Alexis Chommeloux and
Elizabeth Gibson-Morgan

Voting in Contemporary Europe

Patterns and Trends

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Alexis Chommeloux • Elizabeth Gibson-Morgan
Editors

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Foreword

'The cure for democracy is more democracy'. So proclaimed American Progressive reformers like 'Fighting Bob' La Follette in Wisconsin at the dawn of the twentieth century. In cities and states it was believed that people power, openly expressed at the polls—including the referendum, the primary and the recall—would root out the corruption of capitalist bosses that polluted the American political system and the dreams of Jefferson and his fellow makers of the US constitution. Further, the people would generate not only public honesty but public morality since, by definition, they were the keys to a liberal and decent society. The later discovery that direct democracy could produce mass support for demagogues like Huey Long and Joseph McCarthy ('No one loves Joe but the people'), not to mention the bizarre but highly influential prejudices of Donald Trump, was thus deeply troubling. In Europe, the cradle of ideas of representative government and parliamentary democracy, the same anxiety is currently powerfully in evidence across the continent. Democracy has never seemed so fragile in post-1945 Europe. Yet it has never been more necessary. This fascinating collective volume, a genuinely international and multidisciplinary work by a range of eminent scholars drawn from Britain, France, Denmark, Germany, Spain, Switzerland and the Balkans, deals in impressive fashion with the challenges to, and potentialities of, democratic politics today. It appears at an acutely sensitive and deeply significant time, with major national and local elections in many countries, and angry debate over the political structures of the European Union (EU), including a vital referendum in the UK in June 2016 on whether to leave or remain in the Union at all, when the victory of the Brexit campaign

demonstrated much public alienation towards political leaders and the 'Westminster elite'. It will therefore provide an invaluable guide to debate and source of information for the peoples of Europe at a pivotal time in their history and is warmly to be welcomed.

The reasons for the current mood of alienation throughout Europe from traditional parliamentary democracy—indeed a sense of 'anti-politics' that has fuelled many extremist movements of both the right and the left—are numerous and profound. Commentators have pointed to crises and even crimes that have cast parliaments into disrepute in many countries: even in the UK, 'the mother of parliaments', a series of scandals involved often minor misbehaviour over political expenses and occasional sexual misdemeanours involving several MPs and a few peers. The public esteem of its parliament is shown in polls to be at a low level. Members of parliament are publicly rated by the general public at a level far lower than professions such as doctors, lawyers or academics. And yet the disrepute attaching to politicians goes far wider than this. After all, corruption amongst politicians in countries such as Italy has been endemic over many decades. French politicians were caught up in graft from 'Panama' in 1893 to the Stavisky scandal in 1933; ex-presidents like Chirac and Sarkozy have felt the hot breath of the law, and yet the democracy of the French Republic has survived. More powerfully, worldwide social and economic forces—economic globalisation, mass movements of refugees and other migrants notably into Europe, the policies of right-wing austerity which most European governments and the EU itself have adopted—have fuelled widespread discontent with parliamentary institutions and politicians as a class. Their powerlessness has been repeatedly unveiled. They have led to massive disillusion with the operations of politics, with populist, usually right-wing protest movements emerging in countries like Germany, the nations of the former Yugoslavia and, most ominously, with the rise of the Front National in France where Marine Le Pen will mount a powerful challenge for the presidency in the elections of 2017. Euro-scepticism has been fanned in many countries and has driven down the already low levels of enthusiasm for voting in European elections.

More subtly, normal constitutional relationships have helped to undermine the standing of many parliaments and the idea of national sovereignty. This book shows how in Germany and Denmark, for instance, the constitutional roles of the courts, championing doctrines of human rights and endorsed by the European Court in this area, have provided awkward challenges to parliaments. There has been popular resentment at elected parliamentarians being rebuffed by unelected judges. Especially

when these judges have been overseas and invisible, this has also spurred on suspicion of the European idea, as seen in the rise of UKIP in Great Britain. Within Switzerland, something more complicated still has happened, the challenge to democratic ideas in a country where direct democracy by ordinary citizens in the various cantons is a proud and valued tradition. In Switzerland as in Wisconsin democracy has sometimes been turned in anti-democratic directions, as in the long exclusion of women from the franchise until 1971 and the current pressure to control Muslim religious practices and perhaps expel political and religious immigrants.

This book frankly and honestly lays out the difficulties and challenges that confront Europe's democracies now. But it also rightly emphasises the new vitality and hope that current pressures have released. The chapter on Spain shows the new impact of Podemos, a left-wing anti-austerity people's party which has also been effective in turning itself into something far more than simply a parade of public demonstrators and protestors. It is now a serious political party on the cusp of forming a government, in a country where the centrifugal forces of separatism have always been powerful, not only in Catalonia. Podemos has encouraged party membership and party discipline, and made good use, not only for publicity purposes, of the notion of democratic leadership. Iglesias, its leader, has become a political figure of real authority. There is a sense of vitality, too, in the nations of the western Balkans, notably Croatia, where being admitted to membership of the EU has been exciting and inspirational for many young voters in a land where the very notion of representative democracy is new and unfamiliar and which in the 1930s lay under the cruel dictatorship of a neo-Nazi regime, that of the Ustasha. The rise of European sub-nationalities in recent times has also had a liberating and educative effect in many ways. The reform of regional government in France has had a positive civic impact, while devolution for Scotland and Wales in the UK has given a new dynamism for democracy and inspired much enthusiasm, even if the problems of reconciling Celtic democracy in Scotland with the traditional Union-state of the four nations continue to increase and multiply. There is evidence too of the transformation of old political parties, founded in very different circumstances, helping to give new life to ancient democracies. The new mass membership in the British Labour Party, which helped in the unexpected election of the veteran Marxist, Jeremy Corbyn, as leader in September 2015, could provide some kind of a basis for a wider public participation in political life even here.

This book vividly shows, therefore, that there are grounds for hope and renewal as well as pessimism and decline. Democracy is not the most secure defence in meeting the social, economic and humanitarian challenges of our age. But, as Winston Churchill famously said, it is at least better than all the others. His own staunch commitment to the democratic system, and his making it visible in the heart of a blitzed London during the Second World War, perhaps even the plain grave in a small Oxfordshire village of 'Winston Churchill, Englishman' in marked contrast to the worship of the reactionary nationalist, his contemporary Petain, remain an inspiration to many of us who are not Conservatives or even English. What is vital at this sensitive moment in our history is that these forces of renewal should not only be encouraged (and made known through public education) but also directed to the heart of Europe itself. It is difficult to create the notion of 'a European mind' especially in an insular people like the British. It needs symbols, perhaps heroes. An important chapter in this book shows the potentiality of reform through electoral and other technical changes. It is also vital to make the idea of Europe and its legislative processes more accessible, immediate—simply more human. The EU does enormous damage to itself by yoking itself to traditional pre-Keynesian economic dogmas, despite the fierce criticism from leading economists like the Nobel prize-winner, Paul Krugman, and Thomas Piketty. Trying to impose its blanket edicts, whatever the cost in economic bankruptcy, human suffering and public disillusion amongst the citizens, draws attention to the still alarming democratic deficit that endures at the very heart of Europe.

The spectacle of unelected bureaucrats, Eurocrats and bankers, within the invisible recesses of the European Commissions, forcing their judgements upon the elected government of Syriza in Greece was disillusioning, even tragic. Yanis Varoufakis, the Syriza finance minister, has written of his shock at hearing Wolfgang Schauble, the federal German finance minister, tell him 'Elections cannot be allowed to change an economic programme of a member state.' Another EU finance minister added that this principle applied even more to 'a small and bankrupt country like yours'. The EU's 'rules', not the views of the citizens of Greece, were what mattered. If democracy in Europe is to be revived, the process of fundamental change must begin right here. Even the terrible atrocities recently carried out in Brussels, near the epicentre of the EU, might have some salutary effect in showing the

wider international repercussions of insensitive, anti-democratic economic policies. Neo-liberal dogmas in Brussels mean more suffering for Muslim refugees and potentially more terrorism. So the global bureaucratic oligarchy might do well to read, and inwardly digest, the judgements of this excellent volume. They might end up with a more buoyant view, with ideas of human potential that have inspired the western world since the French Enlightenment philosophers. Or, to put it more simply, in the language of Podemos, Yes we can.

Kenneth O. Morgan
Westminster
March 2016

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Introduction

Alexis Chommeloux and Elizabeth Gibson-Morgan

The peoples of Europe may not all share a common language, a common currency, a common foreign policy or a common army but, with a few notable and notorious exceptions, they share a common right: the right to take part in, fashion and supervise what one of the great Europeans is said to have described as "the worst form of government except for all others", via an essential and much fought for activity: that of voting. The relatively new European institutions that most of them do share may be criticised for the "democratic deficit" on which some put so much emphasis in the UK, France and Denmark, for instance, and yet the improvements in the way other Europeans vote (in the West Balkans in particular) owe a great deal to those institutions. Besides, it is voting that allows the former to peacefully consider leaving the European Union (EU), protest against it in the European Elections—for reasons seldom genuinely European—or limit the extent of their participation in and cooperation with the EU or other Europe-wide institutions. Political Europe is currently confronted with several major, potentially life-threatening crises. As it is attacked, for interfering or for doing too little, there is a feeling in many places that it is also Europe's politics as we know it that is being attacked. The helplessness of

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Europe echoes the helplessness of politicians all the more loudly since the latter tend to find comforting short-term expediency in blaming theirs on Brussels. As a result, Euro-enthusiastic parties are taking an electoral hit in many countries, notably because they tend to be more open to the world and more liberal—in most senses of the word—whereas the parties that are capitalising on fears currently inspired by globalisation, Americanisation, immigration and perceived encroachments on their precious sovereignty often share a visceral dislike of Europe—that is, of Europe-wide economic policies, of Schengen, of the so-called European super-state.

These fears are fuelled by the economic slowdown, the Euro crisis and the mass immigration resulting from five years of bloody conflict in Syria in particular; the subsequent dislike is often a central plank in the strategies of these parties which, in some cases, are redolent of an ideology that, in the past, had very little regard for voting. Yet it is these parties that are taking votes away from traditional parties and, sometimes, from the rather substantial party of abstention. Old Europe is weary of its political elites and unhappy with what it sees as a crisis of representation. That engenders a rising interest in alternatives to traditional voting, entrenched absenteeism and, increasingly, an attraction to alternative parties or unexpected leaders. Breaking away from the traditional mould of politics, voters are attracted in greater numbers to outsiders like the decidedly "Old Labour" leader of the British Labour party, Jeremy Corbyn. Well-established two-party systems are being challenged in several European countries—notably in Spain and to a lesser extent in the UK with its Conservative-Liberal Democrat coalition government from 2010 to 2015. Far-right parties are making gains in Eastern Europe—forming governments not only in Hungary, Poland and, recently, in Slovakia—where populism cements an illiberal left-wing party and a very radical extreme-right—but also in Western Europe with the Front National claiming with more and more justification to be "France's first party" (cf. Chap. "Exploring the "Americanisation" of French Politics"). Many European countries, inside or outside the EU, are therefore facing a fragmentation of the political spectrum and a sharp decline in the loyalties inspired by the main political parties (e.g. in Germany, as shown by Professor Krüper in Chap. "Constitutionalizing Electoral Politics: Democracy in the Berlin Republic").

At a time when the European Parliament, the only democratically elected European institution, has gained a good deal of institutional clout and legitimacy (as is explained by Professor Rossetto in Chap. "Elections to the European Parliament"), European citizens' turnout is on the decline.

Too often, in long-established democracies like France or the UK, the right to vote has been taken for granted; people are less and less inclined to turn up and vote in national and European elections. This is less true of Switzerland which has a long experience of direct democracy via popular initiatives and referendums (as Professor Hertig-Randall explains in Chap. "Direct Democracy in Switzerland: Trends, Challenges and the Quest for Solutions"), and whose voters, regularly consulted on important topical issues, use their popular initiatives to the full. By contrast (as can be seen in the analysis of Doctor Pavlovic in Chap. "Voting in the Western Balkans"), the new democracies of the Western Balkans are still relatively unfamiliar with their new political freedoms. Their electorate does not really know how to use their right to vote in a multiparty political environment and is too often influenced, not to say manipulated, by unscrupulous politicians trained in the old school. Faced with the growing lack of trust in politicians and the crisis of representative democracy—national and European parliamentarians being generally held in low esteem—participatory democracy is considered more and more as a preferable alternative (e.g. in Denmark as shown by Peter Gjørtler in Chap. "The Case of Denmark: Voting, the European Union and the Constitution"). This can be observed throughout Europe. As political divisions had deepened over the years regarding the construction of a new airport near Nantes, and as the situation had become seemingly inextricable, the French government has just announced a regional referendum whose organisation, in a country still unaccustomed to such local consultations, appears to have achieved the feat of angering most of the parties involved in the dispute. In the UK, where parliamentary sovereignty remains a pillar of the constitution, referendums, which the famous British constitutionalist, A.V. Dicey, used to describe as "the people's veto", have become more common, at least with the devolution process (as shown by Doctor Gibson-Morgan in Chap. "The significance and impact of the United Kingdom 2014 European Elections"). The country is now heading towards its third UK-wide referendum, after the successful 1975 referendum on Europe and the unsuccessful one in 2011 on alternative vote for the election of members of the House of Commons. Although British people are still not very familiar with national referendums—now regulated by an independent national electoral commission—they were recently invited to make a fundamental choice. On 23 June 2016, their decision to leave the EU was a defining moment for the future of the country as well as the future of the EU.

The crisis of representative democracy in Europe can partly be explained not only by structural dysfunctions such as dated voting systems no longer adapted to changing societies but also by the misbehaviour of politicians. Ignoring the result of referendums may justifiably be considered as misbehaving, but other forms of dishonesty have weakened the bond between citizens and the establishment. Corruption is widespread in political life in Europe including in the "Mother of Parliament" whose reputation was damaged by the "MPs expenses scandal" in 2009. The two main political parties in Spain—the PP (the Popular Party, a right-wing party) and PSOE (the Spanish Working-Class Socialist Party)—have not been spared by this phenomenon and this has contributed to the emergence of new parties like Podemos eager to introduce more ethics in politics. Proportional Representation is often put forward throughout Europe as a way of introducing a fairer representation of parties and political groups in parliaments, although it makes it more difficult to form strong, stable majorities. Except in the UK or in France—where attempts at proportional representation mostly failed—the European countries covered by this book have all introduced some form of proportional representation, which has aggravated the fragmentation of the political spectrum and favoured the emergence of small, very vocal far-right parties. Another feature of the current political landscape is the tendency to question the cogency of the left/right divide—even in a very politicised country like France or an acutely class-conscious society like the UK —when analysing today's voting trends and patterns with regard to the environment, free trade or human rights for example, but even more so where attitudes to Europe are concerned.

If Europe is in turmoil and faced with many potentially dispiriting uncertainties, it nonetheless remains a continent of hope. This is well illustrated by Doctor Nez in her chapter explaining the emergence of a new party in Spain. Even though Spain struggled to form a government after the legislative election of December 2015 that led to a hung parliament—like the UK after the May 2015 General Election and like many European countries not covered in this book, from Ireland to Greece via Slovakia—the emergence of Podemos indicates that there may be a new way of doing politics that eschews the sirens of right-wing populism. Its leaders are trying to make politics and the electoral process more transparent, and to bring it closer to the people and their preoccupations, while traditional political parties tend to lose touch with their members, ultimately losing many of those members altogether. The longest serving head of government, German Chancellor Angela Merkel, though hugely

popular for a long time as a national mother figure, has herself been the victim of voters' discontent as a result of her handling of the refugee crisis in Europe. She was criticised for what many saw as her excessively generous open-door policy towards refugees fleeing the war in Syria. Her political future is now more uncertain. On 13 March 2016, elections in Baden-Württemberg, Rhineland-Palatinate and Saxony-Anhalt were predicted to shake up the German political landscape and did, with populist anti-Euro, anti-immigrant Alternative für Deutschland (AfD) even coming second in the former East-German Land of Saxony-Anhalt with around a quarter of votes cast. In the process, however, notwithstanding Germany's perceived recent harshness towards the Greek people, Mrs. Merkel seems to be transcending left/right divides, gaining respect and admiration among liberal-minded people throughout the continent. The legislative elections in 2017 will tell whether she still enjoys enough support among German voters. 2017 will also be a crucial year for France where the historically unpopular President Hollande is coming to the end of his first five-year term in office. As is explained in Chap. "Exploring the "Americanisation" of French Politics" by Doctor Chommeloux, more and more people within the ranks of the Socialist party are calling for American-style primaries while the French right-wing party—renamed *les Républicains*—is organising its own primaries. This is happening in a context where the Americanisation claim (or accusation) is often made, to either woo or repel potential voters, a strategy that transcends the left/right divide almost as much as debates over Europe tend to, with many Europhobes often also expressing their distaste for American influences.

As was mentioned above, a Eurosceptic climate has prevailed of late in Europe along with a "lurch to the right", as is exemplified by the breakthrough of extremist and/or populist Europhobic parties—such as the Far-Right Front National in France, UKIP in the UK and AfD in Germany, the latter confirming its growing popularity with voters last March. Against this backdrop and as the country is experiencing an increase in attacks against foreigners, the question of banning neo-Nazi parties (in this case the NPD) has once again cropped up and is being hotly debated in Germany. Whereas in other countries, the role of the constitutional courts is less well established (in France, e.g. cf. Chap. "Exploring the "Americanisation" of French Politics"), the role of the German Constitutional Court will be central, a feature characteristic of that country (as made obvious by Professor Julian Krüper) and equally crucial in Denmark, particularly with regard to matters involving transfers of sovereignty and referenda (cf. Peter Gjørtler's analysis).

Even if, in the West Balkans, young people are full of enthusiasm for Europe and relish the prospect that their country might join the EU, nationalist Europhobic—in some cases anti-Muslim and racialist—parties are on the rise. Besides, traditional centrist parties are adapting to the alleged "lurch to the right", vowing to organise risky referendums to assuage populist Little-Englanders or adapting their rhetoric (e.g. on the unemployed, refugees or terror suspects) to suit a new mood that is distinctly less liberal, even among French intellectuals whose current morbid obsession with "decline" harks back to the troubled 1930s.

It is in this highly uncertain yet fascinating context that the editors and authors of the current book have joined their expertise to provide an analysis of the electoral process, of voters' behaviours and of voting trends and patterns in their own countries. They have done so without complacency yet—they hope—without excessive or undue pessimism. They are all eager to provide tools to allow readers to better understand how people vote in various European countries, what motivates those voters and the ways in which they can hope to influence the decision-making process and, therefore, their countries' future and Europe's future. Far from being an abstract debate among experts, the book aims at being accessible to everybody: it includes the contributions of authors who are professionals and, therefore, have a practical, pragmatic approach to the issues at stake—Professor Hertig-Randall and Peter Gjørtler are not only academics but also practising lawyers—or, for example, of a sociologist like Doctor Nez who has worked in the field, collecting voters' personal testimonies. All their observations are anchored in contemporary societies and take their citizens' expectations into account. Coming from different disciplines—law, politics, regional studies, history and sociology—and from different countries, they offer an original, international and multidisciplinary perspective on deeply rooted democracies like Switzerland and the UK, on countries which have returned to democracy after dark periods like Germany and Spain and on countries whose experience of democracy is more recent, like the Western Balkan states. The nine chapters explore what can be done to restore voters' trust in their voting system and their political leaders. The authors have adopted the same formal approach, focusing on the current voting system and electoral process in place in their respective countries, and identifying the main trends and patterns that they believe characterise them. They also often look to the future and analyse the role voters themselves can play in shaping it. If there is undoubtedly a need to rehabilitate politics, not just the European ideal,

it is more urgent than ever to find ways of putting citizens (back) at the heart of European democracies. Voting is an essential right thanks to which citizens—the demos—can have a say and make a difference, getting their elected representatives to think again and voting them out if and when necessary. This is where the heart of democracy lies. This is where the current crisis in European politics begins. Extending voting—"the suffrage"—was once considered a "leap in the dark", an image also widely used in an attempt to scare voters considering one outcome of the latest British referendum. Unless current trends and patterns in relation to voting are analysed, understood and acted upon by the leaders of Europe's seasoned or inexperienced democracies and by the leaders of its common institutions, there is a risk that the expression "leap in the dark" could also aptly encapsulate the next phase in Europe's history.

The Significance and Impact of the United Kingdom 2014 European Elections

Elizabeth Gibson-Morgan

European Elections were once described as "the world's largest experiment in democracy".[1] In May 2014, the citizens of 28 different countries were invited to cast their votes to elect their Members of the European Parliament (MEPs) directly as the representative of the peoples of Europe. These elections turned out to be memorable. Jean-Claude Juncker described them as "the most important European Parliament elections to date with the new powers allocated to the European Parliament by the Lisbon Treaty" but they were also important because, for the first time ever, the European Parliament put forward candidates for the position of European Commission President, "giving citizens a real say in who runs the European Union's executive arm".[2] He was to become the new President of the European Commission in spite of a very reluctant British Prime Minister. David Cameron rejected his views which favoured a broadly federal European Union. However, Juncker's comment on the importance of the last European Elections might very well apply to British politics and the relationship between the UK and the European Union. In the words of the Labour peer Roger Liddle, they could "take Britain

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significantly towards a more Eurosceptic direction" or even towards the exit—more commonly known as "Brexit".[3]

The year 2014 proved to be a year of significant change, a "year of Europe" for both the Europhile and the Europhobe. Herman Van Rompuy, the then Belgian President of the European Council, declared in his latest book[4]: "Europe, overwhelmingly, has been a force for good in the world from the securing of the post-war peace, to the promotion of Human Rights". Yet, though a predictably staunch supporter of the EU himself, he believes that "Europe is in a storm". To the violent image of a storm, one might prefer that of a wind of change blowing over Europe, altering both the composition of the European Parliament and the European Commission as well as Europeans' voting trends and patterns.

The May 2010 General Election in the UK might have been the beginning of a new era ushering in major change in British politics with the setting up of a coalition government composed of the Conservatives led by David Cameron and the Liberal Democrats led by Nick Clegg, two different parties claiming to rule the country for the general public interest, as was said in their Coalition Agreement Programme, in the absence of any election manifesto.[5] In an increasingly nationalist Scotland, with an SNP government elected in 2011, the mood of change was especially pronounced. The 2014 European Elections in the UK did confirm some of the trends and voting behaviour that emerged in the May 2010 General Election which further undermined the two-party politics generally associated with the First-Past-The-Post voting system and led to a hung parliament. They had however a more limited impact on the UK General Election held on 7 May 2015—for the first time under the Fixed-Term Parliaments Act 2011[6]—with the strengthening of the UK Independence Party (better known as UKIP) advocating Britain's withdrawal from the European Union. The outcome of the 2015 General Election was highly uncertain and therefore difficult to predict as seven different parties competed against one another confirming the multiparty nature of British politics. Confounding all the opinion polls which until the last moment predicted the Conservatives and the Labour Party neck and neck, and another Hung Parliament, the Conservatives won an outright majority though a slender one. To their own surprise, they won 331 seats out of 650 and 36.9 % of the UK national vote. This was the best result for the Conservative party since the working majority of John Major in 1992 and the first time since 1900 an incumbent Prime Minister improved his majority both

in seats and vote share after having served a full term in office. Though UKIP won only one seat in the Westminster Parliament against none in 2015, the Leader of UKIP himself having lost his seat in Kent in Thanet South—the anti-EU, anti-immigration party of Nigel Farage nonetheless won 12.6 % of the national vote. That is to say some four million people voted for UKIP, which is far from being negligible.

Finally, the latest European Elections in the UK could have shaped the future of the relationship between the UK and the EU in a fundamental way. Indeed, the two unions were and still are faced with a great deal of uncertainty and change. On 18 September 2014, Scottish voters were invited to say whether they wanted Scotland to become independent or not. In the referendum which saw the very high turnout of 84.6 %, 55.3 % of Scottish people rejected what would have been the most radical change in the history of their country as it would have put an end to a union of more than 300 years. A large minority, however, of 44.7 % voted for independence and the SNP continued to grow thereafter. So the Scots, the most pro-European people of the UK, decided to stay within the EU in spite of the option of joining it separately as an independent Scottish state. 62 % Scottish people voted in favour of remaining in the EU in the 2016 referendum on Britain's EU membership promised by the Prime Minister, David Cameron in 2013 were he to retain office—and he did as his party, the Conservative party, won the 2015 UK General Election. Unlike in 2010, David Cameron won a clear mandate with which he could easily command the confidence of the House of Commons. It also gave him more legitimacy and a stronger position to implement the political manifesto of his party.[7] One of his key challenges was to try to maintain not only the unity of his own party—more than ever divided on the European issue—but also the unity of the country as a Union State. This time, there was no need for the Conservatives to negotiate with other parties to form a coalition with the Liberal Democrats or any other political party and such a clear victory was a personal one for the incumbent Prime Minister. He was judged by the electorate on his economic record—the economic recovery and a lower unemployment rate—and his abilities as a leader. He was thought to be better at handling the economy and leading the country than his main political opponents, Ed Miliband and Nick Clegg, as well as more likely to command the confidence of the House of Commons, which he did without any difficulty. Yet, in his second term in office, David Cameron had to rely more on the support of his own backbenchers, including the Eurosceptic hardliners, than in his previous coalition government.

This was therefore a particularly interesting time to study change in British politics as key elections were held if not simultaneously at least at short intervals, in many European countries for local and national elections, and in all member states of the EU for European elections. They were a key moment reminding those who govern that they are accountable to the people and the latter that they can peacefully and lawfully vote them out of power.

Beyond the study of voting trends and patterns in the UK in the wake of the 2014 European Elections, the current chapter will examine what can be done to restore confidence in the national voting system and institutions and how to revive support for Europe as well as the will to stay together. As the 2014 European Elections showed, the hope could have come from countries like Italy whose pro-Europe, anti-austerity, youngest-ever Prime Minister, Matteo Renzi, the charismatic leader of the centre-left Democratic Party (PD) at the head of a coalition government achieved a result unprecedented for any Italian political party since 1958. Indeed the PD won the European Elections in the country with 40.8 % of the vote, following a campaign fought on a simple, straightforward message "hope not fear", even though Renzi's position in domestic Italian politics remained precarious. This offered a symbol of hope in contrast to the rise of Europhobe populist or neo-fascist parties like the Front National in France and Golden Dawn in Greece.[8]

To better understand why British people and their European partners voted the way they did at the 2014 European Elections, it is important to explore the economic and political background in the run-up to those elections as it might illuminate the voting patterns and trends that were to follow.

An Economic and Financial Crisis Generating Economic and Financial Austerity

In the last few years the European Union (EU) has experienced a prolonged economic recession. Economic disparities between member states and within their populations, largely ignored in the creation of the Eurozone, have generated growing inequality. The EU, more particularly the Eurozone, has been particularly weakened by unemployment, with an average unemployment rate of 12 %, affecting some nineteen million Europeans. Youth unemployment is especially marked in Greece, Italy, Portugal, and Spain let alone France. As a reaction, European governments, starting with the British, have adopted austerity budgets, trying to cut deficits by drastically

limiting public expenditure including social benefits. Such economic policies worsened the Euro crisis of 2010 which resulted from deeper structural problems. Beyond their financial and social impact, austerity measures antagonised many Europeans and fuelled Eurosceptic feelings among the most vulnerable who had already been directly hit by the economic recession. These policies contributed to widening the gap between European citizens and the institutions of the European Union along with the European Court of Human Rights and underlined the inherent weaknesses of the Eurozone where monetary union was not accompanied by fiscal union. The main aim of the founding fathers of the European Community, Jean Monnet and Robert Schuman,[9] beyond securing a lasting peace in Europe most notably between France and Germany, was to guarantee prosperity and solidarity between Europeans[10] as Roger Liddle[11] explained. Both were determined to prevent any possible return of mass unemployment of the type that had enabled Adolf Hitler to come to power in 1933. Many European voters in 2014 blamed European leaders and institutions for failing to produce work and economic growth for the people of the member states, and saw their stringent budgetary controls as making matters worse.

The 2014 European Elections coincided with the centenary of the First World War, thus offering European citizens an opportunity to consider how European integration had helped to maintain peace in Europe. Yet the long economic and financial crisis divides European leaders who support strict austerity policies like the German Chancellor Angela Merkel from advocates of economic change and more expansionist policies. Among the latter are Italian Prime Minister Matteo Renzi, Greek Prime Minister Alexis Tsipras—the leader of the radical left Syriza party[12] who, two seats short of a majority, agreed to form a coalition government with the populist right-wing Independent Greeks—or the French Socialist President, François Hollande, who, at first at least, was convinced that fiscal austerity was the wrong answer. Persistent economic and financial difficulties faced by the EU in the run-up to the 2014 European Elections led to a widespread belief among European citizens that the European political and economic decision-makers had mishandled the financial and economic crisis, driving countries like Greece into a state of near-bankruptcy, and they were to express their disapproval of such policies in a vote of protest in the May 2014 European Election.

Nonetheless, the economic context and social malaise alone cannot explain what happened in the 2014 European Elections. The growing lack of credibility of both national and European parliaments, hit by a series of financial

scandals such as the MPs expenses scandal in the Westminster Parliament in 2009, contributed to European citizens' disillusion and distrust in European institutions. So, along with the economic and political crisis, there was also a crisis of political representation at the national and European levels.

A Crisis of Political Representation: An Anti-Politics, Anti-Brussels and Anti-Westminster Mood

In the UK the campaign, leading up to the 2010 general election, and more recently the 2014 referendum on the independence of Scotland have shown much antipathy towards the national Parliament. The Scots talked contemptuously of the "Westminster Elite", a perceived elite that provoked resentment which UKIP was also able to exploit in England. In the same way, the only European institution directly elected by the people, the European Parliament, is not highly regarded by the European electorate. Turnout in European elections has always been low and some commentators go as far as describing the European legislature as an unloved Parliament. Christopher Howarth from Open Europe[13] for his part wrote that: "British people feel increasingly disillusioned with the EU on the grounds of its cost, intrusiveness, democratic deficit, a general feeling of powerlessness, the lack of transparency and democratic accountability". However, this statement needs to be qualified as Eurosceptic feelings are mainly to be found in England. Welsh people who benefited a great deal from European structural funds tended to be less critical of Europe, at least until the 2016 referendum on Britain's EU membership. UKIP had made significant progress in Wales, as demonstrated by the election of an MEP in 2009 and 2014. As for the Scots—as was seen previously—they are the most pro-Europe of all, as the former leader of the Scottish National Party Alex Salmond[14] was very well aware. The European argument played an important role in the 2014 referendum campaign for the independence of Scotland. It was used by the SNP as an argument in favour of the independence of Scotland since they argued that it was the only way for Scottish people to remain in the EU, whereas pro-Union Scots claimed that independence might mean Scotland's expulsion from Europe.

"Beyond people's perception of European institutions as a distant bureaucratic apparatus"[15]—in the words of Antonin Cohen and Antoine Vauchez[16]—there is undeniably a structural democratic deficit of the EU and its institutions which are still not democratically accountable to the European citizens in spite of the progress made under the Lisbon Treaty.[17] The lack of involvement of national parliaments in the EU decision-making process and in the scrutiny of European legislation is one of the

main reasons for this lack of accountability. Indeed, if the introduction of universal direct suffrage for the election of MEPs in 1979 was a breakthrough for democracy at the European level, national parliaments lost the organic link that they had with the European Parliament as they took part in its composition. Thus, the ties between the European Parliament and national parliamentary institutions were made loose, and damagingly so.

The run-up to the 2014 European Elections gave the opportunity once again for people to condemn this deeply rooted democratic deficit. It was made worse by the crisis of political leadership in many EU member states, including France which, heading as it was towards the mid-term in office of its President, still lacked a sense of direction either on domestic or European matters. Politicians at the national and European levels had lost much credibility, leading to a widely shared anti-politics mood as voters struggled to understand what they stood for and what their vision for the future of their country and for Europe might be. The crisis in the Eurozone, with its endemic structural weaknesses, made things worse.

In this political context characterised by lack of trust on the part of the electorate and lack of direction on the part of their leaders, the opening of European borders to Bulgarians and Romanians on 1 January 2014 and the unrestricted entry of EU citizens from Eastern Europe further damaged the relationships between European officials and European citizens. Facing harsh economic and financial conditions, feeling let down by politicians at the national and European levels, they became more suspicious of their new European counterparts and more reluctant to welcome them into their own country, seeing them as potential rivals on the job and housing markets. Hostility to immigration was the inevitable outlet for protest against economic globalisation.

The End of the Transitional Restrictions on the Free Movement of Migrant Workers from Bulgaria and Romania

Since 2004, when the enlargement of the European Union to Eastern Europe, notably Poland, took place, an average of 79,000 citizens from the new Eastern European EU member states with far lower incomes than British nationals have come to the UK each year while only 32,000 a year have left. As a reaction, when Bulgaria and Romania joined the European Union in 2007, the UK government decided this time to make the most of the provisions of the respective Accession Treaties of Bulgaria and Romania, to provide for transitional controls on free movement of

migrant workers from those two new member states for a maximum of seven years,[18] to try to protect its job market ending on 1 January 2014. At the beginning of the year, just a few months before the European Elections, a general climate of fear and suspicion was reinforced by Nigel Farage's UK Independence Party towards a potentially massive arrival of migrant workers from Romania and Bulgaria. The same party was to run its European Election campaign largely on an anti-immigration platform. Traditional parties themselves—the Conservative party and, to a lesser degree, the Labour party—started to call for curbs on immigrants' access to welfare benefits. A year earlier, in January 2013, in his Bloomberg speech that would have a lasting impact on British policy towards the European building process, the Conservative British Prime Minister had seriously challenged one of the four fundamental freedoms[19] at the basis of the European Union—enshrined in the 1957 Treaty of Rome—that is, the right to the free movement of persons.

In January 2013, David Cameron made a number of promises and proposals not as commitments of the whole Coalition Government but as a pledge on behalf of any Conservative government elected in the General Election to be held on 7 May 2015. Thus, he mentioned that the 2015 Conservative Party Manifesto would include provisions asking "for a mandate from the British people for a Conservative government to negotiate a new settlement with our European partners in the next parliament and to put it to the electorate in an In/Out referendum by the end of 2017". It was the first time that he explicitly mentioned an In/Out referendum on the UK's continued EU membership. It was not so much that he was personally eager to do so but he made the promise under the pressure of the most Eurosceptic Conservative MPs who had already started to rebel against his European policy that they considered too moderate. He also encouraged British voters tempted to vote UKIP to stick to the Conservative party. The European agenda that the British Prime Minister unveiled in his Bloomberg speech revolved around three main proposals more commonly known as the three "Rs" standing for Reform, Renegotiation and Referendum.

The British Prime Minister was not asking for more financial concessions for the UK from its European partners as Margaret Thatcher had done before him when she negotiated the British rebate in 1984. Rather, he asked for a series of reforms including structural ones such as increasing the democratic accountability of European institutions by giving a greater say to national parliaments and more generally trying to improve the governance of the European Union, a development which could only

be approved by the other member states. In his speech, he made a plea for "a more flexible and differentiated model of integration" as an alternative to "an ever closer union"—a key objective which was part of the original Treaty of Rome. It is now enshrined in the preamble and Article 1 of the Treaty of the European Union (TEU) along with the preamble of the Treaty on the Functioning of the European Union (TFEU). Cameron also wanted to show that he was determined to "renegotiate" British EU membership in order to obtain a "new settlement" for the UK which, though unclear, was understood to entail an effort to "repatriate" some powers from the European level to the UK as a nation state. Such a proposal had already been made in the Conservative Manifesto[20] as part of the 2010 General Election campaign which the party had fought separately from the Liberal Democrats. "More specifically, it included the "repatriation" to the UK of powers under the Charter of Fundamental Rights, of powers in criminal justice and of powers in social and employment legislation. So the Bloomberg speech did not make any fundamentally new point regarding the Conservative European policy with the major exception of the official promise of holding an In/Out referendum on the EU by 2017 after the next General Election of May 2015. Such a commitment could lead to the UK leaving the EU, which could have a very serious effect for both the UK and its European partners. It is in such a climate of suspicion towards Europe that the May 2014 European Elections were held.

The 2014 European Elections: In Between the May 2010 and the May 2015 UK General Election

The May 2014 European Elections were the eighth to be held since the first European Parliament elections by direct universal suffrage of 7 and 10 June 1979. In 1979, 63 % of European voters took part in the election of 410 MEPs, the highest ever in the elections to the European Parliament. The turnout has since declined significantly and regularly—after the initial relative enthusiasm of European voters—in inverse proportion to the growing powers of the European Parliament. It reached record low levels in the 2009 European Elections (with 42, 9 %)[21] and was even worse in 2014 (with 42, 54 %)[22] for the election of the now 750 MEPs. Under the Lisbon Treaty[23] no state can elect more than 96 MEPs or less than 6 MEPs. The UK for its part has 73 MEPs, which means that it is one of the three largest countries after France with 74 seats and Germany with 96 seats. It took some 20 years for the UK to adopt proportional representation for

the election of its own MEPs (officially in 1999)[24] and thus line up with its European partners, since British officials feared it would undermine the First-Past-The-Post voting system for its own MPs. A few years ago, in 2011, the Coalition Government actually tried to change the British voting system for the election of members of the House of Commons via a referendum on the Alternative Vote—the second to be held at the national level in the history of the country after the 1975 referendum on Europe. But it came to nothing as this proposal was strongly opposed by British people, being very unpopular with Conservatives and the result of self-serving pressure from their minority Liberal Democrat partners. Two-thirds of them voted against it.

The UK's 73 MEPs are supposed to be "free and independent" in so far as they do not represent their own country—the UK. In the same way, they are not part of conventional political parties since the European Parliament is composed of heterogeneous political groups[25] which are not clearly defined and are thus difficult for European citizens to identify and to identify with.[26] An indication of Cameron's lack of commitment to the EU in 2010 was his decision to remove his MEPs from the mainstream Christian Democrat bloc to a more miscellaneous right-wing group including neo-fascists and anti-Semites from countries like Latvia and Slovakia. In any case, since the 1980s, European Elections in the UK have increasingly not been about Europe but a verdict by British voters on their government's performance. Peter Kellner, the Head of Ipsos Mori, describes the European Elections as "second-order, low-turnout election in which people feel able to cast a protest vote without risk".[27] British politicians themselves have traditionally run their campaign on domestic issues. As one of the journalists of the *New Statesman* wrote "conventional parties are in fact not interested in European Elections as they are outside their quest for power".[28] He added that the then leader of the Labour Opposition, Ed Miliband, simply "ignored the European issue" while the Prime Minister David Cameron gave priority to the British economy, welfare reforms and immigration.

What British voters did not realise however, when they took part in the 2014 European Elections—for those who did vote—was that this time there was a real risk not only for the future of British politics but for the breakthrough of Eurosceptic parties determined to undermine the European Union itself. Moreover, in spite of the traditional low turnout in the European elections, their impact should not be underestimated as elections at the European, national and local levels are more than ever intertwined. Indeed, the last European elections in the UK[29] were held on the

same day as local elections on 22 May 2014 in all 32 London boroughs, 36 metropolitan boroughs,[30] 74 district councils and 20 unitary authorities in England. Altogether, a third of all seats were to be contested across councils in England and Northern Ireland. For many decades, local elections in the UK have attracted low polls of around 30 % despite their impact on people's everyday lives. They also proved to be very much a vote of protest like the elections of the supranational European legislature, with UKIP making limited headway ~~there~~, especially in some northern English cities.

The Fragmentation of British Politics

Since the early 1970s the combined voting share of the main centre-left and centre-right parties has fallen from 89 % to 65 % in Britain. One of the big political trends of the past 60 years has been the declining dominance of the two big, more ideologically rooted parties, and the rise of the Liberal Democrats, the Greens, the Scottish National Party, and now UKIP. This is more than ever the case, with the major exception of the Liberal Democrats who have registered disastrous results in the last series of elections to the point where the very survival of the party is now seriously questioned. Thus in the previous European Elections of 2009, the two main British political parties were down to 43 % of the total votes cast. The impact of the 2014 European Elections has had on an already weakened—sometimes also described as "broken"—British political system[31] is open to speculation. From that point of view, the last national elections prior to the 2014 European Elections do provide useful elements for assessing the current political situation.

Four years ago, the then three main political parties—the Conservatives, Labour and the Liberal Democrats—fought separate political campaigns. As noted above, they resulted in a hung parliament, which was not widely expected. The Conservative party had not won enough seats to form a majority of its own and, faced with the choice of either constituting a minority government and then holding an early election or forming a coalition government with one or several other parties, it chose the second option. They did so even though coalitions in the UK tend to be unpopular as they are both alien to British people and unusual under the first-past-the-post voting system. Together with the Liberal Democrats led by Nick Clegg they formed the first full coalition government since the Second World War and so the political picture in 2010 was a very volatile one which, in the end, turned out to be anything but traditional. It confirmed

the decline of support for the two main parties—the Conservatives and the Labour Party—and the emergence of divergent voting patterns in the country. Only 65 % of those voting either supported the Conservatives or the Labour Party. The fragmentation of the vote led to 433 MPs out of the 650 members of the House of Commons being elected by a minority of votes as a sign of voters' increasingly divided loyalties. UKIP for its part won 3 % of the votes cast in the 2010 General Election and the Greens 9 %.

