

**A DUAL LEGITIMACY FOR A DEMOCRATIC EUROPEAN
COMMUNITY?**
**JÜRGEN HABERMAS AND CONSTITUENT POWER IN THE
EUROPEAN UNION**

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ABSTRACT

The debate about whether democracy as the best available political regime at national level can and should be transferred to the supranational level as well becomes particularly relevant when applied to the framework of the ‘ever closer’ European Union. In this paper, I assess one of the profound contributions to this debate, that of Jürgen Habermas, from the perspective of a specific concept, that of constituent power. I ask (1) where does constituent power, that is, the power to create a (democratic) political community, lie in Habermas’ theory when applied to the EU level and (2) whether and how his proposals for the development of the EU advance the discourse on its political nature. I start with reviewing his general theory of the role of law in society to outline the main differences he views between a democratic community at a national and supranational level. Then, I look at his understanding of the EU where he argues in favour of a constitution making process by two subjects, ‘the citizens and the peoples of Europe.’ Despite the fact that a close look on Habermas’ scholarship in the last fifteen years shows a transformation from the ‘postnational’ to ‘transnational’, which is indicated by ‘milder’ criteria for an emergence of a European *demos* or drafting a European constitution, I argue that he offers a road towards a democratic EU which, with some ‘intermediate steps’ and political will, is applicable in the contemporary environment, characterised by integration via methods of ‘executive federalism’.

KEYWORDS

Dual Legitimacy; Legitimacy of the EU; Constituent Power; Political Community; Jürgen Habermas

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INTRODUCTION

After the failure of the ratification process of the Constitutional Treaty, it might have seemed that the European Union (EU) would never become a full-fledged political community. Indeed, when its predecessor was established in the 1950s as a product of ‘Political Messianism’ (Beširević, 2014), its prime aim was to bring peace. However, during the more than 60 years of its existence in various forms, the Union has come ‘ever closer’ (e.g. Dinan, 2010), and the question of its legitimacy more pressing. Shortly after the Constitutional Treaty failed to provide a sufficiently acceptable answer to this question, the ‘*rulers of Europe*’ agreed on the Lisbon Treaty, which can be, in its content, considered as almost the same as the Constitutional Treaty. Soon after, the economic crisis exacerbated the need for joint action at the EU level which was mostly realized via intergovernmental measures (Bickerton et al., 2014) by agreement in the European Council or Council of Ministers. However, the legitimacy question, more acute than ever before, has remained unanswered. Why should the European ‘peoples’ obey regulations coming from the EU level? In fact, are they ‘peoples’ (demoi) or ‘people’ (demos) or citizens (see also Dupeyrix and Raulet, 2014, p. 9)? How can the deepening of the EU proceed without their participation in some way?

In this paper, I provide a possible answer to these questions from the perspective of one particular thinker, and then confront it with the contemporary discourse. The reason for choosing Jürgen Habermas is rather simple: he is the one of the few who have a complex theory of legitimacy of law and constitutional order, and who in recent years has turned his attention towards these problems of the ‘European political animal’. Based on a usual deductive approach I, firstly, examine his general views on constituent power, a concept ‘focused on constructing the political order in ways that make political freedom possible’ (Spång, 2014, p. 1), and then, secondly, the source of constituent power at the EU level in his recent contributions (primarily Habermas, 2012a, 2009, 2001). The results of this comparison, presented in Section 1, show that on both levels, Habermas introduces the process of ‘co-original’ creation of a legitimate order but when it comes to the EU with its greatest challenges ahead, the nature of this co-originality is different. While on the national level, its focus lies in the *process* of constitution-making, where the two principles (discourse and democracy) are set up as necessary conditions for any legitimate outcome, on the supranational level it, especially in his later writings, concentrates on the *subjects* who already exist and interact (in accordance with the two principles) to establish a European polity.

