



Béla Pokol¹

Legitimacy Problems of the EU Juristocracy

The European Union is an international legal formation that was created by an international treaty and not as a state, but its permanent existence over the member states united by the treaty means a superior machine of power that in many ways determines the exercise of power and decisions within states. In particular, by including EU citizenship in the Basic Treaty in addition to the citizenship of each country, the EU made a big step towards transforming it into a real state and it is increasingly becoming a semi-federal state. This has been the most important issue of power struggle within the political elites of the member states from the beginning. This raises the question of what arguments justify and legitimise this machinery of power over the Member States. Are there any such arguments in the ongoing debates about the functioning of the EU, and in theoretical considerations about the nature of the Union? The answers can determine the direction in which the EU must change its organisational structure in order to be legitimate in front of more than half a billion citizens.

Theoretical considerations regarding the necessity of legitimising states and their exercise of power did not emerge with some authors of state theory until the beginning of the 20th century, but justifications can be found, for example, in the early Roman Republic without explicit theoretical considerations. At that time, Agrippa's famous story attempted to justify the structure of rule, including the dominance of the patricians, in the withdrawal of plebeians who were dissatisfied with patrician rule, and explained the role of certain Roman social groups in this regard before the plebeians, and justified this with an analogy to the functions of important parts of the body. In the same way, many more stable state powers in the course of civilisations had a way of justifying the assumption of power, such as the assertion of the divine nature of the pharaoh, of the emperor, or the justification of the power delegated by the gods as can be seen in the ceremony of papal anointing of the earthly ruler in the Christian Middle Ages. In the same way, Lenin's theory at the beginning of communist

¹ Professor, Eötvös Loránd University Faculty of Law Institute of Political Sciences. Contact: pokolb@ajk.elte.hu.

rule of the Soviet empire presented the legitimacy of the avant-garde that led to communism as a fulfilment of historical necessity.²

However, the question arises as to why this EU formation, which was created through international treaties and continually modified through treaty changes, has to be justified by special legitimacy efforts at all? It was created by democratic states so that its democratic legitimation also radiates this formation. This was certainly not a problem for the European Economic Community after it was founded in 1957, since after the Treaty of Rome was created by the Member States, all decision-making powers were in the hands of the Council of Ministers, which represented the governments of the Member States. Although the Commission has been chosen independently by the heads of state or government of the Member States, this body only has the right of initiative over the actual decisions of the Council of Ministers, and does not take decisions, although it has a monopoly in this regard and the Council can only decide what the Commission proposed. In principle, however, the Commission and the EU power machinery do not have their own decision-making powers over the intergovernmental mechanism, so they did not have to be legitimised separately. The liberation of the EC and then the EU from full competence of the Member States was only achieved through a series of rulings by the European Court of Justice; the ECJ proclaimed in 1962, then in 1964, the decisions of *Van Gend en Loos* and *Costa v. Ennel* the direct effect of Community law in the Member States in addition to their national law and its precedence over national law in the event of a conflict between them. Since the Treaty of Rome did not include an accountability mechanism for the Court of Justice and there was no lifting mechanism against this 'judicial coup', the Community and then the European Union that replaced it began to act as an independent decision-maker.

It quickly became clear that the European community and then the EU power structure, which exercised considerable decision-making autonomy, freed itself and deviated from the democratic legitimacy of the governments of the member states. Since the modern form of legitimation developed in Europe and it became widespread in many parts of the world, that is, justification of state power can only be achieved through the election of millions of citizens, the debate on this topic has been termed a 'democratic deficit'. This debate, of course, too benevolently obscures the fact that no democratic deficit should have arisen in the power structure created by the Treaty of Rome, since it was originally driven by the interstate machinery of the Member States and was legitimised 'from

² For a more detailed analysis of the question of the legitimation of states, see Béla Pokol, *Politikaelmélet. Társadalomtudományi trilógia III* [Political Theory. Trilogy of Social Sciences. Vol. III] (Budapest: Századvég, 2006), 91–102.

home". The deliberate wording of the democratic deficit in the debate on the European Community, however, was more to transform the parliamentary assembly, which was originally referred to as a delegate from the national parliaments, from a mere consultative to a real parliament. In the 1960s, MEPs confidently renamed themselves here and also achieved direct elections and the name of the European Parliament in the new founding treaties. However, this has not changed the fact that, beyond the peoples and national identities of individual countries, there is no single European people and no single European identity and, therefore, parties at European level that gradually emerge from national parties are only loose formations.

