

## THE EUROPEAN UNION AND THE CITIZENS OF EUROPE

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**T**he relationship between the European Union and the citizens of Europe has been a constant matter of debate since the failure of the European Constitutional Treaty after the referendums in France and the Netherlands.<sup>1</sup> The national referendum on the suggestions of the European Union concerning the Greek crisis, launched by the former Greek Prime Minister *Alexis Tsipras*<sup>2</sup> and the discussion of Great Britain's possible withdrawal from the EU ("Brexit")<sup>3</sup> have shown that this relationship remains a crucial issue for the European Union, even or maybe especially in times of crisis.

Since the failure of the Constitutional Treaty the EU has become more aware of the central role of the citizens of Europe for the success of the European Union. The sometimes sceptically termed "elite driven project"<sup>4</sup> EU therefore has put a lot of effort in the so called "Europe of the citizens", trying to enhance civic participation at EU level.<sup>5</sup> These efforts are part of a wider discussion concerning the so called "democratic deficit" of the EU.<sup>6</sup> With the last comprehensive Reform Treaty of the EU, the

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<sup>1</sup> See Craig WHITLOCK, France rejects European Constitution, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/29/AR2005052900644.html> (16/2/2016) and Dutch say "devastating no" to EU constitution, <http://www.theguardian.com/world/2005/jun/02/eu.politics> (16/2/2016). Many French voters who opposed the constitution said they were angry that they had not been given a chance to vote on E.U. expansion from 15 to 25 members last year in 2004.

<sup>2</sup> Cf. <http://www.reuters.com/article/us-eurozone-grecce-idUSKBN0P40EO20150627> (2/2/2016).

<sup>3</sup> See Marcus THEURER, Worüber die Briten wirklich abstimmen, <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/brexit-hintergruende-zum-eu-referendum-von-david-ferguson-14048572.html> (4/2/2016).

<sup>4</sup> Cf. Heinrich BEST, György LENGYEL, and Luca VERZICHELLI, Introduction: European integration as an elite project, in: Heinrich BEST, György LENGYEL, and Luca VERZICHELLI (eds.), *The Europe of Elites, A Study into the Europeanness of Europe's Political and Economic Elites*, Oxford 2012, p.1-13; Thomas RISSE, *European Institutions and Identity Change: What Have We Learned?*, in: Richard K. HERRMANN/Thomas RISSE/Marilynn B. BREWER (eds.), *Transnational Identities, Becoming European in the EU*, p. 247, 260 et seq.

<sup>5</sup> See, for example, the Website of the European Commission, [https://eacea.ec.europa.eu/europe-for-citizens\\_en](https://eacea.ec.europa.eu/europe-for-citizens_en) (12/2/2016).

<sup>6</sup> [http://europa.eu/legislation\\_summaries/glossary/democratic\\_deficit\\_en.htm](http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm) (12/2/2016). Many voices have criticised the 'democratic deficit' of the European Union, e.g. the former judge of the German Constitutional Court, Dieter GRIMM, *Der Mangel an europäischer Demokratie*, <http://www.spiegel.de/spiegel/print/d-13679731.html> (12/2/2016). See also the declaration of 90 European intellectuals, including Jürgen HABERMAS, Nobel Literature prize winners Herta MÜLLER and Imre KERTESZ 'We are Europe! Manifesto for rebuilding Europe from the bottom up,' initiated by sociologist Ulrich BECK and Green politician Daniel COHN-BENDIT, cf. Nancy ISENSON, *European intellectuals warn of EU's demise*, <http://www.dw.com/en/european-intellectuals-warn-of-eus-demise/a-15924248> (16/2/2016).

Treaty of Lisbon (2009), which could only come into force after the second and then positive referendum of the Irish people<sup>7</sup>, the member states have tried again to redress the “democratic deficit” of the EU.<sup>8</sup> One of the major improvements for the democratic legitimacy of the EU has again been – as in every EU Reform Treaty – the increase of power for the European Parliament.<sup>9</sup> Besides new rules concerning the election of the European Parliament and rules to strengthen the role of national parliaments in the EU, the member states have also created a new participatory opportunity for European citizens, the European Citizens’ Initiative in article 11 para. 4 TEU.<sup>10</sup> With the European Citizens’ Initiative the European Union gives the European citizens (consisting of a minimum number from at least 7 of the 28 member states) a tool to suggest a legislative act to the Commission.<sup>11</sup>

The Citizens’ Initiative constitutes the first attempt to introduce an element of direct democracy in the European Union and it also represents the first attempt worldwide to introduce direct democracy into an international organization.

The paper wants to address the relationship between Europe and the European citizens from different perspectives. The first chapter shall deal with the structure of the European Union as an international organization and shall pose the question how democracy as a principle fits into that structure (I.). The chapter shall also describe the various forms of democratic elements in the European Union. The second chapter is supposed to sketch the “European citizen” as an idea of the European Union taking up the citizenship of the European Union (II.). The third chapter is dedicated to scrutinizing the participatory possibilities for European citizens (III.). In that context I also want to display some data how the new European Citizens’ Initiative has been working practically so far. The summary will be able to shed some light on the relationship between Europe and the European citizen (IV.).

