

## DEMOCRACY AND EUROPEAN GOVERNANCE\*

by Paolo Ponzano

The system of governance of the European Union, as created by its founding Treaties and amended by subsequent Treaties, has never been consistent with the principles of democratic legitimacy of its Member States. Suffice it to recall that the fundamental principle of separation of powers, whereby no single body can have power to pass legislation, enforce law and interpret the law as the judiciary all at the same time, is contradicted in the European Union by the European Commission. The Commission participates in the legislative process through its almost exclusive right of legislative initiative, participates in enforcing laws through its approximately 2,500 “executive” decisions a year, and also has a judiciary role when making decisions and imposing sanctions regarding competition and State aid which are not contradicted by the European Court of Justice. In issue 47 of the *“Federalist Papers”*, Madison agrees with Montesquieu that “the legislative department shall never exercise the executive and judicial powers, or either of them”; the same applied to the executive body and the judicial body. The main consequence of the exclusive right of legislative initiative attributed to the European Commission is the lack of that right for the European Parliament which – unlike each national Parliament – can only ask the European Commission to present a proposal for legislation. Naturally, this peculiarity of European governance has been justified in two ways: on the one hand, the European Commission needs to examine national legislations and take account of the interests of the Member States before proposing a draft European law; on the other, a draft European law presented by a majority of MEPs would be unlikely to take the interests of the least populated countries into consideration.

This “anomaly” in European governance is compounded by the fact that the European Council of

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Ministers exercises both the legislative and the executive functions provided for by the Treaties (for instance, in foreign policy issues) and can also self-delegate new executive functions (at least in the areas of competence of the European Union where it can adopt legislation without the agreement of the EP).

For these reasons, Giuliano Amato said in his opening speech to the European Convention in 2002 that “Montesquieu never visited Brussels” (even though the Treaty that emerged from the Convention’s works did not re-establish the principle of separation of powers, but only corrected certain secondary anomalies such as the power of the European Commission to modify the content of European laws without the consent of the legislative power).

For these and other reasons, many analysts of the project for European integration felt that the EU suffers from a “democratic deficit” or, in any case, fails to respect the principles of constitutionalism developed by the European Enlightenment tradition (such as the principles of limited government, of the declaration of rights, of the “checks and balances” and of the separation of powers). Therefore, says Stefano Bartolini in his essay “Taking Constitutionalism and Legitimacy seriously” (1), the terms of “Constitution” and of democratic “legitimacy” should not be misused when the principles of modern constitutionalism are so weak or even absent in the European Treaties. Another analyst of “European democracy”, Philippe C. Schmitter, believes that, in its current institutional set-up, the European government system is not a democracy and will not become so until its members decide to give themselves new rules and rights (in his essay “How to democratise the European Union” (2), he relates the quip that the European Union could not join itself because it fails to meet the democracy criteria required of candidate countries). According to the analysis by Fritz Scharpf, there is no doubt that the Union is far from having reached the same “strong” collective identity that seems evident in the national democracies. In the absence of such an identity, institutional reforms cannot significantly increase the legitimacy, in terms of input, of the decisions taken in application of the majority rule (3).

The literature on the “democratic deficit” of the EU is very extensive and cannot be summarised

here. It is sufficient to remember that, according to another analyst of European construction, Prof. Joseph Weiler, the European Union will only be democratic when European citizens are able to “send home” the government leaders after a European election (Prof. Weiler does not, however, specify whether the ones to be “sent home” should be the members of the European Commission, its President or the President of the European Council).

Another analyst of European governance, Prof. Sergio Fabbrini, defines the European Union a “compound democracy” (in the words of Madison), referring to the constitutional experience of the United States. Sergio Fabbrini distinguishes European democracy from the democratic models that have become established in the Member States and identifies its specific characteristic in a “decision-making process that cannot be monopolised by an individual Institution”. In a similar vein, other analysts of European governance such as Moravcsik and Renaud Dehousse summarise the issue in the following question: should a new European supranational democracy be necessarily founded on the same constitutional principles that inspired the national parliamentary democracies? In its judgement of 30 June 2009, the German Constitutional Court – the most scrupulous in defence of democratic principles – tried without success to give a clear answer to this question: on one side it recognised (see section 227 of the judgement) that European supranational democracy should not be necessarily founded on the same principles as national democracies but, on the other, contradicts this statement when it believes that the European Parliament is not respecting the principle of “one man, one vote” found in the national states (see section 285-286 of the judgement).