Section 2 utilizes these conclusions when asking how the two, perhaps most fundamental proposals put forward by Habermas, the need for a European *demos* and the

support for a European constitution, fit into his theoretical universe. It shows that these elements would normally place Habermas among the ‘federalist’ thinkers about the EU. However, drawing briefly upon alternative approaches and criticisms of Habermas’ thought, I show that Habermas, at least with his post-crisis writings, lies between federalists and pluralists, who instead of a single *demos*, argue for a specific form of interaction between multiple *demoi*. The reason for this conclusion is that Habermas does not want a European *demos* to replace the European *demoi*, but wants both to exist, one along the other. Still, as I argue in the remaining paragraphs, he does not provide us with any clear-cut blueprint how the single *demos* can be created, and thus his approach rests on fairly optimistic assumptions that such a process is possible in contemporary circumstances. The ‘window of opportunity’, which Habermas wants us to discover, may be, however, too small to be seen and perhaps even closed for the time being. Thus, in the light of the development of the EU today, his proposals become fairly hard to realize in practice. Because of this, one might agree that less ambitious answers to the legitimacy question may be relevant in the short term. However, what Habermas provides is a forceful defence of a great European project of ‘transnational democracy’ to which we, as ‘good Europeans’, should aspire.

1. CONSTITUENT POWER IN HABERMAS: FROM NATIONAL TO TRANSNATIONAL?

Though Habermas entered the ongoing philosophical discussion by emphasizing the development and role of the public sphere and deliberation for modern societies, his work ‘addresses most extensively the way in which modern law can be justified rationally on the basis of a system of rights’ (Deflem, 2013, p. 84). This makes it impossible to avoid the question of establishment of a new political order which then acquires a coercive legal form. The legal code of this order, if its laws are valid, ‘has both a normative and a factual side: on the one hand it is legitimate and on the other it is positive’ (Finlayson, 2005, p. 114). The question, however is, how law can be legitimate.

I. National

In *Between Facts and Norms*, Habermas adopts a reconstructive approach to the already existing legal order. He sets up two principles which have to hold in order for legitimate law to come into being. The first is the discourse principle, which says that ‘just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses’ (Habermas, 1998, p. 107). This principle means that if each rational person can add his/her consent to the law and its coercive power, and eventual punishment if one does

not obey it, then it can be labelled as legitimate. The problem is, why this matters – how can the *procedure* of lawmaking incorporate the discourse principle in order to create legitimate law? Habermas answers with the second, democracy principle, according to which the deliberation has to unfold already in this procedure. In other words, ‘only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted’ (Habermas, 1998, p. 110). This implies not only a strong input from individuals and civil society in the legislative process but also the crucial role of the *procedure* of lawmaking, instead of a particular *subject* (e.g. the people or representatives).

The participation of individuals and civil society must, therefore, be secured via a system of rights, otherwise there would be no stability and guarantee of a legitimate procedure. Habermas (1998, pp. 118–131) distinguishes between five categories of rights which encompass both individual freedoms that ‘secure the *private autonomy*’ of the subjects of law and rights to political participation, because only the latter can secure that laws will ‘issue from citizens’ exercise of *public autonomy* as lawmakers acting through elected representatives’ (Bohman and Rehg, 2014; see also Rehg, 1998, p. xxv). The joint presence of private and public autonomy constitutes the *dual legitimacy* of modern law. Such duality, then, operates on the level of law as well (see above), which is why legitimate law lies ‘between facts and norms’.

In sum, the duality of modern law is a crucial invention of Habermas, and one which has implications for the understanding of the relationship between the subject and process of lawmaking. For him, collective subject exists *in the procedure* of creation. Constituent power, if we use this term, rests *within* this procedure and nothing as popular sovereignty could emerge without such a procedure. Therefore, it seems to be proper to classify Habermas’ approach to constituent power as a relationalist one which holds that ‘[it] not only involves the exercise of power by a people: it simultaneously constitutes a people’ (Loughlin, 2013, p. 229). However, as I will show below, the underlying assumptions change at the EU level as the empirical reality which serves as a background for theorizing is slightly different. Habermas is aware of this difference and proposes an original, but not uncontroversial way of adopting to it.

II. Transnational

When it comes to the EU, a clear difference emerges from the nation-state context in which Habermas operates when laying down the fundamentals of his theory because the EU in its

current design can hardly be considered a (federal) state. Member states remain the ‘Masters of the Treaties’ which come closest to some kind of constitution and form the basis of EU law. The economic crisis, however, caused the need for immediate and joint measures to be taken to supranational level. What Habermas empirically observed is that European law is being ‘constitutionalized’ in crisis atmosphere (Habermas, 2012b). That alone, however, is not a sufficient development, because the process of subordination to EU law does not imply shared sovereignty, no matter how is it exactly defined. Instead, what can be observed, and, for Habermas, is a factor exacerbating the legitimacy deficit of the EU, is ‘post-democratic executive federalism’ which predominantly consists of unaccountable decision-making in intergovernmental bodies of the EU. To put it differently, he denounces current crisis management as ‘hand-to-mouth incrementalism’ which ‘highlight[s] the lack of political creativity’ (Habermas et al., 2012).

