

# The Emergence and Democratization of European Society:

## On the Transformation of Public Law in Europe

By Armin von Bogdandy

### 1. Idea and Programme

Many Europeans struggle to understand where EU-centred Europeanization has led them. The standard response—that their situation is *sui generis*, one of a kind—no longer holds. Thus, Brexit, disappointments such as in the fight against COVID-19, and conflicts over European financial transfers, immigration, or dubious judicial reforms in some Member States demand a more substantial answer. With this in mind, I reconstruct European integration by reconstructing European public law in the light of Article 2 of the Treaty on European Union (TEU).<sup>1</sup>

According to Article 2 TEU, all Europeans are today part of *one* society. European integration may not have produced a European state or people, but it has helped create a European society. This society is intimately interwoven with European public law, for the Treaty legislator—that is, the 27 Member States’ political systems in cooperation with EU institutions—avails itself of constitutional principles to characterize it. Thus, Article 2 TEU states that European society is one ‘in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’ and in which the values of ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ apply.

I interpret this statement as the manifesto, identity, and constitutional core of a *democratic* society. This take is not mere academic speculation. According to the German government’s Memorandum on the Lisbon Treaty, the values of Article 2 TEU ‘constitute the essence of a democratic society’.<sup>2</sup> Thus, Europeans should understand that European integration has ushered in

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<sup>1</sup> For a psychological reconstruction, O. Angelucci von Bogdandy, *Zur Ökologie einer Europäischen Identität. Soziale Repräsentationen von Europa und dem Europäer-Sein in Deutschland und Italien* (2003).

<sup>2</sup> Memorandum on the Treaty of Lisbon of 13 December 2007, Bundestag publication BT-Drucks. 16/8300, at 153.

a European democratic society. This approach takes the bull by the horns because democracy represents the key concept in the struggle to understand and develop our society.

Some will question whether Article 2 TEU can serve as the constitutional core of European society. Its conceptual potpourri appears to reflect woolly compromise. And indeed, it mediates between many ideas, identities, interests, traditions, and world views. But in the Hegelian tradition in which I write, this is an asset, not a shortcoming.<sup>3</sup> Indeed, Hegel considers a well-working constitution a system of mediations.<sup>4</sup> On this view, Article 2 TEU establishes the standards by which European society must seek its compromises. While compromises, i.e. mediations, characterize true democracies,<sup>5</sup> immediacy represents the promise of hybrid or authoritarian regimes.<sup>6</sup>

The spirit of compromise expressed in Article 2 TEU lies at the democratic heart of European society. In Hegelian terms, the haggling in Brussels is desirable if it engenders mediations that meet the standards of Article 2 TEU. As compromises, these mediations will always meet criticism, for the most diverse reasons. However, such criticism is a valuable asset in itself, for it feeds European society's self-critical attitude.

European public law thus provides, I hold, the normative structure of European democratic society. This take is not universally shared. For the public-law scholar Christoph Schönberger it represents 'constitutional science fiction'.<sup>7</sup> The political scientist Philip Manow's view is even more sombre: 'Anyone who invokes Europe wants to cheat.'<sup>8</sup>

To be sure, European institutions, public law, and society exhibit manifold deficiencies.<sup>9</sup> A democratic compromise may even compromise a democratic society, for not every compromise is valuable.<sup>10</sup> In reconstructing the democratic features of European public law, this book does not, therefore, glorify the status quo. To the contrary, it suggests further transformations.

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<sup>3</sup> G. W. F. Hegel, *Lectures on the History of Philosophy (1837)*, vol 1 (1995), at 35.

<sup>4</sup> G. W. F. Hegel, *Elements of the Philosophy of Right (1821)* (1991), at para. 302, addition.

<sup>5</sup> D. Innerarity, *Democracy in Europe. A Political Philosophy of the EU* (2018), at 61 ff.

