht Treaty had transferred considerable powers to the EU.[12] The EU has already been identified as having a democratic deficit given many conventions have failed to confirm its lost legitimacy as well as at the same time fighting against the illiberal onslaught of hybrid semi-democratic semi-authoritarian regimes. Since the transformation of the economic Union into a political Union following the Maastricht Treaty, the debate on the 'no-demos' thesis has been used to increasingly engage in such discussions.[13] However today, the debate is no longer centered on whether the EU needs a constitution or if there is one *demos* or several *demoï* but whether the EU's responses – other than a new constitution – respond to the 'polycrisis'. It is imperative to determine what the latest EU responses are with regard to enhancing democratic participation and to find a solution to the rule of law crisis. The first response corresponds to the

[8] For an analysis of the relevance of the term, see Nolte and Aust (2013).

[9] Sternberg (2016).

[10] Idem.

[11] Papadopoulou et al. (2017), p. 432.

[12] See Smismans (2019), p. 127.

[13] Grimm (1995), pp. 282–302; Habermas (1995), pp. 303–307; Weiler (1995), pp. 219–258.

Conference on the Future of Europe (COFOE), whereas the second one refers to the financial and techno-managerial mechanisms[14] of the EU, a pure product of the European governance in order to palliate or hopefully resolve the rule of law crisis. Our hypothesis is the following: neither the COFOE will palliate the EU democratic deficit nor will the techno-managerial mechanisms put an end to the rule of law crisis unless democracy and rule of law are perceived together as un-imperishable ensemble. The paper argues that there is an urgent need to reset EU's legitimacy and establish the old/new bases.

The two EU responses illustrated above offer the possibility to examine whether there is an interconnection between the crisis which the EU is facing today, namely the rule of law crisis, with its problematic legitimacy and democratic deficit. If this hypothesis withstands debate, the interconnection between the crises confirms the problematic 'telos' legitimacy of the EU. In this regard, we will first focus on the analysis of two current EU responses to the democratic deficit and the rule of law crisis, namely the Conference on the Future of Europe and the European Responses to the Crisis of the Rule of Law (2), then we will review the theoretical influences and instruments used by the 'historical' responses and demonstrate that we are currently witnessing a 'path dependency' which prevents us from identifying a response that will strengthen the link between democracy and the rule of law (3). Finally, we will examine the legitimacy crisis within the EU through the lens of the democratic deficit and rule of law crisis, focusing on the inevitable nexus between democracy and rule of law (4). On the basis that improved input/output legitimacies are not enough, in this last chapter several reflections on a new telos narrative are proposed. Even if the 'telos legitimacy' or 'political messianism' of Europe has always been an economic messianism that has been duly disguised, we offer a beginning of solution for the lost Promised Land which shall integrate the rule of law and democratic principles (5).

2 The Two Current EU Responses to the Democratic Deficit and the Crisis of the Rule of Law: A Telos Legitimacy Salvation?

The two current EU responses to the democratic deficit and the rule of law crisis have been the Conference on the Future of Europe (COFOE) and the techno-managerial mechanisms (MEDROI)[15] respectively. However, there is already a debate on whether these two EU answers will make it possible to respond to the purpose for which they were created. Both of them are linked to democracy and the rule of law, principles embodied in Article 2 of the TEU. The European history demonstrated that during the economic and financial crises of the 1970s, a greater endorsement

[14] Such as indicators and scoreboards, benchmarking, peer reviews, conditionality, national reform programmes, etc.

[15] We name them techno-managerial because they rely mainly on indicators, compiled in scoreboards and implemented through coordination mechanisms, patching up as part of a techno-managerial logic in which law and fact are not clearly separated but are continually intertwined. For a more concise and detailed analysis see *infra* §2.2.

on the part of the public was needed to sustain the integration project.[16] In order to achieve such a mobilization coming from the 'people', official EU rhetoric focused on 'what the people wanted', so that its legitimacy could be claimed, partly, on representational grounds and revolved centrally around the European citizens and their needs and sensitivities.[17] It has been argued however that this change of perspective did not necessarily mean that these citizens had more of an actual say. According to Claudia Sternberg "Both the People's-Europe and post-Maastricht EU-official legitimation discourses centered on democratic responsiveness. They prioritised this over democratic accountability or authorisation, often linking responsiveness with modes of governance ensuring efficient performance, even at the expense of representativeness, participation, or democratic control, and generally seeking alternatives to majoritarian modes of democracy and their procedures".[18] It seems that once again the EU rhetoric revolves around the need for social legitimacy and therefore the popularity of the EU's discourse through the COFOE.

It is well-known that the EU's problems began with the Treaty changes at Maastricht which instilled a contradiction into the European integration project of expanding supranational Community law and giving it a strong political dimension in addition to the pre-existing economic dimension without addressing the EU's democratic deficit.[19] However, the democratic deficit cannot be effectively filled by a 'statist shortcut' to the problem, but rather is deepened.[20] As long as the Commission, the Council, and the CJEU are not filled with life, this will accelerate tendencies towards the autonomisation of bureaucratized politics.[21] The above response was given by Jürgen Habermas to the question of whether the EU needs a constitution, and the same answer can be given to the question of whether the COFOE can be the solution to the democratic deficit.

If, in a sense, the EU is trying to enhance its social legitimacy and therefore its popularity through the COFOE, the decision-making process does not seem to be satisfactorily or effectively confronting the rule of law crisis. Even if trust in the European Union has increased according to the results of the Standard 2020–2021 Eurobarometer, there is a disconnect between Europe and its citizens in terms of democracy and the rule of law. On the one hand, satisfaction with the way democracy works in the EU and nationally among member states has increased since November–December 2021, with almost six in ten citizens (59%) stating they are satisfied with the way democracy works in the EU, while 36% are not satisfied.[22] On the other hand, if satisfaction is now growing in regards to democracy, there is less to say about rule of law which comes at the end of the list of values to protect. This Eurobarometer poll reveals that at least one in five are of the opinion the European

[16] Sternberg (2016).

[17] Idem.

[18] Idem.

[19] Schweiger (2016), p. 296.

[20] Habermas (1995).

[21] Idem.

[22] European Parliament Eurobarometer, Rallying around the European flag. Democracy a anchor point in times of crisis, Spring 2022, EB 97.3, DG COMM, Public opinion monitoring unit, p. 117.

Parliament should prioritise defending the protection of human rights in the EU and worldwide (27%), freedom of speech and thought (27%), equality between women and men (23%), the rule of law (22%) and solidarity between EU Member States and between its regions (20%).[23] This means that despite the rule of law crisis, the value of rule of law gained only one point compared to previous years, not to mention the uncoupling of values of democracy and the rule of law being perceived separately. If democracy ranks among the top three values in 23 countries, rule of law is only considered as a priority in Slovenia and Romania, and is widely mentioned in Finland, Greece, Bulgaria and Germany.[24] A similar discontinuity as regards democracy and rule of law can be found in the primary topics Europeans wish to learn more about where citizens are most interested in more information about what the European Parliament is doing in the areas of public health, the future of Europe (both 32%) and the fight against poverty and social exclusion (31%), while only 24% were interested in democracy and the rule of law.[25]

In 20 Member States a majority of respondents have stated they trust the EU,[26] although 54% of EU citizens rate the justice system in their country – in terms of the independence of courts and judges – as good, while 35% say it is bad.[27] It is to be said however that the rule of law is not one of the major values to be defended as a priority for the European Parliament; according to the European Parliament Eurobarometer, Europeans see democracy as the first value the European Parliament should defend as a matter of priority, as it was chosen by around a third of respondents (32%). It is followed by freedom of speech and thought (27%), the protection of human rights in the EU and worldwide (25%), gender equality (24%) and the rule of law (22%).[28] However, the insignificant place accorded to the rule of law can be justified by the fact that Europeans' awareness of the rule of law in other EU countries (other than their own) is markedly low.[29]

Even if social legitimacy and popularity are supposedly attained through citizens' participation in the COFOE, this is not the case with the EU response regarding the rule of law crisis. Contrary to the COFOE, the rule of law crisis is designed to be tackled with mechanisms that are not truly subject to democratic control and

[23] Ibid, p. 96.

[24] Ibid, p. 98.

[25] Ibid, p. 108.

[26] See the results of the Standard Eurobarometer 94 for Winter 2020–2021, p. 10. Only six member states are at the other end of the scale: distrust is the view of the majority in Greece (63%), Austria (53%), Czechia and Cyprus (both 52%), France (49 vs 39% "tend to trust") and Italy (46 vs 44%).

[27] Flash Eurobarometer 489, Perceived independence of the national justice systems in the EU among the general public; Report, Fieldwork: March–April 2021, Publication: July 2021, Survey conducted by Ipsos European Public Affairs at the request of the European Commission, Directorate-General for Justice and Consumers; Survey coordinated by the European Commission, Directorate-General for Communication (DG COMM "Media Monitoring and Eurobarometer" Unit).

[28] European Parliament Eurobarometer: Defending democracy/Empowering citizens, Public opinion at the legislature's midpoint, DG COM, Public opinion monitoring uni, autumn 2021, EB 96.2 II. Europeans and the European parliament, p. 42.

[29] A majority of respondents (68%) do not feel well-informed about this subject, including just over one in five (21%) feeling as if they are not informed at all. See Special Eurobarometer 514, Justice, Rights and Values Report Fieldwork: March–April 2021, p. 11.

accountability, but rather follow a more technocratic path of European governance. If the COFOE aims for the 'throughput'[30] legitimacy of the EU and therefore for the process that connects the input and the output – namely the democratic deficit – the techno-managerial mechanisms aim for the 'output' or result legitimacy of the EU, namely a combination of success per se, of success in realising its objectives and of contentment with those results. In other words, throughput legitimacy – or how the decisions are taken – cannot make up for a lack of input or output legitimacy, as it only serves as a complement to policy output and political input.[31] Therefore, we will examine the characteristics of each mechanism, including firstly how the Conference on the Future of Europe will bring about a new *vox populi* and strengthen democracy by increasing participation (2.1.) Then we will analyse the second EU response correlated to the rule of law crisis, hence the techno-managerial mechanisms for the re-establishment of rule of law (2.2.). Finally, we will assess whether these EU responses are adequate and prompt solutions. The article ultimately focuses on a negative answer by addressing the means by which to make up for the lost Promised Land and the transformation of political messianism to economic messianism.

2.1 Strengthening Democracy Through the Conference on the Future of Europe: Bringing About a New *Vox Populi*

The problematic legitimacy of the EU is predicated on the meaning we associate with the word democracy. Joseph Weiler states that we live by the credo that any exercise of public power has to be 'legitimated' democratically and it is exactly here that EU's 'process legitimacy' fails.[32] The EU's response to this 'legitimacy deficit' has sought to address this failed process legitimacy through the Conference on the Future of Europe. Considering that the EU's accountability is extremely weak due to political failures of European governance such as the embarrassing Copenhagen climate fiasco, the weak realisation of the much touted 'Lisbon Agenda',[33] and the very story of the defunct European constitution,[34] will the COFOE follow the destiny of the above failed achievements? Or for the first time will it enhance political participation and strengthen legitimacy? EU institutional actors have in the past already sought to ameliorate the Eurozone's deteriorating 'output' policy performance and to respond to citizens' increasingly volatile political 'input' by reinterpreting the 'throughput' processes focused on 'governing by the rules and ruling by the numbers' without admitting it.[35]

The COFOE initiative follows this statement of change and is the culmination of the debate surrounding the Future of Europe that started after the June 2016 Brexit

[30] Whereas the 'output' legitimacy is for the people, the 'input' is by (and of) the people, and the 'throughput' is with the people. See Schmidt (2013).