From this short outline it should be already clear that Habermas requires an alternative to the dominant contemporary mechanism of European integration, and that is precisely because this mechanism does not provide for the legitimacy of any emerging European order. An alternative to ‘executive federalism’, almost a polar opposite, is ‘transnational democracy’, in which Member States ‘retain their monopoly on the legitimate use of force [but they] subordinate themselves to supranational law [...] and share their sovereignty with the citizenry of the Union as a whole’ (Habermas, 2012b, p. 339). It is useful to recall that the subordination to EU law is, at least for Habermas, already happening (but cf. criticisms on this point below), and what is missing, therefore, is shared sovereignty between the member states and citizens. This is the ultimate requirement for a legitimate transnational democracy which Habermas cannot emphasize more: ‘Once we come to see the European Union as if it had been created for good reasons by two constitution-founding subjects endowed with equal rights – namely, co-originally by the citizens (!) and the peoples (!) of Europe – the architecture of the supranational but nevertheless democratic political community becomes comprehensible’ (Habermas, 2012a, pp. ix–x).

The practical political consequences of this co-original establishment of a European political community, which in its *focus on the procedure of creation* do not differ that much from Habermas’ approach to constituent power within the borders of a nation state, are twofold. Firstly, if it is the interaction of the citizens of the EU and citizens (peoples) of the Member States which creates transnational democracy, it is, in contrast to the national level, in which popular sovereignty was established in the procedure of constitution making, required that these citizens and peoples at least to some extent *already exist* before the

procedure actually begins. Habermas subscribes to this view when he argues that ‘the sharing of constituting powers between EU citizens and European peoples [...] divides sovereignty at the origin of a political community which is going to be constituted, and not only at the source of the already constituted political community’ (2012a, pp. 28, 38). The duality he introduced in *Between Facts and Norms* is still present, but on different level: it is not primarily the duality of private and public autonomy, but rather the duality of citizens and peoples, two constituting *subjects*. Undoubtedly, the procedure of constitutionalization remains important but this time it requires the subjects to exist before the procedure begins in order to be successful.

In line with this interpretation of the duality, Habermas claims ‘we do not need a European people [for a transnational democracy] but individual citizens, who have learnt that they can be both national citizens and European citizens in one person’ (Habermas, 2014, pp. 82–83). This argument just underlines the fact that European citizens (if we presuppose their existence) are *dual citizens* in the sense that they are at the same time citizens of the Member States, just as US citizens are at the same time citizens of one of the 50 states. Even if the ‘second’ citizenship is not formalized, it still requires the awareness of its existence in each individual. Still, it is precisely this duality we encounter here, which has profound consequences for any effort to ‘label’ this thought as federalist or something else.

This categorization necessitates an awareness of Habermas’ proposals as well which are the second consequence of the theoretical requirement of co-original creation. For long time, the philosopher has been arguing for almost two decades in favour of a single European constitution. It is important to understand why he did so; it is because he is convinced in the need to ‘conserve the great democratic achievements of the European nation-state, beyond its own limits’ (Habermas, 2001, p. 6). A European constitution would thus not only help the procedure of joint action of the member states (2001, p. 12) but would be beneficial for the gradual emergence of a ‘community of fate shaped by common descent, language and history’ (2001, p. 15). Here we discover the mutually constitutive relationship between the constitution as a legal document and the European ‘demos’ as citizens with shared identity. The constitution is important because it creates political institutions (see the very exact proposals on institutional reforms in e.g. Habermas, 2014) with a ‘catalytic effect’ on the formation of European identity which means ‘nothing other than unity within national diversity’ (Habermas, 2000, p. 161). The ‘demos’ which emerges from this association, in turn, provides the constitution with legitimacy (but not the EU as a whole; for this, citizens as peoples of the member states are also required). Once again the importance of the *process*

towards a specific end can be observed here, though this time, in contrast to the genesis of sovereignty on the level of nation states, it is the subject of the European ‘demos’ which emerges from this process. This underlines the key role of the process of European constitution-making for Habermas. If such a process does not take place, a European ‘demos’ is unlikely to emerge.

