



## ARTICLES

# CREATING EUROPEAN PUBLIC SPHERES: LEGITIMISING EU LAW THROUGH A RECONFIGURATION OF EUROPEAN POLITICAL PARTIES

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TABLE OF CONTENTS: I. Introduction. – II. The importance of the public sphere for the democratic legitimacy of law. – III. Conceptualising European public spheres. – III.1. Barriers to European public spheres. – III.2. Adaptations at the EU level. – IV. *Status quo* of European public spheres. – IV.1. Institutions of the EU's sphere of will formation. – IV.2. The European mass media. – IV.3. The European party system. – IV.4. The impact of the non-existent party system. – IV.5. Interim conclusion. – V. A new role for political parties in the EU. – V.1. A model for the European level: political parties as communicative actors. – V.2. Changing the role of European political parties. – VI. Conclusion.

ABSTRACT: The European Union's political response – or the lack thereof – to the current Covid-19 pandemic has reinforced doubts about the future viability of the Union. One of the key issues decreasing the acceptance of the EU is the (perceived) lack of democratic legitimacy of EU law. This *Article* attempts to assess the causes for this deficit and to develop suggestions to address it. With the objective of evaluating the institutions in the EU's spheres of will formation and the public spheres, it sets out a discourse-theoretical model of democratic legitimacy as a benchmark. To create European public spheres, inclusive transnational processes of opinion formation and law-making must be institutionalised. Under the changed conditions of modern communication, adaptations to account for a fragmentation of discourse and the importance of digital public spheres are necessary; this requires an institutional focus on internet communication at the EU level. An analysis of the *status quo* reveals that the factual non-existence of a European party system is a decisive factor for the legitimacy deficit of EU law. Without strong European political parties as communicative actors, a void between the EU's procedures of will formation and civil society exists, and European public spheres cannot be created successfully. This structural problem can be addressed, it is argued, by freeing European political parties from the constraints currently imposed by EU law. If they are conceptualised as transnational communicative actors with adequate funding, they can create European public spheres and help to overcome the legitimacy deficit of the EU.

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KEYWORDS: EU law – legitimacy of EU law – European political parties – European public spheres – institutional structure of the EU – digital public spheres.

## I. INTRODUCTION

The public narratives around the European Union have drastically changed over the last decades. After being heralded as a successful peace and economic project and designated to be a model for other countries in every corner of the world,<sup>1</sup> the acceptance of the EU has dropped considerably across different Member States. Its strategy during the European debt crisis since the end of 2009 was – at least – questionable and has resulted in doubts about the future prospects of the whole project.<sup>2</sup> Doubts resurfaced in 2020, when the outbreak of the Covid-19 pandemic saw Member States employing a “me-first response” with export bans on vital medical equipment and the reinstatement of border controls, leading critics to wonder if the latest crisis could be the “final straw” for the EU.<sup>3</sup>

Often linked to this diminishing acceptance is the perceived democratic deficit of the EU and of EU law.<sup>4</sup> The struggle to foster wide acceptance for the Union’s policies is linked to the decision-making and communication structures of the EU. Different reasons can be identified to explain the democratic deficit: the underdeveloped role of the European Parliament due to the dominance of the European Council,<sup>5</sup> the role of the Court of Justice of the European Union (CJEU) in the European integration process,<sup>6</sup> or the lack of spheres for contestation of the Union’s policies.<sup>7</sup> This *Article* attempts to develop a suggestion how the democratic legitimacy of EU law can be increased. It focuses on outlining how changes to the EU’s legal framework can help to achieve that goal. This approach does not call into question the importance of sociocultural changes<sup>8</sup> and the personal attitudes of the responsible politicians in the Member States,<sup>9</sup> but it will be

<sup>1</sup> M Leonard, *Why Europe Will Run the 21<sup>st</sup> Century* (Fourth Estate 2005) 7.

<sup>2</sup> E Balibar, ‘Europe Is a Dead Political Project’ (25 May 2010) *The Guardian* [www.theguardian.com](http://www.theguardian.com).

<sup>3</sup> AK Mangold, ‘How Corona Aggravates the Crisis of the European Union and Threatens its Existence: Call for European Democratic Solidarity’ (6 April 2020) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de); J Rankin, ‘Coronavirus Could be Final Straw for EU, European Experts Warn’ (1 April 2020) *The Guardian* [www.theguardian.com](http://www.theguardian.com).

<sup>4</sup> *Inter alia* EO Eriksen, ‘An Emerging European Public Sphere’ (2005) *European Journal of Social Theory* 343; A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) *JComMarSt* 533; D Grimm, ‘Jetzt war es soweit’ (18 May 2020) *Frankfurter Allgemeine Zeitung* [www.faz.net](http://www.faz.net).

<sup>5</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 343.

<sup>6</sup> D Grimm, ‘Jetzt war es soweit’ cit.

<sup>7</sup> A Føllesdal and S Hix, ‘Why There Is a Democratic Deficit in the EU’ cit. 551 ff.; F de Witte, ‘Interdependence and Contestation in European Integration’ (2018) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 488 ff.

<sup>8</sup> D Grimm, ‘Does Europe Need a Constitution?’ (1995) *ELJ* 295 ff.; A Wilkens, ‘Europe Needs Another Cultural Revolution. But Who Would Lead it?’ (13 November 2019) *The Guardian* [www.theguardian.com](http://www.theguardian.com).

<sup>9</sup> J Habermas, *The Lure of Technocracy* (Polity 2015) 73 ff.

argued that the EU's current legal framework prevents crucial institutional developments that could help legitimise EU law.

For this purpose, the *Article* will first provide a normative explanation of the generation of legitimate laws in democratic states (section II). It relies on a discourse-theoretical model that emphasizes the importance of public spheres in the legitimisation of state action. This model will then be applied to the EU to set out how European public spheres can be created (section III). The existing institutions of the EU will be evaluated against this backdrop which shows the particularly weak role of European political parties (section IV). Building on that, this *Article* will propose changes to the legal status of political parties in the EU which would allow them to become communicative actors at the EU level, help to create European public spheres, and legitimise EU law (section V).

## II. THE IMPORTANCE OF THE PUBLIC SPHERE FOR THE DEMOCRATIC LEGITIMACY OF LAW

The normative justification of state institutions and of the laws they enact is a question at the heart of political and legal theory.<sup>10</sup> Scholars have attributed a significant role in the exercise of authority by the people to the existence of a public sphere (*Öffentlichkeit*).<sup>11</sup> It describes, in a simplified way, "a sociological aggregate of readers, viewers or citizens, that excludes no one *a priori* and is endowed with key political and critical powers".<sup>12</sup>

One of the most advanced concepts of the public sphere focusses on the importance of deliberation, an idea that was established in several publications by Jürgen Habermas. His considerations focus on the process of public deliberation that takes place in the public sphere. For a functioning democratic process that produces reasonable results, the power structure of the State must relate to other "discursive arenas".<sup>13</sup> It is the public sphere with its deliberation processes that links civil society to the power structure of the State.<sup>14</sup>

Discourse in the public sphere is of particular importance for legitimising laws enacted by state institutions. The continuous process of deliberation in the public sphere allows for different fragmentations to come into conflict, get coordinated, and resolved.<sup>15</sup> Democratic legitimacy of law then does not stem from the participation of citizens in the law-

<sup>10</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 342; U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (Mohr Siebeck 2004) 149 ff.