[31] Schmidt (2020), p. 39.

[32] Weiler (2012), p. 251.

[33] Also known as the "Lisbon Strategy" or "Lisbon Process".

[34] Weiler (2012), p. 252.

[35] Schmidt (2015).

referendum in which, for the first time, ever a Member State decided to leave the EU.[36] The idea of the COFOE was based on an open letter from the French President Macron addressed to all European citizens proposing "all the changes our political project needs",[37] in order to renew the EU and make it sovereign, united and democratic.[38] The aim of this project is therefore clearly to rethink the ways in which the European project is legitimised, but it goes far beyond this and covers a very broad spectrum. The COFOE's institutional governance remains unclear since, on the one hand, the Joint Declaration states that the Conference is "a citizens-focused, bottom-up exercise[39]" by promoting the organisation of a multitude of events "at different levels, including European, national, transnational and regional level and will involve civil society and stakeholders[40]", and including national and regional Parliaments, the Committee of the Regions, the Economic and Social Committee, social partners and academia; on the other hand, the Joint Declaration does not clarify the precise modalities in which the organisational structures of the Conference will take place. It only states that: "The structures of the Conference will agree from the outset and on a consensual basis on the modalities for reporting on the outcomes of the various activities undertaken in the context of the Conference[41]".

The EU appears to be as an institution to be tolerated and with whose abstractions we must abide.[42] These abstractions are obvious today with the European Parliament's Conference on the Future of Europe initiative; if, according to J. Weiler's terms, Europe has a constitution without constitutionalism, will the COFOE become part of the constitutionalist process? Or will it become another top-down perfunctory set of exercises? The COFOE initiative of the European Parliament, Commission and Council differs significantly from past attempts at EU institutional reform. Specifically, the COFOE holds a different logic, format and legal basis than in the past.[43] The previous President of the Commission, Jean-Claude Juncker, had recognised the urgency of "bringing our citizens closer to Europe[44]". In this way, he conditioned the very success of the EU to a change in the way that the outputs of EU action were framed, in seeking to be as "responsive" as possible to what the citizens wanted.[45]

[36] Alemanno et al. (2021a).

[37] See: French President Emmanuel Macron's Lettre Pour Une Renaissance Européenne, 4 March 2019.

[38] See: French President Emmanuel Macron's speech at Université La Sorbonne, 26 September 2017; and speech at the award of the Charlemagne Prize, Aachen, 11 May 2018.

[39] See Joint Declaration on the Conference on the Future of Europe, 10 March 2021.

[40] Idem.

[41] Idem.

[42] Habermas (1995).

[43] Alemanno (2020), pp. 484–508.

[44] Speech of J. C. Juncker of 22 October 2014 to the European Parliament: "I am convinced that this will be the last-chance Commission: either we will succeed in bringing our citizens closer to Europe, or we will fail. Either we will succeed in making Europe a political whole that deals with the big issues […], or we will fail".

[45] Sternberg (2016).

In the Special Eurobarometer on the Future of Europe, Europeans believe that climate change and the environment, health, as well as the economy, social justice and jobs are the key topics for the Conference and are of importance for the future of Europe.[46] Values and rights such as rule of law and security were ranked only fifth on the list. Globally, the majority of Europeans (55%) agree that the Conference represents significant progress for democracy within the EU, including 13% who "totally agree". However, three in ten (30%) disagree with this statement. At the same time, the same percentage of Europeans (55%) agree that the Conference will have no real impact, meaning it will not change much, and this includes 18% who "totally agree".[47]

The Conference on the Future of Europe marked an unprecedented encounter of diverse participants. It encompassed the European citizens' panels, the national panels, the multilingual digital platform and the conference plenary. The European citizens' panels brought together around 800 citizens from all backgrounds and corners of the European Union whose participants were randomly selected in Summer 2021 (random telephone calling was the main method used by 27 national polling institutes coordinated by an external service provider), with the aim of setting up EU diversity 'Panels' on the basis of five criteria: gender, age, geographic origin (nationality as well as urban/rural), socio-economic background and level of education.[48] The EU citizens' and national citizens' panels focused on the following four themes: 'European democracy/Values and rights, rule of law, security', 'Climate change, environment/Health', 'EU in the world/migration and 'A stronger economy, social justice and jobs/Education, culture, youth and sport/Digital transformation'.

Regarding the national citizens' panel, six Member States – Belgium, Germany, France, Italy, Lithuania and the Netherlands – managed to organise them, fulfilling the same principles as the European Citizens' Panels and including principles for good deliberation. The recommendations of those National Citizens' Panels were presented and debated in the January and March Plenaries, as well as in the Plenary Working Groups, together with the recommendations of the European Citizens' Panels on the same topics.[49] Belgium, for example, organised a national citizens' panel in which 50 randomly selected citizens, representative of the general population, came together over three weekends to discuss the topic of 'European democracy' and how citizens could be more involved in EU affairs.[50] Germany organised a national citizens' panel with 100 randomly-selected citizens, intended to be representative of the population, who participated online and debated the topics related to Europe's role in the world, climate and the environment, rule of law and values and

[46] Special Eurobarometer 517 Report on the Future of Europe, Fieldwork: September–October 2021, Survey conducted by Kantar at the request of the European Commission and the European Parliament, Survey co-ordinated by the European Commission, Directorate-General for Communication (DG COMM "Media monitoring and Eurobarometer Unit") and the European Parliament, Directorate-General for Communication (DG COMM "Public Opinion Monitoring Unit" (POMU)), p. 153.

[47] Ibid, p. 157.

[48] Conference on the Future of Europe, Report on the final outcome, May 2022, p. 15.

[49] Ibid, p. 22.

[50] Idem.

a stronger economy and social justice.[51] France organised 18 Citizens' Panels with each panel bringing together between 30 and 50 randomly-selected citizens, representing the diversity of the regional population. The panels identified 14 priority recommendations that were submitted to the French government.[52]

This unprecedented, year-long journey of discussion, debate and collaboration between citizens and politicians culminated in a report centered around 49 proposals that included concrete objectives and more than 320 measures for the EU institutions to follow up on under the above topics. The proposals are based on recommendations made by citizens who met within the European Citizens' Panels, National Citizens' Panels and contributed their ideas on the Multilingual Digital Platform.[53] It is of course a mystery what to do with the recommendations and how they will be debated and discussed and decided. Who will be the plenary members who reject a particular proposal and on what grounds? Where could they then be held accountable and by whom?

According to certain legal scholars, if the COFOE stems from past attempts – notably the failed Constitutional Treaty – it has nevertheless learned from them.[54] The novelty of the COFOE is that it is the first time where decision-making has relied on popular input to shape its overall future. Others have focused on its process and prospects given that it is an out-of-the-box initiative intended to "relaunch" the project of European integration after a decade of crises.[55] Despite the perspective of unprecedented magnitude, that of even changing the treaties, its ambiguities are more than obvious. The Conference's constitutional mandate remains unsettled, which reflects conflicting preferences among the EU institutions and Member States on its *finalité*.[56] The nature of the COFOE is that it seeks to combine features of bottom-up participatory democracy with elements of top-down elite decision-making.[57] If the objective of the COFOE is to lead "towards more efficient decision-making processes", what will the latitude and degree of citizens participation be? Engaging with citizens for democracy in order to build a more resilient Europe means renewing the EU in every aspect.

The preamble of the TEU refers to *peoples* on multiple occasions. More specifically, it states "desiring to deepen the solidarity between their peoples", "determined to promote economic and social progress for their peoples", "resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples" and "resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". Therefore, the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States, also affect their citizens. However, the cooperation between the European

[51] Ibid, p. 23.

[52] Idem.

[53] See Press release 9 May 2022 Brussels, The Conference on the Future of Europe concludes its work.

[54] Sternberg (2016).

[55] Fabbrini (2020).

[56] Idem.

[57] Idem.

Parliament as an expression of 'peoples' will' and the other institutions can be extremely weak. Even if the European Parliament has the right to give its opinion when asked, it often is not asked, and in areas where it was meant to be asked, the Commission and Council would complete their bargaining ahead of such advice, which thus became *pro forma*.[58] A striking example of this unsatisfactory cooperation is the negotiations surrounding the new rule of law conditionality regulation. Although this regulation has been adopted under an ordinary legislative procedure whereby the European Parliament is co-legislator the different approach adopted by the European Council's conclusions of December 2020[59] limited the regulation's scope and determined the regulation's *finalité*. Furthermore, and even more fundamentally, the role and nature of the intervention of the European Parliament in this conditionality mechanism is clearly out of step with the other two institutions of the institutional triangle.

Even if debates on democracy do not cease to reappear and occupy the public sphere,[60] the above example is a mere demonstration of the contradiction between democratic participation (of the European Parliament and citizens) and the results of the decision-making process. In 2019, the communication of the President of the Commission put forward the need for a "new momentum for democracy in Europe" and a right of initiative for the European Parliament.[61] However, in a later speech in September 2020, she only mentioned the Conference in the context of the development of an "EU Health Union".[62] In contrast, the European Parliament's resolutions, in January[63] and June[64] 2020, focused on ambitious goals, an open agenda and a broad-based citizen forum without excluding the option of altering the treaties. However, the Council aimed to limit the scope of activities of the Conference by explicitly distinguishing the Conference from a convention and excluding treaty changes in accordance with Article 48 of the TEU. Thus, three different visions are incorporated within the content of the COFOE that will presumably be balanced between the Commission's vision of deepening integration, a programme to accompany the Strategic Agenda of the European Council as proposed by the Council, and a significantly deepening of the level of integration through citizen and youth "agoras" as advocated by the European Parliament.[65]

[58] Weiler (2012).

[59] See the Conclusions of the European Council of 10–11 December 2020, Brussels, 11 December 2020 (OR. en).

[60] See Plottka and Müller (2020).

[61] Communication from the Commission to the European Parliament and the Council shaping the Conference on the future of Europe, Brussels, 22.1.2020, COM(2020) 27 final.

[62] See the speech of 16 September 2020, "Building the world we want to live in: A Union of vitality in a world of fragility", State of the Union Address by President von der Leyen at the European Parliament Plenary.

[63] European Parliament resolution of 15 January 2020 on the European Parliament's position on the Conference on the Future of Europe 2019/2990(RSP).

[64] European Parliament resolution of 18 June 2020 on the European Parliament's position on the Conference on the Future of Europe (2020/2657(RSP)), Brussels.

[65] von Ondarza and Ålander (2021).

Previous experiences with participatory democracy within the EU have been seen, namely the European Citizens' Initiative introduced by the Treaty of Lisbon, the member states holding national citizens' dialogues in 2018, and the organization of citizen consultations, in which Europeans were able to submit their feedback on legislative initiatives to the Commission via internet surveys (Juncker Commission). The results of these citizen-participative formats have hardly been incorporated into the EU's decision-making processes.[66] Logistical hurdles, claims of a lack of competence[67] and complete inaction on the part of the Commission were some of the reasons for the lack of incorporation of the proposed changes. If the COFOE stands for democratic participation and mitigation of the democratic deficit in order to strengthen the social legitimacy of the EU, the aforementioned issues of the past need to be overcome.

