Democratic Self-Government in Europe

Domestic Solutions to the EU Legitimacy Crisis

Damian Chalmers

policy network paper

Policy Network
Third floor
11 Tufton Street
London SW1P 3QB
United Kingdom

t: +44 (0)20 7340 2200
f: +44 (0)20 7340 2211
e: info@policy-network.net

www.policy-network.net

Contents

About the author

Damian Chalmers is professor of European Union law at the London School of Economics and Political Science (LSE). He was head of its European Institute 2007-11, co-editor of the *European Law Review* 2003-2009 and is co-author of *European Union Law* (2010, 2nd Edition, CUP).

Executive summary

In September 2012, the Eurobarometer found for the first time that more European citizens considered the EU to be undemocratic than democratic. Responses up to now have focused on how to reform the EU Institutions.

This paper takes a different approach. The European Union should only govern when it has democratic authority within a member state. To this end, the paper proposes five reforms which could be realised without EU Treaty change:

1. There should be a new test of relative democratic authority where the EU can only act if it enlarges choices or protects certain values in a way that cannot be done by domestic parliaments and where the benefits of this action exceed collective domestic democratic costs.

2. This test of relative democratic authority would be policed by national parliaments. An EU proposal would be abandoned unless two thirds of the national parliaments indicate their support.

3. A new test of democratic responsiveness would require that if one third of the national parliaments propose either that legislation be reviewed or that new legislation should be proposed, the Commission is obliged to make a proposal to this effect.

4. Individual national parliaments should also be able to pass laws disapplying EU law where an independent study shows that EU law imposes higher costs than benefits for that member state.

5. To protect certain domestic democratic values and traditions, citizens should have the right to petition a national Constitutional Court to disapply an EU law if the law violates those values or traditions. If an EU law is disapplied by a national parliament or Constitutional Council a majority of other parliaments, on the basis of an independent report, may petition the European Council to mediate, if the costs on other citizens are excessive or there is no violation of domestic democratic values or traditions.

Finally, the paper considers the options of exiting the EU or pursuing selective engagement – two proposals increasingly debated in the UK context. It concludes that much EU law will necessarily still be applied regardless of whether a state is within or outside the EU. Paradoxically, the constraints of EU law are such that a state may be less restricted by EU law when it is inside the EU, under the scenario above, than when it is outside the Union.

1. Introduction

Law is the central instrument of EU rule. There is consequently a lot of it: over 10,700 legal measures were in force at the end of 2011.[1] However, there is currently not a lot of love for EU law, even amongst those who make it, enforce it and interpret it. The EU is doing less law-making.[2] There is increasing judicial resistance to the application of EU law[3] and wariness of its costs amongst both EU and national officials.[4] Concerns about its scope are also on the up with EU laws adopted under the most far-reaching competencies only having authority in some states with national parliamentary assent.[5]

If what bothers citizens is less how Brussels decides things but rather the amount and quality of legal rule they have to endure from Brussels, its 'bossiness' to quote the British Prime Minister,[6] then the issues raised by this declining legitimacy of EU law are not simply ones for legal technocrats. When EU law is deployed, the authority it has in such circumstances goes to when and how Brussels should rule us. It goes to the heart of what people get from or sacrifice for the European Union. It is impossible to calculate in any crude cost-benefit way what EU law generates or costs for each of us. However, a starting point might be to think of its biggest cost, and how this might be tempered. The Union, instead of promising nirvana, might turn the debate around, and consider how to limit its adverse effects.

The assumption of this paper is that, for most citizens, the central adverse effect of EU law is how it encroaches on their domestic self-government. It constrains choices that they may wish to make; limits the use of domestic political procedures they cherish; and may pursue values with which they disagree. A further premise is that the existing modus vivendi is seen by many citizens as neither valuing nor protecting domestic self-government sufficiently.

On this basis, this paper considers what would be the best way to secure greater domestic self-government within today's Europe.

One way would be to say that EU law can only prevail over national law where it does not compromise the democratic identity of that state. Actually, since the Treaty of Lisbon, by virtue of Article 4(2) TEU, EU law allows this. Furthermore, many national constitutions make it a condition of that state's EU membership. However, nothing has been done to exploit this provision. This paper argues that two important reforms could be made without Treaty change that would secure much greater domestic self-government without compromising, in any way, the stability of the European Union.

First, there should be a new test of relative democratic authority. The Union should only be allowed to act where it secures greater democratic value than other avenues of action. This will be where it enlarges choices or protects certain values in a way that cannot be done or has been historically poorly done by domestic parliaments, and the value of this action offsets any domestic democratic cost. There would, furthermore, have to be strong institutional safeguards to police this involving those with greatest credibility. This paper proposes, therefore, that, to safeguard this, two thirds of national parliaments would have to give their assent before an EU law could be adopted.

Secondly, even where relative democratic authority is established, there should be a further test, namely that EU law should not violate domestic democratic values. This would have two institutional heads. To safeguard democratic responsiveness, there would be a parliamentary responsiveness procedure. National parliaments should be able to pass laws disapplying EU law where an independent study has shown that EU law imposes high costs for that state. To protect certain notions of individual autonomy, justice and tradition absent in EU law citizens' initiatives

1 These include 8862 Regulations and 1885 Directives. European Commission, *Twenty ninth Annual Report on Monitoring the Application of EU Law,* COM (2012) 714, 2.

2 37 legislative files have been closed every 6 months under the ordinary legislative procedure post Lisbon Treaty compared to 63 prior to it. http://www.consilium.europa.eu/policies/ordinary-legislative-procedure/other-information?lang=en <accessed 1 April 2013>

3 Most saliently, the refusal to apply a CJEU ruling by the Czech Constitutional Court, Pl. ÚS 5/12 Slovak Pensions, Judgment of 31 January 2012.