<sup>11</sup> J Durham Peters, 'Distrust of Representation: Habermas on the Public Sphere' (1993) *Media, Culture and Society* 542 ff., with an analysis of the terminology.

<sup>12</sup> *Ibid.* 543 ff.

<sup>13</sup> J Habermas, *Europe: The Faltering Project* (Suhrkamp 2008) 158 ff.

<sup>14</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 358.

<sup>15</sup> I Spiecker, 'Kontexte der Demokratie: Parteien, Medien und Sozialstrukturen' (2018) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* 35.

making processes but rather “from the formation of opinions and wills that can meet the claim of approval in rational free debate”.<sup>16</sup> The democratic procedure draws its legitimizing force from the general accessibility of this deliberative process whose structure provides the basis for an expectation of rationally acceptable results.<sup>17</sup>

Habermas himself understands that his reliance on the discourse-generated reasonableness requires the institutionalisation of different types of discourse, and the democratic process must be organized and conducted.<sup>18</sup> Such an institutionalised public sphere is not an entity existing prior to decision-making bodies or independently of decision-making agencies. Historically, it developed after freedom rights were granted by modern constitutions; the public sphere thus became the vehicle to test the legitimacy of new legal provisions and a counterweight to governmental power.<sup>19</sup> Consequently, the public sphere cannot be conceptualised as an entity simply waiting to be discovered. It rather must be created and emerges in opposition to the power structure of the State.<sup>20</sup> Thus, the creation of the public sphere calls for the existence of certain institutions to allow for and steer the deliberation process.

One necessary institution for the continued processes of deliberation in the public sphere is the existence of a media system. The mass media, as a whole, permit public spheres to emerge by enhancing the context and range of communication.<sup>21</sup>

Political parties are another important feature of the deliberation process in democratic societies. Political competition fosters debate, which subsequently promotes the formation of public opinion on different policy options.<sup>22</sup> An institutional design that allows political parties to compete and provide opportunities to articulate different positions will result in a firmer legitimacy of laws. In consequence, for Habermas, the public sphere “first and foremost [requires] the initiative, the enlightenment and organizational capacity of political parties”.<sup>23</sup>

<sup>16</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 347.

<sup>17</sup> J Habermas, *The Postnational Constellation. Political Essays* (MIT Press 2001) 110; cf. EO Eriksen, ‘An Emerging European Public Sphere’ cit. 347; L Mitsch, ‘Soziale Netzwerke und der Paradigmenwechsel des öffentlichen Meinungsbildungsprozesses’ (2019) Deutsches Verwaltungsblatt 811.

<sup>18</sup> J Habermas, *Between Facts and Norms* (MIT Press 1996) 110.

<sup>19</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 345.

<sup>20</sup> *Ibid.* 344-345; C Lefort, *Democracy and Political Theory* (Polity 1988) 37-38.

<sup>21</sup> J Durham Peters, ‘Distrust of Representation’ cit. 561.

<sup>22</sup> A Føllesdal and S Hix, ‘Why There is a Democratic Deficit in the EU’ cit. 550.

<sup>23</sup> J Habermas, *The Lure of Technocracy* cit. 78.

### III. CONCEPTUALISING EUROPEAN PUBLIC SPHERES

The focus on public discourse as a legitimizing force in democratic systems is a starting point in conceptualising the public sphere beyond the nation state.<sup>24</sup> Solely transferring the discourse-theoretical model to the EU level is, however, impracticable.

#### III.1. BARRIERS TO EUROPEAN PUBLIC SPHERES

The normative concept of democratic legitimacy through public discourse for a nation state is mainly focussed on presenting a model of *the* public sphere, leading to the impression that a singular communication network links society with the power structure of the State. This idea of one unitary communication network no longer seems appropriate, especially when considering the European context. Growing regionalism and nationalism at a sub-state level – to be observed, inter alia, in Catalonia and Scotland – creates distinctive communicate spaces below the state level.<sup>25</sup> Even in nation states presumed to have a collective identity and an interplay between the different discursive spheres, fragmented regional spheres exist and emerge. These observations indicate that an adequate normative model for the EU has to account for a plurality of public spheres; the public sphere has nowadays become “a highly complex network of various public spheres stretching across different levels, rooms, and scales”.<sup>26</sup> With a growing complexity and diversity in contemporary civil societies, “a variety of differentiated processes, forms, and *loci*” is needed to discuss emerging democratic issues.<sup>27</sup> Tendencies towards a fragmentation of public discourse have been highlighted by researchers for various countries.<sup>28</sup> Such tendencies are potentially spurred by the increased importance of digital communication spheres. Whether or not the usage of online services such as social networks does indeed (and already) have polarizing effects is empirically questionable;<sup>29</sup> it is clear that the algorithmic structuring of communication theoretically has the potential to create fragmented discussions and “echo chambers”.<sup>30</sup>

<sup>24</sup> EO Eriksen, ‘An Emerging European Public Sphere’ cit. 348.

<sup>25</sup> *Ibid.* 342, stated this tendency as early as 2005.

<sup>26</sup> *Ibid.* 345; J Habermas, *Between Facts and Norms* cit. 373 ff.

<sup>27</sup> S Benhabib, *Situating the Self* (Polity 1992) 105.

<sup>28</sup> J Bright, ‘Explaining the Emergence of Political Fragmentation on Social Media: The Role of Ideology and Extremism’ (2018) *Journal of Computer-Mediated Communication* 17 ff.; L Mitsch, ‘Soziale Netzwerke und der Paradigmenwechsel des öffentlichen Meinungsbildungsprozesses’ cit. 812 ff.

<sup>29</sup> A Sirbu, D Pedreschi, F Giannotti and J Kertész, ‘Algorithmic Bias Amplifies Opinion Fragmentation and Polarization: A Bounded Confidence Model’ (2019) *PLoS ONE* 1 ff.; JP Rau and S Stier, ‘Die Echo-kammer-Hypothese: Fragmentierung der Öffentlichkeit und politische Polarisierung durch digitale Medien?’ (2019) *Zeitschrift für Vergleichende Politikwissenschaft* 399 ff.

<sup>30</sup> S Flaxman, S Goel and JM Rao, ‘Filter Bubbles, Echo Chambers, and Online News Consumption’ (2016) *Public Opinion Quarterly* 298 ff.; J Müller, V Hösel and A Tellier, ‘Filter Bubbles, Echo Chambers, and Reinforcement: Tracing Populism’ (2020) *Election Data* arxiv.org.

Other crucial factors in this development are personal news curational practices that complement the selection through journalists and algorithms in the newsfeeds of social networks: transnational research shows that users personalize their repertoire of news by following or blocking specific outlets in social networks. This news curation has the potential to stabilize and deepen existing gaps in the opinion formation process between users; those users interested in news tend to boost news content in their newsfeeds while others that say they avoid news are limiting news in their social media feed. For the US specifically, the research shows that such news-limiting practices on social media are also linked to political extremism.<sup>31</sup>

These tendencies towards a fragmentation of the public sphere mean that at the EU level, it cannot be assumed that the creation of European institutions will result in *the* European public sphere. Rather, a network of various, partly digital, public spheres that allows the deliberation of a multitude of issues is required. But how can a diffuse and transnational network of (digital) public spheres generate a set of reasonable public opinions concerning EU policies? "How can a collection of actors be transformed into a group with a distinct collective self-understanding capable of exerting influence unless there is a sense of common mission or vision?"<sup>32</sup> A model for the EU level must be able to explain what makes the European people come together to deliberate and form their opinions in a network of (digital) public spheres while also accounting for an increasing fragmentation of deliberative processes even within nation states.