The coalition that emerged from the 2010 General Election—though British voters had not voted for it—was perceived as a growing difficulty for the first-past-the-post voting system since it resulted in single-party governments. In the aftermath of the Election, the political negotiations between the Conservatives and the Liberal Democrats led to an agreement, later known as the Coalition Programme for Government, which provided for a national referendum on a reform of the voting system for the elections of members of the House of Commons. The Conservatives and the Liberal Democrats reached a deal, the Liberal Democrats promising to support the redrawing of constituency boundaries—aiming at introducing fewer and more equal-sized constituencies[32] to redress an inequality that favoured Labour—as well as fixed-term parliaments while the Conservatives committed themselves to backing a national referendum on the Alternative Vote aiming at replacing the first-past-the-post voting system.[33] In the wake of such a deal, the Westminster Parliament passed the Parliamentary Voting System and Constituencies Act 2011, providing the necessary legal framework notably the referendum on AV. But on 5 May 2011 British voters massively rejected the Alternative Vote by 67.90 % against 32.10 %. This voting system, which requires candidates to obtain more than 50 % of the votes in order to be elected, is generally considered beneficial to smaller parties but is also more likely to produce coalitions. Unlike in the elections for the European Parliament, voters had not been offered the option of Proportional Representation, wisely so since that was even more unpopular in Britain.

What the May 2010 General Election really showed was that the electoral system had to contend with a very different political landscape characterised by a significant decline of two-party politics and the fragmentation of the vote, with options that ranged beyond the nationalist parties in Scotland, Wales and Northern Ireland as people could also choose to vote for other parties like UKIP or the Greens.

If, in a way, the May 2010 General Election came as a severe blow to the two-party system—a political trend started in the 1970s—the 2014 British local elections and European Elections held on the same day could

even mean the end of three-party politics (the Conservative party, the Labour party and the Liberal Democrats) with the rise of UKIP. Indeed, in the latest local elections and European Elections, for the first time in more than 100 years, neither Labour nor the Conservatives won a national majority.

The End of the European Elections as "Second-Class Elections"

The final results of both the 2014 local elections and European Elections in the UK were mixed for all the parties except for UKIP which until then had very much remained an outsider. In the 2014 local elections the Conservatives and the Labour Party claimed 61 % of the votes cast. Labour came first with 31 % gaining a total of 338 councillors, thus securing a lead of 1 % over the Conservatives. Labour was slightly ahead but it was not a decisive victory. The Conservatives for their part won 230 seats but their electorate was split since they lost part of their electorate to the advantage of UKIP which secured a third place with 163 seats thus strengthening its local government base. Yet with 17 % of the votes it was less successful than in the 2013 council elections where it had obtained 23 %. Besides, if UKIP did well in the Northern cities which traditionally voted Labour and in depressed seaside towns in England, it was not the case in cosmopolitan, ethnically diverse, better-educated London constituencies where they obtained only 7 % of the votes. As for the junior coalition government partners, the Liberal Democrats, they were downgraded to the fourth position, lagging behind UKIP with 13 % of the votes. They lost nearly 307 council seats and did very badly in London as well as in other big cities such as Manchester and Liverpool—their leader facing poor personal ratings within his party and in British public opinion. His own seat in Sheffield was even precarious.

The 2014 local elections were, first of all, interpreted as a vote of protest against the governing parties. The Liberal Democrats were blamed for having broken key promises, notably on tuition fees and over the health service, whereas the Conservatives were held responsible for the very unpopular bedroom tax and cuts in public services. They also failed to convert voters to coalition governments.

Moreover, the fairly disappointing results of the main opposition party, the Labour Party, confirmed British voters' distrust of conventional politics as well as their sense of alienation from the political class. They also

showed a lack of clarity with regard to Labour's economic policy and direction. Labour remained concentrated in Scotland, Wales, the North and parts of London. The 2014 local elections once again illustrated the fragmentation of the votes within party support and between parties. They will also be remembered for the rise of UKIP, even though it did not win an overwhelming victory. Until then, UKIP was a party on the fringe and its leader, Nigel Farage had not been thought of as a serious contender. He gained votes not so much through the dislike for Europe but through distrust and opposition to the traditional political class, filling the gap left by the Liberal Democrats as the party of protest. It was also a bad omen for the European Elections that were held on the same day as the most pro-Europe party, the Liberal Democrats, running well behind a party (UKIP) originally founded to make the UK leave the European Union. The emphasis on Europe in the 2014 European Elections tended to give a bonus vote to fringe parties like UKIP in the UK and the Front National in France—similarly votes for Scottish and Welsh Assemblies have given a boost to the SNP and to a lesser extent Plaid Cymru, both of them pro-Europe. Besides, recent European Elections proved to be more damaging to the Conservatives than to Labour because they are more divided than Labour on Europe.

Though European elections are traditionally considered as second order, low key—elections fairly quickly forgotten until the next ones—the 2014 polling appeared as revolutionary on many grounds, a veritable "earthquake". It was not so much a "European Spring" as a "Spring of Discontent". Indeed, if as is usually the case the turnout was low, with 57 % of the European citizens of the 28 member states abstaining from voting, those who did turn up voted in great numbers for Eurosceptic, anti-immigrant, anti-Establishment, (old and new) populist parties from neo-Marxists in Greece and Italy, to the far-right throughout Europe with a few exceptions notably in Germany. Significantly, in the UK and in France for the first time since the introduction of direct elections to the European Parliament in 1979 the main conventional (moderate) parliamentary parties on the Left and on the Right side of the political spectrum—the Labour and the Tory parties in the UK, the Socialist and the UMP parties in France—fell behind populist fringe parties (UKIP in the UK and the Front National in France).

And so in France, the Front National, a far-right party founded in 1972 by admirers of the late Marshal Pétain and the heirs of former

supporters of French Algeria won the 25 May 2014 elections with 25 % of the votes—against 6 % in the 2009 European Elections—multiplying by eight the number of its MEPs ahead of the main opposition party the UMP (the Union for a Popular Movement) with 21 %. The Socialist party of President Hollande came third with a record low of 14 %. The leader of the Front National, a younger charismatic female politician and former lawyer, campaigned not so much on the theme of immigration as on the promise to take France out of the Euro and out of Schengen—though she did not advocate leaving the EU altogether. In a country that was among the six founding countries of the European community, those who favour the withdrawal from the euro—more commonly known nowadays as Frexit (France exiting the Euro)—are more and more vocal and Euroscepticism seems entrenched as the last failed referendum on the European Constitution showed in 2005.

In the UK, where Eurosceptics have traditionally opposed further economic and political integration for fear that they would further undermine British sovereignty, the 2014 European Elections, as we have demonstrated, saw the unprecedented victory of the United Kingdom Independence Party (UKIP). It had been founded in 1993 in the wake of the Maastricht Treaty with a single goal—at least at the beginning—which was to withdraw the UK from the European Union altogether. Chaired by Nigel Farage, UKIP campaigned not so much on the European issue than on the threat of mass immigration from EU member states, especially those that joined the EU recently. UKIP came first in the European Elections with a 27.5 % share of the vote in the UK thereby winning 23 MEPs whereas the most pro-European party, the Liberal Democrats came fifth behind the Greens, losing 11 of its 12 MEPs. It is interesting to note that UKIP won a seat in Scotland—polling around 10 %—knowing that a minority of Scottish voters share the English (and to a much lesser extent Welsh) concerns with Europe and Immigration. On 28 May 2014, Lord Smith, a Liberal Democrat peer, described the European elections results in Europe—far-right nationalists and hard left parties having won almost a third of the seats of the European Parliament—as "Europe's Tea Party moment". Only London, with its more ethnically mixed, better-educated electors, resisted the UKIP wave. Thus, it seems that traditional party lines and divides have been blurred and that the political spectrum is more and more fragmented, as are the parties themselves in many European countries.

Conclusion

One might wonder whether the rise of extremist parties throughout Europe is only a temporary phenomenon to be interpreted as maybe a cry for help, a desperate act, coming from the European citizens who have been most directly hit by recession, unemployment and austerity, and who feel they have been left behind. They seem to be not so much self-professed Eurosceptic as people who feel that the EU has failed to deliver on jobs and economic growth, and has produced greater inequality. Certainly, if Europe has achieved peace since the Second World War, it has failed to keep the original promise of economic prosperity that its founding fathers had made to Europeans. Its failure could lead to social unrest, political instability and in the end disunion.

The paradox, therefore, is that the 2014 European Elections might have a more decisive impact on British politics than on the European Parliament. Indeed, in spite of the breakthrough of anti-Europe nationalist parties such as UKIP in the UK or the Front National in France, the pro-Europe Conservative People's Party (EPP)—though 60 seats down—is still the largest political force within the European Parliament (with 212 of the 751 MEPs). It was strong enough to vote in Juncker as president despite his sombre record in fixing a tax concession programme in secret with major corporations for the benefit of Luxembourg during his long premiership there. It is significant that the British Conservatives have not joined it. It is followed by the centre-left Progressive Alliance of Socialists and Democrats which obtained 191 seats.

The 2014 European Elections in the UK thus showed—unlike previous European Elections—the growing importance of the European issue in domestic politics. Now, both the Conservatives and the Labour party have toughened their stance on European immigration for fear of losing more voters to UKIP. Britain has already fairly loose terms of membership of the EU having decided to opt out from both the Eurozone and Schengen, yet as promised in his 2013 Bloomberg speech—and as the then Labour Leader, Harold Wilson, did in 1975—the current Conservative Prime Minister went to Brussels in February 2016 to renegotiate the terms of the country's membership of Europe. He was determined to obtain further concessions for the UK, bearing in mind British voters' desire for reduced immigration. During a European Summit specially convened in Brussels to discuss the EU-UK relationship, the British Prime Minister tried to renegotiate the UK membership as a prerequisite to his UK-wide

referendum on Europe. Towards the end of the Summit, on 19 February 2016, a deal was finally reached between David Cameron and the other 27 EU member states. The British Prime Minister described the latter as "a new renegotiated relationship between the UK and the EU" having negotiated successfully an opt out on ever closer Union—that is, a special status for the UK within the EU. This means that the UK will not take part in any further political integration. Besides, the UK will never join the Euro and will not take part in further fiscal integration. The UK has also been granted "the emergency brake" that it claimed over EU migrants' in-work benefits such as tax credits. This means that EU migrants will not be able to claim benefits on their arrival in the UK but will have to wait for four years. This, however, is unlikely to deter people moving to the UK which is a very attractive country with its low unemployment rate and flexible labour market. Finally, the least controversial part of the deal aimed at strengthening national parliaments' control over EU legislation. If 16 out of the 28 national parliaments of EU member states agree to oppose EU legislation that they believe breaches the subsidiarity principle, they will be in a position to compel the Council to discuss the issue and reconsider the matter. No sooner had David Cameron won a deal over Europe than Michael Gove, the then Lord Chancellor and Secretary of State for Justice, announced that he would campaign to leave the EU. It was a major blow for the Prime Minister as he is a high-profile, respected politician in the Conservative party. He was soon joined by another senior Conservative, Boris Johnson, the then Mayor of London—a cosmopolitan largely pro-Europe city. British people having voted for their country to leave the EU on 23 June 2016, the Brussels deal became null and void. There is now a great deal of uncertainty not only for the UK but also for the rest of the EU. Let us hope that the economic and political focus that led to Britain's strong support for "joining Europe" in the 1975 referendum retains some force within an insular people jealously guarding its sovereignty, despite the recent pressures, trends and patterns that appear to point in the opposite direction.

Notes

1. Erhard Stackl, "Populist Challenge to Future of Europe", *The New York Times International Weekly / The Observer*, 8 June 2014.
2. www.debatingeurope.eu, 11 May 2014, interview of Jean-Claude Juncker [consulted 14 May 2014].

3. Roger Liddle, "Cameron's bid to save the Conservative Party advances Brexit", 2 October 2014.
4. Herman Van Rompuy (2014) *Europe in the Storm: Promise and Prejudice* (Leuven: Davidsfonds).
5. Cabinet Office (2010) *The Coalition: Our Programme for Government* (London: HM Government).
6. The Fixed-Term Parliaments Act 2011 also extended the terms of the Scottish Parliament and the National Assembly of Wales.
7. Under the Salisbury Convention, the House of Lords is expected to vote—without trying to delay—the draft bills contained in the manifesto.
8. In the last legislative elections in Greece on 25 January 2015, the neo-Nazi Golden Dawn party emerged as the country's third political force slightly ahead of the Pro-European centre-left party Potami that had hoped to come third.
9. Indeed, the Schumann Declaration of May 1950 read: "Europe […] will be built through concrete achievements which first create a de facto solidarity […] The solidarity […] thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible".
10. Roger Liddle (2014) *The Europe Dilemma: Britain and the Drama of EU Integration* (London: I.B. Tauris) p. xv.
11. *Ibid*.
12. On 25 January 2015, the radical left Syriza party won 149 out of 300 seats in the Greek legislative elections two seats short of the 151 MPs needed to gain an absolute majority allowing it to govern alone. It won 36, 3 % of the vote, eight points ahead of the party of the Conservative Prime Minister Antonin Samaras (27.8 % of the vote).
13. Christopher Howarth, "The European Parliament: a failed experiment in pan-European democracy", Open Europe, 14 May 2014.
14. In the wake of the results of the referendum on the independence of Scotland on 18 September 2014 where some 55 % of the voters chose to stay within the UK, Alex Salmond announced that he would resign as Leader of the SNP and as Scottish First Minister.
15. Antonin Cohen and Antoine Vauchez (2007) *La constitution européenne: Elites, Mobilisations*, *Votes* (Bruxelles: Institut d'Etudes Européennes) p. 113.
16. *Ibid*.
17. The Lisbon Treaty gave a specific duty to national parliaments to examine whether legislative proposals comply with the principle of subsidiarity—the subsidiarity check of national parliaments.
18. Treaty of Accession, Protocol VI and Protocol VII, par. 5.
19. The other three fundamental freedoms are the freedom of goods, services and capital.

20. Conservative Party Manifesto (2010) "Invitation to join the Government of Britain".
21. 34,27 % in the UK and 40,49 % in France.
22. 34 % in the UK—half that of a British General Election.
23. 750 without the President of the European Parliament.
24. Yet, proportional representation for British members of the European Parliament only started to be used for the 2004 European Elections.
25. Every political group must be made up of 25 MEPs from at least 7 member states.
26. A few years ago, the leader of the Conservative Party—the current British Prime Minister—David Cameron decided to pull out his party from what is still one of the two main political groups in the European Parliament, the European People's Party/EPP which is a right-of-centre political group. So British Conservatives sit in the separate anti-federalist Conservative and Reformists group.
27. Peter Kellner (June 2014) "Does class still drive politics?" *Prospect*, Vol. 219.
28. Mark Leonard (30 May–5 June 2014) "How the anti-politics mood is fuelling the rise of the hard-right", *New Statesman*, p. 7
29. Before the 2014 European Elections, the Conservatives held 26 seats in the European Parliament, the Labour party 13 and the Liberal Democrats 11.
30. Before the May 2014 local elections, Labour controlled 29 of the 36 metropolitan boroughs.
31. Cabinet Office (2010) *The Coalition: Our Programme for Government*.
32. Under which Wales would have lost a quarter of its constituencies.
33. Characterised by plurality voting and territorial representation.

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Exploring the "Americanisation" of French Politics

Alexis Chommeloux

At a time when, according to President Hollande, the country is at war,[1] "appropriate tools"[2] are required to wage that war on terror, when, rather uncharacteristically,[3] the tricolours are coming out massively and many are calling for the ban on ethnic statistics to be lifted,[4] "Americanisation" of French politics is once again on many lips. "That old chestnut", some might say, and yet "Americanisation" is a remarkably serviceable concept. A neutral definition that least depends on, reflects or furthers political and polemical considerations simply describes a phenomenon transferring to other countries or systems American characteristics.[5] By "American" characteristics what is almost always meant is "North-American" characteristics and characteristics pertaining to the USA more specifically. The concept and its suitability have come under criticism from social scientists, and yet, as Susanne Hilger puts it, this "complex process of transfer (…) becomes a meaningful *terminus technicus* when we include the decision-making processes of the percipients" and when we understand the importance of "acceptance and adaptation, but also rejection" of Americanisation.[6] The cogency of analysing recent electoral events, in light of what is sometimes claimed—with more or less national indignation, political afterthought and electoral acumen—to be an unquestionable reality cannot be assessed in

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a vacuum. Historical, constitutional, political similarities need to be taken into account though, given the constraints inherent to writing a short chapter, historical or constitutional references will be kept to a minimum, at times providing a partial backdrop to topical events. Besides, where similarities are uncovered, we should not assume we are dealing with one-way processes wherein America is invariably the model. France, or the risk that America may be becoming like France, is a red flag—in more senses than one—conveniently pulled out by the American right to denounce the allegedly socialistic tendencies of the Democrats. France evokes socialism, big government and their associated evils to many Americans,[7] just as America is often equated with unbridled capitalism and a string of dangerous conservative values to many French people—and, it should also be said, equally dangerous "liberal"[8] values to increasingly vocal others. It is illustrative of this state of affairs that, in a book devoted to American conservatism, not Franco-American relations, the authors should conclude their general introduction expressing the hope that readers were not looking for commonplace manifestations of "anti-Americanism in Europe and anti-Europeanism in America" or expecting "to be told that George Bush is a moronic, oil-obsessed cowboy or that the French are cheese-eating surrender monkeys" (Micklethwait and Wooldridge 2004 p. 24).

What is often referred to as Americanisation in the UK is something that could be called "presidentialisation", a trend denoting an emulation of a system placing far greater emphasis, with regard to the electoral process and policy-making, on the leader, the "commander in chief" and far greater hope in "*l'homme providentiel*", whereas *primus inter pares* was supposed (until when, one may ask) to be the rule of the British game. That there was a greater degree of "Americanisation" is often claimed with reference to the premierships of Margaret Thatcher whose political love affair with Ronald Reagan was staged and spun as another welcome renaissance of the "Special Relationship". The same tropism is associated with Tony Blair, whose "swing back to pro-Americanism" (Morgan 2011, p. 195) has damaged the legacy, on this side of the proverbial "Pond", altered the pronunciation and improved the bank balance. More recently, during the latest general election campaign, the whole kerfuffle about the "leaders' debate(s)" lent more credence still to those arguing British elections are being Americanised. Is this analysis of a phenomenon that apparently affected British leaders also applicable to French politicians so apt to refer to the British as America's lapdogs—or rather French poodles? What is clear is that the term "Americanisation" is more derogatory,

more stigmatising in a country still nostalgic of General de Gaulle and his foreign policy doctrines,[9] and whose most recent "finest hour" was probably Dominique de Villepin's passionate speech[10] against an American adventure in Iraq that, to almost all French people (and many others), was ill-advised not to say foolish and unlawful. Hence the tongue-in-cheek remark made by newly elected President Sarkozy at a gala organised by President Bush in his honour: "You can be the friend of America *and* win an election in France". Regarding "presidentialisation", finding traces of American influence may of course be more difficult when the term applies to France for the role of its president has waxed and waned[11] and, whenever criticism is levelled at what is believed to be the excessive power of the head of state, such criticism usually establishes connections with France's monarchical past or with what President Mitterrand referred to as *le coup d'Etat permanent*[12] rather than any trans-Atlantic transfers. Nonetheless, "Americanisation" is occasionally considered when the changing role of the French president is analysed and critiqued. Besides, the notion of *monarchie républicaine* (republican monarchy) is frequently summoned to describe a phenomenon also known *mutatis mutandis* in other regimes, including the American.[13] An increasingly resented distance between the political establishment on the one hand, pictured in their ivory towers at the "*Palais*"[14] or the White House, and, on the other hand, so-called ordinary voters and the hapless middle-class—in the Franco-American sense of the word rather than the British—is also worth noting. That the ivory towers have become glasshouses is also true in pluralist democracies and the fact that American internet networks and such Anglo-American notions as "accountability" and "open government" have contributed to achieving this may not be sufficiently appreciated as "Americanisation" in France,[15] even though the suffix "gate" is hard to dissociate from the characterisation of scandals involving its increasingly discredited and dispirited elected representatives. And yet these American-suffixed scandals *are* having an effect on voting, especially in a context where politicians have long benefited from great privileges, not to say impunity, where democracy was seen almost exclusively as representative and centralised,[16] and where the expression "*crise de représentativité*" is now made extensive use of.

What recent events, debates, trends, phenomena, practices or values could justify the claims, often made in the French media, that French politics and French voting may be becoming Americanised? With little regard to any taxonomical method—off the top of the author's head as it were—primaries come to mind, as does the increasing criticism levelled at

lobby groups that are accused of blocking the system, of making France impossible to reform, despite the wishes of the electorate, and whose influence is believed to corrupt the American political system (Lessig 2011). Recent changes to election terms and dates are seen as having brought the system closer to that prevailing in America. The cost of campaigning and issues related thereto have come to the fore recently, questioning the introduction of "American-style" campaigns and the consequences of that on funding and content. In other areas, similarities have been noted: Changes in the French right's *Weltanschauung*, though they seem inconsistent and divisive or perhaps for that very reason, have often been likened to changes reflected or brought about by the emergence of the Tea Party movement. New forms of—or new expression of—American-style "social" or "religious" conservatisms have definitely made unexpected inroads in recent months. Other projects conjure up an image of a more American way of doing things, notably in the policies of successive governments and the discourses of the two parties traditionally most likely to form a government. In many cases, these issues will merit a mention with regard to both the Americanisation *of* French politics (as an assertion to be doubted or justified) and Americanisation used *in* French politics, as a political argument or as a public perception to be taken advantage of in electoral contests. Questions as to whether French society, politics and elections are indeed being Americanised will be discussed below but, bearing in mind that the claim has a long history and that the concepts of "Americanisation" and "anti-Americanism" should be analysed jointly (Dard and Luesebrink (eds) 2008, p. 12), the ways in which such a claim may be used to "play politics" will need to be evoked first.

Americanisation *in* French Politics?

"The US Model cannot be applied to France" the rising star of French politics, Marine Le Pen, argued before the latest presidential election, annoyed at President Sarkozy's "fascination for the United States".[17] On 7 October 2015, in the name of the not inconsiderable number of far-right MEPs,[18] she attacked the European Union as having made the Europeans "the vassals of the United States", recycling one of her father's favourite expressions. Jean-Marie Le Pen's heiress seems willing (more or less convincingly but very tactically) to shed some of the ideas of her (more or less convincingly and very tactically) estranged father. Whether the creation of political dynasties can be seen as a form of Americanisation

will not be dealt with here, but the use of "Americanization" is clearly still a very popular gimmick for a populist party with far-right roots like the *Front National* wishing to reject values that are liberal in most senses of the word and assert sovereignty-based credentials. Admittedly, cracks are beginning to appear (more or less convincingly and very tactically) on a number of social issues, including same-sex marriage but, unsurprisingly, one of the more socially liberal leaders of that party, Florian Philippot, was diligent in denouncing the "Americanisation" of French politics when the tabloid magazine *Closer* revealed his homosexuality.[19] Lately, the connexions of Marine Le Pen's party with Putin's Russia (an echo to the traditional anti-American friendships nurtured by her father in a variety of unsavoury regimes) indicated the party's clear bias at a time when Russia is engaging in inflammatory rhetoric against the West and America and pursuing its own geopolitical agenda aggressively. Aymeric Choprat,[20] who used to be in charge of the party's geopolitical line, claims the *Front National* is arguing for the restoration of a different equilibrium between the USA and Russia. Old theses are conjured up that oppose the maritime powers, that is, the USA and the UK, to a European hinterland the *Front National* considers was hard done by. The attitude of the far right towards Americanisation also finds its roots in its history, notably in the 1930s.[21] It is worth noting that the uncovering of contacts between the so-called patriotic party and Russian dignitaries—and of the funding of the far-right party by Russian banks—seems so far to have done little to destabilise the *Front National* or damage it in the polls.[22]

Attitudes to—or pronouncements on—"Americanisation" happen to be shared, in a variety of idiosyncratic and ideological ways, by parties, politicians and political commentators occupying widely differing positions on the political spectrum. France used to have a powerful communist party that took part in government[23] while, for a time, taking its orders from Moscow, and used to enjoy considerable support among voters.[24] On the decline since the early 1980s, it has attempted to revitalise itself by co-founding an anti-capitalist movement (*Le Parti de Gauche*) with Jean-Luc Mélenchon, a former socialist grandee turned populist and as eagerly anti-American as the communists used to be. Though the movement does not seem to be taking on, the other extreme having pillaged many of its ideas—François Hollande was attacked by the left for saying so too candidly—and even more of its voters, the anti-American ideology, which the two "extremes" share, has not abated and it does not take a stimulus as strong as the negotiation of the TTIP[25] to set it going.

On that issue however, whatever cogent arguments are used on both sides, the more or less pertinent view that the treaty is a Trojan horse for more "Americanisation" is enthusiastically supported by what the French increasingly call "the left wing of the left".[26] Such a view is also supported by right-wing populist groups and the latter's somewhat paradoxical likeness with the Tea Party movement will need to be looked at.[27]

Conversely, hinting at a form of Americanisation may also be a way, for centre-left politicians in particular, to assert their reforming, modernising credentials in a period where the left, lacking a clear vision and bogged down in economic difficulties, is taking a hammering in almost every election since 2012.[28] Just as there is a liberal, free-market right and a more protectionist right with vast and complex differences between them and within each sub-group, there is, in the current government, a free-market left (though some ministers are considered by many in a very divided Socialist Party within a very divided left[29] as hardly left wing at all) that is also using Anglo-American characteristics as political markers. When he presented a number of measures aimed at making the labour market more flexible, Prime Minister Valls had no qualms about referring to the measures as a "French-style Small Business Act".[30] Whether this will pay off in electoral terms remains very much to be seen and, in any case, many voters who would call themselves left-of-centre and right-of-centre are also wary of "Americanisation" as a positive marker for the electorate and, more fundamentally, as a positive reality.[31] At any rate, many are gloomily evoking the Schröder[32] precedent rather than any American electoral success story of the Democratic Party. Prominent figures in the left-of-centre intelligentsia are denouncing the lowering of standards of politicians since de Gaulle (the reference for the right) and Mitterrand (his left-wing nemesis) and their increasing dependency on big money.[33] Editorialists in the centre-left and the centre-right press regularly deplore the Americanisation of French elections, without necessarily agreeing on what aspects of that protean concept are most regrettable. For example, left-leaning journalist and broadcaster Bernard Guetta evokes an unwanted Americanisation of French politics, lacking "intellectual seductions" and resulting in a more "mundane" polity for two main reasons: the shortening of the presidential mandate by Sarkozy in 2000 and the introduction of primaries by the Socialists, both changes hatched out in a bipartisan system, with two big catch-all parties in a period devoid of political myths. Nevertheless, Guetta considers that the Socialists, far from being "archaic" (a traditional cliché) may be a vanguard party in the new century for bringing about an Americanisation

that may not "flatter national pride" but should cause a welcome renewal of ideas and candidates.[34] In the conservative daily, *Le Figaro*, a former Sarkozy advisor turned political observer tends not to take such a dim view of Americanisation in general, particularly regarding economic matters, yet believes France is adopting the wrong kind of Americanisation.[35] The five-year term, for instance, in a centralised country without effective checks and balances, is blamed for having Americanised the presidential office, thus exposing the office to the electorate's frustrations and thus causing the President to lose "sovereignty", to gain in its place the "illusion of absolute power", and to become "the head of the majority party, ever-present, over-exposed in the media". The subsequent weakening of the office, the ensuing unpopularity of the President, the increasing dominance of personality over substance and of "personal and family sagas" over hitherto intellectual debates all show, Maxime Tandonnet claims, that by "incompletely and incorrectly copying the American model, the French system of government (…) has careered into a dead-end". The drop in turnout in legislative elections—to American levels—is also presented as evidence that France has adopted "the most dubious aspects of the American political system", ignoring the "features that make the wealth of the United States", not least the "exceptional vitality of its local democracy" described as "limiting the divide between the people and the elites, at the heart of the French disease". The question asked, by political commentators and editorialists, whose writings are in essence analytical and prescriptive, is that of the reality and shape of the so-called Americanisation *of* French politics in all sorts of areas where Americanisation is used in French politics and in French political analysis. Whatever the reality of more or less stealthy emulations of the USA, it seems that, for moderates not averse to transferring some American ideas and practices, the notion should be handled like political nitro-glycerine and finding Franco-French references such as a "Sixth Republic" may certainly be more politic.

Americanisation, which is often equated with modernisation, cannot be dissociated from globalisation and is even described as "a phase of globalisation".[36] Amalgamation of the two concepts in the minds of French voters is crucial and accounts for much of the potency of Americanisation as a political marker. Yet that efficiency as a marker has waxed and waned in recent years. It has done so mainly because the preeminence of globalisation also waxed and waned in political debates, but even the amalgamation itself was called into question at times when *mondialisation* (the correct term, that is in non-Americanised French, for globalisation and just as dirty

a word for many) became something that, it was felt, placed the French who feared it in the same boat as many Americans. The Occupy movement for example, or China's growing influence and potential attraction as the new villain played their role, as did recent Russian antics. American voters also played their role, on occasion pushing the unpalatable reality of globalisation out of focus. Barack Obama appeared for a time to be the perfect antidote to reviled George W. Bush. Not many foreign elections are momentous enough to cause pollsters to ask the electorate of other nations who they would vote for and, in the 2008 and 2012 presidential elections, opinion polls showed the French would have voted overwhelmingly for the Democrats.[37] Terrified as they were at the prospect of more Americanisation and the capitalist free-for-all intent on destroying their precious "social model" and indeed their way of life, the French, when it became clear that Obama had won, were almost all Americans, let alone Americanised. Now that the Obama effect has faded somewhat and that France—and indeed much of Europe—is experiencing a period of self-doubt and, as will be pointed out, a tendency to distrust and fear outside influences (Brussels, globalisation, the European Central Bank, immigrants, refugees, Chinese imports, Spanish fruit and veg, Polish plumbers and so on). Americanisation, as a symbol of nefarious outside influences, will likely retain some appeal *in* French political discourse. But, what of the actual Americanisation *of* French politics?

Americanisation *of* French Politics?

Before examining aspects of the Americanisation of French politics and voting, a few words should be devoted to a possible Americanisation of French constitutional law. Elisabeth Zoller pointed out in 2001[38] that conceptions of sovereignty are at the heart of what traditionally sets the USA apart from France (and Europe) and, though the French conception has changed over the post-War decades, the author did not believe the case for Americanisation could be made. The evolving role of the Conseil Constitutionnel was obviously examined, along with French fears regarding judicial activism and a "government of judges" anathema to a tradition of undivided sovereignty but, despite undeniable changes, Zoller believed the case was inadmissible. That the American Supreme Court constituted an attractive model for many was beyond doubt as were changes to the Conseil Constitutionnel's remit. New case law had contributed to making it more judicial, particularly *Liberté d'Association*,

on 16 July 1971, a decision sometimes presented as a French *Marbury v. Madison*[39] that, by recognising freedom of association—which appeared in no constitutional document—as a constitutional liberty, extended the role of the Conseil. Of its own initiative, the latter appropriated the right to control the constitutionality of the law with regard not only to the Constitution itself but also to "the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed by the preamble to the Constitution",[40] principles that hitherto had had political significance but had not been legally enforceable. The constitutional reform of 1974[41] also reinforced the institution, bolstering up the role of the opposition in a country that had had conservative governments for so many years and leading one of the Conseil's members, over 30 years on, to assert that two centuries after the Founding Fathers, France had "reinvented (…) the theory of checks and balances".[42] Also beyond doubt was the Conseil's newly acquired popularity for controlling some of the abuses of political power. However, for Zoller, such changes and the American appeal failed to justify the Americanisation claim since the Supreme Court's role was much broader and, of course, mainly concerned with issues inherent to a federal system and the need to unify federal law. The greatest resemblance concerned the compliance of Acts of Congress with the Bill of Rights but, there again, Zoller insists on the differences—the scarcity of such cases and the concrete nature of the disputes in the USA, as opposed to the abstract questions the Conseil analyses, as would a third chamber, not a court. The main argument to refute the Americanisation claim—and its corollary: the "government of judges"—was that, on constitutional matters, French judges would never have the last word. Whether the 2008 reform made a dent in Zoller's analysis regarding Americanisation is unlikely, though allowing private individuals with concrete demands to bring proceedings has made the Conseil's work less abstract. The QPC (Question Prioritaire de Constitutionnalité) allows citizens to challenge the constitutionality of existing legislation before the Conseil, which may also control the interpretation by judicial and administrative judges of the "Constitutional block". For Jean Cédras, the founding fathers of the French Constitution would have been surprised and probably irritated to note this "progressive 'Americanisation'" but he adds that if "for American constitutionalists (…), the way in which control is provided is clear and well organised, their French colleagues, in this area, are going through a period of transition, hesitation and constitutional fumbling that is troubling".[43] Others insist on the fact that, though eminent jurists such as Georges Vedel and even

President Mitterrand[44] hoped, as early as the 1980s, that French citizens would get American-style direct access to the Conseil, we haven't quite reached that point with the QPC. Only litigants in a trial may bring proceedings and filters[45] are in place as the courts that lawyers still consider as the "supreme courts" – and that very much consider themselves as the "supreme courts" (the Cour de Cassation and the Conseil d'Etat) – get to decide on the merits of the claim.[46] Hubert Haenel, commenting in 2010, makes it clear: the Conseil Constitutionnel for all the recent changes and its specificities is a "constitutional court" predominantly based on the Kelsenian model, not a "supreme court" based on the American model.[47] Zoller's conclusion moves away from the Conseil Constitutionnel, taking a broader view that confirms the notion that the Americanisation of constitutional law remained a mere possibility. The one change whose consequences are finally evoked as likely to have notable consequences on French institutions and voting, the five-year term, is said to be, as and of itself,[48] incapable of resulting in an American-style presidential regime. What would "Americanise" the French presidency, she added, is a reform that would eliminate the Prime Minister, the government's accountability to Parliament and the President's prerogative to dissolve the National Assembly, a reform that would have a great impact on voting on several levels. This has hitherto not happened, and yet claims of Americanisation abound. Finally, even if "politicisation" is an accusation levelled at both the US Supreme Court and the French Conseil Constitutionnel, the reality of the accusation is very different. The Supreme Court is made up of judges, not senior civil servants or retired politicians,[49] as is the case in France. As Zoller put it in an interview broadcast a few days before the confirmation of the nomination of Laurent Fabius, the former foreign affairs minister, as president of the Conseil, the idea of Obama making John Kerry Supreme Court Justice is an inconceivable one.[50]

The changing exposure of politicians' private lives, denounced recently as an unwelcome form of Americanisation, indicates that French voters are no longer able to claim they are not interested. Voyeurism as a form of Americanisation is a theory that is beyond the scope of this chapter and it could be said it is the USA that has moved closer to France since Bill Clinton's indiscretions. In any case, as long as voting and elections are concerned, the French knew the current President was unmarried and had had children out of wedlock before electing him and the very popular former Mayor of Paris—who would have been re-elected comfortably in the latest municipal election had he wished to stand—was openly gay.

Having said that, the "reality televisation"[51] of the political debate and electoral campaigns by politicians and the press, with more focus on the image and the personality of candidates and less emphasis on ideological divisions, is arguably a form of more or less direct Americanisation that does have an impact on elections, all the more since traditional party political divides are melting away for a variety of reasons, some specifically French, that will be evoked below. That more use is being made of spouses and children is not completely new and politicians who in the 1970s wished to be considered modern and thought of as modernisers were apt to use "American-style" techniques involving a novel use of television. Giscard d'Estaing was "probably one of the first French politicians, following the American example, to understand the point of taming the television tool and taking care of his image as one of his top assets" (Bellenger 2007, p. 5). During the 1967 general election, he referred explicitly to the "New Frontier" and took the unprecedented step of buying a double page in the weekly magazine *L'Express* to publish his platform. The broad picture that accompanied it was of himself and John F. Kennedy.[52] His penchant for American practices did come under fire from various sections of society but the "moderniser" with the American-style communication strategy was elected to Parliament and became President seven years later, achieving what another centrist once referred as the French Kennedy, Jean Lecanuet, had not.[53] At a time when Gaullism and communism were losing their appeal, a dose of Americanisation – and Kennedy – worked wonders in electoral terms. Most recently, political analysts have also been looking at a seemingly very French tendency among politicians to write or at least publish books.[54] All the candidates in the coming primaries have done so and Nicolas Sarkozy's *La France pour la vie* is the latest in a long list, but a major American book (White 1961) was instrumental in inspiring the French political élite to publish, notably Giscard d'Estaing with his *Démocratie Française* which came out in 1976. The reason why this paper-based phenomenon has not abated can also be explained by the fact that politicians are eager to earn themselves an invitation to appear on American-style talk shows and entertainment programmes. In the new (some would say Americanised) show-business-oriented media, a book launch will do just that, putting them in the public eye, alongside other "celebrities", more efficiently than any political rally or conventional interview.

The scale of campaigns and the involvement of family members have increased dramatically since the 1960s and 1970s. The stage-managed "Bonne chance mon papa" ("Good luck my Daddy"), uttered by Sarkozy's

son Louis on a giant screen in November 2004 at a campaign meeting, epitomises this as does the use of the former President's love life, first with Cécilia, then with former model and singer Carla Bruni. Recently, Sarkozy Jr., given (less and less) unusual prominence in the press declared in *Paris Match* his love for many things American, including (most unusually for a Frenchman) his love of weapons and the right to bear arms as a symbol of liberty.[55] A number of scandals in connection with the financing of Sarkozy's "American-style campaigns" (the Bettencourt and Bygmalion scandals in particular) cast a shadow over the former President and lend credence to assertions, including Jean-Louis Guigou's, that politicians may be relying unhealthily on the rich. Campaigns may be an increasingly important element in elections and voting patterns, and there is no doubt that they resemble American campaigns more and more, with the increasing use of influential spin doctors, of single issues,[56] of show business personalities in an attempt at "co-branding" politicians and movie or pop stars,[57] but surely substance counts too.

The Sarkozy presidency is described as the period when "presidentialisation" came into its own. Not all commentators and academics insist on equating this phenomenon with Americanisation—France is not the UK and there were plenty of internal, constitutional, historical reasons for the shift—but the causes, actors and symptoms of one happen to be very similar to the causes, actors and symptoms of the other. Olivier Duhamel has no doubt that Sarkozy caused a presidentialisation unprecedented since de Gaulle's famous press conference on the indivisible authority of the state over four decades earlier. Indeed Duhamel presents not one but three types of presidentialisation (presidentialisation retrieved—after periods of "cohabitation"[58]—presidentialisation admitted—in compliance with the spirit and practical interpretation of the Fifth Republic—and presidentialisation amplified—with a new phase that concentrated power in the hands of the president). In his chapter, America is never mentioned explicitly. The conclusion lists a number of elements that are believed to disappoint the advocates of a mythical Fifth Republic and those calling for a Sixth in equal measure: "the five-year term,[59] the concomitance of ballots (…), the 2007 presidential election with "*présidentialisme*" displayed by the main candidates, the great comeback of the bipartisan logic and the renewed fervour of voters, the enduring attachment of the French to the presidential election consolidated by the transformation of politicians in and by the media".[60] In an article published five years earlier entitled not "Towards a presidentialisation of the institutions?" but "Towards an Americanisation

of the French constitutional system",[61] the same elements are used by a constitutionalist to openly question a different paradigm and, despite the absence of a question mark, the conclusion is nuanced with relation to Americanisation and the article itself *does* end with a question mark. If most constitutional changes (legal and practical) are seen as a presidentialisation that tends to bring the French system closer to the "American model", including the increasingly judicial control on the President as the legislative control weakens, the effect on the two main parties whose main purpose is to prepare for head-to-head elections, what is lacking in this manner of Americanisation is a powerful Parliament, "the cornerstone of the system of checks and balances". In 2003, as Sarkozy was said to be Americanising politics, the question remained as to who in society and the media would effectively contradict the presidency, thus bringing about the "ultimate Americanisation of France's political society".

Thirteen years on, François Hollande's "normal presidency" is in dire straits and his ratings are consistently at a record low for French Presidents. Despite forthcoming primaries in the main opposition party, there is little "fervour" for two parties that were supposed to be formidable electoral machines and that have ended up accounting for barely more than 50 per cent of the votes.[62] Parliament's attempts at "checking and balancing" are being presented with the powerful challenge of article 49.3 of the constitution[63] and the use of executive "*ordonnances*".[64] Movements outside party politics are not providing useful "checks and balances": they are compounding dissatisfaction with not just the President but elected representatives more generally, blocking reforms[65] and making France more difficult to govern. Is this a failed Americanisation of our institutions? The current period is characterised by ideological blurring, national self-doubt and distrust of tried and tested politicians: the "left of the left" has redoubled its anti-American/anti-capitalism rhetoric, but seems to be doing so in a vacuum. The centre left is questioning its traditional tenets and trying to introduce New-Labour/Schröder-inspired elements and policies that the rest of the left would consider too American: freeing the labour market, cutting red tape, encouraging the unemployed to accept jobs that they are overqualified for (or so it would have been argued hitherto), checking up on job seekers, cosying up to enterprise and employers ("J'aime l'entreprise"[66]), evoking the possibility of ending the "privileges" of civil servants, reforming the hefty Labour Code.[67] Some are claiming that the left is dying[68] and the centre right, in a context described as a lurch to the right[69] facilitated by globalisation (and Americanisation?),

is no longer so afraid of being *de droite* (right wing is still problematic in English, as is *conservateur* in French but, for current purposes, conservative will be deemed an apt translation) and of putting forward values that indicate that the fear of being accused of Americanising no longer affects a majority of a party English-speaking commentators should now think twice before persisting in calling Gaullist. The radicalisation of the French conservatives (the centre right? the right?) on economic issues follows a shift to the right noticeable in French politics overall and also reflected in the success of the far-right *Front National* as it radicalises politics on other issues at the expense of all other parties.