It should certainly be acknowledged that the Lisbon Treaty has introduced a number of improvements in the functioning of European governance. For instance, the increase in legislative and budgetary power of the European Parliament, the link introduced between the choice of President of the European Commission and the results of the European elections, the strengthening (albeit limited) of the role of the national parliaments, and the abolition of the anomaly that allowed the European Commission to change the contents of a European law without the agreement of the

European legislator. Two further progresses in democratic terms introduced by the Lisbon Treaty have been the recognition of participatory democracy with the right of legislative initiative, even if only indirectly, by the millions of European citizens, and also the binding character for courts of the Charter of Fundamental Rights which places limits on European legislative action. However, these elements of greater “democracy” in the European Union have not removed the main anomalies of European governance present in the Treaties and in institutional practice:

- 1) the European Commission continues to enjoy the almost exclusive right of legislative initiative (extended in the meantime to judiciary and police cooperation, while the Member States have, at the same time, lost their pre-existing right to individual initiative), with just the complementary obligation to give reasons in cases where it refuses to follow up requests for legislative proposals emanating from the European Parliament or from the European Council of Ministers (of course, this statement refers to the formal right of initiative held by the Commission and does not take account of the fact that this has been substantially eroded in practice by the growing role taken by the European Council and by the Commission’s practice to positively follow up 95% of the legislative requests received from the Member States, from other Institutions and from pressure groups).
- 2) Despite the European Parliament’s increased powers enshrined in the Lisbon Treaty and reinforced in practice by the institutional agreements concluded with the European Commission, it has not yet succeeded in establishing itself as an institution that is truly representative of European citizens. This is not so much due to the low voter turnout in the European elections (who would challenge the representativeness of the House of Commons or of the Dutch Parliament just on the basis of a voter turnout of under 50%?) as due to the European electoral procedure, the absence of real European political parties and also the impossibility for the European citizen to directly influence the nominating of a European government or the choice of legislative programme. The European elections are, in practice, national elections based on the list of national candidates, not transnational, chosen by

political groups that do not present any real alternative programmes but just manifestoes that are somewhat vague and very similar to each other (at least for the three main political groups) and which have not yet managed to propose their candidates for the office of President of the European Commission (even though the Lisbon Treaty had already authorised this choice). This situation is due to the fact that the European Parliament is obliged to be part of a continuous process of negotiations and compromises, in a sort of “grand coalition” that prevents the European election candidates from making specific electoral promises as do the political parties in national elections. This also applies to the legislative work in the European Parliament since it can only exert a decisive influence on the Council of Ministers when it musters an absolute majority on a specific text of a draft European law (see, for example, the agreement between the People’s Party and the Socialists on the directive known as Bolkestein or on the REACH regulation on chemical products). In other words, the political culture of the European Parliament is largely consensual, making it very difficult for European citizens to choose which party to vote for in European elections knowing that their decision will not have a great influence on either the appointment of the President of the European Commission or on the content of European laws. In addition, the vague and not clearly alternative manifestoes published by the European political parties at the moment of European elections can be explained by the large spectrum of political opinions existing within political groups and by the impossibility of candidates to undertake to put a specific political or legislative programme into effect on being elected. To these elements is added the lack of a direct relationship between the electoral choice of European citizens and the investiture of a European government that could obtain the confidence of a political majority in the European Parliament. This situation could be modified by a decision of the main political groups in the EP to present their alternative candidate for the Presidency of the European Commission. Although this decision does not resolve the problem of an absence of a true European government

responsible for a legislative programme to Parliament, it would still permit introducing a direct political link between the European citizen's vote and the choice of President of the European Commission. According to some analysts of European governance, such a procedure would enhance the democratic legitimacy of the European Union and constitute a fundamental element for the formation of a European "demos" (4).

- 3) The third anomalous element of European governance is in the increasingly important role exercised by the European Council. While initially the half-yearly or quarterly meetings of the Heads of State or of Government merely gave impetus to the other EU institutions or decided on some general policy guidelines, now the European Council has assumed the role of permanent manager of the economic and monetary union (it is to be remembered that, since the outset of the economic and sovereign debt crisis, the European Council has held no fewer than 28 formal or informal meetings, taking place nearly every month). Before analysing the recent evolution in the role of the European Council, it should be remembered that even the intense legislative activity of the Council of Ministers, composed of the executives of the Member States, has been criticised as heralding a "perversion" of democracy (the expression is Joseph Weiler's, but has been picked up by other analysts) understood both as supremacy of the executive over legislature in producing regulations, and as a possibility for the national executives to take rather covert decisions, thereby escaping the control of the national electorates (5). Other commentators have noted that "the powers lost at national level by the representative institutions are then acquired by the EU by non-representative institutions or by... efficient technostructures". And, anticipating what we shall say on the evolution of the European Council, "if the political centre of the European system is identified in the intergovernmental body, ...European integration risks coming from intergovernmental choices that, by the mere fact of being carried out at EU level, lack the political and constitutional checks that national laws are subject to" (6).