A further obstacle is connected to the focus of the concept on public discourse: as Dieter Grimm has pointed out, the communication between different people requires a common language. "Communication is bound up with language and linguistically mediated experience and interpretation of the world." In the EU there is a multitude of official languages. Grimm argues that chiefly due to that language diversity, the creation of a European public or a European political discourse is severely hampered, if not impossible.<sup>33</sup> A normative concept for the EU level must consider these communication difficulties.

### III.2. ADAPTATIONS AT THE EU LEVEL

Regarding the conditions under which the European people will come together to deliberate and form their opinions in a network of public spheres, it is important to remember that concepts for the nation state are based on the idea that the people within a state share some basic (sociocultural) characteristics; the concept of the public sphere is thus founded on the assumption that (a state's) democratic legitimation requires a certain ho-

<sup>31</sup> L Merten, 'Block, Hide or Follow – Personal News Curation Practices on Social Media' (2020) *Digital Journalism* 15 ff.

<sup>32</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 345.

<sup>33</sup> D Grimm, 'Does Europe Need a Constitution?' cit. 295-296.

mogeneity of the state-constituting people.<sup>34</sup> However, Grimm points out that such a homogeneity can have different bases. He argues that society must form “an awareness of belonging together that can support majority decisions and solidarity efforts.”<sup>35</sup> This indicates that such awareness is not connected to a common language or ethnic characteristics, but the political process. At the EU level, this awareness translates to the capacity for transnational political communication and discourse.<sup>36</sup> While this interpretation *prima facie* might appear circular in the sense that communicative processes generate both democratic legitimacy and the necessary homogeneity, it is important to consider that nation states are the result of a historical development as well,<sup>37</sup> and that their national identities did not exist naturally, but were artificially created. This means that the cultural substrate, necessary for an inclusive process of deliberation in public spheres, must not be in place before political institutions exist, but can be created through inclusive processes of opinion formation and law-making. Public spheres are thus conducive to a reflexive identity.<sup>38</sup> The self-understanding of citizens in a democratic community is understood as “the flowing contents of a circulatory process<sup>39</sup> that is generated through the legal institutionalisation of citizens' communication”.<sup>40</sup> In the model set out in this *Article*, a certain homogeneity, *i.e.* shared (sociocultural) characteristics, can thus be created through deliberative processes, producing reasonable results. For European people to come together in inclusive processes of deliberation, an institutional structure must be in place that allows citizens to be involved in a transnational political discourse. Social integration must be fostered in the legally abstract form of political participation.<sup>41</sup> At the EU level, such a structure for political participation must also be strong enough to integrate citizens from all Member States. The legal framework must allow for an inclusive process of public deliberation that enables citizens to jointly make political decisions.

The identified problems relating to the fragmentation of public discourse are not specific to the EU level. As mentioned above, various nation states within the EU have to deal with growing regionalism and nationalism. This indicates that all democratic states and international organizations must find answers to the question how the deliberation processes in (digital) public spheres can be fostered and function under these changed circumstances. The structural issue is not situated at the EU level but a bigger (global) one,

<sup>34</sup> J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' (1995) ELJ 305.

<sup>35</sup> D Grimm, 'Does Europe Need a Constitution?' cit. 297.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* 285 ff.

<sup>38</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 346; see LA Friedland, T Hove and H Rojas, 'The Networked Public Sphere' (2006) *Javnost - The Public* 18 ff.: “networked public sphere systematically increases communicative reflexivity”.

<sup>39</sup> Cf. AD Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish 2006) 244 ff., with a depiction of communication as an ongoing process.

<sup>40</sup> J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' cit. 306-307.

<sup>41</sup> *Ibid.* 306; cf. A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 550.

with even nation states facing the emergence of a network of (digital) public spheres.<sup>42</sup> Under the changed conditions of modern communication, an institutional focus on internet communication is necessary to address potential fragmentation effects. Just like for “analogue public spheres”, the processes of deliberation in digital public spheres must be shaped in a way so that different fragmentations can come into conflict, get coordinated, and resolved.<sup>43</sup> This will require state regulation for the content review in services such as social networks to ensure a sufficient structure of the discourse. In addition, rules for the content curation in social networks should be considered, e.g. “must-carry-rules” to prevent relevant information from being overlaid by other content.<sup>44</sup> On the European level, a uniform regulatory model should be established to replace the scattered legislation by some Member States – such as the German Network Enforcement Act<sup>45</sup> or the (unconstitutional) French Avia law<sup>46</sup> –, an objective the EU will try to tackle in 2021 with its Digital Services Act.<sup>47</sup> Besides regulation, another crucial factor for shaping digital public spheres will be the presence of institutions within these digital public spheres that take part in and help to shape the discourse. The institutions of the sphere of will formation and political parties in particular need to have a strong presence within services such as social networks to steer the discourse in digital public spheres. Isolated accounts by some political parties, such as the Twitter account of the European People’s Party (EPP) with a little over 100.000 followers, are not sufficient. The (traditional) institutions of the public sphere must actively provide information in new, digital public spheres, so that the people can continue to rely on that information in their opinion formation process.<sup>48</sup>

In the outlined concept, which focusses on the accessibility of a (digital) deliberative process and its communicative context, the significance of different languages is diminished. It is not necessary for the public discourse to take place in one language, if it is institutionalised in a way that can include all European citizens across all Member States. A plurality of public spheres and languages thus does not prevent a public discourse at the European level: “[t]he public sphere comes into existence whenever and wherever all affected by general social and political norms of action engage in a practical discourse, evaluating their validity.” This means as many public spheres can exist as controversial gen-

<sup>42</sup> See *supra*, section III.1.

<sup>43</sup> See *supra*, section II.

<sup>44</sup> L Mitsch, ‘Soziale Netzwerke und der Paradigmenwechsel des öffentlichen Meinungsbildungsprozesses’ cit. 817 ff.

<sup>45</sup> Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, NetzDG), BGBl. 2017 I, 3352.

<sup>46</sup> EDRI, ‘French Avia law declared unconstitutional: what does this teach us at EU level?’ (24 June 2020) edri.org.

<sup>47</sup> European Commission, *The Digital Services Act: ensuring a safe and accountable online environment* ec.europa.eu.

<sup>48</sup> Cf. U Schliesky, ‘Digitalisierung – Herausforderung für den demokratischen Verfassungsstaat’ (2019) *Neue Zeitschrift für Verwaltungsrecht* 700, referring to the State as a “guarantor for information”.



eral debates about the validity of norms are conducted.<sup>49</sup> If a transnational communication between citizens about the validity of EU policies can be legally institutionalised, European public spheres will emerge even if the communication happens in different languages. Digital public spheres can play a vital role for transnational communication if institutions are present to steer the discourse. Additionally, the growing multilingualism of EU citizens works in favour of European public spheres. Research points to an increasing knowledge of foreign languages in the EU: 65 per cent of EU citizens know at least one foreign language,<sup>50</sup> and more than half of EU citizens can speak English.<sup>51</sup> Language diversity does thus not prevent or no longer prevents the creation of European public spheres. European public spheres can be created through the legal institutionalisation of inclusive transnational processes of opinion formation and law-making.