For example, there are still no serious plans for expelling countries that are no longer ruled in a democratic manner from membership in the EU. The inertia of the Article 7 TEU mechanism implies that it is unlikely that their ability to vote in key institutions like the (European) Council will ever be suspended. However, even if this situation is not presented as a menace as such, should European citizens tolerate the *status quo*? And if not, is this decision susceptible to being part of the COFOE considering that rule of law is one subject of the non-exhaustive list? If embraced, one of the citizen recommendations that are already emerging from the conference "could potentially be game changers for the EU's democratic quality, calling for developments that are prefigured but not entrench in current EU practices: making the disbursement of EU funding conditional upon the respect of media pluralism and the rule of law by its Member States".[68] Intergovernmentalism and informal intergovernmental institutions like the Eurogroups which frequently used to side-line the European Parliament by avoiding further citizen involvement is the consequence of damaging the EU's legitimacy, and the dissatisfaction of citizens with the EU rose along with national-populist parties during the crises.[69] The rise of illiberal democracies or the so-called 'democratorships'[70] has led to a renascence of citizens' concerns with the future of democracy.

According to the European Parliament Eurobarometer "Overall, just over half (53%) of respondents say they are satisfied with the way democracy works in the EU, while 41% are not satisfied. The slight negative shift since November–December 2020 follows a consistently positive trend since 2017, and positive ratings continue to outweigh negative ones. While a majority of citizens are satisfied with democracy in the EU, it is clear from the latest Future of Europe survey that this is a topic of concern. That survey found that nine in ten Europeans agree that there is still work

[66] Idem.

[67] A citizens' initiative against the Transatlantic Trade and Investment Partnership, which collected more than three million signatures, was rejected by the Commission on grounds of a lack of competence – wrongly, as the European Court of Justice ruled in 2017.

[68] Alemanno and Nicolaidis (2022).

[69] See Plottka and Müller (2020).

[70] Hochmann (2019).

to be done to strengthen democracy in the EU".[71] Europeans see democracy as the first value the European Parliament should defend as a matter of priority, given it was selected by around a third of respondents (32%).[72] However, rule of law is not one of the most important issues the EU is facing at the moment.[73] For example, close to half of Europeans are not satisfied with the measures taken by the European Union to fight the coronavirus pandemic[74] and a very large majority of Europeans (90%) agree that EU citizens' voices should be taken into further account for decisions relating to the future of Europe. Around nine in ten respondents (89%) agree that there is still work to be done towards strengthening democracy in the EU; a similar proportion (88%) agrees that there is still work to be done to protect democracy in the EU. Globally, the statistics revealed that EU citizens' voices should be taken into further account for decisions relating to the Future of Europe.[75]

Lastly, it has been argued that the planned Conference on the Future of Europe is the venue wherein such a vision could emerge, given the debate on European democracy must lie at the centre of its deliberations.[76] Although the historical rationale for the Conference on the Future of Europe is the 'revitalization of EU constitutionalism', we cannot abstain from sharing a contradiction: if all subjects can be submitted to the *vox populi* and even rule of law issues, how can the new techno-managerial instruments set out for rule of law re-establishment include democratic participation?

2.2 Strengthening Budget Stability Through the Techno-managerial Instruments for Rule of Law Enforcement

If the COFOE is part of the sensibilization of EU citizens, the question as to the extent of the EU reform is still open. The European narrative first started by putting an end to the atrocities of the two world wars and laying down the foundations for peace, progress, and prosperity. However, even if this narrative was relevant until recently, it has been challenged, on the one hand, by the impact of the sovereign debt

[71] Public Opinion Monitoring Unit, European Parliament Eurobarometer, Autumn 2021, Defending democracy, empowering citizens public opinion at the legislature's midpoint, Public Opinion Monitoring Unit within the Directorate–General for Communication (DG COMM) of the European Parliament, p. 23.

[72] Ibid, p. 42.

[73] According to the results of the Standard Eurobarometer 94 winter 2020–2021, the most important issues are health, economic situation, the state of member states' public finances, the environment and climate change, immigration, unemployment, rising prices/inflation/cost of living, the EU's influence in the world, terrorism, crime, pensions, energy supply, and taxation, p. 22.

[74] Ibid, p. 27.

[75] Overall, around half (52%) "totally agree" with this statement, while 38% (+1) "tend to agree" and only 7% (+1) disagree. See Special Eurobarometer 517 Report Future of Europe, Fieldwork: September–October 2021, Survey conducted by Kantar at the request of the European Commission and the European Parliament, Survey co-ordinated by the European Commission, Directorate-General for Communication (DG COMM "Media monitoring and Eurobarometer Unit") and the European Parliament, Directorate-General for Communication (DG COMM "Public Opinion Monitoring Unit" (POMU)), p. 125.

[76] For this approach, see Julian Plottka and Manuel Müller 2020; For the argument of the Conference on the future of Europe as a Pandora's box, see the interview with Alemanno (2021a, b).

crisis that has shown that European integration and prosperity do not necessarily go together. On the other hand, it has been challenged by the rise of illiberal democracies in Europe.

Regarding the first challenge, the project of creating scales of efficiency and prosperity and making Europe the most competitive and dynamic knowledge-based economy, capable of sustainable economic growth with better jobs and greater social cohesion, suffered from a rather non uniform debate on the consequences of the Euro crisis.[77] The mounting Greek balance-of-payment problem signaling the start of the Euro crisis, affected core policies of the EU and the flagship projects of European integration of the 1990s.[78] The prosperity gaps in many Member States laid bare the fundamental imbalance obtained between the economic and social dimensions of European integration.[79] The fundamental asymmetric relationship between (Europeanized) economic policies and (national) systems for social sharing was the result of the course of European integration.[80]

Regarding the second challenge, the rise of illiberalism questions the very core of European shared values by post-socialist Central European Member States whose economies were perceived as democratization and economic liberalization success stories.[81] Nevertheless, in the aftermath of the financial crisis and following the 2015 migration crisis, liberal democracy has been criticized by the leaders of some Member States, emphasizing in particular the threat migrants represent to native cultures and national security as well as the demise of Western political models.[82] In the field of political economy, the weakening of support for European integration after the financial and Eurozone crises is explained by Wolfgang Streeck. He noted that the period of economic stability and growth that characterised the *trente glorieuses* following the end of World War II, left policymakers with a view of the 'normal' relationship between capitalism and democracy which was in fact a product of a specific time and place and which had decayed by the 2010s.[83]

The EU's response to the democratic deficit through the COFOE is one way to address its claim to legitimacy in order to demonstrate a plausible connection to what the people consider correct and desirable. However, it has been argued that output- and input-grounded legitimacy can durably work only if they act in unison. The EU's response to the abovementioned rule of law crisis displays that coupling

[77] de Wilde (2022). See also Risse (2015).

[78] Schimmelfennig (2018), pp. 969–989. According to Frank Schimmelfennig, crises are open decision-making situations presenting a manifest threat and a perceived significant probability of disintegration but may also trigger reform activities leading to more integration.

[79] Scharpf (2002).

[80] Idem.

[81] Countries such as Croatia, Czechia, Hungary, Poland, Slovakia and Slovenia become EU members and were argued to have not only adopted, but also internalized, the European Union's liberal values. See Hajdinjak et al. (2022), pp. 1–11.

[82] See the speech of Victor Orbán, the Hungarian Prime Minister, at a Summer University in Transylvania in 2014.

[83] Streeck (2014), pp. 3–7; Wellings (2022), pp. 1–15, Rosamond (2017), p. 39. According to Ben Rosamond the slow retreat from the Keynesian welfare model of the nation states is central to any understanding of the EU's crises of the 2010s.

input and output legitimacy does not require merely a simple matching between outputs and citizen preferences.[84] In a way, "the discursive history of EU legitimation can be told as a story of a push and pull between de-politicising forces and counter-forces that actively politicised the stakes of EU politics".[85] Unlike other treaties used to establish an organisation, the TEU and TFEU created a new "legal order", one which is particularly rich and complex and displays numerous features that can rarely be found anywhere else in the world of international law. These include the broad and flexible nature of the competences conferred on the EU, extending into almost all areas of law-making, the existence of a common currency and common citizenship, the decision-making regime marked by the involvement of institutions that are not controlled by the Member State governments and by recourse to majority voting in the state-controlled Council of Ministers, and the habit of national courts to obey their duty to apply EU law[86] If the EU is an executive federalist system in which European legislation is still primarily carried out and implemented by the Member States, the difficulty involves how to adequately attribute political and administrative action to a particular political subject.[87] The EU institutional setting has become so complex that the problem is not the distribution of competences as such, but rather its lack of generality within the system; in the words of a Resolution of the European Parliament: "the lack of a credible single executive authority enjoying full democratic legitimacy and competence to take effective action across a wide spectrum of policies".[88] If traditionally the political role of the Commission was to defend European institutions and programmes against the Member States or to be an executor of a political majority of the European Parliament, today's Commission seems to do neither.[89]

In this respect, if today Europe faces a "crisis of values", this has an impact on its legitimacy internally and externally. The systemic deterioration of the EU's founding values in certain Member States, in particular Hungary and Poland, is illustrative of a significant decline in the rule of law.[90] The establishment of electoral autocracies that seek to undermine the limits on the exercise of executive power in order to keep the dominant political party in power in the long term engenders a real identity crisis, given that it undermines the axiological dimension of the European project, according to which Member States share both a common ideal and a common destiny.

In the face of these systemic violations of the rule of law by certain Member States, the EU institutions may have recourse to several political mechanisms.[91]

[84] Sternberg (2016).

[85] Idem.

[86] De Witte (2018), pp. 227–242.

[87] Möllers (2018), pp. 243–272.

[88] Ibid, p. 250. See European Parliament Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union 2014/2248(INI).

[89] Ibid, p. 251.

[90] For an analysis of this crisis: Spieker (2018); Smith (2019), p. 561; Waelbroeck and Oliver (2017), p. 299.

[91] For general analysis of the tools: Jakab and Kochenov (2017); Müller (2015), p. 141; Schroeder 2016, Jakab and Kirchmair (2021).

In particular, Article 7 TEU comprises two procedures aiming at ensuring that all EU Member States respect the common values of the EU, including the rule of law. However, it has not been effective in combating the decline of the rule of law. Due to the voting procedures, Member States concerned by the Article 7 procedure are in a position to protect each other and prevent any sanctions. Therefore, any proposals to activate the preventive mechanism provided for in Article 7 TEU with regard to Poland and Hungary have been unsuccessful. In addition to Article 7 TEU, a number of other mechanisms have been progressively created by the EU institutions to address rule of law issues in Member States.

