Abstract: This paper argues that the European ‘democratic deficit’ cannot be solved simply by granting the European Parliament (EP) more powers. Instead it submits that the EP can only enhance the EU’s democratic legitimacy if it is viewed and organised as a confederal parliament. To this end, the paper first develops a ‘core’ concept of popular sovereignty and analyses the position a democratic parliament should have. Next, it develops the idea of a confederal parliament and elaborates on the question why confederal majority decision can be thought of as legitimate for all peoples involved. Lastly, the paper analyses the EP’s electoral system and its ‘degressively proportional’ representation to be confederal in nature. Representing not one, but several peoples, an ‘alarm-bell’ procedure, possibly along the lines of the Ioannina Compromise should be introduced in the EP to safeguard the overall legitimacy of its decisions. To conclude, the paper argues that expansion of the legislative competences of the Parliament only leads to more European democratic legitimation if such a procedure is implemented first.

1. Introduction

One of the classical debates about the European Union (EU) is undoubtedly the debate over its ‘democratic deficit’. Two of the four ways the Lisbon Treaty has tried to lessen this deficit include granting the European Parliament (EP) more legislative powers and enhancing its position when it comes to appointing the Commission. In the 2014 elections it was even claimed that “[t]his time it’s different” because the voters could “[c]hoose who’s in charge.” These changes assume that granting the EP more powers lessens the democratic deficit. However, the answer to the question why and how the Parliament helps legitimise the EU has become more complicated than before, as the text of the EU Treaties is more ambiguous than before. This paper challenges the notion that granting more power to the EP helps reduce the deficit per se as being too simplistic. In order to do that it will analyse the input of the Parliament (what it represents) rather than its output (its competences). If there exists no European demos, but there is a European Parliament, two questions that obviously need to be answered is in whose name the EP legitimises...
the EU and why its decisions can be thought of as democratic. This paper tries to answer these questions.\(^4\)

The paper attempts to show that a classical understanding of popular sovereignty, in the much-criticised ‘tradition’ of the Bundesverfassungsgericht, contrary to what many authors claim, is capable of explaining the constitutional position of the EP, at least to a large extent. This contribution argues that popular sovereignty is not outdated, and neither is the dichotomy between federal states and confederal unions. Instead it submits that the EU is confederal in nature, and that the European Parliament should be understood as a confederal parliament. It is not the European Union that is fundamentally sui generis or new, it is its parlament that is sui generis or new.\(^5\) This paper acknowledges that the EU may be a novel confederation in that it primarily seems to be economically inspired or aimed and that it may focus much more on the harmonisation of legislation than ‘classical confederations’ such as the Dutch Republic.\(^6\) But it submits that it is not so much its nature that is novel, but rather the nature of its parliament, combined with the intensity of its cooperation.

The paper starts out by briefly analysing the representative position the European Parliament has according to the Treaties (section 2). In doing so, it shows how contradictory the Treaties provisions are, making it very hard to get a proper understanding of the position of the EP, if that understanding were to be based on the text of the Treaties alone.

Having described the problem, the paper moves on to describe the two theoretical concepts it uses to analyse and explain the position of the EP. First, it outlines a basic concept of popular sovereignty and asks what the task of a parliament would be, if it were to be based on that concept (section 3). Any understanding of popular sovereignty is controversial in itself, especially in a European Union context. However, as the paper is not about popular sovereignty per se, it will only describe the concept as far as is necessary for its purpose, leaving many a controversial issue for other contributions to academic literature.\(^7\)

Having established the theoretical relation between a people and its parliament, the paper will move on to confederalism, showing what a confederal parliament is (section 4). While there is no good historical example to compare the European Parliament to, it is possible to build and elaborate on the confederalism theory of John C. Calhoun to briefly outline what the constitutional position of a confederal parliament should be. Specifically, this section will elaborate on the conditions under which a confederal parliament can legitimise legislation on behalf of multiple demois.

Finally, the paper applies these theoretical thoughts to the European Parliament (sections 5 and 6). It analyses the EU to be confederal in nature and explains why the EP should be understood as a confederal parliament.\(^8\) It concludes that the European Parliament may be too

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\(^4\) In doing that, this paper draws on the dissertation the author successfully defended on 23 January 2014. M. Duchateau, *Het Europees Parlement als transnationale volksvertegenwoordiging. Een onderzoek naar volkssoevereiniteit, (conf)ederalisme en Europese volksvertegenwoordiging*, Deventer: Kluwer, 2014. This paper presents one of the main conclusion in the English language for the first time.

\(^5\) There is no historical example of a functioning political confederacy that has combined a democratic system with universal franchise with the idea of a directly elected confederal parliament.


\(^8\) As will become clear, this paper understands the concept of ‘union of sovereign states’ (Staatenverbund) of the BVerfG to be the newest incarnation of Calhoun’s theory on sovereignty and confederalism. Interestingly, not only the BVerfG implicitly relies on old American and German debates on sovereignty and federalism, but so do many authors. See for instance S.J., ‘The European Union after the *Maastricht* Decision: Will Germany Be the
‘European’, as it lacks an ‘alarm-bell’ procedure. It submits that if the EP is to really legitimise European legislation, an alarm-bell procedure should be introduced first before it is granted the powers necessary to have the European elections generally determine the EU’s policy agenda.