Whether this lurch to the right should be seen as Americanisation or whether the success of a populist party calling into question the bipartisan system should itself call into question the very notion of Americanisation are questions worth asking. In the wake of the regional elections, political commentators are insisting that the primaries to come will be vital in determining whether the traditional right will try to combat the emergence of a new but seemingly entrenched three-party system by trying to woo the populists into a broad-church Republican-type party or take to the centre ground, possibly as a first move towards a new two-party system with a new party of that would be open and liberal (in most senses of the word) and another new party based on sovereignty and a form of nationalism. Movements at the heart and on the margins of the main conservative party (UMP turned *Les Républicains* in 2015—how long will this cumbersome fig leaf of an article last, one may wonder) such as la "Droite Forte"[70] or la "Droite Populaire", symptoms of a new *droite décomplexée* (unhibited right) that dares speak the name "right" and of a more explicit broad-church reminiscent of the GOP, seem to have turned the table on the left in the public debates and, according to opinion polls, in "public opinion". These movements, and the party, do borrow ingredients redolent of the American right (social conservatism, neo-liberal ideas, increased nationalism and populism). Such ingredients are found, but often separately in the different components of the parties and, increasingly, beyond: A movement such as *Les Pigeons* focuses on what they see as excessive taxation and big government, whereas the above-mentioned *Le Printemps Français* epitomises the rather surprising return of a brand of social conservatism that was thought to have all but vanished as a political force in a country that had until recently seemed to be proceeding full steam ahead on a liberal agenda (gender parity, same-sex marriage and equal rights pertaining to adoption, procreation, etc.). As the President of *Le Monde*

Diplomatique puts it: "That kind of atmosphere encourages a widespread Tea-Party style, neo-Poujadist movement outside the traditional parties, through intermittent outbursts of rage and the incessant tub-thumping of social networks. In barely 18 months, we have had small businessmen refusing to pay their taxes, Catholic crowds protesting against gay marriage and farmers and truck drivers wearing the bonnet rouge (red hat) in the style of the 18th century Breton rebels".[71] Just like the Tea Party, such movements "could not be plopped into available conceptualizations about third parties, social movements or popular protests during sharp economic downturns" (Skocpol and Williamson 2012, p. IX).

Are we witnessing the emergence of French-style Tea Party, as some commentators are claiming (Godet 2012, p. 16)?[72] PhD doctorates will get the opportunity to answer that question. What can be noted is that no single movement comprehensively represents the various ideas of the Tea Party but elements of its *pot-pourri* right-wing ideology can be found in various conservative, populist and even free-market-oriented sub-groups, as can some of the methods used. Prior to the election (among party members) of the UMP chairman, the candidates (including former President Sarkozy) were quizzed on their stance on same-sex marriage by the representatives of *la Manif' pour Tous* (Demo for All), a new symbol of the revival of socially conservative France born of the rejection of same-sex marriage in France (*le mariage pour tous* or marriage for all).[73] French politicians are still officially averse to the notion of coming out on single issues[74] and to complying with American candidates' obligations to declare their position on abortion, arms control, and so on. And yet the grilling of centre-right politicians by anti-gay-rights activists gave off a distinctive whiff of something resembling this foreign practice. But is *Le Printemps Français* (the French Spring), the movement behind the so-called demo for all comparable to the Tea Party movement? The movement, which started with a series of massive demonstrations and is not really officially part of any party, supports a right-wing agenda. But what is their take on tax and immigration? Are they trying to outright the traditional right on everything? Do they have representatives within *Les Républicains*? If the Tea Party movement may be seen as a partial model, the issues are very different and reflect significant differences. Besides, the organisers would be loath to endorse the notion that they are contributing to an Americanisation of France. This socially conservative movement also denotes a tendency to reject the values of 1968, of the "boomers", liberal values (in the American sense of the word) they detest and that are considered as having Americanised France

with its mixture of permissiveness, consumerism and arrogant capitalism.[75] Among this resurgent traditionalist right, Americanisation is tantamount to treason and "sovereignty" is the antidote, a sovereignty better understood by Putin and that "our leaders, during 15 centuries of monarchical, then Republican, history, until 1968 had nonetheless defended tirelessly".[76]

Americanisation: An Imperfect Prism Allowing Glimpses into a Troubled Society.

French society and the French electorate are currently in the grip of multi-pronged fears with relation to the future of their nation, their place in the world and their "identity" as a nation, fears that are being played on in a political landscape where old ideologies are all but disappearing. Some of these fears are almost specific to France in their nature or their intensity (a fear of decline has given rise to a ubiquitous theory known as "*déclinisme*" (declinism), others more widespread in Western democracies, notably the USA, and beyond (fear of Islamic fundamentalism, fear of terrorism and even fear of Islam), others shared to varying degrees (fear of globalisation). The way these fears have been compounded and framed in intellectual terms is no doubt very French (Hazareesingh 2015, pp. 235–255), and French voters are inundated with reactionary pronouncements and pessimistic analyses articulated by politicians but also by "intellectuals" or pseudo-intellectuals who put a Gallic intellectual gloss on their now televised right-wing hyperboles reminiscent of what has been seen and heard on American TV channels for much longer. On that note, the development of new channels has given French audiences access to programmes with far less consensual editorial lines than France Télévision and one such channels, BFM TV, was even called B*FN* TV (a reference to the *Front national* aka *FN*) for its coverage of a story relating to the deportation of a Rom schoolgirl and for the virulence of the channel's attacks against the President. Some of the fears—in an Americanised media environment—are fears of things more or less explicitly referred to as or associated with Americanisation. Our "model of integration" of immigrants is considered to have failed by following the American model (communities living alongside each other, ghettos, etc.). On economic issues, some fear France has failed to adopt the American model of increased deregulation and to espouse globalisation while many others fear the effects of the free market. In part due to their failure to tackle unemployment, few now believe in the socialists' clumsy attempts at finding a *via media* in "social-liberalism"

(a mixture of free-market reforms and social safeguards). The two heads of the executive have been faring badly in opinion polls for months and their occupying the centre ground is doing them little good so far. A shift to the right of the centre ground of French politics is noticeable as "centrist" seems to be replacing "right wing" as a dirty word within *Les Républicains*. Alain Juppé, candidate to the primaries, had referred to the party as "the union of the right and the centre of French politics" at a meeting he attended in his own city of Bordeaux with former President Sarkozy. He was booed copiously without the latter batting an eyelid. This new insistence that right-wing values, the values of the republican right (if not quite of the Republican right) be reaffirmed whilst an embattled government is increasingly prone to endorsing centrist ideas—and even right-wing ideas in response to the terrorist attacks of November 2015—is a phenomenon wherein commentators have perceived an element of Americanisation. Just as they have in the way "liberal" had become a dirty word for so many before "*de gauche*" (left wing), "*bien pensant*" (self-righteous rather than right-thinking) or even "centrist" seem to be becoming in France.

A fundamental difference, in electoral terms, is that the reinforcement of right-wing values has not called into question the two-party system in the USA. The Tea Party movement, whose existence is often summoned to shed more or less enlightening light on the lurch to the right in France has not led to the emergence of a third force to the right of the GOP capable of disrupting the traditional alternative. To be sure, third candidates proved a thorn in the side of US presidential candidates but Ross Perrot had taken part in the Republican primaries and had failed to create his own party with a view to having an independent existence in Congress. The French party which benefits most from this scramble for the right and what some see as a phenomenon presenting similarities with that of the Tea Party does not corroborate the notion that the French may be voting *for* Americanisation. As the *Front National*, a third party now claiming with growing credibility to be the first party, inexorably piles electoral gain upon electoral gain, the advent of a bipartisan system pitting *Les Républicains* against Democrat-style social democrats has never seemed such an uncertain prospect. The "*départementales*" were able to hide that reality with its electoral system whose small constituencies favour proximity and "traditional" or "conventional" candidates,[77] the regional elections potentially less so.[78] What is worrying for those fearing a disruption of the traditional *alternance* is that never before in the Fifth Republic has the system been so ill-equipped to deal with the risk of the far-right

party winning a by-election in a binary election[79] or obtaining a majority of seats in one or several regional assembly/ies in the 2015 election. The only remotely bipartisan logic that some were considering and many rejected in this new context is for lists, in some constituencies, to merge or withdraw before the second round: a "*front républicain*" (republican front) against the *Front National* in the hope of keeping the latter out. Many political scientists warn of the dangers of giving in to the temptation of resorting to a dam which was used readily in the past, but the right is less and less tempted anyway, favouring the "neither nor" tactic,[80] and the left knows the price of such a tactic is ultimately to give legitimacy to Le Pen's habitual accusations that the two "conventional" parties are "thick as thieves". Until the recent creation of *Les Républicains*, she and her activists made abundant use of the homemade acronym "UMPS" (recycling UMP and PS for *Parti Socialiste*) which stuck in the minds of many a disgruntled voter. Prior to the regional elections, many politicians agreed this poll should be sacrificed (even if one, two or three regions were to be relinquished to the far right) for the good of the main election, that of 2017 but when push came to shove the socialists did withdraw in the two regions where the risk of a far-right win was greatest thus preventing the *Front National* from controlling a single region. A difference between America and France is that regardless of the results of the various mid-term elections, including said regional elections, the Head of State and his party or coalition may take hits, often do and often promise change on election night, but there are no real American-style "mid-terms" that mechanically have the potential to affect the reality of the presidential power by making the checks and balances more or less conciliatory.

If, for ideological and tactical reasons, Europe has been the main target of the *Front National*, Marine Le Pen's party and its intellectual forbears abhor Americanisation and most things American. Notwithstanding past collusions with "Pétainism" or an attachment to colonialism (two -isms the USA thankfully contributed to terminating), if we charitably concentrate on the policies advocated by Madame Le Pen herself, no Americanisation seems on the cards. As the right's and the far-right's edges blur as a result of the former pushing desperately to the right while the latter claims Gaullist credentials, argues that it is neither right wing nor left wing and attempts (rather successfully) to combat "demonization", using the prism of the attitude of the right to Americanisation may become a more cogent marker enabling political scientists to classify a new right belying traditional divides.[81] Indeed, as the right allows itself to shift even more to

the right, the even more right-wing fringe that seems to be sharing the spoils of Social Democrats in turmoil and an unconvincing and disorganised—also anti-American—"left of the left" appears far less pro-American, far less liberal (in both senses of the word), openly pro-Russian and fond of citing de Gaulle's legacy for good measure! That is true of the *Front National* and of other smaller movements obsessed with "sovereignty".[82]

The primaries in the "*Les Républicains*" party will be seen as a great vindication of the Americanisation claim. Attitudes to the *Front National*, to the sovereignty-obsessed right, to the "*front républicain*" and therefore to the strategy in the second round of elections, to the centre ground, as well as personality will determine who gets the investiture in a process that is inspired by the USA but devoid of the quirkiness of the US primaries and, naturally, its federal component. According to political scientist Brice Teinturier, one of the essential lessons of the 6.8 million votes obtained by her party in the second round of the regional elections, a confirmation of the possible (or indeed probable) presence of Marine in the second round of the presidential election of 2017 where only two candidates may compete, is that the primaries organised by *Les Républicains* will be even more important and even more decisive.[83] Hence the frantic manoeuvring around the possibility of bringing the primaries forward in the wake of the December 2015 poll. Whether surprise and new people will emerge—the promise of a successful Americanisation—remains to be seen. For what it is worth, what occurred to the Socialist Party in its very first truly open primaries[84] showed that there could be surprise without renewal as François Hollande, an experienced inner-circle activist and a dab hand at bringing together the various elements of a complex party structure, beat candidates who *prima facie* were more charismatic. What the primaries, combined with the shortening of the presidential mandate, did achieve in other respects with regard to Americanising French politics is a little unclear. The five-year term did change the rhythm of elections and more was probably made among commentators of the parallel between Hollande's "mi-mandat" and American mid-term elections.[85] Yet it failed to fundamentally change the role of the Prime Minister. Political practice and the voters in elections,[86] by-elections and virtual elections in the form of opinion polls play a role, for instance, inciting the President to replace the Prime Minister as Hollande felt he had to do in the wake of the March 2014 municipal elections.[87] The Prime Minister may be a political fuse but remains an important one. One area where it may be argued that the primaries have influenced voting, in Parliament not the country at large,

is in the loss of discipline of parliamentarians in the ranks of the majority party or coalition, as they "do not feel they owe him (the President) they own election and do not even feel accountable for his choices".[88] Some will compare this with the attitude of American Congressmen; others will see nothing American about it beyond the cause: the primaries.

Claims of Americanisation are easy to make in a globalised environment where, it could also be said, ideas and institutions have good cause to converge. As the French say, the same causes produce the same effects, and claims of "Europeanisation" are often just as valid, and just as effective as a party political tool: "*européanisation*" is admittedly a mouthful but "c'est la faute de Bruxelles" ("It's all Brussels' fault") requires no speech therapy. Besides, it often means different things to different people: those who denounce aspects of what they see as Americanisation actively contribute to what others deplore as being other manifestations of Americanisation. When a new category of conservative and right-wing polemists—presented as "intellectuals" in the French tradition—rant and rave against (American?) political correctness and liberal "*bien-pensance*" in the name of traditional national values, where can Americanisation be found? Can it be found in the liberal ideas they claim to be combatting so patriotically? Can it be found in the resemblance an Eric Zemmour[89] may increasingly bear with a Glenn Beck? In the fact that these new (recycled) polemists can peddle reactionary clichés *ad nauseam* in the name of a broad, "American-style" interpretation of freedom of expression they would like to see replace the more guarded French version with its insistence on protecting the public against extremist views and ideas conducive to racial hatred or religious strife? In the fact that their nationalist views are now being aired on newish channels reminiscent of American networks like Fox News? In the way that such channels and their polemical shows are successfully poaching viewers from traditional, more consensual networks?[90] In the fact that liberals should rightly worry that the latter are tempted to introduce a dose of right-wing polemics and a dose of scientific relativism in their most popular programmes?[91] In the fact that all this seems to be accompanying if not causing a shift in the centre of gravity of French politics where being called "de gauche" will soon be as dubious a compliment as being called "liberal" seems to be for many Americans? Has the boomers' Americanisation replaced Rupert Murdoch's Americanisation as a more effective punching ball for French opinion makers these days and, if so, is that the crowning glory of Americanisation, that is, the demise of the Socialist Party, of the left?

Much was made of claims of American influences on the French Right but the left is not immune. A Sixth Republic—a deliberately un-American reference—is a project that has been floated in socialist circles for some time now and if Arnaud Montebourg, the man most associated with this idea has fallen from grace in government circles, influential socialists, including the president of the National Assembly, have not given up on a project that would do away with the Prime Minister. Besides, among those on the centre left, as social democrat is being replaced as a reassuring, centrist term by social liberal (a term still anathema to the left of the party but part and parcel of a strategy that includes wooing business and promoting free-market ideas still associated in many minds with Thatcher and Reagan), one project is the creation of a French-style Democratic Party that could challenge the right for the middle-ground of French politics. In the wake of the regional elections where no party could truly claim victory,[92] the tactics (and hopes) of Prime Minister Valls seem clearly to include a centrist alliance, and changing the party's name is likely to be on the cards before long. Only if this Americanisation happened without the current entrenchment of American politics—with liberal Republicans and middle-of-the-road Democrats so hard to find these days—would this strategy make sense though.

Is it the implication not just of press magnates like Murdoch but of the super-rich in general in shaping politics wherein Americanisation should be detected, despite the very strict rules with relation to the financing of political parties and campaigns? Or could it be the return of social and religious conservatisms in a country where secularism is glorified and restated constantly but where le "*fait religieux*" is now casting a long shadow over politics? The left should not become too depressed though since the generalisation of American-style primaries should give it the possibility to make its voice heard if such a voice still exists. The effects of broadening the electorate on the results of leadership election in the British Labour Party should give them heart, at least till the next British general election, that is, when Britain's (Americanised?) centre of gravity may once again be reminded with another Labour defeat. Besides, in a system where it used to be difficult to "oust the outgoing", it remains to be seen how effective these primaries are at promoting renewal at the helm. Primaries, which are one of the most remarkable electoral imports of recent years, have already met with some success but the idea floated in November 2014 by socialist minister Thierry Mandon went a step further, and one might claim, one step further than the political reality across the ocean: Indeed, the idea is

not just for a parliamentarian in place to be subjected to challenges from within their own party, to be "primaried",[93] but for the current President of the Republic to be "primaried" as a matter of course. More recently, the debate has gained huge momentum with a call by intellectuals, economists, politicians and environmentalists for the left and the ecologists to organise primaries before the 2017 presidential election,[94] and even the First Secretary of the Socialist Party seems to have been persuaded.[95] As Sarkozy is still hoping to become re-elected as President despite having been beaten last time round and despite his party's lacklustre semi-victory in regional elections from which he emerged weakened, there is a growing feeling that another aspect of Americanisation is long overdue and that French politics should take heed of the Americanisation of the French language suggested by the suffix "gate" or the pseudo American expression "has-been". To be sure, Lincoln tried several times but recent American practices should cause Nicolas Sarkozy to think twice. Other forms of Americanisation should give comfort to those seeking better democracy: the same social-liberal Mandon promised what he was careful not to present explicitly as American but what most people would nonetheless recognise as Anglo-Saxon if not American: concepts such as open democracy, open government and accountability. In this area, things have been changing fast in order to give the public greater access to information and allow more participation by citizens in a country bemoaning the sorry state of its representative democracy. According to the Open Knowledge Foundation in December 2014, France ranked 3rd as opposed to 12th in 2013. And the minister promised a freedom of information act.[96] As for the promotion of equality via the less and less consensual yet nonetheless very American notion of positive discrimination, gender "parity" has been consecrated in all the French elections where it could possibly be implemented.

Conclusion

Americanisation is a serviceable concept indeed and it is also a very subjective concept however neutral you try to keep it. In many cases, sociological, societal and technical changes that admittedly often appear in the USA first—which accounts, as was mentioned above, for the equation frequently made between modernisation and Americanisation—suffice to cause fears that Americanisation is at work. That said, more and more technological change occurs simultaneously these days and only connexions with the Silicon Valley, American universities and American corporations will

warrant more or less credible claims of Americanisation. It is also because the concept is subjective that the author finds it to be so convenient for the purpose of a brief, general overview of current phenomena pertaining to recent and forthcoming elections in a country that used to be sure of its place in the world and is not quite so confident now. The concept is very handy for those who believe France is becoming too liberal politically, too liberal economically, too illiberal, too conservative, too fat, too "dumb", too "bling"… for those who need a scapegoat and are too well behaved to blame an underdog, and for those who are used to blaming any foreign cause they can think of. Despite the reality of very active US-funded networks aimed at developing Franco-American friendship in the elite, which networks have been extremely good at predicting which young people would make their mark on French politics and make it to the top echelons of the civil service, and therefore be useful friends one day,[97] there does not seem to be a uniform, concerted movement towards Americanisation of political opinion and constitutional or electoral practice beyond the expected effects of the diplomacy and soft power of a diplomatic and cultural giant, and of market forces in tune with the capitalist ideology dominant in that economic giant. Understandably, given the giant that is America, the tendency to look for American causes is much greater here than the converse tendency in the USA. Hardly anyone analysing the perplexing ascent of Donald Trump in the first phases of the run-up to the Republican primaries turned to populist phenomena in Europe, at least until the concurrent electoral success of Marine Le Pen in the regional elections and the insane Muslim exclusion plan of the Republican started giving the American media ideas about the latter being America's Le Pen, and if a very small number of commentators let out the f. word—fascism—the reference was to a period of global history the USA had thankfully[98] taken decisive part in, not in transatlantic political transfers. The potential role of Donald Trump, if he had not been selected in the primaries and if he had chosen to "go it alone", would probably have been seen as an evolution of the Tea Party logic rather than a third party drawing from the experience of populist third parties in Europe. As would, it should be added, a scenario that became more credible as Trump increased his lead in the primaries: that of another conservative Republican standing against the yellow-haired populist. Nor does there seem to be a general, concerted anti-American agenda beyond the seemingly inexorable progress of a party whose founding member dreamed of a "boreal Europe" and whose daughter and current leader has no love for Atlanticism which

she associates with Europe's decadence. Among the thinkers currently expressing and contributing to the pessimism that is hanging over France, some actually embrace American values[99] while others concentrate on the risks America poses France. Among most French people, the USA is summoned frequently, but *ad hoc*, as an example or a counter-example depending on the argument that needs to be made. In many respects, the French political psyche is very different from the American and superiority complexes inevitably reflect inferiority complexes. The national pride and confidence apparently so characteristic of the USA could not be more different from the fears, self-doubt and national soul searching about the politically loaded notion of "national identity" France is currently displaying. Yet these more or less rational debates, in many cases very French in their manifestation, call upon American practices and precedents in a globalised environment that has moved away from the ideologies of the post-War. Americanisation cannot be the be all and end all to understand the French as they discuss politics in the local bistro or queue at the polling station but, as with law, culture, entertainment, the media, food and many areas of life though perhaps less so, it can be a useful prism to catch glimpses of the fascinating and in many ways alarming jolts French politics is currently subject to in a context of Islamist terror where the fears described above are increasingly tainted with anger and even hate. What the opinion polls seem to be suggesting however, in the first weeks of the year of the French right's primaries—and possibly, since the socialists are warming to the idea, of the French left's primaries—is that the American right's components (the libertarian, the moralist and the nationalist) are not all consistent with the structure and aspirations of the French electorate. France's right, which for much of the twentieth century and the beginning of the twenty-first claimed to defend the individual against society and government, is rediscovering the nation and patriotism, causing a traditional Gaullist like (former Prime Minister) Alain Juppé to do better in all opinion polls than opponents associated with "*le libéralisme*" like (former Prime Minister) François Fillon or indeed (former President) Nicolas Sarkozy. As for "laïcité", a central notion that "secularism" fails to adequately translate and that seems to mean different things to people of different political persuasions, it is now causing the latter to express regrets, *inter alia*, for his misguided (and rather un-French) temptations to espouse the values of the religious right. He is now backpedalling on the issue of same-sex marriage and promising he will not abrogate that legislation should he be re-elected.[100] All this looks like a typical case of

"*plus ça change*" in a country which, "Americanised" or not, is desperate for proper democratic change and whose electorate is increasingly willing to use the ballot box in novel ways in an attempt to obtain that change. Almost everyone in France seems to agree that there is a crisis of representation and that political change is long overdue, but what exact forms such change will take and how deep recent trends in voting patterns will prove to be remains unclear.

Notes

1. David Van Reybrouck was not alone in expressing the view that the President's terms were, as he put it, "the harrowing and almost word for word repetition" of George W. Bush's speech before Congress after 9/11. "Etat d'urgence: le débat piégé", *Le Monde* (*Cahier Culture et Idées*), 28 November 2015, p. 1.
2. The French President's use of the exact same words as those used by President Bush after 9/11 gave rise to much commentary about the frightening possibility of a French-style Patriot Act.
3. The French, traditionally conscious about waving the national flag, had come to think it most uncool, a symbol best left to football fans or associated with nationalist far-right groups.
4. Dominique Schnapper considered recently that the change was inevitable, following a European movement that had originated in the USA. France Culture, *La Grande Table*, 2 November 2015.
5. Other definitions are also relevant in the context of the USA, relating to the acquisition of American values by immigrants, with its avatars advocated by (usually conservative) organisations not to mention fictional forms of Americanisation such as that of the Office of American Absorption. Cf. Roth (2005).
6. Susanne Hilger, "The Americanisation of the European Economy after 1880" *EGO European History Online*, 14 May 2012.
7. In other cases, even Britain is still seen as a socialist counter-example, particularly when it comes to debates on health provisions and the so-called Obamacare.
8. Liberal here is to be understood as referring to both economic and social (and societal) liberalism.
9. President de Gaulle asserted France's independence and sovereignty on various occasions, notably when he decided to take France out of the command structures of NATO in 1966 (a decision that took effect in 1967). Many other examples can be given including de Gaulle's two vetoes to the UK's membership of the EEC or his decision to be the first Western county to have diplomatic relations with the PRC.

10. Dominique de Villepin, the then minister for foreign affairs, denounced the American project in an historic speech at the UN on 14 February 2003.
11. France's five "Republics" have placed more or less emphasis on Parliamentarianism. The Second Republic, the most presidential (with a strict separation of powers and a President elected directly by the people), led to a coup by Louis-Napoléon Bonaparte after only three years. The Fifth, introduced by the Constitution of 1958, was mainly Parliamentarian but became increasingly hybrid, all the more since the constitutional change of 1962 providing the President be elected directly by the people. Between 1986 and 2002 (cf. note supra), the presidential elements became less obvious and 2005 is often thought to mark a return to "presidentialisation".
12. Mitterrand, following the 1962 Constitutional reform, published an essay whose eponymous central notion is still a household name in French politics.
13. David Cannadine, for example, provides a perfect example of transatlantic transfers with regard to the paradoxical and scarcely admitted emulation of George III's monarchy by the Founding Fathers as they devised the presidency, an emulation in fact based on a perception of regal power that was ill-understood and eventually created an institution far more powerful than demonised original. "Is the US President an elected monarch?" BBC Radio 4, *A Point of View*, 15 May 2015.
14. The Elysée Palace is often referred to as "le Palais".
15. Regarding accountability and open government, France has made huge progress in recent years, overtaking the USA in the area of open data as is shown inter alia by the figures released yearly by the Open Knowledge Foundation.
16. The law is changing though and the President's privileges are being gnawed at. Besides, more and more debates are taking place in France on how to increase citizens' participation in policy-making, with the promotion of Hackathons or the Etalab mission.
17. France 24, 3 June 2012.
18. Out of 74 Members of the European Parliament representing France, 24 were elected on *Front National* lists (against 20 for the UMP and only 13 for the socialists). Marine Le Pen's party came first with 24.86 per cent of the votes in 2014. The UMP got 20.81 per cent and the socialists 13.98 per cent.
19. The *Front National* is making progress among many voters beyond its traditional electorate and, as it is gaining a strong foothold in traditionally left-leaning, working-class regions such as the North while confirming its clout in more affluent, traditionally conservative regions such as the South East, consistency is becoming a problem. Europhobia,

"Islamophobia" and a rejection of Americanisation are therefore very useful markers to avoid embarrassing questions on social or fiscal issues.

20. Aymeric Choprat, France Culture, *Les Matins*, 17 mars 2015.
21. On anti-American thinkers, cf. *inter alia* Olivier Dard "le cancer américain : le titre phare de l'anti-américanisme français entre les deux guerres" in Dard and Luesebrink (2008), pp. 115–133.
22. Most revelations came out in November 2014 (e.g.) "Poutine et le FN: révélations sur les réseaux russes des Le Pen", *Le Nouvel Observateur*, 27 November 2014. In February 2015, an IFOP opinion poll indicated the Front National was still gaining ground with 30 per cent of those polled claiming they would vote for Marine Le Pen's party. In the April 2015 local elections, some argued that the FN had lost the second round, having failed to obtain a majority of seats in a single "département" and that with its 25.2 per cent of the national vote it was not the biggest party. Given that it had not presented candidates in every constituency—only in 1909 out of 2054—the truth is it attained an historic level in the first round of that election. Other media have since insisted on the strong ties between the *Front national* and Russia (e.g. "Secrets d'Info – Enquêtes sur des réseaux russes en France" *France Inter*, 27 November 2015) but the results of the regional elections show no fall in the support for that party.
23. There were communist ministers in several post-War governments: In de Gaulle's first governments in 1944–1946, in 1946 when Vincent Auriol was President (until 1947), in the first Mauroy government under the presidency of Mitterrand (1981–82) and when President Chirac had to "cohabit" with a coalition of left-wing parties led by Prime Minister Lionel Jospin between 1997 and 2002.
24. In the legislative elections, for example, between 1945 and the early 1980s, only once did the Communist Party obtain less than 20 per cent of the share of the votes, and when it did, with 19.08 per cent of the vote in 1958, it still came first as it had done in 1945, November 1946 (with 28.26 per cent), 1951 and 1956.
25. It is symptomatic of the difference between the UK and France that D. Cameron should make political capital out of his role in pushing through the free-trade agreement. (cf. BBC 1, *The Andrew Marr Show*, 4 October 2015.). French politicians of a similar persuasion are far more circumspect. The results of a CSA polls on TAFTA conducted on 20 May 2014 for *l'Humanité* and which shows that among those who have heard of the treaty 55 per cent believe it to be a threat to France against 28 per cent who believe it to be an opportunity explain such caution. A year later, France scepticism, its leader's prudence and traditional French unease regarding globalisation and somewhat irrational distrust of the USA was pointed out. Cf. Elvire Fabry, "La France: Un terreau d'opposition au TTIP?" Policy Paper 136, *Notre Europe – Institut Jacques Delors*, 10 June 2015.

26. "La gauche de la gauche" avoids the political pitfalls of the expression "extreme left" which irks many to the left of the governing socialist party. Examples of fears of Americanisation can be found in countless publications and blogs.
27. Unsurprisingly, the former communists of the *Front de Gauche* and the *Front National* sympathisers are least impressed with the treaty (69 per cent and 63 per cent see it as a threat) but even among UMP supporters, 40 per cent feel threatened by it whereas 38 per cent feel encouraged.
28. In 2012, socialist candidate François Hollande beat outgoing Nicolas Sarkozy to become President (51.64 per cent/48.36 per cent).
29. Going into Regional elections predicted to be disastrous for the left, a fringe of the Socialist Party led by former ministers—les "frondeurs"—are openly critical of the government. The Communists are divided as to what electoral alliances to make, as are the ecologist movement whose very political survival is threatened by bickering and schisms.
30. "Un Small Business Act à la française", 9 June 2015.
31. This reticence remains true despite the regular front page in weekly magazines about France's limitations and the aspiration of her young people to emigrate to the UK or North America.
32. The modernising German Chancellor's party was beaten by Angela Merkel's CDU-CSU in 2005.
33. Jean-Louis Guigou, "L'américanisation de notre société est en marche – je le regrette – je le redoute", *Humeurs Méditérranéennes* (*blog*), 19 June 2013.
34. Bernard Guetta, "La politique française s'américanise", *Libération*, 8 December 2010.
35. Maxime Tandonnet, "Primaires, Hillary-mania: l'américanisation de la politique française", *FigaroVox*, 13 April 2014.
36. Marling (2006), quoted in Hilger, *op. cit.*
37. In 2008, 80 per cent of the French hoped Obama would win. 8 per cent preferred McCain. (TNS Sofres/Logica poll published on 10 September 2008). In 2012, 67 per cent of the French preferred Obama to Romney (5 per cent) according to a CSA poll published by *Direct Matin* on 26 October 2012. According to another poll, France was *primus inter pares* for its love of Obama with 72 per cent supporting the President against 2 per cent favouring the Republican. Slate.fr referred to France as the most "Obamamaniac" country.
38. Elisabeth Zoller, "L'américanisation du droit constitutionnel: Préjugés et ignorance", Archives de philosophie du droit et de sociologie juridique, 45, 2001, pp. 77–87.
39. George D. Haimbaugh, "Was it France's Marbury v. Madison?" *Ohio State Law Journal*, 1974, vol. 35, p. 910 or Jean Cédras, "La constitu-

tionnalisation de la procédure pénale en France et aux Etats-Unis", Revue internationale de droit penal 2011/3 (Vol. 82), p. 452.

40. Cons. Constit., n°71–44, 16 July 1971.
41. The constitutional statute of 29 October 1974 allowed 60 Senators or 60 deputies to request a constitutional review of an act of parliament before it was signed into law. This gave article 61 of the 1958 Constitution the teeth it lacked since only the President, the Prime Minister or the president of either assembly used to have that prerogative.
42. Olivier Dutheillet de Lamothe, "Les méthodes de travail du Conseil Constitutionnel", www.conseil-constitutionnel.fr, 16 July 2007, p. 10.
43. Jean Cédras, *op. cit.*, p. 455.
44. President Mitterrand's 14 July address, in 1989.
45. These filters were, on several occasions, described as corks (des bouchons).
46. Early on, the judicial supreme court (the court of cassation) seemed to try to derail the QPC before it was even used and to take the P out of it by going over the Conseil's head and referring the first case to the European Court of Justice and then by competing with it in the defence of human rights (causing havoc on the issue of police custody in particular).
47. Hubert Haenel, "Vers une Cour suprême?" www.conseil-constitutionnel.fr, 21 October 2010.
48. Elizabeth Zoller mentions what she calls the "dry five-year term" (le quinquennat "sec").
49. For a fascinating sociological analysis of this « club for pensioners and the bourgeoisie », read Dominique Schnapper's *Un sociologue au Conseil constitutionnel*.
50. France Culture, *L'Atelier du pouvoir*, 27 February 2016.
51. The term was used to describe American campaigns by a Republican leader interviewed on BBC Radio 4's "Today" programme on 4 September 2015.
52. Marie-Christine Kessler, "M. Valéry Giscard d'Estaing et les républicains indépendants: juillet 1966-novembre 1967", *Revue Française de Sciences Politiques*, 1968, vol. 18, N° 1, p. 77.
53. Jean Lecanuet obtained just over 15.5 per cent of votes in the first round of the 1965 presidential election.
54. France Culture, *Du Grain à Moudre*, 28 January 2016.
55. *Paris Match*, 7 October 2015.
56. Nicolas Sarkozy, with a little help from media groups owned by personal friends (notably Martin Bouygues' TF1), was greatly helped before his successful presidential campaign by an obsession for "crime" in the media. Reports of the attack on a helpless old man, "Papy Voise", hours before the vote, were later seen as somewhat staged-managed.
57. The co-branding is still seen as amateurish and clumsy by many, though. Cf. "Le showbizz fait de la politique et le politique assure le spectacle » in

http://www.lefigaro.fr/politique/2015/02/26/01002-20150226ARTFIG00237-cotillard-laurent-hollande-le-showbizz-fait-de-la-politique-et-le-politique-assure-le-spectacle.php

58. "Cohabitations" used to be considered an institutional anomaly in the fifth Republic. It occurs when a majority politically opposed to the President in place is returned to the National Assembly (a different majority in the Senate is more common, less problematic and doesn't warrant the use of the term). The phenomenon became common in the 1980s and 1990s. In 1986, President Mitterrand had to "cohabitate" with Jacques Chirac. Re-elected in 1988 for another seven-year term, he had to "cohabitate" with another conservative Prime Minister (Edouard Balladur). When Chirac dissolved the National Assembly in 1997, he was rewarded with a "cohabitation" of his own, sharing power with socialist Lionel Jospin.
59. The term, admittedly reduced to five not four years, has more or less aligned the president's mandate with that of the legislature.
60. Olivier Duhamel, "Vers une présidentialisation des institutions?", in Perrineau (2008).
61. Abel Hermel, "Vers une américanisation du système constitutionnel français", *Libération*, 30 July 2003.
62. In the March departmental elections, the UMP obtained 29.4 per cent of votes and the Socialists 21.85 per cent. The Front National came second with 25.19 per cent. In the 2014 European elections, the Front National came first with just under 25 per cent ahead of the UMP (just under 21 per cent) and the socialists (just under 14 per cent).
63. Critical of the use of a provision allowing governments to push through legislation by conditioning the survival of the government upon the passing of a particular bill or reform, the current government nonetheless used article 49.3 in June 2015 and didn't rule out using it again. In March 2016, the idea was evoked once again with relation to the controversial reform of labour law contained in the so-called Loi Travail.
64. In the run-up to the primaries, one of the candidates (Jean-François Coppé) is advocating making greater use of "ordonnances".
65. One example was the way the "Bonnets Rouges" movement forced the government to do a costly U-turn and to scrap the "écotaxe", an ecological tax on road traffic that had been a campaign commitment.
66. "J'aime l'entreprise" is arguably one of Prime Minister Valls's most memorable catch phrases.
67. In that area, Manuel Valls has had to contradict his Finance Minister, Emmanuel Macron, who is not a member of the Socialist Party, used to be a banker, and is being more neo-liberal in his declarations.
68. Alain Badiou, France Culture, *La Grande Table*, 15 September 2015.
69. This "lurch to the Right" is not limited to France. Cf. Simone (2010).

70. Marika Mathieu (2013).
71. Serge Halimi, "The Americanization of French Politics", *Counterpunch*, 12 January 2014. (*Le Monde Diplomatique*, translated and published in *The Greanville Post*, vol. IX, 2015).
72. The idea is floated in the French press. For example, the regional daily Sud-Ouest on 24/11/14 evoked the Tea Party model when mentioning the "radicalisation" of the French right. However, as is pointed out by a French academic, the French media tend to focus on the more extreme pronouncements of "birthers" and "nativists" rather than on more crucial issues regarding economic and tax policy.
73. On 13 July 2013, an unexpectedly massive demonstration opposed the law opening marriage to same-sex couples. Between 300,000 and one million demonstrators took part.
74. This does not mean that French politicians have resisted the demagogic temptation to inflate a single issue in crucial phases of campaigns. Nicolas Sarkozy, helped by conservative media groups, was able to impose "insecurity" in his first presidential campaign.
75. Philosopher and former conservative minister Luc Ferry or former revolutionary and media-specialist Regis Debray agree on the origins of the Americanisation/modernisation of France leading to a destruction of traditional values. The rejection of the values the boomers stand for is conveniently shared by many on the right and on the left, given the conveniently multifarious nature of the liberalism (economic, social and cultural) they are accused of embodying. Cf. *inter alia*, France Culture, *L'Atelier du Pouvoir*, 22 November 2014.
76. A revealing post by Alexandra Latsa, 5 May 2015, in *Metamag*.
77. In the newly named "élections départementales", the administrative entity that is the "département" is divided into "cantons" and duos (made up of a man and a woman for gender-parity reasons). There are two rounds and any duo obtaining a majority of votes and a quarter of the number of voters on the electoral register in the first round wins straightaway. In the second round, the duo obtaining the most votes is elected.
78. The rules pertaining to the regional elections in the 13 new regions are new. It is unlikely that any party's (or coalition's) list will obtain a majority in the first round. In the second, any party having obtained 10 per cent of the votes cast may compete. It may also wish to withdraw or agree to merge with another list. After the second round, the party with the most votes obtains 25 per cent of all seats and the other seats are distributed on the basis of highest average proportional representation. In other words, the party that comes first has a clear advantage.
79. Hitherto, the *Front National* had either benefited from the country's experimenting with proportional representation or, when the majority system was retained or restored, with victories in "triangulaires", i.e.

elections where the two other parties had been unwilling or unable to create a common front against this unsavoury third party. Again, different electoral rules in December 2015 will mean different results.

80. The "ni ni" tactic, which now replaces the occasional tactical merger of centre-left and centre-right lists known as "front républicain" is all the more favoured by the right today since its voters are less put off by the *Front National*'s new face and since it proved efficient in the last "départementales" where the right did well and the far-right party, though having increased its number of councillors, was unable to take control of a single council.
81. René Rémond's seminal work *Les Droites en France* described the categories into which French right divided. Traditional markers will remain but as, borders become less clear within the right, attitude to foreigners, to Europe but also to America and Atlanticism may be more cogent than before.
82. Among these right-wing parties—claiming not to be and calling themselves "souverainistes", *Debout la France* now counts as its informal supporters former socialist Jean-Pierre Chevènement who had resigned from the government in January 2001 in disagreement with the treatment of Saddam Hussein, a traditional friend of the far right.
83. Brice Teinturier in Le 5/7, *France Inter*, 14 December 2015.
84. Only in 2011 were the primaries open to all who adhered to "left wing and republican values". The previous primaries only allowed socialist activists to take part.
85. For example, "L'Esprit Public: Le mi-mandat de François Hollande – Les élections du mid-term aux Etats-Unis", *France Culture*, 9 November 2015.
86. Between the presidential and the disastrous municipal elections, five by-elections were organised in which the five constituencies that were held by the left were lost by the left.
87. François Hollande got Jean-Marc Ayrault to resign and replaced him with Manuel Valls.
88. édito politique, *France Info*, 22 April 2013.
89. Eric Zemmour probably best symbolises the changing face of a vocal anti-liberal right and its success in the media. His book *Le Suicide Français* topped the charts (400,000 copies were said to have been sold in 2014), his weekly magazine *Valeurs Actuelles* is increasing its readership in a context that is morose for the press in general and he is almost ubiquitous on French television and radio, as a host on Paris Première and for a time on RTL, or as a guest in many programmes, notably "On n'est pas couché" on *France 2* (cf. infra).
90. Cf. Fox's success not only against liberal (i.e. left wing) MSNBC, but also against mainstream CNN.