This analysis fully fits with the recent decisions by the European Council about economic

governance of the Eurozone. The insufficiency, or even the absence of competence by the Union in the field of economic policies of the individual States (subject to a European coordination without much juridical muscle: it is to be remembered the breach of the Stability Pact in 2003 by the French-German axis, never punished), coupled with the need to implement mechanisms of financial assistance to States in difficulty, has produced what one analyst called “the heaviest intervention (by the European Union) in national responsibilities with the least legitimacy” (7). The decision of the European Council on 8 June 2010 which requires Greece to cut pensions, holidays and social allocations, the number of public sector staff and the adopting of new laws on wages (while the Treaty does not recognise the EU as having any authority in the matter of harmonisation of wages), intervened like others in questions of economic and social policy that pertain to the national Parliaments. The consequence of these decisions has been that the heads of government of some Member States have been required, under the threat of sanctions, to seek majorities in their national Parliaments, after the event, to implement what they had agreed with their colleagues in Brussels. This sort of “executive federalism” – notes Jurgen Habermas – of a European Council that has autonomously invested itself with authority, would be the model of a post-democratic exercise of power (8).

A similar criticism can be made about the famous letter from the European Central Bank of 5 August 2011 in which the ECB asked the Italian government to apply specific and incisive economic reforms, such as the reform of the pension system and the labour market. These requests by the ECB certainly overstep its tasks as set out in the Treaties, which basically concern “the management of the EU’s monetary policy” (Article 282 TFEU). It is hard to argue that the decision of the Council as regards Greece, and similarly the letter from the ECB to the Italian government, are creating “precedents” for the economic governance of the EU since they imply the EU’s authority to impose precise obligations of economic policy in matters that should be the sole competence of the Member States (in the same respect, see the speech by Roland Bieber of 30 September 2011 at the EUI about the “gaps in legitimacy in managing the financial crisis of the

European Union (9). From the point of view of substantial democracy, it should also be noted that the decisions or recommendations of the Council in matters of economic policy do not imply any intervention of the parliamentary bodies (either of the European Parliament or of the national Parliaments) which are only informed after the event about the measures (this gap is, however, attributable to the provision in the Lisbon Treaty). We can only agree with those who believe that such actions by the Heads of State, of the Council or the ECB in matters largely of national responsibility cause legitimate doubts and concerns in public opinion and in the national political forces towards the European Union. Jurgen Habermas speaks explicitly of “agreements taken with no transparency and no legal form” which “should be imposed on the ‘dispossessed’ national parliaments by means of threats of sanctions and various types of pressure” (10). Andrea Manzella wonders how the national democracies are able to remain democratic considering the decisions of the new methods of European governance (11). Some analysts have questioned the compliance with a fundamental democratic principle – the origin of the role of national parliaments – of “no taxation without representation” in the context of both financial support such as the European Stability Mechanism and the austerity measures imposed on Member States benefiting from European aid. It should be noted that such criticism has been made both by the German former member of the ECB (Otmar Issing) in relation to German taxpayers who should have to fund the financial aid to countries in difficulty, and by those that believe that the citizens of the less virtuous countries should pay for the austerity measures (abolition of public sector jobs, haircuts on salaries and pensions, etc.) without being able to participate in the decisions of the European Council or the ECB. An Italian politician summed up this ‘dispossession’ of national democracy in the sentence “if the decisions on economic and social policy are taken in Berlin or Frankfurt, then I want to vote in Germany”. Andrea Manzella adds that the problem now affects the sustainability, by democratic systems, of procedures for adjusting public accounts that irreparably damage the existential conditions of citizenship (12). It is a paradox that the German Constitutional Court was called upon to rule on the constitutionality, on 12 September, of the ESM in relation to German Fundamental

Law, when the same Court stated in the already mentioned judgement of 30 June 2009 that a modification to the European Treaties should not call into question the fundamental elements of the German “Social State” (while the decisions of the European Council or the ECB are likely to call into question elements of the Social State considered equally important for other Member States).