The debates on the democratic deficit, therefore, only mask the deeper struggle, since a significant proportion of the political elites in the Member States believe that there is no deficit here, but only those power groups should be pushed back that want to transform the EU into a federal state and restore the original Treaty of Rome, namely to put the exclusivity of the intergovernmental structure created by the Treaty in the centre of the EU. In contrast, the federalist supporters want to make the European Parliament the main power and convert today's Commission into a government or make it dependent on the majority of the EP. The long-term processes that have led to Euroscepticism show that the power of intergovernmental forces will increase in both the EP and the Commission, depending in part on how the balance of power changes after the EP elections in May 2024, but the ECJ will remain intact and the standoff is unlikely to be resolved. (It is, therefore, worth mentioning in brackets that due to the existence of this supreme judicial power, it is right to call the EU's power structure a juristocracy!) Therefore, in addition to call attention to the democratic deficit, let us also consider the other theoretical considerations regarding the legitimacy of the EU.

The answers to this question can be divided into four main trends. According to one answer, the EU institutions themselves largely create an abstract EU law, which is interpreted by the European Court of Justice, but the application of state sanctions is carried out by the member states and their courts, so that no legitimation at EU level is required (1). The other admits the need for legitimacy because of the legal power of EU institutions, but gives legitimacy to EU institutions as a neutral arbiter over selfish power struggles between member states, who deserves recognition as the defender of neutral justice over the member states. The highest power of the ECJ also protects individual EU citizens from their own state, and, in this way, this juristocracy is legitimised as an administrator of justice (2). A third line of legitimation reinterprets the justification for democratic elections and extends it as a mere input legitimation with output legitimation. The content of the output legitimation relates to the welfare growth created by

the Union, to legal solutions and to disputes between European countries instead of war, and so on, and instead of a democratic deficit, it emphasises the output side as justification (3). Finally, the fourth argument for legitimising the power of the EU institutions projects the future vision at the beginning of European integration, which has shown European integration as the land of promise for European citizens (4).

A juristocratic confederation together with a number of democratic member states as a solution to the problem of legitimation

In a critical study, *William Scheuerman* examined the idea of *Hauke Brunkhorst* and *Jürgen Habermas*, which arose after the failure of the European Constitution in 2003 and which dealt with the possibility of global governance without a global state, taking into account the possible legitimation of the EU.³ After Scheuerman's reconstruction, Habermas basically only followed Brunkhorst's analyses of the EU, which, in turn, was based on Kelsen's theory of the world legal revolution from the early 1950s. Scheuerman's reconstruction creates a specific EU legitimation basis for Habermas and Brunkhorst, from which he distances himself, but the structure of this issue of legitimation is clearly visible in his explanation.

The essence of this legitimation is that Brunkhorst and Habermas separate the individual government functions, and while the state administration and law enforcement function remains at the level of the member states (which must be legitimised!), only the legislative function will take place without direct compulsion at the EU level transfer. The latter essentially means that the fundamental treaties are specified by the European Court of Justice and, based on this specification, only the abstract EU law is created by the Commission, the Council and the co-decision EP. In this way, the EU is only an abstract legal apparatus, the law of which is applied in practice at the level of the member states and ultimately enforced under state pressure.

In this presentation, legitimation only requires the constitutional judgments of the European Court of Justice as the centre of legal machinery at EU level, while the executive decisions and ultimately the coercive measures of the Member States, which are subject to EU law, require democratic legitimacy and they undoubtedly have this legitimation. Brunkhorst and, in his footsteps, Habermas even readily recognise that the creation of EU law, which is shaped by the consensus of the

³ William E Scheuerman, *Frankfurt School Perspectives on Globalization, Democracy, and the Law* (New York – London: Routledge, 2011), 75–104.

member states at EU level, does not constitute statehood. In his opinion, the search for a federal state should be a misguided adherence to an old tradition of thought.⁴ In today's intertwined globalised world, world government or regional governance like the EU no longer require statehood and sovereignty because, at their discretion, these concepts are only partially valid, which is no longer appropriate in a fully globalised world. These concepts have been partially reinterpreted and partially rejected by them, and, in recent years, at the discretion of the Western world, three-tier governance has been established that radiates from there around the world.⁵ The world government is regulated by the United Nations and specialised world organisations, such as the WTO or the World Labour Organization, the ILO, and so on, which bring about comprehensive human rights standards and their industry-specific standards. In this context, regional organisations like the EU form additional standards, which means that the human rights standards are specified at this level. However, in addition to the Member States (at least in the EU), individual citizens and legal entities are recipients of EU standards and EU rights, about which they can hold their nation states also accountable. At this level, however, this does not require an organisation with statehood, but a 'confederation of states' that has been known in the past is sufficient. Ultimately, the lowest level belongs to the (nation) states and they have the remaining elements of sovereignty, but this level is under the control of the higher levels.