91. "Laurent Ruquier: 'l'une des critiques que je peux entendre, c'est celle d'avoir gardé Zemmour'", *Libération*, 4 October 2015. The presenter of "*On n'est pas couché*", *France 2*'s late night talk show, while defending his choice of guests, admitted that speech had been "liberated" (meaning that very right-wing ideas were aired more freely), that "a certain little music" could now be heard and that questions about national identity had been given too much prominence. He also confessed that keeping right-wing polemicist Eric Zemmour and providing him with a platform had been a mistake. In December 2015, Zemmour was convicted of provoking hate against Muslims and fined 3,000 euros.
92. The Socialists and their allies retained a majority in five regions despite the government's unpopularity, the conservatives are now in control of seven, some with very narrow majorities and the *Front National* was unable to win a single region—thanks to the left's choice to withdraw in two regions—but increased its support to 6.8 million votes overall.
93. For an explanation of the neologism and the importance of the "epidemic of primary challenges" in the US, *cf.* Boatright (2013).
94. Published in *Libération*, on 11 January 2016, the call was made by people who shared the idea that Hollande should not stand in 2017. Such a call, most unlikely to be heeded as it would weaken the current Head of State and his office, would potentially break with the trend that has seen the left move inexorably to the right.
95. On Sunday 21 February, the First Secretary of the Socialist Party, Jean-Christophe Cambadélis, expressed his support for primaries of the left including the socialists to be organised as early as December 2016.
96. France Culture, *La Grande Table*, 27 May 2015.
97. American programmes targeting promising people to reinforce Franco-American friendship (and American influence in France) include the International Visitors' programme supervised by the US embassy in Paris and the Young Leaders' programme supervised by the French American Foundation.
98. Literature offers chilling fictional alternative, notably: Roth (2005).
99. Conservative liberals (liberals in the current French sense of the word) denounce France's inflated state sector, its "autism" and a failure to follow other Western nations in modernising society and the economy. Even self-proclaimed economic liberal Sarkozy failed to break with statism. Baverez (2003) and Baverez (2012), p. 56 cited in Hazareesingh (2015), pp. 243–244.
100. Some time before the publication of Nicolas Sarkozy's aforementioned book, *Le Figaro*, which had disclosed some of the ideas it contained, expressed the anger felt by the author's former friends of *la Manif pour tous*. "Les opposants au mariage pour tous sont tous déçus par 'l'évolution' de Sarkozy", Le Figaro, 22 January 2016.

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The Case of Denmark: Voting, the European Union and the Constitution

Peter Gjortler

This chapter aims at examining the developments in Danish voting with relation to the European Union, an examination that will include Denmark's successful accession, in 1972, and the unsuccessful attempt, in 2015, to remove some of the country's permanent reservations that have been applied since the introduction of the Maastricht treaty in 1992. The chapter concentrates on the constitutional restraints, on voter response and on the judicial challenges that, in Denmark, have accompanied the development of an ever-closer European Union.

Constitutional Restraints

The Danish constitution was introduced in 1849 during the revolutionary movement that swept Europe in 1848–1850 and it marked the formal ending of absolute monarchy in Denmark, although in many relations monarchical power had already been subject to limitations during preceding periods.

Prior to the constitution, various contractual arrangements had been established during the Middle Ages in line with the 1215 Magna Carta

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in what was later to become the UK. These contracts were entered into between the nobility and the monarch, who at the time in Denmark held an elective office, and the contracts determined the powers of the monarch being elected. This included the introduction of the notion of habeas corpus.[1]

The last contractual arrangement was made in 1648, and, in 1661 the concept of absolute monarchy was introduced in Denmark and was subsequently to be applied for the next 200 years.[2] However, even with the new constitution the monarchy was not removed as an institution in 1849, but Denmark became a constitutional monarchy, which to some degree may be regarded as a resumption of the contractual arrangements.

An important distinction was the contractual format, as the constitution was adopted by and for the people as such, with the notion that the constitution could serve also to regulate the powers of the monarchy. This was essentially the outcome of debates concerning the question of the principalities of Schleswig, Holstein and Lauenburg, where the monarch conceded that his government was no longer able to uphold his policy against popular protest, and on this basis the monarch accepted that his powers were no longer absolutist.[3]

The first constitution was adopted during the 1848–1850 war which involved the principalities and was successfully concluded by Denmark. However, the first constitution was limited to regulating internal matters of Denmark, and it was therefore amended in 1855 so as to introduce a confederation between Denmark and the principalities, which the monarch ratified in 1863. This led to the 1864 war concerning the principalities, which was definitively lost by Denmark, and the constitution was once again modified in 1866 to specify that the principalities no longer formed any part of Denmark.[4]

The next constitutional amendments were undertaken in 1915 during the First World War, but the amendments concerned only internal matters. The voting system for the election of parliament was amended to become more proportional, and the right to vote was granted to women and servants. The most important issue in relation to the as yet unborn European Union was the introduction of limitations on further constitutional amendments.[5]

The limitations are set out in Section 83 which uses the Danish name of the parliament, Folketing, and which provides:

> Should the Folketing pass a Bill for the purposes of a new constitutional provision, and the Government wish to proceed with the matter, writs shall be issued for the election of Members of a new Folketing. If the Bill is passed un-amended by the Folketing assembling after the election, the Bill shall, within six months after its final passing, be submitted to the electors for approval or rejection by direct voting. Rules on this voting shall be laid down by statute. If a majority of the persons taking part in the voting, and at least 40 per cent of the electorate, have voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent, it shall form an integral part of the Constitutional Act.

Despite the stringent requirements, it was possible in 1920 to obtain an amendment of the constitution so as to accommodate Northern Schleswig in becoming an integrated part of Denmark, following the referendum held in the principalities after First World War[6]. In a similar manner, an amendment was made in 1953 so as to accommodate the inclusion of Greenland and end its status as a colonial entity.[7]

Thus it has been a common trait of all the successful constitutional changes that they concerned the external matter of the geographical scope of the country in the constitution. It may be noted that the Faroe Islands were considered an integrated part of Denmark, which was formalised by the 1849 constitution.[8] At the time however, Iceland refused such integration, although it was considered subject to the Danish monarch. Iceland was granted its own constitution in 1874 without any perceived need for changes to the Danish constitution.[9] Subsequently, monarchical relations with Iceland were codified by the 1918 Act of Union, which also formally acknowledged Iceland as a sovereign state. Those relations were later terminated unilaterally by Iceland, in 1944, during the German occupation of mainland Denmark in the Second World War.[10] The only reference to Iceland in the current Danish constitution is to be found in the 1953 provision in Section 87 which continues to guarantee the equal treatment of Icelandic citizens as previously provided by the Act of Union.

Differing from these external matters, a constitutional amendment proposed in 1939 set out to reform the parliamentary system by eliminating the division into two houses of parliament. Yet this proposal failed to meet the stringent requirements of Section 83 and, accordingly, did not get adopted. It was later made part of the 1953 amendment, together with the abovementioned inclusion of Greenland and provisions granting respectively female ascendency to the throne and a legal basis allowing

Denmark to join supranational organisations, such as the then fledgling 1951 European Coal and Steel Community.

It is difficult in retrospect to define which of the four amendments carried the day in 1953, but it is a general assumption that the female ascendency was seen as a very popular issue that could serve as a suitable vehicle for getting the mundane issues pertaining to the parliamentary system and Greenland adopted, as well as the vital legal basis for what would become accession to the European Union.[11] Without this essential provision, it seems unlikely that Denmark would have become a Member State of the EU and, instead, it seems likely that Denmark would at most have been a member of the EEA, as are presently Iceland and Norway, also part of Denmark until 1814.

The legal basis introduced in 1953 can be found in Section 20 of the constitution, which provides:

> Powers vested in the authorities of the Realm under this Constitutional Act may, to such an extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.

Thus, it is clear that the legal basis is limited to organisations promoting international law and order, and that the provision only allows for a transfer of sovereign power from Denmark to such organisations when the scope of the transfer is set out in statutory legislation. This must be compared with the general provision on international relations, which in Section 19.1 provides the following.

> The King shall act on behalf of the Realm in international affairs, but, except with the consent of the Folketing, the King shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation the fulfilment of which requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, denounce any international treaty entered into with the consent of the Folketing.

It should be noted that the Danish constitution does not contain any provision whereby international law automatically becomes part of Danish law, as may be found in other countries such as the Netherlands. Accordingly, Denmark adheres to the dualist understanding of international law, whereby the country as such may be obliged by international law, but whereby any effect of international law within the national legal order will require the intervention of the Danish legislator.

It is clear from the constitution that the Danish legislator is the parliament (Folketing) and, although the constitution does not explicitly address the issue, it is understood that the parliament may delegate legislative competence to the executive. A similar understanding applies within the European Union, and with the Lisbon Treaty in 2007 it was codified in the provisions of the Treaty on the Functioning of the European Union (TFEU), which regulates the delegated and implementing powers of the European Commission in Articles 290–291.

At the same time, it should be noted that while the original constitution did foresee a central role for the monarch, similar to that of the presidents of for example France and Latvia, a constitutional tradition has developed whereby such references to the monarch are taken to refer to the government, which in turn holds power based on the explicit or implicit approval of the parliament.[12]

Certain provisions are seen still to refer to the monarch as such, including the power to grant royal assent, which under Section 22 is required for parliamentary legislation to come into force. However, this power is today seen as ceremonial. The last attempt to exert political power took place in 1920 and almost brought about the abolition of the monarchy.[13]

It may be noted that the constitutional tradition was not codified in 1953 and this reflects a general approach to the Danish constitution, which is not interpreted by reference to the original intentions of drafters. This marks a difference from traditions in the USA, where amongst other issues the recently deceased chief justice Antonin Scalia of the US Supreme Court insisted on interpreting the constitution in the light of original intentions. Instead, the Danish constitution is seen as a living document to be interpreted in line with the needs of present day.[14]

On this basis, the devolution of centralised authority over parts of Denmark, such as the Faroe Islands and Greenland, in order to introduce home rule, was not deemed to require constitutional amendment, but was deemed possible to achieve via ordinary parliamentary legislation.[15] This has left open the question of whether such devolution would be open to subsequent modification by the parliament, or whether by the nature of its subject matter, such devolution became part of the constitutional traditions, possibly taking a place below the constitution itself, but above other legislation.[16]

Despite this uncertainty, it may be concluded that in general the Danish government has a broad competence to act in international relations, but that it is limited by the need to obtain parliamentary assent for any commitment that concerns the territory, requires legislative implementation or

is otherwise of major importance. In practical terms, the government may enter into international agreements, but in most cases they may be ratified only by parliament.

The Danish constitution does not contain a judicial mechanism such as found in TFEU Article 218, whereby the Court of Justice of the European Union (CJEU) may perform an *ex ante* review of whether an international treaty to be entered into by the European Union is compatible with the legal order of the European Union as set out in the treaties.

However, under the Danish procedural code the courts accept not only direct claims relating to legal rights but also accept recognition claims, whereby the other party, typically the state, is requested to recognise a specific interpretation of the law. Such recognition claims are not explicitly regulated by the procedural code, but their acceptance does require that they relate to a specific and presently relevant case, and that they do not concern general hypothetical situations.[17]

Further, the constitution contains in Section 19.3 a conflict avoidance mechanism, so as to avoid the international dilemma and embarrassment that would be seen to occur, by Danish political standards, if the government were to enter into an agreement, which subsequently the parliament was to refuse to ratify. The provision provides:

> The Folketing shall appoint from among its Members a Foreign Policy Committee, which the Government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Policy Committee shall be laid down by statute.

A parallel to this constitutional mechanism was established for the new membership of what was to become the European Union, whereby the proposed legislation of the European Union was to be presented by the Government to a European Affairs committee with representatives from all parties represented in parliament.

Going further than the constitutional provision, the European Affairs committee was to give implicit approval to the government positions due to be taken in the Council of Ministers, originally the sole legislative body of the EU. The approval was to be implicit in the sense that the government would be limited only if the committee was to take a decision explicitly against the government position.[18]

The constitution does not regulate the relations between members of parliament and the political parties of which they may be members, but it is assumed that Section 34 on the inviolability of members also

provides for independence of members from parties. Thus, the control mechanism for the Foreign Affairs committee in Section 19 of the constitution, like the similar mechanism established for the European Affairs committee, relies on political tradition, whereby the parliament would not be expected to vote against measures approved in advance by such scrutiny committees.

Compared with the general scrutiny system, the requirements for surrendering sovereignty to international organisations are much more restrictive, and in fact only slightly less intimidating than the abovementioned requirements for amending the Constitution. Thus, Section 20.2 provides

> For the enactment of a Bill dealing with the above, a majority of five sixths of the Members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in Section 42.

The provisions on referenda are provided in Section 42.5

> At the referendum, votes shall be cast for or against the Bill. For the Bill to be rejected, a majority of the electors who vote, and not less than thirty per cent of all persons who are entitled to vote, shall have voted against the Bill.

Thus, the difference to constitutional amendments is that there is no requirement of a parliamentary election or an unamended readoption of the bill prior to the referendum, and that the requirement of entitled voters in favour of the bill is reduced from 40 to 30 per cent. Further, Section 20.2 offers a fast track solution if the parliament can muster a five-sixths majority and is willing to take political responsibility for undertaking a transfer of sovereignty without consulting the population in a referendum.

Voting on the European Union

Although Denmark had already secured the legal basis for accession to the then EC in 1953, actual accession to what after 1957 was known as the European Communities (EC), later the European Union, was able to take place only in 1972.

The reasons for this delay were connected with the structure of the Danish export markets, which were strongly based on agricultural products, for which the UK constituted a major market. Accordingly, when France rejected overtures from the UK to join the EC in the late 1950s, Denmark followed the UK into the European Free Trade Area (EFTA) established in 1960.[19]

The accession to EFTA, which was constructed as an international organisation on a traditional intergovernmental basis, without legislative powers, did not call for use of Section 20 of the Danish constitution, as there would not be any transfer of sovereignty involved. However, the membership could certainly be classified as being of major importance and ratification was therefore performed by the Danish parliament.

When accession to the EC of the UK was accepted in 1972, Denmark, Ireland and Norway had joined the application and were also accepted, but subsequently a referendum held in Norway turned down the accession to the EC,[20] whereas accession was approved by referendum in Ireland, while the UK acceded without referendum, but subsequently confirmed membership by referendum in 1975.

The Faroe Islands, having obtained home rule in 1948, were not included in the proposed Danish accession to the EC. Greenland later obtained home rule in 1979 and subsequently decided to leave the EC in 1985, which was agreed to by Denmark and the other Member States. No constitutional or treaty provisions were drawn up for these purposes, as what is now TFEU Article 355.6 allows for a regulation of the overseas territories of Denmark, France and the Netherlands. On this basis, Algeria had left the EC in 1962 after achieving independence from France.

In 1972, the 5/6 majority required for Danish accession without referendum, according to Section 20.2 of the constitution, could not be obtained, but an ordinary majority was obtained in the parliament: as a result, a referendum was held according to Section 42.5 of the constitution. The challenge for the government was to obtain a majority vote in the referendum that would constitute at least 30 per cent of the entitled votes.

It may be argued that in order to obtain this, a misleading strategy was adopted, which in subsequent years came back to haunt the relations between government and the population where EU matters were concerned. Thus, the EC treaties were presented in 1972 as constituting merely the framework for a trade relationship, and a necessity for maintaining the lucrative trade relations between Denmark and UK, which country was presented as being sure to join the EC.[21]

The legal implications of surrendering sovereignty were minimised, as legal opinions that had been submitted with the 1953 constitutional amendments had underlined that only the regulations to be adopted by the EC would have any supranational effect, while treaty provisions and other legal instruments, such as directives, would have effect in Denmark only as provided for by the Danish parliament under the dualist approach.

However, by this time the CJEU has already presented landmark judgements such as in case 26/62 Van Gend en Loos,[22] which had established the direct effect of treaty articles, and case 6/64 Costa v Enel,[23] which established that it followed from the nature of EC law, and later EU law, that it must have supremacy over national law. As for case 11/70 Internationale Handelsgesellschaft,[24] it established the application of fundamental rights as part of EC and later EU law.

The result of all this was a bitter debate on what the EC and later EU constituted, and whether it was in the interest of Danish voters to accept membership of such an international organisation, or whether it might be expected to grow into an institution caring more for the interests of the union than for the citizens of any given member state.

The referendum activated 90.1 per cent of the electorate, with 63.4 per cent in favour and 36.6 per cent against accession.[25] Followed by the UK confirmation of its accession with the referendum in 1975, it could be argued that the government has reasonable grounds on which to assume the issue of opposition to the EC—and later the EU—had been decisively settled.

However, the EC failed to deliver the open markets that had been promised, and the Danish voters, as consumers, continued to be faced with high levels of taxation on items that had been expected to come down in price as a result of accession. Registration of cars continued to be subjected to 200 per cent taxation in Denmark, and taxes on items such as alcohol and televisions appeared to be substantially higher than in other Member States, whereas some form of harmonisation had been expected in the form of lower Danish taxes.

All of this could be explained partially by incorrect expectations—to some extent caused by inaccurate information fed during the referendum campaign—but also by the failure of the EC to establish the intended common market. Accordingly, expectations were high when the EC initiated the Single European Act (ESA) in 1986, one of the purposes of which was to replace the defunct common market with the then new internal market.[26]

Viewed from the Danish constitution, the ESA did not, as such, entail any further transfer of sovereignty that would engage the use of its Section 20. New areas of cooperation such as environmental law were nothing new, since the provisions constituted only a codification of the rulings of the CJEU whereby environmental law had always formed part of EU competence. Another new area of cooperation, foreign policy, was clearly kept at an intergovernmental level and thus outside the scope of sovereignty transfer.

At the same time, the move in the ESA towards actually applying the majority voting rules of the treaties, and towards extending the fields in which they could be used, certainly would have an impact on the influence of Denmark upon EC and subsequently EU matters, while the coordinated foreign policy would certainly limit the independence of Danish foreign policy. And yet, in itself, this could not be categorised as a transfer of sovereignty in any legal sense.

Possibly on the background of this split between formal sovereignty and actual influence, the government decided to call an advisory referendum on accession to the ESA. This mechanism is not regulated by the constitution, but was also found not to contravene the constitution as the voluntary referendum would serve to advise the government how best to proceed politically with the question of an accession covered by Section 19 of the constitution.[27] An advisory referendum had hitherto only been used in 1916, in order to form part of the decision concerning the sale of the Danish West Indian Islands to the USA.

The outcome of the ESA referendum showed a diminished turnout, at a level of 75.4 per cent, and also a diminished vote in favour (at 56.2 per cent with 43.8 per cent against[28]). This would become indicative of future EU-related referenda in Denmark, with the notion of objection to the EU having become an established part of Danish voting culture.

The 1992 Maastricht treaty introduced the concept of the European Union (EU), which included the regulation of new fields of activity, which had previously only to a limited degree been covered by the then EC treaties. The first field covered cooperation between Member States in civil and criminal judicial procedure, as well as police and customs matters. It was then referred to as Home and Justice Affairs (HJA), and it was subsequently integrated into what became the Area of Freedom, Security and Justice (AFSJ), first partially in the 1997 Amsterdam treaty and later entirely in the 2007 Lisbon treaty. The second field had already been partially regulated in the ESA and now became the Common Foreign and Security Policy (CFSP), which has remained the title.

Both these areas were regulated only in an intergovernmental and not a supranational manner, and as a consequence they could not engage Section 20 of the Danish constitution. However, the government requested a report from the Ministry of Justice to ascertain whether the other parts of the Maastricht treaty did involve a transfer of sovereignty that would warrant the use of Section 20, as the government had also done in 1972 prior to the first accession to the then EC.

In the report, the ministry found that some issues such as the right for EU citizens to participate in local elections and the common determination of visa requirements did entail a transfer of sovereignty, as did the envisioned transfer of HJA to the EC treaty, as the government was seeking prior approval of such a transfer in relation to asylum matters.

On several of the new policy areas listed in the EC part of the Maastricht treaty, the ministry did not arrive at any definitive conclusion as to whether they entailed transfer of sovereignty, or whether they merely codified interpretation of the existing treaties, as had been the case with ESA. On the other hand, the ministry found that accession to the monetary union did not entail transfer of sovereignty, as the constitution in Section 26 only reserves the issuance of coinage for the King, whereas the Maastricht treaty only granted the Community the right to issue bank notes.

Overall, the ministry recommended the use of Section 20 of the constitution, and when voted on in the Danish parliament, the act on ratification of the Maastricht treaty was adopted by a majority of 130 against 25, with 1 abstention and 23 absentees. Accordingly, a binding referendum was called, as the five-sixths majority requirement was not met.

It should be noted that the government cannot call a binding Section 20 referendum on a voluntary basis, and on this basis it had been discussed whether an advisory referendum, as had been held for the ESA, was permitted under the constitution. Thus, if the government did not wish to assume responsibility for joining the new European Union, it needed facts that complied with Section 20. It has therefore been suggested that both the report of the ministry and the subsequent 23 absentees reflected an arrangement in order to submit the accession act to a binding referendum.

As it prepared the referendum, the government carried out an extensive information campaign, but unfortunately a core element was the distribution to all households of the full text of the Maastricht treaty. On the face of it, this was a good transparency initiative, but as the Maastricht treaty was drafted as a long list of amendments to the existing treaty texts, and not as a coherent independent text, the distribution mainly served

to confirm an image of EU law as being incomprehensible and therefore dangerous.

The referendum was carried out as a vote on the accession act as such, without any possibility for a response to separate parts, about which the electorate might have separate opinions. It was a close call, with participation at 83.1 per cent, with 49.3 per cent in favour and 50.7 per cent against.[29] It has been indicated that the negative vote may be seen as a reaction to the federalist aspects of the Maastricht treaty.

This created problems for the Danish parliament, which traditionally is characterised by having multiple parties and no clear majorities, thus requiring the use of either coalitions or minority governments. It was therefore a significant development that after the Maastricht referendum, a group of seven parties in the Danish parliament, representing a majority vote, managed to agree on joint position in relation to future of the Maastricht treaty. This became known as the national compromise, which called for modifications in the obligations to be placed upon Denmark by the treaty. The initial demand seemed to be for an additional protocol to the Maastricht treaty, but in fact the other Member States refused any reopening of the ratification procedure.

The Danish constitution did not formally require any change to a legal act, such as that of accession to the Maastricht treaty, prior to a resubmission to referendum. The same would seem to apply in Ireland, where subsequently both the 2001 Nice treaty and the 2007 Lisbon treaty were resubmitted for referendum, without any amendment of the obligations contained in these treaties. However, in Denmark, it was felt in 1992 that this would not be politically possible.

Against this backdrop, the parties behind the national compromise agreed to what was developed as the Edinburgh agreement of 12 December 1992, covering the application of alternatives already held by Denmark under the Maastricht treaty. The main point of deviation from the national compromise in this respect concerned Union citizenship, where the Edinburgh agreement restrained itself to noting that this citizenship has no consequences whatsoever for national citizenship. The original demand had been for a Danish exemption from taking part in the EU citizenship.

The major mechanism in the Edinburgh agreement was that the negative application by Denmark of options in the Maastricht treaty was explicitly accepted by the other Member States. For the final stage of the Economic and Monetary Union, including adoption of the Euro, and for the development of Community defence policy, it was decided in the

agreement that Denmark would not participate. For any extension of rights held by Union citizens and for any transfer of powers under HJA, the agreement emphasised that such steps would require a renewed application of section 20 of the Danish constitution.

The Edinburgh agreement was drafted as an international agreement, not as any EU instrument, and furthermore it did not contain any provision, such as in the protocols of the Brussels Convention on Jurisdiction and Enforcement in Civil and Commercial matters, whereby the CJEU was granted jurisdiction over the agreement.

As a point of departure, the Edinburgh agreement would therefore be subject to the International Court of Justice in the Hague (ICJ), which could be argued to constitute an infringement of what is now TFEU Article 344, under which the Member States undertake not to submit a dispute concerning the interpretation or application of EU matters to any method of settlement other than those provided for in the EU treaties. This provision was highlighted by the CJEU in its opinion 2/13 on the proposed act of EU accession to the European Convention on Human Rights (ECHR).[30]

Based on the Edinburgh agreement, the government resubmitted the accession act for the Maastricht treaty to the parliament. The seven parties behind the national compromise were what might be termed as the centre-right wing and centre-left wing parties, leaving the opposition to be formed by the extreme right and left wing parties. In fact the seven parties not only held a parliamentary majority but also constituted a five-sixth majority, which as set out above would be the requirement in Section 20 of the constitution for renewed adoption of the Maastricht accession without referendum.

However, the seven parties wished to have a referendum, and it was found that circumvention in the form of absentee members, as may have been applied in the case of the ESA, would not be acceptable. Neither was it seen as viable to proceed on the basis of a voluntary and advisory referendum. Instead, a convoluted mechanism was used, which involved three separate legislative proposals, with the purpose of triggering a binding referendum.

The first proposal concerned an amendment of the Danish national act on accession to the existing EC, which would comprise the implementation in Denmark of accession to the Maastricht treaty and thus the EU. However, this implementation act was made dependent on a second act being adopted, which would be a joint ratification act for the Edinburgh agreement and the Maastricht treaty.

Under the dualist approach, any such ratification would not in itself grant legal effect to the Maastricht treaty within Denmark, which effect would come from the first act if, and only if, the ratification act was adopted. Thus, the argument was it was the implementation act that was subject to Section 20, whereas the ratification act was subject to Section 19 of the constitution.

Accordingly, the third act was a proposal to submit the second act to a binding referendum under Section 42.1 of the constitution, which provides:

> When a Bill has been passed by the Folketing, one third of the Members of the Folketing may, within three weekdays from the final passing of the Bill, request the Speaker to submit the Bill to a referendum. Such a request shall be made in writing and signed by the Members making the request.

Thus, it could be explained that the 1993 referendum was not a rerun of the original Maastricht referendum, but instead was a referendum concerning the Edinburgh conditions to be applied to the Maastricht treaty. In this manner, political and constitutional propriety could be said to have been observed, and turnout remained at about the same level as in 1992, with 86.5 per cent taking part, but with a result more akin to that of 1986 with 56.7 per cent for and 43.3 per cent against.[31]

Subsequently, this convoluted mechanism was not reused, and referenda were held exclusively under Section 20 of the constitution. With the 1997 Amsterdam treaty, which confirmed the Edinburgh conditions in the protocols of the EU treaties, it was debatable whether any sovereignty was actually transferred. The Ministry of Justice nonetheless established a report to that effect.[32] The referendum achieved 76.2 per cent turnout, with 55.1 per cent for and 44.9 against.[33] Subsequently, in reports from the Ministry of Justice the 2001 Nice treaty, the 2003 Athens treaty and, more controversially, the 2007 Lisbon treaty were found not to require application of Section 20, and accession was secured under section 19 of the constitution.

In a similar manner, Danish accession to the 1985 Schengen agreement, originally entered into between five EU Member States so as to ensure the open borders foreseen by the ESA, was adopted under Section 19 in 1996, as the Schengen authorities were found not to have been granted any powers reserved for Danish authorities under the constitution. Since then, the Schengen agreement has been integrated into the

EU treaties, but under the Edinburgh conditions, as confirmed by the Amsterdam treaty, Denmark retains a special standing under the Schengen agreement.

Over time however, the Edinburgh conditions were found to be a limitation contrary to national interests and, on this basis, Section 20 of the constitution was applied in 2000 to a proposal to join the common currency, the Euro. It may be argued that the government was too complacent in its referendum campaign, as the advantages of the Euro were seen to be self-evident. The referendum had participation as usual at 87.6 per cent, with a narrow as in 1992 showing 46.8 per cent for and 53.2 per cent against.[34]

From a political perspective, it seemed as if the government underestimated the attachment of the population to the notion of having one's own currency. In a television interview, the then director of the National Bank confirmed that sovereignty in the field of currency was important, but that Danish sovereignty in this field had an average duration of seconds, as this was the usual time between a change in interest rates set by Deutsche Bank and the corresponding change set by the Danish National Bank. The irony was missed by many viewers.

Apart from the popular notion of currency sovereignty there were also several economists that argued that the forecasts of benefits resulting from a joint currency were incorrect, and that Denmark would stand stringer with its own currency. The changing fortunes of the Euro as a new currency seemed at various times to respectively refute and confirm the economic opinion.

On this background, it was often discussed after the 2000 referendum how and when to relaunch a referendum concerning all or some of the Edinburgh conditions, but governments held back in fear of a repeated vote against changes. However, in 2014, success was achieved in an associated field, as a referendum was held on the Unified Patent Court agreement, which marked a new low in turnout at 55.85 per cent, but produced a substantial majority with 62.5 per cent for and 37.5 against.[35]

In this context, the government launched a referendum in 2015 based on the option introduced in the Lisbon treaty, whereby Denmark could exchange its general reservation on supranational cooperation in the field of HJA, so as to have an opt-in possibility instead, in line with the conditions applying to Ireland and the UK. Thus the referendum was about a framework, which in future could be applied by parliament without further use of Section 20, but only within the field of HJA.

The parties behind the proposal comprised most of the parties behind the 1992 national compromise and constituted a parliamentary majority. In order to clarify the referendum theme, these parties had identified 22 HJA acts of the EU, to which they publicly committed to apply the opt-in, once the mechanism was adopted by referendum. This could be characterised as a reverse version of the 1992 national compromise, but as in the 2000 referendum on the Euro, it may be argued that the government campaign was too complacent and did not sufficiently address the concerns of the population about Danish sovereignty. The result was a low turnout at 72.03 per cent, with 46.9 per cent for and 53.1 per cent against[36], almost a mirror image of the distribution in the 2000 referendum on the Euro.

Judicial Challenge

Overall, the Danish approach to referenda on EC accession, and later EU accession, has moved mainly within a 60–40 per cent range, with only the original accession breaking through to a 65–35 per cent range, and many subsequent referenda staying even within a 55–45 per cent range. Together with the changes between majorities in favour and against various EU accession acts, this presents a country with a lasting and well-established internal dispute as to its EU commitments.

It is therefore hardly surprising that attempts have been made to use the Danish court system to establish limitations on the use by governments of Sections 19 and 20 of the constitution in relation to EU accession acts. Over time, the Danish courts have modified their initial approach and have developed a nuanced response to the question of transfer of Danish sovereignty.

Already prior to the 1972 accession, when only a proposal for the accession act had been submitted to parliament, a Danish lawyer challenged the decision to join the EC by suing the Prime Minister with a claim for recognition that this would be contrary to Section 20 of the constitution. In its 1972 decision,[37] the Danish High Court found the case to be premature, as the accession act had not yet been adopted, and as the court did not have competence to rule on the constitutionality of draft legislation.

This position was confirmed on appeal by the Supreme Court in its 1972 decision,[38] issued just three months after the High Court decision, and after the adoption of the accession act, without entering into the issue of whether a citizen could at all challenge the constitutionality of an accession act.

However, when a second case was brought before the adoption of the accession act, and decided by the High Court after the adoption of the accession act, this case was not deemed premature, but instead it was decided on the basis of legal standing.

In this second case, a Danish citizen brought a challenge to the Danish government decision to sign the accession treaty and to hold the accession referendum under Section 20 of the constitution. It is apparent from the 1972 decision[39] of the High Court that the judges had difficulties handling the submissions of the applicant, who had chosen to represent himself as is possible under the Danish procedural code, and who did not have legal qualifications.

In defence, the government argued that the case should be dismissed, as the claims were not suitable to be brought before the court, partly because they were imprecise and partly because they related to hypothetical issues. In addition, the government argued that the applicant lacked sufficient legal interest to have legal standing in the case.

The court seized upon the last argument, thus avoiding having to deal with the issues of whether the claims suffered other defects. It found that the 1972 act of accession did not have any effect on the applicant that could form the basis for his claim that he had specific and current interest in pursuing a constitutional challenge against the accession act.

This argument is reminiscent of that often entered by Member States in EU-related court cases, whereby the claim is made that the provision, upon which a private party relies, does constitute an obligation upon the state, but that it only creates a right for the EU to require compliance. However, the CJEU has a long-standing line of jurisprudence whereby an obligation placed on a member state as a point of departure always creates a legitimate expectation for the citizen that the state will respect its obligation, thus creating enforceable rights for the individual, and only in rare cases has the CJEU held that such rights belonged exclusively to the EU itself.

On appeal, in its 1973 decision, the Supreme Court[40] limited its reasoning to a one-sentence reference to the reasons given in the decision of the High Court, which accordingly was confirmed. Despite the very brief reasoning, this jurisprudence was regarded as so definitive that it would take more than 20 years before a new case brought a change to jurisprudence.

A major source of inspiration was presumably the case brought in 1992 before the German Federal Constitutional Court (Bundesverfassungsgericht), which in its 1993 decision[41] admitted claims brought against the German

accession to the Maastricht treaty, so as to examine whether the bounds of the German constitution had been exceeded. As these bounds were drafted in a manner similar to Section 20 of the Danish constitution, it seemed obvious that the question of legal interest might be tried once more before the Danish courts.

Accordingly, prior to the late 1993 ruling of the German court, a similar case was brought before the Danish High Court. Unlike the 1973 case, this case was brought by lawyers, representing a number of individual Danish citizens, each claiming that the Maastricht treaty would have a direct impact on their lives, so as to overcome the test of legal interest.

However, with very brief reasoning, the High Court in its 1994 decision[42] endorsed its 1973 decision by finding that the applicants had failed to present any specific and current interest in pursuing a constitutional challenge against the accession act. On appeal however, the Supreme Court took a new direction in its 1996 decision,[43] finding that a transfer of sovereignty to the EU had a decisive effect on the lives of many citizens and that on this basis the citizens had sufficient legal interest to initiate a judicial challenge against the constitutionality of the accession act.

The Supreme Court underlined that it was this general effect of transfers of sovereignty under Section 20 that set constitutional challenges against such transfers aside from other cases, where citizens might wish to challenge the constitutionality of legislation, and where the usual conditions of specific and current legal interest would apply.

The case was duly referred to the High Court, to which the applicant submitted several requests for the government to disclose documents on which the applicants wished to rely as evidence. These requests were refused by the High Court, and leave to appeal to the Supreme Court was denied by the Appeal Committee, a separate body the applicant subsequently and unsuccessfully sued before the High Court and, on appeal, the Supreme Court.[44]

In the remanded case on the accession act, the High Court in its 1997 decision[45] once again ruled against the applicants. On appeal, the Supreme Court in 1998[46] confirmed the ruling of the High Court, but rather than the usual brief reference to the grounds cited by the High Court, the Supreme Court developed its own view of the relations between Danish and EU law, in a manner very reminiscent of the 1993 ruling by the German Federal Constitutional Court.

The applicants had argued in line with what had been the current legal understanding at the time of the 1972 accession: EU law was seen as a new

concept referred to as Internal State Community (IST) law, which was to be regarded as separate from both international and national law, as it was characterised by having direct effect within the states concerned, without action to be taken by the national legislator.

Reference was frequently made at the time to the Nuremberg court agreements, following the Second World War, as examples of IST law. To a certain extent, the rulings of the CJEU in founding cases such as 26/62 Van Gend en Loos, 6/64 Costa v Enel and 11/70 Internationale Handelsgesellschaft, as referred to above, and also the then recent CJEU opinion 2/94 on accession to the ECHR,[47] could be seen to confirm the statement that EU law, as IST law, has its own special character, which serves to explain its ability to gain direct effect within national legal system.

Conversely, the government argued against the existence of EU law as a special category of law, and essentially argued that only the categories of international and national law existed. Accordingly, under national law and the dualist approach, the effect of international law is limited to the effect granted by national law, and this applies also to EU law.

This also became the argument of the Supreme Court, but like the German Federal Constitutional Court, the Danish court reached out to the CJEU by stating explicitly that, on a practical level, it would remain the exclusive competence of the CJEU to invalidate EU law. Thus, the role of the Supreme Court would be limited to ensuring that if an element of EU law were to violate the Danish constitution, and was not to be declared invalid by the CJEU, then that element of EU law would be declared inapplicable in Danish law.

In practical terms it may be argued that supremacy of EU law over Danish legislation, but not the Danish constitution, is achieved by regarding the Danish parliamentary act of accession, implementing EU law in Denmark, which is based on Section 20 of the constitution, as having gained from that provision a special standing in the Danish hierarchy of norms, subject to the constitution, but above other legislation. A different explanation would rely on a constitutional tradition, as referred to above in relation to the home rule arrangements for the Faroe Islands and Greenland.

Further, the Supreme Court refuted the argument of the applicants, whereby the transfer of sovereignty was not sufficiently specific and delimited, as required by Section 20 of the constitution. In its decision, the Supreme Court identified a workable solution to the classic question of whether the EU has been granted competence to identify its own competence, often referred to in German as the issue of Kompetenz-Kompetenz.

The Supreme Court found that the general transfer of sovereignty was sufficiently precise in the Danish act of accession, and that it did not constitute a violation of Section 20 of the constitution that the more detailed delimitation of EU competence was an exclusive competence of the CJEU. In this, the Supreme Court was able to refer the abovementioned opinion 2/94 of the CJEU, in which accession to the ECHR had been refused on the grounds that it fell outside of EU competence. Furthermore, the oversight function of the Supreme Court would also apply here, with the possibility of declaring EU law inapplicable if it should reach outside the limits of the original transfer of sovereignty.

This point of view has to a certain extent been codified in the Norwegian constitution, which in Section 115 contains a provision similar to Section 220 in the Danish constitution, but the Norwegian provision explicitly provides that a transfer of sovereignty to an international organisation cannot entail any power to amend the constitution of Norway. It might prove a difficult point of negotiation if ever Norway were again to seek accession to the EU.

As a final element, a case was introduced in 2008 before the Copenhagen Municipal Court and subsequently moved to the High Court, in which the applicants claimed that the accession to the Lisbon treaty under Section 19 of the Danish constitution constituted a violation of Section 20, as the Lisbon treaty was claimed to entail a transfer of sovereignty, contrary to findings in the 2007 report from the Ministry of Justice as referred to above.

The government argued that contrary to the Maastricht case, the present case had been entered at a time where the Danish government had deposited its act of ratification, but that the Lisbon treaty could come into effect only at a later stage when ratification had been obtained by all 27 Member States, thus arguing in line with the first 1972 case that the application was premature. However, in its 2009 decision,[48] the High Court refused this argument, as the conditionality of ratification by other Member States was insufficient to remove a present interest of the applicants in challenging the constitutionality of the Danish accession.

On the other hand, the High Court accepted arguments by the government according to which the applicants lacked specific interest in the case. In assessing this argument, the High Court performed an evaluation of the Lisbon treaty and found that it was not capable of affecting the interests of ordinary citizens. However, on appeal the Supreme Court found in its 2011 decision[49] that the High Court had thereby prejudged the case, as the question of whether individual interests were concerned by the Lisbon

treaty constituted the core element for deciding whether Section 20 of the constitution should have been applied.

As in the Maastricht case, the Lisbon case was therefore referred back to the High Court, which in its 2012 decision[50] found that no transfer of sovereignty had taken place that should have required the use of Section 20 of the constitution. On appeal, the Supreme Court in its 2013 decision[51] confirmed the ruling of the Maastricht case with an extensive reasoning that refuted each of the elements claimed to constitute a transfer of sovereignty.

Conclusions

The Danish constitution reserves a central place for direct voting, in the form of referenda, when the possible transfer of sovereignty to international organisations is considered. The constitution requires the transfers to be specific and delimited, but this may be undertaken at a general level, leaving the more detailed specifications to be made by the international organisation to which sovereignty is transferred.

The use of referenda is not voluntary, but it depends on whether sovereignty is transferred and whether an insufficient majority of parliament votes for the accession, which with a sufficient majority could be decided by parliament alone. In practice however, politicians have often refrained from taking direct responsibility for actual or apparent transfers of sovereignty, and various approaches have been used, including advisory referenda and complicated mechanisms to ensure a referendum takes place, such as for the Edinburgh agreement.

The access to judicial control of the use of referenda was originally limited by a classic requirement of specific and current legal interest, which by and large continues to be applied as a test of admissibility where constitutional challenges to legislation are concerned. However, with the Maastricht and Lisbon cases, the Supreme Court has chosen to broaden the definition of legal standing for parties wishing to challenge the legality of acts claimed to be subject to Section 20 of the Danish constitution.

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Constitutionalising Electoral Politics: Democracy in the Berlin Republic

Julian Krüper

List of Acronyms

AfD	Alternative für Deutschland
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (rulings of the GCC; official compilation, citation by volume, page (page of reference))
BT-Drs.	Bundestagdrucksache (parliamentary prints, citation by legislative period, page of reference)
BVerfGG	Bundesverfassungsgerichtsgesetz (Procedural Code for the GCC)
BWahlG	Bundeswahlgesetz (Federal Electoral code)
CDU	Christlich-demokratische Union
CSU	Christlich-soziale Union
EP	European Parliament
FDP	Freie demokratische Partei
FRG	Federal Republic of Germany (BRD: Bundesrepublik Deutschland)
GCC	German Constitutional Court (Bundesverfassungsgericht)
GDR	German Democratic Republik (DDR: Deutsche Demokratische Republik)
GG	Grundgesetz (German Constitution)
MEP	Member of the European Parliament
PDS	Partei des demokratischen Sozialismus
SED	Sozialistische Einheitspartei Deutschlands
SPD	Sozialdemokratische Partei Deutschlands
UN	United Nations
WahlGV	Wahlgeräteverordnung (Ordinance on Voting Machines)

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Introduction

It goes uncontested that the fall of the Iron Curtain marks one of the most elating moments, if not the most elating moment, in twentieth-century European history. In an *annus mirabilis*, the people of the former eastern bloc shook off the yoke of dictatorship and fervently reclaimed their *vis populi*. Difficult times followed and still linger on because the transformation from communist dictatorships to liberal parliamentary democracies posed unique challenges not only in terms of economic hardship, but in political and institutional terms as well.

