

Chapter 2

An Unfinished Polity

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The European Union is an unfinished polity. The single market has been completed, although free movement still works better for goods and capital than for services and people. At the same time, the four freedoms are protected by an imperative legal system. But the polity lags behind. Decisions bearing on the market are taken at Union level, whereas most decisions on fiscal policy – taxes and public expenditures – are taken at national level. Moreover, political decisions regarding the market are weakly anchored among European citizens. As a political system, the Union thus suffers from both a “social” and a “democratic” deficit. Is this a sustainable solution in the long run? That is the question of this chapter.

The point of departure is that the Union is now at a crossroads. However, it is not the protracted nature of the ratification process for the Lisbon Treaty that is the main cause for this. The Irish rejection of the new treaty in a 2008 referendum may have spread gloom amongst proponents of European integration, but the problem is more fundamental than that. The atmosphere this time is marked by a spreading awareness that the Union is not fully legitimate in the eyes of European citizens. European citizens seem to be alienated from decision-making in Brussels. They are hardly involved in European politics at all. At the same time, the imbalance between the polity, the market, and the legal order is increasingly apparent.

As long as cooperation in the Union was limited to a few technical areas, like customs, tariffs, and farm subsidies, the Union could derive legitimacy from the democratic constitutions of its Member States. European citizens tolerated the democratic deficiencies of the supranational state, because the market delivered wealth that could be distributed according to principles determined by each Member State. Today, however, this “permissive consensus” is meeting with less and less acceptance. Moreover, as the Union has expanded its authority to new areas and deepened its cooperation in established ones, its public legitimacy has been diminishing.

Furthermore, many consider the equilibrium of the Union to be threatened by the activism of the European Court of Justice (ECJ), which serves to undermine the balance between the EU and its Member States. In three widely observed and debated legal cases in particular, the Court has interpreted Community law in favour of basic

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principles of the market and at the expense of nationally determined systems for labour law and social affairs. National solutions to counteract social dumping have accordingly met resistance from the Court, which has viewed them as a violation of market principles. Jurisprudence regarding the market seems to have put politics out of the game.

The aim of this introductory chapter is to describe how the present structure of the Union – with its partly common “domestic” policies for a common market protected by an imperative legal system – came to be, and to contribute to the current debate among political scientists on whether such a construction is sustainable over the long run. What is decided at Union level, and what areas have the Member States reserved for their own jurisdiction? What tensions follow from this construction, and is it sustainable? In sum, my purpose in this chapter is to ascertain the historical moment at which the Union finds itself.

I begin with a brief account of the Union’s historical development from federal vision to complex multi-level system. I then turn my attention to two distinguishing traits of today’s Union: the “democratic” deficit and the “social” deficit. In the next section, I discuss the new situation that has followed upon the recent legal activism of the Court. The focus therein is on three widely observed and debated legal cases. These deal with the relationship between, on the one hand, the freedom to provide services and the right to establish business operations; and, on the other, the right of the Member States to develop their own systems for labour law and social affairs. I then proceed to discuss the state of the Union from the standpoint of three common views in contemporary political science on what the Union must do in order to regain its legitimacy. In the concluding section, finally, I summarise my findings and emphasise the need for political solutions – which may not be easy to achieve – in order to solve the fundamental problems of the Union.

2.1 From Federal Vision to Complex Multi-level System

In the debate over the Lisbon Treaty, the focus has been – much as with previous treaty reforms – on whether another step is being taken towards a federal state in Europe. Ever since the Community first appeared, ideas of a federal destination – a United States of Europe – have flourished among its leading representatives. Various national interests, however, have always opposed such a development vigorously. The controversy over the EU’s destination has therefore raged throughout its history, even though the method initially chosen for cooperation in Europe did not in fact presume any end point.

The initial strategy was to promote incremental integration in limited and politically uncontroversial areas, in order to reach concrete results and, of course, ultimately to preserve the peace in Europe. The gains arising from joint decision-making would outweigh the fears of handing over decision-making powers to the supranational state. Over time, the benefits accrued would encourage broader and deeper cooperation in more sectors. A review of the history as it actually transpired – from the rules on the common market laid down in the Rome Treaty to the deepened cooperation in

justice and home affairs set forth in the Lisbon Treaty – serves to confirm this expectation, although the integration process has come periodically to a standstill.

The distribution of competences between the Union and its Member States is the result of repeated negotiations that have taken place since the 1950s. Over time, the Member States have delegated competences in more and more areas, especially those bearing on trade, agriculture, and the single market. These areas, which by tradition were purely domestic affairs, are nowadays part of the Union's common "domestic" sphere. However, the reluctance to waive powers over taxes, welfare policies, and foreign policies has been strong throughout (for a discussion of the EU's foreign policy in particular, see Chap. 3). As a result, the combination of supranational and intergovernmental traits displayed by the Union differs from that found in fully developed federal states.