2. Representation, the European Parliament and the Treaties

Our first step is to analyse what representative position the European Parliament has according to the Treaties. Art. 14(2) reads: “The European Parliament shall be composed of representatives of the Union's citizens. (...) Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.” Absent a European demos, these provisions do not make very clear what the political identity of the citizens is when they are represented by the European Parliament. Apparently, the Parliament represents citizens rather than a ‘people’, and these citizens are represented degressively proportional, proportional meaning there is a relation between the population size of the Member States and the number of members of the European Parliament (MEP’s) they have. For, it is the Member States who are allocated numbers of seats. Presumably, what is actually meant here is the number of inhabitants or the size of the peoples of the several Member States, as democratic representation usually conceptualises citizens to be members of a people rather than an ‘amorphous mass’ of individuals.

So who are the citizens when they are represented by the EP, and of what democratic community or people are they a member? Are they citizens of the Union itself, as art. 13(1) seems to suggest? Should they be viewed as members of the peoples of the European Union, as art. 3(1) TEU implies? As members of the “ever closer union among the peoples of Europe”, following art. 1 TEU? Or maybe even as members of “the peoples of the States brought together in the Community”, as art. 189 of the Treaty on European Community used to state?

These questions directly relate to the ‘democratic narrative’ of the EU, i.e. to the question in whose name the Parliament is supposed legitimise the European Union. As will become clear in section 3, democratic legitimacy, at least according to popular sovereignty, mainly builds on self-rule by a political community rather than on self-rule of citizens as such, and on imputation of decisions taken by that community to all citizens. Democratic citizenship, and representational majority decisions in particular, cannot be understood absent a people or demos, the membership of which the citizenship is an expression.

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10 Art. 13(1) reads: “The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States …” (italics added, MD).

11 Art. 3(1) reads: The Union's aim is to promote peace, its values and the well-being of its peoples.” (Italics added, MD).

12 This point can be illustrated with the case-law of both the German BVerfG and the European Court of Justice (ECJ). The BVerfG continuously stresses that as the German people have not lost their sovereignty, it is mainly up to them, through the Bundestag, to legitimise the EU. And when the European Parliament does (additionally) legitimise the EU, the citizens it represents should be viewed as a member of the peoples of the Member States of the EU. See for instance BVerfGE 89, 155 (190) (Maastricht), BVerfG, 2 BvE 2/08 of 30 June 2009 (Lissabon), para. 231, 235, 262 280-287, 335 and 346-350, BVerfG, BvR 2661/06 of 6 July 2010 (Honeywell), para. 53 and 57 and BVerfG, 2 BvR 1390/12 of 12 September 2012 (ESM/Fiskalpakt), para. 208. The ECJ, on the other hand, has stressed for many years now that “citizenship of the Union is intended to be the fundamental status of nationals of the Member States”. This suggests that the collective of which those citizens are a member somehow
The EU-Treaty presents us with a paradox. On the one hand art. 9 stipulates that “in all its activities, the Union shall observe the principle of the equality of its citizens”, suggesting that all EU citizens should have an equal voting weight. On the other hand though, art. 14 prescribes representation to be degressively proportional to the population size of the Member States, suggesting that when it comes to European elections, EU citizens are equal only to other EU citizens casting their vote in the same Member State. Indeed, the BVerfG has calculated that the voting weight of votes cast in Malta is twelve times the voting weight of votes cast in Germany. If equality is to be one of the fundamental democratic principles, it appears that the EP represents several peoples rather than one demos consisting of equal European citizens.

But if this is true, how can one institution then represent multiple peoples at the same time and even vote by majority? Does democratic self-rule of a people not preclude representatives of other peoples from overruling the representatives of that people? The BVerfG certainly seems to think so. If that is the case, federalism seems to be fundamentally at odds with democratic equality.

To see if this actually is true, it is necessary to first turn to the question why a parliament can be thought to legitimise state authority; that is to help explain why it is ‘right’ that individuals are bound by the law. This entails describing what it means to be a ‘people’ and how it can be thought to rule itself. As will be seen, the equality of citizens is essential to democratic representation. Therefore, section 4 will reflect on what it means to be a ‘confederal parliament’.

3. Popular sovereignty and the power of parliament

As was mentioned above, any understanding of popular sovereignty and of what it means to be a ‘people’ is bound to be controversial, especially in a European Union context. It would no doubt be quite possible to write an entire dissertation on this question alone. Therefore, it is important to stress that this paper does not seek to critically analyse the credibility or consistency of the
concept of popular sovereignty or of the idea of a ‘people’ as such. Instead, it takes note of the many European constitutions that are based on the idea of the popular sovereignty and of the influence of the concept on constitutional courts, such as the German Bundesverfassungsgericht (BVerfG) and the Czech Ústavní soud. Accordingly, it presents a basic concept and only focuses on the aspects it needs to analyse what it means to be a confederal parliament. In order to present a popular sovereignty concept that is as ‘conventional’ as possible, it mostly draws on the work of Jean-Jacques Rousseau, Emmanuel Joseph Sieyès, Carl Schmitt, and Hans Lindahl. In doing so, it will not focus so much on specific competences a democratic parliament should have. Instead, it will focus on the question why a parliament can be thought to legitimise state authority, as this will turn out to be the key to understanding the legitimising position of the European Parliament.