The limits of this paper do not allow to investigate other aspects of the democratic anomaly in the current European economic governance. However, it should be remembered that, while it is true that the new Treaties relating to financial discipline (Fiscal Compact) and the ESM are ratified by national parliaments, the link of conditionality between the two texts (only those States that have ratified the Fiscal Compact can benefit from the ESM) is a condition not unlike that which existed for FIAT employees at the moment of the referendum on the new employment contract: they could certainly vote against the contract’s outcome but ran the risk the FIAT would decide to abandon its investments in Italy. The parliaments of countries in difficulty, as well as Irish voters, have suffered similar conditions. Lastly, it should be recalled how Prime Minister Papandreou had to give up the idea of holding a referendum about the conditions imposed on Greece to qualify for European aid.

Despite being incomplete, this analysis leads us to ask ourselves about the possible solutions for overcoming the anomaly in the current European governance. Even though this governance was improved by the Lisbon Treaty, it continues to be poorly understood by European citizens and has elements that are barely compatible with democratic principles. If national governments continue to take decisions that are likely to jeopardise certain important elements of the social state without the democratic participation of citizens and their representatives, this could cause a reaction of rejection (already appearing in some European countries) against the European project itself.

There are not very many possible solutions: to be brief, we will remind about the two main ones that have some variations:

- 1) the gradual creation of a European political Union consisting of the States in the Eurozone and those due to enter it in the coming years.

A growing number of political leaders, economists and analysts of European integration believe that

the economic and monetary Union cannot survive for long unless the foundations for progressively establishing a real European political union are quickly put in place (at least among the Eurozone States). This perception seems to be shared, to greater and lesser extents, also by the current Heads of State who commissioned a quartet of Presidents at the end of June (Van Rompuy, Barroso, Draghi and Juncker) to present a preliminary report in October and a final report in December on the measures to be taken to strengthen the EMU and create a Banking union, a Budgetary union and, in the end, a European political union. While a Banking union and, at most, a Budgetary union could be created without amending the current Treaties, a Political union would certainly require a new Treaty to be signed to modify the Lisbon Treaty. The experience of how the Lisbon Treaty came into force might suggest that it will take many years to conclude a new Treaty, and yet the experience of the Treaties of Rome and of the Single European Act show that it is possible to conclude new treaties in a short period of time (however it is true that there was a smaller number of States and that all the ratifications were made through parliament and not by referendum). However, the main problem is related to the method of preparing a new Treaty/Constitution for establishing a true European political union (of a federal nature according to a current of opinion, which consists of more than just the federalist movements). Choosing the traditional intergovernmental method (Intergovernmental conference preceded by a Convention and followed by 28 national ratifications by parliaments or referendums) would not only take up the next three or four years but would come to a standstill when certain countries failed to ratify it (starting with the UK). Moreover, its results would probably not be consistent with the principles of democratic legitimacy already mentioned and currently missing. For these reasons, an even more extensive current of opinion is asking that the European political union be enacted by a constituent assembly elected by European citizens according to criteria of proportional representation (for instance, see the recent article by Pier Luigi Bersani in the newspaper *L'Unità*). A majority of federalists and political leaders believe that it is for the European Parliament – as the only democratic expression of European citizens – to draft a new Treaty to be submitted to a “consultative” referendum of

European citizens on the basis of the criterion of double majority, simple or qualified, by these citizens and the participating States. The consultative character of this European referendum would be necessitated by the fact that in some European countries (particularly Germany, Italy and Belgium), a binding referendum on the text of a treaty is prohibited by the Constitution. Obviously the result of this referendum, although consultative, would be unlikely to be contradicted by national parliaments called to ratify the new Treaty establishing the European political union. However, it seems politically difficult to entrust this European Parliament, elected under the conditions mentioned earlier and by now coming to the end of its term, with this task of a constitutional nature. Instead, a constituent assembly mandate could be granted to the new European Parliament which will be elected in June 2014 and make this mandate the central theme – for once truly European – of the election campaign.

However, this scenario is far from guaranteed: if we exclude the hypothesis that the current European Parliament autonomously invests itself with a constituent assembly mandate and/or spontaneously drafts a new Treaty, it seems unlikely that the Heads of State or government decide at the European Council of December to immediately leap towards a federal type European political union. While President Napolitano has recently said that a European political union is no longer a taboo, the declarations of the other political leaders or European figures (from Mario Draghi to the Presidents of the European Council and the European Parliament), according to whom “the United States of Europe is not necessary” for defending the Euro and to strengthen the economic and monetary union or “it is not the right time to go along the Federal route”, give the idea that the decisions of the European Council in December will be marked by a policy of tentative steps (unless there is a new crisis with the single currency). In this case, there would not be a new democratic legitimacy of European governance by creating a tight deadline for a European federal entity.