Among the transformations at hand, German reunification drew tremendous international attention because the decades of German separation epitomised the political ramifications of a war fought and won by highly diverse allies. Regaining inner unity and sovereignty under international law marked the legal and political end of the post-war period not only for Germany but also for Europe at large. Yet, the process of reunification did not come to an end on 3 October 1990, the day of German reunification. It actually just began. The consequences of German reunification have been described as a transformation from the *Bonn Republic* to the *Berlin Republic* (Krüper 2015, 16ff.). Rich in historical overtones of the *Weimar Republic* (1919–1933), the idea of the Berlin Republic insinuates that there is more to reunification than legal or diplomatic acts of state. Far-reaching social, economic and cultural changes are attributed to a reunification that changed the face of the republic. Those changes of course relate to political and institutional matters of state, namely, the entire democratic framework. From expansion of the *populus* by roughly 17 million people to re-establishing the new federal states by passing constitutions, from establishing political institutions under those constitutions to founding political parties and—of course—holding elections, all democratic matters had to be dealt with. Hailed as an almost magical moment of democratic liberty, the peaceful revolution in the former GDR and the following reunification soon led to a hard slog of making the new and newfound democracy work. First and foremost, federal elections had to be held soon after the official reunification in October of 1990. They raised fundamental political and constitutional questions, which were closely related to the rather unique German electoral system. They can be seen as the origin of a period of heated electoral debates and conflicts.

In this chapter, I shall endeavour to give an overview of electoral debates and developments in contemporary Germany. Legal perspectives

dominate, partly due to my background as a constitutional jurist, but mostly because the Berlin Republic has seen a tremendous rush towards significant constitutionalisation of electoral politics. A traditionally self-confident German Constitutional Court (GCC) encountered a legislative branch, challenged with the task of continuously adjusting a highly complex electoral system and often tempted to mould the electoral system in a way that would serve its own interest. At the same time, the German party system underwent highly dynamic changes, voting patterns changed and a process of *Politikverdrossenheit* emerged, that is, a disenchantment of the people with politics and politicians in general. In order to be able to assess the numerous aspects of German electoral debates and the many conflicts that took place, preliminary remarks on the electoral and party system will be provided in a first part. I will then deal with the political and legal implications of the first federal election after reunification in 1990 and ongoing reforms of the electoral system. I will conclude with some remarks on the institutional repercussions of the electoral conflicts between the GCC and the federal parliament.

Legal Framework and Party System

Constitutional Framework and Statutory Features of the Federal Electoral System

The German electoral system at the federal level is based on Art. 38 § 1 of the German constitution (GG), which reads: "Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections".[1] Those fundamental electoral principles are considered to be non-negotiable conditions required by the constitutional principle of democracy in Art. 20 § 2 GG. They are applicable at the level of the federal states too, which—for the most part—prescribe those principles in their respective constitutions. In addition, Art. 28 § 1 GG specifies that those principles are mandatory prerequisites for elections held at the municipal level, too.

Of course, Art. 38 § 1 GG and the respective provisions of the federal states are not self-executing. At the level of statutory provisions the respective electoral codes, namely, the *Bundeswahlgesetz* (BWahlG) at the federal level, provide a so-called system of "mixed member proportional representation". It combines proportional representation with a majority vote by granting two votes to each voter.

Half of the now 598 members of the Bundestag (§ 1 BWahlG) are elected by (simple) majority vote in 299 constituencies, in which a simple majority of votes suffices (the so-called *first vote*). More important for the general outcome of the elections however is what is known as the *second vote* or *party vote*, by which voters cast their votes for a political party, hence the name *party vote*. On the basis of the federal proportional outcome of the second vote (Nohlen 2014: 369), a total number of mandates is assigned to the political parties, thereby essentially rendering the electoral system proportional. Mandates won by the first vote are under all circumstances apportioned to the respective party candidate (Nohlen 2014: 370). They are deducted from the number of the mandates won on the basis of the party vote, and at times, the former even exceed the latter (the so-called overhang seats). Remaining mandates won by the party vote (if applicable) are then apportioned, based on the lists the parties set up in the respective federal states.

The details of the electoral system (outlined in § 6 BWahlG), namely the process of apportionment, are mathematically complex and objects of scholarly research.[2] The GCC, equally famed—and infamous—for its strict rulings on matters of electoral law, traditionally emphasises the paramount importance of electoral equality, calling for its strict and formal implementation.

The German electoral system tries to attain a very high level of proportionality in order to guarantee the equality of votes. Equality of votes is traditionally conceptualised as twofold: it comprises the so-called *Zählwertgleichheit* (guarantee of an equal *counting* value) as well as the *Erfolgswertgleichheit* (guarantee of equal electoral success). Whereas *Zählwertgleichheit* forbids any electoral system in which voters do not have the same number of votes, *Erfolgswertgleichheit* focuses on the actual mathematical impact a vote has on the mandates assigned. Whereas *Zählwertgleichheit* (i.e. "one man, one vote") is the basis of any democratic system of majority vote, *Erfolgswertgleichheit* is crucial to any system of proportional vote in which a large number of votes has to be equally apportioned to a small number of mandates by means of rather complex mathematical rules (for a similar problem see Krüper 2016).

Another key feature of the German electoral system (at the federal and the state levels) is a threshold of 5 %. Any party must gain at least 5 % of the party votes in order to be included into the distribution of mandates. If the party fails to gain 5 % or more of the votes, the votes are lost and the party does not win any seats at all in the respective parliament. Obviously,

the threshold serves the purpose of ensuring parliamentary stability and increasing the likelihood of working majorities. While the threshold at the federal level and the level of the state elections is still considered constitutional, the threshold for the elections to the European Parliament has been ruled unconstitutional by the federal constitutional court twice (BVerfGE 129, 300ff.; 135, 259ff.[3]). Several constitutional courts of the states have nullified the threshold at the municipal level in recent years too.

From Strict Tri-Partite to Fluid Five-Partite: The Party System

In a democracy dominated by political parties—a party state or, in German, a *Parteienstaat*—electoral issues cannot be separated from the party system at hand, which in return influences the electoral system (Nohlen 2014: 373ff.). The German party system has undergone significant changes in the last decades (Jun 2008: 28ff.), changes that have challenged the functionality of the electoral system. As a rule of thumb, an erosion of large organisational structures can be observed: Not only parties, but other forms of organised interest or shared beliefs, such as unions, parties or churches, have suffered from a severe drop in membership and hence a loss in political impact (Jun 2008: 28).

The post-war party system in Germany was for a long time a tri-partite system made up of the Christian-conservative CDU/CSU, the liberal FDP and the liberal to left-wing SPD (Alemann 2010: 46ff.). Traditional alliances with particular social milieus were strong and have remained a vital part of the parties' profiles, although traditional alignment is not as relevant as it used to be (Alemann 2010: 125ff.). Social alignment between milieus and parties declined with the German *Wirtschaftswunder*, the economic "resurrection" of post-war western Germany. Along with economic growth, new political issues with relation to environmental protection arose in the 1960s and 1970s. In addition, the escalation of the nuclear arms race—the retrofitting of missiles on both the Soviet and the American sides—heightened the attention given to security issues and the lingering threat of a nuclear war. This led to the German peace movement—the *Friedensbewegung*—in which ideas of protecting creation from both industrial and military threats coincided. By 1979, the left-wing and, at the time, somewhat fundamentalist party *Die Grünen* emerged and managed to win 5.6 % of the vote in the 1983 federal elections (Alemann 2010: 69). Still, the party system retained its former high degree of stability and its basic bipolar structure. Namely, the "role" of the respective parties was

not challenged: The CDU/CSU and the SPD remained large "catch-all" parties (*Volksparteien*), whereas the FDP and *Die Grünen* served special interests and formed "small coalition" governments with either the CDU/CSU or the SPD.

The most significant change occurred with reunification, which extended the West German party system to the new, formerly socialist states, the *neue Länder*. The newly founded PDS—the former socialist SED of the GDR—managed to establish itself as a regional party at the state level in the *neue Länder* and as a small party in the states of former West Germany (Alemann 2010: 74ff.).

The process of loosening ties between traditional social milieus and the respective political parties continued after reunification, chiefly affecting the CDU/CSU and the SPD. Party membership continued to decline resulting in a membership where the elderly were structurally overrepresented. The SPD suffered from profound changes in the "labour world" and the continuing deindustrialisation of the workforce. In addition, by taking on the project of challenging social reforms and the structure of social subsidies for the unemployed, the so-called *Agenda 2010* brought about loyalty conflicts between the SPD and the (former) social democratic electorate. The once solid ties between the SPD and the unions loosened but, since then, there have been attempts to restore them (Jun 2008: 29). At the same time, secularisation of society and an increasing number of secular voters from the former GDR after reunification weakened the impact both of churches and the Christian-conservative CDU/CSU (Jun 2008: 29). At the same time, traditional loyalties of parties and social milieus have not entirely been relinquished; they still form the core of the respective parties' support. But the weakening of loyalties has led to significant change in turnout in the elections because the former big parties became unable to mobilise their voter potential merely on grounds of traditional or cultural loyalties. They now suffer from a "representational crisis" (Jun 2008: 29). Politically speaking, the German party system is still undergoing a process of fragmentation and polarisation. The number of politically relevant parties is increasing and ideological differences and self-characterisations are sharpening (Jun 2008: 30).

Along those lines, the German party system has gained a great deal of fluidity that became relevant in the federal elections (Niedermayer 2008: 9). The former catch-all parties—the CDU/CSU and the SPD—gained only 57 % of the vote in the 2009 federal election (against 67 % in 2013 and over 90 % in the 1970s). The newly formed single-issue party *Die Piraten* gained 2 % of the vote (2.2 % in 2013). In 2013, the liberal

FDP—coming from an all-time high of almost 15 % in 2009—was "kicked out" of parliament and the newly founded conservative to right-wing AfD almost reached the 5 % threshold. As a result, in 2013, roughly 15 % of the votes were not represented in the Bundestag, due to the 5 % threshold. As of late, the increasingly radical AfD seems to have gained even more support, mainly due to the European refugee crisis. By the end of 2015, the AfD was represented not only in the European Parliament but also in several state parliaments (*Landtage*). In contrast, the popularity of the *Piraten* decreased tremendously, rendering them an irrelevant political factor in public debates, although they are still represented in four state parliaments (Berlin, Bremen, Saarland, Schleswig-Holstein) and—due to the nullification of the threshold—in the European Parliament (with 1.4 % of the votes resulting in one mandate).[4]

One has to keep these rather profound changes in mind as a political backdrop to electoral debates in unified Germany and as the factual basis of the constant reforms of electoral provisions that took place in the course of recent decades.

Voting in the Shadow of the Revolution: The Election of 1990

Among the elections of the past quarter century the 1990 federal election stands out, as it was the first election after reunification. It needs to be understood as a transitory election of a Germany still not really "unified" and no longer West German (Kaase and Gibowski 1990: 14).

The political landscape of 1990 was characterised by the controversy about if and when reunification was desirable. Whereas by the end of 1989 a majority of citizens thought reunification probable within ten years, a polarised political debate in early spring and summer of 1990 made reunification within a short time span likely. When the monetary union of the GDR and the FRG was put into effect in summer of 1990, reunification within months became likely. At the time, it was a widespread assumption among the members of most parties that the long-term advantages of reunification would supersede the short-term disadvantages (Kaase and Gibowski 1990: 22). For the most part, the population dreaded the socioeconomic challenges of reunification. This played into the hands of the coalition government of the CDU/CSU and FDP of long-time chancellor Helmut Kohl. His CDU/CSU was seen as competent in socioeconomic matters, giving them a strategic advantage over the mid-left and left-wing parties.

Expectations were high not only on both sides of the former border, but within the political spectrum as well. Would implementing democracy work and what would the outcome be? Various political and legal challenges presented themselves, chiefly for the parties and party-to-be citizen committees of the former GDR. Several factors played against them: Not only did they not have proper time to accumulate funds and resources, but due to a strong bias in population (roughly 63 million people in the former FRG as opposed to roughly 17 million people in the former GDR) and to the 5 % threshold, an electoral takeover of the east by the west loomed. Calculations showed that parties running only in the territory of the former GDR would have had to gain approximately 27 % of the vote to be represented in parliament. The Bundestag tried to solve that problem by allowing the highly unusual exception of *joint lists* of parties that would have made it easier to overcome the hurdle of the 5 % threshold.[5] Yet, the constitutional court intervened (BVerfGE 82, 322ff.) and the verdict, handed down ten weeks before the scheduled elections, forced parliament to change the electoral code and provide for rules that established separate thresholds for the territories of the former FRG and the former GDR.

The court's ruling, obviously under enormous political, temporal, even historical pressure, somewhat foreshadowed its relationship with the legislator in the following years: The court in the *Leitsätze* (guidelines of the ruling) literally dictated the actual solution to the problem, suggesting separate thresholds on the territory of the former FRG and the former GDR. What seems to be a crass example of judicial activism needs some context to be fully grasped: Given the circumstances at the time, with the election date quickly approaching, the court did not want to run the risk of a second ruling on a new—and potentially still unconstitutional—electoral code, maybe just days before the election. At the same time, the court felt that the regulation at hand was a perfect example of party-interest-infused legislation. The SPD had an interest in stabilising the left-wing spectrum of the party system by keeping the SED's successor, the PDS, out of parliament: If a nation-wide threshold were applied, chances of the PDS gaining more than 5 % of the vote were significantly lowered. At the same time, allowing for joint lists seemed profitable for the DSU, a newly founded party in the territory of the former GDR, with close ties to the CDU/CSU in former West Germany (Grigoleit 2004: 312ff.). The GCC would have none of it. Its ruling helped to establish the court's reputation as a stronghold of judicial review in matters of *droit politique*. Ever since, a strict judicial review in electoral matters has been a key feature of the GCC in the Berlin Republic.

The 1990 campaign was dominated by heated controversies on how to provide for the huge funds the process of reunification would call for (up to 2 trillion Euros as of 2014). Whereas Oskar Lafontaine, the SPD-nominee, voiced scepticism and concerns as to the financing of reunification, incumbent chancellor *Helmut Kohl*—in what is today considered an almost proverbial metaphorical statement—promised *blühende Landschaften* ("blossoming landscapes") on the territory of the former GDR. In the face of severe economic and social struggle in the aftermath of reunification, Kohl was often held to that statement, mostly in a critical or satirical fashion.

Eventually, in the 1990 election, Helmut Kohl's coalition government was confirmed by the voters, gaining almost 55 % of the votes while the SPD dropped to 33.5 %. The most significant result was that *Die Grünen*, which had been represented in parliament since 1982, dropped below the 5 % threshold in the territory of the former FRG, whereas their East-German counterpart, the Bündnis'90 managed to gain more than 5 % of the votes in the former GDR, thereby solely representing the green movement in parliament for four years.

Contrary to what one might assume, voter turnout in the 1990 election was not above average with a 77.8 % turnout on average. Voter turnout in the newly founded states, the former territory of the GDR was lower than in the western states of the former FRG, ranging between 70.9 % (in the state of Mecklenburg-Vorpommern) and 76.4 % (in the state of Thüringen). The lower voter turnout in the states of the former GDR became a characteristic feature of any federal election since, in some states dropping almost 10 % below the federal average. When in 1998 the coalition government of the CDU/CSU and the FDP was, for the first time since 1982, replaced by a SPD/*Die Grünen*-coalition with Gerhard Schröder taking office, voter turnout on average rose to a high of 82.2 %, and the gap in voter turnout between the western and eastern states lessened, but remained. A somewhat dramatic plunge in turnout then occurred in 2009, with a federal turnout of about 70 % (and below 63 % in some of the eastern states).

Decreasing Voter Turnout: Twilight of Democracy?

One of the most prominent issues concerning electoral matters is the decreasing voter turnout not only in federal elections but also in elections at the state and local levels (Steinbrecher et al. 2007; for a broader context Suntrup 2010). Over the course of decades turnout in elections

at the federal level shrank significantly. Whereas turnout in the early years of the FRG was usually around 80 %, it rose to an all-time high in 1970 (90.8 %). Since then, it has continually shrunk, hitting an all-time low of 72 % in 2013. Voter turnout in local or state elections is usually even lower; voter turnout in the 2004 election to the European Parliament dropped to 43 %.

Given the mathematical distortions and paradoxes the German electoral system is prone to produce (Lenski 2009), more often than not parliamentary majorities (at the federal level) and therefore democratic legitimation of government are not backed by a majority of votes cast. This problem remains somewhat diffuse as long as voter turnout remains comparatively high. Yet, the continuous decrease in recent years has raised the question of a qualitative assessment of democratic legitimation. Jurisprudence has so far been rather reluctant—or unable—to acknowledge decreasing voter turnout as a legal problem, but with numbers frequently plummeting below the 50 % threshold, concerns are becoming more pressing. But constitutional scholarship is mostly in favour of a mere formal understanding of democratic legitimation. There is a great deal to be said in favour of this perspective of democratic legitimation. It is, in German constitutional thought, strongly tied to an understanding of positive and negative liberties, among which suffrage plays a prominent part. If—in theory—civil liberties comprise the right to "act out" on them or to refrain from doing so, there is no such thing as insufficient voter turnout. If the decision not to vote is equally protected by the Constitution, there is no constitutional substance in decreasing voter turnout.

As compelling as the argument appears *prima facie*, it fails to provide a viable justification for not dealing with the problem from a legal point of view. It confuses theoretical concepts of civil liberties with the needs and requirements of a democratic polity: Suffrage might be the link between the civil sphere of the electorate and the sphere of public polity but that does not necessarily imply that the rationale of civil liberties—their inner rules of positive and negative liberties as two sides of the same right—have to be applied when and wherever possible. German legal scholar Georg Jellinek conceptualised individual rights by differentiating between particular relations of the individual to the state (Jellinek 1905). Whereas in the so-called liberal *status negativus* individual liberties fend off public authority by preventing disproportional interventions, individual liberty in the *status activus* (a status of "active citizenry" (*Zivität*) as Jellinek put it) is achieved by means of public-private cooperation,

namely in the form of political participation. It hardly takes the Jellinekian concept too far if one deduces practical legal consequences from the tight intertwining of the public and the private spheres: Suffrage is at the same time a right of the citizen and a mechanism aimed at creating parliament as the organisational basis of representative democracy. Now, providing for a stable organisational framework is undoubtedly a constitutional objective of its own important accord, not to be subdued to the logic of individual rights. Therefore, constitutional doctrine needs to take a more prominent stand on the ever-decreasing voter turnout and must come up with suggestions on how a conventional understanding of suffrage on the one hand and measures to raise voter turnout on the other hand relate to each other.

Between Ever-Looming and Ever-Lasting Reform

Attempts at large-scale and not-so-large scale reforms of the electoral code have been made over the course of the history of post-war Germany. Although minor, medium and at times pretty mediocre reforms of the electoral code have taken place, a landslide revolution is yet to come. Basically, the electoral system as described above still works the way it was originally set out in legal rules in 1953. Yet, rather significant changes have been made "within" the electoral system, mainly on the level of rules of apportionment (*Mandatszuteilungsverfahren*).

Motives of Reform

Proportional vs. Majority Vote

The German electoral system is proportional in nature. This has for a long time attracted much criticism from politicians as well as political scientists. Whereas proportional electoral systems tend to result in coalition governments, majority vote tends to establish a one-party-rule (for context, see Nohlen 2014: 67ff., 141ff.). Political scientists opted for a system of majority vote throughout the 1960s and 1970s in order to promote functioning and stable government and—more important—regular change of the party in power. When in 1966 a so-called grand coalition of the CDU/CSU and the SPD came into office, chances of electoral reform increased, since the CDU/CSU had been traditional proponents of majority vote. But discussing electoral reform cannot be separated from the party system because motives for reform are rarely functional or conceptual: They are often political. Whereas the CDU/CSU in the 1950s and 1960s were sure

to draw electoral profit from a system of majority vote, the SPD could not be so sure and, ultimately, blocked the reform. Ever since, demand for a system of majority vote has been made, as of today to no effect. Although the constitutional court traditionally holds that the constitution does not prescribe a given electoral system so that parliament may enact an electoral code with a system of majority vote, strong doubts as to its constitutionality may be entertained.

5 % Threshold

A key feature of the German electoral system (at the federal level) is the 5 % threshold parties have to exceed in order to be represented in parliament. In recent years though, the constitutionality of the 5 % threshold has come into question. Obviously it infringes on the legal equality of votes and is therefore constitutionally questionable. For a long period of time, it was justified by drawing on requirements of parliamentary functionality (BVerfGE 1, 208ff.; 4, 31ff.; 34, 81ff.; 82, 322ff.; 95, 408ff.). A highly diversified parliament, as the argument goes, is not able to create and support a stable and reliable government (Pauly 1998). Granting influence or even veto rights to minority positions would destabilise political decision-making and subject democracy to extremists belonging to both sides of the political spectrum. The argument is heavily infused with a vague reminiscence of the *Weimar Republic* that is said to have failed partly due to a malfunctioning parliament, the former *Reichstag*. Subsequently, the GCC held the 5 % threshold constitutional at the federal level and has done so until today but support keeps crumbling away from two sides. Acting as the constitutional court of the state of Schleswig-Holstein—a procedural peculiarity that since has been repealed—the federal constitutional court held the 5 % threshold for elections on the municipal level unconstitutional as an unjust infringement of the equality of votes (BVerfGE 120, 82ff.). In the following years the thresholds at the municipal level of the German states were largely abolished.

A strong blow was delivered to thresholds as a feature of German electoral law in the 2012 ruling of the constitutional court regarding the 5 % threshold for elections to the European Parliament (EP) (BVerfGE 129, 300ff.). The court denied the constitutionality of the threshold based on functional considerations. The ruling came somewhat as a surprise since, in 1979, the court held the exact same threshold constitutional (BVerfGE 51, 222ff.). And yet, in the meantime, standards of judicial review in the area of electoral law have been significantly heightened. In 2012, the court

held that, as infringements of the equality of votes, thresholds could only be justified to guarantee functioning parliamentary majorities, hence to enable a working parliamentary system. The court held that, given the already high level of inner diversification of the EP, further diversification of the EP that would follow the abolition of the threshold in Germany (leading to a more diverse representation of the German electorate among MEPs) would not actually make a difference in day-to-day decision-making. In fact, the court drew on a calculation of past elections saying that abolishing the threshold would increase the number of parties represented in the EP by merely seven, from 162 to 169. The court therefore held the threshold unconstitutional. The judges upheld their ruling when the legislative branch changed the law and introduced a 3 % threshold shortly after the first ruling (BVerfGE 135, 259ff.). The problem at hand is a classic in constitutional law, as it calls for a balancing of individual rights and the organisational requirements of the polity. In the view of many, the GCC overemphasises the significance of equality of votes at the expense of the organisational needs of the EP and—more generally—at the expense of the democratic prerogative of the legislative branch to design the electoral law as it sees fit. It is therefore not surprising that the second EP-ruling raised some eyebrows in Berlin. In fact, it led to a more or less hidden *angst* the GCC might one day even abolish the 5 % threshold for the federal elections to the Bundestag, potentially leading to fierce political competition. Although the court explicitly stated that its reasonings were not applicable to the German Bundestag, politicians were eager to make sure a court's change of mind would not fall on fruitful constitutional grounds. Consequently, proposals for a constitutional amendment were made in an attempt to "constitutionalise" the 5 % threshold, but legal concerns were raised before and behind the scenes (Krüper 2014). Parliament is now refraining from changing the constitution, not least in order to avoid an open confrontation with the widely revered constitutional court.

Rules of Apportionment of Mandates

Within the technical realm of electoral systems comes the choice of rules of apportionment of mandates, that is, the mathematical system by which the number of votes (in the millions) is represented in the comparatively few parliamentary mandates (see Grzeszick 2014). A mere and simple division of votes by mandates will usually not suffice due to fractional seats and large rounding losses that are unconstitutional regarding the equality of votes (*Erfolgswertgleichheit*). Complicated mathematical systems of

apportionment are therefore required in systems of proportional representation. Several systems of apportionment have been developed and are in use, in parliamentary elections as well as for the apportionment of seats in parliamentary committees.

Traditionally, the *d'Hondt* system (similar to what is called *Jefferson's method*), was widespread and is said to favour parties with strong electoral support over smaller and small parties. The German electoral code has long prescribed the *Hare/Niemeyer* system of apportionment; after a number of attempts, the German Bundestag changed the system to *Saint-Laguë/Schepers* in 2008. It is said to prevent certain paradoxes *Hare/Niemeyer* produces. Rules of apportionment play a very important role in designing an electoral system, although they are somewhat hidden in the shadow of debates concerning voting rights and electoral systems (see Behnke 2012). Rules of apportionment gained some attention in the midst of a severe constitutional strife between the Bundestag and the GCC. The dispute was about if and how one should resolve instances of the so-called Alabama paradox (*negative Stimmgewicht*) in German electoral law.

Negative Stimmgewicht

The most prominent electoral controversy of recent years concerned what has become known as the *negative Stimmgewicht*, which refers to the afore-mentioned Alabama paradox. A literal translation of the German term would be something like "negative impact of votes". While certain rules of apportionment make the phenomenon more or less likely, its occurrence was mainly due to the complexity of the German electoral system that combines elements of centralised and federal, of personalised and party-related voting (see Krüper 2013: 1150ff. for details). It would be mind-numbing to explain the mathematical details and systematic preconditions for the occurrence of the paradox whereby losing votes means mandates are gained or vice versa. What is important though is to be aware that the effect cannot be *planned* in favour or at the expense of a party; it occurs involuntarily and can only be observed by performing alternative mathematical calculations on the basis of actual election data. That is to say that the paradox is an *ex post phenomenon*. Still, the GCC held the legislative branch responsible for coming up with an electoral system that would make the occurrence of the paradox impossible. In two rulings within a period of four years, the GCC held the electoral code unconstitutional and forced the legislator to come up with a regulatory system for which the court set strict conditions (BVerfGE 121, 266ff.; 131, 316ff.).

The court's opinion was based on the premise that parliament under the German Constitution can freely decide which electoral system to implement; it enjoys the prerogative to choose an electoral system which may be a system of majority vote or proportional representation. Once a decision has been made, though, the strictest of constitutional standards are applied by the court. As reasonable as the premise may sound on the face of it, it is not convincing because its presuppositions are flawed: The decision for a certain electoral system is much less binary as the court suggests because—setting aside systems of sheer majority vote and proportional representation—any combination of the two forms *a new* electoral system with its own standards and inner rationale. Shouldn't it be the legislative's prerogative to decide which combination of the two elements is to be realised? By subjecting the legislative decision to the harshest constitutional scrutiny, the court effectively does away with its own premise that parliament enjoys a prerogative to choose. Secondly, any advanced system of proportional representation is prone to producing distortions in apportioning votes to mandates. Again, it should be the legislative's choice to select the system along with the distortions it is willing to democratically accept (Krüper 2013: 1155).

Überhangmandate

One of the all-time classics of German electoral debates of recent years is about whether and to what extent the so-called *Überhangmandate* ("overhang seats") can be constitutionally accepted. Overhang seats are a paradox of the German electoral system based on two votes. As discussed, the proportional outcome of the second (party) vote is crucial for the number of party mandates in parliament. Yet regularly, parties gain more mandates thanks to the first votes cast in the various constituencies than they are entitled to by the proportional standard of the second vote outcome. Since the mandates won by the first vote are personalised as the votes are cast for one specific candidate, there are no means of cutting back those "overhanging" mandates: they remain with parties in parliament. This is an infringement of the constitutional guarantee of equality of votes because the electoral success (*Erfolgswert*) of the party votes for the party gaining overhang seats is larger, because the votes/seat-ratio is changed in their favour, or to put it colloquially: there is "more seat to the vote". Overhang seats often stabilise and increase the somewhat tight majorities won by coalition governments, thereby gaining tremendous political influence. For a long time, the GCC accepted overhang seats as a built-in paradox of the electoral

system—although the opinions of the justices on the matter were split 4:4 in the decisive case (BVerfGE 95, 335ff.). Over the years, overhang seats became more frequent and numerous, and were no longer acceptable. In 2012 the GCC eventually ruled that no more than fifteen of those (uncompensated) mandates could be accepted, thereby forcing the legislator to come up with a system of "compensating mandates" that restores the proportionality called for by the second vote. Due to the combination of overhang seats and compensating mandates, the current Deutsche Bundestag comprises 631 mandates: 598 regular mandates, 4 overhang seats and 29 "compensating mandates".

Increasing the Electorate

In the shadow of the various controversial legal arguments surrounding electoral law in Germany at the moment, political attempts have been made to increase the electorate by rethinking fundamental provisions of electoral law. Generally speaking, in order to enjoy suffrage in Germany, one must be 18 years of age, a citizen of Germany, and one must have been a resident for a least three months and not have been excluded from suffrage (§ 12 BWahlG).

Art. 29 lit. a. iii) of the UN Convention on the Rights of Persons with Disabilities calls for a guarantee of the "free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice". Yet, § 13 Nr. 2 BWahlG, as of today, excludes those citizens who are placed under the permanent supervision of a custodian. Although attempts to change the provision have been made in recent years,[6] the Bundestag has not yet passed a reformed version. In early 2015, the Committee on the Rights of Persons with Disabilities, which is based on Art. 34 of the Convention, urged Germany to do away with any discriminatory provisions hindering full political participation by the disabled.

Another field of political queries regarding electoral law is concerned with the rules and regulations pertaining to the absentee ballot (*Briefwahl*). Recent years have shown a tremendous increase of absentee ballots, which in some cases account for up to 20 % of the votes cast. Parliament is not compelled to provide any means to overcome factual hindrances in casting one's vote and yet, absentee ballots have long been a household feature of the German electoral system. They further the constitutional principle of the generality of elections, widening the participating electorate. At the same time, the equally constitutional call for secret

and equal elections is being called into question by absentee ballots. Time and again, reports have indicated that, in facilities caring for the old or disabled, nurses in charge have cast patients' and inmates' votes for them. Constitutional scholars and election practitioners have therefore been at loggerheads regarding the rules allowing for absentee ballots. In 2013, the constitutional court held the legislatures' waiving of the requirement of specific reasons for an absentee ballot constitutional (BVerfGE 134, 25ff.). Clearly, the court upheld the idea that broadening the electorate was constitutionally favourable, justifying the potential risks of violations of the principle of general and equal elections.

In 2012, the constitutional court ruled on the constitutionality of limiting suffrage (BVerfGE 132, 39ff.). The legislator had limited the suffrage of German citizens with a non-German-residence to those who, at one point in the past, had had a German residence for a minimum of three years. The court found those conditions to be an unnecessary infringement of the principle of general elections. Although a certain knowledge of social and political circumstances was to be considered a prerequisite of the "communicative function" of democratic elections, the regulation at hand did not properly provide for that knowledge and was therefore held unconstitutional. The ruling prompted a change to the electoral code, which now calls for such knowledge or, alternatively, a residence of three months at least. Of course, both options lack normative heft, since the residence requirement does not guarantee familiarity with the socioeconomic conditions and the mere calling for such knowledge is not properly enforceable.

For several decades now, a debate on the legitimacy of broadening the electorate has been virulent with respect to the lowering of the age requirement from (currently) eighteen years on the federal level to sixteen years (or lower). Whereas this debate is basically concerned with matters of constitutional expedience, it raises grave constitutional issues as these calls may result in what one might describe as "proxy" or "parental suffrage" entitling parents to vote for their children as long as those are not entitled to suffrage themselves (Krüper 2006). While some legal scholars, politicians and advocates of the rights of future generations[7] (Stiftung für die Rechte zukünftiger Generationen 2008) have been strong supporters of parental suffrage, many constitutional scholars are reluctant to support it. The argument basically goes as follows: Suffrage is conceptualised as a strictly personal right that is not fungible (*höchstpersönliches Recht*). Therefore, legally speaking, parents cannot act as

agents for their own children. Giving parents an additional vote would therefore infringe on the principle of equal suffrage as well as undermine the principle of *Unmittelbarkeit*, of directness or immediateness of the vote. Constitutional concerns against parental suffrage have hitherto prevailed, but the debate lingers on.

Berlin vs. Karlsruhe: Institutional Repercussions of Electoral Conflicts

Judging from a more abstract level, electoral debates in Germany have given rise to questions concerning the institutional relationship between parliament on the one hand and the GCC on the other hand. Over the years, several electoral battles between Berlin and Karlsruhe have shed new light on the constitutionalist's classic question of the scope of judicial review. Fundamental constitutional suppositions have to be reconciled as it is characteristic for debates on judicial review.

Generally speaking, parliament is the first and foremost interpreter of the German *Grundgesetz* (constitution). As a mere framework of the political system, its fundamental principles more often than not need to be brought into enforceable rules in the form of statutory law. Given the electoral context, the German electoral code and ordinances based on that code (Bundeswahlordnung (BWahlO), Wahlgeräteverordnung (WahlGV)) have set a mostly stable, though occasionally highly volatile, framework of elections.

Judicial review, although explicitly stipulated in Art. 93 of the German Constitution and the procedural code for the constitutional court (the BVerfGG), remains a crucial constitutional feature. The explicit constitutional provision settled the question of the "ifs" and "buts" of judicial review. But how such review is to be executed by the court is far from obvious: How strict or how lenient can or must judicial review be in order to preserve a balanced separation of powers?

The legal issues at hand fall in the territory of what *Jean-Jacques Rousseau*, in the subtitle of his *Contrat Social*, called *droit politique*, law of politics. Among the fields of German law nowadays considered to be part of *droit politique* are party law (*Parteiengesetz* (*ParteienG*), particularly matters of party financing), parliamentary law (as in the statute regarding the status of representatives (*Abgeordnetengesetz* (*AbgG*)) and, of course, electoral law. What they have in common is that any legislative act in those

areas is basically a decision on the politicians' own behalf because they are either addressees of the provisions (*Abgeordnetengesetz*) or closely affected by them (*Parteiengesetz*, *Bundeswahlgesetz*).

This has sparked a constitutional debate focusing on the structural deficit of democratic control (Streit 2006: 179ff.) of those regulations (Lang 2007). Namely, parliamentary opposition often fails to execute its democratic control in the interest of a cross-party consensus: That is why, for decades, changes in electoral law and other fields of *droit politique* could usually be built on a broad majority, effectively banning any partisan-fuelled public controversy on those matters.

Given the structural deficit of democratic control and a traditionally brisk constitutional court, the court's control of electoral law has developed into a stronghold of judicial review. And although the GCC's reputation is traditionally very good and the court is usually highly respected by politicians, criticism of the court has risen and, on occasion, has become shrill. For example, the court's unforgiving stance with regard to the *negative Stimmgewicht* and the threshold of 5 % for elections to the European Parliament provoked harsh reactions among high-ranking politicians. The widely respected president of the Bundestag, Norbert Lammert, accused the GCC of overstepping its constitutional limits and intervening in political matters. Even amending the constitution by stipulating a 5 % threshold was considered a means of dispossessing the court of its instruments of judicial review.

It is part of the political culture of Germany to criticise the GCC's rulings and then, eventually, to follow them. The court's role as the (sole) keeper of the constitution remains uncontested. Politics against the court will therefore usually be perceived as politics against the Constitution. That is why, in the area of electoral law, politicians strive to constitutionalise their policies—in order to keep the court from constitutionalising political conflicts on its own terms. But constitutionalising electoral politics comes at a price for both parties involved: It increases the political heft of the GCC but makes the court even more susceptible to political reasoning, therefore weakening its judicial authority. Constitutionalising electoral policies in order to hold the court at bay might bring short- and medium-term relief for the legislator but, in the long run, it could prove to be a risky manoeuvre, for the way the court will interpret the new provisions remains largely unpredictable. Electoral politics and constitutional politics in general remain a fickle business.

Notes

1. "Die Abgeordneten des Deutschen Bundestages werden in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl gewählt.
2. The leading German mathematician in the field of rules apportionment is professor emeritus Friedrich Pukelsheim of the University of Augsburg.
3. The citation refers to the official collection of rulings of the GCC (BVerfGE) and refers to the volume (first number) and the starting page and/or page of reference (second number).
4. Statistical information on elections can be obtained from the website of the federal election commissioner (www.bundeswahlleiter.de).
5. Joint lists have to be differentiated from a combined list. Joint lists merely serve as a mathematical means to add the votes for different parties in order to overcome the 5 % threshold. A combined (shared) list is one list set up by two parties.
6. See the legislative proposal of Bündnis '90/Die Grünen, BT-Drs. 17/12068 (obtainable from the website www.bundestag.de).
7. See www.srzg.de (Foundation for the Rights of future Generations).

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Podemos: The Emergence of a New Political Party in Spain

Héloïse Nez

The new Podemos party, set up on 17 January 2014 following on from the anti-austerity movement of "the Outraged", has become in less than two years an unavoidable player in the Spanish political arena. A few months after its launch, Podemos achieved a surprising result in the European elections of 25 May 2014 by obtaining nearly 8 per cent of the votes (i.e. more than 1.2 million) and five MEP seats. 2015 confirmed the upsurge of this new party, achieving the fourth place in national politics in Spain's European elections. Podemos then took part in regional elections which first took place in Andalusia (22 March), then in 13 regions (24 May) and finally in Catalonia (27 September). It achieved the third place in nine of the 15 regions, obtaining its best results in Aragon (20.51 per cent), in the Asturias (19.02 per cent) and in the Madrid region (18.59 per cent). Although Podemos decided not to stand alone in the municipal elections of 24 May 2015, it nonetheless joined the "coalitions of popular unity" in various modes depending upon the local context. These lists not only won major Spanish cities, such as Madrid and Barcelona now run by Manuela Carmena and Ada Colau, but also Cadiz, Santiago de Compostella, Corunna and even Saragossa.

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In the legislative elections of 20 December 2015, Podemos confirmed this historic breakthrough and placed itself fairly and squarely in position as the third national political party with 20.66 per cent of the votes and 69 MPs. It gained virtually four million voters compared to the European elections of 2014 and ran very close—less than 350,000 votes—to the Psoe (the Spanish Socialist Workers' Party) which gained the second position behind the PP (the conservative right-wing Popular Party). These two parties that have alternated in power since the restauration of democracy, obtained 22.01 and 28.75 per cent of the votes, respectively. Podemos came first in Catalonia and in the Basque region and second, before the Psoe, in the Madrid and Valencia regions as well as in Galicia, Navarra and the Canary and the Balearic Islands. These scores were thus particularly high in the three regions where Podemos stood in the context of broader coalitions (in Catalonia, Valencia and Galicia) manoeuvring for recognition of a multinational State and for the organisation of a referendum on Catalonian independence.

How can its success be explained? This chapter aims at understanding the factors governing the emergence of Podemos and the reasons for its meteoric rise. To what extent is the economic, social and political crisis responsible for the emergence of this new party? What are the links between Podemos and the anti-austerity movement of "the Outraged"? Where did the founding members of Podemos come from and what is their political strategy? The first part of this study will cover the context in which the anti-austerity movement and Podemos have emerged as well as the links between these two phenomena. In the second part we shall see that the success of Podemos also stems from the ability of its founding members to break away from the spheres of action and communication of the extreme left wing parties from which they originate.

This analysis is based on fieldwork which I have been pursuing in Madrid since the end of May 2011, studying the anti-austerity movement and its transformations. Over the course of several periods spent there, I observed the Puerta del Sol camp (set up from 15 May to 12 June 2011) where more than 60 or so meetings were organised on this central square in Madrid and in the suburbs of the capital (from the period of the decentralisation of the movement on 28 May 2011); I also observed numerous events and demonstrations organised by the anti-austerity movement. When Podemos emerged, I began to analyse the organisation of the party both at national level—taking part in its founding congress on 18 and 19 October 2014—and municipal and regional level, tracking the activities of

a local Podemos circle in Parla, a town in the southern suburb of Madrid; I also followed the campaign for the regional elections in May 2014. In addition, between 2013 and 2015, I carried out semi-directive interviews with around 40 anti-austerity movement members and/or Podemos militants with the aim of retracing the background to their joining the movement; I was encouraged in this by studies carried out on the sociology of collective action concerning "militant careers". A dozen interviews were made in June 2015 with founding members and national leaders of Podemos as well as with certain newly elected members of the regional Parliaments in Madrid and Andalusia.

Factors in the Emergence of Podemos

In order to understand the political and social changes at work over the last few years in Spain, first of all with the emergence of the anti-austerity movement and then with Podemos, it is necessary to take into account the specificity of the national context. Indeed, since 2008, the country has gone through a major economic and social crisis with, in addition, a profound crisis of legitimacy of the political parties and elites. As it happened, the founding members of Podemos perceived this context as a "window of political opportunity" for setting out a new political alternative.