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<sup>7</sup> See Henry McDONALD, Ireland votes in favor of Lisbon Treaty, <http://www.theguardian.com/world/2009/oct/04/ireland-votes-yes-lisbon-treaty> (16/2/2016); and one year before Henry MC DONALD/Allegra STRATTON, Irish voters reject EU treaty, <http://www.theguardian.com/world/2008/jun/13/ireland> (16/2/2016).

<sup>8</sup> See [http://europa.eu/legislation\\_summaries/glossary/democratic\\_deficit\\_en.htm](http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm) (2/7/2015).

<sup>9</sup> Cf. Deirdre CURTIN/Tatevik MANUCHARYAN, Legal Acts and Hierarchy of Norms in EU Law, in: Anthony ARNULL/Damian CHALMERS (eds.), *European Union Law*, Oxford 2015, p.103, 122.

<sup>10</sup> Cf. <http://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=URISERV%3Aai0033> (16/2/2016), [http://europa.eu/rapid/press-release\\_MEMO-09-531\\_de.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-09-531_de.htm?locale=en) (16/2/2016); Thomas HIEBER, *Die Europäische Bürgerinitiative nach dem Vertrag von Lissabon*, Tübingen 2014, p. 13 et seq.

<sup>11</sup> See <http://ec.europa.eu/citizens-initiative/public/welcome> (16/2/2016). Cf. also the reportage on you tube that explains how the European Citizens’ Initiative works, <https://www.youtube.com/watch?v=HDJxXiYIK48> (16/2/2016).

## § 1 – THE EUROPEAN UNION AND DEMOCRACY

### A) The European Union as an International Organization

From the perspective of international law, the European Union constitutes at first sight an ordinary international organization. As such the European Union is a normal subject of international law with full legal capacity. That means it can conclude international treaties with other states or international organizations, it has its own diplomats<sup>12</sup> and it takes part in normal international proceedings. Viewed from this perspective the European Union seems to be just one of the numerous international organizations that have sprung up after the disaster of World War II.<sup>13</sup>

However, a closer look reveals the uniqueness of the European Union. Whereas other international organizations are based on intergovernmental agreements and only provide intergovernmental structures the European Union features a “supranational constitution”. This means not only that European law takes precedence over national law, but also that it affects national law much more strongly than common international law. This is manifested, for example, in the regulation, one of the major secondary legislative acts of the EU. According to article 288 para. 2 TFEU<sup>14</sup> the regulation shall have general application and it shall be binding in its entirety and – this is the crucial part – it is directly applicable in all member states. As a result of the international law principle of sovereign equality of states, normally an act of national law is indispensable to implement international law into the national legal order. In the European Union, the member states have transferred parts of their sovereign power to the level of the EU. Therefore, the interlinking of European law and national law is so close, that the member states have partly waived their usual right to control an act of international law by passing a law to implement such an act. This is the reason why such an – from a point of international law – unusual because directly applicable legislative act as the directive can exist. The German Federal Constitutional Court has coined the term ‘Staatenverbund’ for the European Union intending to express that the Union constitutes

<sup>12</sup> [http://ceas.europa.eu/jobs/delegations/european-diplomatic-programme/index\\_en.htm](http://ceas.europa.eu/jobs/delegations/european-diplomatic-programme/index_en.htm) (16/2/2016).

<sup>13</sup> For international law World War II has been a key event. After the second World War the states were united by the strong will to do everything to never ever have another comparable international disaster again. From this arose a firm determination to cooperate amongst states which led to the foundation of numerous international organizations as a consequence. The importance of international organizations as key players on the international scene is one of the major characteristic factors of modern international law (besides the prohibition of the use of force in international relations laid down in the UN Charter and the increased importance of international human rights), *See*, for example, Matthias Herdegen, *Völkerrecht*, 14th edition, München 2015, § 2 para. 22 et seq.

<sup>14</sup> Treaty on the Functioning of the European Union, Consolidated Version of the Treaty - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, Official Journal C 326, 26/10/2012 p.1 – 390.

something which is a much closer union than a normal international organization (“Staatenbund”), but not a federal state (“Bundesstaat”) either.<sup>15</sup>

The European Court of Justice (ECJ) has played a fundamental role in establishing the idea of the European union as a “supranational organization”. Already in the 1960’s the Court stressed that the law of the – at that time – European Community differs fundamentally from the international law normally applying within international organizations. In *van Gend&Loos* the Court held that “the European Economic Community constitutes a new legal order of international law<sup>16</sup> for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals”.<sup>17</sup> In the famous *Costa/ENEL* judgement of July 15th 1964 the ECJ stated that “by contrast with ordinary international treaties, the EEC treaty has created its own legal system<sup>18</sup> which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply”.<sup>19</sup> And in an opinion of the Court of 14 December 1991 the ECJ went even further and found that” [...] the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law”.<sup>20</sup> All this shows that the European legal system has unique characteristics clearly distinguishing the EU from all other international organizations.