2) Introducing new mechanisms for democratic legitimacy without amending the Treaties.

In a recent article, Alberto Majocchi recalls that creating a European Treasury, as well as Fiscal

Union, must be subject to the democratic control of Parliament and act as part of a government that is representative of the people's will, in accordance with the principle of "No taxation without representation" (13). Therefore, the decision to proceed with creating a Fiscal Union, with a Treasury and a federal financial union, should be accompanied by a simultaneous decision setting the date for starting a European Federation. If no such decision were taken, it would still be necessary to introduce new mechanisms for democratic legitimacy in European governance because, as Sergio Fabbrini writes in "Il Sole 24 Ore", it is becoming an institutional monster without the necessary legitimisation. "It cannot be leaders elected in just a few Member States that take decisions having an impact on the lives of citizens in all the other States" (14). A similar conclusion is reached by Barbara Spinelli in her recent article "Minimalists in Europe" (La Repubblica of 5 September) and by Andrea Manzella in his article "A porous democracy will save Europe" (La Repubblica of 18 May 2012). This analysis, now agreed by many commentators, was further authoritatively supported by President Napolitano in his very recent speech in Venice: "The need to delegate increasingly significant functions... to the EU Institutions has become mandatory and inescapable: the real problem is the democratic nature of the decision-making process of the EU".

Andrea Manzella also identified, in a recent article (15), three measures to be taken without amending the Treaties in order to strengthen the democratic legitimacy of European governance:

a) adopting a uniform electoral procedure for the EP elections that enables the exchange of candidacies and the presentation of single heads of lists between country and country by the major European parties. To this proposal – also mentioned by President Napolitano in his speech mentioned earlier – there could be added those already mentioned according to which the main European political parties should submit their candidates for the office of President of the European Commission for European citizens to choose. However, although these measures are certainly useful for "Europeanising" the EP elections and reinforcing its democratic legitimacy, they do not resolve the problem of creating a European government responsible to the representatives of

European citizens.

b) the governments, in a joint pre-election declaration, could undertake to appoint the President of the European Commission elected by the majority of the European Parliament to also be the President of the European Council. This “personal union” of the two Presidents, compatible with the Treaties and already mentioned in the European Convention of 2003, would have the merit of strengthening the European branch of the Executive with respect to the European Council. However, also this measure may have only limited effects in terms of democratic legitimacy if the 27-28 Heads of State and government regarded the new President of the EU as a mere agent responsible for preparing the reports and for performing the mandates decided in their almost monthly meetings (after all, already now Van Rompuy and Barroso jointly develop the reports on economic governance and on the strengthening of the EMU entrusted to them by the Heads of State).

c) The national parliaments and the European Parliament could state that they want to work together by means of Euro-national “conferences” or “conventions” on the major issues of the European Union in order to re-evaluate their role with respect to voters and to strengthen the democratic control over European decisions. This measure would comply with the provision in regulation 1176/2001 of the EU according to which the strengthening of economic governance should include a closer and timelier involvement of the EP and the national parliaments. Also Article 13 of the Fiscal Compact provides for organising joint conferences of representatives of the EP and the national parliaments to discuss budgetary policies. However, also this measure would have only a limited impact unless the European Council agreed to submit its guidelines, before they become operative, to the impedimentary scrutiny of a joint inter-parliamentary meeting (according to the model of the “European Congress” proposed in 2002 by the President of the European Convention, but not accepted by the Convention). If, however, this meeting gave a veto power against the decisions of the European Council, this procedure would require an amendment of the Treaties. If, on the other hand, the heads of government could implement their decisions despite the contrary

opinion of the inter-parliamentary meeting, this procedure would not solve the problem of democratic legitimacy.

This brief analysis of the relationship between European governance and democracy leads to the conclusion that it does not seem possible to reconcile the institutional functioning of the EU with the principles of representative democracy except by a modification of the existing Treaties and the establishing of a European federal entity (not necessarily the presidential model of the United States). In this respect, we must not forget the warning issued in 1948 by Luigi Einaudi and recalled by Barbara Spinelli in the aforementioned article: “Now that so many willing men endeavour to promote the foundation of the United States of Europe, it is necessary to repeat the warning of thirty years ago. Let us not work in vain and harmfully by disputing over a simple union of sovereign States! It would be better to do nothing at all because a union of sovereign States would soon become impotent....”

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