The question of democratic legitimacy of the law ultimately goes back to the very fundamental question of why an individual should feel bound by the law. It is common for the popular sovereignty narrative to start with the proposition that freedom means that individuals are only bound by rules that have their consent, while equality means that an individual can no more legally bind others than others can bind them. Especially Rousseau and Sieyès claim that there can be no law in what they called the ‘state of nature’. According to them, all legal rules derive their binding force from the ‘social contract’, that is the basis for fundamentally ‘free’ individuals to form a self-governing people. Although different authors disagree on the specifics, the commonly perceived function of the social contract is that it (a) lets individuals voluntarily bind themselves to become a ‘people’, while (b) the collective will of this people serves as the permanent basis for the binding force and the legitimacy of the law. As such, the social contract


21 It is very common for parliaments, being directly elected by the people, to co-decide on legislation, and in parliamentary systems to mainly set the policy agenda by ‘controlling government’ and by legislation. C. Pinelli, ‘The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government’, European Constitutional Law Review, Vol. 9, No. 2, p. 184. For instance, art. 20(2) of the German Grundgesetz reads: “all state authority is derived from the people. (…)”. (In German: “Alle Staatsgewalt geht vom Volke aus. (…)”)


23 In the work of Rousseau and Sieyès, the state of nature is the condition that theoretically existed before the state was established. Rousseau, ‘The Social Contract’, pp. 3-24 and Sieyès/Sonenscher, ‘What Is the Third Estate?’, p. 120, pp. 133-134, pp. 136-137 and pp. 152-153. Cf. Hoogers, De verbeelding van het souvereine, p. 29.

24 While according to Rousseau the social contract converts legally unbound individuals into citizens that are members and subjects of the sovereign people, Schmitt stresses that democratic equality is very important as
is the ‘hinging point’ between the state of nature and the legal order on the one hand, and free individuals and the sovereign people on the other. It is the focal point at which individual wills legally become one collective will, while the bearer of that collective will is the sovereign community that is called the people.

It is important to stress that, while individuals are fundamentally thought to be free, the social contract attributes sovereignty to the people as a unit. For this reason, Rousseau conceptualised the social contract not only to be the basis for the legal order, but also as the instrument that converts individuals into citizens; that is, members of the sovereign people. From that point on, it is the people that is deemed to rule itself, through the legal order, by majority rule.

A question that obviously needs to be answered here is why it would be legitimate for free individuals to be bound by majority decisions they did not personally agree to. The answer to that question can be found in the idea of the general will, or volonté générale. According to Rousseau and others, being a sovereign people not only implies the equality of citizens, it also requires that those citizens bind themselves to strive for the common good. Accordingly, the will of the people axiomatically is aimed at the common good and thus represents what is good for the people a whole. Two of the reasons the common will is thought to be able to legitimately bind all individuals of the people are that it is conceptualised to be a rational will and that any majority has to take into account the interests of the minority.

A particularly controversial issue, especially in the context of the European Union, is to which extent the people ought to be homogeneous for this to work. For instance, Dieter Grimm holds that if a “society wants to constitute itself as a political unit (…) this requires a collective identity, if it wants to settle its conflicts nonviolently, accept majority rule and practise solidarity.” He expressly points out that this identity does not need to be rooted in ethnic origin, but may also have other origins; “All that is necessary is for the society to have formed an awareness of belonging together that can support majority decisions and solidarity efforts, and for it to have the capacity to communicate about its goals and problems discursively.” In his reply to Grimm, however, Habermas points out that a common identity and unity of the people do not


Famously, Rousseau concludes that the minority can be thought to have been mistaken in what it really wanted, while “anyone who refuses to obey the general will shall be forced to do so by the whole body; which means nothing more or less than that he will be forced to be free.” Rousseau, ‘The Social Contract’, pp. 117-118 and p. 19.


evolve separately from democratic processes, but rather are the result of those processes.\textsuperscript{31} Therefore, the homogeneity and identity of people might be something that does not pre-exist, but might be something that needs to be shaped by the ‘democratic life’ of a sovereign people.

While it is not the point of this paper to evaluate Grimm’s or Habermas’ right or wrong, the exchange does lead to a very important point, that Hans Lindahl has published on extensively.\textsuperscript{32} In European Union law, a distinction is often made between ‘participatory democracy’ and ‘representative democracy’, suggesting that the former entails the people to act itself, while the latter requires representatives to act in its stead.\textsuperscript{33} Lindahl questions this dichotomy by looking into what it means for the people to act sovereignly. According to him, the unity of the people and the general will do not, and cannot exist as such at all as, following Rousseau, they are more than the mere addition of individual wills. As the idea of the general will is that it is the will of the people as a political community, and that community is a unit rather than an amorphous mass of individuals, it can only exist through representation of that unitary will.\textsuperscript{34} The general will is binding on all citizens precisely because it is the will of the people as a political unit rather than the will of private individuals. Accordingly, no matter whether the people are deemed to use its constituent power to enact a constitution or whether they want to rule themselves using constituted powers (the organs of the state), representation is always necessary.\textsuperscript{35}

With this very basic account of popular sovereignty in mind, we can finally turn to the representative position of a parliament that is based on popular sovereignty.\textsuperscript{36} Following our account of this concept, the legal order serves for the sovereign people to rule itself, using constituted powers such as the parliament. To the parliament the task obviously falls to legitimise public authority by representing the people. Legally this means taking decisions by majority that are then imputed to the people and its members. For legally, representation means that one or more representatives act in the name of what is represented (\textit{i.e.} the people), while their acts count


\textsuperscript{34} While the general will can only be known through contestable(!) representations of that will, it is reasonable to assume, as many political theorists do, that the general will can only be decided upon through deliberation. Lindahl, ‘Sovereignty and representation in the EU’, pp. 90-112. Cf. Lindahl, ‘The Paradox of Constituent Power’, pp. 495-496 and D. Grimm, \textit{Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs}, Berlin: Berlin University Press 2009, p. 116.