In 2007, the Commission set up the Cooperation and Verification Mechanism for Bulgaria and Romania as a transnational measure to assist the two countries in their progress in the fields of judicial reform, corruption and – for Bulgaria – organised crime. Several years later in 2014, the Commission established a Rule of Law Framework that has aimed to prevent emerging threats to the Rule of Law that could potentially escalate to the point where Article 7 TEU must be triggered.[92] In addition, since 2016, the Council has organised a Rule of Law Dialogue annually. This dialogue is currently divided into two political discussions: a horizontal discussion regarding general rule of law developments in the EU, and country-specific discussions covering key developments in the Member States. However, Article 7 TEU, the CVM, the Rule of Law Framework, and the Rule of Law Dialogue in the Council, as well as the various resolutions adopted by the European Parliament, have not led to any decisive results that would have hampered the decline of the rule of law.[93] Faced with the ineffectiveness of the rule of law's political protection mechanisms, the EU has launched a new strategy which relies on judicial and economic/fiscal mechanisms that would complete and strengthen the aforementioned political mechanisms. This partly involves the creation of dedicated mechanisms, alongside the utilization of instruments developed in the context of the surveillance of national policies or the application of EU law.

On the one hand, a number of preliminary references and infringement procedures have been referred to the Court of Justice of the European Union,[94] with the CJEU having found on numerous occasions serious rule of law problems in Hungary and Poland in relation to, *inter alia*, the independence of the judiciary, the situation of migrants, refugees and asylum standards, the financing of NGOs, and respect for academic freedom.[95] It has recently signalled that it is inclined to use provisions – in particular Article 19 TEU[96] – that do not directly touch on the rule of law in order to link the principles contained therein to said rule of law.[97]

On the other hand, the COVID-19 crisis has created an opportunity for the European institutions to effectively ensure rule of law in Member States in the sense that the EU has opted to link European economic recovery to respect for the rule of law.

[92] COM(2014) 158 final.

[93] Kelemen (2020).

[94] Schmidt, Bogdanowicz (2018).

[95] See, e.g., cases C-286/12, C808/18, C-78/18, C-66/18 and C-192/18.

[96] C-64/16. Associação Sindical dos Juízes Portugueses v Tribunal de Contas.

[97] Réveillère (2019).

In doing so, the EU has promoted a new strategy which relies on economic and fiscal instruments that were not specifically designed nor envisioned to protect the rule of law, namely the European Semester, the Multiannual Financial Framework, and the protection of the EU's financial interests. These mechanisms mainly pertain to the Economic and Monetary Union, cohesion policy and European fiscal policy, and rely on techno-managerial mechanisms (indicators and scoreboards, benchmarking, peer reviews, national reform programmes, etc.). Their use to indirectly protect the rule of law in Member States was first urged by the Commission; indeed, in April and July 2019, the Commission published two communications on the rule of law[98] where it notably stressed the role that the European Semester could play, as well as that of the ESIF. The Juncker Commission also put forward the concept of a Rule of Law Mechanism, which would eventually lead to the adoption of an annual Rule of Law Report – published for the first time on 30 September 2020[99] – and the necessity to create, as a part of the MFF, a mechanism to protect the EU's budget when generalised deficiencies regarding the rule of law in Member States affect or risk affecting that budget. The Commission's approach has recently been approved by the European Council following the COVID-19 pandemic,[100] and was subsequently fully integrated into the 2021–2027 MFF and the European recovery plan also known as Next Generation EU. In other words, the EU has put in place a comprehensive financial package consisting of several instruments, in particular the Multiannual Financial Framework, the European Recovery Plan (more commonly known as Next Generation EU), and the Regulation on a general regime of conditionality for the protection of the Union budget.[101] Whether the beneficiaries of EU economic recovery receive aid is linked to their respect for the rule of law, explicitly through the Regulation 2020/2092 on the protection of the EU budget, and implicitly through the European Semester and the Recovery and Resilience Facility.[102]

The problem of the new strategy[103] developed by the EU institutions is that it is likely to result in insufficient protection – or even less protection – for the rule of

[98] COM(2019) 163 final; COM(2019) 343 final.

[99] COM(2020) 580 final.

[100] During the negotiations on a European economic recovery plan following the COVID-19 pandemic, the European Council stressed that "the Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU"- European Council, *Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions* (CO EUR 8 CONCL 4), para. A24. In this regard it further highlighted "the importance of the respect of the rule of law". The European Council's statement thus endorsed the strategy recently put forward by the Commission to strengthen protection of the rule of law.

[101] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, [2020] OJ L 433I/1; Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, [2020] OJ L 433I /11; Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, [2020] OJ L 433I/23.

[102] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L57/17.

[103] For an analysis of the New EU Strategy to Protect the Rule of Law in the Wake of the COVID-19 Crisis, see Fromont and Van Waeyenberge (2022), pp. 1–16.

law. These techno-managerial mechanisms lead to a techno-managerial management of European values which may affect the EU's constitutional balance. Having been gradually introduced into public administrations under the influence of New Public Management,[104] these mechanisms enable the Union to influence the definition and implementation of the Member States' policies as closely as possible, including in areas in which the EU has only limited competence (social, fiscal, budgetary, health care, education, justice policies, etc.). However, the European intervention through techno-managerial mechanisms is not subject to a real EU democratic deliberation. In fact, the European Parliament is not fully involved in the European Semester[105] and the RRF[106] insofar as it is most of the time only informed or even consulted but without any real power of constraint. In addition, given their non-formally binding nature, the acts adopted as part of this new strategy are not subject to judicial review by the CJEU, even though they are *de facto* binding.[107]

This is, for example, the case with conditionality as this mechanism has been developed significantly since the sovereign debt crisis, to the point that its use was generalised during the COVID-19 crisis. From now on, Member States will only be able to benefit from the European budget and the EU Recovery Plan on the condition that they respect the rule of law and the country-specific recommendations issued in the framework of the European Semester. However, this conditionality raises several difficulties. Firstly, it is embedded in various "national programmes" which form the basis for numerous reforms in the Member States, yet these programmes are negotiated between the European executive and national governments, without the involvement of the European Parliament and/or national parliaments. Secondly, conditionality has altered the nature of EU intervention by systematically linking the granting of European funds to the European Semester, with conditionality making the latter *de facto* binding, whereas it had initially been conceived as a process for coordinating national economic, fiscal and social policies. Another example is that conditionality may affect the uniform application of EU law in Member States, as it allows for a trade-off between the rule of law and other interests (economic, political, etc.) during the negotiations.[108] In other words, the instruments put in place by the EU to fight the rule of law backsliding in certain Member States are problematic on two levels: they do not meet the democratic standards expected from an *Union de droit* and as a result they contribute to reinforcing the EU crisis of legitimacy.

On the other hand, this new approach employed by the European institutions could alter the very way the rule of law is understood and protected by the EU. While it allows for the rule of law to be taken into account in the definition and implementation of European policies, and is likely to ensure a more effective protection of the rule of law within the Union, this enhanced effectiveness may only benefit those dimensions of the rule of law that contribute to "a highly competitive social market economy" (Article 3(3) TEU) and neglect other dimensions, in particular

[104] Le Texier (2016).

[105] EU Parliament has denounced this secondary role. See Schutser (2020) point K.

[106] Recital 61 and Article 26(3) of Regulation (EU) 2021/241.

[107] For an analysis of this *de facto* biding effect, see Crum (2020), p. 14.

[108] Fromont and Van Waeyenberge (2022).

the fight against inequality and, more broadly, the protection of fundamental rights, such as the rights of LGBTQI + persons. The question therefore arises as to which techno-managerial mechanisms actually allow to be taken into account. Indeed, economic, cohesion and budgetary policies were not initially designed to ensure respect for the rule of law and thus pursue their own objectives. For example, since its creation in 2011, the European Semester has incorporated some rule of law dimensions, such as the independence of the judiciary, the fight against corruption and fraud, etc. However, these dimensions are closely linked to the economic and budgetary objectives pursued by the European Semester. This new approach by the European institutions could thus modify the very notion of the rule of law within the EU by mainly ensuring the protection of those dimensions of the rule of law with economic or budgetary implications by making certain tools binding (such as the European Semester[109]), by resorting to sectoral policies or by mobilising the judiciary while other dimensions of the rule of law – those that are sometimes politically sensitive – will continue to be dealt with via non-binding and/or ineffective instruments.

Several concrete solutions come to mind regarding fostering the pre-existing techno-managerial mechanisms for the preservation of the rule of law by reconnecting them with democracy. The role of the Commission through its Rule of Law Report can offer several incentives; considering that it has a breadth of (re)sources containing information provided by national contact points, input from several European agencies and networks, and information furnished by other international organizations – specifically the Council of Europe's Venice Commission and its GRECO (Group of States Against Corruption) committee – a series of solutions is feasible. However, the clear disconnection between the rule of law and democracy is intelligible as the Rule of Law Report focuses on four areas: the quality of the justice system, the anticorruption framework, media freedom, and other institutional issues related to checks and balances.[110] The Report's silence on broader issues related to the rule of law, such as the transparency and accountability of government conduct, or the protection of fundamental rights as well as government procurement and use of EU funds[111] is representative.

Therefore, our mere suggestion is that the Rule of Law Report should not address "concerns" or "serious concerns," but rather make use of non-soft, non-descriptive language. In this respect, the European Parliament has already criticized the Commission through its resolution on the 2020 report.[112] The country-specific recommendations addressing different reforms within Member States should contain specific measures on how to address the concerns identified, including deadlines for implementation, where appropriate, and benchmarks to be followed up on.[113] Addressing generic recommendations such as "take steps" or "continue efforts" often present within country-specific recommendations addressing rule of law issues

[109] See Fromont (2022), pp. 176–190.

[110] Conzelmann (2022), pp. 671–675.

[111] Idem; For a review of the 2020 report see Mungiu-Pippidi (2020).

[112] Resolution (2021/2025(INI)) of the European Parliament of 24 June 2021 on the Commission's 2020 Rule of Law Report, consideration 5. Also see considerations 50 and 61.

[113] Ibid.

cannot satisfactorily lead to a solution and hinder democratic backsliding. Interestingly, regarding the budget conditionality mechanism, it is argued that "the Commission may take into account the Rule of Law report […] when identifying and assessing breaches of the principles of the rule of law that affect the financial interests of the EU."[114] At the same time, when the rule of law conditionality mechanism was introduced, it was an important trigger for the new peer review mechanism on the rule of law.[115] The use of the country-specific evaluations in the Commission's Rule of Law Report within the peer review mechanism of the Council could only strengthen the Rule of law dialogue.[116] However, both of these mechanisms – the Commission's Rule of law Report and the Council's peer review – have been discredited as "toothless".[117] In spite of that, these instruments bring all EU Member States under scrutiny against the same standards as well as give a voice in the process to domestic civil society and actors outside of the EU such as the Council of Europe's Venice Commission.[118] However, while the Council's Peer Review focuses only on the quality of the justice system, the anti-corruption framework, the media pluralism, and other institutional issues related to checks and balances,[119] the Commission does not for the moment intend to broaden the scope of its report.

Accordingly, we suggest the interconnection and impact between the country-specific recommendations in the Commission's 2022 Rule of Law Report and the discussion in the Council peer review[120] in order to lend further political weight to the Commission's report. Suffice to say, the gap between the reality of illiberal democracies and the silence within the country-specific recommendations cannot generate productive remedies. Consequently, the most recent peer review in April 2022, which covered Hungary amongst others, "did not lead to the adoption of conclusions".[121]

[114] European Commission, 2022 Rule of Law Report.

[115] Federal Foreign Office, Germany: Working to Promote the Rule of Law in Europe 2020.