In William Scheuerman's criticism, however, it is clear that this picture is idealised and a number of tensions are hidden. The assumption that a constitution without a state (only in a loose confederation) is possible, contradicts the obvious tendency that if the member states disobey, the entire EU system can be put into question without a coercive apparatus.⁶ Ultimately, this type of liberation of the EU from statehood (= monopoly-forced use) and thus from legitimation means nothing more than the uncertain floating of decades in the state of semi-statehood and this is presented here as a final solution. But if past prosperity and peaceful global economic conditions disappear (as they now appear), this could drag the bottom out from under it. So this explanation only shifts the answer to the problem of legitimation.

⁴ Scheuerman ironically points out that even before the fall of the draft European Constitution to implement federalisation in 2005, Habermas was the main proponent of EU statehood in referenda. (Scheuerman, *Frankfurt School Perspectives*, 88)

⁵ See Hauke Brunkhorst, 'Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit', in *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, ed. by Mathias Albert and Rudolf Stichweh (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), 63–107; Jürgen Habermas, *The Divided West* (Cambridge: Polity Press, 2006).

⁶ Scheuerman, *Frankfurt School Perspectives*, 82–96.

Exposing and justifying the EU's juristocratic character

Jürgen Neyer follows Brunkhorst and Habermas in that he also regards the search for the EU's democratic legitimation as a bad question and answer, but he does not claim that the EU does not need legitimation without a violent apparatus, but only the member states that use coercive means. In his view, the EU has a high level of legitimacy, but has so far been searched in the wrong direction. The title of a study on the subject, *Justice not Democracy*, summarises its position.⁷ In this context, he argues that ensuring justice in the relations between Member States and beyond guarantees the rights of individual EU citizens against their own state through EU courts and this is a specific basis for the legitimacy of the EU. Neyer is not concerned with the parliamentary elections in relation to the legitimacy of the EU, which must be debated here, because there is no such thing as European people; instead, there are at least twenty national communities, represented by national parliaments in a way that is never accessible to the European Parliament, but the abolition of dominance between weaker and stronger Member States and the decision of the European Court of Justice in their disputes turn power disputes into legal justifications. The arguments under the EU treaties and secondary EU law and in the EU replace the earlier power decisions with legal justice decisions. Likewise, the fact that EU law entitles citizens to legal protection against their own state means that the citizens of the Member States can demand a justification for the EU member state measures that restrict their freedom. And if this justification is insufficient, the EU court enforces the right of EU citizens to actual justification by annulling the state measure.

This is the basis for the legitimation of the EU, which Jürgen Neyer describes with a basic formula as 'right to justification': 'It is justice, not democracy, which is the appropriate concept for questioning and explaining the legitimacy of the EU. [...] In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations, be the global economic structures, domestic election procedures or the EU. [...] It relaxes the national-state focus inherent in the language of democracy and opens the way for reflecting about new means to facilitate legitimate governance. It is a critique of methodological nationalism and asks for new solutions to new problems.'⁸ The right to justification as a legitimising principle essentially means

⁷ See Jürgen Neyer, 'Justice, Not Democracy. Legitimacy in the European Union', *Journal of Common Market Studies* 48, no 4 (2010), 905–923.