Since the European Union is not an ordinary international organization the question arises what it is and if it is rather a national state than an international organization. The wording of the Court in its opinion of 14 December 1991 (“the EEC Treaty [...] constitutes the constitutional charter<sup>21</sup> of a Community based on the rule of law”) might seem to suggest this.<sup>22</sup> It seems very doubtful, though, whether the European Union really is on its way to become a federal state as we look at the crises the Union has experienced in the last few years. Those crises imply a gradual decrease or even a disintegration of the Union rather than an

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<sup>15</sup> Cf. BVerfGE 89, 155, guiding principle 8, judgement of 12/10/1993.

<sup>16</sup> Emphasis added.

<sup>17</sup> See ICJ, judgement of 5 February 1963, Case *van Gend&Loos*, point 3.

<sup>18</sup> Emphasis added.

<sup>19</sup> Cf. ECJ, judgement of 15 July 1964, Case *Costa/ENEL*, point 3.

<sup>20</sup> See ECJ, opinion 1/91 of 14 December 1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, point 1. The opinion goes on: ‘The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.’

<sup>21</sup> Emphasis added.

<sup>22</sup> See above.

ongoing progress in European integration.<sup>23</sup> Whether one tends to view the ongoing development as an decelerated integration rather than a decline of the European Union depends on the attitude of the observer. At least one has to keep in mind that the European integration has proceeded at a tremendous pace so far. The introduction of the possibility of withdrawal in article 50 TEU by the Treaty of Lisbon, for example, is on the one hand a manifestation of the crises the EU has experienced in the last years. It is on the other hand also a step towards normality since treaties founding international organizations usually contain a withdrawal clause.<sup>24</sup> However, it is obvious that the EU is at the moment certainly not moving towards a European state.<sup>25</sup> Although the idea of a “United States of Europe” still has its advocates<sup>26</sup>, the current debate rather focuses on the question if the European Union will be able to overcome its crises and will continue to exist at all in its present form.

One of the reasons why the European Union will probably never become a federal state is a fundamental scepticism of some EU member states and of the population as well concerning European integration in general and specifically concerning a development towards a European state. And even in member states where such a scepticism towards the European Union might not exist, a development towards a European State would not be welcomed, e.g. in Germany, where the German Federal Constitutional Court in its judgement concerning the Treaty of Lisbon made it explicitly clear that it would see a development towards a European State as not in accordance with the German constitution.<sup>27</sup> The scepticism towards a too tight European Union manifests itself in many ways. One thing is the reluctance of some member states – such as Great

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<sup>23</sup> Cf., for example, Mark MARDELL, Could the EU fall apart completely?, <http://www.bbc.com/news/world-europe-33162306> (23/2/2016); Jim Yardley, Has Europe reached the breaking point?, [http://www.nytimes.com/2015/12/20/magazine/has-europe-reached-the-breaking-point.html?\\_r=0](http://www.nytimes.com/2015/12/20/magazine/has-europe-reached-the-breaking-point.html?_r=0) (23/2/2016).

<sup>24</sup> The fact that the founding treaties of the EU did not contain such a clause, is astonishing from an international law perspective. It shows the firm determination of the founding member states to form a strong and maybe even permanent union. The idea of a permanent union is indicated in some judgements of the ECJ, e.g. ECJ, judgement of 15 July 1964, Case Costa/ENEL, point 3: ‘By creating a community of unlimited duration, [...] the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves’.

<sup>25</sup> A totally different question is whether it seems at all desirable to turn the European Union into a federal state. At present, the EU clearly does not meet the criteria of a federal state. Especially the principle of conferral in article 5 para. 1, 2 TEU which keeps state sovereignty with the member states and not with the EU, indicates that the powers of the EU are obviously limited as that of an international organization.

<sup>26</sup> See, for example, the former Vice-President of the European Commission Viviane Reding, Why we need a United States of Europe now, [http://europa.eu/rapid/press-release\\_SPEECH-12-796\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-796_en.htm) (26/2/2016); the Italian Prime Minister, Matteo Renzi, cf. Martin Banks/Nick Squires, Italy to push for ‘United States of Europe’ when it holds the EU presidency, <http://www.telegraph.co.uk/news/worldnews/europe/eu/10918134/Italy-to-push-for-United-States-of-Europe-when-it-holds-the-EU-presidency.html> (23/2/2016); the movement Paneuropa Union, <http://www.paneuropa.org> (23/2/2016).

<sup>27</sup> Cf. 2 BvE 2/08 et al., judgement of 30/6/2009, para. 264, [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) (23/2/2016).