\textsuperscript{35} Sieyès famously distinguishes between the constituent power (\textit{pouvoir constituant}) of the people and constituted powers (\textit{pouvoirs constitués}) that serve to enable it to rule itself. Sieyès/Sonenscher, ‘What Is the Third Estate?’, pp. 135-137.

\textsuperscript{36} Obviously popular sovereignty does not preclude a presidential system. However, with the aim of this paper in mind, that possibility will be overlooked here.
as acts of what is represented. And as we have seen, this can be considered legitimate because decisions of the parliament (read: the people, acting through its representatives), are the expression of the general will, that is aimed at the public good, just as majority decisions can legimitate be imputed to a minority because both the majority and the minority are part of the political unit called ‘the people’ that is formally acting.

Without going into detail, and glossing over most theoretical specifics of this account, there are two preconditions for a parliament to be able to fulfil its legitimising role that need be highlighted before we can move on to the next section. As the basic premises of popular sovereignty are equality and freedom, the first basic premise is democratic equality, at least when it comes to voting rights. For it is hard to explain how freedom and equality could somehow entail that some are more equal than others, unless there is a very specific reason for that.

A second premise that needs to be highlighted is that all public authority that binds the people must somehow be based on the will of the people. In German constitutional law, this idea is elaborated through the concept of the Legitimationskette. If the legal order serves to have the people rule itself, the parliament serves to make this possible. That is why it has to decide on legislation and it has to have control of government. And this thought also explains why elections must somehow generally determine public policy.

On the basis of this, the representative position of a parliament in a parliamentary system according to the outlined concept of popular sovereignty can be briefly summarised as follows. To parliament falls the task of legitimising public authority by (co)deciding on legislation and having control of government. This ‘output’ legitimises public authority because decisions of the parliament are held to be the decisions of the people it represents. Accordingly, democratic self-government requires all public authority to be derived from the people and requires elections to somehow decide on the policy agenda. However, as we have seen, this narrative of imputing parliamentary majority to all citizens can be a credible narrative only if certain conditions apply, such as electoral equality and a practice of deliberative decision-making that takes proper account of minority interests.


38 Preconditions such as regular elections, a free mandate and parliamentary immunity are not dealt with in this paper. For an elaborate analysis of ten tenets of popular sovereignty, see Loughlin, ‘Ten Tenets of sovereignty’. McDonald strikingly paraphrases and cites John Locke in this regard: “And no men could be judged foolish enough to consent to the establishment of a form of government in which they supposedly “agreed that all of them but one, should be under the restraint of Laws, but that he should still retain all the Liberty of the State of Nature, increased with Power, and made licentious by Impunity.”’ V. McDonald, ‘A Guide to the Interpretation of Locke the Political Theorist’, Canadian Journal of Political Science 1973, Vol. 6, No. 4, p. 616. Also, the BVerfG attaches very great weight to the principle of one person, one vote. For instance, see BVerfGE 95, 335 (376, 385, 387, 389-390 and 392) (Überhangmandate II) and BVerfG, 2 BvE 2/08 of 30 June 2009 (Lissabon), para. 212-217 and 256. It remains to be seen whether a (con)federal structure counts as a good enough reason.


41 It is no coincidence that the idea of the democratic deficit entails that the European Parliament should have more legislative powers and more control of the Commission.
4. Parliament, popular sovereignty and confederalism

Things get more complicated when the question arises how multiple sovereign people can govern themselves in one confederation, using the same parliament.\(^{42}\) For, while imputation within a people has been explained, imputation between sovereign peoples seems at first sight to be impossible. How could, for instance, decisions that were taken by German representatives be conceptualised as acts of self-government by the Maltese people? Does confederal cooperation between sovereign peoples not necessitate a veto power for every national contingent of MEP’s and preclude MEP’s from organising themselves along the lines of political ideology rather than nationality? An addition to the European democratic narrative is necessary to overcome these issues and explain how transnational inequality on the one hand, and majority voting on the other, can be convincing elements of a confederal democratic narrative.

One of the authors who has perhaps contributed most to confederalism theory is John C. Calhoun.\(^{43}\) In many publications he has reflected on the position of the sovereign peoples in (con)federations.\(^{44}\) Central to his work is the notion that in confederations, which allow the confederal public authority to operate directly on the people, the confederal organs and organs of the Member States should be viewed as (separate) agents of the same principal.\(^{45}\) This essentially means that confederations are in a sense ‘parallel legal orders’: Confederal organs represent the sovereign people and take decisions in their name, as do the organs of the Member States. Both can enact laws that are binding on the people and have the highest state authority within their own separate sphere because the powers of both are derived from the same people. According to Calhoun, this should not be taken to mean that sovereignty can be divided.\(^{46}\) On the contrary. The

\(^{42}\) For the purpose of this paper, a confederation is defined as the lasting cooperation of several states and/or peoples in such a way that they appear to be a constitutional unit, while they remain sovereign. It is not the purpose of the paper to analyse what a confederation is. The reason the concept is used here is because it is a concept that has been consistently used by the allgemeine Staatslehre to typify lasting constitutional cooperation between sovereign entities. The question of what the difference between a confederation and an international organisation is can remain open here. For a different definition of a confederation, that ultimately seems to build on sovereignty as well, see Cuypers, ‘The confederal comeback’.