Before turning to the question of how the approach of Habermas falls into the current debate about European constitutionalism, let us summarize the three main points of his view of the legitimacy of the EU. First, the EU in its current design does not provide sufficient legitimacy for Habermas because instead of heading towards a ‘transnational democracy’, it utilizes the doubtful decision making methods of ‘executive federalism’. Second, on the normative level, the EU can become a legitimate polity only if its constituent power, which is of dual nature (European ‘demos’ + Member States ‘demoi’), will co-originally create it. Third, such a process is highly unlikely to happen without a European constitution that provides room for the formation of a joint identity, a single identity of citizens of many different states. In sum, if we one day view the EU as legitimate, we need the constituent power of a dual nature. Such a constituent power will, however, not emerge without a joint European identity serving as the basis for a united ‘demos’. For this identity to be ‘made’, a European constitution is essential. This construction is, though highly persuasive, not immune to criticism, first of all because of its circularity – the constituent power for the emergence of which the European constitution is necessary is supposed to create a community within an already existing institutional structure. Hence, in the next section, alternative views on the question where does constituent power rest in the EU are utilized to put Habermas’ understanding in context and try to find a solution to the circularity problem.

2. A FEDERALIST OR ‘CATEGORY IN ITSELF’? THE LINES OF HABERMAS’ ‘EUROPEAN’ THOUGHT

Having become familiar with the main theoretical assumptions of Habermas, it may seem reasonable to place him under the heading ‘federalist thinkers’ in the political thought of the EU. This is indeed what some scholars do, either because they think he advocates for a political union ‘in which true political power and legitimacy would be shifted beyond the confines of the member states to supranational institutions’ (Lindseth, 2013, p. 149) or because they think he proposes ‘a continental federal system that serves a European-wide civil society’ (McCormick, 2006, p. 406 [5]). This classification, however, should be approached with greater care as in one of his most recent writings, Habermas argues (on a global scale) in

favour of ‘supranational communities, which can generally meet the democratic benchmarks of legitimation, *even if they do not take the format of federal states* on a larger scale’ (Habermas, 2014, pp. 82–83). If federalists are defined as those who defend the establishment of sovereign procedures of law-making within Europe which stimulate the establishment of ‘political identity familiar to the conventional republican polity at this EU level’ (Bowman, 2006, p. 196), it seems that Habermas with his requirement of co-original creation of two subjects does not fit into this model. Hence it may be more suitable to start with a different classification and then locate Habermas’ ideas on the basis of two key lines: the problems of European *demos* and European constitution.

Before doing so, it is necessary to mention an alternative classification offered by Walker (2008), who identifies four categories of approaches towards constituent power in the EU on the basis of two usual questions within this issue (*who* and *how* makes the first law and establishes the new order) and two specific questions (*whether* it is useful to think about constituent power in the EU and, if so, *why* it matters). Although the specificity of the latter two questions within this sphere may be contested (cf. Loughlin’s (2013) classification where he leaves place for those who would answer the *whether* question negatively on the national level as well and calls them normativists), the four categories he creates seem reasonable. Whereas the first three categories either answer the *whether* question negatively (non-constituent constitutionalism) or do not see room for improvement of the presence of constituent power on the EU level because it is either already there (constitutional vindication) or can never exist (constitutional scepticism), it is only the latter category (post-constituent constitutionalism) for which Walker has a preference, that acknowledges the absence of constituent power in the EU dimension but sees this lack also as ‘an opportunity to develop an appropriately flexible response to the sustained problems of pedigree and effective realization of a democratically responsible system of government [...]’ (Walker, 2008, p. 252).

It is not difficult to label Habermas, with his firm belief in the need for a democracy in the EU and at the same time his criticism of currently prevailing ‘executive federalism’, as a ‘post-constituent constitutionalist’, who believes in the possibility to ‘fix’ the democratic shortcomings of the Union despite the fact that it had not been created in a truly democratic way. The problem arises only after this is done, because although this clearly separates Habermas from scholars who deny the importance of thinking about constituent power on the EU-level (Přibáň, 2010) or view deeper integration towards political unity as undesirable (Bellamy, 2013), precisely because of the proliferation of different approaches defending the

need for constituent power in the EU it sums altogether different conceptions under one heading. It is more proper to go deeper into Habermas' solutions to the two particular issues of *demos* and constitution which should allow us to answer whether he is a federalist or not.