[116] Presidency conclusions 14173/19 cit. points 15, 8, and 10. The November 2019 Council conclusions announced a "comprehensive, genuine and interactive discussion broadly focused on the rule of law situation in the Member States and in the Union as a whole, taking into account both positive and negative trends". The Finnish presidency specifically mentions the establishment of a 'new mechanism for peer review' on the rule of law as one of the objectives of its presidency; see: Finland's Presidency of the Council of the European Union, Strengthening the Rule of Law.

[117] Kelemen (2020); Scheppele and Pech (2018).

[118] Because of the wide consultation exercise that the Commission conducts for the Rule of Law Report.

[119] This list is limited and ignores the interdependence of the rule of law discussion with human rights and democratic standards. It is also much more circumscribed than the rule of law checklist issued by the Council of Europe's Venice Commission. See Conzelmann (2022).

[120] Idem.

[121] European Council, General Affairs Council (12 April 2022).

3 The Theoretical Influences and Instruments Used by 'Historical' Responses (Path Dependency)

The European Union's crisis of legitimacy is not a recent phenomenon, and accordingly the Union has already attempted to respond to it. Nevertheless, it is striking that the current responses for reconsidering, reconceptualising, and re-envisioning the future of the Union and those seeking to stem the crisis of the rule of law in Europe follow the same logic and use the same types of instruments. In other word, we are currently witnessing a sort of 'path dependency'[122] which has the consequence of preventing us from taking a step back to find a response that will strengthen the link between democracy and the rule of law. This "dependency" explains, at least partially, the choices made by the European institutions to meet the current challenges of European construction. Indeed, one has the impression that "recipes" from the past are being reused in order to provide new solutions. More precisely, we believe that it is the tools developed some twenty years ago, in order to fight the "crisis of legitimacy" that have been afflicting it – i.e. the "Better Regulation" program set up at the Lisbon European Council (2000) and its "White Paper on European Governance" (2001) – which are reused here.[123] This program intended to solve the "democratic deficit" through a combination of two processes: opening up the decision-making process to 'civil society' (increase input legitimacy),[124] and offering answers which were more 'efficient' (increasing output legitimacy),[125] while keeping the classic Community method intact.[126]

This program has given rise to the following twofold action: On the one hand, and under the influence of the work of Jurgen Habermas and his participatory democracy,[127] instruments are emerging that aim to ensure the actual cooperation of actors for real collective action. In other words, the model of representative democracy based on the use of law must therefore be improved by means of participatory

[122] "Path dependency" is understood in this contribution as "a range of technological, economic, social and political arrangements, once in place, appear to generate patterns of costs and benefits such as rational actors prefer to maintain the status quo even if an alternative might provide higher aggregate in the long run." (Alexander 2001, p. 254.) As Bruno Palier explains very clearly, the effect of this phenomenon is that it becomes necessary to reconsider the major political choices made in the past because «creating new alternative institutions would generate high costs in terms of initial investment (of attention and political capital), learning, coordination and anticipation.» (our translation) – Palier (2010), p. 414. For a deeper analysis of this phenomenon see Pierson (2000), pp 251–267.

[123] Commission européenne, Livre blanc sur la gouvernance européenne, COM(2001) 428 final, 25 juillet 2001.

[124] For the first time, the Commission clearly stated that "the legitimacy of policies also derives to a large extent from the involvement and participation of all in the decision-making process and that the quality, relevance and effectiveness of the Union's policies explicitly depend on the broad participation of citizens at all stages, from policy conception to implementation" Duez (2011), p. 90.

[125] See, for example, the words of Romano Prodi, then-President of the Commission, "the effectiveness of the action of the European institutions is the main source of their legitimacy" R. Prodi Speech in front the European Parliament, Strasbourg, 15 February 2000.

[126] Commission européenne, Livre blanc sur la gouvernance européenne, COM(2001) 428 final, 25 juillet 2001, p. 9.

[127] Habermas (1997), p. 153. For an analysis see Frydman (2006), p. 136.

devices based on a procedural use of the criteria of validity.[128] In the wake of the White Paper, a framework for consultation with non-institutional parties has been developed, setting out general principles and minimum standards.[129] This led to additions to primary law: Article 10(3) of the Treaty on European Union reads as follows: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen". Article 11 TEU requires the European institutions to ensure that citizens and representative associations have the opportunity to make their views known, to enter into dialogue with the institutions and to be consulted by the Commission on the Union's activities. Paragraph 4 of the same provision establishes the so-called citizens' initiative, which allows a minimum of one million European citizens, subject to certain conditions, to submit proposals to the Commission.[130] On the other hand, since the White Paper on European Governance, there has been a real reduction in the traditional instruments of the Community method, as provided for in Article 288 of the TFEU,[131] in favour of new regulatory techniques directly inspired by the New Public Management[132] such as impact assessments, conditionality, indicators, rankings or benchmarking. It should therefore be seen as a shift from the classic command-and-control mode of institutional regulation (regulations and directives) to a form of economic regulation based on an incentive-based logic.[133] The main objective of these instruments is to seek to improve the efficiency of public policies by reducing transactional costs.[134] The focus on objectives and the need to make them measurable is reflected in the extensive use of performance indicators and benchmarking techniques[135]; these instruments are thus simultaneously incentive, control and evaluation mechanisms.[136]

This dual movement is rather paradoxical insofar as it seems rather irrelevant to want to increase both the number of interlocutors representing different interests and the efficiency of decision-making. Moreover, these developments raise numerous questions as to their compatibility with the Community Method and with a certain number of essential principles of the European legal order, including the separation/

[128] In this view, a norm would only be valid if it is the result of a free and rational discussion between the interested parties – Lenoble and Maeschalk (2009), p. 3.

[129] Communication de la Commission « Vers une culture renforcée de consultation et de dialogue – Principes généraux et normes minimales applicables aux consultations engagées par la Commission avec les parties intéressées» [COM(2002) 704 final].

[130] Règlement (UE) nº 2019/788 du Parlement européen et du Conseil du 17 avril 2019 relatif à l'initiative citoyenne européenne. Bertrand (2013), p. 6.

[131] In 1985, the White Paper on the Internal Market foresaw the adoption of approximately 300 directives to dismantle the remaining barriers between Member States, whereas the Lisbon Strategy, fifteen years later, foresees less than ten directives for growth and employment. See Commission européenne, Actions communes pour la croissance et l'emploi: le programme communautaire de Lisbonne, COM(2005) 330 final, 20 July 2005.

[132] Peters (2014), p. 398.

[133] Peters and Pagotto (2006), pp. 214–215; de Burca and Scott (2006).

[134] Le Galès (2014), p. 303.

[135] Bruno and Didier (2013).

[136] For an analysis of this phenomenon, see Frydman and Van Waeyenberge (2014).

balance of powers.[137] More specifically, the insistence with which certain European institutions, starting with the Commission, have promoted the ideals of participation and deliberation clearly reflects a desire to legitimise their own activities. The search for efficiency by means of managerial instruments raises a series of questions as to the respective effectiveness of judicial protection. Indeed, since they are not dressed in the garb of 'official' law, the admissibility of actions (*locus standi*) for annulment is a particularly difficult challenge.

Finally, and beyond these criticisms of the substance, it can be seen that, overall, this "better regulation" program and its subsequent policies have not achieved their goal as the democratic deficit continues to be a central issue for citizens and academics alike.[138] What is striking is that the COFOE and the EU's strategy to protect the rule of law are a direct continuation of what has been undertaken with mixed success over the past 20 years.

The COFOE is a bottom up exercise, with an institutional governance that is unclear and which appears polycentric[139] by promoting the organisation of a multitude of events at different levels (regional, national and European) and involving institutions (national/European), civil society and stakeholders such as social partners and academia.[140] The multiplication of public discussion spaces has been accomplished by many interested parties, but where it is the institutions that draw the conclusions of the debates there appears to be an updated version of the Habermasian theory of participatory democracy in its European context.

The EU's strategy to protect the rule of law promotes the use of managerial instruments to protect European values. Indeed, mechanisms such as the European Semester and the RRF rely on indicators, scoreboards, benchmarking, peer review, national reform programs, conditionality etc. This New Public Management approach lies at the heart of the strategy and is a continuation of what was launched in the early 2000s and is known as 'new governance'.

In conclusion, the theoretical influences[141] and tools used to combat this crisis over this last twenty years, and having assessed this policy, the conclusion is reached that they were not sufficient for coping with the democratic deficit. As such, there is a need for a regime change in order to achieve better results than those achieved over the last decades. It is time to leave this "path dependency" and to find a new method of more closely integrating democracy and the rule of law.

[137] For an analysis of the risks see Van Waeyenberge (2015), pp. 224–289.

[138] See, for example, the answer to the question (2021): "In general, does the EU conjure up for you a very positive, fairly positive, neutral, fairly negative or very negative image?" in only positive at 48%; Bechtel (2018), pp. 61–71.

[139] See Joint Declaration on the Conference on the Future of Europe, 10 March 2021.

[140] *Idem*.

[141] Genicot and Van Waeyenberge (2022), pp. 5–25.

4 Democratic Deficit and Rule of Law Crisis: The Inevitable Nexus Between Rule of Law and Democracy

As mentioned previously, the 'telos legitimacy' of the EU is related to the European narrative, that of political messianism[142] where "the justification for action and its mobilising force, derive not from 'process', as in classical democracy, or from 'result and success', but from the ideal pursued, the destiny to be achieved, the 'Promised Land' waiting at the end of the road". J. Weiler argues that there is a connection between legitimacy and popularity, as "the deeper the 'legitimacy resources' of a regime, the better able it is to adopt unpopular measures critical in the time of crisis".[143] The 'legitimacy resources' of the EU will be the result of negotiations with the member states in order to obtain valid acceptance. Nevertheless, the EU's attempt to 'save' the eurozone has already demonstrated that it is incapable of offering a space for open contestation and communication, one which is integral to its overall legitimacy. The absence of a political sphere in the aftermath of the eurocrisis does particularly accentuate the importance of the democratic deficit, as the limited powers of the European Parliament and the evolutive role of the European Council refer to what we called before 'process legitimacy'. Even if the EU is not a state, it has borrowed the traditional State mechanisms of governmental control and parliamentary accountability, though it has nonetheless failed to replicate them at the EU level, a potential sign of the failure of the 'process legitimacy'. Moreover, a democratic mode of exercising public power is promoted at the EU level, whereas basic democratic elements such as accountability and representation are not always present.[144] The economic and financial crisis has been a mere illustration of the idea that in order to protect economic liberalism and respect for fiscal discipline, representative democracy must be curtailed.[145]

A lot has already been said on the democratic deficit within the EU which is inextricably bound to its political deficit, namely its non-partisan or neutral orientation. However, the problem does not stop there. The latest expression of the European calamity is the rule of law crisis. State approaches always associate democracy with rule of law, since democracy cannot exist without rule of law.[146] Several member states have been accused of breaking the rule of law through national reforms, with these violations concerning the independence of the judiciary, legal certainty and fundamental rights, among others which normally define and guarantee democracy. If the democratic deficit, the loyal acolyte of the political deficit, has come to stay, can one not say the same about the rule of law crisis? If this is the case, the narrative of the European project characterized by the messianic promise of a better land is doomed to its own failure. From this perspective, the close relationship between democracy and rule of law needs to be revisited by the EU institutions taking into

[142] Weiler (2012), p. 256.