\(^{44}\) According to Calhoun, a confederation is a union of governments, whereas a federation is a union of peoples, the differences being that a confederation has a treaty as its ‘basic document’, a federation has a ‘constitutional compact’ as its basic document. The difference between the two is irrelevant here and will be disregarded. For the purposes of this paper, both be will described as confederation, the crucial element being the sovereignty of the several peoples. J.C. Calhoun, ‘A Discourse on the Constitution and Government of the United States’, in: R.K. Cralle (ed.), A Disquisition on Government and A Discourse on the Constitution and Government of the United States, Columbia, South Carolina: A.S. Johnston, 1851; reprinted in The Papers of John C. Calhoun Vol. XXVIII, Columbia, South Carolina 1977: University of South Carolina Press 2003, pp. 100-104. Cf. M. Duchateau, Het Europees Parlement als transnationale volksvertegenwoordiging, pp. 288-289.


\(^{46}\) For Calhoun, the sovereignty itself is inseparable: “Sovereignty is an entire thing; to divide is to destroy it.” Calhoun, ‘Discourse’, p. 91.
sovereignty itself is a unit, but powers derived from the sovereign people can be divided. For why could one sovereign people not delegate its powers to several public authorities? This situation obviously works best when there is no overlap between the confederal authority on the one hand, and Member State authority on the other.  

Calhoun was mostly concerned with the situation where American federal organs, which were confederal organs in his view, overstepped their authority by enacting laws that are ultra vires. For these specific cases he developed a theory on interposition, nullification and secession. Essentially, he considers sovereignty to entail that ultimately, a people decides on what powers it has delegated to which public authority. A confederation, then, is a constitutional entity of which the power is derived from multiple peoples at the same time and which acts as an agent of those peoples, by enacting laws and governing in their name(s).

Turning to the question of confederal parliamentary self-government, one may expect Calhoun to conclude that confederal organs should always decide on the basis of what he calls a ‘concurrent majority’. One, however, would then be wrong. While he does have a few basic conclusions about how confederal acts of legislation should be legitimised on a day-to-day basis, he is very brief about it. He submits that it is ‘common knowledge’ that members of the American House of Representatives are elected as “delegates of the several States, in their distinct, independent, and sovereign character, as members of the Union,—and not as delegates from the States, considered as mere election districts”. It can be assumed that he essentially saw the members of the Senate in the same light. This would indeed be consistent with the nature of the United States as he saw it. However, he did not question majority voting by either organ or reflect on representation of multiple demos as such. This may be well explained by his main aim. Calhoun was mainly concerned with legal theory that elaborated a confederal narrative of the United States Constitution, and that Constitution allowed for majority voting in both the House and the Senate.

While Calhoun did not reflect on majority voting in the House and the Senate, he did elaborate on the legitimacy of constitutional amendment by majority voting. While he stresses the Constitution to be a constitutional compact between several sovereign peoples, he does accept that the compact can be amended by a three-quarter majority of those peoples. According to him, the amendment of the Constitution is a task that was delegated to a three-quarter majority “for their mutual agreement and advantage”, without in any way impairing the sovereignty itself. Not the sovereignty itself is delegated, rather the exercise of sovereign powers is.

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47 For an interesting comparative analysis on this, see Boom, ‘The European Union after the Maastricht Decision’.


50 The idea of the concurrent majority means that decisions can only be taken if all the component parts of a community agree. It was originally developed by Calhoun for decision-making by the sovereign people, each interest group within the people having a veto power. Calhoun, ‘Disquisition’, pp. 23-26.

51 Calhoun, ‘Discourse’, p. 95; Forsyth, Unions of States, p. 126. Calhoun considered the United States to be a federation, which in modern terms is a confederation.

52 He explicitly explains that even though the Constitution may be amended by a majority of the States, the sovereignty may in any case be preserved by seceding from the Union. Calhoun, ‘Discourse’, p. 87 and p. 179.

The key to understanding the import of Calhoun’s view on confederal representation lies in his remarks that sovereign powers can be delegated to an agent for their mutual advantage. While he does not elaborate on it much, it is clear that he understands such an agent to act on behalf of, and in the name of, several sovereign peoples at the same time, suggesting that the agent represents multiple sovereigns at the same time. However, he does not explain why he believes majority decisions within one organ can be legitimately imputed to all peoples that are represented by that organ. As mentioned before, he does explain how sovereignty of the peoples may be preserved through voluntary adoption of the Constitution at the beginning, and the possibility of interposition, nullification and secession later on. However, these competences alone cannot explain how decisions of confederal organs can legitimately be seen as acts of self-government of all the peoples.\footnote{Unfortunately, other confederalism theories are not very helpful either. Max von Seydel, whose work is influenced very strongly by Calhoun, used the exact same argument but also doesn’t elaborate on it any more. M. von Seydel, ‘Der Bundesstaatsbegriff, Eine staatrechtliche Untersuchung’, Zeitschrift für die gesamte Staatswissenschaft 1872, pp. 221-222. Philipp Zorn, on the other hand, does elaborate more on this issue, but ultimately construes a sovereign unity from several former sovereigns. This means he moves beyond confederalism. P. Zorn, Das Staatsrecht des Deutschen Reiches part I: Das Verfassungs- und Militärrecht, Berlin en Leipzig: Verlag von Guttentag 1880, pp. 62-64. The Bundesverfassungsgesicht, which perhaps has elaborated the most modern confederalism theory, almost exclusively relies on the Bundestag for legitimization of European Union law. It appears it does not really accept imputation of decisions of the European Parliament to the German people. BVerfG, 2 BvE 2/08 of 30 June 2009 (Lissabon), para. 262.}