⁸ Neyer, 'Justice, Not Democracy'. 906. The articulation of the democratic deficit as a manifestation of 'methodological nationalism' sounds innocent to the Hungarian ears, but it should be pointed out that the adjective of nationalism among Germans (especially in German intellectual

that any measure restricting an individual or a private organisation in the EU (both at Member State and EU level) must be justified and that justification can be challenged before an EU court. And if the Court considers this to be insufficient, it declares it to be incompatible with EU law and ultimately imposes it by imposing a penalty (in the final stage of the infringement procedure).⁹

With this shift in focus, Neyer places the European Court of Justice at the centre of the EU's power structure, and this is in line with the real power structure that we have examined so far. Accordingly, effective EU law results from the case law of the European Court of Justice, in which the treaties are freely and fundamentally interpreted against the will of the founding states, which is essentially the constitutional adjudication of this Court. As a further effect of its case law, the Commission largely codifies the case law of the Court of Justice with its monopoly on the proposal of regulations and directives and submits it to the Council for adoption. The Member States could only act unanimously to amend the Court's decisions on the interpretation of the treaties, which is practically impossible due to conflicts of interest. Not only for this practical reason, but also formally, Luxembourg judges are insured against the questioning of this decision-making structure, which secures their highest power position, since the existing situation is also formally anchored in the basic contracts. Under Article 281 TFEU, the Council and the EP have the right to rule on an amendment to the Statute of the Court of Justice of the European Union under the co-decision procedure, but they can do so on a proposal from the Commission if the Court agrees.¹⁰ Otherwise, they can rule on a proposal from the Court in this area, in which case the approval of the Commission is required before a decision can be made. In other words, the Court of Justice is indispensable for changing its

life!) has been synonymous with 'Nazi' for decades. Although all topics are saturated with emphasis, this is above average in Jürgen Neyer's German intellectual environment, and the assessment as 'methodological nationalism' essentially implicitly expresses the need for a moral judgment regarding the opposing debaters.

⁹ See in the wording of Neyers: 'The idea of justice as a right to justification has the important strength that it is both empirically and normatively sound. It is established on the assumption that we have a human right to demand and receive justification from all those individuals or organizations, that restrict our freedom. This does not necessarily imply that no limitations of our freedom are legitimate, but only holds that the legitimacy of any such intervention depends on the reasons that are given to explain it.' (Neyer, 'Justice, Not Democracy', 910)

¹⁰ Article 281 TFEU: 'The provisions of the Statute for a Court of Justice of the European Union, with the exception of Title I and Article 64, may be amended by the European Parliament and the Council in accordance with the ordinary legislative procedure. The European Parliament and the Council act either at the request of the Court of Justice and after consulting the Commission, or on a proposal from the Commission and after consulting the Court of Justice.' The text does write a consultation that leaves open whether the involvement of the Court of Justice means a right of consent or just a simple request for comment, but if at least once would result

decision-making mechanism, and, in this way, it is formally elevated to the role of the highest EU power because it is essentially free as it has been in the EU's founding treaties for over sixty years of uncontrolled interpretation. That is why the EU, at its deepest foundation, is not based on the principle of democracy but on juristocracy. This means that the functioning of European societies and the changing of details in power struggles with legal or disguised arguments will ultimately always be decided by the Court.

Thus, with regard to the main power role of the Court of Justice, one has to agree with Neyer, but it has to be critically asked whether this structure of juristocracy is actually the embodiment of justice or whether it is just a disguise of power struggles in which the dominant power groups fight while the masses of millions of Europeans are pushed back. This brings to the fore the dominant social groups, which may not have been in power through the elections, but have the resources of the intellectual and media sectors, and can, therefore, assert their interests behind juristocracy. I do not want to repeat the analysis of previous thoughts on NGO networks established by some wealthy global foundations behind the ECHR and the EU institutions, so I will only refer to them. The narrative taken seriously by Neyer, according to which EU citizens have only been given the right and freedom to act against their own states by the Court of Justice and the ECHR, is already evident in the above-mentioned decisions of the 'judicial coup' of 1962–1964 (*van Gend and Costa v. Ennel*) in which this emerged as an argument. In this narrative, Member States' rights were granted directly to citizens, and this was portrayed as a radical extension of rights. However, this obscures the much more important point that, instead of a system of Member State leadership that has been created and cyclically replaced by citizens in their parliamentary elections, an elite of judges not elected by them begins to make decisions about them, as well as the fact that their centuries-old National communities and nation states have started going down on the path of putrefaction.