#### IV. *STATUS QUO* OF EUROPEAN PUBLIC SPHERES

Since the creation of European public spheres is generally possible, one has to wonder why scholars – still and more than ever – highlight the legitimacy deficit of EU law.<sup>52</sup> An analysis of the EU's institutions present in the different communicative spheres will show what issues have hindered deliberation processes at the EU level so far.

##### IV.1. INSTITUTIONS OF THE EU'S SPHERE OF WILL FORMATION

The EU's power structure is shaped by the interplay between European Parliament (EP), European Council, and European Commission. While the EP forms a possible key institution for an institutionalized discourse in the sphere of will formation that can receive input from (possible) public spheres,<sup>53</sup> critics have pointed out for a long time that its role is limited due to the dominance of the European executive. As long as the EP was equipped with weak competences and the European Council made key political decisions about the orientation of the Union, it could not be seen as having a strong influence in decision-making processes.<sup>54</sup> However, it must be noted that the competences of the EP were extended substantially with the changes to the European treaties. Its role was transformed from a consultative assembly to a decisive figure among the top EU institutions, equipped with a great proportion of law-making responsibilities.<sup>55</sup> The

<sup>49</sup> S Benhabib, *Situating the Self* cit. 105.

<sup>50</sup> Eurostat, '65% know at least one foreign language in the EU' (26 September 2018) ec.europa.eu.

<sup>51</sup> European Commission, *Europeans and their Languages* op.europa.eu.

<sup>52</sup> See *supra*, section I.

<sup>53</sup> J Habermas, *Europe: The Faltering Project* cit. 159-160.

<sup>54</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 353; D Grimm, 'Does Europe Need a Constitution?' cit. 283; J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' cit. 303.

<sup>55</sup> PM Huber, 'Art. 14 EUV' in R Streinz (ed.), *EUV/AEUV* (CH Beck 2020) para. 2 ff.; cf. A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 535.

EP has progressively developed into a more properly integrated Parliament with increased powers in legislation, the budgetary process and economic governance.<sup>56</sup> It has also become more involved in the process of appointing the European Commission.

The Commission as the EU's executive branch is responsible to the EP pursuant to art. 17(8) TEU. Because the president of the Commission is elected by the EP and the other members of the Commission require its vote of consent (art. 17(7) TEU), the EP has a decisive role in the appointment process for the Commission and thereby mediates democratic legitimacy.<sup>57</sup> Responding to suggestions from scholars that an opportunity for voters to choose between candidates for executive offices at the European level might strengthen the Commission's – and the Parliament's – legitimacy,<sup>58</sup> the election of the president of the Commission was politically linked to the elections to the EP by nominating lead candidates (*Spitzenkandidaten*) for European parties at the 2014 and 2019 parliamentary elections.<sup>59</sup> However, the process was discarded in 2019 when the European Council did not propose the lead candidate of the EP, Manfred Weber, but then German Minister of Defence Ursula von der Leyen as candidate for president. That course of action clearly showed that the European Council remains at the political and legal centre of the EU<sup>60</sup> and potentially disturbed the institutional balance in the long term.<sup>61</sup> Despite increased competences of the EP, its deliberative processes can still be trumped by the decisions of the Council, thus calling into question whether these processes warrant the presumption that its outcomes are reasonable products of a sufficiently inclusive deliberative process in the EU's sphere of will formation. The persistent dominance of the EU Council can thereby weaken the legitimacy of EU law.

This weakness of the EP is, however, not equivalent to illegitimate EU law. The public spheres as the intermediary systems between civil society and the power structure of the state were identified as the key discursive spheres with particular importance for legitimising laws.<sup>62</sup> Even if the sphere of will formation at the EU level only includes weak institutions – as shown for the EP –, the legitimacy of EU law still predominantly depends on an accessible discourse in the public spheres. Well-developed public spheres between the

<sup>56</sup> A Héritier, 'The Increasing Institutional Power of the European Parliament and EU Policy Making' (2017) EIF Working Papers 3 ff.; G De Angelis, 'Political Legitimacy and the European Crisis: Analysis of a Faltering Project' (2017) *European Politics and Society* 294.

<sup>57</sup> D Kugelman, 'Art. 17 EUV' in R Streinz (ed.), *EUV/AEUV* (CH Beck 2020) para. 119.

<sup>58</sup> A Føllesdal and S Hix, 'Why There Is a Democratic Deficit in the EU' cit. 552; cf. D Kugelman, 'Art. 17 EUV' cit. para. 119.

<sup>59</sup> S Fotopoulos, 'What Sort of Changes Did the *Spitzenkandidat* Process Bring to the Quality of the EU's Democracy?' (2019) *European View* 194.

<sup>60</sup> A Gray, J Barigazzi and M de La Baume, 'Who Killed the *Spitzenkandidat*?' (5 July 2019) *Politico* [www.politico.eu](http://www.politico.eu); PM Huber, 'Art. 14 EUV' cit. para. 5.

<sup>61</sup> Editorial, 'The European Parliament at the First Crusade' (2019) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 423 ff.

<sup>62</sup> See *supra*, section II.

EU institutions and the people can thus (partly) compensate for the intrinsic deficits in the sphere of will formation. Although the weakness of the EP hinders its legitimacy, EU law can still draw legitimizing force from the general accessibility of the deliberative process in public spheres. The structure of these public spheres grounds an expectation of rationally acceptable results. Therefore, the key element of assessing the legitimacy of EU law is the examination of the link between the EU institutions and civil society.

#### IV.2. THE EUROPEAN MASS MEDIA

Looking at the institutions for possible European public spheres, different opinions exist regarding the role of the mass media system. Based on his argument about language diversity,<sup>63</sup> Grimm stated in 1995 that prospects for a European communication system are “non-existent”. An increased reporting on European topics in national media could not establish a European discourse as those remain attached to national communication habits.<sup>64</sup> This argument about national media no longer necessarily holds true today. It was already argued that when the legitimacy of law is largely based on the accessibility of a deliberative process and its communicative context, the significance of different languages is diminished.<sup>65</sup> Therefore, the public discourse does not need to take place in one language and through purely European mass media for it to create transnational public spheres. If the discourse is institutionalised so that it is accessible in different languages but across all Member States, a multitude of public spheres in which discourse about EU policies takes place (in different languages) can be created. National mass media can focus on the same issues in different languages and foster a public discourse. To this effect, research suggests that a greater convergence in journalistic reporting exists, meaning “there is something approaching a common experience for European journalism.” Journalists across the EU are highlighting many of the same problems and share a common understanding of their roles.<sup>66</sup> An example can be seen in the transnational media coverage of the EU's policies following the spread of Covid-19, with mass media across different Member States and language areas striking very similar, critical tones.<sup>67</sup> The fact that the EP picked up on that criticism and demanded additional oversight for the EU recovery

<sup>63</sup> See *supra*, section III.1.

<sup>64</sup> D Grimm, ‘Does Europe Need a Constitution?’ cit. 295.