I. Line 1: European *demos*?

From the discussion in Section 1 it emerged that Habermas requires a *demos* to enter into polity-making process but this *demos* can only emerge in the process of making of a European constitution. According to this understanding, a *demos* for Habermas is created by a 'set of practices and procedures actively engaged in by citizens through which social bonds are forged' (McCormick, 2006, p. 408 [6]). The single *demos* stems from the 'intersubjectively shared context of possible mutual understanding' (Habermas, 2000, p. 159). That is why, at least for 'early' Habermas, the constitution-making process is essential; it facilitates the European-wide debate and becomes a source of 'civic' identity. Based on this line of thinking, the EU as a 'community of fate' would require a 'binding constitutional regime' that would 'provide an authoritative answer to the question of the character of the polity by settling in constitutional terms the Union's identity' (Dimitrijević, 2014, p. 55).

Let us examine the criticism of this line before turning to the other one. The common identity of a *demos* Habermas advocates is usually described under the term *constitutional patriotism* (Vujadinović, 2014) and criticised for the risk of undermining 'the unique normative potential of a political entity composed of distinct [reflexive national] identities' (Lacroix, 2009, p. 141). However, it is not clear how this 'undermining' could happen, as even in his early writings Habermas does not call for diminishing national identities as such. Instead, he views European *demos* with a single identity, emerging from the discursive practices in the European public sphere, predominantly during the constitution-making process, as the constituting subject of the EU as a political entity. Another criticism, which views the single identity as exclusionary in the sense that it confirms the 'domination of EU citizens over non-citizens' (Bowman, 2007, p. 740) because it leaves out the different identities of immigrants, may seem more justified but only until the question is posed why immigrants, if they gain rights as EU citizens, cannot accommodate the European identity along their own identities. As pointed out before, this European identity is not supposed to be based on any religious, national or ethnic background, but on civic essentials (human rights and principles of solidarity) enshrined in the European constitution. Immigrants thus would become EU citizens by subscribing to these essentials, without getting rid of their own cultural, ethnic or any other backgrounds.

Still, it is not entirely clear where this ‘civic solidarity’ comes from. In one of his pre-crisis texts, Habermas (2009, p. 87) sees the ‘window of opportunity’ for such solidarity in the ‘empty shell of the European citizenship [...] filled with the awareness that all European citizens now share the political fate.’ Such awareness can arise via the European public sphere and discursive interaction of citizens across the borders of the member states. However, even if not taking into account his proposals for a ‘two-speed’ Europe (e.g. Habermas, 2014, p. 87, 2012a, p. 116) which would hardly lead to ‘shared political fate’ among all European citizens, a problem with this window is that it likely remains closed until such a public sphere is not in place. Instead of a ‘*Sozialstaat*’ Habermas assumes the EU can be transformed into, in the absence of the public sphere, it is more likely that the Union will become a ‘*Sektoralstaat*’, in which citizen participation or material equality in redistribution or social protection would be non-existent (McCormick, 2006, p. 423 [14]).

The single identity of a single *demos* emerging via the process of making of European constitution can thus be evaluated as a very optimistic, nonetheless persuasive construct, especially in the pre-crisis atmosphere where numerous tendencies pointed towards the gradual ‘federalization’ of the EU and the question was rather how to make the new federation work than whether it will truly become a reality (Trechsel, 2005). The failure of the project of the Constitutional Treaty combined with the economic crisis which required swift response from European elites transformed the environment in which even intellectuals like Habermas used to operate, as it pointed towards the painful limits of the reality of European policy-making process. Therefore, even though Habermas’ ‘response’ to the crisis still very much operates with similar concepts to civic solidarity or European citizens, it combines them in a slightly different manner. Now it is the co-originality of citizens and peoples which becomes the constituent power, though for the ‘citizens’ to come into being, the European public sphere is still needed. The problem is, that without the European constitution and the process of its creation, it is unlikely that this kind of public sphere would emerge. The ‘innovation’ consisting of a shared constituent power between the citizens and the peoples ‘at the origin of a political community which is going to be constituted, and not only at the source of the already constituted political community’ (Habermas, 2012a, pp. 28–38) shifts the desirable locus of the constituent power on the EU level. From the process of constitution-making and establishing a single *demos*, constituent power becomes attributed to the two subjects involved in the process of polity-making (not necessary via a single constitution), with one of the subjects nonetheless unlikely to emerge without such a constitution-making process. This is what Raulet (2014, p. 102) describes as a ‘striking contradiction between the

plea for a European constitution [in (Habermas, 2001)] and the idea that there may be “other” ways of grounding the European identity [i.e.] other constituting subjects than the subject which is itself constituted as subject through the constitution.’ Utilizing different terminology, the move can be described as an evolution from the ‘postnational’ (constituent power resting in the process of establishment of a single identity) to the ‘transnational’ (shared constituent power among two subjects). The latter implies that ‘the EU cannot be a federal state [because] the EU and the member states share the sovereignty’ (Canivez, 2014, pp. 134–135).