Such an explanation is possible when we extrapolate from Calhoun’s theory and try to fill in the blanks. The point of departure is that the confederal parliament represents several peoples, which entails that it legally decides on the common good, or, using Rousseau’s terms, the general will of all those peoples. Each having been elected by their own peoples, the task of the representatives is obviously to negotiate decisions that represent the common good of the confederated peoples. So decisions of the confederal parliament are at the very least influenced by the representatives of all the peoples, meaning that maybe being outvoted is not the same as not having been able to influence decisions. In that sense, majority decisions of a confederal parliament are not wholly ‘external’ decisions of a foreign power. Rather, they are decisions influenced by the ‘own’ representatives, taken by a collective of representatives of peoples with whom cooperation was wanted to form a confederation. However, we saw with Rousseau, and this also holds true for Calhoun, that legitimacy should be derived from the people’s own representatives taking decisions that serve the own general will (read: common good). Imputation of majority decisions was considered to be legitimate because members of the same people were deemed to serve the common good of the same collective. The question still remains how, if push comes to shove, decisions taken by a majority of confederal representatives can be imputed to all the confederated peoples. Surely, the possibility of secession and of influencing those decisions is not enough to legitimise every decision taken?

In order to understand this and conceptualise such a confederal ‘chain of legitimacy’, it is good to go back to the very essence of confederations for a moment. For Calhoun, and other theorists on confederalism, the basic concept of confederalism entails that several sovereigns wish to remain sovereign, but want to cooperate at the same time.\footnote{Calhoun, ‘Discourse’, pp. 75-76, p. 103 and pp. 152-153. Cf. Seydel, ‘Der Bundesstaatsbegriff’, p. 198 and p. 208 and C. Schmitt, Verfassungslehre, pp. 372-373.} This means that confederations operate under the assumption that the common good of each of the sovereigns is best served by taking common decisions as such and that confederal decisions can be very well seen as acts exercising sovereignty, rather than limiting it. In other words, a common decision as such can be assumed to serve the ‘own’ common good, even if it does not represent all the wishes of the representatives of a specific sovereign. With this in mind, it becomes understandable how Calhoun can claim that multiple sovereign peoples can delegate (constitutional) law making
powers to common representatives “for their mutual agreement and advantage”. It appears from extrapolation from his theory that confederal majority decisions can be assumed to serve the common good of all the confederated peoples, because common decisions as such are assumed to serve the common good of all those peoples best. Following this, imputation of those decisions to all the peoples involved can be assumed to be legitimate because they are taken by the combined representatives, including the ‘own’ representatives, while the fact that there is a collective decision is as such assumed to be the best way of serving the own common good. Following this line of reasoning, confederal representatives can take legitimate decisions for all peoples involved as long as they involve representatives from all peoples and try to take decisions that serve the common good of all peoples.

As a last step, it has to be pointed out that this assumption does come with a caveat. If confederations operate under the assumption that common decisions are best for all the confederated peoples, none of those decisions may threaten the vital interests of one of those peoples. Decisions threatening the vital interests of a sovereign people obviously cannot be assumed to be in the common good of that people. Therefore, it is submitted here that it would be wise for the functioning of confederal parliaments to include an ‘alarm-bell procedure’ that allows every national contingent of that parliament to formally protect the vital interests of the people it represents.

Obviously at this we point we have moved a bit beyond the work of Calhoun on confederation. However, we have not moved beyond his confederal system as such. Rather, in an attempt to show decisions can legitimately and democratically be taken by a majority of confederal representatives, this paper has provided an additional explanation where Calhoun remains silent. It is submitted that with Calhoun’s confederalism theory, with these additions, it can clarify the legitimising position of the European Parliament on the one hand, and make suggestions to improve that position on the other.

5. The European Parliament as a confederal parliament

In section 2 the question was raised how the legal position of the European Parliament should be understood in terms of the democratic narrative of the European Union. It was pointed out that while the EU’s citizens elect MEP’s using a range of electoral systems, and while they are represented fundamentally unequally, the European Parliament decides by majority voting, suggesting that it represents one political community to which its decisions can be imputed. Following the German Bundesverfassungsgericht, this imputation seemed to be democratically illegitimate. According to the BVerfG, the EP can only ‘complement’ legitimatio of European public authority of the national parliaments, because it does not represent the sovereign German people as such. Accordingly, the court held in the Lisbon Judgement that the sovereignty of the German people entails that the German Bundestag must retain “substantial national scope of action for central areas of statutory regulation and areas of life”, downplaying any democratic role the EP could play. However, using Calhoun’s confederalism theory, it appears the European Parliament can play a much bigger role, clearing the way for a parliament that legitimises European policy at the European Union level. In this final section, both the ‘core’ concept of

56 To be sure, this extrapolation does not represent Calhoun’s thoughts. Rather, it represents the logical consequences of his theory, as they are perceived by the author of this paper. The aim this extrapolation serves is not to oversee the consequences of Calhoun’s theory per se. Rather, it is developed to help us understand the position of the European Parliament (in section 5).
57 See section 5 for an application of this idea to the European Parliament.
58 BVerfG, 2 BvE 2/08 of 30 June 2009 (Lissabon), para. 262.
59 BVerfG, 2 BvE 2/08 of 30 June 2009 (Lissabon), para. 262 and 351.
popular sovereignty (developed in section 3) and the idea of a confederal parliament (developed in section 4) will be applied to the European Parliament. In doing this, the question will be answered to what extent the idea of a confederal parliament helps us understand the democratic position of the EP.