For me, this one-sided, wrong argument gives rise to the argument that is often heard, and which has defended the trend within states in recent decades for constitutional courts to extend constitutional rights at the expense of legal rights, that constitutional judges only give new fundamental rights to citizens, and whoever goes against it can only be bad! In fact, what elevates an activist constitutional court from a simple level of legislative law to a constitutional jurisdiction by referring to a constitutional principle has once been removed from the

from an internal shift in power – for example after the EP elections in 2024 – a binding interpretation by the Court of Justice to rule on the case, then the Commission and a majority of the EP would confront the Court of Justice over its interpretation.

scope of legally changing rights and the legislature will no longer have it from now on. In other words, it empties the scope of citizens' democracy and gives them a constitutional right, while, at the same time, takes away the democratic stipulation. Of course, this essential moment is missing in the narrative, and Neyer uses this narrative even if he legitimises juristocracy rather than democracy.

Democratic but relativised legitimization: Input legitimization versus output legitimization

In addition to the suppression of the legitimization principle of democracy mentioned above, there were lines of argument that wanted to keep this legitimization, but only in a weakened form.

In addition to the democratic legitimization in the member states, in which the state power depends on millions of citizens, the leaders of the highest power of the EU, the European Court of Justice and the Commission do not depend in any way (as the former) or only indirectly (as the latter) on elected bodies. Although the Council has democratic legitimacy with the ministers of the Member States, its decision-making powers are limited because the Commission has a monopoly on proposals before taking a decision. The problem of EU legitimacy was, therefore, primarily raised as a democratic deficit.¹¹ This was changed for the first time by Fritz Scharpf's distinction from the conceptual apparatus of systems theory in the 1990s, which reformulated the concept of democratic legitimization as input legitimization and also considered output legitimization possible.¹² With this enlargement, it has become possible that the EU's power decisions can only be linked in a fragmentary way to democratic legitimacy, but that its arguments for prosperity and economic growth can be justified in front of millions of people. This expansion was already evident in the 1970s in analyses of the legitimacy of today's western democracies as a supplement to true legitimization, which was represented with the category of *diffuse mass loyalty*, which is, however, only brainwashing and distraction from public affairs in the consumer society. This is to say that only a lower level of satisfaction and acceptance is created, but not the level of recognition that legitimization requires. But in this reformulation, this

¹¹ An exception to this is Andrew Moravcsik, who despite a dozen critical studies describes the structure of the EU as a model of democratic empowerment. See Andrew Moravcsik, 'In Defense of the "Democratic Deficit": Reassessing Legitimacy in the European Union', *JCMS* 40, no 4 (2002), 603–624.

¹² See after several explanations, for example Fritz W Scharpf, 'Problem-Solving Effectiveness and Democratic Accountability in the EU', *MPIfG Working Papers*, no 1 (2003).

negativity has already disappeared here and, as two members of an equivalent pair, the input and output legitimization stand side by side.¹³

In this way, however, they not only extended the proof of the legitimacy and worthiness of the recognition of the existing state power to the achievements created by power (welfare, consumption, and so on), but also limited the question of legitimization to the legitimization of the current state power. This narrowing becomes visible only if we focus on the fact that the legitimization debate originally dealt with whether the divine origin of state power and the consecration of the current new king through papal anointing or another Christian rite of the ruling dynasty were sufficient to do so to justify. Or, as it spread after Rousseau in the late 1700s and especially in the 1800s, only state power derived from the people can be considered legitimate. The elections were only a technical means of doing this, but in Hungary, for example, this democratic legitimization was literally not accepted by Margit Schlachta's Legitimacy Party even after 1945. (In contrast to the two, the legitimacy of the Communist–Leninist avant-garde for the legitimate leadership of society proclaimed the power of a state leadership that understood and applied the scientific laws of society and did not require popular elections!)

Since the turn of the millennium, the explanation of the power structure of the EU with this dual legitimization concept – input/output – has become common practice, and even if there are problems with democratic legitimization on the input side, this can be corrected accordingly with the performance legitimization on the output side. This was refined by a study by *Vivien Schmidt* from 2013, which introduced the *throughput legitimization* in addition to the two – by dividing the output side into two. These are indicators of the quality of the governance process – efficiency, accountability, openness, transparency, inclusion of the ruled people, and so on – and it summarises these indicators as a third side of