There is one problem and one finding which can be pointed to in this ‘modified’ conception. The former was by and large explained; it is the low likelihood of emergence of European citizens without a constitution-making process. As regards the finding, it rests in the striking correlation of the other subject Habermas needs, i.e. ‘European peoples’ or ‘*demos*’, with the subject posed by the so-called *demoicracy* theorists. According to these scholars, what the EU needs is to be a *demoicracy*, that is, a democracy of multiple peoples. To be sure, this similarity is, alone, superficial because, in contrast to Habermas, advocates of *demoicracy* do not need European citizens for their model to work. Habermas’ ‘deliberative strategy’ is, in their opinion, not acceptable because it ‘overestimates the potential for transnational deliberation and consensus and underestimates the need for constitutional rights and limits’ (Cheneval and Schimmelfennig, 2013, p. 340). On the one hand, the latter part of this argument may be challenged from the perspective of Habermas, who has an indispensable place for human rights in his theory (at least in its pre-crisis articulation which rested on the joint civic identity based precisely on rights arising from the principle of human dignity). On the other hand, the current shortcoming in deliberation remains a valid objection of *demoicracy* theorists.

In general, what they propose (with some simplification disregarding the differences between the approaches of particular theorists), is the retention of *constituent powers* in the hands of peoples of the member states ‘regarding entry, exit and basic rules of the political order of multilateral democracy’ (Cheneval and Schimmelfennig, 2013, p. 342). Still, even this proposal implies some extent of unification in constitutional practices, such as a single law on European referenda on treaty changes. A necessary component of this mechanism, which can, in contrast to federalist approach, accommodate the absence of single identity on European level, is also constitutional pluralism in judicial decision making (2013, pp. 345–347). In other words, what is desirable in this view is to ‘stay at the Rubicon’, that is, at the line ‘which separates a Union ruled by and for multiple *demos* from a Union ruled by and for one single *demos*’ (Nicolaidis, 2013, p. 366). The constituent powers rest in the subjects of the

member states but the constituted powers which are established on the basis of Hamilton's 'reflection and choice' are transferred to the Union.

To conclude, the idea of *demoicracy*, though different from Habermas', requires, as he does, the participation of the peoples of member states as the constituent power. The problem with this idea, which views the legitimacy deficit in contemporary EU rather as the absence of several procedural mechanisms of collective decision-making than the lack of joint identity, is that the introduction of such mechanisms on the institutional level is not likely to fundamentally change the prevailing attitudes of European citizens. They, though still having overall positive standing to the EU as such, trust less and less both in the European institutions, and their national governments respectively (European Commission, 2014). That is why the *demoicracy* as the *finalité* (!) of European integration remains a rather unconvincing conception. Before elaborating more on this argument in the conclusion, it is worth uncovering more clearly the circularity problem in post-crisis Habermas' via summarizing his views on the European constitution.

II. Line 2: European constitution?

Posing again the question whether Habermas requires a European constitution may, in the light of the findings above, be superfluous. However, two layers have to be considered when thinking about it. It is true that the 'pre-crisis Habermas', who defended the emergence of single identity in the constitution-making process, viewed it as a crucial component for achieving a legitimate constitutional order in the EU. The question becomes trickier when turning to the 'post-crisis' layer with the shared constituent power between citizens and peoples of the EU. As I argued several times, notwithstanding this turn, the 'citizens', as opposed to the 'peoples', still have to emerge in some way. This may be possible through a European public sphere, defined by Habermas as 'a communicative network extending across national boundaries and specializing in the relevant questions' (Habermas, 2009, p. 87). However, how could such network create 'itself' without the extraordinary process of constitution making?² Media might help but might not as well, and without them we are left with the 'forced' establishment of such sphere via activities of the European institutions,

² Some recent works argue that even the 'late' Habermas still requires a European Constitution 'that contains the forms of rights necessary to create the basis for a democratic union to insure the necessary 'incentive above' to protect and preserve democratic rights' (Minda, 2013, p. 48). This might be right but the *process* of this constitution-making seems to be different. It is no more the process of making a written document in which a European *demos* with its distinct identity emerges but rather the framework of EU law which encompasses fundamental rights based on the principle of human dignity. Cf. the first innovation in Habermas (2012a, pp. 20–28): 'the primacy of supranational law over national law'.

which can only possess sufficient powers for such activities if they, in the absence of democratic methods of participation, would be strengthened by the very method of ‘executive federalism’ which Habermas opposes.