Britain and Poland – to fully join the EU Charter of Fundamental Human Rights.<sup>28</sup>

The fundamental scepticism also shows up clearly in the referendums on European matters initiated by some member states. This development will reach its temporary high in the referendum on the maintenance of Great Britain in the EU. This referendum will be the first referendum held by a long-time member state about staying in the EU and might constitute the first application of article 50 TEU. Whether these referendums really relate to EU politics or are rather dominated by national politics often remains doubtful. This is also the case with the “Brexit”, which can also be seen as a poll concerning the British immigration policy of the last decade.<sup>29</sup> The referendums in the Netherlands and in France in 2005 demonstrate though that referendums have the power to affect European integration in a serious way regardless of what the will of the people wanted to express in the first place.<sup>30</sup> That way referendums are a double-edged sword. On the one hand referendums often acted as drags on the further European integration process and not infrequently smashed political efforts. Referendums therefore pose a momentary risk for European integration on the one hand and can be seen as the sword of Damocles over the fate of the European Union. On the other hand they provide a proper means to identify the people’s will concerning European matters and to integrate the people of Europe into the European decision-making process. And this integration proves essential for the long-term success of the European Union.

## **B) The Principle of Democracy in the European Union**

The deeper reason why those referendums play such a fundamental role for the progress of the European Union can also be found in the structure of the EU. As a supranational community the EU is dedicated to certain principles that are normally not part of international organizations. One of the fundamental principles the EU is build upon is democracy.<sup>31</sup> Democracy has always been a principle all member states stay committed to. It therefore also constitutes one of the fundamental general legal principles of the

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<sup>28</sup> Cf. Josef Franz LINDNER, Zur grundsätzlichen Bedeutung des Protokolls über die Anwendung der Grundrechtecharta auf Polen und das Vereinigte Königreich – zugleich ein Beitrag zur Auslegung von Art. 51 EGC -, EuR 2008, p.786-799.

<sup>29</sup> See Marcus THEURER, Worüber die Briten wirklich abstimmen, <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/brexit-hintergruende-zum-eu-referendum-von-david-cameron-14048572.html> (4/2/2016).

<sup>30</sup> Cf. Referendum: Niederländer lehnen EU-Verfassung ab, <http://www.spiegel.de/politik/ausland/referendum-niederlaender-lehnen-eu-verfassung-ab-a-358625.html> (4/2/2016).

<sup>31</sup> See, for example, the Preamble of the TEU (“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, [...]”) and Article 2 TEU (“The Union is founded on the values of respect for human dignity, freedom, democracy, [...]).

European Union itself. But democracy on a European level can not be equated with the idea of democracy within a state.<sup>32</sup> That was also the opinion the German Federal Constitutional Court displayed when examining whether the Treaty of Lisbon is compatible with German constitutional law.<sup>33</sup> International organizations operate according to principles different to those in national policy. First of all, international organizations are state-orientated. They are founded by a number of member states and their structure therefore is arranged according to the states' interests. The legal tool for this is international public law, which is characterized by a coordinative rather than an over – and subordination relationship which is typical for domestic legislation. This coordinative structure marks the second major difference between international organizations and states.

International organizations therefore usually are based on the principle of “one state one vote” which stems from the sovereign equality of states as a fundamental element of international law.<sup>34</sup> The principle of “one state one vote” as a state orientated principle is prone to come into conflict with the people orientated principle of democracy which strives for the idea of “one man one vote”. This structural conflict is displayed exemplarily by the ongoing debate about voting rights in the election of the European Parliament. According to article 14 para. 2 TEU the European Parliament shall be composed of representatives of the Union's citizens. The number of representatives shall not exceed seven hundred and fifty, plus the President. Representation of citizens shall be degressively proportional,<sup>35</sup> with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats. In practice, this means that member states with a very small population such as Malta or Luxemburg are allowed to send more representatives into the European Parliament in comparison with their population than

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<sup>32</sup> Cf. Damian CHALMERS, *The Democratic Ambiguity of EU Law Making and its Enemies*, in: Anthony ARNULL/Damian CHALMERS (eds.), *European Union Law*, Oxford 2015, p. 303-326; Oliver Mross, *Bürgerbeteiligung am Rechtsetzungsprozess in der Europäischen Union*, Berlin 2010, p.37.; Martin NETTESHEIM, *Demokratisierung der Europäischen Union und Europäisierung der Demokratietheorie – Wechselwirkungen bei der Herausbildung eines europäischen Demokratieprinzips*, in: Hartmut BAUER/Peter M. HUBER/Karl-Peter SOMMERMANN (eds.), *Demokratie in Europa*, Tübingen 2005, p.143, 165 et seq.

<sup>33</sup> Cf. German Federal Constitutional Court, 2 BvE 2/08 et al., judgement of 30/6/2009, para. 266, [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) (23/2/2016).