4 At an EU level see European Commission, *Smart Regulation in the European Union* COM (2010) 543; European Commission, *EU Regulatory Fitness* COM (2012) 746. Within the United Kingdom see *Transposition Guidance: How to Implement European Directives Effectively* (April 2011, HMG) 6-10.

5 EU Act 2011, section 8 (United Kingdom); *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13, paras 306-328 (Germany).

6 See comments made on the TV television show Daybreak on 14 January 2013, http://www.guardian.co.uk/politics/video/2013/jan/14/david-cameron-eu-video <accessed 1 April 2013>

should be able to be brought before a constitutional council to rule on whether EU law violates such values, and to suspend it where this occurs.

These changes would allow much greater self-government than is currently the case but it might still be felt by some that this is insufficient insofar as it would still impose some constraints on the state concerned. This paper therefore considers whether either partial (repatriation of certain competencies) or full exit from the Union would grant greater domestic self-government. It argues that paradoxically neither would.

Partial exit suffers from the problems that, legally, it is both difficult to fully ring-fence fields from EU intrusion and to ensure that a state is not excluded from areas in which it wishes to participate. Politically, it leads to increased problems in those areas of EU activity in which the state is still involved. Legitimate tensions are unaddressed as political capital has been expended securing opt-outs, and there may be incentives for other states to form coalitions excluding the state in question to protect those activities in which that state does not participate.

US and other non-EU state practice show that a considerable amount of EU law is likely to continue to be applied in a state which has fully left the Union, almost irrespective of the wishes of the domestic legislature. Commercial, administrative and local governments either apply EU law unilaterally or push for it to be turned into domestic law because of the considerable advantages they see in it for themselves. This would be greater in the case of states leaving the Union partly by virtue of their proximity to the Union, but, more importantly, because of the legacy issue. EU law, as the dominant law governing significant social and economic relations, cannot simply be suspended without establishing a regulatory vacuum which would generate chaos. Unlike with the United States, it would therefore almost certainly act as the default until a domestic substitute could be found: a time-consuming process.

2. EU law ceding to the democratic identities of member states

The traditional narrative is that EU law offers little leeway to local democratic choices. EU law has primacy over national law and imposes duties on national administrations and judiciaries to ensure its effective application and enforcement. This is certainly a constant refrain of the case law of the Court of Justice.[7] However, this narrative has been accepted by the courts of only four out of twenty seven states.[8] Since the Treaty of Lisbon, the central provision for mediating this relationship has been Article 4(2) TEU:

> 'The Union shall *respect* [member state] identities, inherent in their fundamental structures, *political and constitutional,* inclusive of regional and local self-government… [author's italics]'

The Court of Justice has interpreted this provision to allow national laws to derogate from EU law in a limited way: only if they cannot safeguard the identity in question through less restrictive means.[9] The reasoning is terse and should not be considered the end of the matter. It offers an unusually restrictive notion of the word 'respect'[10] and conflicts with the legislative history of the provision which suggests that the provision was intended to curtail the ambit of EU legal authority rather than provide an exception to it.[11] Furthermore, there is no reason to assume that the Court of Justice has a monopoly of authority over interpretation of this provision. Insofar as it goes to the identity of national constitutional democracies, it is one over which national constitutional courts have ultimate authority. As guarantors of these identities, only they are placed to set out the content and limits.

7 For recent statements to this effect see Opinion 1/09 *Creation of a Unified Patent Litigation System* [2011] ECR I-1137; Case C-399/11 Melloni, Judgment of 26 February 2013.

8 The only EU States following this reasoning in an unqualified manner are BENELUX and Austria. Even within these States, there have been tensions. Dutch courts, for example, have refused to follow CJEU rulings, S. Garben, 'Sky-high controversy and high-flying claims? The *Sturgeon* case law in light of judicial activism, Euro-scepticism and Euro-legalism' (2013) 50 CMLRev 15.

9 Case C-51/08 *Commission v Luxembourg,* Judgment of 4 May 2011; Case C-208/09 Sayn-Wittgenstein [2010] ECR I-13693

10 Respect suggests that an identity be recognised as valuable in its own right. This does not happen if it is subject to a proportionality test which confines it to the minimum necessary. S. Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability* (2006, Harvard University Press) 11-15.

11 B. Guastaferro, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause.' (2012) 31 YEL 263, 271-285.

As a consequence, German scholars[12] and Spanish and French Constitutional Courts[13] have argued that this provision grants fundamental rights protected in domestic constitutions precedence over EU law. The provision also protects fundamental domestic *political* structures. The German Constitutional Court has been clear that such structures lie within the democratic identity of the state. In its *Lisbon Treaty* judgment, it stated that the principle of democracy was a 'structural principle that may not be balanced against other legal interests; it is inviolable'.[14] If EU law violates this democratic identity, it is not to be granted authority in Germany. Similar stances have been taken in Poland[15] and the Czech Republic.[16] Beyond the Lisbon Treaty, analogous reasoning has also been adopted in Portugal[17] and Estonia.[18]

For the Germany Constitutional Court, this 'democratic identity' protection means that national law prevails over EU law in certain fields of activity. To that end, criminal law, policing, social policy, fiscal policy, defence, family, education, and religious law should be predominantly governed by national law.[19] In like vein, national law-making monopolies have been asserted over matters 'inherent to national sovereignty'[20] and the 'material core of the … constitution'[21] in France and the Czech Republic respectively. Italy has talked of protecting an 'area from the control of EU law.'[22] In Poland a domestic constitutional monopoly is asserted, *inter alia* over matters of social justice, the principles determining the bases of the economic system, and laws relating to the protection of human dignity.[23]

This protects certain domestic laws from EU interference. Such ring-fencing is not unproblematic. It involves obscure choices between fields seen as central and peripheral to domestic democratic life. However, not a single court has indicated that respect for domestic democratic identities has to be confined to ring-fencing.

So what would the substantive content of such a principle involve? The commitment to respect domestic democratic identities suggests not simply that pan Union decision-making processes be democratic but also that these be part of and act in tandem with a wider system of European democracy compromising all domestic systems of democracy. This, in turn, involves acknowledgement of two further principles.