¹³ Claus Offe started criticising diffuse mass loyalty instead of legitimization in the early 1970s and for me it was key in Eastern Europe to formulate that in the early 1980s, in the Kádár Hungary ('Goulash Communism') after the former tougher Stalinism, in which legitimization by the future of communism had already been given up, *legitimation by consumption* formed the basis of legitimacy. Even if the level of domestic consumption did not reach the level of the West, but its continued small increases since the 1960s – and especially with reference to the plight of the other surrounding socialist countries – was widely recognised. Since this part was removed from my first article in *Valóság* in Hungarian on this subject in 1981, I could only publish it as an article in the university magazine in German. See in Hungarian: Béla Pokol, 'Stabilitás és legitimáció' [Stability and Legitimation], *Valóság* 26, no 1 (1983), 13–22; and in German: 'Stability and legitimization. The reinterpretation of legitimization in Western sociology', *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Section iuridica* 26 (1984), 173–179. But in my analysis it was clear that it is not legitimization, but an addition to its lack.

legitimation.¹⁴ In my opinion, however, this only answers the success of a particular EU government (Commission) in front of hundreds of millions of people as a subordinate question, but it does not answer the way in which the Union is managed and how it is identified. This superficial nature comes to the fore when a major global economic crisis or other global catastrophe suddenly pulls the soil out of the previously appropriate level of economic governance and welfare. It then becomes clear to what extent the masses regard the power over them as worthy of recognition in addition to everyday problem solving, and to what extent they feel strong in their identity with them so that they themselves can endure great difficulties. On the other hand, their tolerance was previously only for everyday comfort and what they thought about a state power worthy of recognition was suppressed.

The global economic crisis that began in 2008 and has yet to be seen to end – and economic analyses are constantly predicting even more serious phases in this area – as well as the already visible outlines of Europe’s demographic breakdown and the EU’s sluggishness against the influx of millions of Muslims, the previous level of diffuse mass loyalty to the EU has been resolved in recent years. Especially since the governments of the member states have already started to tackle these problems due to increasing mass dissatisfaction, and it is the EU elite in Brussels and Luxembourg that is blocking this due to their previous political practice and case law. This raises the question of legitimacy and the question is: ‘Who authorised them to paralyse the governments that we have elected with a parliamentary majority?!’ On the one hand, the positive results of the Union will disappear and on the other hand, it will be irrelevant that the Brussels elite will otherwise discuss the plans with thousands of self-created NGOs and that the expenditure of the Commission and some of its Directorates-General will be transparent. As was the case with Kadarism in Hungary, it only lasted while this one-party system without real elections managed to make itself bearable by a so-called legitimization through consumption.

The legitimization of the EU ‘by’ the future and its eventual decay

Joseph Weiler was not satisfied with the reinterpretation of democratic legitimization as the devalued input legitimization and the expansion of output legitimization

¹⁴ ‘Throughput legitimacy builds upon yet another term from systems theory, and is judged in terms of the efficacy, accountability and transparency of the EU’s governance processes along with their inclusiveness and openness to consultations *with* the people.’ Vivien A Schmidt, ‘Democracy and Legitimacy in the European Union Revisited. Input, Output and “Throughput”’, *Political Studies* 61, nos 1–2 (2013), 2–22.

did not meet his theoretical needs. Although he had been a star professor of the Brussels–Luxembourg lawyer-elite working towards a federal Europe since the early 1980s, and he had been a key player in the academic backing of the tandem between the Court and the Commission, and for several decades he had been moving towards a pan-European federation, following the failures that the EU suffered in this area, he pointed out with utmost sincerity the internal contradictions and the baselessness of the entire project, which he had previously helped. After the failure of the draft European Constitution of 2005, in which Weiler had played an important role before the failure with the EUI lawyers in Florence, and the impact of the global financial crisis of 2008 on Europe, he considered the cause of the failure in several studies. As a young EUI researcher, he was involved in the creation, support and research of an increasing level of European integration with this institute from the second half of the 1970s, and he found that in the years after the millennium, the entire milieu of the EU aspirations had changed. The earlier milieu, which characterised the founding of the French and Italian associations for European law in the mid-1950s (mainly with members who had been socialist and communist partisans against the German occupation in the Second World War), was filled with the belief of a united Europe as a Promised Land. He saw this milieu as gone and this change has shown him that this is not just about the ‘democratic deficit’ and that the output legitimacy that has been developed to cure it and express the EU’s welfare benefits was more like the ‘circus and bread’ method to please the crowds in dying Rome.