<sup>34</sup> The principle of the sovereign equality of states is as well the basis for the European Union and is therefore reflected in the TEU, *see* article 4 para. 2 TEU (“The Union shall respect the equality of Member States before the Treaties [...]”). Moreover, article 3 para. 5 TEU commits the European Union to comply with the general legal principles of international law as enshrined in the Charter of the United Nations, cf. article 3 para. 5 TEU (“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”(emphasis added).

<sup>35</sup> Emphasis added.

member states with a high population such as Germany and France. The idea behind the principle of degressive proportionality was not to render the European Parliament too big and that way expensive and ineffective, but also to give smaller states the chance to send more than just one representative to the European Parliament. The result is a regulation that conflicts with the basic democratic principle that all votes should count equally. This conflict is the reason why article 14 para.3 TEU only rules that the members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot and does not mention the principle of equality. On the other hand, article 9 TEU states that “In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.” Whether the mechanism of degressive proportionality is in accordance with article 9 TEU seems doubtful. The German Federal Constitutional Court in its famous judgement concerning the Treaty of Lisbon criticised the principle of degressive proportionality as not in accordance with the general democratic orientation of the EU as described in article 10 TEU.<sup>36</sup>

In spite of these difficulties the European Union has dedicated itself to the principle of democracy. The uneasiness with the principle of democracy can be felt, though. It is exemplarily shown in Article 1 TEU: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken *as openly as possible and as closely as possible to the citizen*”.<sup>37</sup> The wording of article 1 TEU demonstrates that the EU is aware of the fact that democracy works different on a European level. It also shows a certain awareness of the member states that the European Union in the past might not have always succeeded to address the needs of the population at the local level. As democracy on a European level can not be equated with democracy on a national level, the question arises how democracy is designed on a European level. The democratic legitimacy of the EU in principle is based upon two pillars.<sup>38</sup> Both pillars rely on the principle of representative democracy.<sup>39</sup> The first pillar is the direct representation of European citizens in the European Parliament. The second pillar relies on the member states that are represented in the European Council by their heads of state or government<sup>40</sup> and in the Council by their governments, which are themselves democratically accountable to their national Parliaments<sup>41</sup>. Over the course of history, the direct representation of European citizens has become more and more important with the advancing

<sup>36</sup> Cf. German Federal Constitutional Court, 2 BvE 2/08 et al., judgement of 30/6/2009, para. 280,

[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) (23/2/2016).

<sup>37</sup> Emphasis added.

<sup>38</sup> Cf. article 10 para. 2 TEU.

<sup>39</sup> See article 10 para. 1 TEU: “The functioning of the Union shall be founded on representative democracy”.

<sup>40</sup> See article 15 para. 2 TEU.

<sup>41</sup> Cf. article 16 para. 2 TEU.



integration of the Union and the growing power the member states have granted the European Parliament with each amending treaty. That way the EU has evolved from a normal international organization into an ever closer union working according to the principle of supranationality.

The Treaty of Lisbon not only gave more power to the European Parliament, but clearly tries to focus on the European citizen.<sup>42</sup> The Treaty of Lisbon introduced a whole new chapter 'Provisions on Democratic Principles' into the TEU (chapter II, articles 9-12). In this chapter the TEU elaborates about how democracy is supposed to work on a European level. Although the European Union is based essentially on the principle of representative democracy, the Treaty of Lisbon introduced the European Citizen's Initiative provided in article 11 para. 4 TEU as an element of direct democracy.

## § 2 – THE “EUROPEAN CITIZEN”

The concept of the European Citizen is closely linked to the Citizenship of the European Union, which has been introduced into the founding treaties by the Treaty of Maastricht in 1993. The Maastricht Treaty marks a turning point to European integration. Setting up the European Union as a political complement to the European Community, the Maastricht Treaty turned the organization into a truly political union.<sup>43</sup> This development has further proceeded with the Treaty of Lisbon. With each step on the way of further political integration the focus has turned more and more to the European Citizen as a crucial figure for the political success of the European Union.

In the present treaties article 9 TEU defines the Citizenship of the Union as additional to national citizenship.<sup>44</sup> The EU Citizenship is therefore sometimes called a “multilevel citizenship”.<sup>45</sup> According to article 20 para. 2 TFEU the Citizenship of the European Union entails rights and duties<sup>46</sup> that come along with the citizenship of one of the member countries, but it shall not replace the citizenship of a member state. That way, the member states and their national citizenship law and not the European Union itself decide who will become a Citizen of Europe and who will not.<sup>47</sup> The Citizenship of the Union therefore constitutes not a

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<sup>42</sup> That way the concept of the European citizen introduced by the Maastricht Treaty in 1990, became more alive with the Treaty of Lisbon.

<sup>43</sup> The idea of a political union had already been present in the beginning of the European integration process. After the French Assemblée Nationale had turned down the idea of a European Defense Community in 1954, the founding members of the EU concentrated on economic cooperation hoping that with the economic success of the EU the will to promote further political integration would come, too. The plan proved successful.