The increase in the supranational powers bears instructive comparison with that seen in the United States. In certain areas, interestingly enough, the centralisation of competences went considerably faster in Europe than in North America. Within a space of less than 50 years, for example, most areas relating to trade, the single market, and monetary affairs have been delegated to the supranational level. Foreign policy and social affairs, by contrast, are still decided by each Member State separately. The sequence was the converse in the USA: power over foreign policy and the military was centralised before regulation of the market was. Even today, in the latter area, the central determination of policy in the USA is less far-reaching than in the EU.

The completion of the single market, which was accomplished by the Single European Act of 1987, involved a constitutional settlement on the division of competences which essentially still holds. The treaties that followed – Maastricht in 1993, Amsterdam in 1999, Nice in 2003 – have not altered the essential features of this power balance (except for Maastricht, which transferred monetary policy to the supranational level for those countries participating in the euro). The Lisbon Treaty will also confirm, if ratified without major alteration, the above-mentioned division of competences among different levels of the EU.

The EU has thus acquired legislative powers in connection with the creation and regulation of the single market. This includes policies pertaining to trade, agriculture, fisheries (in part), the EU's customs union, and – for those countries participating in the Monetary Union – monetary questions as well. These all form part of the Union's main "domestic" sphere, wherein it possesses exclusive competence. The purpose, of course, is to remove trade barriers within the Union (such as border controls and customs), and to establish common tariffs for trade with countries outside the EU.

Within policy areas devoted to the correction of market failure, the Union and the Member States share the right to legislate. The latter can decide by themselves only so long as there is no EU legislation in the area in question, and so long as the general principles of Community law are followed. (I will return to this later.) Competences are shared between the EU and its Member States in the areas of environmental, social, regional, industrial, and economic policy. In the area of social policy, for instance, the Union can decide on minimum demands in connection with the working environment, labour law, and equal treatment; while the

lion's share of labour law is still decided by the Member States. It becomes especially apparent, when we examine this particular area, how national regulations can collide with EU regulations, since nationally decided rules are not allowed to undermine the general principles of the single market.

The Member States retain power over redistribution, except in the areas of agricultural and regional policy. Here the EU lacks the right to legislate, although it can take action through "soft law" and open coordination, which promotes cooperation within certain areas but without binding the Member States. These policy areas include employment, culture, education, housing, and research. In this way, the Union has established common goals for employment policy within the framework of the so-called Lisbon Agenda, which sets out the aim of making the EU the most dynamic and competitive economy in the world by 2010. The EU has thus centralised "domestic" policies within certain areas (market-creating and regulatory policies), whereas other areas are to a varying degree decentralised (market-correcting and redistributive policies).

It bears stressing in this context that we are talking about *formal* competences; the reality can be rather different. For instance, the formal authority to decide over a policy area may be circumscribed by an inability to reach agreement within or between certain EU institutions. Furthermore, an insufficient implementation of EU legislation may imply that actual conditions differ from those assumed in the formal rules. However, the most striking deviation from the formally specified division of competences is when the EU's authority is "stretched" as a consequence of actions taken by the Commission and the Court. This takes place when, for example, Community law is applied to areas that had previously been considered, wholly or in part, to fall outside the ambit of Community legislation. We shall see some examples of this later on.

But the European Union involves more than a certain *substantive* division of competences between the supranational and the Member States. It is also crucial to examine the *institutional* set-up of the EU as it has evolved. The four main institutions – the Commission, the Council, the Parliament, and the Court – were established already in the 1950s. The European Council was formally established in 1974. Successive treaty reforms have assigned these institutions the power to legislate, execute, and judge in matters dealing with the Union's common concerns, or – in the case of the European Council – to lay down guiding principles for the Community.

In addition, the balance of power between the institutions has varied over time. For instance, it is commonly acknowledged that the ECJ had pressed for further integration during the 1970s, when political cooperation between the Member States was working poorly. During the 1980s and into the early 1990s, the Commission, under the leadership of its chairman Jacques Delors, is thought to have been particularly influential. (It was at this time, for example, that the Single European Act and the Maastricht Treaty were passed.) With each treaty reform, moreover, the European Parliament has gained greater authority, especially as co-legislator with the Council. The influence of the Council of the European Union co-varies with the influence of the other institutions, implying that some of its

previously exclusive authority to legislate is nowadays shared with the Parliament. The European Council has also gradually assumed a more central role in the EU's political system. Its importance as a crisis-management organ, for example, has increased, as has its role in laying down guiding political principles for the Community.