<sup>6</sup> G. Frankenberger, *Autoritarismus. Verfassungstheoretische Perspektiven* (2020), at 255 ff.

<sup>7</sup> Schönberger, 'Hegemon wider Willen. Zur Stellung Deutschlands in der Europäischen Union', 66 *Merkur* (2012) 1, at 5 f., 8.

<sup>8</sup> Manow, 'Ach, Europa—Ach, Demokratie', 66 *Merkur* (2012) 20, at 26.

<sup>9</sup> In novel form, R. Menasse, *The Capital* (2019); in greater detail see 2.4.A.

<sup>10</sup> Thus, on the policies of the European Council vis-à-vis Poland and Hungary, Editorial comments, 'Compromising (on) the general conditionality mechanism and the rule of law', *Common Market Law Review* (2021) 267; see *infra* see 3.5.B.

Although I write in the Hegelian tradition, I do not believe that progress is a foregone conclusion. Future transformations may take many directions, as may the interpretation of the standards of Article 2 TEU. Thus, transformative constitutionalism for a more European democratic society (see 2.6.D) is one option—but so is a European concert of powerful states, one country’s hegemony, executive federalism, national withdrawal, and, last but not least, the ideas personified by Viktor Orbán.<sup>11</sup> A European democratic society exists, but it does not seem consolidated.

## 2. European Society

This book presents European public law as the law of European society. This is not science fiction but a scholarly reconstruction. Article 2 TEU provides its legal anchor, as it explicitly refers to *society*.<sup>12</sup>

There are many European societies. Consider the more than 3,000 European companies in the legal form of *Societas Europaea* (such as Airbus, BASF, Dior) and thousands of civil society organizations, ranging from the European Society of International Law to the European Society of Cardiology to the *European Society* for Spiritual Regression. The term *society* in Article 2 TEU encompasses all of these, but it refers to much more—namely, the social whole constituted by the EU Treaty.

To clarify this concept of society, I show that it takes on the role of Hegel’s concept of the state. The latter includes all public institutions with their staff, procedures, instruments, and practices, but also all citizens with all their social relationships.<sup>13</sup> Over the course of the 19th century, the concept of society increasingly came to designate this social whole as well.<sup>14</sup> That links German thought with a tradition famously expressed by Article 16 of the French Declaration

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<sup>11</sup> An overview in G. Levi and D. Preda (eds), *Euroscepticisms. Resistance and Opposition to the European Community/European Union* (2019).

<sup>12</sup> The term has received little attention from legal scholars, see Calliess, ‘Art. 2 EUV’, in C. Calliess and M. Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar* (2016), at para. 30; Klamert and Kochenov, ‘Article 2 TEU’, in M. Kellerbauer, M. Klamert, and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (2019), at para. 5; Fumagalli, ‘Commento Art. 2 TUE’, in A. Tizzano (ed.), *Trattati dell’Unione europea* (2014) 11, at 14; but see also Mangiameli, ‘Article 2’, in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (2013), at paras 35–41.

<sup>13</sup> von Bogdandy, ‘Hegel und der Nationalstaat’, 30 *Der Staat* (1991) 513.

<sup>14</sup> P. Vogel, *Hegels Gesellschaftsbegriff und seine geschichtliche Fortbildung durch Lorenz von Stein, Marx, Engels und Lassalle* (1925).

of the Rights of Man and Citizen of 1789, one of the most important provisions of European constitutionalism. It states: ‘Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.’

Since the beginning of the 20th century, that broad understanding of society is safely established. Max Weber wrote quite naturally about public authority, bureaucracy, government and the state in his seminal book *Economy and Society*.<sup>15</sup> The European Convention on Human Rights (ECHR) illustrates how common this understanding is in Europe today. Many of its provisions feature the words ‘a democratic society’ (e.g. Article 6(1), Article 8(2), Article 9(2), Article 10(2), Article 11(2) ECHR). In doing so, they mainly refer to the Convention states’ public institutions, as Article 16 Declaration of the Rights of Man and Citizen.