<sup>44</sup> 'Every national of a Member State shall be a citizen of the Union', *see* also article 20 para.1 TFEU with the same wording.

<sup>45</sup> *See*, for example, Willem MAAS, Multilevel Citizenship in Europe, in: Willem MAAS (ed.), *Multilevel Citizenship*, Philadelphia 2013, p. 15-21.

<sup>46</sup> Interestingly, the TEU does not mention or specify the duties of European citizens, but talks solely about the rights of the citizens.

<sup>47</sup> Cf. ECJ, C-135/08 (Rottmann), judgement of 2.3.2010, para. 39.

real nationality – which is consistent since the EU is not a federal state, but a specially designed international organization.<sup>48</sup> Nevertheless the EU Citizenship provides the European citizens with fundamental “European” rights: the right to move and reside freely in the EU<sup>49</sup>, the right to vote for and stand as a candidate in European Parliament and municipal elections<sup>50</sup>, the right to be protected by the diplomatic and consular authorities of any other EU country<sup>51</sup>, the right to petition to the European Parliament and complain to the European Ombudsman and the right to contact and receive a response from any EU institution in one of the EU’s official languages<sup>52</sup>. Moreover, EU Citizens have the right to non-discrimination on the basis of nationality when the TFEU applies.<sup>53</sup> They also have the right to equal access to the EU Civil Service. All those rights contribute essentially to the attractiveness of the citizenships of EU member states as we can see in the refugee crisis.<sup>54</sup>

In conferring those rights to European Citizens the Maastricht Treaty has made the European Union more tangible for the people. But the development into a political Union has also moved the focus to the European Citizen as a crucial part in the European decision making process.<sup>55</sup> In a European Union based on democratic principles the European Citizen is bound to play a decisive role. The European Union now has to keep the promise of a closer involvement of the European Citizen into the decision making process in the EU.

### § 3 – PARTICIPATING IN EUROPE

#### A) Participation Opportunities for European Citizens

The classical path of citizen’s participation in an international organization goes via the national Parliaments. The German Federal Constitutional Court therefore sees the main legitimization of the European Union in the Consent Act to the Founding Treaties of the European Union.<sup>56</sup> From a strictly constitutional point of view the means of democratic participation provided by the European Union therefore only constitute a supplementary legitimization for the European Union.<sup>57</sup> The possibilities of

<sup>48</sup> See I.1.

<sup>49</sup> See articles 20 para. 2 a), 21 TFEU.

<sup>50</sup> Cf. articles 20 para. 2 b), 22 TFEU.

<sup>51</sup> See articles 20 para. 2 c), 23 TFEU.

<sup>52</sup> Cf. article 20 para. 2 d), 24 TFEU.

<sup>53</sup> See article 18 TFEU.

<sup>54</sup> There are other reasons, too, why so many refugees come to Europe: The vicinity of Europe to international flashpoints such as Syria, for example. And, of course, some European countries attract more refugees than others on account of various reasons. But all in all one can say that the refugee crisis is also – among many other reasons – a consequence of the economic and political success of the European Union.

<sup>55</sup> Another development adding to the new focus on the European Citizen is the implementation of the EU Charter of Fundamental Human Rights by the Treaty of Lisbon.

<sup>56</sup> Cf. German Federal Constitutional Court, 2 BvR 2134/92 und 2 BvR 2159/92, judgement of 12/10/1993, ‘Maastricht judgement’, guiding principle 3 b).

<sup>57</sup> That is the wording of the German Federal Constitutional Court in the ‘Maastricht judgement’, see above, guiding principle 3 b).

democratic participation provided by the European Union itself have become various. Of course, the most important means of participation is via the direct elections to the European Parliament.<sup>58</sup> The European Parliament is now - together with the Council of the EU - the key figure in the European legislation process.<sup>59</sup> But also the above mentioned rights to petition to the European Parliament<sup>60</sup>, to complain to the European Ombudsman<sup>61</sup>, and the right to contact and receive a response from any EU institution in one of the EU's official languages<sup>62</sup> are fundamental rights involving the European citizen into EU political matters.

## **B) The European Citizen's Initiative**

In addition to those ways of classical democratic representation, the Treaty of Lisbon has introduced the European Citizen's Initiative as an element of direct democracy. This is extremely unusual for an international organization since international organizations normally solely rely on the consent of the states joining the organization and do not establish a direct connection between the organization itself and the citizens of the member states. But the European Union is – as described above – different. As a Union comprising only democratic states<sup>63</sup> the EU has dedicated itself to the principle of democracy. Therefore, the EU has ventured to introduce the citizen's initiative as a means to involve the citizens of the EU directly in EU legislative matters. The European citizens' initiative allows EU citizens to call on the European Commission to make a legislative proposal.<sup>64</sup> The citizens' initiative has to be backed by at least one million EU citizens, coming from at least 7 out of the 28 member states.<sup>65</sup> In each of those 7 member states a certain minimum number of signatories is required depending on the number of inhabitants of the state.<sup>66</sup> The organisers of the initiative have to be citizens of the European Union and have to be of the age to be entitled to vote in elections to the European Parliament<sup>67, 68</sup>. The subject of the

<sup>58</sup> Cf. articles 10 para. 2, 14 para. 2, 3 TEU.