However, the most important observation to make about the institutional set-up of the EU is that it is not uniform in the fashion of other federal states. Nor are the various competences uniformly divided between the Union and the Member States. In some areas, the power to legislate is exercised at Union level, while democratic accountability is found mainly in the Member States. The European Parliament, assuredly, is directly elected by European citizens in common elections every fifth year. But it is widely acknowledged that the Parliament is the weaker of the two legislative institutions (even if it has, as noted above, gained more and more influence over the EU's legislative activities). Moreover, campaigns for elections to the Parliament are more concerned with national issues than with the European issues over which the Parliament actually decides.

The Council of Ministers is composed of representatives appointed by the governments of the Member States. Said representatives are held accountable within the Member State they represent, which means there is no co-ordinated mechanism for direct democratic control of the Council. Furthermore, national parliaments exercise but weak control over the European policies of the governments of the Member States. In general, moreover, Union affairs play an insignificant part in national electoral campaigns. In sum, politics in the EU is shielded from public scrutiny and control, leading to a remarkably low civic engagement in matters over which the EU can actually decide.

Thus, both the substantive and the institutional set-up of the Union contribute to its complex multi-level character. The EU is not strictly federal; nor is it purely intergovernmental. The manner in which power is exercised and accountability ensured lacks uniformity. And it displays a strong bias towards common market policies; yet complementary common social policies are conspicuous by their absence. What does this peculiar construction tell us about the legitimacy problems currently confronting the Union?

2.2 The EU's "Democratic" and "Social" Deficits

The fact that the suprapstate is strong while corresponding mechanisms for accountability are absent accounts for the wide attention attracted by one of the Union's most prominent imperfections: the "democratic deficit". It is widely accepted nowadays that the Union suffers from a democratic deficit. However, there are those who think the problem is exaggerated. If the Union is viewed primarily as an organisation for regulating markets and finding efficient solutions for promoting the general welfare, rather than for redistributing resources between different groups in society, then we need not place particularly high demands on it for

democratic influence. It may thus be justifiable that the Union has a strong suprapstate with power over the market and monetary policies, while at the same time lacking corresponding mechanisms for accountability.

This construction has been commonly accepted and hence sustained simply because of the limited content of the issues over which the suprapstate has decisional power. It is only because the EU decides over matters that do not attract the political engagement of citizens that they consider the system to be legitimate. The construction accordingly means that a large part of economic policy – that having to do with the single market – has been decoupled from social policy. The market is regulated supranationally, and for the most part apolitically. However, the consequences attending the operation of free-market forces – the unequal distribution and social injustice, with all that they require in the way of compensatory taxes and welfare – must be handled by each Member State separately.

In addition to the democratic deficit, then, the EU suffers from a “social” deficit. Each country is responsible for handling the distributive effects arising from the operation of the single market, while the suprapstate is relieved of any such responsibility. At the same time, the Stability and Growth Pact sets limits on how far each country can go in this regard, since it forces Member States to keep their public finances in check. It is this particular combination of substantive and institutional traits on the part of the EU – with the accompanying democratic and social deficits – that accounts for the distinctive character of that organisation. As long as the market runs efficiently, opportunities for generating taxes are not restricted, and each country is free to choose its own model for redistribution, the arrangement with a less than democratic suprapstate can continue. In fact, the democratic deficit *presumes* a social deficit. For if the Union were engaged in full-scale redistribution to disadvantaged groups in society – as the Member States are, with their nationally developed welfare models – citizens would not accept their inability to hold responsible persons accountable.

Ever since the single market was completed, the Union has sought to compensate for its market-liberal bias by building a “Social Europe”. The French Socialists, headed by President François Mitterrand and Jacques Delors, President of the European Commission, argued in connection with the Single European Act for the introduction of a “social dimension” into the European integration project. In December 1989, 11 of the then-12 Member States, exclusive of the United Kingdom, signed a Community Charter of the Fundamental Social Rights of Workers, a document dealing primarily with working conditions and the rights and influence of employees at the workplace. During the negotiations leading up to the Maastricht Treaty, a majority of the Member States also wanted to incorporate this charter into the treaties, which the Conservative British government refused to do. This forced the other eleven states to conclude an agreement limited to themselves – the Social Policy Agreement – which was then enclosed within the treaty. Later on, in connection with the Amsterdam Treaty, the British government – now constituted by the Labour Party – agreed to include the agreement in the treaties and to improve the social dialogue with the social partners. The Amsterdam Treaty also

introduced a new method for open coordination – usually described as “soft law” – in order to improve the co-ordination of employment and social policies among the different countries.