Except for a few smaller groups and countries, an ever closer European integration has not been called into question up till then. What caused this change and what has changed so far that the original ideal is no longer effective? – asked Weiler. His answer arose from the fact that post-World War II European integration promised to end the gruelling war between peoples and the highest level of hostility and hatred that had lasted for many years, and it proclaimed a prosperity perspective instead of deprivation and hunger. For the European elites, this was the land of promise, and everything that was wrong in their daily lives meant exceeding it and reaching almost earthly paradise. With a view to Soviet ideology, Weiler saw the power of the Bolshevik avant-garde, which was legitimised by the future of communism, but also in the fascist Italian and German states he saw the legitimisation with the visions of the future in front of enchanted masses.¹⁵ In a vision of a wonderful future state, he even demonstrated

¹⁵ Naturally, he emphasises that, in contrast to the visions of communism and fascism, which led to terrible consequences, the vision of European integration was incomparably nobler and he did not want to exempt the two terrible systems. (Weiler, ‘Europe in Crisis’, 256)

legitimacy in the great European states of the 19th century. With this justification through future visions, these states have achieved widespread recognition. Against this background, in his opinion, democratic legitimacy was accepted for states only from the middle of the 20th century, but was only accepted by the European economic community, which was created without a state organisation and whose goals found the greatest support among the peoples and elites of the then Western European member states and the legitimisation was spontaneously restored through future visions. Legitimation through the future ensured that the broad masses regarded the march towards ever closer integration as commendable. But when the goals were largely achieved, the hatred between the French and the Germans disappeared and the prosperity rose to unimaginable heights and the needy were also granted social benefits and so on, this condition was obvious to the new generations, and the legitimisation through visions of the future have lost their appeal. In addition, the discrepancy between the promised ideal state and the distortions of everyday reality leaves only feelings of disillusionment and deception. The global crisis of 2008 and the stagnation of prosperity that had plagued the masses for years had completed the reversal of earlier positive relations with the EU. The rapid rise in Euroscepticism is only a superficial sign that it is really the deeper legitimisation crisis of the entire integration project.

What way out does Weiler see in his diagnosis? We have to stop here because he has two writings for this problem from 2011 and 2012, and there is a big shift in the latter compared to the previous one. The first was given by him as a guest professor at the *Herti School of Governance* in a lecture and is available online as a study. The second was published a year later, which, in addition to an important insert, means the earlier one. The first lecture ends with a pessimistic statement that future legitimisations always are like this, and that the land of promise is necessarily only fragmentary, and is, therefore, always followed by a sober disillusionment. If it could, democratic legitimacy would help, but it has been lacking in the EU's historical past. In Weiler's words: 'Democracy was not part of the original DNA of European integration.'¹⁶

However, in his 2012 publication, there was a major change that put the issue of legitimacy from Weiler in a completely different perspective. In the insertion here, he emphasises the role of the European Court of Justice in the constitutionalisation of the originally international community law and the institutions of the community (and later the EU). He points out that he does not want to criticise this and has pushed integration in the right direction, but that it has led to the overestimation of the unsuitable EU institutions (the Commission,

¹⁶ Joseph H H Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', *The International Journal of Constitutional Law* 9, nos 3–4 (2011), 694.

the Council, COREPER and the EP). These organisations are only caricatures of true democracy, but the Luxembourg decisions of 1962–1964 on the direct effect and the primacy of Community law over the law of the member states have constitutionally constituted these bodies for which task they were actually not suitable: ‘But can that level of democratic representation and accountability, seen through the lens of normative political theory, truly justify the immense power of direct governance which the combined doctrines of direct effect and supremacy placed in the hands of the then Community institutions? Surely posing the question is to give the answer. In some deep unintended sense, the Court was giving its normative imprimatur to a caricature of democracy, not the thing itself.’¹⁷

Although Weiler expresses himself vaguely – he half criticises, half defends the Luxembourg judges – he sees the causes of the lack of legitimacy and the current fate of the EU as well as the growing scepticism about European integration in the decisions of the European Court of Justice in 1962–1964, which started the constitutionalisation and the federalisation of European integration. The EU cannot do justice to this, and even the global crisis and other crises (for example millions of migrants) question its successes so far, not to mention the future increase in wealth and security in question. The suffocation of legitimisation by the future has given us no chance for decades to restore the old belief. This raises the question of how Weiler sees a way out after genuinely acknowledging the failure of the EU’s constitutionalisation and federalisation project. Taken into consideration that for decades, he was the chief professor and then director of the EUI, which helped the lawyers in Brussels and the judges in Luxembourg, and acted as editor-in-chief of several European legal journals, one could almost regard his proposals as expressions of genuine repentance. In comparison, he now sees a way back to the return to nation states: ‘It will be national parliaments, national judiciaries, national media and, yes, national governments, who will have to lend their ‘legitimacy’ to a solution which inevitably involve yet a higher degree of integration. It will be an entirely European phenomenon at what will have to be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of ‘legitimacy’ in the integration project will be affirmed yet again.’¹⁸