A Favourable Context

Spain is one of the countries in Europe most severely hit by the present economic crisis, which is explained by the burst of the "housing bubble" in 2008. During the previous decade, Spain's economic success, admired by political leaders in Europe, was based on strong growth in the field of construction and public works: "Between 2002 and 2007, the number of houses built in the country went beyond that of France and Germany taken together, whereas these two countries had three times as many inhabitants and double the surface area". The collapse of this sector of the economy led to an explosion of the rate of unemployment soaring from 8.57 per cent in 2007 to levels systematically above 20 per cent since 2010. In 2012 and 2013, over a quarter of the active population was unemployed. Another social consequence of the housing crisis was the multiplication of housing evictions which the Victims of Bankruptcy Platform (PAH) estimate at more than 360,000 between the beginning of the crisis in 2008 and the first quarter of 2012. For the first quarter of 2012 alone, official

figures registered more than 46,000 legal evictions, that is, an average of 517 per day. According to a report published by the charitable organisation Caritas published in 2013, poverty and inequality have increased in Spain over the last few years more than anywhere else in the European Union: the wealthiest 20 per cent now possess 7.5 times more wealth than the poorest 20 per cent whereas the ratio was 5.5 in 2007. Young people are particularly affected by the crisis and the level of unemployment of those under the age of 25 is double the average for the European Union, which explains the economic exile of qualified young people.

In addition to this economic and social crisis there is a profound political crisis demonstrated by a loss of confidence by the population in their elected representatives and the political parties. It must be said that the PP and the Psoe are implicated in innumerable cases of corruption connected with the housing speculation which led to the economic crisis. In 2014 there were around 1,700 law suits for political corruption in Spain and more than 500 people were prosecuted. For example, the case of the illegal financing of the PP by companies in the building sector involved the senior leaders of the party, including, to begin with, Mariano Rajoy who is thought to have received 25,200 euros a year over 11 years according to extracts from the secret accounts of the party published in the press at the beginning of 2013. The Psoe is also implicated in a series of corruption cases such as the misappropriation of public funds destined for companies in difficulty in Andalusia. As a consequence, the PP and Psoe are perceived by electors as being co-responsible for the crisis and its effects. All the more so as the Psoe was in power when the economic crisis occurred: thus it was the socialists who introduced the initial spending cuts in public services and who reformed the Constitution in September 2011 laying down the rule of a balanced budget and an absolute priority of repaying the public debt.

This context explains the responsive chord in the anti-austerity movement which was greater in Spain than anywhere else in Europe and North America (in Ancelovici et al. 2016). The discontent became apparent in the streets before being reflected in the ballot box. According to the official figures of the Ministry of Home Affairs, the number of demonstrations reported was multiplied by five between 2008 and 2012. The anti-austerity "15-M" movement—referring to its set up on 15 May 2011—marked a turning point in collective action events in Spain (in Cruells and Ibarra 2013) because the movement recruits beyond militant circles, is broadly intergenerational and has strong popular support. According to an Ipsos Public Affairs survey carried out in June and July 2011, more than three

quarters of the people polled said they supported the movement; this is a considerable proportion in a country still divided by the civil war and Francoism. The claims of the anti-austerity movement are directly bound up with the crisis: they denounce the corruption of elected representatives, the two-party system and socioeconomic inequalities and demand "real democracy" and more social justice. As the philosopher Hedwig Marzolf and the sociologist Ernesto Ganuza declared, one cannot understand the emergence of Podemos in Spain without looking back at the anti-austerity movement and "what it meant for and in Spanish society, what it has changed in the manner of understanding and enacting politics".

The Electoral Effect of the 15-M Movement

The reference to the anti-austerity movement is recurrent in the speeches of the founders, militants and sympathisers of the party, convinced that "Podemos would not exist without the 15-M movement". "The seed", "the germ", "an awakening", "a precondition": the words used in interviews by the anti-austerity movement's representatives active today in Podemos underline the links between the two phenomena. The initial party manifesto, entitled "Move the chessmen forward. Convert outrage into political change", makes a direct allusion to the 15-M movement. This relationship was voluntarily upheld by the leaders of Podemos when, for example, they organised a "March for change" on 31 January 2015 on the symbolic Puerta del Sol square where the anti-austerity movement had installed their camp. Nonetheless this transformation of the social movement into a political party was not evident: the anti-austerity movement had set itself up in strong opposition to parties and trade unions as is witnessed by its main slogan "they don't represent us"; it refused to accept both a figurehead leader and the phenomenon of delegated power. How could an anti-party and anti-leader movement end up as a political party with a centralised organisation and a charismatic leader?

Its filiation is only partial; the 15-M movement has had a durable effect on Spanish society inciting numerous members of the public to question established procedures in existence since the democratic transition, such as the two-party system or the exercise of power by the political elites. With the emergence of the anti-austerity movement, politics has become a daily subject of conversation (in squares, in bars, coming out of school, at home, etc.). As Eric, a 29-year-old Solicitor involved in the legal commission of the 15-M movement, remarked: "The amazing thing was that during the

first two weeks, people were talking about politics everywhere […]. Punks spoke with fascists and old women in favour of Franco and they thought: 'We've got much in common!'" The assemblies, in particular, constituted a crucial moment in the politicisation and apprenticeship in public speaking. Many of those involved then started to speak in public without having had any previous experience. This was the case of a 60-year-old man, his voice full of emotion during the first assembly in the working-class area of Carabanchel on 28 May 2011, who said: "This is the first time I have spoken in an assembly… since the day I was born!"

Those who were actively involved in the anti-austerity movement, despite the diversity of their sociological backgrounds, their militant careers and their type of involvement, have in common the fact of having become aware of their power to act, that is to say their individual and collective capacity to alter their social reality. Thus they find themselves involved in a process of *empowerment*, "which develops an individual dynamism of self-esteem and the development of one's abilities as well as collective involvement and social transforming action" (in Bacqué and Biewener 2013, p. 144). Indeed, by taking part in the assemblies and in various demonstrations such as the struggle against housing evictions, those in the anti-austerity movement discovered their collective strength for finding solutions to issues they thought until then were only personal problems and placed their confidence in their ability to act collectively. As the Secretary General of the Parla Podemos circle, a young woman of 26, who felt she had been "awakened" to politics through the anti-austerity movement, said: "The 15-M movement made me realize that problems were neither mine nor yours, but that they were collective problems and therefore the solutions were collective too".

Maria, an Equatorial cleaning lady, aged 36, who lives in Carabanchel, very well illustrates this phenomenon. After being mistrustful at first towards the anti-austerity movement, this mother of two children attended the assembly on housing on the advice of the social services in order to solve a personal problem she had had since her husband lost his job: they were unable to repay their mortgage. She became involved from then on in all the assemblies and demonstrations organised locally by the anti-austerity movement although she had had no previous militant experience. In the past, Maria used to be paralysed facing her bank manager: "Before I used to go and practically beg the manager, 'please, please…' [Laughter]. And now, it is no longer like that; now we know and are conscious that there had been a swindle and we no longer feel guilty […] we are going

to demand [she insisted on the word] they provide a solution". With the anti-austerity movement, Maria realised her ability to act individually, and above all collectively, when facing institutions: "The bank did not want to negotiate with me. When I was on my own, they would not listen to me […] On the contrary now, when I go there as part of a group, they see us every time". Whereas she used to feel guilty about her situation, Maria today criticises the economic system which was at the origin of the crisis. While a faithful Psoe voter, she is thinking about voting for Podemos in the European elections.

A Political Alternative

Although Podemos' project did not stem from one of the assemblies of the anti-austerity movement, it is underpinned by an interpretation of the movement, in particular the need to politicise the conditions of everyday life and rally people beyond traditional cleavages. The message launched by the founding members of Podemos corresponds with the feeling of a part of the anti-austerity movement which recognises the limits of demonstrations and sees the need to become involved in the electoral scramble in order to change matters. This was the case for Manolo who, at the age of 36, had been out of work for several years when he discovered collective action with the 15-M movement. During our first interview on 29 April 2014, he indicated his disagreement with change through an institutional process: "A lot of people say that we are not going to get anything done like that […], that you have to join political parties, that things are done from inside and can't be done by remaining outside. But I don't think that that is the case". Being very critical towards Podemos, he then thought that "things will have to change a great deal before I join a party". Yet Manolo joined the Parla Podemos circle at the end of January 2015. What made him change his mind? When I asked him during a second interview on 25 April 2015, he admitted: "We have already tried from the outside but they didn't listen to us […] so we have to join up and try to change things by winning elections".

The ground is therefore fertile for a new political party seeking to channel discontent. The idea of Podemos was launched by a group of academics and militants involved in politics long before the anti-austerity movement existed. Two hubs can be identified amongst the founders. The first consists of political science lecturers at the Complutense University of Madrid, most of whom are aged about 30 and are in a precarious professional situation. They often come from families who struggled against Francoism

and their careers as militants have been marked by strong involvement in student and anti-globalisation movements. In almost every case their militant action includes time spent in the Izquierda unida (United Left), a left wing coalition set up in 1986 by various political parties, including the Spanish Communist party, but who were disappointed by the group's lack of power. Before the 15-M movement sprang up, these intellectuals had given thought to a project for an alternative form of political representation inspired by the theories of Antonio Gramsci and Ernesto Laclau and the experiences of progressive governments in Latin America. The best-known figurehead is Pablo Iglesias (37 years old), who was active for 14 years in the Communist Youth Organization and then became involved in and studied the movements of civil disobedience in Italy and Spain. Number two in the party and Podemos' political strategist, Iñigo Errejón (32 years old), wrote his thesis on the means of coming to power in Bolivia of Evo Morales and the Movimiento al socialismo (MAS, Movement Towards Socialism).

The second founder hub was made up of militants of the Izquierda anti-capitalista (Anti-capitalist Left), a small organisation corresponding to the Spanish section of the Fourth International. One of the main figureheads is Teresa Rodríguez, a secondary school teacher aged 34, who became much involved in the anti-austerity movement and in the "rising tide of the Greens" defending public education. Today she is head of Podemos in Andalusia where she is an MP and represents the critical wing of the party. Also amongst the national leaders of Podemos are militants with different backgrounds, such as those coming from the PAH, the movement against housing evictions. This is the case for Rafael Mayoral and Irene Montero who today belong to the team immediately surrounding Pablo Iglesias and who saw the limits of action outside institutions: "I realized that social demonstration is never enough. Of course, I am ready to go and stop housing evictions, but what I want is a change in the law". "Reconversions of militants" (in Combes 2011) are thus quite numerous in Podemos, involving leaders of social movements or social organisations abandoning charitable militancy in order to devote their activity to involvement within the party.

A Political and Communications Strategy

Besides the favourable context for the anti-austerity movement on which it is based, the success of Podemos resides in its capacity to "break away from certain taboos of social and left wing movements". Its political strategy can be summed up in three simple but effective ideas: get rid of

speechifying and the traditional references of the left wing minority, assert the opportunity for a political alternative in the face of austerity, and build the image of a charismatic leader by the strategic use of television, opinion polls and social networks. The founding members of the party thus clearly show a break with the speeches and practices of the "left of the left wing" from which they nonetheless originated, as Pablo Iglesias ironically declared: "If you want to succeed, do not do what the left wing would do" (in Iglesias 2014, p. 10).

A Renewal of the Political Debate

Their chief strategy consists in going beyond the traditional political left-wing/right-wing cleavage in favour of a top/bottom cleavage, opposing "the people" to "the caste", "the majority" to "the minority", "citizens" to "elites". The party's initial manifesto thus proposed for the European elections "a candidate who, facing governments serving a minority of 1 %, demands 'real democracy' based on the sovereignty of the people". This was where Podemos took up again the slogan "we are the 99 %" of the Occupy movement in the USA. In Spain the anti-austerity movement had also highlighted the cleavage between "those at the top" and "those at the bottom", pointing a finger at the responsibilities of bank managers, elected representatives and employers at the expense of citizens suffering from the social consequences of the economic crisis.

But why refuse to take up a position of alignment on a left-wing/right-wing axis whereas most of the founders of Podemos were militants in Izquierda unida and that one of their sources of influence, the Syriza party in Greece, means "the coalition of the radical left wing"? The principal argument put forward by the leaders of Podemos is that this opposition between left and right does not enable them to win elections. It serves as a means for majority political parties and the media to label a party like Podemos as "extreme left wing" or "radical left" in order to reduce it to a marginal position in the political and electoral arena. Moreover this cleavage would no longer seem useful today to proclaim a political alternative, the "left wing" concept having lost its meaning since the time when the socialists in power took austerity measures.

As Belén, a militant woman in the Parla circle explained, Podemos' strategy is moving away from Izquierda unida's by refusing to utilise concepts perceived as "obsolete" and having "failed", just as those coined from Marxism or feminism. Jorge Lago, a national leader of the "itinerant

school" prepared for use by local Podemos circles in the summer of 2014, took another look at this study of words and concepts: "I tried to show, from a theoretical point of view, that there is a way of having the traditional speeches one is used to [in militant spheres] made intelligible by translating them into a more inclusive language […]. For example, "anti-capitalism" or "economic democracy" means almost the same thing but the first expression frightens whereas the other does not". The renewal concerns not only the vocabulary but also the references and symbols traditionally associated with the left such as songs and flags. When he refused to unite with Izquierda unida for the legislative elections of December 2015, Pablo Iglesias rejected this symbolic heritage. He then sought to keep his distance from "the typical sad, tedious and bitter leftist" who was "content to put up with his 5 % [of votes], his red flag", because "that's the way the enemy wants us to be: mean, using a language that no one understands, in a minority, and hiding behind our usual symbols".

This strategy, influenced by the writings of Antonio Gramsci, aims at going beyond the identity dimension of left wing organisations in order to construct a counter hegemony project capable of winning over a majority of the population and transforming social reality. The aim, shared by all parties aspiring to become a majority, is to occupy "the centre stage of the political chess board" by creating a new "community feeling". In an article published on 20 April 2015 in *Público*, Pablo Iglesias declared that this central position did not correspond to the "ideological centre", but to a "redistributive economic project faced with the dogmatism of austerity". Proclaiming the defence of social justice and the denunciation of corrupt elites (which was already the theme of the anti-austerity movement), he aimed to define two camps, on the one hand the partisans of austerity and on the other the promoters of change.

Affirming the Possibility of an Alternative

Another key to the success of Podemos resides in the affirmation of its capacity to win elections and not just remain a top-up party in political alliances. As Rita Maestre, at that time a student aged 26 and active in Podemos from the start, now the spokesperson of the municipal government in Madrid, declared: "We do not want to be a minority power pressurizing the institutional left into pushing it further to the left". The name chosen for the party ("We can") and the slogan taken up from the anti-housing evictions movement and the anti-austerity movement (*Sí se puede*, "Yes, we can")

emphasise a real opportunity for change, whereas the elected representatives and the parties in power kept saying at the time "it isn't possible" (to stop housing evictions and corruption, to carry out fiscal reform, etc.). This formula, which also echoes Barack Obama's campaign for the presidential election of 2008 ("*yes, we can*"), attracted a great deal of attention for drawing in new militants and voters. Thus Belén tells what encouraged him, at the age of 40, to become a militant in the Parla Podemos circle: "What I really like is the idea that Podemos has emerged not in order to be in the opposition, but in order to win. This stimulates many people. Because it is obvious to me that there are parties in Spain, for example Izquierda unida, which are parties of the losers".

For Germán Cano, who was a member of Izquierda unida before joining the national headquarters of Podemos, "you must understand the context from which we sprang, a context in which we were beaten and where our tradition was a tradition of defeat". This philosophy professor mentions how Podemos' first campaign for the European elections was inspired by the marketing techniques used during the referendum against Pinochet in 1988 and which were the subject of the film *No* (directed by Pablo Larraín in 2012): "Publicity experts were trying to campaign for a 'no' to Pinochet with strategies which irritated the traditional left wing; their positive language, auto-affirmation and hope stand out when faced by a retrospective perusal of the crimes of the dictatorship. […] We talked about it a lot during the campaign because it was the message, the main idea we had to transmit". This strategy is well illustrated by the slogan that Podemos chose for the campaign for the European elections: "When was the last time that you voted hoping to win?"

This message of hope which Podemos promotes is accompanied with simple words, starting out with everyday problems of the people (employment, housing, access to education and health services, etc.). It hinges on a few key concepts such as democracy, sovereignty and social rights. This approach, based on the demand for a social State and redistributive policies, aims to reclaim "the field which social-democracy abandoned". In this way, the party demonstrated the opportunity for an alternative to austerity policies in the European Union. Its programme for the legislative elections included, for example, "a people's bail-out" financed by a one-off tax on banks having received public money, by fiscal reform which would progressively increase taxes on property, income and inheritance. One of its figurehead proposals is "Law 25 on social urgency" (referring to Article 25 of the Universal Declaration of the Rights of Man of 1948

guaranteeing a right to housing), which consists, in particular, in bringing to a halt housing evictions and in maintaining the supply of water, electricity and gas in all homes.

The Role of Leadership and Communications

The success of Podemos resides not only in this combative language but also in the figurehead of a charismatic leader who supports the party in the media. As Ariel Jerez, one of the founding members of the party explains, the communications strategy of Podemos is based on the conviction that "in order to win, it is necessary to use the weapons of the enemy" such as television and opinion polls. This marks an essential breach with the anti-austerity movement which refused the figurehead of a leader and was very mistrustful of the media. This approach was adopted during the European elections when the campaign team chose to use Pablo Iglesias' face as a logo on the ballot papers. The decision was made following an opinion poll carried out by Carolina Bescansa, a political science professor and member of the headquarters' team, which indicated at that time that 50 per cent of the people polled knew who Pablo Iglesias was whereas only 8 per cent knew about Podemos. The position of leadership poses numerous problems about which there is much internal discussion regarding the personalisation of power and the democratic imbalance within the organisation; it is also a symbol with which different kinds of public can identify themselves. Thus Sarah Bienzobas, who took part in the conception of Podemos' campaign for the European elections, observes that "everyone can identify themselves with Pablo Iglesias: mothers associate him with their son, just like Pablo, unable to get a good education because he didn't get a good enough grant or because he was unable to get any work – he is a kind of ideal son; for young people, he is their spokesman enabling them to be heard". Dani, out of work, aged 24, who would like to start studying again but cannot do so for financial reasons and who is active in the Parla Podemos circle, indicates, for example: "Pablo and his pony-tail are a symbol. […] He's a person with whom I can easily identify, his tastes, his ideology,… He loves the *Game of Thrones*, role playing, he is a *geek* like me and all my friends. Who better than he, whom others despise, can give importance to people who are never taken into account?"

The construction of this media figure stems from the principle that television constitutes the broadest arena for political socialisation for the majority of the population. Pablo Iglesias thus sought to invade the media arena as broadly as possible long before Podemos was launched.

In order to provide as wide an audience as possible for their critical approach outside lecture theatres, the political science lecturers of Complutense University invested in their own audiovisual equipment. Thus, from 2010 onwards, Pablo Iglesias broadcast "La Tuerka", a programme of political debates initially retransmitted by TeleK, a suburban television station, then broadcast on channels with wider audiences (Canal 33, PúblicoTV). What is at stake is, in his opinion, "a strategy of political combat": "For the first time […] the left was having its say about its own programme and, what was more, not, as it had been doing since the very beginning, only talking to itself" (in Iglesias 2014, p. 19). In this way Pablo Iglesias drew the attention of foreign numerical television stations which provided him with programmes to broadcast such as "Fort Apache" on HispanTV. He was invited afterwards on right-wing television stations such as InterconomíaTV where his appearance in the programme "El Gato al agua" in April 2013 gave rise to a great deal of interest and gained him access to two generalist channels, Cuatro and La Sexta. His regular appearances in the "Las Mañanas de Cuatro" and "La Sexta noche" programmes, which gain even wider audiences through Twitter (where Podemos is much more present than the other political parties), considerably increase his popularity.

José Fernández-Albertos, a sociologist who in 2015 published a book on "Podemos' voters", shows that the appearances of Pablo Iglesias and of the other party leaders on general public programmes "have played a central role in sending out the message of the candidature to places that would have been impossible to reach in any other way given the weak organizational structure of the party" (in Fernández-Albertos 2015, p. 52). Television has thus made possible, during European elections, an improved spread of the vote across the country, which would have been more concentrated if the campaign had been carried out through other channels of communication. Podemos also succeeded in winning the support of voters in widely differing social and occupational categories as much among the middle classes as within the working classes. The new formation finally succeeded in remobilising people who did not vote or who no longer voted. According to a poll carried out after the European elections in May 2014, one Podemos voter in four did not vote, was not able to vote (due notably to age) or could not remember any longer what he or she did at the last legislative elections in 2011 (in Fernández-Albertos 2015, p. 47). Thus Podemos demonstrated an ability to represent an electorate unable to find its place amidst the existing partisan opportunities, in particular for young people who are its main voters.

How Has Spain's Political Arena Been Transformed?

In less than two years since it was set up in January 2014 up to the legislative elections in December 2015, Podemos had already made a considerable impact on the political and partisan system in Spain. The chief element was the fact that it called into question the two-party system which had implied a monopoly of the Psoe and the PP in Spanish political life since the democratic transition. In the 2014 European elections these political parties each lost more than 2.5 million votes. The fall of the two-party system was even more brutal in the regional elections: it is true that the PP and the Psoe often held onto the two top positions, but they were obliged to forge alliances with other political groups in order to govern. Podemos and/or Ciudadanos, a centre-right group which also advocates political renewal but without attacking the foundations of economic policies, are thus put in a position to play a key role in allowing regional governments to be set up. The PP and the Psoe did not obtain an absolute majority in any region in May 2014, whereas they had carried the vote in 8 out of 13 regions in 2011. Their collapse is sometimes more severe than in municipal elections where the two major parties can be outstripped by very recently created political groups. In the legislative elections of 20 December 2015, while the PP and the Psoe remained in the lead, between them they lost more than five million votes compared to the 2011 elections. The Psoe registered its worst score in its history and the PP its worst result since 1989. Both were unable to form a government without the support of new parties such as Podemos and Ciudadanos.

Another change bound up with the emergence of Podemos concerns the generational change amongst the political elites. This was particularly visible and somewhat staged by Podemos when their deputies made their entry into the Congress of Deputies during the investiture session of 13 January 2016. There were young people wearing jeans, revolutionary T-shirts and raising their firsts who upset the parliamentary protocol. The pictures of a Podemos Deputy with dreadlocks or of Carolina Bescansa breastfeeding her baby, widely reported in the media, significantly indicated a breach in the stylistic and generational habits on the benches of Parliament. In this legislature, the level of renewal of Deputies, 62 per cent, is historic. Since the emergence of Podemos, the other political parties have also promoted younger candidates with different styles and appearances. A typical case occurred in the Psoe, where Alfredo Pérez Rubalcaba (64 years old) resigned from the post of Secretary General on 26 May 2014,

to be replaced by Pedro Sánchez, a handsome 43-year-old economist who follows Pablo Iglesias' style (white shirt without a tie). Izquierda unida too has experienced a rejuvenation of its leaders: Willy Meyer (63 years old), the former European figurehead of the European party, resigned on 25 June 2014 and was replaced by Javier Couso, an artist, then aged 46, with a background in social movements. Alberto Garzón, a 30-year-old economist, much involved in the anti-austerity movement, elected Deputy in 2011, was a candidate for Izquierda unida for the 2015 legislative elections. Even the king, Juan Carlos I, at the age of 76, resigned his position on 19 June 2014 in favour of his son Felipe VI, who was 47 years old at the time! As the journalist Juan Luis Sánchez claimed: "The election results accelerated the abdication of the king. Willy Meyer also fell and now no one can go on as though nothing is happening".

Beyond the renewal of the elites, the impact of Podemos also concerns the practices and language of the other political groups. Although the institutionalisation of this new party has resulted in a centralised and vertical structure, Podemos maintains a number of specific aspects compared to other partisan organisations by regularly calling upon all its sympathisers to vote, ensuring unequalled transparency in its accounting and in its deputies' activities, while taking steps in order to avoid the professionalisation of politics. Its "ethical code" thus contains a ceiling for payments to elected representatives (no more than three times the minimum salary, the minimum wage in Spain being 655.20 euros per month in 2016), a limitation on the plurality of elected mandates for the future, a renunciation of all legal or material privileges directly linked to the representative status or the forbidding of "revolving doors" (when an elected representative or a minister obtains a post in the private sector). This way of behaving in politics, even though it is not as new as the militants from the anti-austerity movement would like it to be, is beginning to spread to the other Spanish political parties which are being led to adapt their operating modes and vocabulary to counter the emergence of yet another player in the political arena.

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Direct Democracy in Switzerland: Trends, Challenges and the Quest for Solutions

Maya Hertig Randall

Introduction

Switzerland is a direct democracy and proud to be one.[1] Most Swiss consider direct democracy inherently superior to representative democracy. Being able to shape and have a direct say on important policy issues is viewed as an essential component of a truly democratic legal order. Instruments of direct democracy have become, in addition to federalism and neutrality, a founding myth of Swiss national identity. Direct democracy is prevalent at all three levels of the Swiss political order (municipal, cantonal and federal).[2] A citizen living in the City of Geneva, for instance, was called to the polls to vote on a total of 23 issues in 2014. Fourteen concerned the federal level, eight the cantonal level, and one the municipal level.[3]

Direct democracy Swiss style places a great deal of trust in the people. The high level of confidence in the citizens has for a long time been a source of pride. Supporters of direct democracy tend to ask the rhetorical question: "What other Nation but the Swiss would vote against a proposal to introduce an additional week of paid holidays,[4] or agree to tax increases?"[5] Yet something has changed in recent years. For outside observers, the so-called

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anti-minaret initiative came to epitomise this change.[6] Proposed by a group consisting mainly of supporters of the right-wing Swiss People's Party in 2007, a constitutional clause providing for an absolute ban on building minarets on the Swiss territory was accepted by a majority of 57.5 % in a referendum on 29 November 2009.[7] The approval of the 'anti-minaret initiative' has undermined the assumption that the political process offers sufficient safeguards to avoid collisions between popular sovereignty and the rule of law[8] and to prevent direct democracy from degenerating into a tyranny of the majority.

More worryingly, the minaret ban is neither the first nor the last constitutional provision initiated and accepted by the Swiss people which is a cause of concern. The acceptance of a series of popular initiatives clashing with the rule of law and Switzerland's human rights obligations or other international treaties of fundamental importance[9] seems to be part of a general trend pointing to an increased success rate and a changing function of the popular initiative in the Swiss legal order. Some numbers help to underscore this point.

Between 1891, when the popular initiative was introduced in the Swiss Constitution, and June 2015, 200 constitutional amendments initiated by the people were submitted to popular vote. 22 initiatives were accepted, whilst 178 failed at the polls.[10] Although the general success rate is relatively low, it has varied over time.

Between 1951 and 1980, for instance, all 38 initiatives submitted to vote were rejected. This does not mean that the popular initiatives had no impact during that time. Popular initiatives are an instrument of political opposition and generally result in proposals that are not supported by Government (named the Federal Council) and Parliament (the Federal Assembly, consisting of two chambers, the National Council and the Council of States). One strategy to defeat popular initiatives deemed politically unwise or too radical is for Government and Parliament to elaborate a more moderate counter-proposal, either in the form of a federal statute (so-called *indirect* counter-proposal) or in the form of a constitutional amendment submitted to popular vote the same day as the initiative (so-called direct counter-proposal). Within the mentioned period (1951–1980), eight direct counter-proposals were submitted to popular vote, half of which were accepted. Although the acceptance rate of popular initiatives was zero during that period of time, these initiatives managed to trigger some political and legal change through the counter-proposals.

The success rate of popular initiatives and counter-proposals since the new millennium shows a different picture. Between 2001 and 2015, 10 out 62 initiatives were accepted, and 52 were rejected. Government and

Parliament opted for a direct counter-proposal only twice. In one case, both the initiative and the counter-proposal were rejected; in the second, the initiative was approved and the counter-proposal defeated at the polls.

The increased success rate of popular initiatives—coupled with the low number of direct counter-proposals and their failure to be accepted as a sounder alternative to the initiatives—can be read as a sign of radicalisation and decreasing trust in Government and Parliament. As already mentioned with respect to the anti-minaret ban, a qualitative assessment of recent popular initiatives leads to the finding that a considerable number of accepted popular initiatives clash with Switzerland's international obligations and the rule of law. This chapter aims at providing a better understanding of these changes and the challenges they raise. It is structured as follows. The *first* part offers an overview of the instruments of direct democracy in the Swiss constitutional order. The analysis will be limited to the federal level, leaving aside the cantonal and municipal level of the Swiss polity. The s*econd* part outlines the main functions of popular initiatives and highlights the on-going changes. The *third* part provides a more complete picture of recent popular initiatives that are a cause of concern. The *fourth* part outlines the on-going discussions aimed at reconciling direct democracy with the rule of law and Switzerland's international obligations.

Direct Democracy in the Swiss Constitutional Order

Two main instruments of direct democracy—the popular initiative and the referendum—enable direct popular participation[11] at the federal level. As will be shown, the Swiss constitutional and political system has so far mainly relied on political, as opposed to legal, safeguards against constitutional amendments clashing with the rule of law and Switzerland's international legal obligations.[12]

Instruments of Direct Democracy

The Popular Initiative

The popular initiative enables adherents of a certain policy to trigger the amendment procedure of the Federal Constitution[13] if they manage to gather 100,000 signatures within 18 months in support of their proposal to adopt

a new constitutional provision. Since 1891, the number of required signatures has remained unchanged. All attempts to amend the Constitution with a view to adapting the constitutional threshold to the increase of the Swiss population (which was about 3 million in 1891,[14] and currently exceeds 8 million) have so far failed. It is interesting to note that the Swiss founding document only provides for a *constitutional* and not for a *legislative* initiative. As citizens can only trigger the adoption of constitutional provisions, rules of secondary importance that ought to be addressed at the statutory level are included in the federal Constitution. This is one factor among others that explains why Swiss citizens do not view the Constitution as an almost sacred document removed from ordinary politics but rather as a policy instrument enabling the people to shape and participate in the political process.

The Referendum

The second main instrument of direct democracy, the referendum, takes two forms. The so-called *optional* referendum makes the entry into force of federal statutes and significant international treaties contingent on the approval through popular vote by a simple majority of the voters if either eight cantons or 50,000 citizens request it within a three months' deadline as of the date of adoption.[15] The so-called *mandatory* referendum requires two categories of acts to be approved in a popular vote securing the majority of those who vote and a majority of the cantons:[16] firstly, constitutional amendments, whether they were initiated by the federal authorities or by the people (through the popular initiative), and secondly, international treaties of particular significance, namely accession to organisations for collective security (e.g. NATO) or to supranational communities (e.g. the EU).

Political and Legal Safeguards

In order to understand why popular initiatives that clash with fundamental principles of the rule of law and fundamental rights are submitted to popular vote, it is important to point out that there is no formal hierarchy within the Swiss Constitution, in contrast with the German Basic law.[17] Although legal scholars have debated for decades whether some essential principles set limits to the constituent power,[18] the idea of intangible constitutional provisions has never gained sufficient ground. More importantly, the validity of popular initiatives is subject to very few conditions, the control of which is entrusted to a political body (Parliament) and not the judiciary.[19] The only substantive limit to the validity of popular initiatives is their compliance with

'peremptory norms of international law', a practice inaugurated in 1996[20] and codified in 1999 (Art. 139 para. 3 Cst.).[21] Indeed, in 1996, Parliament invalidated the initiative 'for a reasonable asylum policy' on the grounds that it infringed the principle of *non-refoulement*, which was considered as a peremptory norm of international law. This was the first and only case of an initiative being declared invalid as a whole on substantive grounds.[22] Subsequent practice of the Federal Assembly has been less bold. It has tended to confer a narrow meaning to peremptory norms of international law, essentially equating them with *ius cogens* norms and non-derogable provisions of the ECHR.[23] As a consequence, popular initiatives which clash with human rights norms which are not part of *ius cogens* or non-derogable provisions of the Convention are valid and subject to vote. Moreover, Government and Parliament have tended to interpret the wording of popular initiatives in such a way as to make it consistent with peremptory norms of international law.[24] This approach is underpinned by the principles of '*in dubio pro populo*' and popular sovereignty, so deeply embedded in the Swiss political system.

The Swiss founding document being flexible as compared with other constitutions and containing few legal safeguards, the main guarantees against popular initiatives infringing core principles of constitutionalism are political ones. The underlying assumption is 'that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones'.[25] The faith 'in the power of reason as applied through public discussion'[26] goes hand in hand with the belief that citizens display a high level of trust towards political institutions and tend to follow their recommendation to reject popular initiatives or to favour more moderate counter-proposals.

Functions of Popular Initiatives

Popular initiatives have traditionally been viewed in Switzerland as an instrument enabling minorities to influence the political process and to make their voices heard. Aimed at triggering political change, they can be means to advance innovative proposals (such as stipulating maternity leave in 1945)[27] or to express dissatisfaction with governmental policies, by providing, for instance, for vigorous protection of the environment[28] or stricter rules as regards executive pay.[29] This type of popular initiative can be viewed as forming part of a system of checks and balances, enabling the people to exert control over political and economic power.

These classical functions are still relevant today. However, there has been a trend towards using popular initiatives as an instrument forming part of an electoralist strategy aimed at mobilising support for political parties. The biggest political party in Switzerland, the Swiss People's Party, has been the most prominent actor launching popular initiatives to rally support around their restrictive policies in the field of immigration, and its opposition to European integration. Part of an overall electoral strategy, this type of initiative has been widely promoted through political campaigns in the mass media, using slogans and posters appealing to xenophobic or racist sentiments.[30] The high cost of running effective political campaigns is likely to be one factor among others explaining the increasing use of popular initiatives by financially strong political parties. This trend risks turning direct democracy from an instrument enabling political minorities to influence the political agenda into a tool directed against groups which are little represented in the political process, such as immigrants or new religious minorities. These groups are not new targets of popular initiatives,[31] but the increase in both the number and acceptance rate of this type of proposals is a recent phenomenon. A new trend is also to launch popular initiatives as a means to provoke a conflict between domestic and international law.[32] The aim of this strategy is to highlight the encroachment of international norms on national sovereignty and to discredit both the international legal order as a whole, as well as the 'rule of foreign judges', epitomised by the European Court of Human Rights (ECtHR). An overview of the most controversial popular initiatives accepted since the beginning of the new millennium helps to underscore this claim.[33]

Examples of Controversial Initiatives

Initiatives Clashing with Human Rights

A series of successful popular initiatives has stirred a lot of controversy, as they conflict with international human rights and/or fundamental rights protected in the Swiss constitution. They have in common that they target minorities or unpopular groups, such as Muslims, foreigners and criminal (mainly sexual) offenders, as the following examples show.[34]

The 'Initiative on Internment'

The so-called *initiative on internment* was adopted by the people with a majority of 56.2 % on 8 February 2004.[35] It had been launched by two sisters

as a reaction against a violent sex crime committed by a repeat offender against a child close to them[36] and was opposed by all the major political parties represented in Parliament except for the Swiss people's party. The constitutional provision resulting from this initiative provides for life internment of sexual or extremely violent offenders deemed incurable[37] without the possibility to request early release, and thus excludes periodic judicial review of the legality of detention, as is requested by Art. 5 para. 4 ECHR.[38] It also risks raising issues under Art. 3 ECHR, which requires that life sentences be *de facto* and *de iure* reducible.[39] Faced with the difficulty to reconcile the new constitutional provision with the Convention, Parliament first refused to implement the initiative but later adopted a new provision amending the Swiss Criminal Code[40] which, based on a highly creative reading of the new constitutional provision, attempted to bring it in line with Art. 5 para. 4 ECHR. The resulting compromise[41] reduces the potential for conflicts with the ECHR, without ensuring full compliance.[42] At the same time, it is difficult to reconcile with the clear wording and intent of the initiative, which makes it a target of criticism for both human rights groups and supporters of unlimited popular sovereignty.

The 'Anti-Minaret Initiative'

The already mentioned *anti-minaret initiative*, adopted in 2009, holds that '[t]he construction of minarets is prohibited'.[43] Due to its precise wording and its limited scope, it has not required statutory implementation. The new constitutional provision was directly challenged before the Swiss Supreme Court (named Federal Tribunal) and subsequently before the European Court of Human Rights on the grounds that it infringes freedom of religion (Art. 9 ECHR) and the prohibition of discrimination (Art. 14 ECHR). Both bodies declared these requests inadmissible, as they lack the competence to review the challenged act *in abstracto*.[44] So far, no case directed against a decision refusing the applicants to build a minaret has reached the Federal Tribunal or the ECtHR.

The 'Deportation Initiative'

Accepted on 28 November 2010, the so-called *deportation initiative* provides for the automatic removal of foreign nationals who committed certain crimes or abused the social security system.[45] Although its wording does not mention an exception to comply with the *principle of non-refoulement*, considered previously by Government and Parliament as part of *ius cogens*, the initiative had been declared valid and submitted to popular vote. The

refusal to invalidate the initiative on the grounds that it was incompatible with peremptory norms of international law was justified on the grounds that it was possible to interpret the initiative consistently with the *principle of non-refoulement*.[46] The decision to 'save' the 'deportation initiative' based on the principle *in dubio pro populo* failed to strike a balance between popular sovereignty and human rights. It was taken despite the fact that the wording and purpose of the initiative—*automatic* removal—were clearly incompatible with human rights guarantees other than the *principle of non-refoulement*. As was easily foreseeable before the vote based on the case law of the ECtHR, automatic removal clashes *inter alia* with the right to respect for private and family life (Art. 8 ECHR), which requires a case-by-case proportionality analysis.[47] The incompatibility with the Convention and the proportionality principle[48] was however disputed by the Swiss People's Party during the campaign.[49] Once the initiative was accepted, and several rulings of the ECtHR clearly demonstrated the evident incompatibility of automatic removal with the Convention,[50] the Swiss People's Party changed its line of argument. Instead of admitting that its position during the campaign preceding the vote had been incorrect, it started decrying the ECtHR's case law as failing to respect the sovereignty of the Swiss people and arguing that its initiative precisely aimed at correcting the European Court's rulings which, it claimed, were far too soft on criminals.[51] This reasoning aimed at discrediting the ECtHR is part of a wider opposition against 'foreign judges' and other international bodies viewed as infringing national sovereignty. Opposing limitations on untrammelled majority rule from the outside, the Swiss People's Party has also rejected attempts within Switzerland to limit the impact of the initiative by reconciling it as much as possible with human rights. After the acceptance of the initiative, Government and Parliament had to adopt statutes implementing the 'deportation initiative' and were faced with the challenge of squaring the circle: How to respect the clear wording and aim of the new constitutional provision whilst respecting human rights?[52] As Parliament had attempted to defeat the initiative with a direct counter-proposal that specifically provided for the necessity to respect human rights and the proportionality principle, supporters of the initiative argued that the people had expressed their clear preference for automatic removal and opposed proposals to introduce safeguards in the implementing legislation. Less than two years after the approval of the 'deportation initiative', the Swiss People's Party launched another initiative aimed at implementing the first initiative in a strict manner.[53] Despite the Damocles sword of a second

popular vote on automatic removal, the Federal Assembly agreed after a protracted legislative process on a compromise.[54] It opted for a safeguard clause enabling the authorities to refrain from removal in cases of serious personal hardship. This solution justifies exceptions to automatic removal but falls short of a full proportionality review.

The 'Paedophile Initiative'

The so-called *paedophile initiative* was adopted with a majority of 63.5 % of voters and a strong majority of the cantons on 18 May 2014.[55] It had been launched by the Swiss branch of the Movement 'La Marche blanche'[56] aimed at fighting paedocriminality and provides for a life-long ban guaranteeing that convicted paedophiles cannot work with children. Similar to the 'deportation initiative', it has given rise to concerns because it does not allow for a proportionality analysis[57] and may breach the fundamental right of economic liberty, which is protected in the Swiss Constitution. By contrast with the 'deportation initiative', the 'paedophile initiative' does not clearly infringe the ECtHR, which may partly explain why Parliament submitted it to vote without recommending to voters that it be rejected. It had however opted for an indirect counter-proposal, consisting in a package of legislative measures aimed at reinforcing the protection of children against paedophilia. Little debated during the campaign preceding the vote, these measures failed to convince the Swiss voters not to back the 'paedophile initiative'. During the implementation phase, legislative proposals to soften the absolute nature of the ban in exceptional cases are being debated.[58]

Initiatives Clashing with the Agreement on Free Movement of Persons with the EU

Instruments of direct democracy have had a decisive impact on the relationship between Switzerland and the EU. By contrast with most European States, Swiss accession to the EU would require a mandatory referendum.[59] After accession to the European Economic Area failed at the polls in 1992, EU-membership has virtually vanished from the Swiss political agenda. The Swiss authorities have opted for a bilateral approach, consisting of a dense network of treaties with the EU and its Member States aimed at guaranteeing market access to both sides.[60] The most controversial of these agreements is the Agreement on the Free Movement of Persons, concluded in 1999. Accepted as part of a package in a referendum on 21 May 2000, the Swiss people reaffirmed its support for free

movement in 2005 and in 2009, in votes concerning the extension of the Agreement to new EU-member states.