This development signifies that employment and social policies – traditionally counted among the competences of the Member States – are also handled nowadays at the Union level. However, the co-ordination of employment policies is not legally binding for the Member States, although it leads to pressure in practice to follow common goals and guidelines. It is important to underline, however, that social legislation and the co-ordination of employment policies within the EU is a far cry from the extensive welfare policies pursued within the Member States, with their far-reaching systems of social and unemployment insurance, health and medical services, and other provisions for social welfare. Union authority over social policy has been extended since the latter part of the 1980s, but the nucleus of this policy area remains in the hands of the Member States.

In an attempt to strengthen further the fundamental political, economic, and social rights of citizens, the European Council decided in 1999 to establish the Charter of Fundamental Rights of the European Union, which secured among other things the right to take collective action, including strike action. The proposal for a Constitutional Treaty – which was rejected in referendums in France and the Netherlands in 2005 – incorporated the Charter. The United Kingdom, however – out of concern for the impact on its own labour market – raised objections to the legally binding character of the Charter. Subsequently, in the course of the negotiations for the Lisbon Treaty, the United Kingdom was exempted from the Charter, as was Poland later on. This solution implies that the charter is no longer included in the treaty; however, the treaty includes a reference to the charter, which actually makes it legally binding.

More importantly, the ECJ already applies the Charter within its legal practice. This has become evident, as we shall shortly see, in three widely discussed legal cases in which the Court describes the right to take collective action as a fundamental right, and then proceeds to weigh it against the right of free movement for services and the right to establish business operations. It is highly unlikely, furthermore, that the Lisbon Treaty would lead to changes in this legal practice. This is also why European trade unions press for the addition of a new social protocol, or at any rate an equivalent way of marking that fundamental social rights cannot be subordinated to the principles of the single market. For this to happen, however, 27 Member States have to agree to such an amendment; which would appear to be highly unlikely, since several countries have welcomed the recent developments in this area.

Thus, we have good reason to pay closer attention to the specific interpretations the Court has made when weighing fundamental social rights against market principles. In fact, the actions taken by the Court have brought matters to a head, and accentuated the Union’s fundamental problems. Three of these legal cases will be scrutinised in the following section.

2.3 Integration through Court Decisions

According to many observers, recent developments in the Union may pose a more serious threat than did the constitutional crises arising from the problematic ratification of the Lisbon Treaty. In a series of court judgements – known publicly under the headings of *Laval*, *Viking*, and *Rüffert* – the ECJ has consistently put the provisions of the EC Treaty on the free movement of goods, persons, services, and capital before the rights of employees, as these have been laid down in collective agreements at the national level. These judgements serve to create a body of precedential case-law which, according to the critics, moves the Union in the direction of more market liberalism.

In the *Viking* case, the shipping company of that name – which is subject to Finnish law – had decided to sail one of its ships under an Estonian flag, in order to circumvent Finnish collective agreements. The company wanted to replace the mainly Finnish crew with Estonian workers, whose wages are far lower than those of their Finnish counterparts. After the Finnish union threatened to strike, and the International Transport Workers' Federation requested that its associated unions refrain from negotiating with Viking, the ECJ finally had to decide whether such actions were consistent with Community law.

Similarly, the construction company *Laval* – which is subject to Latvian law – posted Latvian workers to a school-refurbishing job run by its Swedish affiliate company in Vaxholm, just outside Stockholm in Sweden. The Swedish Building Workers' Union then launched a boycott of the site, in order to force the company to abide by the applicable Swedish collective agreements. The company – which later went into liquidation – considered these actions illegal, and the case eventually ended up at the European Court of Justice.

In the *Viking* and *Laval* cases in December 2007, the Court laid down that the right to take collective action on the labour market – including the right to strike – is assuredly an integral part of Community law. The Court explicitly writes in both cases that “the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures”. However, the Court continues, “the exercise of that right may none the less be subject to certain restrictions”.

The right to strike and to take collective action must not, the Court emphasises, be exercised in such a way as to restrict freedom of establishment and the freedom to provide services. The latter freedoms can only be restricted if the public interest requires it, and if the restrictions imposed are suitable for the purpose. Thus, the Court writes in the *Laval* case, “it is clear from case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community, a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest”. In the *Viking* case, the Court writes similarly that “a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that

were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it”.

The right to take industrial action and the right to strike are accordingly subordinate to the principles of the single market. Hence, the Court has shifted the balance between the economic freedoms established at the Union level – freedom of establishment and the freedom to provide services – and the social rights of workers, which are guaranteed mainly at the national level, through legislation and collective agreements. The ability of the Member States to shape their own social models is thus made contingent on its compatibility with the fundamental principles of the single market. Here is how the Court, in its usual juridical prose, expresses its determination that the Member States be forced to acknowledge the priority of market principles: “Even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law”.