<sup>65</sup> See *supra*, section III.2.

<sup>66</sup> P Statham, ‘Making European News’ in R Koopmans and P Statham (eds), *The Making of a European Public Sphere* (Cambridge University Press 2010) 148.

<sup>67</sup> T Boucart and L Elliott, ‘The Coronavirus Crisis Has Brought the EU's Failings into Sharp Relief’ (29 March 2020) *The Guardian* [www.theguardian.com](http://www.theguardian.com); Franceinfo, ‘Coronavirus : quatre signes de l'impuissance de l'Union européenne face à l'épidémie de Covid-19’ (9 April 2020) [www.francetvinfo.fr](http://www.francetvinfo.fr); N Schmidt and P Pena, ‘Wie die EU in der Coronakrise versagt’ (23 March 2020) *Der Tagesspiegel* [www.tagesspiegel.de](http://www.tagesspiegel.de).

plan agreed upon by the European Council<sup>68</sup> exemplifies that (convergent) national mass media coverage can impact the deliberations in the EU's sphere of will formation. In light of these developments, it can be argued that the transnational infrastructure on which a European mass media system could be build is no longer totally absent.

Despite some encouraging tendencies, however, the actual acceptance of existing structures by the European population remains low. The market share of Pan-European services such as ARTE and Euronews remains very low.<sup>69</sup> Consequently, the current European media debates are not inclusive and elicit little public interest.<sup>70</sup> The same holds true for online services, with Europeanised communication on the internet being characterized by strong elite biases.<sup>71</sup> Uniform European regulation of digital spheres like social networks remains in the development stage, with national institutions trying to exert their influence on these spheres.<sup>72</sup> A strong presence of the EU institutions as well as European political parties in social networks is necessary to ensure that deliberation processes in digital spheres can link civil society to the power structure of the State.

In determining expectations for European mass media, the commercial character of press companies must be borne in mind. The primary role of mass media as institutions of public spheres is to provide information and to expose potential deficits at the EU level, thereby contributing to Europeanised communication. Their duty is not, however, to bridge the gap between the EU's sphere of will formation and EU citizens, with this task being firmly located within the political system.<sup>73</sup> Drawing a conclusion from an institutional perspective, parts of a European mass media network are there, but their structure is not strong enough to create European public spheres; the primary role in creating European public spheres cannot rest with the mass media.

#### IV.3. THE EUROPEAN PARTY SYSTEM

European political parties are given an important task in the Treaties of the European Union, with art. 10(4) TEU stating that “[p]olitical parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Un-

<sup>68</sup> European Parliament Resolution 2020/2732(RSP) of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020.

<sup>69</sup> C Bailey, 'Democracy as Ideal and Practice: Historicizing the Crisis of the European Union' in GM Genna, TO Haakenson and IW Wilson (eds), *Jürgen Habermas and the European Economic Crisis* (Routledge 2016) 28-29.

<sup>70</sup> P Statham, 'What Kind of Europeanized Public Politics?' in R Koopmans and P Statham (eds), *The Making of a European Public Sphere* (Cambridge University Press 2010) 299 ff.

<sup>71</sup> R Koopmans and A Zimmermann, 'Transnational Political Communication on the Internet' in R Koopmans and P Statham (eds), *The Making of a European Public Sphere* (Cambridge University Press 2010) 194.

<sup>72</sup> See *supra*, section III.2.

<sup>73</sup> P Statham, 'Making European News' cit. 147 ff., pointing out a shared transnational understanding by journalists to this effect.

ion.” Their capacity to fulfil that function have, however, been scarcely developed. Political parties at the European level are limited to combining the representatives and functionaries of national political parties and bundling up their existing concepts.<sup>74</sup> They are not independent political actors but alliances of national parties. In the past elections to the EP, European voters didn’t have any ideas about the programmes of the main parties on election day.<sup>75</sup>

The current role of European political parties is a consequence of their legal conception: art. 2 of the Regulation (EU, EURATOM) 1141/2014 of the EP and of the Council on the statute and funding of European political parties and European political foundations, based on art. 224 TFEU, defines “political parties” as an association of citizens which pursues political objectives, and which is either recognised by, or established in accordance with the legal order of at least one Member State. It further defines “European political parties” as political alliances between cooperating parties. Art. 3 of that Regulation establishes conditions such alliances must meet to be recognised at the European level: most important, the national member parties must be represented in at least one quarter of Member States by members of the EP, in the national parliaments, regional parliaments, or in the regional assemblies. Alternatively, the European political party or its members must have received in at least one quarter of the Member States at least three percent of the votes cast in each of those Member States at the most recent EP elections. The requirement to be represented in numerous national parliaments or to have received a vote in the European elections in numerous Member States prevents newly founded parties from being recognised at the European level, restricting political competition among the parties.<sup>76</sup>

The legal framework does not only restrict the establishment of European political parties, but also sets out the parameters for their funding. Art. 3(1)(e) of the Regulation 1141/2014 stipulates that European political parties must not pursue profit goals, severely restricting their financial leeway. While the Regulation includes provisions about the funding of European political parties from the general budget of the EU, only parties which are represented in the EP by at least one of its members (*i.e.* a national party) can apply for funds pursuant to art. 17(1) of the Regulation 1141/2014. 90 per cent of EU funding is distributed in proportion to a party’s share of elected members of the EP among the beneficiary European political parties (art. 19 of the Regulation 1141/2014). The combination of these provisions significantly hinders access to funds for smaller parties, especially those not yet represented in the EP. In addition, possible financing from the EU budget is subject to a relative ceiling of 90 per cent of eligible costs according to art. 17(4) of the Regula-

<sup>74</sup> PM Huber, ‘Art. 10 EUV’ in R Streinz (ed), *EUV/AEU* (CH Beck, 3rd edn 2020) para. 67.

<sup>75</sup> M Nettesheim, ‘Art. 10 EUV’ in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 2020) para. 114; P Statham, ‘What Kind of Europeanized Public Politics?’ cit. 304.

<sup>76</sup> PM Huber, ‘Art. 10 EUV’ cit. para. 64.

tion, meaning that European political parties must, in principle, come up with a share of ten per cent on their own for each grant. Since it is difficult for European political parties conceptualised as alliances between cooperating national parties to generate revenue on their own, this requirement restricts their room for manoeuvre.<sup>77</sup>

Considering the restrictive legal framework, it is unsurprising that the amount of funding available to European political parties is rather low. In 2020, the maximum funding that could be awarded to all European political parties combined pursuant to Regulation 1141/2014 was at approx. 41.8 million euros, with the EPP as the largest party in the EP receiving approx. 11 million euros.<sup>78</sup> Consequently, the campaign expenditure of the European parties is significantly lower than the corresponding campaign expenditure of their national members.<sup>79</sup> In the campaigns before the elections to the EP, European political parties face considerable challenges to spread their political messages: While they are responsible for distributing election materials and organising events,<sup>80</sup> their limited resources and the effort necessary to coordinate the different interests of the national parties makes it difficult for them to become strong communicative actors in the public sphere.<sup>81</sup> In contrast to national political parties, European political parties possess neither the necessary rights nor the funding that would allow them to permanently communicate to civil society. The consequence is that there is no Europeanised party system, just alliances of national parties in the Strasbourg parliament that loosely cooperate.<sup>82</sup> This is reinforced by research analysing the voting behaviour of Members of the European Parliament (MEPs): while their ideology – shown by their party affiliation in the EP – primarily drives their voting, findings show that national interests and country-level economic variables also predict MEPs' votes.<sup>83</sup> With European political parties being defined as political alliances between cooperating national parties, the institutional structure fosters such a high relevance for national interests.