However, the argument that the already mentioned 'deportation initiative' was not only incompatible with the ECHR but also inconsistent with the Agreement on the Free Movement of Persons did not prevent Swiss citizens from voting in favour of it. More importantly, another initiative, launched by the Swiss People's Party and accepted with a very slight margin of 50.3 % yes-votes against 49.7 % of no-votes on 9 February 2014, has shaken Swiss-EU relations to its foundations.[61] Under the catchy title 'against mass immigration', the initiative proposed a new constitutional provision aimed at limiting immigration through quotas.[62] The text does not set out an annual maximum number of permits but holds that they 'are to be determined in accordance with the overall economic interests of Switzerland and taking into account that Swiss nationals receive preferential treatment'.[63] It also contains a clause opposing the signature of international treaties which are incompatible with the newly adopted constitutional provision[64] and holds that contravening international treaties have to 'be renegotiated and shall be adapted within three years of the adoption of that article by the people and the cantons'.[65] A transitional provision sets a deadline of three years for implementing legislation to be adopted and to enter into force. In the event that this deadline is not met, the text provides that the Government shall enact provisional measures by ordinance.[66]

Although a system based on quotas and national preferences clearly flies in the face of the fundamental EU-principles of free movement and non-discrimination based on nationality, the supporters of the initiative portrayed the successful renegotiation of the Free Movement Agreement with the EU as a realistic scenario, stressing that the initiative did not aim at terminating the Agreement.[67] When negotiations with the EU turned out to be virtually intractable, as was to be expected, the spokesman of the Swiss People's Party and founder of the Committee against gradual accession to the EU accused the Government of surrender, stating that it needed to consider terminating the Agreement on Free Movement.[68] Should it fail to do so, termination would need to be obtained via a new popular initiative. Based on these statements and the strong Euroscepticism of the Swiss People's Party, it is sound to infer that the purpose of the 'initiative against mass immigration' has not only been to cap immigration but also, if not foremost, to stop the bilateral integration process between Switzerland and the EU. Whilst debates on how to implement the 'initiative against mass immigration' are still on-going without a consensus in

sight, signatures are being collected to support an initiative named 'let's get out of the impasse', proposing to abolish the constitutional provision introduced on 9 February 2014.[69]

'Backlash Initiatives'

The term 'backlash initiatives' is used in this paper to refer to initiatives that are immediate reactions to the failure (real or perceived) to implement or comply with constitutional amendments originating in popular initiatives. The so-called implementation initiatives and the recently launched 'initiative on self-determination' are examples in point.

'Implementation Initiatives'

The Swiss People's Party has coined the term 'implementation initiative' (Durchsetzungsinitiative[70]/initiative de mise en oeuvre) when it launched the already mentioned popular initiative aimed at securing strict implementation of the 'deportation initiative'.[71] Extremely detailed, the 'implementation initiative', which has not yet been submitted to a vote, opposes attempts to square the 'deportation initiative' as much as possible with Art. 8 ECHR by holding that its provisions take precedence over norms of public international law with the exception of peremptory rules of international law.[72] This approach is worrisome not only in the light of human rights but also in view of separation of powers. Launched shortly after the 'deportation initiative' was accepted, the 'implementation initiative' interferes with the parliamentary process and questions the role of Parliament as a legitimate actor in the implementation phase. It reflects a vision of democracy reduced to untrammelled majority rule with one political party pretending to incarnate the 'will of the people' and willing to push through its political agenda by circumventing all other constituted powers except for the people deciding at the ballot.

Recourse to 'implementation initiatives' may not remain exceptional. As already mentioned, the threat of a new initiative has already been voiced in the aftermath of the 'initiative against mass immigration'[73] and may be used in future instances, too.

'Initiative on Self-Determination'

Whilst the 'implementation initiatives' mainly target Parliament, the so-called initiative on self-determination, launched by the Swiss People's Party in March 2015, is best understood as a backlash against the Swiss Federal

Tribunal. In a highly controversial judgement, the highest Supreme court signalled its willingness to disapply a constitutional provision in case of an irreducible conflict with the European Convention.[74] Reacting to this ruling, the popular initiative proposes a new constitutional provision according to which the Constitution trumps public international law except for peremptory norms of international law. Going beyond the conflict between constitutional provisions and international law, the initiative addresses also the relationship between parliamentary statutes and international treaties. It purports to give precedence to parliamentary statutes over international treaties that have not been subject to referendum. This clause most likely targets the European Convention: at the time of ratification in 1974, the Constitution did not provide for a referendum for this type of treaty, parliamentary approval being sufficient. Although members of the Swiss People's Party tend to deny that the ultimate aim of the initiative is to denounce the European Convention, the full title of the initiative 'initiative in favour of Swiss Law and Against Foreign Judges (self-determination initiative)' and the campaign material shows that the European Court is clearly targeted.[75]

The Quest for Solutions

The insight that popular initiatives may clash with Switzerland's international obligations[76] or may contradict other fundamental provisions enshrined in the Swiss Constitution is not new. The traditional answer to this problem has been, as was already pointed out, to rely on political, rather than legal safeguards. According to this view, a lively political debate and parliamentary counter-proposals are generally sufficient to avoid clashes with international law. In the unlikely event that a constitutional amendment in violation of binding international treaties should be adopted, the authorities ought to interpret and implement it in a way consistent with international obligations. If this harmonising strategy fails, the approval of the initiative is to be considered, according to the traditional view, as an implicit mandate to either terminate the treaty, find a negotiated solution or simply incur the consequences of international responsibility.

Whilst the traditional approach is highly respectful of popular sovereignty, it has several drawbacks. Its main weak point is that it is ill suited to multilateral treaties in general (which are difficult to renegotiate) and human rights treaties, in particular. Conventions protecting human rights are not based on the principle of reciprocity between states but have an

objective nature. They lay down common values to be protected by the community of state parties as a whole and aim to protect the individual. Although the European Convention on Human Rights could, by contrast to the International Covenant on Civil and Political Rights (ICCPR), be terminated from a legal point of view, such an option is, from a political point of view, very hard to implement. Moreover, the view that the acceptance of an initiative which infringes human rights is an implicit expression of people's will to terminate the Convention is, at best, simplistic and potentially counter to democratic rights, as it imputes to the electorate an intention which is far from being established. This is even more the case if citizens are confronted with contradictory assessments, the promoters of the initiative firmly denying the incompatibility of their proposal with international law.

Against this backdrop, detractors of the traditional approach highlight the need for reform.[77] Existing proposals can be divided into three groups: the first ones aim at reinforcing *ex ante* review of the initiative the second ones prefer *ex post* review of the newly adopted constitutional provision. A third type of proposals focuses not on binding review mechanism but on improving the decision-making process.

Reinforcing Preventive Review

Reinforcing preventive review raises at least four difficult and interrelated questions. Firstly, to what extent should the substantive conditions of the validity of popular initiatives be extended? Should all initiatives infringing international law be declared void, or only those in violation of treaties which cannot be terminated *de facto* and/or *de iure*? Or should only international human rights (or even more narrowly, human rights considered of particular importance) set limits to the constituent power of the people? Or should limits to the *pouvoir constituant* be sought within the Swiss Constitution, similar to the German Basic law?[78]

Secondly, can the conditions of validity to which popular initiatives are subject be strengthened via a broad interpretation of the wording of the Constitution or would the founding document need to be amended? Whilst the latter option would be preferable in terms of legitimacy, the first one is, from a political point of view, would be more feasible. There is however little agreement among scholars on how broadly 'peremptory norms of international law' (Art. 139 para. 3 Cst.) can be construed. For some authors, the Constitution refers exclusively to the international concept

of *ius cogens* (the scope of which is itself controversial under international law). For others, 'peremptory norms of international law' are an autonomous concept of Swiss constitutional law that goes beyond the very limited number of *ius cogens* rules.

Thirdly, ought the validity of the initiative be decided before its authors are allowed to gather signatures[79] or, as is currently the case, only after the initiative has passed the necessary threshold of gaining the support of 100,000 citizens?

Fourthly, which authority should be vested with the decision to examine the validity of the initiative? As many scholars rightly point out, the more the substantive requirements are broadened, the more review by a judicial body seems necessary. It is indeed problematic that a political authority (i.e. Parliament) should decide on legal questions. However, entrusting the Swiss Federal Tribunal with this power is unfortunately likely to meet resistance from Parliament and probably also from the people. Fears of a 'juristocracy' are deeply rooted in Switzerland. As a consequence, even moderate reforms that were aimed at strengthening preventive judicial review failed. An example in point is a governmental proposal of 1996 which provided that Parliament ought to seek a legally binding opinion from the Federal Tribunal in case of doubts on the validity of popular initiatives.[80]

Strengthening Subsequent Review

Authors who favour strengthening subsequent review over preventive review do so mainly on two grounds. Firstly, they hold that it is more respectful of direct democracy to enable citizens to vote and give them a chance to express their opinion on any policy matter. Secondly, defenders of *subsequent review* consider that a historical interpretation of the Constitution does not permit broadening the material validity requirement of initiatives beyond *ius cogens*. It is however argued that the Swiss founding document can be interpreted in a way as to enable courts to disapply constitutional provisions that infringe international law, and in particular international human rights. According to this view, the constitutional requirement to respect 'peremptory rules of international law' is interpreted as applying to the *validity* of popular initiatives and in no way impacts the *application* of the resulting constitutional provisions.[81] This stems from the fact that the duty to apply norms is governed by another constitutional provision, article 190 of the Swiss Constitution. The primary rationale of this provision

(known as the 'immunity clause') is to preclude constitutional review of Acts of Parliament. Reflecting the primacy of the legislature over the judiciary, it holds that courts (and, more generally, any authority) have to apply federal statutes. The same provision also prescribes the duty to apply international law.[82] As the purpose of the immunity clause is to preclude constitutional review of Acts of Parliament and of international law, the Constitution itself is not part of the 'immunised acts'. Based on the wording of article 190 of the Constitution, it can be argued that statutory and international norms have to be applied even if they infringe a constitutional provision. It follows, *a contrario*, that a constitutional provision that infringes international law needs to be disapplied. The same reasoning would prevent courts from setting aside a statutory provision implementing a constitutional provision initiated by the people. When Parliament decides to 'soften' radical initiatives during the implementation phase (as was the case for the deportation initiative), courts are held to apply the implementing statute even if it could be viewed as conflicting with the constitutional provision which originated in a popular initiative.

The reasoning according to which a constitutional provision conflicting with an international treaty needs to be disapplied based on Art. 190 Cst. is not unanimously shared. An opposing view challenges the distinction between the *validity* and the *application* of a constitutional provision and holds that it is incoherent and undemocratic to call citizens to vote upon a text that is doomed to remain ineffective. According to this view, article 139 para. 3 Cst. is a *lex specialis* in relation to article 190 Cst. Based on this precept, peremptory norms of international law are the only limit that courts can enforce in the implementation of a constitutional provision.[83] It is also contended that article 190 Cst. only applies to constitutional norms which have been enacted before the ratification of a conflicting international treaty (*lex posterior rule*).[84] Focus is thus given to the intention of the *pouvoir constituant* when enacting the constitutional provision.

In a famous ruling handed down on 12 October 2012, the Swiss Federal Tribunal elaborated on the problem of constitutional provisions conflicting with fundamental principles enshrined in the Constitution, on the one hand, and with international human rights, on the other hand. It affirmed two important principles: Firstly, the Constitution has to be read as a whole. This implies that a new constitutional provision cannot be applied and interpreted solely based on its wording and on the will expressed by the people who launched the initiative but needs to be reconciled as much as possible with fundamental rights and principles of the

rule of law enshrined in the Constitution.[85] Secondly, if there is an irreducible conflict between a new constitutional provision and the European Convention, precedence is to be given to the ECHR based on Art. 190 Cst.[86] The Federal Tribunal reached this conclusion after it had outlined the two main competing strands of scholarship on the relationship between constitutional provisions and international law. Its ruling sided with the views distinguishing between the *validity* and the *application* of a constitutional provision, at least as far as the ECHR, and probably also other international human rights norms, are concerned. This conclusion builds on a strand of case law initiated in 1999, according to which Acts of Parliament which conflict with international human rights norms need to be disapplied.[87] The extension of this ruling from federal Acts to constitutional provisions has been a bold move, which prompted, as mentioned, the so-called self-determination initiative.[88] It also increased the pressure on the judiciary, which is problematic in the Swiss system: by contrast with most other Supreme Court justices in other countries, the judges at the Swiss Federal Tribunal are not elected for a single term or for life but stand for re-election by Parliament every six years.[89] Judicial independence thus depends to a large extent on Parliament's self-restraint and willingness not to interfere with the judiciary. The last re-elections on 24 September 2014 showed, however, that this cannot be taken for granted. They resulted in a significantly worse result for the justices who had handed down the judgement of 12 October 2012.[90] Considering the relatively weak position of the judiciary in the Swiss constitutional system, it would be misguided to expect the Supreme Court to be able to uphold international law and the rule of law on its own, without the support of the other branches of government, and ultimately, the people.[91]

Enhancing Informed Decision-Making

Considering the strong premium placed on (direct) democracy in the Swiss constitutional system, a third group of proposals views the reinforcement of binding review mechanisms with scepticism, favouring proposals aimed at improving the quality of the democratic decision-making process. The suggestions made so far mainly purport to reduce voters' confusion and to enhance informed decision-making. One such proposal argues in favour of a stricter review practise with respect to the titles of popular initiatives. Indeed, the Federal Chancellery,[92] which carries out a formal review of popular initiatives before the beginning of the 18 months

deadline to collect signatures, already has the power to modify titles if they are misleading.[93] It has however used it only with great restraint, opening the way for catchy, imprecise and evocative titles that are often only vaguely related to the content. The initiative 'against mass immigration' and the one 'for self-determination' ('for Swiss law and against foreign judges') are examples in point. It is indeed difficult to think of anyone who would favour 'mass immigration' and oppose self-determination.

Another type of proposals consists in providing clear information on the international legal provisions that would be breached if the initiative came to be accepted. The Swiss Federal Council, for instance, made the suggestion that the forms used to collect the signatures should indicate a warning detailing the norms of international law that are incompatible with the proposed constitutional amendment.[94] This proposal has however met with wide scepticism.[95] Supporters of virtually unlimited direct democracy have decried it as limiting popular sovereignty, whilst political forces and scholars favouring a reinforcement of binding review mechanisms have rejected it as ineffective. Whilst the Swiss Federal Council's approach would have entailed a review of the compatibility of the initiative with international law by a public authority followed by a mandatory warning, a paper elaborated by the Swiss Think Tank Foraus places the main responsibility on the group who has launched the initiative.[96] It leaves it up to the initiators to include in the text a provision stating clearly which international norms are not respected. If they do so, the citizens would be called to vote on two questions: A first one asking them whether they approve the initiative; a second one asking them if they wish to terminate the international agreement(s) which are violated by the initiative. If only the first question receives a positive answer at the ballot, the new constitutional provision would be interpreted, implemented and applied consistently with international law. The same would apply if the initiators fail to list the provisions infringed by their proposal. If both questions are answered in the affirmative, popular will would trump international law, with the exception of rules forming part of *ius cogens*.

All these proposals offer the advantage of increasing transparency. Their drawback is that they are based on the assumption that legal arguments, related to the compatibility of the initiative with international law, have a decisive impact in the decision-making process. This is far from certain when initiatives touch upon unpopular groups and sensitive issues, such as sexual predators or other criminal offenders, or immigrants. Moreover, in certain cases, it may not be entirely beyond doubt whether an initiative is

compatible with international treaties or whether there is room for renegotiation. Confronting the voters simultaneously with the choice between supporting the initiative or terminating the agreement seems in these cases both premature and ill advised. When treaties of fundamental importance are concerned, it seems preferable to subject termination to the people in a separate vote, once the full implications of the initiative are known. This is the way Switzerland may be heading with respect to the Free Movement Agreement with the EU after years of stalemate and legal uncertainty caused by the new constitutional provision 'against mass immigration'.

Conclusion

Direct democracy is a cornerstone of Swiss national identity and prevalent on all three levels of the Swiss federal state. This paper has focused on one instrument of direct democracy—the popular initiative enabling 100,000 citizens to propose an amendment of the federal Constitution. The overall success rate has been around 10 % (22 out of 200) since 1891, when the popular initiative was introduced in the Swiss Constitution. Whilst the people and the cantons between 1891 and 2000 approved only 12 initiatives, almost the same number—10 initiatives—was accepted since the beginning of the new millennium. The increased acceptance rate of initiatives is significant both from the quantitative and the qualitative points of view. It has called into question the traditional assumption that radical proposals will be defeated through the political process. This is all the more significant as a considerable number of recently adopted initiatives have been difficult, or virtually impossible to implement, as they are incompatible with Switzerland's international law obligations (mainly under human rights treaties and the Agreement on Free Movement with the EU) and core principles of Swiss constitutionalism, such as the proportionality principle and the principle of non-discrimination. These initiatives tend to target unpopular groups, including criminal offenders (mainly perpetrators of sex crimes), immigrants and the Muslim community. Some of them raise the difficulty that their incompatibility with international law and human rights is intentional rather than accidental. They form part of a wider strategy aimed at discrediting international institutions (mainly the EU and the ECHR) in the name of an absolutist vision of popular sovereignty.

Nevertheless, support for direct democracy remains very strong within Switzerland, both in political and academic circles as well as within the general public. However, the difficulties caused by recent initiatives have

stirred lively discussions on how to reconcile direct democracy with international law and fundamental principles of the rule of law. This contribution has outlined the complexity of the problem and sketched the main solutions that are being discussed. Whilst each solution has its own particular advantages and drawbacks, all of them are intended to ensure that direct democracy Swiss style remains an integrative, innovative force enabling small groups to have their voices heard rather than a divisive tool used for electoral purposes to the detriment of minorities.

Notes

1. On the concept of direct democracy, see e.g. A. Auer, G. Malinverni & M. Hottelier, *Droit constitutionnel suisse,* vol. I, *L'Etat*, 3rd edition, Berne: Stämpfli 2013, p. 203ff.
2. For comprehensive legal studies on direct democracy in Switzerland, see A. Kley & Y. Hangartner, *Demokratische Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft*, Zurich: Schulthess 2000; E. Grisel & A. Neuenschwander, *Initiative et référendum – Traité de la démocratie semi-directe en droit suisse*. 3rd edition, Berne: Stämpfli 2004.
3. See the information available under https://www.ge.ch/votations/2014.asp (visited 18/07/2015; without an indication to the contrary, all references to webpages refer to this date).
4. See the popular initiatives '6 Weeks of Holidays for Everyone' rejected on 11 March 2012 (see FF [French abbreviation for 'Federal Gazette'] 2012 6149).
5. By way of example, a temporary increase of the VAT was accepted at the ballot on 27 September 2009 (see FF 2009 7889).
6. For more details on the Swiss popular initiative, see *infra* section. II.A.1.
7. The results of federal referenda can be accessed via the webpage of the Swiss Federal Office of Statistics (http://www.bfs.admin.ch), under the headings Bundesamt für Statistik > Themen > 17 – Politik > Abstimmungen, or via the webpage of the Swiss federal administration (www.admin.ch), under the headings > Themen > Politische Rechte.
8. Before the new millenium, a considerable number of xenophobic popular initiatives suggesting new constitutional provisions referring mainly to immigration, asylum and naturalisation policies were rejected by the people; see for instance the popular initiative 'against illegal immigration', rejected on 1 December 1996; the popular initiative 'for the limitation of immigration', rejected by the Swiss people on 4 December 1988, the popular initiative seeking 'to limit the number of naturalisations' and another 'to reduce the foreign population to 12.5 % in ten years', both rejected on

13 March 1977; the initiative 'against foreign incursion and over-population of Switzerland', rejected by the Swiss people on 20 October 1974; 'the anti-immigrant initiative', narrowly defeated on 7 June 1970. Three attempts to launch popular initiatives seeking to limit immigration failed to gather the required number of signatures: the popular initiative 'to limit immigration' in 1997; the popular initiative 'to limit immigration of foreigners and asylum seekers' in 1991; the popular initiative 'to limit access to Switzerland of asylum seekers' in 1988.

9. See *infra*, section 0.
10. See the statistics 'Angenommene und verworfene Abstimmungsvorlagen, nach Typ' accessible via http://www.bfs.admin.ch under the heading Bundesamt für Statistik > Themen > 17 – Politik > Abstimmungen > Indikatoren.
11. The average voter turnout per year in federal referenda has ranged between 32 % and 52 % between 1990 and 2014. See the statistics 'Stimmbeteiligung. Stimmberechtigte und Stimmbeteiligung seit 1990. Jahresdurchschnitte, accessible via http://www.bfs.admin.ch under the heading Bundesamt für Statistik > Themen > 17 – Politik > Abstimmungen > Indikatoren.
12. This section draws on M. Hertig Randall & E. McGregor, "Reconciling Direct Democracy and Fundamental Rights: the Case of the Swiss Minaret Initiative", *Tijdschrift voor Constitutioneel Recht* (2010), pp. 428–436.
13. Swiss Federal Constitution of 18th April 1999 (hereafter "Constitution" or "Cst."); an English version is accessible on https://www.admin.ch/opc/en/classified-compilation/19995395/index.html (visited 18 July 2015).
14. See the Swiss statistics on population size over the years, http://www.bfs.admin.ch/bfs/portal/fr/index/dienstleistungen/publikationen_statistik/statistische_jahrbuecher/stat__jahrbuch_der/jahrbuch-archiv.html, 29th June 2010.
15. Art. 141 and 142 para. 1 Cst.
16. Art. 140 para. 1 and 142 para. 2–4 Cst. Switzerland is composed of 26 cantons, 6 of which are referred to as 'semi-cantons', describing the fact that they result from partition. In mandatory referenda, 'semi-cantons' have half a cantonal vote, the other cantons one vote (Art. 142 para. 4 Cst.).
17. See art. 79 para. 3 and 19 para. 2 of the German Basic Law.
18. For an overview, see for instance Kley/Hangartner (note 2), p. 200ff.
19. The choice of political body is due to the high premium placed on democratic legitimacy in the Swiss political system. It is worth noting that similar reasons explain why all attempts to introduce judicial review of federal statutes (e.g. Acts of Parliament subject to the optional referendum) have failed so far. Fears of a politicised, omnipotent judiciary have trumped

concerns to provide for safeguards against violations of constitutional rights by the legislature, although courts already have the power to set aside federal statutes that infringe international human rights norms, according the so-called 'PKK-case law', inaugurated in ATF 125 II 417 (ATF = French abbreviation for Judgements of the Swiss Federal Tribunal, which can be accessed via http://www.bger.ch/).

20. FF 1996 I 1305.
21. Art. 139 para. 3 Cst. provides for two additional requirements popular initiatives have to meet so as to be valid: the requirements of consistency of form (according to which a popular initiative has to be either conceived as a general proposal or in the form of a specific draft, a mix of both forms being inadmissible), and the requirement of consistency of subject matter (according to which there must be an intrinsic connection between different parts of an initiative). Moreover, based on the practice of the Federal Assembly, an initiative can also be declared invalid if it is impossible to implement. All three grounds of invalidity have been construed narrowly. So far, two initiatives failed to meet the requirement of consistency of subject matter (the initiative 'against the increase of living costs and inflation', invalidated in 1977, and the initiative 'for lower military expenditure and for more peace policy', invalidated in 1995, and one initiative was deemed impossible to implement (the so-called 'Chevallier initiative', invalidated in 1955).
22. If the section of the initiative conflicting with peremptory norms of international law can be separated from the rest of the text, the initiative is not declared invalid as in whole but only in part. One initiative has been declared *partially* invalid on the grounds that it was incompatible with peremptory norms of international law in 2013, see below, footnote Error! Bookmark not defined.
23. See for more detail, FF 1997 I 369ff, and, for a more recent analysis, FF 2013 8493, 8501ff.
24. See the example of the 'deportation initiative', *infra*, section IV.A.
25. Quotation borrowed from U.S. Supreme Court, *Whitney v. California*, Brandeis, J., concurring, 274 U.S. 357 (376).
26. Ibid.
27. Although accepted in 1945, the constitutional provision on maternity leave was effectively only implemented in 2004, by a statute adopted in 2003 (see RO [French abbreviation for the Official Collection of Federal Law] 2005 1429) and approved in an optional referendum on 26 September 2004. In the meantime, new popular initiatives on the same subject and several implementing statutes had failed.
28. See for instance the so-called 'Rothenturm initiative' (initiative for the protection of moors), aimed at protecting moor landscapes and moor biotopes, accepted on 6 December 1987 (RO 1988 352).

29. See Art. 95, para. 3 Cst., initiated through the so-called 'Minder initiative' (initiative against abusive pay), adopted on 3 March 2013. So far, the initiative, which had been highly controversial, does not seem to have had a major effect on executive pay (see 'Minder-Initiative hat erst sanfte Folgen', Neue Zürcher Zeitung, 1 April 2015).
30. See mainly the billboards supporting the following initiatives (the content of which is outlined below, in section IV.):

the 'anti-minaret initiative': the most widely used billboard showed a map of Switzerland replete with minarets resembling missiles with a stern looking woman wearing a full body veil in the foreground.

the 'deportation initiative': one of the billboards used depicted foreigners as black sheep being kicked out by white sheep. Other billboards showed each a picture of a male, with one of the following slogans: "Ivan S., rapist, soon Swiss?"; "Faruk B., assassin, soon Swiss?"; "Izmir K., fraudster on social security benefits, soon Swiss?"

the 'initiative against mass immigration: one of he billboards used two big headings. The first followed the sentence "Those are the consequences of uncontrolled immigration:" and read: "Kosovars slash open Swiss". The second, placed underneath, read: "Stop uncontrolled immigration". A text in small print described an incident related to the killing of a Swiss citizen by two Kosovars. The illustration on the billboard showed a series of big black boots marching over Switzerland. This billboard gave rise to a lawsuit resulting in a sentence for incitement to racial hatred and discrimination under the Swiss Criminal Code (see SVP-Kader verletzten Rassismus-Strafnorm, Neue Züricher Zeitung, 30 April 2015). The judgment was rendered by a cantonal court and is subject to appeal before the Federal Tribunal.

31. The first popular initiative ever accepted in Switzerland concerned freedom of religion: In 1893, the Swiss people voted in favour of an absolute ban on slaughtering livestock without previously stunning the animal. This effectively prevented the slaughter of animals according to Jewish and Muslim rituals and was thus contrary to the freedom of religion and conscience (see the Federal Council's assessment in FF 1893 IV 403). As regards initiatives concerning asylum and immigration, see the list of initiatives under footnote 30.
32. See P. Tschannen, "Wem gehört die Verfassung? Neuer Streit um die Gewaltenteilung", *Zeitschrift des bernischen juristenvereins* (2007), pp. 793–806. Apart from the anti-minaret initiative, the following initiatives, described below, can be considered as directed against international (mainly European) law: the 'deportation initiative' (section IV.A.3); the 'implementation initiative' (section IV.C.a) the 'initiative against mass immigration' (section IV.B.) and the 'initiative on self-determination' (section IV.C.b).

33. To provide a balanced account, it is important to underscore that some initiatives directed against immigration of foreigners more generally have been defeated at the polls or failed to get the required number of signatures. See for instance the popular initiative for 'democratic naturalisations', was rejected by the Swiss people on 1 June 2008; the popular initiative 'against abuse of the right of asylum', rejected by the Swiss people on 24 November 2002; the popular initiative calling for a "regulation of immigration", rejected by the Swiss people on 24 September 2000; They will not be further discussed in the following section. One attempt to launch popular initiatives seeking to limit immigration failed to gather the support of 100.000 citizens: the popular initiative to 'limit immigration from non EU countries' in 2004.
34. For a more detailed overview, see S. Grodecki, "La démocratie directe en Suisse au XXIe siècle – une évolution nécessaire ? ", *Zeitschrift für Schweizerisches Recht* II (2012), 99–183, p. 110ff.
35. See Art. 123a Cst. The initiative was accepted by 19 cantons and 5 semi-cantons.
36. For the motivations see A. Chaaban, "Von der eigenen Betroffenheit zur Volksinitiative – der Weg der Verwahrungsinitiative", *LEGES* (2003), pp. 103–104.
37. The Swiss Federal Tribunal interprets incurability in a restrictive manner, narrowing the reach of the new constitutional provision and minimising in this way the potential for conflict with the ECHR (see ATF 140 IV 1, p. 5 ff).
38. The initiative provides for one exception: the justification of incarceration (which is based on the dangerous nature of the offender) can be reviewed if new scientific findings exist which prove that the offender can be cured. Based on Art. 5 para. 4 ECHR, periodic review of the lawfulness of detention implies that the court can assess whether the conditions justifying detention (i.e. the dangerous nature of the offender) still exist and ability to order the release of the detained person if this is not the case.
39. ECtHR (GC), n° 66069/09, 130/10 and 3896/10, 9 July 2013, *Vinters and others v. United Kingdom,* para. 107ff.
40. Art. 56 para. 4 bis; Art. 64 para. 1bis; Art. 64c of the Swiss Criminal Code of 21 December 1937, RS [French abbreviation for the Systematic Collection of Federal Law] 311.0.
41. The implementing provisions of the Swiss Criminal Code enable the interned person to seek review by a specialised panel, which would focus on the question whether new scientific evidence exists. If this is the case, treatment would be offered to the offender, who could, following his or her successful treatment ask the competent court to be released. So as to provide for period judicial review of the legality of detention, it was suggested to interpret 'new scientific evidence' broadly, as encompassing also

changes affecting the personality of the offender or outside circumstances (see A. Peters & I. Pagotto, Das Verhältnis von Völkerrecht und Landesrecht in der Schweiz, *ius.full: Forum für juristische Bildung* 3 (2004), pp. 54–65, p. 57).

42. See the assessment on www.humanrights.ch/home/de/Schweiz/Politik/Justiz/Freiheitsentzug/idart_5700-content.html, 19 November 2008 and 'Schlussspurt bei der Verwahrungsinitiative' Neue Zürcher Zeitung of 19 December 2007 (accessible on <www.humanrights.ch/home/upload/pdf/071219_NZZ_mrip_verwahrung.pdf>, 19 November 2008).
43. Art. 72 para. 3 Cst.
44. For the Swiss Federal Tribunal, see the decisions of 14 December 2009, n° 1C_527/2009, 1C_529/2009, and of 13 January 2010, n° 1C_451/2009; for the European Court, see ECtHR (Admissibility decisions), n° 66274/09, 28 June 2011, *Ligue de musulmans suisses v. Switzerland*, and n° 65840/09, 28 June 2011, *Ouardiri v. Switzerland*.
45. See Art. 121 para. 3–6 Cst.
46. Indeed, so as to make the initiative compatible with the principle of *non-refoulement*, the Federal Council held that a distinction needed to be drawn between the decision to expel a foreigner and the implementation of that decision. Based on this view, the authorities would need to decide to expel criminal offenders or people who have abused the social security system so as to comply with the initiative but would then have to suspend the implementation until the receiving country can be viewed as a safe state for the individual (see FF 2009 4571, 4576ff).
47. The Court carries out the proportionality analysis taking into account a series of criteria, see ECtHR (GC), n° 46410/99, 18 October 2006, *Üner v. the Netherlands*, para. 57.
48. Under the Swiss Constitution, the proportionality principle is listed as a fundamental principle of the rule of law (Art. 5 para. 2 Cst.) and as one of the four conditions in the general limitation clause of fundamental rights (Art. 36 para. 3 Cst.).
49. See 'Oui à l'initiative populaire pour le renvoi des étrangers criminels (initiative sur le renvoi)', p. 24, available at http://www.initiative-pour-le-renvoi.ch/fr/downloads/arg_ausschaffungsinitiative_lang_frz.pdf
50. See mainly ECtHR, n° 5056/10, 11 October 2011, *Emre v. Switzerland* (*n° 2*).
51. See e.g. the People's Party's paper presenting the arguments in favour of the so-called 'implementation initiative' (for this initiative, see *infra*, section IV.C.b), p. 18, available at http://www.durchsetzungsinitiative.ch/printable/assets/argumentarium-d.pdf.
52. See the report by a special working group set up by the government, published on 21 June 2011 (accessible via www.bj.admin.ch > Sicherheit > Ausschaffung), p. 34ff.

53. See *infra*, section A.I.A.4.a).
54. See the amendment to the Swiss Criminal Code adopted on 20 March 2015, FF 2015 2487.
55. See Art. 123c Cst.
56. The same association had previously launched an initiative providing for the imprescriptibility of acts of child pornography, accepted on 30 November 2008. The text resulted in Art. 123b Cst.
57. Opponents of the initiative frequently used the example of consenting sexual relations between adolescents, involving for instance a sixteen year old and a fifteen year old (the latter being underage according to Swis law). In such a scenario, a life-long ban to work with children would fail to meet the proportionality test.
58. See the information available on http://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2015/2015-05-130.html.
59. See *supra*, section II.A.2.
60. These bilateral treaties fall into two categories: (1) The Agreements known as 'Bilateral Agreements I' adopted in 1999. The seven agreements in question cover the following areas: public procurement, free movement of persons, technical barriers to trade, agriculture, transport, aviation and research. (2) The Agreements known as 'Bilateral Agreements II', were adopted in 2004. The nine agreements cover the following areas: Schengen-Dublin, taxation of savings, fighting against fraud, media, education, statistics, environment, pensions and processed agricultural products. The Bilateral Agreements I and II complement the Free Trade Agreement between Switzerland and the EC adopted in 1972.
61. Another initiative, called 'Ecopop (stop overpopulation)', which aimed at capping immigration in a more drastic way than the 'initiative against mass immigration' was rejected by the people and the cantons on 30 November 2014.
62. An English translation of the text of the initiative can be found on http://cjicl.org.uk/2014/02/26/swiss-accept-initiative-stop-mass-immigration-legal-implications-part/.
63. Art. 121a para. 3 Cst.
64. Art. 121a para. 4 Cst.
65. Art. Art. 197 para. 9 (1) Cst.
66. Art. 197 para. 9 (2) Cst.
67. See http://www.masseneinwanderung.ch/content/argumente/, p. 42.
68. See 'Der Bundesrat hat schon kapituliert', Basler Zeitung, 12 February 2015, p. 2, also published on the webpage of the Committee against gradual accession against the EU, see http://www.eu-no.ch/downloads/der-bundesrat-hat-schon-kapituliert_10.
69. See FF 2014 8839. According to the information published on the website of the committee which launched the initiative, the required number of sig-

natures was collected by August 2015. The Swiss people are thus likely to be called to the polls to reconsider the 'initiative against mass immigration'.

70. The German term is more accurately translated with "pushing through".
71. See *supra*, IV.A.
72. See the text published in FF 2012 6873. The initiative moreover contained a detailed and very conservative list of which norms form part of *ius cogens*. Following the Federal Council's assessment (see FF 2013 8493, p. 8506ff.), Parliament declared this clause of the initiative invalid on the grounds that the Swiss Constitution could not unilaterally define the content of *ius cogens* norms, which are determined by the international community as a whole (FF 2015 2487).
73. See *supra*, IV.B.
74. ATF 139 I 16, p. 30f.
75. The campaign material deals extensively with the ECtHR, see Extrablatt der Schweizerischen Volkspartei, March 2015, available at http://www.svp.ch/tasks/render/file/?fileID=6 A864520-26F3-449B-AC1D6F7DEE0139AF.
76. For an extensive study on the relationship of direct democracy and international law, see G. Lammers, La démocratie directe et le droit international. Prise en compte des obligations internationales de la Confédération et participation populaire à la politique extérieure, Berne: Stämpfli 2015.
77. For an overview of various options, see the report of the Federal Council on the relationship between international and domestic law of 5 March 2010, FF 2010 2067 and mainly its additional report of 30 March 2011, FF 2011 3401; Grodecki (note 34), p. 132ff; Volksinitiativen: Bausatz für eine Reform. Analyse und Bewertung der verschiedenen Vorschläge, foraus n° 7, April 2011, accessible via http://www.foraus.ch/#!/publikationen/c!/content-386. The following section is an updated version of Hertig Randall & McGregor (note 12), p. 432ff.
78. The Federal Council considered extending the grounds justifying the invalidation of initiatives to the essence of fundamental rights, a proposal that met with resistance and was withdrawn in 2014 (see FF 2014 2259).
79. Authors favourable to this solution are divided on the question as to whether the review of initiatives should be binding or non binding (e.g. of advisory nature) at this stage; for the first approach, see e.g. A. Griffel, Vom Umgang mit verfassungswidrigen Initiativen, *Neue Zürcher Zeitung*, 9 December 2009; for the second approach, which is considered a more realistic scenario than the former, see C. Schoch, Das Volk ist souverän, aber nicht ungebunden, *Neue Zürcher Zeitung*, 8 December 2009.
80. See FF 1997 490.
81. A. Auer & B. Tornay, Aux limites de la souveraineté du constituant: l'initiative « Pour des naturalisations démocratiques », *Aktuelle* Juristische Praxis (2007), pp. 740–747.

82. The initial wording of this provision, which was enacted in 1874, was narrower and only referred to "treaties approved by the Federal Assembly". In the light of the growing importance of international law, the immunity clause was extended to international law in general. Its rationale is thus no longer limited to democratic concerns but aims at protecting the reliability of Switzerland as an international actor as well as the principle of *pacta sunt servanda*.
83. T. Zimmermann, Quelles normes impératives du droit international comme limite à l'exercice du droit d'initiative par le peuple?, *Aktuelle Juristische Praxis* (2007), pp. 748–760, p. 756.
84. J. Künzli, Demokratische Partizipationsrechte bei neuen Formen der Begründung und bei der Auflösung völkerrechtlicher Verpflichtungen, *Zeitschrift für Schweizerisches Recht* I (2009), pp. 47–75.
85. ATF 139 I 16, p. 24f.
86. ATF 139 I 16, p. 29ff.
87. ATF 125 II 417, see *supra*, note 19.
88. *Supra*, section 4.C.b).
89. Art. 145 Cst.
90. See G. Steinmann, Denkwürdige Wiederwahl der Bundesrichterinnen und Bundesrichter, *Schweizerisches Zentralblatt für Staats– und Verwaltungsrecht* (2015), p. 1.
91. This was an important argument urging the Federal Assembly to implement the 'deportation initiative' as much as possible in conformity with the ECHR instead of leaving it up to the Federal Tribunal alone to safeguard human rights faced with a constitutional provision and an implementing statute incompatible with international human rights law.
92. The Federal Chancellery is the state office of the Federal Council and also responsible for the Government's communication, the publication of Federal Acts. Moreover, it plays an important role with regard to the organisation and coordination role of elections and votes.
93. See Art. 69 para. 2 of the Federal Act on Political Rights of 17 December 1976 RS 161.1.
94. See the report by the government published in FF 2011 3401.
95. The Government withdrew its proposal as a consequence, see its report of 19 February 2014, FF 2014 2259.
96. See 'Volksinitiativen und Völkerrecht. Eine Lösung, um Vertragsbrüche zu vermeiden', foraus n° 3, November 2014, accessible on http://www.foraus.ch/#!/publikationen/c!/content-185.

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Voting in the Western Balkans

Vojislav Pavlović

The Balkans was a synonym for a rather complex region composed of a number of smaller states. The wars in former Yugoslavia were the latest in a sadly long list of events, which confirmed the conflictual political culture of the region. In the aftermath of the final stage of partition of what used to be Tito's non-aligned and self-managed Yugoslavia, at the beginning of the twenty-first century, the region was once again united by a common objective: the will to join the European Union. The political agenda of the successor states of former Yugoslavia and of Albania was approved during the EU-Balkan summit, held at Salonika on 21 June 2003, when the EU heads of state reiterated their unequivocal support for the European perspective of the Western Balkan countries.[1] Since Greece was already a member of the EU and Rumania and Bulgaria were well on their way to joining the EU, the term referred to the countries of Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia (because of a long-lasting dispute with Greece, the official name of the country is still the Former Yugoslav Republic of Macedonia), Albania and Kosovo. The region's progress towards Europe, however, was a somewhat irregular affair. Croatia became a member of the EU in 2013; Serbia, Macedonia, Montenegro

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and Albania are candidate countries; Bosnia and Herzegovina is a potential candidate, while the territory of Kosovo has signed the Stabilization and Association Agreement (SAA) with the European Union in 2015, even though five EU countries did not recognize its independence.

The Western Balkan states thus accepted the obligation to implement the principles and legislative solutions of the *acquis communautaire,* namely the Copenhagen criteria that provide for the stability of institutions guaranteeing democracy, the rule of law, human rights along with respect for and protection of minorities.[2] The transition of the Western Balkans countries from the communist regimes of former Yugoslavia and of Albania towards European-style democracies, was, and still is, a long and tedious process undertaken with the help, but also under the scrutiny, of the EU.[3] The process started in the last decade of the twentieth century and gained its full momentum after the definitive organization of the region, that is, after the separation of Serbia and Montenegro in 2006, and the declaration of independence of Kosovo in 2008. One of the founding pillars of the democracy that the EU helped introduce to the Western Balkans was the election process. Even though the communist heritage was not always of the same nature in all the states of the Western Balkans, the problems had a common origin: a half-century of one-party dictatorship that destroyed democratic institutions which, in the region, weren't particularly stable or well established to start with. More importantly, beside the institutions, the communist dictatorship completely destroyed the nascent political culture and, consequently, several generations had to learn how to make the best use of their political rights in a multiparty political environment. Furthermore the communist nomenclature tended to invade the democratic institutions, doing what it could to preserve its power and privileges, changing its name from communist to socialist, and if need be, creating new political parties. The undisturbed continuity of the secret police in some of the countries presented another huge challenge for the organization of democratic institutions. On top of the common communist heritage, the countries of the Western Balkans shared other identical problems as they attempted to organize the election process in accordance with the EU criteria. The problems regarded four main issues: the legislative framework, the electoral process itself, the financing of campaigns and the use of the media during the election campaign. Such problems created the context for diverse election strategies that were followed by major political parties in the region. Those were the conditions in which the process that was supposed to assure the effective "everyday life" of the democratic institutions and the gradual improvement of the political culture continued.