[143] Ibid, p. 249.

[144] Ibid.

[145] Wilkinson (2015), pp. 313–339.

[146] According to Michel Troper the opposite is possible; rule of law without democracy can exist within enlightened despotism, Troper (1992), pp. 51–63.

account that democracy and rule of law have until today been foreign attributes of European integration, always absent from political messianism.

The hypothesis formulated above relates to the traditional state approach to the definition of liberal democracy alongside the rule of law. The European idea in the aftermath of the Second World War was based on the union of democratic member states aiming toward a better future. According to J. Weiler, European integration is marked by a political messianic venture *par excellence*, "the messianic becoming central feature of its original and enduring political culture[147]". The 'telos legitimacy' of the EU is precisely carried by this dream that has been dreamt, this vision offered by the Schuman Declaration.[148] If, according to J. Weiler, the Schuman Declaration is the manifesto of political messianism, this is still the case today given the war in Ukraine led the President of the Commission to bring to life the Declaration's messianic feature by defending the outlawry of war, democracy and fundamental rights.

According to the Schuman Declaration:

> "World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable. […] A first step in the federation of Europe [which] will change the destinies of those regions which have long been devoted to the manufacture of munitions of war. […] This production will be offered to the world as a whole without distinction or exception".

However, the EU has been accused of operating without a veritable commitment to the principles it has demanded of its aspiring members – democracy and human rights,[149] namely that not all are parties to the European Convention of Human Rights, whilst aspirant States had to accede to it as such. This narrative of political messianism has allowed the EU to free itself of having to demonstrate its democratic credentials unlike its member states. This proves that democracy was simply not part of the original vision of European integration.[150] Nevertheless, the elements of Article 2 TEU including democracy, the rule of law and the protection of fundamental rights lie at the very foundation of the EU's legal order.[151]

There are two elements that can be used to describe the topical rule of law crisis occurring within the EU. On the one hand, the tenacious democratic deficit maintains the idea that if there is no democracy, how can there be rule of law? On the other hand, violations of the rule of law within the supranational legal order are coming from democratic member states, namely member states who have met the

[147] Weiler (2012), p. 256.

[148] Robert Schuman, "Schuman Declaration" delivered on 9 May 1950, Paris at the Salon de L'Horloge, Quai D'orsay.

[149] Weiler (2012), p. 259.

[150] Ibid, p. 260.

[151] Lavranos (2009). See in this regard, C-156/21 – Hungary/Parliament and Council, ECLI:EU:C:2022:97, para. 232 and C-157/21, Poland/Parliament and Council, ECLI:EU:C:2022:98, para. 264. For an analysis of these judgments see Mavrouli (2022).

democratic criteria of accession to the EU. The wording of Article 2 TEU speaks articulates the founding 'values' of the Union such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. This wording would be unfortunate if it could deprive the rule of law of its legal value as a core legal principle in the context of EU law.[152] This means that rule of law is not a descriptive value, but rather a legal prescriptive principle. The same applies to democracy and the protection of fundamental rights[153] whose enforcement under EU law should not be excluded on the mere argument that they are only values and not principles.[154]

These core values received at the early inception of the EU had a strongly implied component of liberty establishing a clear link between democracy and the rule of law.[155] Dictatorships and 'unfree' countries were not welcome to join the Union. This configuration first began as an unwritten principle, part of the political messianism of Europe's Promised Land, and was soon codified in pre-accession strategy texts preparing the EU for enlargement. What is interesting in this constellation is that democracy and the rule of law were never part of the indisputable legal rules of the European Communities. Notwithstanding the fact that adherence to those values has traditionally been approached as a national and not supranational concern, the EU adopted this holy trinity – rule of law, democracy, fundamental rights – after the *Solange* case.[156] The reinvention of the EU under fundamental rights' pressure was actually a profound reinterpretation of the treaties – if not a *de facto* rewriting – this time including the holy trinity. As D. Kochenov puts it "The rule of law – even if a slightly tautological one – followed suit, only to be joined by an official story of democracy, after the paper dust of the democratic deficit debate settled somewhat".[157]

5 Conclusion: Making Up for the Lost Promised Land

The aforementioned techno-managerial mechanisms aiming at protecting the rule of law have been repeatedly criticized, implying that the EU has exceeded its competences[158] or has compromised the rule of law.[159] The above response on the part of the EU to the rule of law crisis through 'output' legitimacy appears to contradict the COFOE initiative aiming to improve 'input' legitimacy. The 'reason why' has already been revealed by J. Weiler in his article on the surface manifestations of crises in the midst of the financial crisis in 2012. He identifies how crises are always on the front pages of newspapers due to the tangible split of rule of law with

[152] Pech (2010), p. 359.

[153] Kochenov (2016), p. 11.

[154] See the distinction between values and principles, Jakab (2009), p. 145.

[155] Kochenov (2016), p. 12.

[156] BvL 52/71, *29 May 1974,* BVerfGE 37, 271.

[157] Ibid, p. 13.

[158] Alemanno and Chamon (2020).

[159] Scheppele et al. (2020).

democracy.[160] While J. Weiler was then talking about the Euro-crisis, both economic and financial, ten years later his concern is more than topical. Up to 2022, the EU had endured a multitude of crises, each taking a rather different form: economic and financial, migration, or rule of law. Within this context, the EU institutions have devised different mechanisms aimed at the apprehension of the crisis. Nevertheless, EU constitutionalism swivels between a non-constituent constitutionalism[161] and a technocratic one.[162] If the Treaty of Rome furnished the economic European Constitution and a supranational market-enhancing system of rights, the legitimacy of those rights depended precisely on the absence of democratically-responsive will formation. The volatile preferences of the broad representative institutions have been subsumed by the invisible hand of the market, supplemented by the expert hand of the technocrat. The absence of a distinct democratic pedigree relates to downgrading the value of a holistic conception of democracy, since there is less constituent initiative and no distinctive transnational 'people'. On this view, democracy has undergone a transformation – rather than being nominal ('democracy'), the key index of value becomes adjectival ('democratic').[163] In other words, the value of European democracy is no longer found in the conception of a common political community but in disaggregated virtues of democratic arrangements.

These democratic arrangements can be the legislative procedure with the participation of the Council and Parliament or the control of national parliaments. Those democratic arrangements lie on the positive side of a still on-going democratic deficit stagnating the EU's legitimacy. Even if the COFOE will rejuvenate the throughput legitimacy of the EU, it cannot alone remedy all crises and the political input. The domino effect of the three aforementioned successive crises demonstrates the drawbacks of this political messianism: when something collapses, everything else does too; or, as J. Weiler puts it "Part of the very phenomenology of 'political messianism' is that it always collapses as a mechanism for mobilisation and legitimation".[164] The problem is mainly because any political community must incorporate a two-fold commitment to self-determination – on the one hand, it must reflect the idea that citizens are free and equal (individual self-determination), while on the other hand, it must provide an institutional mechanism that allows for discussion and mediation, tying citizens together in pursuit of the larger "common good" (political self-determination). The traditional state approach offers this dual commitment to individual and political self-determination through the principles of separation of powers, of rule of law, of democratic institutions and the protection of fundamental rights. The EU's lack of institutional sophistication required to establish such a genuine form of political self-determination is part of its problematic 'telos' legitimacy. In other terms, the establishment of a genuine political form of self-determination by means of which the EU could tie its own trajectory to the desires of its citizens is neither present nor wanted. On the contrary, it has been argued that the apolitical

[160] Weiler (2012), p. 251.

[161] Walker (2008), pp. 248–267.

[162] Blokker (2013).

[163] Weiler (2012), p. 253.

[164] Ibid, p. 267.

nature of the EU was constructed by intentionally focusing on the efficient pursuit of its objectives [165] and not on the articulation of a 'dense' and integrated political system.

The recent rule of law crisis is a reaction to both of these failed commitments to pluralism and sovereignty which are currently suffering a certain tension. The EU institutions have not stayed silent vis-à-vis these tensions, but they still encounter a difficulties in crafting remedies, and the commitment to pluralism has sought reinvention through an initiative of the European Parliament launched in March 2021, as an effort to politically restructure the European project. The project involving inaugurating the Conference on the Future of Europe started to take shape in order to enhance democratic participation within decision-making, and there is no doubt that the Conference on the Future of Europe could not have come at a better time. The recent phenomenon of derogations from EU law on claims of national constitutional identity demonstrates an implicit tension between national and supranational orders. In this regard, the examples of the German Constitutional Court's *ultra vires* control, the French Council of State's implicit disagreement,[166] and not to mention the Hungarian, Polish and recent Romanian claims of an "illiberal" constitutional identity are nothing but consequential symptoms of an institutional crisis. As such, the rule of law crisis is lies at the heart of EU constitutional deficit and threatens to fragment the illiberal constitutional identities within the EU. However, the establishment of liberal democracy – a necessary prerequisite for EU accession – is always associated with the rule of law. If the rule of law crisis persists, how can democratic participation fill in the gaps?

As mentioned in the course of this article, a new European narrative is needed in order to generate enthusiasm and support among generations of Europeans who have not experienced war and for whom peace seems to be a given.[167] It is beyond the scope of this article to provide one, but certain ingredients cannot be overlooked. The European project must be green, at the cutting edge of digital technology, while controlling its excesses and provide a humanist response to the challenge of migration. If the European project is to continue in earnest, these three dimensions must be taken into account as a matter of priority.

This article also called for a transformation of the European decision-making process with a view to democratising it. This transformation involves improving the tools of participatory democracy on at least two levels. Upstream to provide a better distribution of resources among participants to offer a better equal access and downstream, to ensure that the institutional triangle really takes into account the result i.e. a better connection between these tools and the classic decision-making process

[165] Dawson and De Witte (2013); Müller (2012; See also Dawson and De Witte (2015).

[166] Judgment of the Conseil d'État in French Data Network and others. CE Ass., 21 April 2021, Req. no. 393099.

[167] In this respect, please note the work of the RECONNECT research project funded by the European Commission. This project aims to "strengthening the EU's legitimacy through democracy and the rule of law (…) and seeks to build a new narrative for Europe, enabling the EU to become more attuned to the expectations of its citizens.".

based on representative democracy.[168] Finally, it is necessary to encourage citizens to take advantage of them, because even when the instruments exist they remain under-exploited.[169]

One way of improving the osmosis between participatory democracy and representative democracy would be to offer a general right of initiative to parliament, or at least to initiatives resulting from participatory processes. This would reconnect the two forms of democracy and give visibility and recognition to the work of citizens. In this respect, the initiative proposed by the CoFoE (and supported by more than 2/3 of the participants) to give the European Parliament the right of initiative to organise European referenda, and that it should then be able to implement the results (the European Commission and the Council should follow, without the possibility of blocking it)[170] offers an interesting perspective and, in our opinion, is a step in the right direction.

Another promising reform currently being discussed by the co-legislators concerns electoral reform. In May 2022, Parliament adopted a legislative initiative report[171] that seeks to reform the EU's Electoral Act. Of the various changes proposed, two deserve particular attention: first 28 additional MEPs to be elected on EU-wide lists (*liste transnationale*) that must ensure balanced geographical representation; second the right for citizens to vote for the President of the Commission in a "lead candidate" (*Spitzenkandidaten*) system through the EU-wide lists.[172] These two aspects of the reform, which may be criticised in some respects, have in any case the quality of trying to create the conditions for the emergence of a European public space and strengthened the connection between the European demos and its representatives.