Thus, Member States retain the right to shape their own social models, but they must nevertheless respect the fundamental principles of Community law. In his book on the subject, *Fundamental Rights or Trade Barriers*, the Swedish political scientist *Karl-Göran Algotsson* examines how the Court has attempted in these cases to weigh two interests against each other: the right to take collective action on the one hand; market freedoms on the other. While it has considered both interests to be legitimate, the Court has apparently concluded – in these particular cases, at least – that the right to take collective action weighs less heavily than do market freedoms.

In the *Rüffert* case, the conflict had to do with a German construction company which had won a public tender and then used a subcontractor based in Poland for structural work in building a prison in Niedersachsen, a federal state in Germany. German law prescribes that employees receive payment at least as high as the minimum wage at the location where services are to be performed pursuant to the collective agreement in force. However, the Polish subcontractor employed workers on the site at a wage which turned out to be only about half of the minimum wage laid down. When this was discovered, Niedersachsen terminated the contract, on the grounds that the company had failed to comply with the collective agreement. The case was examined by a regional court, which then referred it to the ECJ for a preliminary ruling.

The judgement in the *Rüffert* case was delivered in April 2008. It states, once again, that it is incompatible with the freedom to provide services to demand from employers based in other Member States that they pay their posted employees anything more than the minimum rates of pay fixed by law, or by collective agreements which have been declared universally applicable. And in the Court’s view, the collective agreement in this particular case has not been declared universally applicable. Moreover, the rate of pay specified by the collective agreement in question exceeds the minimum rate of pay provided pursuant to the collective agreement which has been declared applicable in Germany for employers based in another Member State which post their workers to Germany. Similar reasoning animates the

Laval judgement, in which the Court stresses that industrial action is unjustified if the purpose is to demand higher rates of pay than the minimum rates provided for by the *Posting of Workers Directive*, which has been passed by the EU for the purpose of protecting posted workers.

The Court's line in the *Viking*, *Laval*, and *Rüffert* cases has exposed a deep cleavage in the EU: between the drive to safeguard freedom of establishment and the freedom to provide services on the one hand, and the need to maintain different social models in the Member States on the other. The main message from the Court is that, while the right to take collective action is assuredly a fundamental right recognised as an integral part of Community law, the manner in which it is exercised must not pose a threat to the free single market. The rights of employees are accordingly subordinate to the fundamental principles of the single market.

These remarks notwithstanding, however, it is not clear that market principles must always enjoy priority. After all, the Court explicitly says there are legitimate reasons to impose restrictions, even if it deems that no such reasons were present in the cases studied here. However, no action – not even the exercise of fundamental social rights – is protected from being tested and weighed against market principles on a case-by-case basis. In the particular cases under examination here, market principles have come into conflict with one particular social right – the right to collective action on the labour market – but it is conceivable that similar conflicts will appear in other areas which have traditionally fallen within the competence of the Member States. Upon closer inspection, then, it may then turn out that the solutions chosen by certain Member States are in conflict with the fundamental principles of the single market. We already know, for instance, how the Commission and the Court fight against public monopolies (see Chap. 7). What, if anything, can stop other nationally shaped solutions within the area of social policy – e.g., public hospitals, the public housing sector – from being treated in the same way?

The outcome of the above-mentioned cases has quite naturally been interpreted as a big setback for European trade unions. Associations of trade and industry, on the other hand, have welcomed the rulings. Above all – and regardless of where we stand on the issue as such – we must interpret these developments as a failure for the Union's legislative politicians, which have left it to the Court to determine the proper balance between free movement on the one hand and nationally chosen social models on the other. Developments are now drifting towards a market liberalisation of the Union. And this trend is being directed by jurists beyond public control, rather than by publicly elected politicians.

These cases call our attention, then, to the issue of where the boundary goes between the competence of the EU and that of its Member States. They also accentuate the fundamental problems of the Union: the democratic and social deficits. Jurisprudence has put politics out of the game! For some, this de-politicisation of European decision-making is cause for satisfaction: the market is being protected by the suprapstate (meaning the Commission and the Court, ultimately), while national politicians are being prevented from intruding in ways that might threaten fundamental market principles. Others hold that these developments threaten the legitimacy of the entire system. They seek therefore to politicise the Union, or

at least to regain a reasonable balance between politics, the market, and the law. These three solutions to the EU's fundamental problems are the subject of my next section.

2.4 Three Ideas on the Future of the EU

In light of the developments described here, those who are concerned about the future of the EU may be encouraged to discover that there are proposals for reform in the contemporary academic debate which are founded on the facts. Disagreements are no longer based primarily on disputes over what the facts are. On the contrary, the contemporary debate appears to be unusually well-founded in political realities. Few scholars nowadays embrace either the extreme position that prescribes a full-scale *federalisation* of the Union, or that which calls for a *re-nationalisation* of the competences granted to the Union. Instead, the debate centres on how ideals can be reconciled with the political reality in which we live.