<sup>59</sup> See articles 14 para. 1, 16 para. 1 TEU, 294 TFEU.

<sup>60</sup> Cf. articles 24 para. 2, 227 TFEU.

<sup>61</sup> See articles 24 para. 3, 228 TFEU.

<sup>62</sup> Cf. article 24 para. 4 TFEU.

<sup>63</sup> International organizations very often consist of democratic and non-democratic states, e.g. the United Nations (UN) or the World Trade Organization (WTO). Since most states in the world can not be called democratic, the chances in international organizations with numerous members are high that non-democratic states are also members of the organization.

<sup>64</sup> See article 11 para. 4 TEU.

<sup>65</sup> Cf. article 11 para. 4 TEU and the official Website of the Citizen's Initiative <http://ec.europa.eu/citizens-initiative/public/welcome?lg=en> (1/3/2016).

<sup>66</sup> See <http://ec.europa.eu/citizens-initiative/public/signatories> (1/3/2016).

<sup>67</sup> The age to vote is 18 years in all member states of the EU, besides Austria, where the voting age is 16.

<sup>68</sup> See article 3 para 1 of the Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011R0211-20131008&from=EN> (1/3/2016). The Regulation was adopted on the legal basis of

initiative has to fall under EU competence.<sup>69</sup> Moreover, the Commission has to have the power to submit a proposal for a legal act concerning the subject of the initiative.<sup>70</sup>

If an initiative gets one million signatures representatives of the Commission will meet the organisers of the initiative within 3 months so they can explain in detail the issues raised in their initiative. Besides, the organisers will have the chance to present their initiative at a public hearing in the European Parliament. In the end the Commission will adopt a communication published in all official EU languages spelling out what action it will propose in response to the citizens' initiative, if any, and the reasons for doing or not doing so.<sup>71</sup> The Commission is not obliged to propose legislation as a result of an initiative. If the Commission decides to put forward a legislative proposal, the normal legislative procedure kicks off: the Commission proposal is submitted to the legislator (generally the European Parliament and the Council or in some cases only the Council) and, if adopted, it becomes law.

So far, three initiatives have been “successful”, meaning that they have been able to reach the required number of statements of support. The first initiative had been registered on 10/5/2012 and carried the title “Water and sanitation are a human right! Water is a public good, not a commodity!”.<sup>72</sup> The process ended with a communication from the Commission.<sup>73</sup> In this communication the Commission did not propose a legislation installing the right to water as a human right in the EU. Instead it proposed a number of other actions, partly connected to the already existing water quality legislation.<sup>74</sup> The second initiative that reached the magical border of one million supporters was registered one day later on 11/5/2012 and was called “One of us”.<sup>75</sup> It was directed against abortion and research involving embryos.<sup>76</sup> The final Communication of the Commission of 28/5/2014 turned down the initiative.<sup>77</sup> The last initiative from 22/6/2012 with the title “stop vivisection” was directed against animal testing.<sup>78</sup> It was answered on 3/6/2015 with a reference to the already existing

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article 24 para. 1 TFEU which allows the European Parliament and the Council to set out the rules and procedures of the European citizen's initiative.

<sup>69</sup> According to the principle of conferral (article 5 para. 1 TEU) the European Union needs an explicit authorization to introduce legislation. The division of competences between the EU and the member states is regulated in articles 2-6 TFEU.

<sup>70</sup> See article 11 para. 4 TEU.

<sup>71</sup> <http://ec.europa.eu/citizens-initiative/public/how-it-works/answer#tabs> (1/3/2016).

<sup>72</sup> Cf. <http://www.right2water.eu> (1/3/2016).

<sup>73</sup> See <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-177-EN-F1-1.Pdf> (1/3/2016).

<sup>74</sup> Cf. <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-177-EN-F1-1.Pdf> (1/3/2016).

<sup>75</sup> See <http://www.oneofus.eu> (1/3/2016).

<sup>76</sup> <http://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/2012/000005/en> (1/3/2016).

<sup>77</sup> See <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-355-EN-F1-1.Pdf> (1/3/2016): “The Commission concludes that the EU currently has the necessary legal framework to effectively manage EU development funding in a way that helps minimise the number of abortions performed in developing countries.”