The first is the principle of relative democratic authority. Democratic authority acts as the currency of a system, which recognises multiple sites of democracy, each with an equal authority and value and should therefore govern when one law-maker rather than another should have authority. If conflicts emerge, it should be the site which has the greatest democratic authority in the case in hand which should govern the matter. EU law carries a democratic cost in that it relies on more centralised procedures for its enactment and these attract less democratic engagement from citizens than national procedures. It can only claim democratic authority over the latter, therefore, where it secures some added democratic value which could not be easily secured through domestic democratic procedures and this value exceeds the democratic cost of not going through national law.

Secondly, Article 4(2) TEU commits the Union to recognising also that each state has particular democratic values and procedures (an identity) which must be safeguarded. Irrespective of the overall added democratic value of EU action, it is particularly problematic where the Union is unable to secure certain values central to any democracy but its action thwarts a state's commitment to protect those values. Such a scenario would fail to respect domestic democratic identities in that it would offer no safeguard for values integral to these identities.

12 A. v. Bogdandy & S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLRev 1417.

13 *Re European Union Constitutional Treaty and the Spanish Constitution* [2005] 1 CMLR 981; *Re European Union Constitutional Treaty and the French Constitution* [2005] 1 CMLR 750

14 *Re Ratification of the Lisbon Treaty* [2010] 2 CMLR 712, paras 216-217.

15 K 32/09, *Treaty of Lisbon,* Judgment of Polish Constitutional Tribunal of 24 November 2010.

16 *Re Constitutionality of Framework Decision on the European Arrest Warrant* (Czech Constitutional Court) [2007] 3 CMLR 24.

17 Article 8(4) of the 1976 Portuguese Constitution (2005, 7th revision).

18 Case 3-4-1-6-12 Article 4(4) ESM Treaty, Judgment of Estonian Supreme Court of 12 July 2012, paras 134 etseq

19 *Re Ratification of the Lisbon Treaty* [2010] 2 CMLR 712, paras 252-260

20 *Ratification of the Lisbon Treaty* (French Constitutional Council) Case 2007-560) [2010] 2 CMLR 26, paras 7-9.

21 *Czech Sugar Quotas* [2006] 3 CMLR 15, paras 109-110;

22 *Admenta v Federfarma* (Italian Constitutional Council [2006] 2 CMLR 47, para 83.

23 K 32/09, *Treaty of Lisbon,* Judgment of Polish Constitutional Tribunal of 24 November 2010.

3. The principle of relative democratic authority

A Union claim to add democratic value must rest on some understanding of democracy which allows us to identify that value. Three elements are traditionally present in the idea of democracy. There is, first, a *procedural* dimension. Democracy involves law-making procedures in which citizens can participate or be represented as free and equals.[24] However, it would not be democratic for 50.1% of the electorate to vote to kill the rest, as democracy is based on the idea that its members are free and equals. Democracy, secondly, also commits law-makers to the pursuit of increased freedom and equality, and not to violate certain minimum levels of freedom and equality.[25] Finally, democracy is also about securing outcomes through collective action which would otherwise be unrealisable. In this, it is, thirdly, committed to augmenting our knowledge of the world insofar as this will both enable more choices to be made and provide a firmer basis for making these choices.[26]

If there is disagreement about the balance between these elements, a commitment to secure democratic values involves some commitment to respect for all of them. A claim to add value can, therefore, only be made where one value is enhanced without lowering the commitment to the others or where the commitment to all three forms of value is still respected but a claim can be made that the overall balance is more democratic.

On this basis, the Union might be able to add democratic value for a state's citizens in ways that could not be achieved by domestic democratic procedures in the following circumstances:

- EU action increases alternatives for its citizens, and therefore augments their freedom, through enabling certain transnational goods to be realised which could not be realised through domestic procedures. Examples include greater wealth and opportunities through the single market programme; increased security through the area of freedom, security and justice; and increased presence in international economic relations by virtue of the greater clout of the Union. These are realised, furthermore in ways that allow for more citizen engagement– be it through lobbying, voting for MEPs, engaging in consultations with the Commission, litigation or holding their minister to account for their Council through their national parliaments- than the alternative: international treaty regimes comprised of deals between civil servants.

- EU action performs a parallel role in relation to the management of harms or risks which emanate from the territories of other member states. In this instance, it secures an equality between citizens of the member states by allowing some collective control of the activities which generate these which would be absent in a world where states could externalise these on to the territories of others.

- The EU offers an increased capacity to manage knowledge through combining the regulatory resources of twenty seven member states. This possibility for learning extends beyond expertise to civic norms in fields such as human rights, education and citizenship with democracies looking to practice beyond their territories to understand the meaning and policy implications of such norms.[27] Involvement in EU decision-making makes this knowledge more accessible to a state. It also allows it to be more engaged in the formulation and deployment of this knowledge than if it simply applied received knowledge to its territory.

- Historically, parliaments have been poor at adequately articulating minority, diffuse (i.e. women, consumers) or future interests (public borrowing, financial services and the

24 Most famously, R. Dahl, *Democracy and Its Critics* (1990, Yale University Press) 102-110.

25 eg R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996, OUP) Introduction; J. Habermas & W. Rehg, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 *Political Theory* 766.

26 D. Estlund, *Democratic Authority: A Philosophical Framework* (2008, Princeton University Press, Princeton, NJ) 15-18; R. Goodin, *Reflective Democracy* (2003, OUP) chapter 5

27 The literature cited in W. Cole, 'Human Rights as Myth and Ceremony? Re-evaluating the Effectiveness of Human Rights Treaties, 1981–2007' (2012) 117 *American Journal of Sociology* 1131, 1131-1132.

ecology). In all cases, these interests have been unable to mobilise sufficient political force within elected assemblies to secure powerful voice. Across the world, non-majoritarian institutions - courts, quangos or regulatory agencies - have emerged to prevent 'majoritarian abuse' and secure the interests of these groups.[28] Within Europe, the Union has provided this role.[29] It has advantages within these arenas. It offers a wider array of venues for these interests to be mediated, and, these venues, by dint of their scale, tend to be more plural than their national equivalents.