Political parties, as crucial institutions in creating public spheres and maintaining public discourse by steering the opinion exchange, are absent at the EU level, and the legal framework prevents changes to this *status quo*.

<sup>77</sup> J Schmälter and S Haußner, 'Die Finanzierung des Europawahlkampfes' (2 May 2019) Bundeszentrale für politische Bildung [www.bpb.de](http://www.bpb.de).

<sup>78</sup> European Parliament, *Funding from the European Parliament to political parties at European level per party and per year* [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>79</sup> J Schmälter and S Haußner, 'Die Finanzierung des Europawahlkampfes' cit.

<sup>80</sup> S Fotopoulos, 'What sort of changes did the *Spitzenkandidat* process bring to the quality of the EU's democracy?' cit. 199 ff.

<sup>81</sup> *Ibid.*

<sup>82</sup> D Grimm, 'Does Europe Need a Constitution?' cit. 294.

<sup>83</sup> E Cencig and L Sabani, 'Voting Behaviour in the European Parliament and Economic Governance Reform: Does Nationality Matter?' (2017) *Open Economies Review* 967 ff.

## IV.4. THE IMPACT OF THE NON-EXISTENT PARTY SYSTEM

Under the outlined normative concept of democratic legitimacy, political parties were identified as key institutions for the creation of public spheres. At the EU level specifically, a shared political culture was highlighted as the foundation for the development of a necessary homogeneity.<sup>84</sup> The absence of a European party system fundamentally impacts the political discourse at the EU level. A link between institutionalized debates – the EU's power structure – and civil society is missing. The topics debated in institutions such as the EP cannot be filtered and transmitted into European public spheres.<sup>85</sup> With the structural attachment of European political parties to national political parties that relegates them to the role of “branch offices”,<sup>86</sup> a void between the sphere of will formation and civil society exists. The lack of interest for European mass media services shows that the missing link cannot be created by the media alone, as a transnational discourse also requires the initiative and capacities of political parties.<sup>87</sup> The intermediate structures necessary for transnational binding debates are lacking at the EU level.<sup>88</sup>

The absence of real European political parties directly affects the legitimacy of decisions taken by the EU's institutions in the sphere of will formation. In elections to the EP, national parties compete on the basis of the performance of their national governments.<sup>89</sup> With only alliances of national parties competing in elections and loosely cooperating in the EP, even the participants in debates within the Parliament are not genuine European actors. Without a link to civil society and opportunities for transnational discourse, European legal acts overwhelmingly derive their legitimacy from the democratic legitimation of the national governments.<sup>90</sup> Consequently, the EU lacks democratic substance even though democratic forms are present.<sup>91</sup>

With the lack of democratic legitimacy of the European Parliament and the European Commission, European integration has been pushed forward not least by the CJEU. Its decisions to declare the primacy of EU law and broadly interpret the free movement provisions have advanced European integration. However, this means that crucial political decisions are taken in an apolitical mode, barring the participation of other EU bodies as well as civil society.<sup>92</sup> EU law operates in isolation from the institutional process

<sup>84</sup> See *supra*, section III.2.

<sup>85</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 355.

<sup>86</sup> P Mair, *Ruling the Void* (Verso 2013) 93.

<sup>87</sup> J Habermas, *The Lure of Technocracy* cit. 78.

<sup>88</sup> EO Eriksen, 'An Emerging European Public Sphere' cit. 343.

<sup>89</sup> A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 535 and 552; D Grimm, 'Jetzt war es soweit' cit. 9.

<sup>90</sup> D Grimm, 'Does Europe Need a Constitution?' cit. 284.

<sup>91</sup> *Ibid.* 293.

<sup>92</sup> D Grimm, 'Jetzt war es soweit' cit. 9; F de Witte, 'Interdependence and Contestation in European Integration' cit. 484.

that was meant to ensure congruence.<sup>93</sup> People who favour an alternative set of policy outcomes to the current EU policies have no visible “opposition”.<sup>94</sup>

The legitimacy deficit and the lack of possibility to contest EU policies became apparent in the past decade during times of political crisis.<sup>95</sup> During the euro crisis, scholars pointed out that without existing pressure from civil society after an opinion-formation through European public spheres, an unrestrained European executive does not have the power and the interest to regulate markets in a socially responsible way.<sup>96</sup> Strict legality serves as the main resource of legitimacy for EU policies. In responding to the Covid-19 pandemic and its economic fallout, this led to an EU focus on explaining its lack of competence in health matters, without attempting to tap into alternative resources of legitimacy, causing criticism in heavily affected EU countries.<sup>97</sup>

#### IV.5. INTERIM CONCLUSION

The absence of real European political parties is a crucial factor for the legitimacy deficit of the EU. Without them, European public spheres cannot be created successfully, leaving a void between its procedures of will formation and civil society. The lack of a European party system also affects the EU's other institutions, as the will formation in the European Parliament is deficient without real parties as parliamentary actors. Because of the EU's legitimacy deficit, some scholars argue that competences must be transferred back to national parliaments, as only the national political spheres are sufficiently sophisticated to allow for meaningful political expression by the citizens.<sup>98</sup> European integration is seen, in the words of *Wolfgang Streeck*, as a “modernization project that has ceased to be modern, and whose last chance to become democratic has long been missed”.<sup>99</sup> This rollback of EU competences is unnecessary if a modification of the role of political parties in the EU can help to overcome the lack of connection between the EU's power structure and the public.<sup>100</sup> The analysis shows that attempts to address the EU's legitimacy deficit must alter the role of European political parties.

<sup>93</sup> F de Witte, 'Interdependence and Contestation in European Integration' cit. 485.

<sup>94</sup> A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 549.

<sup>95</sup> AK Mangold, 'How Corona Aggravates the Crisis of the European Union and Threatens its Existence' cit.

<sup>96</sup> J Habermas, 'Demokratie oder Kapitalismus? Vom Elend der nationalstaatlichen Fragmentierung in einer kapitalistisch integrierten Weltgesellschaft' (2013) *Blätter für deutsche und internationale Politik* 62.

<sup>97</sup> C Mac Amhlaigh, 'Legitimacy in the Time of Coronavirus' (17 April 2020) *Verfassungsblog verfassungsblog.de*.

<sup>98</sup> R Bellamy and D Castiglione, 'Three Models of Democracy, Political Community and Representation in the EU' (2013) *Journal of European Public Policy* 218; F de Witte, 'Interdependence and Contestation in European Integration' cit. 503.

<sup>99</sup> W Streeck, 'Small-State Nostalgia? The Currency Union, Germany, and Europe: A Reply to Jürgen Habermas' (2014) *Constellations* 218.

<sup>100</sup> Cf. A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 553.



## V. A NEW ROLE FOR POLITICAL PARTIES IN THE EU

Based on the established structural deficits of the European legal framework for political parties, a proposal to free European political parties from their constraints will be developed, aiming to improve the democratic legitimacy of EU law.