As was mentioned in section 3, the basic task of a parliament is to bring a sovereign people to self-government by exercising a range of competences, determining public policy in the name of the sovereign people. While there are many quite different accounts of who is the constituent power of the European Union, viewed through the lens of popular sovereignty it is not so difficult to establish where the sovereignty lies. Despite the European Court of Justice’s consistent case-law on the autonomous nature of the EU legal order, the Treaty of Lisbon, like all its predecessors, was concluded and ratified by the Member States in same way (other) international treaties are. This is a strong suggestion the Member States have remained ‘masters of the Treaties’.

Moreover, at no time in the history of the European Union have the European peoples acted, as a constituent power or otherwise, simultaneously and on the basis of one person, one vote. To the contrary, every time the European citizens act, a formal distinction is made between citizens from different Member States, be it by the European electoral system(s), the European citizens’ initiative or otherwise. Where there have been referenda on the European Union, those referenda were always national referenda, organised by specific Member States according to national constitutional rules and aimed at a decision of the people of that specific Member State. Therefore, it is not surprising that there is no European legal act that relies on the authority of the people of Europe the way constitutions very often do. Even though authors like Ingolf Pernice claim otherwise, the absence of a European constituent act of a European people means that sovereignty still remains with the peoples of the Member States. As was pointed out in section 2, the electoral system(s) and the degressively proportional representation of EU citizens are very much consistent with the conclusion that the EP is a confederal parliament. This setup allows the peoples to elect their own European representatives indeed.


61 The preamble of both the TEU and the TFEU refer to the heads of state as the authors of the Treaties. Cf. Cuyvers, ‘The Confederal Comeback’, p. 720.

62 For the opinion of the BVerfG that the Member States are still the masters of the Treaties (Herren der Verträge) see i.a. 2 BVerfG, 2 BvR 2661/06 of 6 July 2010 (Honeywell), para. 57 and BVerfG, 2 BvE 2/08 of 30 June 2009 (Lissabon), para. 231 and 235.

63 The European electoral system(s) was discussed in section 2. As for the European citizens’ initiative, the first paragraph of art. 11(4) TEU reads: “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.” Accordingly, it formally differentiates between citizens who are nationals of different Member States.


65 At least with those peoples who were sovereign to begin with.
However, one possible inconsistency must be paid attention to. The Treaties speak of ‘citizens’ to be represented rather than peoples. Moreover, art. 22(1) TFEU stipulates that “[e]very citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.” In other words, elections are not reserved to members of the national peoples of the Member States per se. Instead, the electorate of the EP formally is composed of the citizens of the EU, residing though they are in several Member States. However, such a way of describing and qualifying the electorate is mystifying rather than clarifying. As the citizens take part in the elections in their state of residence “under the same conditions as nationals of that State”, it is much more consistent to view EU citizenship as a ‘chameleon status’, allowing citizens to be treated politically as if they are a member of the people of the Member State wherein they reside. Accordingly the electorate of the EP can be understood to be the several Member States of the EU, enhanced as it is by a dynamic citizenship.

It has been explained in section 4 why it can be conceptualised to be legitimate for several peoples to be represented in one institution that decides by majority voting. As such, this idea needs no further explanation here. However, it is interesting to see to what extent the EU and the EP conform to the conditions that were laid out for this idea to work, in the sense of delivering a convincing narrative.

The wish for close cooperation that was analysed to be inherent in any confederation can be found throughout the EU Treaties. For instance, the preamble famously speaks of “ever greater union among the peoples of Europe” and sums up quite a few fields on which this cooperation should take place. Also, the principle of sincere cooperation of art. 4(3) TEU can be read as an expression of the loyalty inherent in the EU. At the same time, art. 4(2) can be read to stress that it is the Member States or peoples that are cooperating, rather than the citizens of the EU forming one European demos, as it stresses that the ‘national identities’ of the peoples shall be respected. Following this, majority voting in the European Parliament and in the Council can be seen as the ultimate expression of the wish for sincere cooperation between the peoples of the European Union.

The European Parliament may be too European, though. While the idea of a confederal parliament does explain majority voting to be legitimate, it also stresses that the members of a confederal parliament have the difficult double task of expressing their national general will and finding a confederal ‘compromise will’ at the same time. Rule 30(2) of the Rules of Procedure of the European Parliament requires political groups to be composed of “Members elected in at least one-quarter of the Member States”. While the existence of transnational political groups is not a problem in itself and can even be helpful for the EP in fulfilling its task, it is inconsistent with the

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68 If the electorate of the EP were to be just ‘the EU citizens’, one would expect every citizen to have the same voting weight, as there would be no decent explanation for the fact that voting weights would vary on the basis of the Member State wherein a citizen would happen to reside.

69 Thanks to Nynke Veenstra for the concept ‘chameleon status’.

70 Art. 4(3) TEU, first sentence reads: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”

71 Art 4.(2) TEU reads: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” It has been analysed by Bogdandy and Schill to require the primacy of EU law to be relative rather than absolute. Bogdandy & Schill, ‘Overcoming Absolute Primacy’.
confederal nature of the Parliament to require political groups to have a transnational composition. Indeed, there is no reason to assume political groups with a less transnational basis cannot fulfil their task. Consequently this rule unnecessarily restraints MEP’s in expressing both their national general will and the European compromise will.