In all instances, however, the benefit would have to be gauged against the democratic costs of such action. An EU measure might still compromise domestic choices, weaken local processes, constrain domestic freedoms or generate undesired inequalities within particular societies.

EU law at the moment is not required to make any case for its added democratic value. The present counterpart is the subsidiarity principle which provides that the EU should only take measures if their objectives could not be sufficiently realised by national action and, by reason of their scale or effects, be better achieved by the Union. The reasoning the Union must provide to discharge this threshold is scant and has been not deployed successfully once in nearly twenty years to strike down a measure.[30] More fundamentally, it is a functional test. It looks neither at the democratic quality of life promised nor that supplanted. Simply considering, for example, whether a measure which improves the single market fails to takes account of issues such as centralisation of power, capture, increased risks of informational asymmetries and policy unresponsiveness, or effects on domestic political economies.

The following five reforms can strengthen democratic self-government in Europe:

REFORM 1

There should be a stronger duty on the Union to set out in detail the added democratic value of a measure. Such a duty should set out the costs as well as the benefits of the measure.

This alone is insufficient. There must be institutional safeguards in place to allow the claim to be contested and verified. At the moment, these are too weak. The central law-makers involve two institutions, the Commission and Council, which are dominated by executive interests. These have neither the incentives nor disposition to assess the democratic value of a measure. The third, the European Parliament, also has little interest in arguing against the presence of EU law, as this deprives it of its influence.

The institutions with most credibility to verify whether an EU measure adds democratic value are national parliaments. They are the central fora for democratic contestation within Europe and, as they lose by EU competence creep, do not have the same reasons as EU institutions to be passive about EU law. Since 2006, first through the Barroso Initiative and then the Early Warning Mechanism in the Treaty of Lisbon,[31] they have been allowed to raise concerns prior to and after the formal announcement of the legislative proposal. In particular, if one third of national parliaments provide reasoned opinions that the proposal does not observe the subsidiarity principle, it is unlikely to go through.[32]

This has already provided a more effective control than simple reliance on judicial control of the subsidiarity principle. Parliamentary opinions have multiplied by almost tenfold in the first six years of operation,[33] and, in 2012, national parliaments secured, for the first time, the formal withdrawal of a measure.[34] Unsurprisingly, they do not discuss the matter in terms of formal compliance with the subsidiarity principle, but the more general concerns EU action raises.[35]

28 C. Eisgruber, *Constitutional Self-Government* (2001, Harvard University Press, Cambridge) esp 10-45.

29 R. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (2007, CUP) 7-25.

30 For an instance of the scant reasoning sufficient to meet the subsidiarity threshold see Case C-176/09 *Luxembourg v Parliament & Council, Judgment of 12 May* 2011 paras 80-83

31 On the Barroso initiative see European Commission, 'A Citizens' Agenda: Delivering Results for Europe', COM(2006) 211, 9. The Early Warning Mechanism is contained in Protocol on the application of the principles of subsidiarity and proportionality, articles 6 & 7. D. Jančíc, 'The Barroso Initiative: Window Dressing or Democracy Boost?' (2012) 8 *Utrecht Law Review* 78.

32 If one third of national parliaments (each State has two votes) provide a reasoned opinion that the proposal violates the subsidiarity principle, the Commission has to justify the measure to continue. The figure is one quarter in the field of the area of freedom, security and justice. *Protocol on the application of the principles of subsidiarity and proportionality,* article 7(2). The measure will fall for measures adopted under the ordinary legislative procedure if a majority of national parliaments believe this to be the case and either 55% of Council votes or a majority of European Parliament votes agree, Ibid. article 7(3). These do not provide a formal veto but in practice such a vote of no confidence by national parliaments would almost certainly mean there is no Qualified Majority in the Council.

33 There were 83 opinions during the first eight months of operation in 2006 and 686 opinions in 2011, European Commission, *Annual Report 2006 on Relations between the European Commission and National Parliaments,* SP (2007) 2202/4, 4; European Commission, *Annual Report 2011 on Relations between the European Commission and National Parliaments,* COM (2012) 375, 10.

34 Commission decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services - COM(2012) 130, http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/letter_to_nal_parl_en.htm <accessed 2 April 2013>

35 On practice see F. Fabbrini & K. Granat, 'Yellow Card, but No Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike" (2013) 50 CMLRev 115.

There are still a number of problems:

- The number of opinions as a proportion of the number of proposals is still small: amounting to twelve opinions per parliamentary chamber per year.[36] They are also asymmetrically distributed;

- Parliamentary silence counts as consent;

- The distinction between parliaments being able to comment on the content of the proposal and on whether it observes the subsidiarity principle is artificial and limits parliamentary voice. In 2011, only 64 opinions were given on subsidiarity matters, compared to over 600 more generally.[37] Only the former have legal implications, however.

- The procedure only operates at the moment of legislative proposal. National parliaments cannot act as agenda-setters either to instigate review or repeal of existing EU laws or to propose new laws.

These limitations can be removed by two further reforms.

REFORM 2

Unless two thirds of parliaments indicate their support for a measure, a Commission proposal should not go forward to the Council.[38]

REFORM 3

If one third of national parliaments propose either that legislation be reviewed or that new legislation should be proposed, the Commission is obliged to make a proposal to that effect.

A two thirds threshold is chosen so that only measures with sufficient national parliamentary support will be adopted. Furthermore, parliaments should be allowed to refuse to give assent for any of a number of reasons: be it that the EU measure is procedurally flawed or excessive, if it generates disliked outcomes, or cuts across important values. All of these issues are central to the quality of democratic life generated by an EU measure.