### V.1. A MODEL FOR THE EUROPEAN LEVEL: POLITICAL PARTIES AS COMMUNICATIVE ACTORS

To allow political parties to perform a mediatory role and link citizens in the social sphere to the procedures of will formation at the EU level, they must no longer be seen as service providers to the EU's executive. When highlighting the important role of political parties as institutions of the public sphere, Habermas has pointed to the concept of art. 21 of the German Basic Law (*Grundgesetz*, GG): parties are not only given a constitutional mandate to participate in the formation of the political will of the people, but a duty to do so.<sup>101</sup> In contrast to the state institutions, the Basic Law understands political parties (primarily) as communicative actors. They create and shape the public debate that is essential in a democracy.<sup>102</sup> Political parties are given an integrative function: internal discourse within the political parties leads to compromises that can then be passed on into the public discourse. The internal discussion and balancing of political ideas and their subsequent public distribution is thereby interrelated to the process of public opinion formation.<sup>103</sup> The integrative function is not limited to ideas but extends to personnel: parties activate and educate citizens for a participation in political life and recruit them to become party members and (potentially) run for public offices.<sup>104</sup> Art. 21(1)(2) GG protects the right to freely establish political parties. The multitude of political parties resulting from this is desired by the Basic Law, which views competition within a multi-party system (*Mehrpartei-enstaat*)<sup>105</sup> as a key element of the deliberation process.

This constitutional mandate for political parties to play an active (communicative) role in the opinion formation by the people is further developed in the law on political parties (*Parteiengesetz*, PartG). The key function of political parties in the democratic process requires broad publicity by the parties themselves.<sup>106</sup> Ss. 8, 9 PartG stipulate

<sup>101</sup> J Habermas, *The Lure of Technocracy* cit. 78.

<sup>102</sup> S Augsberg, 'Die politischen Parteien als zentrale Akteure des demokratischen Wettbewerbs' (2018) JURA 1111.

<sup>103</sup> W Kluth, 'Art. 21 – Parteien' in V Epping and C Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (CH Beck 2019) para. 74 ff.; M Schröder, '§ 119 - Stellung der Parteien' in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (CF Müller 2013) 119 para. 21 ff.

<sup>104</sup> M Schröder, '§ 119 - Stellung der Parteien' cit. 119 para. 20.

<sup>105</sup> *Ibid.* para. 14 ff., 48 ff.

<sup>106</sup> HH Klein, 'Art. 21 – Parteien' in T Maunz and G Dürig (eds), *Grundgesetz Kommentar* (CH Beck 2020) para. 316 ff.

that a general meeting (*Parteitag*) of the party members must be held at least every two years; the general meeting forms the supreme body of a political party. S. 6(3) PartG requires the executive board of a party to inform the Federal Election Commissioner about the statute and programme of the party. These specifications can be seen as a direct implementation of the constitutional requirement in art. 21(1)(4) GG according to which the internal organisation must conform to democratic principles: political parties are public actors who must organise their internal deliberation procedures in a corresponding manner. S. 1(2) PartG adds that political parties contribute to the will formation of the people by promoting the active participation of citizens in political life and training citizens capable of assuming public responsibilities, showing a direct link between political parties and civil society. Art. 21 GG thus imposes mandatory (communicative) duties on political parties, and the legal framework is designed to give them the rights and obligations necessary so the parties fulfil this duty<sup>107</sup> – which is of a fundamental importance for a functioning public discourse.

Adequate funding for political parties also plays a decisive role in the fulfilment of their constitutional duty. The financing of German political parties essentially rests on three pillars: membership fees, donations, and contributions from state resources. The total amount of financial resources available to the parties through these three pillars is substantial,<sup>108</sup> especially when compared to European political parties.<sup>109</sup> Considerable state resources are disbursed to allow German parties to fulfil their constitutional duty. In 2018, the governing Christian Democratic Union (CDU) reported revenue of approx. 147 million euros, of which about 56 million euros (38,1 per cent) came from state funding.<sup>110</sup> The party with the smallest parliamentary group in the *Bundestag*, Alliance 90/The Greens (*Bündnis 90/Die Grünen*) still reported revenues of approx. 48 million euros, with 19 million euros (39,7 per cent) stemming from state funding.<sup>111</sup> Pursuant to s. 18(4) PartG, every party that received at least 0.5 per cent of the votes in a nationwide election or 1 per cent of the votes in a state election has a right to receive state funding. Criteria for the amount of state funds disbursed to each party are their success in past elections and the amount of membership fees and donations raised. This means that political parties receive funds *pro rata* for every valid vote cast for them and for every euro raised by them in membership fees and donations.<sup>112</sup> The combination of a (relatively) low threshold to access state funding and the consideration of party success in the calculation ensures that smaller par-

<sup>107</sup> *Ibid.* para. 162.

<sup>108</sup> *Ibid.* para. 408.

<sup>109</sup> See *supra*, section IV.3.

<sup>110</sup> BT-Drs. (*Bundestag* parliamentary material) 19/16760 3.

<sup>111</sup> *Ibid.*

<sup>112</sup> See in detail R Streinz, 'Art. 21 – Parteien' in HV Mangoldt, F Klein and C Starck (eds), *Grundgesetz Kommentar* (CHBeck 2018) para. 197 ff.

ties can receive funds and bigger parties receive the resources which reflect their importance in the political process (and the public discourse).

Under the German Basic Law and the PartG, political parties are not designed as supporters or extensions of the state's power structure, but independent intermediaries in a free and inclusive public discourse.<sup>113</sup> They mediate between the spheres of informal public communication, on the one hand, and the institutionalised deliberation and decision processes, on the other.<sup>114</sup>

## V.2. CHANGING THE ROLE OF EUROPEAN POLITICAL PARTIES

Building upon the model of the German Basic Law, constraints on political parties in EU law must be removed to allow them to act in a similar way. Comprehensive changes to Regulation 1141/2014 of the Statute on European Political Parties<sup>115</sup> are necessary. European political parties must no longer be defined as alliances of (national) political parties. An option to register political parties with European legal personality and independently of a link to existing national parties should be created.<sup>116</sup> The constraints on European political alliances in art. 3 of that Regulation, requiring them to be represented in assemblies in Member States or to have received a vote share in multiple Member States in the last elections to the European Parliament, must be reduced or removed altogether.

An example that illustrates the existing space for European political parties is the initiative of *Volt Europa*. Founded in 2017 as a Pan-European progressive political movement, it aims to strengthen the EU by empowering its citizens.<sup>117</sup> Under the current legal framework, the Pan-European initiative can only compete in elections to the EP by founding separate parties in the different Member States, which resulted in *Volt Europa* winning one seat only in Germany in the 2019 elections.<sup>118</sup> A newly-conceptualised Regulation for European political parties would allow political initiatives such as *Volt Europa* to be recognised as a party and no longer uphold the dominance of established national political parties.<sup>119</sup> European political parties should also be allowed to admit citizens as party members directly without the legal involvement of national political parties.<sup>120</sup> These new-style European political parties – equipped with European legal

<sup>113</sup> Federal Constitutional Court judgment of 19 July 1966 BVerfGE *Parteienfinanzierung I* 20, 56, 101; Federal Constitutional Court judgement of 24 July 1979 BVerfGE 2. *Parteispenden-Urteil* 52, 63, 83.