Weiler’s recognition that the ‘revolution’ of the European Court of Justice in 1962 and the over-stretching of the entire institutional system of the EU towards federalisation have caused the entire legitimacy crisis to be clarified by

¹⁷ Joseph H H Weiler, ‘Europe in Crisis – On Political “Messianism”, “Legitimacy” and the “Rule of Law”’, *Singapore Journal of Legal Studies*, December 2012, 265.

¹⁸ Weiler, ‘Europe in Crisis’, 268.

the fact that today's dead end means an intermediate phase, that is, the EU is a mixture of the semi-federation and the half-blocked, partially oppressed nation state member states, and the dead end can only be removed by an eruption in either direction. Fragmented national identities and the lack of a single European people and identity only make this a realistic direction for the restoration of the sovereign nation state, and the last sentences of Weiler's writings suggest this. He wants to achieve this by returning to nation states and letting them be the main protagonists who sincerely determine the creation of a federal Europe instead of only the Courts doing this. In contrast, it should be emphasised that if we have truly learned from the EU's failure to date, we must use the return to the 1962 situation and to European integration at the level of a European Economic Community. This is the only way to ensure that the EU will be fully functional again through intergovernmental mechanisms, and thus the democratic legitimacy that the member states are realising 'from home' will also eliminate the crisis of legitimacy here.

References

- Brunkhorst, Hauke, 'Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit', in *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, ed. by Mathias Albert and Rudolf Stichweh. Wiesbaden: VS Verlag für Sozialwissenschaften, 2007, 63–107. Online: https://doi.org/10.1007/978-3-531-90636-2_4
- Habermas, Jürgen, *The Divided West*. Cambridge: Polity Press, 2006.
- Moravcsik, Andrew, 'In Defense of the "Democratic Deficit": Reassessing Legitimacy in the European Union'. *JCMS* 40, no 4 (2002), 603–624. Online: <https://doi.org/10.1111/j.1468-5965.00390>
- Neyer, Jürgen, 'Justice, Not Democracy. Legitimacy in the European Union'. *Journal of Common Market Studies* 48, no 4 (2010), 905–923. Online: <https://doi.org/10.1111/j.1468-5965.2010.02079.x>
- Pokol Béla, 'Stabilitás és legitimáció' [Stability and Legitimation]. *Valóság* 26, no 1 (1983), 13–22.
- Pokol Béla, 'Stability and Legitimation. The Reinterpretation of Legitimation in Western Sociology'. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Section iuridica* 26 (1984), 173–179.
- Pokol Béla, *Politikaelmélet. Társadalomtudományi trilógia III* [Political Theory. Trilogy of Social Sciences. Vol. III]. Budapest: Századvég, 2006.
- Scharpf, Fritz W, 'Problem-Solving Effectiveness and Democratic Accountability in the EU'. *MPIfG Working Papers*, no 1 (2003). Online: www.econstor.eu/bitstream/10419/41664/1/639580440.pdf
- Scheuerman, William E, *Frankfurt School Perspectives on Globalization, Democracy, and the Law*. New York–London: Routledge, 2011, 75–104. Online: <https://doi.org/10.4324/9780203932377>
- Schmidt, Vivien A, 'Democracy and Legitimacy in the European Union Revisited. Input, Output and "Throughput"'. *Political Studies* 61, nos 1–2 (2013), 2–22. Online: <https://doi.org/10.1111/j.1467-9248.2012.00962.x>
- Weiler, Joseph H H, 'The Political and Legal Culture of European Integration: An Exploratory Essay'. *The International Journal of Constitutional Law* 9, nos 3–4 (2011), 678–694. Online: <https://doi.org/10.1093/icon/mor054>
- Weiler, Joseph H H, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"'. *Singapore Journal of Legal Studies*, December 2012, 248–268. Online: <https://doi.org/10.2139/ssrn.2255263>