If society and state designate the same social whole, that does not mean that choosing one or the other is immaterial. To mark one difference: the concept of society conceives the social whole rather from the vantage point of interacting individuals whereas the concept of state conceives it rather from the vantage point of public authority. Society is also more open on possible forms of public authority that provide for political unity. Focusing on society might help overcome statist thinking.

Moreover, European society provides for a new understanding of conflicts in the European Union. Whereas today many conflicts are conceived as conflicts *between* Member States, the new approach frames them as conflicts *within* one society. For example, the crisis over the rule of law is mostly understood as one between liberal Western Member States and some illiberal Eastern ones. The new frame brings to the fore that quite a number of citizens and parties in Western Europe share the views of Viktor Orbán and Jarosław Kaczyński. A similar point can be made for policies of solidarity, today mostly framed as a conflict between Northern and Southern European Member States.

Of course, the question remains whether European society—a society that does not form a state— is a viable democratic entity. Many believe it is not (see 3.3.C, 3.4.B, 3.5.B). This book endeavours to prove the opposite.

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<sup>15</sup> M. Weber, *Economy and Society* (2002), at 52 ff., 212 ff., 635 ff.

While Article 2 TEU envisions a European society without a European state, it does not picture a stateless society. Instead, it posits the Member States, including all their public institutions, as essential parts of European society. The *society* of Article 2 TEU is not limited to the sphere that Hegel calls *civil (bürgerliche)* society, that is, to the web of economic relations. Article 3 para. 3 TEU uses the term ‘internal market’ to designate this web.<sup>16</sup> The term *civil society (Zivilgesellschaft)*, moreover, usually refers to the sphere of social engagement or non-profit organizations, as does the term in Article 11(2) of the EU Treaty.<sup>17</sup> Article 2 TEU’s *society*, by contrast, denotes the social whole, which encompasses all the institutions of the Union and its Member States as well as all their citizens and other residents. Under Article 2 TEU, society thus represents the ultimate social reference of European law.

Article 2 refers to *European* society<sup>18</sup>—and not to the societies of the Member States<sup>19</sup>—because it uses the singular ‘society’. It does not allude to the global (or world) society because it refers to the EU Member States and to democratic values.<sup>20</sup> The reference to values also underscores that Article 2 does not conceive of society in opposition to the concept of *community*: The German dichotomy between society and community, which goes back to Ferdinand Tönnies, is irrelevant when it comes to Article 2 TEU.

Ferdinand Tönnies distinguished between society and community by emphasizing the specific significance that values hold for a community.<sup>21</sup> Following Tönnies, society is often understood as a group that is only integrated in market terms, whereas community is taken to mean a more cohesive group, one integrated through values. Thus, a society’s bonds are rather thin and transactional, whereas a community’s bonds are thick and normative. The European Treaties’ path and terminology exhibit an almost opposite logic. In 1958, the Treaty makers started with the

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<sup>16</sup> Hegel, *Elements of the Philosophy of Right* (n. 4) para. 182.

<sup>17</sup> Mendes, ‘Participation and the Role of Law after Lisbon. A Legal View on Article 11 TEU’, 48 *Common Market Law Review* (2011) 1849.

<sup>18</sup> CJEU, Case C-574/12, *Centro Hospitalar de Setúbal and SUCH*, Opinion of AG Mancini (EU:C:2014:120), para. 40; path breaking Mangiameli (n. 12).

<sup>19</sup> Thus Monjal, ‘Le projet de traité établissant une Constitution pour l’Europe. Quels fondements théoriques pour le droit constitutionnel de l’Union européenne?’, 40 *Revue trimestrielle de droit européen* (2004) 443, at 453 f.

<sup>20</sup> On the scarcity of values in world society, Luhmann, ‘Die Weltgesellschaft’, 57 *Archiv für Rechts- und Sozialphilosophie* (1971) 1.