Are there any alternative frameworks that could help overcome this difficulty? Indeed, there are several, some with greater potential than others. For instance, Börzel (2010, p. 87) thinks that the ‘transfer of national sovereignty rights to the EU level has given rise to the creation of a new supranational Constitution which does not exist as an autonomous layer but is intractably interlocked with the national Constitutions.’ The problem with this is how such ‘abstract Constitution’ would be capable of becoming a source of any civic identity if it has been created by institutional transfers of sovereignty. Another example seeks the way out in the emergence of the European public sphere without the constitution based on somewhat *demos* argument. Here, the pluralist framework consisting of ‘divergent national concerns’ and ‘legitimate constraints that national polities must accept as members of a European community of states’ (these are articulated in European law and jurisprudence of the European Court of Justice) is mitigated by the bargaining in the European Council (Scharpf, 2010, pp. 118–119). Now this sounds like a contradiction in itself because if the intergovernmental framework were working, even with a greater deal of transparency and openness than is going on today, there is no reason to believe that the European public sphere would follow it.

An interesting alternative is called ‘political constitutionalism’. One of its prime advocates (Wilkinson, 2013) opposes the approaches of ‘foundational’ constitutionalism, which requires a *demos* to be in place before the constitution-making process starts, and ‘freestanding’ constitutionalism, which requires a Rawlsian ‘overlapping consensus’ among ‘reasonable individuals’ about ‘constitutional essentials.’³ His proposal is based on the already emerging ‘legal constitution’ (via the constitutionalized European law and decisions of the ECJ) that exists in the political and social context and is thus ‘dynamically reproductive and productive of the people(s) through the political and juridical mediation of the public sphere’ (Wilkinson, 2013, p. 222). However, Wilkinson himself asserts this approach may only serve as a ‘tool’ for understanding what is going on in the EU now (*ibid.*); it, therefore, cannot be considered as the normative reference similar as the one Habermas makes by posing the requirement of co-original creation. It may be true, in line with political constitutionalism that the strengthening of the pluralist approach to the interpretation of EU

³ According to Wilkinson (2013, p. 201), Habermas attempts to reconcile the two approaches. The reason for this argument may rest in his requirement of a consensus (important for freestanding approach) of citizens (crucial for foundationalists) and peoples in Europe.

law (see Jaklic, 2013) together with its constitutionalization brings in a limited public sphere where deliberation occurs on the basis of the outcomes of legal and political processes. In this sense, political constitutionalism may better than Habermas' optimism capture the empirical reality of constitutionalism in the EU. Now, can this empirical reality be reconciled with the normative proposal of Habermas?

To find where the possible reconciliation lies, we must once again stress 'which Habermas' is being discussed. It can be reasonably concluded that his 'pre-crisis' theory was a federalist one, which opted for a European Constitution. According to this approach, 'the Union needs a codified, democratically prepared and enacted highest act' (Dimitrijević, 2014, p. 55). However, 'post-crisis' Habermas with the sharing of constituent power can hardly be labelled as a 'pure' federalist who would in whichever way prioritize the unified European identity over national identities. This theory may be more plausible to label as a 'pluralist' one which emphasizes the necessity of a 'transnational democracy' based on mutual deliberation between the two constituent subjects in the European public sphere. However, the circularity problem, like which can be identified in his 'cosmopolitics', i.e. theory about global order as well (Roele, 2014), remains present in the pluralist approach precisely because there is no satisfactory explanation of how a European public sphere which would be the basis for the identity of the European citizens would emerge without the process of making an European constitution. This is why it seems the empirical reality captured by 'political constitutionalism' does not seem to resemble the normative framework of Habermas (and this is not surprising as he himself is very critical of the current development in the EU). It turns out that Habermas offers us an ideal type for European political community, which rests on milder requirements than his original 'federalist' proposals (for instance, it does not insist on a written European constitution) but which, in contrast to these, includes a quite significant circularity problem. In the conclusion, I offer a possible solution to this problem by introducing the 'intermediate step' in the effort of making a legitimate polity from the EU, which borrows both from Habermas and the *demoicracy* approach.