This article calls for the transformation of EU decision making; the COFOE is an opportunity to rewrite the official story of EU democracy by combining throughput and input legitimacy. Cementing the way decisions are taken through the COFOE is a means toward taking on the responsibility of a political EU polity and not just an economic one. This necessitates clear positioning of the EU institutions on the principles and values to be defended, including a clear stance of the Commission vis-à-vis the positions of other institutions. Thorough motivation for the Commission's decisions that have been made to once again defend the specific political vision that the EU embraces, and the motivation of the Commission regarding the reasons why the European Parliament's approach cannot be embraced in specific cases. As well, thorough motivation of the reasons justifying the alignment with non-normative recommendations of other institutions, and so forth. Democracy draws nearer to its nominal form by becoming a piece of the EU democratic culture by assembling

[168] Alemanno (2021a, b), pp. 647–665.

[169] For figures, see *Ibidem*.

[170] Conference on the Future of Europe, *Report in the final outcome* 2022, p. 201.

[171] The adopted text is available at: https://www.europarl.europa.eu/plenary/en/texts-adopted.html

[172] Press release of the European Parliament, MEPs begin revising rules on EU elections, calling for pan-European constituency, 3 May 2022, available at: https://www.europarl.europa.eu/news/en/press-room/20220429IPR28242/meps-begin-revising-rules-on-eu-elections-calling-for-pan-european-constituency

what used to be disaggregated virtues of democracy and rule of law. Consequently, the emergence of a new European exceptionalism will not be seeking its legitimacy in the nobility of its cause, but it will be rooted from within.

Acknowledgements This research is part of the MEDROI project (ANR-21-CE41-0004-01) funded by the National Research Agency of France (ANR – Agence nationale de la recherche).

Declarations

Conflict of interest All authors declare that they have no conflicts of interest.

References

Journal articles

Alemanno A (2020) Unboxing the conference on the future of Europe and its democratic raison d'être. Eur Law J 26:484–508

Alemanno A (2021a) La démocratie participative dans l'Union européenne : état et perspectives ouvertes par la Conférence sur l'Avenir de l'Europe. Cahiers De Droit Européen 3:647–665

Alemanno A, Mackay J, Milanese N, Nicolaidis K (2021) What's in an experiment? Opportunities and risks for the conference on the future of Europe. EUI, STG Policy Papers

Alemanno A, Nicolaidis K (2022) Citizen power Europe: the making of a European Citizens' assembly. Revue Européenne du Droit. In: Alemanno A, Sellal P (eds) The groundwork of European power, Issue 3. Groupe d'études géopolitiques

Alexander G (2001) Institutions, path dependance, and democratic consolidation. J Theor Polit 13(3):254

Bechtel MF (2018) Is a European democracy possible? Politique étrangère i(4):61–71

Conzelmann T (2022) Peer reviewing the rule of law? A new mechanism to safeguard EU values. In: Bonelli M, Claes M, De Witte B, Podstawa K (eds) Usual and unusual suspects: new actors, roles and mechanisms to protect EU values, vol 7, no 2. European Papers, pp 671–675

Dawson M, De Witte F (2013) Constitutional balance in the EU after the Euro-Crisis. Modern Law Rev 76(5):817–844

Dawson M, De Witte F (2015) From balance to conflict: a new constitution for the EU. Euro Law J 22(2):204–224

de Wilde P (2022) Peace, Prosperity and Protection: Narratives of Integration and the 'Justification Jungle' of Europe's Public Spheres. JCMS, Early View, Online Version of Record before inclusion in an issue

Fabbrini F (2020) The conference on the future of Europe: process and prospects. Eur Law J 26(5–6):401–414

Fromont L, Van Waeyenberge A (2022) Trading rule of law for recovery? The new EU strategy in the post-Covid era. Eur Law J 1:1–16

Fukuyama F (2005) L'exceptionnalisme américain et la politique étrangère des États-Unis. Politique Américaine 1(1):37–42

Grimm D (1995) Does Europe need a constitution? Eur Law J 1(3):282–302
Habermas J (1995) Remarks on Dieter Grimm's 'Does Europe need a Constitution'? Eur Law J 1(3):303–307
Hochmann T (2019) Cinquante nuances de démocratures. Pouvoirs 169:19–32
Majone G (1998) Europe's 'democratic deficit': the question of standards. Eur Law J 4:5–28
Moravcsik A (2002) In defence of the 'democratic deficit': reassessing legitimacy in the European Union. J Common Mark Stud 40:603–624
Müller JW (2015) Should the EU protect democracy and the rule of law inside Member States? Eur Law J 21:141
Nolte G, Aust H (2013) European exceptionalism? Glob Const 2(3):407–436
Pech L (2010) A Union founded on the rule of law: meaning and reality of the rule of law as a constitutional principle of EU law. EU Const Law Rev 6:359
Pierson P (2000) Increasing returns, path dependance and the study of politics. Am Polit Sci Rev 94:251–267
Réveillère V (2019) L'État de droit: le concept au travail en droit de l'Union européenne. Revue des Affaires européennes/Law European & Affairs, Bruylant/Larcier
Scharpf FW (2002) The European Social Model: coping with the challenges of diversity. MPIfG Working Paper 02/8 Max Planck Institute for the Study of Societies, Cologne
Schimmelfennig F (2018) European integration (theory) in times of crisis. A comparison of the euro and Schengen crises. J Eur Public Policy 25(7):969–989
Schmidt VA (2013) Democracy and legitimacy in the European Union revisited: input, output and 'Throughout.' Polit Stud 6(1):3
Schmidt M, Bogdanowicz P (2018) The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU. Common Mark Law Rev 55(4):1061–1100
Smith M (2019) Staring into the abyss: a crisis of the rule of law in the EU. Eur Law J 25:561
Spieker LD (2018) From moral values to legal obligations – on how to activate the Union's common values in the EU rule of law crisis. Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper, vol 24, p 28
Sternberg C (2016) Public opinion in the EU institutions' discourses on EU legitimacy from the beginnings of integration to today. Politique Européenne 4(54):24–56
Troper M (1992) Le concept d'État de droit. Droits 15:51–63
Waelbroeck M, Oliver P (2017) La crise de l'État de droit dans l'Union européenne: que faire? Cahiers Droit Européen 2:299
Weiler JHH (1995) Does Europe need a constitution? Demos, telos and the German Maastricht decision. Eur Law J 1(3):219–258
Weiler JHH (2012) Europe in crisis – On 'political messianism', 'legitimacy', and the 'rule of law'. Singapore Journal of Legal Studies, National University of Singapore, pp 248–268
Wellings B (2022) Nationalism and European disintegration Nationalism and European disintegration. Nations Natl 1–15
Wilkinson MA (2015) Authoritarian liberalism in the European constitutional imagination: second time as farce? Eur Law J 21(3):313–339

Books

Blokker P (2013) New democracies in crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania, and Slovakia. Routledge
Bruno I, Didier E (2013) Benchmarking. L'État sous pression statistique. La Découverte, Paris
De Burca G, Scott J (eds) (2006) Law and new governance in the UE and the US. Hart Publishing, Oxford/Portland/Oregon
Fromont L (2022) La gouvernance économique européenne. Les conséquences constitutionnelles d'une décennie de crises. Bruylant, Bruxelles
Frydman B, Van Waeyenberge A (eds) (2014) Gouverner par les standards et indicateurs. Bruylant, Bruxelles
Habermas J (1997) Droit et démocratie, entre faits et normes. Gallimard, tr Rochlitz R and Bouchindhomme C, Paris, p 153

Hajdinjak S, Chromková Manea B-E, Chytilek R (2022) Introduction how values and attitudes influence illiberal tendencies in central Europe. In: Behind the illiberal turn: values in central Europe, Brill, Series European Values Studies, vol 18, pp 1–11
Ignatieff M (ed) (2005) American Exceptionalism and Human Rights, Princeton University Press, Princeton
Jakab A, Kochenov D (eds) (2017) The enforcement of EU law and values: ensuring member states' compliance. OUP, Oxford
Jakab A, Kirchmair L (2021) How to develop the EU justice scoreboard into a rule of law index: using an existing tool in the EU rule of law crisis in a more efficient way. German Law J 22(6):936–955
Michaël I (ed) (2005) American exceptionalism and human rights. Princeton University Press, Princeton
Le Texier T (2016) Le maniement des hommes Essai sur la rationalité managériale. La Découverte, coll. «Sciences humaines», Paris
Lenoble J, Maeschalk M (2009) L'action des norms – Éléments pour une théorie de la gouvernance. Les Éditions Revue de Droit de l'Université de Sherbrooke, Sherbrooke
Papadopoulou L, Pernice I, Weiler JHH (2017) Legitimacy issues of the European Union in the face of crisis. Nomos, Baden-Baden
Peters A and Pagotto I (2006) Soft law as a new mode of governance: a legal perspective. Newgov: new modes of governance, pp 214-215, available at SSRN:https://ssrn.com/abstract=1668531 or https://doi.org/10.2139/ssrn.1668531
Risse T (ed) (2015) European public spheres. Politics is back. Cambridge University Press, Cambridge
Scharpf FW (1999) Governing in Europe: effective and democratic? Oxford University Press, Oxford
Schutser J (2020) Report on economic policies of the euro area 2020, 2020/2078(INI), point K available at: https://www.europarl.europa.eu/doceo/document/A-9-2020-0193_EN.html
Schmidt VA (2020) Europe's crisis of legitimacy: governing by rules and ruling by numbers in the Eurozone. OUP, Oxford
Schmidt M, Bogdanowicz P (2018) The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU. Common Market Law Review 55(4):1061–1100
Schweiger C (2016) Exploring the EU's legitimacy crisis: the dark heart of Europe. Edward Elgar (New Horizons in European Politics series), Cheltenham
Schroeder W (ed) (2016) Strengthening the Rule of Law in Europe. From common concept to mechanisms of implementation, Modern studies in European law, Bloomsbury
Streeck W (2014) Buying time. The delayed crisis of democratic capitalism. Verso
Van der Eijk C, Franklin M (eds) (1996) Choosing Europe? The European electorate and National Politics in the face of Union. University of Michigan Press, Ann Arbor
Van Waeyenberge A (2015) Nouveaux instruments juridiques de l'Union européenne. Évolution de la méthode communautaire. Larcier, Bruxelles

Book chapters

De Witte B (2018) International law introduction. In: Schütze R (ed) Globalisation and governance. International problems, European solutions. Cambridge University Press, Cambridge, pp 227–242
Duez D (2011) La démocratie participative européenne. Du citoyen à la société civile organisée. In: Chenevière C, Duchenne G (eds) Les modes d'expression de la citoyenneté européenne. Presses universitaires de Louvain, Louvain-La-Neuve, p 90
Frydman B (2006) Habermas et la société civile contemporaine. In: Frydman B (ed) La société civile et ses droits. Bruylant, Bruxelles, p 136
Genicot N, Van Waeyenberge A (2022) Les influences théoriques de la procéduralisation du droit de l'Union européenne: essai de cartographie. In : Adalid S, Michéa F (eds) La procéduralisation du droit dans la mise en oeuvre des politiques de l'UE, PUR, Coll. Droits européens, pp 53–70
Hajdinjak S Chromková Manea B and Chytilek R (2022) Introduction how values and attitudes influence illiberal tendencies in central Europe. In: Behind the illiberal turn: values in central Europe, Brill, Series European Values Studies, vol 18, pp 1–11
Jakab A (2009) Concept and function of principles A Critique of Robert Alexy. In: Borowski M (ed) On the nature of legal principles, Stuttgart, Steiner, pp 145–159