Incentives are provided for national governments to engage national parliaments more actively in EU decision-making. Governments failing to do this will lose voice within the legislative process as initiatives supported by them will not have the vote of their national parliament if there is parliamentary inaction. However, as the threshold for parliamentary assent is not aligned to Qualified Majority Voting (QMV) within the Council, it will be sufficient for national governments to try and reduce their parliaments to cheerleaders. This may not be enough to get the requisite majority. Furthermore, there may be incentives for other state governments to put their position to national parliaments to secure approval. All this would provide greater parliamentary autonomy from their executives.

Parliaments would become involved in matters not historically regulated by them. Many EU matters have traditionally been governed by regulatory agencies, ministerial orders, and statutory instruments. The EU has benefitted from and contributed to this evacuation of parliamentary input. That makes it no less egregious. This reform would secure parliamentary input over much regulation: something absent from much of modern life.

Decision-making would become more plural. To formulate opinions, many parliamentary committees would hold hearings. These would attract a different balance of stakeholders from those

36 There are fifty four chambers which give opinions.

37 European Commission, *Annual Report 2011 on Relations between the European Commission and National Parliaments,* COM (2012) 375, 10.

38 Support could be qualified, ie support subject to a particular amendment.

present in Brussels. In particular, national parliaments offer more accessible opportunity structures for those offered limited benefits from EU legislation (and therefore have little reason to push for EU laws); have largely local concerns; or have limited possibilities to mobilise transnationally.

Representative institutions act as agenda-setters. There are a number of attractions beyond simple parliamentary engagement. The Commission's monopoly of initiative provides incentives for its capture by other actors. It makes it too easy for it to push policies in line with its own institutional interests and preferences. Finally, and most importantly, it allows it to veto any initiative. Deploying national parliaments as agenda-setters reduces these dangers as well as rendering the process more transparent and plural.

4. Non-violation of domestic democratic values

(i) Parliamentary responsiveness

The EU constraint on domestic choices would be offset by the added democratic value of the Union measure in circumstances where the Union can show relative democratic authority. That equation still struggles with the lack of democratic responsiveness of the Union. Responsiveness – the ability to respond to unanticipated or undesirable consequences or changes – is an important democratic value. Typically, democratic systems rely on a series of mechanisms to secure it. These include legislative reform, judicial correction through subsequent interpretation or review, local administrative guidelines or weak enforcement, and electoral punishment.

These do not exist within EU law. At a pan-EU level, there are a number of obstacles. The presence of supra-majorities in the law-making process makes it difficult to amend poor legislation.[39] Judicial interpretation of EU law looks at the legislation's purpose rather than showing sensitivity to the context. Judicial review of EU legislation is extremely rare.[40] Electoral punishment for poor EU legislative performance does not take place at European Parliament elections. National institutions are also restricted from tempering undesired consequences. National courts cannot, formally, declare EU law invalid, and are disincentivised from making corrective rulings by liability actions being brought against the state for incorrect rulings.[41] National officials are required to do everything possible to secure the effective application and enforcement of EU law, irrespective of its effects.[42]

A central democratic value is missing within the Union. EU law may violate central elements of a state's democracy or go against the clear wish of a majority of its citizens, but it cannot be changed. The fourth reform proposed is, thus, one of parliamentary responsiveness.

REFORM 4

A national parliament can ask for an independent study of an EU law in force to be carried out. This study will evaluate the costs and benefits of that law on its territory, on the one hand, and the costs for other EU citizens of its not applying that law. If the parliament judges that the costs of the EU law are significant it may suspend the EU law within its territory.

There is a duty of good neighbourliness. The effects of disapplication on other EU citizens shall be minimised.

The disapplication shall be notified to other national parliaments. These may by a simple majority refer the matter to the European Council where the majority can provide reasons and evidence that the effects on other EU citizens are excessive or that insufficient evidence has been provided of the costs for the state concerned.

39 Legislative reform will need either QMV or unanimity in the Council, Commission agreement and, most of the time, European Parliament acquiescence.

40 EU legislation will only declared disproportionate (the central control for legality) therefore, if the legislation is 'manifestly inappropriate', Case C-59/11 *Association Kapokelli v Baumaux,* Judgment of 12 July 2012. This is a very different test from that in the TEU which talks simply of legislation not exceeding what is necessary to realise EU objectives, Article 5(3) TEU.

41 Case C-140/09 *Traghetti del Mediterraneo v Presidenza del Consiglio dei Ministri* [2010] ECR I-5243.

42 Case C-53/10 *Land Hessen v Mücksch,* Judgment of 15 September 2011, paras 29-33.

The European Council shall endeavour to secure an amicable settlement. If it fails to reach a settlement, the national law shall remain in place.

The proposal addresses the issues of democratic unresponsiveness by allowing national parliaments to rectify unpopular or poor EU choices. It also inculcates greater responsiveness by putting pressure on EU Institutions to reform laws which have less and less force on the ground.

The risks of states free-riding at other states' expense or a cycle of continual suspension of EU law as states retaliate against each other are slim. The procedure would only apply to EU laws which have already been implemented in the state concerned. States could not pass omnibus acts but must pass a separate act of parliament for each EU law. Thus, there would be significant costs in parliamentary time. Passing lots of anti-EU legislation would be at the expense of that state's domestic agenda. Furthermore, if a state were repeatedly referred to the European Council and failed to agree compromises satisfactory to the other states, it would place itself in a very vulnerable position when these came to think about suspending EU law as the other twenty six states would have less reason to care about its interests.