CONCLUSION: HABERMAS' OPTIMISM AND THE WINDOW OF OPPORTUNITY

This paper has examined the nature and location of constituent power on the EU level according to the theory and proposals of Jürgen Habermas in order to find out what kind of development towards a European political community does he exactly advocate for and how is the mechanism proposed by him supposed to work. There are at least three conclusions to be drawn from this investigation.

Firstly, the locus of constituent power in Habermas in the EU is different from the level of nation states and changes slightly through the development of his political thought as well. The ‘pre-crisis’ Habermas considers the process of constitutionalization of a European *demos* with a single identity via the process of making of a European Constitution as the proper location of the constituent power in the EU. In his more recent, ‘post-crisis’, writings, he introduces the process of co-original creation of a community by the European ‘peoples’ and ‘citizens’, however, he seemingly leaves unanswered the question of how these citizens come into (single) being without the process being already in place.

Secondly, after analyzing Habermas’ proposals regarding the legitimacy problem of the EU, it can be concluded that although his original approach is a federalist one, his recent remarks on the role of constitutionalized EU law in the integration process together with the call for a transnational democracy with a dual source of legitimacy (just to recall: citizens + peoples co-originally) fit more an approach that could be labelled as a pluralist one. Still, the prevailing account on the contemporary empirical reality in the EU is the absence of a single identity, even of a civic, rather than cultural, ethnic or religious one, and therefore the assumption of the possibility of the co-original creation is a predominantly optimistic one. As Joerges (2014, p. 256) notes, in the light of the current crisis management of the EU, where methods of executive federalism are, despite all Habermas’ warnings, still very much working and sometimes even bringing effective results in economic terms, Habermas ‘cannot plausibly explain how these cumulative developments [actions of Europeans as citizens of the EU and peoples of the member states] can be democratically inverted.’ In other words, the need for a political union may be very well justified but, as praxis indicates, other options for further integration and resolving the crisis are more likely to be tried before any effort in favour of such a ‘giant leap’ (Lindseth, 2013), especially if the subject who decides on the steps are political elites instead of ‘the people’. Here, Habermas is definitely an optimist who sees a window of opportunity, which, though may exist, seems to be closed in these times.

Finally, the issue on the table remains how to overcome the circularity problem in Habermas’ proposal for the European political community, which, despite some questionable aspects such as the differentiated integration which would constitute an obstacle to the development of a ‘civic’ identity on the European level and thus the ‘citizens’ part in the citizens + peoples pair, points towards a desirable end for the EU as such. The obstacle of impossibility of creating the ‘citizens’ outside of the process of creation of the community, ideally by means of an authoritative constitution, seems fundamental because co-originality cannot be developed without getting over it in some way. The call for a European public

sphere, which resonates forcefully in Habermas' writings, together with the roots of achieving it, such as the politicisation of the EU agenda (Habermas, 2014, p. 87), is justified but the idea is not developed enough to be working on the practical level, where all kinds of obstacles posed by the abovementioned development in crisis management persist. What seems to be required to get from the 'executive federalism' to 'transnational democracy' proposed by Habermas, is an intermediate step.

One vision of that step can be derived from the theories of 'democracy of multiple peoples' on the European level. Contrary to what *demoicracy* theorists state, this arrangement does not seem satisfactory as the *finalité* of the process of European political integration because it does not allow the joint identity to be developed. However, what it *does* enable is the consolidation of the 'peoples' component in a way that makes democratic participation possible in a far more substantial manner than it is now. Such a process may be helpful for the emergence of the kind of public discourse Habermas supports, and this, in turn, may stand at the beginning of the establishment of a joint identity of the 'citizens' component of the duality. Although this window of opportunity is definitely smaller than the one Habermas sees, the likelihood that it is open is greater than in his case. So, why not try to find this window and breathe the fresh air it offers, instead of standing before a larger window that seems hermetically closed for the time being? The *demoicracy* model, as an intermediate step towards establishing the 'citizen' component, may become the source for a qualitatively improved public discourse on the European level that in turn increases the chance for the development of an overreaching European identity and makes the process of co-original creation of a political community a real alternative. And, as the only other approach heading towards a European identity seems to be an artificial constitution put forward and realized by European elites, the choice for now would be rather easy: acknowledging the locus of constituent power in the hand of European peoples to see it one day truly shared among *demos and demoï* of Europe.

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