<sup>78</sup> Cf. <http://www.stopvivisection.eu> (1/3/2016).

legislation and turned down the attempt to totally ban animal testing in the EU.<sup>79</sup>

Right now five more initiatives are open for subscription.<sup>80</sup> Some initiatives have been refused in the first place.<sup>81</sup> That has been the case with the initiative trying to stop the Transatlantic Trade and Investment Partnership (TTIP) since it did not meet the criteria of article 11 para. 4 TEU. According to this article the initiative has to deal with matters “where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”. The Commission argued that an initiative may request the signature and conclusion of an international agreement with a certain content, whereas the preparatory decision of the Council to open legal negotiations can not be considered “a legal act of the Union”.<sup>82</sup> Although three initiatives have managed to cross the one million threshold, no initiative has been able to incite actual legislation. The actual influence of the people’s will on the European decision making process via the European Citizen’s Initiative is therefore minimal so far, which makes the Citizens’ Initiative seem like a toothless tiger and makes one doubt whether the Initiative truly provides an effective tool for actual citizen participation in the EU. On the other hand, the initiative encourages people to spend time on European matters. That way the Citizens’ Initiative helps to build something like a “European public”.<sup>83</sup> At least it provides a means for people to engage in a transnational dialogue on European matters. This is an important thing since one of the problems European politics encounter is the fact that debates about European matters are very often held in the context of national politics rather than truly European aspects. Insofar the initiative provides an integrative counterpart of the referendums on European matters held in member states.

As a brand-new instrument for the European Union and worldwide the European Citizen’s Initiative was introduced on a test basis and is therefore subject to a current reform process.<sup>84</sup> The European Parliament reviewed the Initiative in 2015.<sup>85</sup> All in all the

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<sup>79</sup> See <http://ec.europa.eu/transparency/regdoc/rep/3/2015/EN/3-2015-3773-EN-F1-1.PDF> (1/3/2016): ‘The Commission therefore does not intend to submit a proposal to repeal Directive 2010/63/EU and is not intending to propose the adoption of a new legislative framework.’

<sup>80</sup> Cf. <http://ec.europa.eu/citizens-initiative/public/initiatives/open> (1/3/2016). One interesting initiative with the title ‘Wake up Europe! Taking action to safeguard the European democratic project’ is calling for actions of the EU in the face of the authoritarian developments in Hungary and Poland, see <http://www.act4democracy.eu/?lang=en> (1/3/2016).

<sup>81</sup> <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered> (1/3/2016).

<sup>82</sup> <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041> (1/3/2016).

<sup>83</sup> If something like a ‘European public’ exists at all, is a matter of constant debate, see, for example, Claudio FRANZIUS, Ulrich K. PREUB: *Europäische Öffentlichkeit*, Baden-Baden 2004; Ruud KOOPMANS, Barbara PFETSCH, *Towards a Europeanised Public Sphere? Comparing Political Actors and the Media in Germany*. ARENA Working Paper, 23/2003; Michael BRÜGGEMANN, Andreas HEPP, Katharina Kleinen-von KÖNIGSLÖW, Hartmut WESSLER, *Transnationale Öffentlichkeit in Europa: Forschungsstand und Perspektiven*, *Publizistik*, vol. 54, no. 3, 2009, p. 391–414.

<sup>84</sup> <http://www.europarl.europa.eu/ocil/popups/ficheprocedure.do?lang=&reference=2014/2257%28INI%29> (1/3/2016).

<sup>85</sup> <http://www.europarl.europa.eu/ocil/popups/summary.do?id=1409682&t=d&l=en> (3/3/2016).

Parliament's summary was positive concerning the Initiative. The Parliament's improvement suggestions mirrored the experiences with the application of the initiative, e.g. to make the software for the online collection of signatures more user-friendly, to provide appropriate and comprehensive guidance – especially of a legal nature – as early as possible to the organisers of an initiative or to explore ways of referring initiatives that did not fall within the scope of the Commission's powers to the competent authority, be it at national or regional level.<sup>86</sup>

#### § 4 – PARTICIPATING IN EUROPE

The relationship between the EU and its citizens is intricate. Since the EU is neither a national state nor a normal international organization, the citizens of Europe are neither real citizens with a strong direct bond to the EU nor are they just objects of their state actions and are themselves not connected to the EU. The intermediate state of the EU therefore is reflected in the relationship between the EU and its citizens. The situation is difficult since it is unique. We will have to free ourselves from conventional concepts of democracy that work well within states, but might not succeed in the same way on an international level.<sup>87</sup>

On the other hand the unknown situation provides the opportunity to tread new ground and develop new structures perfectly fit for the international experiment of the European Union.

The member states meet this challenge by organizing the European Union according to representative elements and also try a cautious step towards the implementation of direct democracy in the EU. In the course of history, the member states have learned the important lesson that the EU will not work successfully without its citizens. It also became clear that the closer the Union gets, the more have the citizens to be integrated into the European decision making process. The European Citizens' Initiative constitutes only a small step on this still very long way to go.

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<sup>86</sup> See above.

<sup>87</sup> The observation that structural elements from national legal systems work differently on an international level, is not restricted to democracy and the EU. It is also true for the rule of law and for human rights, for example.