(ii) The national citizens' initiative

Unlike states, the Union only exists to realise certain common purposes: the Single Market, a common environmental policy, economic and monetary union etc. This limits the values it can realise. It does not protect us from torture or intrusion into our privacy, for example. Nevertheless, it can take measures which can violate these values. Strong concerns have been raised in recent years about, *inter alia*, the effects of EU asylum, biotechnology and data protection law and of Memorandums of Understanding (MoUs) agreed with member states receiving financial support on a wide array of individual rights.[43] Whilst there is a requirement that EU law not violate fundamental rights,[44] this has been poorly observed in EU law. There is only one instance of any provision of a Directive, the central EU legislative instrument, being struck down for violating fundamental rights.[45] More axiomatically, fundamental rights set out a very narrow range of cherished values. They set out rights which should never be violated but there may be more diffuse values which are also cherished and central to democracies but which are not granted such absolute protection. A measure may generate individual justices, for example, but may still be legal. However, there would still be concern to ensure justice within the society in question.

In this regard, there are three forms of value not supplied by EU law.

Individual autonomy: This might sound odd as traditional accounts base the Union on economic freedom; an autonomy to trade between states. However, this freedom is only accorded to actors engaged in transnational activities, trading or working across borders. For others, EU law does not grant them any autonomy they did not previously have. Furthermore, many transnational actors have to meet significant regulatory burdens, imposed by both the Union and their home state, in order to trade. If autonomy is valued, it is thinly distributed by EU law. Furthermore, EU law often constrains individual autonomy considerably, as its central *modus operandi* is regulation. This imposes significant responsibilities on private parties to realise common goods: be it environmental protection, consumer protection, a decent working environment or active competition.

Distributive justice: The central EU vision of fairness is one based on mutual dependency. Relationships generating interdependency often trigger reciprocal duties of fairness in EU law: be this in employment relationships (i.e. equal pay for work of equal value between men and women), consumer contracts, or neighbourhoods impacted by development projects (i.e. environmental impact assessment). There are certain other visions of transnational solidarity present in EU

43 The Austrian constitutional court has questioned EU data protection law. Austrian Constitutional Court, 'Constitutional Court has reservations against data retention and turns to the CJEU' Press Release of 18 December 2012. On the proviso that asylum seekers may be transferred to another Member State, notwithstanding that their fundamental rights may be violated see Joined Cases C411/10 and C493/10 *NS v Secretary of State for the Home Department,* Judgment of 21 December 2011. The Portuguese Constitutional Tribunal found that the austerity measures in Portugal's MOU violated the principle of equality between public and private employees, Acórdão 187/2013, *Orçamento do Estado para 2013,* Judgment of 5 April 2013.

44 Article 6 TEU.

45 C-236/09 *Association Belge des Consommateurs Test-Achats v Conseil des Ministres* [2011] ECR I-773.

cohesion, agriculture, structural and development policies based either on us owing something to each other as Europeans or – in the case of development – out of a commitment to alleviating the suffering of humanity. However, beyond that, EU law contains no generalised system of distributive justice. Nothing commits us to securing the health, education, pensions or life-opportunities of other Europeans. Nor does EU law impose duties on states to secure these goods for their own nationals. This is in large part because the Union does not have considerable tax and spend policies. EU policies can, however, constrain these distributive choices: be it through restrictions on taxation or allocation of public expenditure or, more indirectly, by limiting the reasons for collective action.[46]

Local tradition: Domestic traditions provide the symbols and narratives through which local communities come to define themselves. They anchor people's lives by providing a sense of continuity, on the one hand, and a sense of commonality with each other, on the other hand. They can also act as pivots around which ideas of right and wrong, just and unjust are rooted and mobilised. It is not possible to point to particular rituals imbuing meaning in people's lives which are EU rituals. If that allows EU law to question traditions which may be oppressive or problematic in some other way, this can equally make it a law with insufficient tolerance of local traditions and the values they institutionalise. They become cast as whimsical idiosyncrasy rather than seen as central elements of any democracy.

National parliaments cannot be the watchdogs of these three values, correcting EU law wherever it violates them. They do not have the resources. Nor is it clear how they would be held politically accountable for discharging such a role as voters would look to their performance in other areas in casting their votes.

More fundamentally, as these values go to the social contract made between citizens and democracies, it seems right that these should be able to take these up directly rather than through representative institutions.

REFORM 5

The fifth reform is that a Constitutional Council made up of a number of eminent public figures should be set up to hear petitions from 100,000 citizens of a member state that an EU law should be disapplied because it conflicts with a domestic law and violates a valued and valuable tradition or notion of individual autonomy or distributive justice.

A legal opinion will be presented on behalf of the petitioners setting out the reasons why the EU law should be disapplied. The Constitutional Council will also take pleadings from other EU citizens.

The Constitutional Council will disapply the relevant part of the EU law if it finds that there has been a significant violation of a valued or valuable tradition, individual autonomy or distributive justice.

The same duty of good neighbourliness as for the parliamentary responsiveness procedures applies. In addition, the matter must be referred to national parliaments who may refer it the European Council in the same way if the effects on other EU citizens are excessive or insufficient evidence is provided of any violation of individual autonomy, justice or tradition.

The European Council shall endeavour to secure an amicable settlement.

The citizens' initiative counters the institutional asymmetries of the current settlement. EU procedures must engage those who garner benefits from EU law and can mobilise transnationally. The citizen's initiative acts as a counterweight but providing an opportunity structure for those whose incentives are the opposing ones: namely those who would benefit from disapplication of EU law and find it easier to mobilise at a domestic level. It, therefore, puts in place a procedure central

46 On this see M. Dani, 'Rehabilitating Social Conflicts in European Public Law' (2012) 18 ELJ 621.

to any democracy, namely a process whereby today's losers may become tomorrow's winners. It does so, moreover, for values that EU law cannot provide on any meaningful scale, and which, as a consequence, it can, at best, not harm and, at worst, destroy.

A further virtue of citizens' initiatives is that they allow issue unbundling. Matters which would ordinarily be too narrow to warrant a domestic Act of Parliament can be raised through them.[47] Similarly, they can be used to qualify individual pieces of EU legislation which may have many popular or beneficial provisions, but may have a provision, which for, the citizens of one state, is completely egregious. This procedure allows the legislation to remain in place minus the offending provision.