More importantly, in the decision making procedure of the European Parliament there is no way for national contingents of the Member States to formally indicate that the vital interests are put at risk. Given the confederal nature of the Parliament, a procedure safeguarding this should be introduced. The Ioannina Compromise or the Belgian ‘alarm-bell procedure’ can be taken as a basic example. Without it, decisions of the EP run the risk of being illegitimate in Member States of which the vital interests have not been taken into account enough. Moreover, such a procedure is helpful in expressing the difference between a confederal parliament and a parliament that represents just one people. The idea of a confederal parliament entails that it is not enough for the right interests to be taken into account; they must also be seen to be taken into account, at least when vital interests are at stake. Without any such form or procedure, there appears to be very little difference between a national and a confederal parliament, and it could very soon be forgotten that the confederal compromise will can only be assumed to represent the general wills of the several Member States.

Finally, even if the European Parliament would be organised in such a way that it can properly express both the national wills and the confederal compromise will, there might still be a democratic problem. While the EP certainly is not the only institution that legitimises European policy, it is curious that European elections do not generally determine European public policy. It is interesting to note that generally, while the legislative powers of the Parliament have improved very much with the last few EU treaty amendments, its powers to control the Commission are still relatively weak. While the EP does have most of the ‘common’ powers that parliaments have (absent the power of legislative initiative), it still lacks the most important powers to generally determine European public policy.

Specifically, the position of the Parliament in the formation of a new Commission is relatively weak. Even though art. 17(7) TEU states that the Parliament “elects” the President of the Commission, this term is misleading, as it is the European Council that shall propose a candidate, “[t]aking into account the elections to the European Parliament and after having held the appropriate consultations”. The rest of art. 17(7)TEU makes clear that in case the EP rejects the candidate proposed, it is up to the European Council and not the Parliament to propose a new candidate. According to art. 17(7), the other members of the Commission are selected by the President-elect and the Council, who are then “elected” by the Parliament in the same vein. The procedures show that European elections do not, through the powers of the Parliament, determine EU policy. The same holds true for the dismissal of the Commission. While the Parliament can

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72 The Ioannina Compromise has been laid down in Declaration 7 on Article 16(4) of the Treaty on European Union and Article 238(2) of the TFEU and in Council Decision 2009/857, [2009] OJ L314/73. It obliges the Council to “do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised” when a quarter of the Member States representing a fifth of the Union population indicate opposition to certain decisions. See further R. Schütze, European Constitutional Law, Cambridge: Cambridge University Press 2012, pp. 113-114. For the Belgian alarm-bell procedure, see art. 54 of the Belgian Constitution. In a nutshell, it enables a three-quarter majority of a specific linguistic group to formally declare that a “bill can gravely damage relations between the Communities”. The consequence of this is that the bill is referred to the Council of Ministers which then gives a reasoned opinion on the bill and invites the parliament to also give an opinion on it. Further see P. Populier, ‘Belgium’, in: L. Besselink et al. (eds.), Constitutional Law of the Member States, Deventer: Kluwer 2014, p. 94.

73 For a brief overview of the powers of the European Parliament, see R. Schütze, European Constitutional Law, pp. 96-100.

74 There has been quite some controversy over the exact meaning of art. 17(7) TEU. With the slogans and YouTube clips referred to in the introduction, the European Parliament has put forward the idea that it means that the European Council should select the candidate who, after the elections, gets a majority of MEP’s behind him.
dismiss the Commission with a motion of censure, art. 17(8) TEU and art. 234 VTEU stipulate that it can only dismiss all members of the Commission together and it can only do so with a two-thirds majority.\textsuperscript{75} So ultimately, the Parliament may have a lot of influence on European policy and on the Commission, but it does not have the legal powers to compel the Commission to follow its general policy preferences. This may diminish the impact and meaning of European elections much more than the legislative powers the Parliament has.

6. Conclusion

This paper has analysed the European Parliament to be confederal in nature. If democracy means that all public authority is derived from the sovereign peoples, and there is no European people, then the EP must represent multiple peoples. The confederal narrative helps to explain this position. It also explains why majority decisions of the Parliament can be thought to legitimise European Union law, in the name of all twenty-eight peoples. While generally democratic imputation of decisions is only possible within a sovereign people, confederations were analysed to operate under the assumption that cooperation serves the general interest of all peoples involved. Consequently it was submitted that confederal majority decisions can be thought of as legitimate for all peoples involved, as long as no vital interests of one of the confederated peoples are violated.

For the European Parliament, this means that no amendments to its electoral system(s) are necessary. Instead, these systems are to be viewed as the different ways in which the European peoples elect their European representatives. If the EP is a confederal parliament, it is not necessary for each and every MEP to be elected in the same way.

However, this does not mean that all is peachy in terms of the democratic deficit. Most notably, the Parliament lacks an alarm-bell procedure or other way through which MEP’s can signal that the vital interests of the people they represent are threatened. This threatens the democratic legitimacy of decisions of the Parliament and should be remedied before its constitutional position is strengthened again. Indeed, the democratic deficit may very well be worsened if the Parliament were to gain more powers and would act even more as if it has the same position as national parliaments. While from a democratic point of view, it is curious that European elections do not generally determine EU policy, from a confederal point of view this is understandable, given the lack of an alarm-bell procedure in the European Parliament. In terms of selecting the President of the Commission, at the time this paper was written, it remained to be seen if things were actually different. It is concluded here that the European Parliament is not ready to be empowered to select the (political colour of) the next Commission.

\textsuperscript{75} However, in practice members of the Commission may be more vulnerable than is suggested by the Treaties. In the Framework Agreement on relations between the European Parliament and the European Commission (Interinstitutional Agreement of 20 November 2010, OJ 2010, L 304/47) it is agreed that if the Parliament signals its lack of confidence in a member of the Commission, the President of the Commission must seriously consider asking that Member to resign (see art. 17(6) TEU).