The most radical position is that taken by the British political scientist *Simon Hix*. He calls for a far-reaching *politicisation* of the Union, on the grounds that political struggle between distinct left/right alternatives on the basis of majority rule offers the only real solution to the Union's legitimacy problem. Such a development is in fact unavoidable, according to Hix, because more and more of the integration that is taking place concern the degree to which the market should be regulated. As politics in the Union comes more and more to resemble domestic politics, in other words, left/right differences must come to the fore. Such changes will also help the EU to overcome institutional gridlock, promote possibilities for policy innovation and reform, and enhance its democratic legitimacy.

Hix is cautiously optimistic, since he seems to detect progress in this direction. Previous treaty reforms have increased political differences within the EU's institutions, by granting the European Parliament a more prominent role in the legislative process, extending majority voting in the Council, and changing the procedure by which the Commission President is elected. Left/right patterns in voting behaviour are becoming more evident in the Parliament and in the Council, and the Commission too is tending to become politicised along party lines. Hix considers these developments to be positive. The challenge now is to co-ordinate action between these three institutions and to subordinate them to the will of the citizens. Further steps in this direction would be to let the majority set the agenda for the Parliament more explicitly, to open up the legislative process inside the Council, and to nurture a more open competition for the position of Commission President. A greater measure of left/right politics in the EU, then, is a first possible solution for the fundamental problems of the Union. (The role of European political parties in accomplishing this is discussed in Chapter 10.)

Hix's criticism is aimed at those political scientists who want to preserve the blurred accountability relations that follow from the co-government and expert rule characteristic of today's EU. Such a position is represented by the Italian political

scientist *Giandomenico Majone*, who holds that the development urged by Hix would be a worst-case scenario for the Union. European citizens are not demanding a supranational democracy. The democratic deficit, moreover, was designed and sought by the political establishment. Instead of giving opportunistic politicians greater influence over European issues, Majone argues, we should allow the market to be protected by the suprastructure, and hence acquiesce in rule by experts enjoying far-reaching independence – an independence which leaves them free to seek out the best possible solutions to common problems. It is the *de-politicisation* of decision-making that makes it possible to have protection for the market and credibility for the common monetary policy. We should therefore maintain the line of demarcation between traditionally domestic decision-making (which consists essentially of redistributive policies) and regulatory problems that are better dealt with supranationally.

The American political scientist *Andrew Moravcsik* takes a similar position. He too claims that the EU does not suffer from a democratic deficit. On the contrary, the EU is more democratic than any comparable international organisation. Moravcsik takes the view, as does Majone, that the Union has reached a constitutional settlement which maintains a reasonable balance between a limited supranational system of governance for the market, and continued control by Member States over redistributive policies (and for that matter also over armies, police forces, intelligence services, public agencies, and all instrumentalities for exercising the state's monopoly on force). The gist of Majone's and Moravcsik's line of argument, accordingly, is that the Union suffers from neither a social nor a democratic deficit. And if these do not exist, there is no need for any solution. On the contrary, the challenge now is to preserve the present model as much as possible.

If Majone and Moravcsik are champions of the status quo, then, the same can be said of political scientists *Stefano Bartolini* and *Fritz Scharpf*, although their reasons for advocating it are totally different. Changing prevailing conditions in the Union by giving more power to directly elected politicians at Union level – or for that matter by giving the Union's experts and lawyers free reign over the market – would run the risk of disturbing the balance in an already fragile system. Bartolini, for instance, claims that the contemporary EU lacks political parties strong enough to prevent that a politicisation does not lead to uncontrollable antagonisms and conflicts. The politicisation of issues relating to the transfer of powers from the Member States to the suprastructure could result in a highly unstable situation. For precautionary reasons, therefore, it is best to keep the Union as apolitical as possible; this will help to prevent outbreaks of right-wing extremism and the emergence of serious tensions and conflicts among European citizens.

The EU should instead be reformed on the basis of the understanding that it is essential that clear lines be kept between the activities of the Union and those of the Member States. Similarly, the single market must not be allowed to undermine nationally chosen social models. This is the only sustainable solution for the Union in the long run, according to Bartolini and Scharpf. It is therefore of great concern to them that the ECJ, as we saw above in the section on the three legal cases, has taken on the role of protecting the market at the expense of the rights of employees,

as these have been laid out in national collective agreements. This accentuates the fundamental problems of the Union, and endangers the fragile balance contained within it. According to Scharpf, the Court has broken the constitutional settlement between the supranational and the Member States which amounts to an invitation to the Member States to violate the rules publicly. The third solution to the problem of the Union's deficient legitimacy, then, requires that politicians in the Member States take action.