<sup>21</sup> Riedel, ‘Gesellschaft, Gemeinschaft’, in O. Brunner, W. Conze, and R. Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (1975) 801, esp. at 830 ff.

*Community* of the European Economic Community (EEC) Treaty; in 2007, after half a century of integration, they postulated a society based on values (see 3.1.D).

The factual statement in Article 2 TEU—namely, that there is a European society—is sociologically robust.<sup>22</sup> Of course, numerous questions remain as to how to conceptualize European society and how to observe it. As a basic concept of European thought, society has been theorized in many different ways, and the relevant data can be reconstructed in similarly various forms. To interpret Article 2 TEU, it suffices to understand society as social interaction or communicative practice.<sup>23</sup> Legal scholars observe such interaction or practice mainly through the study of certain texts: constitutions, treaties, laws, decrees, directives, judgments, and scholarly publications. These texts provide the empirical basis for my reconstruction of European society.

Lawyers concentrate on juridical disputes, which are an especially intense form of social interaction and communicative practice. Accordingly, European society becomes a reality in the many conflicts involving the terms of Article 2 TEU, conflicts in which *European* rights, *European* justice, *European* solidarity, *European* democracy, or the *European* rule of law become disputatious. Indeed, European society creates itself in these disputes.<sup>24</sup> European law plays a constitutive role inasmuch as it conceptualizes the conflicts as European conflicts, civilizes them, and renders their legal outcomes valid, effective, and legitimate.

Is addressing all Union citizens as part of a European society a merely external ascription, or can we also understand European society as European citizens' self-description? Sceptics will point out that Article 2 TEU was concocted by a small group of people in the Brussels bubble surrounding the Rue de la Loi. However, most constitutions emerged in even smaller bubbles. Many drafting processes were less public, less dramatic, and less political than that of the Lisbon Treaty from 2003 to 2009. The latter involved a convention staged to maximize publicity, a first dramatic failure in the French and Dutch referendums, two Irish referendums, a series of Member State ratifications with qualified majorities, and some spectacular court cases.<sup>25</sup>

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<sup>22</sup> See W. Outhwaite, *European Society* (2008).

<sup>23</sup> Müller, 'Auf dem Weg in eine europäische Gesellschaft? Begriffsproblematik und theoretische Perspektiven', 17 *Berliner Journal für Soziologie* (2007) 7, at 24.

<sup>24</sup> Přibáň, 'Introduction: on Europe's crises and self-constitutions', in J. Přibáň (ed.), *Self-Constitution of European Society. Beyond EU politics, law and governance* (2016) 1, at 3.

<sup>25</sup> J.-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (2010), at 25–63; D. Phinnemore, *The Treaty of Lisbon. Origins and Negotiation* (2013), esp. at 16 ff., 148 ff., 178 ff.

In 1987, Hartmut Kaelble's pioneering study already identified a European society but saw scant evidence of self-reflexive processes.<sup>26</sup> For him, then, the concept represented a merely external ascription. In 2020, however, Kaelble noted that the national societies have continued to coalesce 'substantively'.<sup>27</sup> Accordingly, I interpret the singular *society* posited in Article 2 TEU in 2007 as European citizens' self-description (see 2.2.B, 3.2.A–C).

[These pages are §§ 1 and 2 of my book *Strukturwandel des öffentlichen Rechts. Entstehung und Demokratisierung der europäischen Gesellschaft*, Suhrkamp 2022; an English version is forthcoming].

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<sup>26</sup> H. Kaelble, *Auf dem Weg zu einer europäischen Gesellschaft. Eine Sozialgeschichte Westeuropas 1880–1980* (1987).

<sup>27</sup> H. Kaelble, *Eine europäische Gesellschaft? Beiträge zur Sozialgeschichte Europas vom 19. bis ins 21. Jahrhundert* (2020), at 185 ff., 200.