As the procedure is about securing values rather than protecting interests, it is a reasoned political process. A petition alone is too crude a way of judging whether certain values have been violated. By contrast, legal reasoning is too formal and narrow to deal with many of the concerns raised. Similarly, judiciaries might be seen as too unrepresentative and too concerned with securing the harmony of EU and domestic law. A Constitutional Council is proposed, comprised of significant and representative figures from public life, to consider the petitions. Like courts, these would hold hearings and issue reasoned decisions. There would be no system of precedent binding them, however, and their remit is to make a political judgment rather than a statement of the law.

5. Implementation of the reforms and other choices

These reforms could be introduced without a Treaty amendment. The reforms on relative democratic authority go to reform of EU law-making procedures and, as with other such reforms, could be introduced by a Joint Declaration between the Council, Parliament and Commission.[48] This would set out the reasons to be provided by the Commission to show that the measure has relative democratic authority, and would provide a commitment for the Council to take no common position on or adopt any measure until there was the necessary parliament assent. The reforms protecting states from EU violation of domestic democratic values could be put in place by a European Council Declaration interpreting Article 4(2) TEU. This Declaration would set out Article 4(2) TEU as allowing both a parliamentary responsiveness procedure and a citizens' initiative procedure. States could then notify the European Council of the domestic legislation and procedures implementing this.

To be sure, some may argue that these procedures will lead to a disunity and cherry-picking which will unravel the Union. This is speculative argument. Moreover, analogous procedures to those suggested can be found in the relationship between state authorities and federal law in the United States. States regularly implement federal policies to stymy governmental objectives with which they do not agree; use the legislative discretion afforded to them to set out policies at odds with federal law; or, in some cases, states posit themselves as the ultimate interlocutors of the Constitution and disobey federal law where they believe it violates the Constitution. This is not seen as posing an existential threat to the United States but as fostering experimentation, diversity and constraining concentration of power.[49]

At the other end of the spectrum, it might be felt that the reforms still leave domestic self-government too restricted. Parliaments might not be able to make a case that the domestic costs are significant enough or that the values in question have been sufficiently compromised. It makes sense, in such circumstances, to look at whether other alternatives would actually allow more domestic self-government.

47 T. Besley & S. Coate, 'Issue Unbundling via Citizens' Initiatives' (2000, NBER Working Paper 8036, Cambridge, Mass).

48 Similar use of Declarations has been made to commit the Union to respecting fundamental rights and subsidiarity. Joint Declaration by the European Parliament, the Council and the Commission Concerning the Protection of Fundamental Rights, OJ 1977, C 103/1; Inter-institutional declaration on democracy, transparency and. Subsidiarity, EC Bulletin 10-1993, 118.

49 J. Bulman-Pozen & H. Gerken, 'Uncooperative Federalism' (2009) 118 *Yale Law Journal* 1256, 1284-1295.

Selective engagement with EU compentencies

One alternative might be that a state does not participate in fields where Union activity is most resented and where the extra-territorial pull of EU law is least. The historical experiences of, for example, the United Kingdom – which has tried this with the area of freedom, security and justice; the third stage of Economic and Monetary Union and (briefly) social policy – has shown that this generates a number of unexpected constraints.

Undesired legislation can sometimes be introduced via other EU competencies.[50] EU competencies are functionally interdependent. Product standards may, for example, include questions of consumer protection, environment protection and the single market. This interdependency allows a plausible case for legislation being introduced under a range of different competencies.[51] Furthermore, there may be incentives for other states to avoid the competence protecting British autonomy if it will lead to British law undercutting EU regulation. The only sure way to avoid this is to name the national legislation to be protected. This is not practical for large fields of activity, and may not protect subsequent amending or supplementing national legislation.

A converse problem is that the United Kingdom might be excluded from activities in which it wishes to participate.[52] Legislation would be brought in under the competence from which the British are excluded when they believe it forms part of an EU competence in which they have a right to participate. There are incentives for this where the benefits from a policy comprise in securing privileges at the expense of non-members. If the United Kingdom secured an opt-out from the common fisheries policy, for example, other member states might argue, to secure the competitive position of their fishermen, that trade in fish and fish products fell within that policy rather than the single market, and that British fish and fish products should be excluded from the EU.

Incentives may also emerge for other states to create coalitions between themselves in fields where the United Kingdom participates borne out of reasons that relate to the activities in which it does not participate. This might take place to secure a better functioning of the latter policy; to secure competitive position vis-à-vis non-participants; or positions align simply by virtue of their daily workings together. In all cases, it would lead to a weakening of British entitlements within the Union.[53]

The most challenging problems, however, are more general ones. Over time, British preferences and circumstances change, often unexpectedly, with consequences for the optimal balance between participation and non-participation in Union activities. The significant costs to renegotiating such concessions entail an invariable gap between what can be obtained and what is sought. Furthermore, whilst concerns might constellate acutely around particular EU competencies, they are not exclusive to these. Non-participation ignores the tensions in other competencies and overstates the tensions within the field of non-participation. Even there, there may be issues on which EU legislation might be seen as desirable.[54]

Exit from the Union

The final option is, of course, full exit from the Union. It is worth considering the autonomy secured by this. Possibly, the best case study is that of the United States, economically powerful and not part of any multilateral arrangement, such as the EEA, or bilateral arrangement, such as the EU-Switzerland agreements. The experience of the United States suggests, however, that significant amounts of EU law would continue to be applied within a state which has left the EU for a number of reasons.

52 The United Kingdom has wished to participate in EU measures on external frontiers and visas by virtue of its opt-in to the area of freedom, security and justice. It has been excluded on the grounds that this falls within the *Schengen acquis*, within which the United Kingdom does not participate, Case C-482/08 *United Kingdom v Council* [2010] ECR I-10413.