<sup>114</sup> J Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' cit. 306.

<sup>115</sup> See *supra*, section IV.3.

<sup>116</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* (Nomos 2012) 124-125; F de Witte, 'Interdependence and Contestation in European Integration' cit. 507.

<sup>117</sup> Volt Europa, 'The Amsterdam Declaration' [www.volteuropa.es](http://www.volteuropa.es).

<sup>118</sup> European Parliament, '2019 European election results – Germany' (24 June 2019) [europarl.europa.eu](http://europarl.europa.eu).

<sup>119</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 125.

<sup>120</sup> *Ibid.*

personality – should be allowed to compete in elections to the European Parliament in all Member States. Overall, European political parties would then be conceptualised as transnational actors with a democratic internal structure that could nominate candidates for the European Parliament in all Member States.<sup>121</sup>

Besides legal rights, European political parties must also be given sufficient funding to act as strong (communicative) institutions. At the moment, they are almost entirely dependent on funding from the general budget of the EU. Art. 17(4) of the Regulation 1141/2014 limits the financial contributions or grants from the general budget of the EU to 90 per cent of the annual reimbursable expenditure of a European political party. Since it is difficult for European political parties conceptualised only as alliances of national parties to raise funds independently, this effectively limits the total amount of funds available to a party. To allow for the improved funding of political parties that also places them closer to EU citizens, the process of receiving donations must be simplified. The current limit for donations of 18.000 euros per year and per donor, set out in art. 20(1) of the Regulation 1141/2014, should be increased. While this will give raise to fears about cases of fraud<sup>122</sup> and too much influence by lobbyists, such developments can be prevented through effective and transparent law enforcement; such fears cannot justify an underfunding of political parties by default. Maintaining the current concept that provides for a very limited funding of European political parties and sets a tight cap on donations would uphold the *status quo*. With restricted resources, it will be very difficult for European political parties to emerge as communicative actors. To strengthen new European political parties instead of restricting them, parties not yet represented in the EP should also be given access to funding.<sup>123</sup> The creation of a funding system that is acceptable to the European Council and the European Commission and also improves the financial situation of political parties will require compromises, and the realization of a substantial increase in funds will probably require a long period of time. But for European political parties to be able to create European public spheres, the current funding framework must be changed.

It should be noted that the proposed framework significantly lowers the hurdles for the establishment of European political parties. Such a change to the Regulation would presumably result in more European political parties being registered and competing in the elections to the European Parliament. One could fear that such an increase will lead to a fragmentation of the European Parliament and impair its functionality.<sup>124</sup> The ob-

<sup>121</sup> *Ibid.*

<sup>122</sup> European Council, 'EP Elections: EU Adopts New Rules to Prevent Misuse of Personal Data by European Political Parties' (19 March 2019) [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>123</sup> Cf. C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 125.

<sup>124</sup> Such fears are often raised in the context of the (national) electoral law for the elections to the European Parliament; see Federal Constitutional Court judgement of 26 February 2014 BVerfGE *Drei-*

jective of protecting the operating conditions of the European Parliament cannot, however, stifle all attempts to achieve a stronger legitimacy of EU law from the start. A lively and legitimate democracy requires party diversity.<sup>125</sup> Further changes to electoral law for the elections to the European Parliament based on art. 223 TFEU, such as transnational electoral lists,<sup>126</sup> could complement the new role for European political parties. The feasibility of such reforms is questionable, as changes to the electoral law require an approval of the Member States' parliaments.<sup>127</sup> In contrast, art. 10(4) TEU, in combination with art. 224 TFEU, allow the EU to change the Regulation governing political parties at the European level. This means that the EU itself has the competence to take a step towards a more vivid European democracy and towards the creation of European public spheres. The EU can amend the legal framework to overcome the piecemeal design of the European political structure and design a coherent framework for European political parties. A functioning European party system is a central component of democracy at EU level. The EU thus has the competence to create a transnational party system without being limited due to already existing national party systems.<sup>128</sup>

The objective of realizing the legitimising potential of political parties beyond the existing structures in the different Member States does not mean that all connections between the national parties and the EU level should be cut. Instead, European political parties should act as a network of parties and – now as legally independent actors – maintain their cooperation with national parties.<sup>129</sup> The legal framework must allow for reciprocal effects and reinforcement between the parties on the two levels. It must therefore allow for European citizens to join both a national and a European political party. The establishment of cooperation structures like joint party conferences could be explicitly provided for in a new Regulation. European political parties can thereby ensure the existence of the necessary link to the Member States. With their focus on the EU level, European political parties can make sure that the electoral lists for the elections to the European Parliament are no longer (predominantly) drawn up based on national interests.<sup>130</sup> They can pick up ideas from the national public spheres while also injecting European ideas into the national discourse.

The amended legal framework for European political parties would allow them to act independently of national parties. They could integrate the opinions of European citizens, discuss them internally and present a European viewpoint on EU policy issues in different

*Prozent-Sperrklausel Europawahl* 135, 259, 293 ff., deciding that the German electoral threshold of 3 per cent for the 2014 European Parliament election was unconstitutional.

<sup>125</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 127-128.

<sup>126</sup> *Ibid.* 119 ff.; F de Witte, 'Interdependence and Contestation in European Integration' cit. 507.

<sup>127</sup> PM Huber, 'Art. 223 AEUV' in R Streinz (ed), *EUV/AEUV* (CH Beck 2020) para. 9 ff.

<sup>128</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 125.

<sup>129</sup> *Ibid.* 127-128.

<sup>130</sup> *Ibid.* 128.

Member States and in different languages. Issues would no longer be presented to civil society by national political parties through a national lens; EU issues would no longer be falsified into national issues.<sup>131</sup> These new European political parties could present a real European perspective through their members in debates in the European Parliament and outside of it. With their initiative and organizational capacities, European public spheres could be created, and a Pan-European discourse be steered.<sup>132</sup>

## VI. CONCLUSION

Unlike in 1995, when Dieter Grimm identified language as the biggest obstacle to a Europeanisation of the political process,<sup>133</sup> the absence of a European party system has been revealed as the current key obstacle that stands in the way of that objective in 2021. With European political parties being conceptualised as service providers and organizationally tied to national parties, no connection between the EU's sphere of will formation and civil society exists. Without a strengthening of the legal position and the funding of European political parties, it will be difficult to increase the legitimacy of EU policies and law. A change to the EU's legal framework that no longer constrains European political parties is necessary. This allows the parties to become institutions that generate debate and contestation about politics in the EU.<sup>134</sup> Such parties can create European public spheres and help to overcome the legitimacy deficit of the EU; they can be especially helpful as institutions that shape the discourse in digital public spheres. European political parties arguing about the long-term orientation of European policy can help to reduce the dangerous divide that has emerged between the EU's power structure and European civil society.<sup>135</sup> The desirable outcome can be a firmer and stronger legitimacy of EU law.

<sup>131</sup> J Habermas, 'Demokratie oder Kapitalismus?' cit. 70.

<sup>132</sup> J Habermas, *The Lure of Technocracy* cit. 78.

<sup>133</sup> See *supra*, section III.1.

<sup>134</sup> A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU' cit. 554.

<sup>135</sup> C Franzius and UK Preuß, *Die Zukunft der Europäischen Demokratie* cit. 126-127.