The Legislative Framework

The main political issues of political life in the Western Balkans are settled in the parliamentary elections since all the countries in the region have adopted Parliamentary political systems. The constitutional position and prerogatives of the President vary from one country to another, though political power lies in the hands of the Prime Minister. Therefore, in studying the electoral process in the Western Balkans, our main focus will be on the parliamentary elections and on the presidential ones only when they happen to be of particular political significance.

The Western Balkan countries have all established a multiparty, parliamentary democracy with unicameral parliaments except Bosnia and Herzegovina, the latter being made up of the Federation of Bosnia and Herzegovina on the one hand and of the Republic of Srpska on the other hand. Both constituent parts of the country have their parliaments. The complex constitutional and national structure of the country imposed the necessity to establish a bicameral parliament of Bosnia and Herzegovina that consists of the House of Representatives and the House of Peoples. Members of both Houses are elected according to a proportional representation system. The multinational character of constituencies dictated particular election rules in order to preserve the principle of equal representation of the three constituent nations—Croats, Muslims and Serbs.[4] In the other Western Balkan countries, the members of the National Parliaments are elected according to the D'Hondt method of proportional representation. The regional differences consist in the importance of the threshold percentage of votes each list has to obtain in order to enter parliament.[5]

In Serbia, Parliament is composed of 250 members elected in one electoral unit by a proportional representation system with the threshold of 5 % of votes that does not apply to national minority lists. It is mandatory for the competing lists to be made up of at least 33 % of candidates of the less represented gender.[6] Montenegro's Parliament consists of 81 members that are elected in one nationwide constituency by a proportional representation system, with a threshold of 3 % that does not apply to national minority lists.[7] Macedonia has also adopted a proportional representation system according to which 120 members of Parliament are elected in six constituencies, along with three members that are elected using the majority system in the three geographic constituencies of the Macedonian diaspora.[8] Albania is divided into 12 constituencies that elect 140 members of Parliament using a system of proportional representation with a threshold

of 3 % for a single list and 5 % of votes in the case of a coalition list.[9] The territory of Kosovo, according to the terms of the Law on General Election of 2008, is considered as one constituency in which 100 members of parliament are elected by the system of proportional representation, while another 20 seats are reserved for national minority representatives.[10]

The Electoral Codes of the Western Balkan countries were drafted, adopted and subsequently revised in order to comply with the European role model as codified in the *acquis communautaire*. Nonetheless, the considerable efforts made to introduce the best European electoral experience and practice into the legislation of the Western Balkan countries proved to be the easiest part of the problem. The power brokers from the ranks of the political parties tended to implement the legislation in order to perpetuate governmental control over the electoral process. Such is the case in Montenegro where the Democratic Party of Socialists has been in office from the instauration of the multiparty democracy to the present day.[11] In other cases the political parties, while in opposition, were constantly criticizing the government's interference in the electoral process but, once in office, the reforms they had once promoted were implemented slowly, if not abandoned altogether. The notion of free political choice as a fundamental right for every citizen was only progressively introduced under the impetus provided by the OSCE observers of the electoral processes and by the necessity to comply with EU standards not only in legislation but, above all, in the process of its implementation.

The role of the political parties and their influence on the electoral process was the main stumbling block in the implementation of EU standards. Specific legislation was needed to define their position,[12] and especially to prevent them from blocking the electoral process.[13] The influence parties exerted on the electoral commissions, from the central one to the commission within each polling station, was considered the main source of irregularities and of possible abuse.[14] The neutrality of the electoral commission was the indispensable condition that was patently lacking in some elections, as was the case in the presidential elections of September 2000 in Serbia when the complacent electoral commission tried unsuccessfully to hide Slobodan Milošević's defeat.[15] The parties also tended to consider the mandates won on their list in the proportional system as theirs to distribute, regardless of the order of the names on the list. It was thus indispensable to legislate in order to establish that the order on the list cannot be changed after the election[16] and that the deputies are free to dispose of their mandate, that is, to change party allegiance.[17] The imperative to allow the independent candidates to represent themselves in the elections had to be codified by law.[18]

The influence of the government on the electoral process was the other source of irregularities. Undue pressure or undue influence on the public-sector employees had to be prevented by law.[19] It was of paramount importance to guarantee that no employee or citizen should fear for their employment or social benefits as a consequence of their decision to support or fail to support a given political option.[20] The issue of the conflict of interests between executive government positions and those of candidates pursuing political advantage had to be settled by the provisions of the Electoral Code.[21] Strict separation of government and political party activities had to be enforced and activities or programmes that blur the distinction between official and political sponsorship had to be restricted by law.[22]

The right to vote, in some cases, had to be assured by the special provision of the Electoral Code. The non-resident and temporary absent citizens were given special facilities in order that their votes could be counted.[23] The right to vote had to be assured irrespective of the length of stay of the citizen in the home country.[24] All Bosnia and Herzegovina citizens were guaranteed the right to stand for office on equal terms, a provision that was inspired by the complexity of the constitutional structure of the country.[25] National minority lists have seen their presence in Parliament guaranteed by the Electoral Codes.[26] The importance and representativeness of electoral districts were also a crucial issue in the electoral process since they had to respect, as much as possible, municipal borders. Their review was also envisaged in view of possible demographic changes.[27] The delineation of the electoral districts was supposed to ensure that the number of votes needed to elect members in parliaments is equal.[28] The legal framework, however detailed and comprehensive it may have been, could not resolve all possible issues that had to be settled during the electoral process.

The Electoral Process

The best guardian of the regularity of the electoral process turned out to be its simplification. The mixed first-past-the-post and proportional system in place in Albania in 2001 imposed four election rounds due to the accusations of electoral fraud. Albanian voters had two ballots. With the first one they were supposed to elect, notwithstanding any party allegiance, 100 members of the Parliament. With the other one they cast their vote for party lists that were supposed to fill another 40 seats in the Parliament. The second part of the electoral process was conducted according to the proportional representation system with its threshold of 2.5 % of votes.

The complexity of the election process gave the government ample opportunity to intervene in the proportional representation part of the elections favouring smaller allied parties in order for them to reach the threshold of 2.5 % of votes thus assuring a majority in Parliament for the government in office.[29] Besides the complexity of the election process, the tampering of the voter register was the other way for the government to influence the outcome of the elections. There were several cases of voters being turned away from the polling stations because their names were not in the voter register.[30] Thus, the accuracy of the voting register was of the utmost importance,[31] and its revision had to be jointly supervised by the government and the opposition.[32] In some cases a thorough audit of the voter register had to be carried out.[33] The solution was the establishment of the single, Republic-wide population electronic database from which a voter register could be extracted,[34] and access to the register was given to both the political parties and the citizens.[35] The identity of voters also generated problems since, in some cases, instead of personal identity cards a birth certificate was accepted as proof of their identity.[36]

The slow evolution of the political culture overall and the authoritarian tendencies of the government in office were responsible for more blatant cases of electoral abuse. Ballot-box stuffing was registered in the parliamentary election at the beginning of the period[37] and, unfortunately, other types of serious abuse, such as "vote-buying" persisted until recently.[38] Overall improvement of the electoral process did not prevent the perseverance of abuses in some constituencies, such as theft and destruction of election material, and election-related violence.[39] These kinds of irregularities had to be dealt with by corresponding legislation.[40] They dictated that strict rules be put in place regarding the organization of the polling stations. The premises, along with the shape and position of polling booths, were subject to specific guidelines issued by the Central election commission.[41] In some cases even the voters' education was considered necessary in order to assure the quality of the electoral process.[42] One of the objectives pursued in such educational campaigns was the need to assure the secrecy of the ballot as the ultimate tool that could counter intimidation or pressure.[43] Such campaigns focused mostly on voter registration, on explaining polling procedures and the protection of voting rights in general.[44] Though considerable, the efforts, both legislative and organizational, proved to be insufficient to curb the cases of political corruption that directly influenced the electoral process and its outcome.

Financing Electoral Campaigns

In the Western Balkans, the difficulty of curbing political corruption was a major obstacle for the regularity of election process. The financing of electoral campaigns is regulated by specific legislation or the legislation on the financing of the political parties. In the case of Serbia, the Law on Financing Political Activities of 2011 stipulates that 0.1 % of the Republic of Serbia's budgetary expenditure is allocated for the campaign costs and divided as follows: 20 % is allocated in equal amounts to those running for election while the remaining 80 % is allocated according to the number of seats won to the political parties.[45] In Albania, 70 % of the special state fund is divided among the parties in accordance with the number of their members of Parliament, another 20 % is divided equally between parliamentary parties while the remaining 10 % is allocated to the parties that took part in the parliamentary election and passed the threshold of 1 % of votes won.[46] Macedonia has particular provisions for financing elections. State funding of the election campaigns is prohibited, though political parties are awarded regular subsidies. Private funding is possible but not from foreign and public institutions, and after the end of the campaign all parties that have passed the threshold of 1.5 % of votes are remunerated with 15 Macedonian dinars for each vote.[47] Montenegro provided public funds for the electoral campaign that amount to 0.15 % of the state budget to be allocated as follows: 20 % to be divided among all lists taking part in the election, 80 % to be divided among the lists that have won seats in Parliament, in proportion to the number of the seats won. Another fund amounting to the 0.05 % of the state budget is allocated to the lists that obtained seats in the Parliament under the condition that they can demonstrate that they have obtained the same amount of funding from private sources.[48] Bosnia and Herzegovina, by the provisions of the law of 2012, stipulated that 0.2 % of the state budget would be allocated to the financing of political parties and divided in the following manner: 30 % shall be shared equally between all the parties and coalitions present in the Parliament, 60 % of the funds shall be distributed according to the number of the representative or delegate seats of each political party, and 10 % of the total amount shall be distributed to the parliamentary groups proportionally, according to the number of representative or delegate seats that have been won by an under-represented gender.[49]

The legislation had to be constantly amended and improved in accordance with OSCE recommendations and GRECO findings[50]; however, the problem regarding the audits of reports on campaign financing remains

largely unsolved. The donations, incomes, expenditures and loans are present in the reports but effective audits are still lacking.[51] Moreover, the issue of sanctions in the event of corruption still has not been solved since no political party was ever sanctioned for imprecisions and inaccuracies in, or for outright counterfeit of a report of, campaign finances.[52] Particular issues were registered in Serbia pertaining to loans contracted by political parties in order to finance their campaign and in Macedonia where the source of private donations was difficult to establish.[53] In the case of Serbia, the loans the Democratic Party took out during the 2012 parliamentary election campaign were guaranteed by the private assets of the party's functionaries. In October 2015, the former president of the Democratic Party, Dragan Djilas, who is also a successful businessman with considerable interests in the Serbian Media, reimbursed all remaining loans personally in order to prevent the seizure of his assets and the personal assets of his party colleagues that served as a collateral for the loans contracted during the election campaign of 2012.[54]

The Media

The results of the elections have been largely influenced by media coverage. Consequently, the impartiality of, and equal access to, the state-owned media are major issues as far as the electoral process is concerned. The amount of media coverage is obviously of great importance too. The respective presence of the parties in the media was directly proportional to their financial capacity and, as such, the object of much scrutiny and many audits after the end of the campaign. Fierce battles were fought, and more often than not lost at the beginning of the period, to assure the presence of the opposition in the state-owned media. In Serbia, during the Milošević presidency, it was virtually impossible for the opposition to get access to the state media. During the demonstrations of 5 October 2000 that caused his downfall, the protestors launched an assault on the state television, considering it to be Milošević's *Bastille*.[55] Thus, the recommendations of the OSCE underlined the need for public broadcasters to be independent so that they could provide the public with balanced coverage.[56] The main request was to clearly separate the messages and programmes financed by the parties from the information provided by the electronic and written media.[57] Special Media Monitoring Boards were created but, alas, the impartiality of its members was called into question.[58] Broadcasters were under the close scrutiny of the Broadcasting

Authority in order to prevent the breach of election campaign silence and the practice of charging different tariffs for equivalent broadcast times.[59] Special attention was paid to separating the activities of government officials in their line of duty on the one hand and their activities in the election campaign on the other hand.[60] The issue of media ownership also had to be addressed in order to prevent media monopolies and financial assistance by the state to the privately owned media.[61]

The election process has undoubtedly benefited from the incessant OSCE and EU scrutiny and the voting conditions have therefore improved considerably, to such an extent that in most cases very few problems remain. However, the elections are organized in the political context of the Western Balkans and that context is still far from stable. Subsequently, the electoral process suffers from a general political atmosphere still burdened with major problems. Among those problems, the following should be mentioned: relations between two constitutional entities in Bosnia and Herzegovina, the issue of the independence of Kosovo which Serbia considers a part of its national territory, the interethnic relations in Macedonia, the stringent battle between government and opposition in Montenegro, the relations of Albania with Kosovo and Albanian national minority in Macedonia, and so on. The consequences of the economic crises of 2008 and 2011 have provoked mass unemployment and aggravated already considerable budget deficits throughout the Western Balkans. Parliamentary elections—the major political event—have thus become two things: A source of hope for the majority of the population that still believe that a new government may deal with the crisis, and the means for the parties to perpetuate their hold on the countries' administration as their unique source of political and economic strength. Elections, even though they now comply with EU standards, are the object of a series of political and electoral strategies rather characteristic of the region.

Election Strategies

One of the most visible characteristics of the elections in the Balkans is their variety and irregularity. Early general elections were the expedient that was used by the parties in office in Macedonia (2008, 2011 and 2014) and Serbia (2008, 2012 and 2014). The change in the electoral agenda was seldom the consequence of a new and exceptional event. One such case however was the assassination of the Serbian Prime minister, Zoran Djindjić, in March 2003 that led to an early general election at the end of

2003. More often than not, the reason for early elections were strategic or even tactical as the parties wanted to make the most of the popularity of the party in office, fearing that such good fortune could erode if the election dates provided by the Constitution were respected. Therefore, political life often amounted to a kind of perpetual campaign, and this tended to disguise the economic and political issues that remained unsolved. Even though the EU standards were abided by, complying with the spirit and respecting the very essence of the electoral process were a different matter.

The VMRO-DPME (Internal Macedonian Revolutionary Organization—Democratic Party for Macedonian National Unity), the Macedonian party in office from the 2006 election onwards is preparing for the fourth early general elections in a row. Nikola Gruevski, the VMRO-DPME president and the Prime Minister of Macedonia since 2006, has won three elections in a row, as the head of changing coalitions, even though the major issues of Macedonia's political life still haven't been dealt with satisfactorily. The economic situation has even worsened and relations with the Albanian minority have soured.[62] In late May, a violent shootout with the police in the town of Kumanovo resulted in 18 ethnic Albanians and 8 police officers being killed.[63] The revelations that Gruevski's government were wiretapping the conversations of members of the opposition led to a major political crisis, which caused the opposition to leave parliament in July. In its annual report for 2015, The EU commission described the political situation in Macedonia as "the country's most severe political crisis since 2001 with intercepted communications, apparently involving senior government officials, suggesting breaches of fundamental rights, interference with judicial independence, media freedom and elections, as well as politicisation and corruption".[64] The mediation of Johannes Hahn, the EU neighbourhood commissioner, permitted a temporary solution and the return to Parliament of the opposition in October. Nevertheless, Hann was unable to broker a lasting political solution to the Macedonian crisis, leaving the elections as the only solution. Even though Hann warned that Macedonia's path towards EU was clearly jeopardized by the crisis, no agreement was found.[65] The focus of the crisis then turned to the clean-up of the electoral roll and reforms in the media in order to create a level playing field for the new elections.[66]

Another case of perpetual election campaigning can be found in Serbia where the SNS (Srpska napredna stranka—Serbian Progressive Party), a member of a coalition with the Socialist Party and the United Regions of Serbia, disposed, after the general election held in May 2012, of a 133 seat

majority.[67] Nevertheless, the SNS decided to opt for early general election in March 2014 and obtained a landslide victory with 158 seats out of 250 in the Serbian parliament.[68] The immense confidence the Serbian electorate had in the SNS did not prevent the latter from scheduling another early general election for the spring of 2016. This time the general election is to be held on the same day as local and regional elections. Some political analysts consider that the election strategy of the SNS is based on the conviction that the prestige of the party at the national level will boost its results in local and regional elections.[69] The opposition is insisting there were numerous cases of physical violence and intimidation in the elections held in the last three years, and therefore the conditions for free elections do not exist.[70] Elections, far from being a periodical verification of the political achievements of the government in office, or the lack thereof, have become a sort of weapon—and a very effective weapon—in the political confrontation.

Conclusion

Voting in the Balkans, more than a quarter-century after the fall of the Berlin wall, is generally speaking an orderly process that is organized in compliance with European standards. Yet abuses are still present, mainly because of the unstable political situation that prevails in the Balkans. This lack of political stability is due to residual nationalistic policies, the economic crisis, and the slow and difficult development of the political culture necessary for the citizens of the Western Balkan countries to fully exercise their right to vote and thus influence the outcome of the political battles in their respective countries. Even though most indispensable measures have been taken, both with relation to legislation and the electoral process, the voters of the Western Balkans are still largely inclined to vote under the influence of the government or, as they cast their votes, to follow the logic of national cohesion.

Such a tendency to follow the logic of national cohesion is mostly present in the countries where the national issue is still of outmost importance such as Bosnia and Hercegovina and Kosovo. Voting in the former is organized in its two constitutional parts as two electoral units. In both constituencies, the parties with a clear national character have obtained large majorities. In the Federation of Bosnia and Herzegovina, the SDA, which represents Muslim voters, obtained a relative majority with 27.87 % of the votes in the elections of 2014 for the House of Representatives while the coalition of Croat parties obtained 12.15 % of votes cast. In

Republika srpska, the combined percentage of votes obtained by the two major Serbian parties amounts to 71.15 % of votes.[71] The Kosovo General Election of 2014 brought about an overwhelming victory for the Albanian parties with 79.1 % of votes, while the Serbian list obtained 5.15 % and the Turkish one 1.02 % of votes cast.[72] In both countries the issue of the General Elections demonstrated the deep divisions within the electorate and society as a whole. Recent events reveal the importance of these divisions. The decision to hold a referendum on the authority of the Court and of the Prosecutor of Bosnia and Herzegovina in Republika srpska emphasizes the crucial importance of the national issue in both countries, as does the violent demonstration of the Kosovo opposition in order to prevent the ratification of the agreement between Brussels and Serbia that created a loose association of municipalities with a Serbian majority in the North.[73]

The longevity of the governments in the Western Balkans, as demonstrated by the case of Montenegro and FYROM, or by that of Serbia where different elements of the Democratic party were in office from 2000 to 2012, or indeed by that of Bosnia and Herzegovina, where Muslim, Croat and Serbian parties shared the power from the Dayton agreements of 1995 onwards, proves the tendency of the voters to follow the lead of the government in office. One of the main explanations is to be found in the economy, since the state remains the main provider of secure and durable employment. The government in office and the party or parties that form it thus have the means to reward their supporters and their electoral base with public employment, often the only possible solution given that the rate of unemployment in 2012 ranged from 13.2 % in Albania to 30.6 % in Macedonia.[74] The figures for youth unemployment are even higher. The number of public servants thus continues to grow and with it the influence of the parties that form the government. The economy cannot but suffer from the huge burden of an unproductive mass of "public employees recruited for political reasons",[75] until the situation deteriorates to the point where change becomes inevitable.

Because of the combined effects of the unfinished economic transition and the world economic crisis that followed the subprime scandal on the one hand and endemic national tensions coupled with the authoritarian tendencies of the governments in office on the other hand, the elections in the Western Balkans have been given excessive importance in the political life of the region. In some cases it seems that the elections are the only significant moment in the parliamentary process since, as Parliament carries out its everyday duties, the opposition has precious few opportunities to exert any influence whatsoever on government decisions.

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Elections to the European Parliament

Jean Rossetto

A unique phenomenon in the sphere of international organizations, the European Union includes within its institutions a parliamentary assembly with extensive powers implemented through direct universal suffrage every five years. As a result, this situation provides the European Parliament with an undeniable democratic legitimacy which, in the event, is possessed by no other institution in the European Union. The treaty on the European Union now in force is perfectly clear on this point since its Article 14 indicates that *the European Parliament is composed of the representatives of the citizens of the Union*, and now no longer solely *the people of the States* as the European treaties stated up until then. This is a clear indication of the considerable political and legal weight represented by this popular legitimacy emanating from European citizens, beyond their citizenship of this or that Member State of the Union.

The choice of direct universal suffrage logically implies a whole series of consequences from the institutional point of view. Since the introduction of this method of designating Members of the European Parliament (MEPs), the cogency of the Parliament is, in effect, remarkable in several respects within the institutional mechanisms of the European Union. Through the

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modifications which occurred in the drawing up of the European treaties, this evolution is manifest both in legislative initiatives (most of the texts adopted in this domain by the Union today require the assent of the Parliament) and with regard to the budget (under certain majority requirements, the Parliament can from now on take the final decision in its vote on the Union's annual budget). Moreover, the President of the European Commission has been officially chosen according to the results of the European elections since the Treaty of Lisbon (2009), whereas the nomination has to be confirmed[1] by the Parliament through a majority vote of its members; the other members of the Commission also require their nomination to be approved by the European Parliament. The latter is, in addition, able to oppose external agreements (equivalent to international treaties concluded by States) through which the Union makes undertakings in respect of its partners, principally concerning international economic relations.

The examination of these major prerogatives indicate that great steps forward have been taken since the setting up in 1957 of the European Economic Community, which later became the European Union. The parliamentary assembly that it possessed, then named the *Assembly of the European Communities* (which proclaimed itself as early as 1962 as the *European Parliament*), looked somewhat like a poor relation in European institutions because it only played an exclusively consultative role. It must be said that the initial method of designation was hardly likely to give it any real powers; the Strasbourg Assembly[2] was in fact composed of delegations designated by the national parliaments of Member States. The treaty setting up the European Economic Community (Article 138) had, however, foreseen that this method of designation by indirect universal suffrage would eventually be abandoned; this was the case thanks to a decision made in 1976 as a result of an initiative initiated by the French President, Valéry Giscard d'Estaing. The first election of the European Parliament thus took place in 1979 and the most recent one took place in 2014—the eighth since the decision to implement direct universal suffrage for the election of its members.

Based on these general observations, it is appropriate to examine in more detail the organization of the election, then to point out the influence of national considerations during its organization and finally to present the current political configuration of the European Parliament.

Electoral Arrangements

In the texts as they stand today (Article 14 of the European Union Treaty), the number of members of the European Parliament, *is limited to 750, plus the President*. This figure has varied a good deal over time as the Union set about successive enlargements with the addition of new Member States. Thus the European Assembly was composed of 142 members in 1957 (Europe of the Six), 198 in 1973 (Europe of the Nine), increasing to 410 in 1979 for the first election by direct universal suffrage; it had as many as 766 members in 2007 at the time of the accession of Bulgaria and Romania. Despite criticisms sometimes made of the assembly being finally too numerous, the number fixed today hardly seems unreasonable in a Europe of 28 members. It is simply worth noting in passing that the increase in the number of Member States has had the effect of reducing the influence of a major country such as France; with 19.7 % of the members in 1979 the country had only 9.8 % in 2014.

Be that as it may, the system provided for by Article 14 previously mentioned is based on what the treaty terms *proportional digressivity*. This concept signifies that the number of MEPs elected in each Member State is proportional to its population. Thus Germany elects 96 members (the maximum imposed by the treaty and which concerns Germany alone), France and the UK 74, Italy 73, Spain 54, Poland 51 and so on, down to the threshold of 6 members for Estonia, Luxemburg, Cyprus and Malta. This arrangement implies the major drawback of leading to an unequal representation of Europe's citizens; indeed, it produces a situation in which a German MEP represents 858,729 inhabitants, a French MEP 849,811 whereas an MEP from Luxemburg represents 76,667 inhabitants and an MEP from Malta merely 67,333. Under these conditions it is understandable that the German Constitutional Court mentioned, in a judgement passed on 30 June 2009, what it saw as a *structural democratic deficit* affecting the European Union.

As far as the organization of the election is concerned, it is governed both by the provisions laid down by the European Union and the regulations adopted by the Member States.

Regarding the former, it is first of all to be noted that the Council of the European Union has never succeeded in finding common ground for a uniform method of election for MEPs. Given this failure to set up a uniform procedure, it was decided to abide by the *common principles* appearing in a decision of 25 June and 23 September 2002. These were the following:

the election must take place by proportional representation, being specified that the threshold for obtaining a member's election should not be more than 5 % of the number of voters; States have the freedom to define electoral constituencies as long as they do not affect the proportional nature of the election; finally, it is laid down that membership of the European Parliament is incompatible with membership of a national parliament.

Despite the existence of these *common principles*, the electoral panorama displayed by the European Union does fail to reflect any real homogeneity. This is due to the fact that the arrangements made at their own level by Member States for organizing the election are quite diversified. As a result, it has proved impossible to fully respect the principle of simultaneity which would have required that elections be held in all the member countries on the same day: the Union has had to make do with simultaneity of the "election week" in order to take into account national specificities. As a consequence, elections are held from a Thursday to a Sunday during the same week, the British and Dutch being the first to vote, then the Irish and the Czechs who vote on a Friday, knowing too that 20 States out of 28 organize elections on a Sunday and that in some cases elections take place over two days. This has unfortunately had the effect of lessening the interest of voters despite the fact that vote counting takes place at the same moment and the results are published at the same moment, that is, on a Sunday evening at 10 PM.

One must also take into account that Member States have different competencies for elections, which also contribute to diverse methods of election.

This is demonstrated by seeing whether or not they are able to draw up electoral boundaries; the election thus becomes purely national in the second case, which is the situation of the majority, only Belgium, France, Ireland, Poland and the UK having opted for electoral constituencies. It should also be pointed out that proportional representation may be adapted in tolerably different ways from one Member State to another. While some States use proportional representation with blocked lists, that is, without any means for the voter to change the proposed lists in any way (Germany, Spain, Estonia, France, Hungary, Romania, Slovakia), others accept a preferential vote allowing the voter to alter the order on the list (Austria, Bulgaria, Cyprus, Denmark, Finland, Italy, Latvia, the Netherlands, Poland, Slovenia, Sweden, the Czech Republic), whereas yet others (Ireland, Malta) have introduced a sole transferable vote whereby the voter chooses his preferred candidate and, moreover,

provides a personal order of preference for all the candidates on the list to which they belong. Added to this, the fact that the methods of calculation for the distribution of seats are different from one State to another makes it easy to understand why European elections are scarcely uniform.

Moreover, it must be borne in mind that States are able to lay down a large number of national rules pertaining to the organization of the election. It is up to them to lay down the conditions of eligibility and in particular the electoral age, generally fixed at 18—except in Austria (16)—, the settlement of electoral disputes and, possibly, a cap on electoral costs. In short, a multitude of arrangements accentuating the diversity of these European elections from one country to another, leading to what has been called a *patchwork of voting systems* (M. Abeles, "La vie quotidienne au Parlement européen", Hachette 1992).

It must however be stated that the electoral body called upon to elect Members of the European Parliament in each Member State is not solely made up of nationals of the State in question. Indeed, under section 22 of the treaty on the functioning of the European Union, *any citizen of the Union residing in a Member State of which that person is not a national has a right to vote and stand for elections to the European Parliament in the Member State in which that person resides under the same conditions as nationals of that State.* This provision, rarely put into practice in actual fact, demonstrates the desire to ensure a European dimension for elections to the Strasbourg Parliament.

It remains for us to raise the very delicate political issue of the turnout in polls. On this point, the situation is paradoxical in that the more the powers of the European Parliament have been reinforced by successive European treaties, the more the election turnout has diminished from one election to another, to a point where it has no longer gone above the 50 % mark in recent years. The figures are most eloquent in this respect. The turnout was around 62 % in 1979, 59 % in 1984, 58.5 % in 1989, 56.7 % in 1994, 49.5 % in 1999, 45.5 % in 2004, 42.9 % in 2009 and finally 43 % in 2014, which constitutes a slight upsurge and a surprising one considering the Eurosceptic climate prevailing in Europe at the present time. Moreover, it must be observed that this disaffection affects Member States to different degrees. On the basis of the last election in 2014 it appears that although the turnout sometimes remained high (in particular in Belgium or in Luxemburg where voting, it is true, is compulsory and where national legislative elections were organized on the same day), it remained very low amongst new members that joined the Union

in 2004. Only 13 % of Slovaks went to vote, 19.5 % of Czechs, 21 % of Slovenes, 22.7 % of Poles and 25 % of Croats (even though the latter became citizens of the EU in 2013!). To conclude from this that disillusion with Europe has been practically immediate in Western Europe is a temptation that is only one step away.

It is important to look more closely at the causes of voters' generalized lack of interest. It is evident that there are multiple reasons which help us to clarify the situation. To begin with, we must consider the use of proportional representation, especially when this is accompanied by a system of blocked lists. This electoral method, in addition to the absence of small electoral constituencies bringing the voter closer to the elected representative, places a greater distance between the MEP and the voter. In other words, European citizens are placed in the position of purely and simply not knowing who their MEP is. They are therefore not encouraged to go out and vote and, quite naturally, tend to abstain. Secondly, the low election turnout also stems from the fact that voters generally have very little knowledge of the way European institutions work; they are unaware of the powers of the Parliament and its influence in its relations with the other institutions of the Union, not to mention the fact that they are barely informed of its achievements and about its role in the future. If one adds to that that the majority/opposition cleavage is really very hazy in the European Parliament (excluding any opportunity for a protest vote leading to a political changeover), it is easy to deduce that voters have extreme difficulty in measuring the stakes in the elections in which they are called upon to vote. All in all, they fail to see the point of voting, whereas national elections in their own State seem infinitely more crucial. To put it another way, more academically, there is no European political arena capable of mobilizing voters, as is normally the case within state elections. It all happens as if European elections were of no importance as such. This state of affairs favours the relevance of national considerations in voters' minds. Failing to understand the objectives for Europe in European elections, they cast their votes on the basis of national political considerations.

The Weight of National Considerations

The theme of a symposium organized by Paris III University and the French Association of Political Science after the second European elections (1984) was: "The European elections of June 1984: a European election or ten national elections?" Thirty years later and looking at the

way successive elections right up to 2014 took place there is no doubt that the elections, as much as they are officially European, remain essentially so many national elections. We already know some of the reasons bound up with the arrangements made at their own level by the Member States in order to ensure their organization. But the importance of the national parameter depends upon many other more political considerations that we now need to specify.

It should be noted first of all that, most of the time, European elections take place in the various countries in periods of prosperity during national, presidential or parliamentary political mandates. The result is that, essentially, these elections provide an opportunity to measure the political credit of the national governments in place at the time. For the parties in power, it is all about ensuring that their voters' trust is maintained; for the opposition the situation is the reverse and the election is a chance to prove that the power in place is in reality disavowed by the electorate; as for parties on the extreme right, as well as the extreme left, the proportional vote gives them an opportunity to draw attention to themselves and succeed in getting members elected, which they could not necessarily hope for in national elections. As can be seen, European elections are thus completely diverted from their initial object, that is, legitimizing and orientating the action of the European Parliament, becoming instead a perfect opportunity to provide a full picture of the respective strengths of political forces in a given European Member State. This full-scale test, to which all, or almost all, national political classes adhere, has the effect of very broadly "nationalizing" European elections.

Thus European elections are only rarely an opportunity to open up a proper debate on the real European issues at stake in elections to the European Parliament, which, moreover, is not particularly easy in view of the technicalities of the issues raised. The 2014 European elections, however, evidenced a slight progress in this field. Unfortunately late in the evening, some of the media carried debates between the main candidates for the post of President of the European Commission. Despite that, real discussion is well and truly nationalized and concerns principally the comparative merits of the parties in power and the opposition parties in a given country. The voter is naturally drawn into the game, wanting to send a message of support or warning to the team in place without this leading to too many immediate consequences in the national political life. The voter is all the more inclined to do so as the national political arena is more familiar; the complexities are known, whereas European perspectives

seem particularly difficult to apprehend as we saw earlier on; moreover, the competing political parties seldom take the time to enlighten the electorate on those perspectives.

In this way, we come full circle, "encasing" European elections within the national political debate. As observed by P. Moreau-Defarges in "Les Institutions européennes" (*European Institutions*) 1999, "*the action of political parties is such that these elections get bogged down in national political discussions, Europe is seen as a tedious topic and the elections tend to be only an opportunity to evaluate the political balance of power between two national elections*".

In this context, France is a case in point. Far from being concerned by the competence of the candidates they propose for European issues, the main political parties have an unfortunate tendency to call upon important figures needing to be given a new seat for political reasons. This means that the manoeuvre consists in offering a consolation prize to candidates whose only claim to merit is to have been beaten by universal suffrage in national elections. This process is totally objectionable, not only because it amounts to sending to Strasbourg people for whom Europe is not a major preoccupation, but also because it confirms voters' idea that European matters have veritably only a national dimension. In addition, being anxious to regain a foothold as quickly as possible in national politics, this kind of candidate ends up being an absentee in the European Parliament, usually in order to exercise other mandates which the person has held on to. In this way plurality of offices affects 40 % of French elected politicians and only 4 % where the British are concerned!

What are the remedies for such a situation?

An approach has been envisaged to foster European political awareness by having a number of MEPs (25 on an experimental basis) elected on transnational lists made up of candidates from several countries, that is, a third of Member States; under this hypothesis the constituency would be unique, that is, a constituency for European elections only. This kind of project has never been achieved even though the question was referred to the European Parliament in 2011.

Another way of going about it, even if ambitious and only useful in the long term, implies opting for an educational approach to building Europe. The objective in this case would be to ensure European citizens are properly informed about European realities, the political choices to be put into action at the level of the European Union, the workings of its institutions, and so on, in other words, to contribute to setting up a European public

forum in which European citizens would be able to make choices in an informed manner during elections to the European Parliament. An effort of this kind would suppose that national governments and all the national political forces take active steps to explain matters clearly to voters whenever it proved necessary. One can readily admit that, in a climate marked by a strong increase in Euroscepticism throughout the various Member States, this would be a singularly hazardous undertaking. Nonetheless it is undoubtedly the only approach likely to reverse the tendency to systematically "nationalize" European elections.

The Present Political Composition of the European Parliament

Before examining in detail the political composition of the European Parliament resulting from the elections of 22 to 25 May 2014, it is worth outlining the main trends demonstrated by these elections after which the Strasbourg Parliament still only includes one third of women.

The first tendency is unquestionably the impression of stability shown by the new Assembly compared to the 2009 elections. The extreme right wing, where significant progress was expected against a background of populist attacks on and controversies about the European Union, obtained a score equivalent to that of previous elections, that is, 6.6 % of the votes even if this figure conceals substantial disparities between countries; we will return to this at the end of this chapter. Right-wing parties in office occurring in two thirds of Member States admittedly dropped by 6.7 % compared to 2009 but remain the main political force within the Parliament. Once again the traditional right carried off the battle of credibility. For a large number of voters, the right did indeed seem better placed to tackle the economic and financial crisis as well as all the kinds of turbulence which today affect European societies. Quite logically, and despite serious British reticence, its candidate for the presidency of the Commission, Jean-Claude Juncker, the former Prime Minister of Luxemburg and former President of the Eurogroup, was invested by the Assembly on 15 July 2014.

Left-wing parties in office lost only 2.7 %, totalizing 30.1 % of the votes. It was, however, their lowest score since European elections began whereas their ambition had always been proclaimed to become the prime political force in the European Parliament thus allowing Martin Schulz, a German, President of the European Parliament from 2012 to 2014

(and reinstated in the position in 2014 after the 2014 elections), to head the European Commission. This fresh erosion involving the left wing quite clearly reflects the difficulties which the forces on the left encounter to gain and remain in power on the national front.

Viewed from another angle, these figures ultimately reveal a more global tendency towards a decline of governing parties in favour of small parties or even parliamentarians showing no partisan loyalty. Once again, this evolution is to be set alongside a comparable phenomenon inside Member States (cf. P. Martin, "le déclin des partis de gouvernement en Europe" (*The Decline of Governing Parties in Europe*), Revue *Commentaire* 2013).

If we now come to a more detailed examination of political forces represented within the European Parliament, it is important to look closely at the different political groups that sit in the Assembly. These groups are, indeed, of capital importance for the organization of the political forces involved and the running of the European Parliament. Above all, it must be noted that the constitution of a political group is subject to a number of constraints that the French *Front National*, which we will come to later, had difficulty overcoming in 2014 and 2015. The rule is that a Member of the European Parliament can only belong to a single group and that a group must consist of a minimum of 25 Members from at least a quarter of Member States (that is 7 at present); this provision means that the constitution of groups does not depend on a national criterion but rather on considerations bound up with political affinities. In other words, political groups constitute plurinational formations representing common interests.

The formation of a political group provides several advantages which need to be underlined here. It allows its members to take part in the drafting of the Parliament's agenda, to sit on parliamentary commissions—and even to chair them—to be designated as rapporteurs of texts under discussion, to have a say on all texts examined in public sessions, to submit questions, and so on. These opportunities obviously contribute to providing political groups with the means of expression essential to their parliamentary activity. Added to that, each political group benefits from several million Euros *per annum* included in the European Parliament budget, together with a secretariat and parliamentary assistants placed at their disposal.

At the end of 2015, eight political groups sat in the European Parliament. Each will be examined in succession in order to delineate their different political orientations.

Honour where honour is due, we shall begin with the European People's Party (PPE) because it was set up a long time ago (1976) and has constituted since 1999 the largest political group in the European Parliament. In favour of "a social market economy" combining freedom of enterprise and social justice, the PPE groups together a large number of pro-European parties classified on the right in Member States. In the 2014 elections it highlighted its ability "as the party of responsible government" and its ability to preserve the Eurozone and stimulate economic recovery. It headed the list in half the Member States (14) and occupies the top position among the European Parliament's parties with 217 seats. Then comes the Alliance of Democrats and Liberals for Europe (ADLE), also on the right, which groups together about 60 parties in different countries of the Union. More open on questions of society than the PPE, it declares itself to be more federalist and liberal. With its 70 Members, it occupies the fourth rank of parties in the Assembly. Third and last component of mainstream right-wing government, the European Conservatives and Reformists (CRE) appeared in 2009 at a time when the British Conservative Party decided to leave the PPE. Liberal with regard to the economy and conservative in questions of society, the group is strongly attached to the preservation of national sovereignties and claims steadfast transatlantic bonds (particularly as part of NATO). It brings together about 15 parties representing the conservative right wing in Europe and holds 74 seats, 20 more than in 2009 despite the electoral disappointments for the British Conservative Party, beaten by the party for the independence of the UK (UKIP) in 2014. It is the third largest party in the European Parliament.

Let us now turn to the left-wing social democrats; they are embodied by the Progressive Alliance of Socialists and Democrats (S&D) group in the European Parliament, which includes most left-wing governing parties in Europe. Its chief characteristic is its commitment to European integration and to a political and social Europe, without necessarily differentiating itself from the political creeds of right-wing government parties. It was for many years the main party in the European Parliament (from 1979 to 1994) but the group only has 190 Members today. That is a quarter of the number of seats whereas it held over one third 25 years ago. Nonetheless it now occupies the second position among European groups.

This party, however, is in competition on its left with the confederal European United Left/Nordic Green Left group (GUE/NGL), which represents the radical left-wing opposition to the present orientations of European construction. Indeed, this group advocates the conclusion of

new treaties to guarantee, amongst other things, the primacy of social rights and rigorous regulation of economic life. It has 52 members resulting from a sharp increase in seats in 2014 (17 more compared to 2009). This result has enabled it to gain the fifth position amongst the groups represented and, thus, to take the lead (by two seats) over the Greens/European Free Alliance group (Verts/ALE). The latter was particularly successful in 2009 as Europe Ecology, but this time is slightly down (50 seats instead of 55) and ranks sixth among the parties represented. This stagnation is partly due to its poor results in France and Germany. Politically, the group attempts to reconcile its democratic decentralizing ideals with the workings of the European institutions.

There remains the somewhat confused situation of the extreme right wing, due to its widespread political divisions which prevent it from possessing any organizational unity throughout the European continent. To risk a caricature, two major tendencies have emerged. On the one hand one which groups together the most radical antidemocratic and inegalitarian—and often racist—organizations (Jobbik in Hungary, Golden Dawn in Greece for example); on the other hand rather more populist parties outwardly recognizing democracy and being dedicated defenders of the State-nation (the French *Front National*, the Italian Northern League for example). In any case, the extreme right wing has always been represented in the European Parliament since 1979.

Following the elections in 2014, two political groups came together under the banner of the extreme right. The first one, profoundly Europhobic, the Europe of Freedom and Democracy group (EFDD), has 45 Members, largely from the British UKIP party set up in 2014 under the leadership of Nigel Farage. The second one, with 39 Members, took the name of Europe of Nations and Liberties group (ENL) and was only set up in June 2015. Its French figurehead, Marine Le Pen, leader of the *Front National* having succeeded in getting 25 Members elected to the European Parliament[3] had to manoeuvre for over a year in order to make up the group concerned. Indeed, it imperatively had to unite Members from six other Member States and this objective was only attained in mid-2015 by approaching the Dutch PVV, the Austrian FPÖ, the Flemish Vlams Belang, the Italian Northern League, two Polish Members and one British lady MEP excluded from UKIP. Now the European Parliament only has 14 non-attached Members not belonging to any political group and who are thus lacking any means of playing a real part in European political life in Strasbourg.

Notes

1. This is referred to as "investiture proceedings".
2. The Parliament has its official home in the city where it gathers for plenary sessions approximately one week per month).
3. That makes it the main extreme right-wing organization in Strasbourg.

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