It is among these three positions – *politicise*, *de-politicise*, or *re-balance* – that the Union must seek a solution to its legitimacy problem. Notwithstanding the many differences between these positions, one thing seems to unite them: the view that the constitutional crisis that is said to prevail is not the real problem, so addressing it offers no real solution for the problems faced by the Union. It is, in fact, a diversion that hides the real problem.

2.5 The Need for Political Solutions

The Lisbon Treaty has been depicted by the European establishment as an attempt to democratise the EU. This is not, however, the way European citizens apprehend it. On the contrary; throughout the history of European integration, European citizens have been prepared to accept elite efforts to advance the project because they sympathise with the overall goals but are quite ignorant about the means. Union-level politics has not absorbed European citizens because most policies are still made at the local, regional, and national levels. But this “permissive consensus”, according to which citizens consider the EU and its institutions an acceptable but fairly uninteresting part of the political landscape, has now been called into question. Viewed in this light, the efforts to establish a constitution, and later on a reform treaty, look like a process driven forward by the elites, and for which the Union's citizens have not asked. It is an exaggeration, therefore, to say that the Irish rejection of the new treaty plunged the EU into a crisis, and probably an evasion of the fundamental problem as well.

In this chapter, I have described the Union as an unfinished polity, with an almost complete common market protected by an imperative legal order, and without complementary common social policies. Power in a number of areas is exercised supranationally, but those wielding such power are primarily held accountable within each Member State singly. In addition, market policies are decided jointly, while social policies are decided separately. As a consequence of this peculiar structure, the Union suffers from both a democratic and a social deficit. These unique characteristics cause uncertainty about the long-term sustainability of the Union. The principal question is how far this legally driven integration, with its overriding purpose of protecting the fundamental principles of the single market, can be allowed to proceed before publicly elected politicians lose control over developments. When nationally decided social models are forced into retreat, national politicians will have a hard time explaining to their citizens why the

prevailing balance between the polity, the market, and the legal order must be accepted.

As we have seen, the contemporary debate among political scientists offers no unanimous solution to this quandary. According to Hix, for example, the political left and right should be given the opportunity to compete for power at Union level, and the side winning a majority ought to be given the power to push the “domestic” policies of the Union in the direction favoured by citizens. The losing minority will accept such an order, secure in the knowledge that it can win a majority in the next election. This is what can lend the EU system legitimacy, just as in national political systems. Only in this way, Hix argues, can continued integration win acceptance among European citizens.

In the view of other political scientists, however, letting electoral winds determine the colour of an EU “government” would be both risky and unrealistic in a heterogeneous Europe. According to Bartolini and Scharpf, for instance, such a development would be hazardous for an already fragile political system. It is not primarily politicisation that is demanded by the masses; their concern is rather with getting practical solutions for pressing problems. And if such solutions must be administered at European level, then so be it. What undermines public confidence in the system, ultimately, is the fact that the EU harmonises what the different countries had traditionally regulated on their own. The activism of the ECJ, for instance, threatens the balance between the EU and its Member States. If the Court abstained from hollowing out nationally chosen social models, European citizens would continue to support integration. The sustainable solution over the long run, accordingly, is to regain the balance between supranational regulation and national self-determination. Action is therefore needed from at least some Member State governments willing to fight for their own social and labour-law systems, argue these authors.

There is good reason, however, to doubt the effectiveness of the balancing act urged by Bartolini and Scharpf. There are no signs, for example, of any self-assumed moderation on the part of the Court. Ultimately, it is only joint action from the Member States which can preserve national self-determination. The problem here, however, is that national governments are deeply divided on the matter. What some governments see as an overly aggressive application of market principles is viewed by other governments as the cure for both national and European problems.

It is Majone and Moravcsik, therefore, who are most likely to be satisfied with the state of things. In accordance with the prescriptions of these scholars, a strong suprabate has been established that protects the market and the euro, albeit at the cost of nationally determined social and labour-law systems. The achievement of the European political system is thus found in the fact that publicly elected politicians do *not* have direct influence over the market. This serves to promote efficiency. Politicians care mainly about winning the next election, and are accordingly disposed to put long-term growth at risk. It is the lack of a politicised suprabate that makes the Union efficient, according to proponents of this line of thought. The market will function still better, moreover, if experts – like those now directing monetary policy from Frankfurt – are allowed to set policy in other areas too.