53 There was thus concern about coalitions between euro area States within the European Banking Authority, the body central to standard-setting for EU banking law, to secure the regulatory position of the ECB within the euro area. House of Lords European Union Committee, *European Banking Union* (7th Report, Session 2012-2013) paras 128-138.

54 An example is the relationship between equal pay for work for equal value for men and women and EU social policy. Prior to the last elections, the Conservatives were committed to repatriation of the latter but not the former. The two are inter-related, however, as much EU social policy (ie protection of part-time workers; parental rights) builds on case law in the former area. *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (2010), 114.

The first is the *Brussels effect*. This effect stems from the single market being both the largest market in the world in nominal GDP terms and one of the most protectively regulated. The former entails that non-EU exporters are often dependent for sales from the EU market. The latter entails that this will only happen if they meet additional EU regulatory conditions. This poses difficulties for industry where the differences between EU and domestic state laws impose significant extra costs (i.e. different product standards leading to different production lines); organisational difficulties (i.e. different competition laws obstructing the organisation of corporate structures in an integrated or desired manner); or technical problems (i.e. the establishment of different data bases to meet different data protection requirements). These difficulties have led US exporters to pressure the US government for the adoption of EU standards across the board as they covet the advantages of a single standard that can be applied across all markets. This effect is so pervasive that Anu Bradfurd has noted:

> 'Few Americans are aware that EU regulations dictate the make-up they apply in the morning (EU Cosmetics Directive), the cereal they eat for breakfast (EU rules on Genetically Modified Organisms, "GMOs"), the software they use on their computer (EU Antitrust Laws), and the privacy settings they adjust on their Facebook page (EU Privacy Directive). And that's just before 8:30 in the morning. The EU also sets the rules governing the interoffice phone directory they use to call a co-worker (EU Privacy Laws, again). EU regulations dictate what kind of air conditioners Americans use to cool their homes (EU electronic waste management and recycling rules) and are even the reason why their children no longer find soft-plastic toys in their McDonalds happy meals (EU Chemicals Directive).'[55]

The second source of EU influence is that of the *authoritative alternative*. Opponents of central government within the United States have regularly invoked EU law as an alternative to laws adopted by Congress which should either be adopted by US courts or state legislative authorities. It is invoked simply because it is an alternative credibly applied in a large part of the world. One finds, therefore, that EU chemicals law or international treaties on antidiscrimination apply across significant parts of the US.[56] Opponents of central government seek to arbitrage opportunities either before local government, courts, or national/regional parliaments and assemblies.

The third is the need for *bilateral cooperation* in fields such as counterfeiting, anti-terrorism and extradition. This has led US and EU administrative officials to push for common practices and laws across these fields.[57] The content of these varies, leaning towards the preferences of the dominant party in each field. In most cases, as in EU-UK relations, that is likely to be the Union.

One additional challenge not found in the US experience is that of legacy. Domestic legal relations have constellated around EU law, EU law will not be able to be legislated away overnight. Equal opportunities, consumer, environmental or company law – to take a few examples - cannot be repealed simply because it has been governed by the Union. It would create chaos and injustice in these fields. Existing EU law will have to remain until some formal legal reform takes place: a slow process. Furthermore, a much wider pool of British law does not make sense without reference to EU law. This is because all British law, not simply implementing legislation, has to be interpreted in the light of EU law where it is touched by it.[58] The size of this ripple effect is best exemplified by research which found that 9% of Statutory Instruments enacted in 2007 implemented EU law but that it affected 50% of all UK business law.[59] There would thus be the question of the meaning of ordinary British statutes even if the relevant EU legislation were repealed. Are courts to go back to some pre 1972 meaning or continue to look at EU law to interpret British law?

55 A. Bradford, 'The Brussels Effect' (2012/13) 107 *Northwestern University Law Review* 1, 3.

56 J. Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 *American Journal of Comparative Law* 897; J. Resnik, 'Comparative (in) equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production' (2012) 10 I-CON 531

57 E. Fahey 'On The Use Of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (2013) 19 *European Law Journal* forthcoming

58 D. Chalmers, 'The positioning of EU judicial politics within the United Kingdom' (2000) 23 *WEP* 169, 189-190.

59 House of Commons Library, *EU Legislation* (2007, SN/IA/2888, House of Commons) 11-12.

6. Conclusion

EU law has to be negotiated, whether a European state is within or outside the Union. As a consequence, structures have to be erected which allow for this negotiation in a democratic manner. The purpose of this paper is to show that simple 'in/out' talk fails to do this. As a consequence, strategies which require variously the full force of EU law, its full force in some areas but not in others or simply imagine the issue can be wished away by leaving the Union all fail in quite dramatic ways to secure democratic self-government. It has been argued, by contrast, that elaborating the principles of relative democratic authority and non-violation of democratic values within EU law would allow citizens to engage with EU law-making in a far more accessible manner than previously: both in its enactment, and equally importantly, in its repeal. It would allow citizens more control over the government of their lives than any of the scenarios above.

This raises a final scenario, namely whether these principles could be applied where a state has left the Union. EU law would remain intact until either repealed by parliament after debate of its merits or through some citizens' initiative which could petition for consideration of its repeal by a constitutional council. This is, of course, preferable to the alternate democratic mess, whereby the choice between EU and domestic law would become a roll of a dice probably made by a civil servant. However, it raises a couple of paradoxes. It is, first, not very different from the procedures which would be present for EU states. This begs the question as to whether it is worth the candle to leave. Secondly, insofar as other EU states would not have to be consulted where EU law was repealed, they would retain the right to take retaliatory measures where EU interests were affected. This would either lead to inter-governmental negotiations to find a solution which would, no doubt, be different from that originally enacted or to the retaliation remaining intact. In either case, domestic self-government is affected. The multilateralism of the EU, whereby other states cannot retaliate and also know that the quid pro quo is that they can bring their own exceptions to the fore, might paradoxically allow a state to get away with more than when it is outside the Union.