Kochenov D (2016) The acquis and its principles. The enforcement of the 'Law' versus the enforcement of 'Values' in the EU. In: Jakab A, Kochenov D (eds) The enforcement of EU law and values. Ensuring member states' compliance. Oxford University Press, Oxford, p 11

Lavranos N (2009) Revisiting article 307 EC: the untouchable core of fundamental European constitutional law values and principles. In: Fontanelli F, Martinico G, Carrozza P (eds) Shaping rule of law through dialogue: international and supranational experiences. Europa Law Publishing, Groningen

Le Galès P (2014) Gouvernance. In: Boussaguet L, Jacquot S, Ravinet P (eds) Dictionnaire des politiques publiques. Presses de Sciences Po, Paris, p 303

Möllers C (2018) Constitututional State of the European Union. In: Schütze R (ed) Globalisation and governance. International problems, European solutions. Cambridge University Press, Cambridge, pp 243–272

Müller JW (2012) Militant democracy. In: Rosenfeld M, Sajó A (eds) The Oxford handbook of comparative constitutional law. Oxford University Press, Oxford, pp 1253–1269

Palier B (2010) Path dependence. In: Boussaguet L, Jacquot S, Ravinet P (eds) Dictionnaire des politiques publiques. Presses de Sciences Po, Paris, p 414

Peters B (2014) Nouveau management public. In: Boussaguet L, Jacquot S, Ravinet P (eds) Dictionnaire des politiques publiques. Presses de Sciences Po, Paris, p 398

Rosamond B (2017) The political economy context of EU crises. In: Dinan D, Nugent N, Paterson W (eds) The European Union in crisis. Palgrave Macmillan, London, p 39

Smismans S (2019) Democracy and legitimacy in the European Union locked. In: European Union Politics, 6th edn. Michelle Cini and Nieves Pérez-Solórzano Borragán, p 127

Walker N (2008) Post-constituent constitutionalism? The case of the European Union. In: Walker N, Loughlin M (eds) The paradox of constitutionalism. Constituent power and constitutional form. Oxford University Press, Oxford, pp 248–267

Online and blog articles

Alemanno A, Chamon M (2020) To save the rule of law you must apparently break it. VerfBlog 11 December 2020. https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/

Alemanno A (2021b) Conference on the future of Europe: process more important than outcome. Review of democracy 18 February 2021b. https://revdem.ceu.edu/2021/02/18/conference-on-the-future-of-europe-process-more-important-than-outcome/

Bertrand C (2013) La démocratie participative dans le système institutionnel de l'Union européenne, *Siècles* [en ligne], vol 37, p 6. https://journals.openedition.org/siecles/1246

Kelemen D (2020) You can't fight autocracy with toothless reports. 6 October 2020 EU Law Live. eulawlive.com

Plottka J, Müller M (2020) After a decade of EU pragmatism, it is time to talk about democracy again. *EURACTIV Media network*, Institut für Europäische Politik 8 December 2020. https://www.euractiv.com/section/future-eu/opinion/after-a-decade-of-eu-pragmatism-it-is-time-to-talk-about-democracy-again/

Scheppele KL, Pech L (2018) Didn't the EU learn that these rule-of-law interventions don't work?. VerfBlog 9 March 2018. verfassungsblog.de

Scheppele KL, Pech L, Platon S (2020) Compromising the rule of law while compromising on the rule of law. VerfBlog 13 December 2020. https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/

Schmidt VA (2015) The Eurozone's crisis of democratic legitimacy: can the EU rebuild public trust and support for european economic integration?. Discussion paper available at: https://ec.europa.eu/info/sites/default/files/dp015_en.pdf

Von Ondarza N, Ålander M (2021) The conference on the future of Europe. Obstacles and opportunities to a European reform initiative that goes beyond crisis management. SWP Comment 2021/C 19, 17 March 2021, Stiftung Wissenschaft und Politik, German Institute for International and Security Affairs. https://www.swp-berlin.org/en/publication/the-conference-on-the-future-of-europe

EU acts, case law and documents

Building the world, we want to live in: a Union of vitality in a world of fragility. State of the Union Address by President von der Leyen at the European Parliament Plenary, 16 September 2020. https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655

Commission européenne (2001) Livre blanc sur la gouvernance européenne. COM(2001) 428 final, 25 juillet 2001

Commission européenne (2005) Actions communes pour la croissance et l'emploi: le programme communautaire de Lisbonne. COM(2005) 330 final, 20 July 2005

Communication de la Commission (2002) Vers une culture renforcée de consultation et de dialogue – principes généraux et normes minimales applicables aux consultations engagées par la Commission avec les parties intéressées. COM(2002) 704 final

Communication from the Commission to the European Parliament and the Council shaping the Conference on the future of Europe, Brussels, 22.1.2020, COM(2020) 27 final. https://ec.europa.eu/info/sites/default/files/communication-conference-future-of-europe-january-2020_en.pdf

Conference on the Future of Europe, Report on the final outcome, May 2022p p 15. https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf

Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, [2020] OJ L 433I /11

Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, [2020] OJ L 433I/23

European Commission, 2022 Rule of Law Report – Questions and Answers ec.europa.eu

European Council, Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) Conclusions (CO EUR 8 CONCL 4), para. A24

European Council Conclusions 10–11 December 2020, Brussels, 11 December 2020 (OR. en), EUCO 22/20, CO EUR 17, CONCL 8. https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf

European Parliament Eurobarometer: Defending democracy/Empowering citizens, Public opinion at the legislature's midpoint, DG COM, Public opinion monitoring uni, autumn 2021, EB 96.2 II. Europeans and the European parliament p 42

European Parliament Eurobarometer (2022) Rallying around the European flag. Democracy a anchor point in times of crisis. Spring 2022, EB 97.3, DG COMM, Public opinion monitoring unit, p 117

European Parliament Resolution of 15 January 2020o on the European Parliament's position on the Conference on the Future of Europe 2019/2990(RSP), Strasbourg. https://www.europarl.europa.eu/doceo/document/TA-9-2020-0010_EN.html

European Parliament Resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union 2014/2248(INI)

European Parliament Resolution of 18 June 2020 on the European Parliament's position on the Conference on the Future of Europe 2020/2657(RSP), Brussels. https://www.europarl.europa.eu/doceo/document/TA-9-2020-0153_EN.html

Flash Eurobarometer 489, Perceived independence of the national justice systems in the EU among the general public; Report, Fieldwork: March-April 2021, Publication: July 2021, Survey conducted by Ipsos European Public Affairs at the request of the European Commission, Directorate-General for Justice and Consumers; Survey coordinated by the European Commission, Directorate-General for Communication (DG COMM "Media Monitoring and Eurobarometer" Unit). https://europa.eu/eurobarometer/surveys/detail/2272

Joint Declaration on the Conference on the Future of Europe, 10 March 2021. https://www.europarl.europa.eu/sed/doc/news/flash/25243/JOINT%20DECLARATION%20ON%20THE%20CONFERENCE%20ON%20THE%20FUTURE%20OF%20EUROPE_EN.pdf

Press release of the European Parliament, MEPs begin revising rules on EU elections, calling for pan-European constituency, 3 May 2022. https://www.europarl.europa.eu/news/en/press-room/20220429IPR28242/meps-begin-revising-rules-on-eu-elections-calling-for-pan-european-constituency

Règlement (UE) n° 2019/788 du Parlement européen et du Conseil du 17 avril 2019 relatif à l'initiative citoyenne européenne

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, [2020] OJ L 433I/1

Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L57/17
Resolution (2021/2025(INI)) of the European Parliament of 24 June 2021 on the Commission's 2020 Rule of Law Report, considerations 5, 50 and 61
Schuman R "Schuman Declaration" (delivered on 9 May 1950, Paris at the Salon de L'Horloge, Quai D'orsay) online: Europa http://europa.eu/about-eu/basic-information/symbols/europe-day/schumandeclaration/index_en.htm[Declaration]
Special Eurobarometer 514, Justice, Rights and Values. Report Fieldwork: March–April 2021 p 11
Special Eurobarometer 517 Report Future of Europe, Fieldwork: September-October 2021, Survey conducted by Kantar at the request of the European Commission and the European Parliament, Survey co-ordinated by the European Commission, Directorate-General for Communication (DG COMM "Media monitoring and Eurobarometer Unit") and the European Parliament, Directorate-General for Communication (DG COMM "Public Opinion Monitoring Unit" (POMU)), p 125. https://europa.eu/eurobarometer/surveys/detail/2554
Standard Eurobarometer 94 for Winter 2020–2021 p 10

CJEU judgments:

C-286/12. Judgment of the Court (First Chamber), 6 November 2012. European Commission v Hungary, ECLI:EU:C:2012:687
C-64/16. Judgment of the Court (Grand Chamber) of 27 February 2018. Associação Sindical dos Juízes Portugueses v Tribunal de Contas, ECLI:EU:C:2018:117
C-808/18. Judgment of the Court (Grand Chamber) of 17 December 2020. European Commission v Hungary (Accueil des demandeurs de protection internationale), ECLI:EU:C:2020:1029
C-78/18. Judgment of the Court (Grand Chamber) of 18 June 2020. Commission v Hungary (Transparency of associations), ECLI:EU:C:2020:476
C-66/18. Judgment of the Court (Grand Chamber) of 6 October 2020. European Commission v Hungary (enseignement supérieur), ECLI:EU:C:2020:792
C-192/18. Judgment of the Court (Grand Chamber) of 5 November 2019. European Commission v Republic of Poland (Independence of ordinary courts), ECLI:EU:C:2019:924
C-156/21. Judgment of the Court (Full Court) of 16 February 2022. Hungary v European Parliament and Council of the European Union, ECLI:EU:C:2022:97, para. 232 and C-157/21. Judgment of the Court (Full Court) of 16 February 2022. Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:98, para. 264 (joint cases)

Online documents

Crum B (2020) How to provide political guidance to the recovery and resilience facility?. In-depth analysis requested by the ECON committee, PE 651.371, October 2020, p. 14. https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/651371/IPOL_IDA(2020)651371_EN.pdf
Federal Foreign Office, Germany: Working to Promote the Rule of Law in Europe (2 October 2020) Federal Foreign Office http://www.auswaertiges-amt.de
French President Emmanuel Macron's speech at Université La Sorbonne, 26 September 2017 and speech at the award of the Charlemagne Prize, Aachen, 11 May 2018
French President Emmanuel Macron's Lettre Pour Une Renaissance Européenne, 4 March 2019
Judgment of the Conseil d'État in French Data Network and others. CE Ass., 21 April 2021, Req. no. 393099
Mungiu-Pippidi A. 'Unresolved Questions on the EU Rule of Law Report' (20 October 2020) Carnegie Europe Blog: carnegieeurope.eu
RECONNECT research project funded by the European Commission. https://reconnect-europe.eu/project-info/