It is the clash among the ideas reviewed above that should guide the political debate on the future of the European Union. The first thing European politicians ought to do is to start debating the right things. The destiny of the EU is not determined by whether or not the Lisbon Treaty comes into force. The fundamental problem centres rather on the need to create a balance which is sustainable over the long run between, on the one hand, safeguarding the fundamental principles of the single market, and, on the other, protecting the right of the Member States – and ultimately of citizens themselves – to choose their own systems for labour law and social affairs.

It is striking that the preamble to the now-buried constitution of the Union reads: “thus ‘United in diversity’, Europe offers them [citizens] the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope”. This idea is, in fact, under strong challenge by the Court, who seems to be prepared to assess everything against the fundamental principles of the single market. Nothing is protected from being weighed against these principles! So the question is whether diversity is any longer possible in a Europe where the principles of the single market have achieved a higher standing than fundamental social rights.

Sources and Literature

Those seeking to grasp the academic debate on the future of the EU would do well, in my view, to read the exchange of views between Simon Hix and Stefano Bartolini in “Politics: The Right or the Wrong Sort of Medicine for the EU?”, *Notre Europe Policy paper No. 19*, 2006, accessible from the homepage of the “think tank” *Notre Europe*: http://www.notre-europe.eu/uploads/tx_publication/Polycypaper19-en_01.pdf. Hix has also written a book on this theme which is well worth reading: *What’s Wrong with European Union and How to Fix It* (Polity Press, Cambridge, 2008). Bartolini sets out his viewpoint exhaustively in *Restructuring Europe* (Oxford University Press, Oxford, 2005).

Another position in this debate is taken by Giandomenico Majone, in *Dilemmas of European Integration* (Oxford University Press, Oxford, 2005); and in his article, “The Common Sense of European Integration” (*Journal of European Public Policy*, 2006). Andrew Moravcsik sets out his arguments in “The European Constitutional Settlement” (*The World Economy*, 2008); and in a number of other texts accessible from his homepage: <http://www.princeton.edu/~amoravcs/>. Fritz Scharpf presents his views clearly in *Governing in Europe – Effective and Democratic?* (Oxford University Press, Oxford, 1999); and in his working paper, “Legitimacy in the Multilevel European Polity” (*MPIfG Working Paper 09/1*, 2009). I would also like to recommend Sverker Gustavsson’s chapter, “The Living Constitution of the EU”, in Beate Kohler-Koch & Fabrice Larat (Eds.) *Efficient and Democratic Governance in the European Union* (CONNEX Report Series Vol. 9, 2008), accessible at: <http://www.connex-network.org/series>. My contribution to the debate on the fundamental

problems of the Union can be found in the introductory and concluding chapters of the volume, *The Illusion of Accountability in the European Union* (Routledge, London, 2009), co-authored with Sverker Gustavsson and Christer Karlsson.

An abundance of literature is available, of course, on the distribution of competences that has developed historically between the EU and its Member States. A good way to proceed would be to read a review article by Arthur Benz and Christina Zimmer (and for further reading simply to follow up the references cited therein): “The EU competences: The ‘vertical’ perspective on the multilevel system” (*Living Reviews in European Governance*, 2008), accessible at: <http://www.livingreviews.org/lreg-2008-3>. The asymmetrical construction of the Union, and the social and democratic deficits following thereupon, is discussed in several publications by Christian Joerges: see, for instance, his article co-authored with Florian Rödl: “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*” (*European Law Journal*, 2009). See also Sverker Gustavsson’s chapter, “Defending the Democratic Deficit”, in Albert Weale & Michael Nentwich *Political Theory and the European Union* (Routledge, London, 1998).

The legal cases discussed here (*Viking*, C-438/05, *Laval* C-341/05 and *Rüffert* C-346/06) can be found on the webpage of the European Court of Justice: <http://curia.europa.eu>. A solid exposition of the debate on the freedom to provide services and the right to take industrial action can be found in Karl-Göran Algotsson’s article, “Will the Swedish Labour Market Model Survive in the European Union?” (forthcoming). The *Laval* case, among others, is discussed extensively therein. I would also recommend Martin Höpner and Armin Schäfer’s “A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe” (*MPIfG Discussion Paper 07/4*, 2007). In addition, Notre Europe has published a very readable debate on the legal cases discussed here; see “Economic Freedoms Versus Fundamental Social Rights – Where Does the Balance Lie?”, accessible at http://www.notre-europe.eu/uploads/tx_publication/FlyerECJ-en_01.pdf.

Finally, the expression “permissive consensus” – discussed at the outset of this chapter – was first used by Leon Lindberg and Stuart Scheingold in the 1970s, in *Europe’s Would-be Polity: Patterns of Change in the European Community* (Prentice Hall, Englewoods Cliffs, NJ, 1970).

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