Rethinking Europe

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Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017, transl. by Justin Collings), pp. 273, originally published as *Europa ja – aber welches?* (Verlag C.H.Beck oHG 2016)

European integration is on the wrong path and new avenues towards a better Europe need to be found if failure of the European project is to be averted. In *The Constitution of European Democracy*, Dieter Grimm explains where he thinks Europe missed a turn and what needs to be done.

The Constitution of European Democracy is the latest English-language addition to Grimm's oeuvre, which covers an impressive range of issues in constitutional law and theory.[1] The book consists of 12 essays, most of which were originally published in German and are only now available in English.[2] A majority of the book's chapters were published before in academic journals, while others are extended versions of newspaper articles or conference speeches. As a result, the essays sometimes overlap and the tone, register and intended audience of the essays are different, with some including extensive referencing and others not. Although the essays were predominantly written between 2013 and 2015, they have become even more topical and relevant following the UK electorate's vote to leave the EU and Emmanuel Macron's proposals to reform the EU.

The work showcases the richness and versatility of Grimm's thinking. The subject matters diverge widely, ranging from sovereignty in the EU to a discussion of the role of national constitutional courts in the EU and from the

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[1]Grimm's other recent books in English are *Sovereignty, The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015, transl. B. Cooper) and *Constitutionalism. Past-Present-Future* (Oxford University Press 2016).

[2]Except for chapter 3 ('Sovereignty in Europe'), which was published before as 'Sovereignty in the European Union' in J. van der Walt and J. Ellsworth (eds.), Constitutional Sovereignty and Social Solidarity in Europe (Nomos 2015) p. 39, and chapter 5 ('The Democratic Costs of Constitutionalization – The European Case'), which is an extended version of an eponymous article published in 21 *European Law Journal* (2015) p. 460.

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Bundesverfassungsgericht's Lisbon judgment to the democratic legitimacy of the EU. While it is accordingly not feasible to do justice to the full scope and breadth of Grimm's collection in this review, it is possible to look at the consistency among the pieces, discuss some of the most pioneering ideas and highlight a few blind spots. Accordingly, I focus on Grimm's proposal to 'de-constitutionalise' the Treaties, his suggestion to establish a division of powers to better delineate the EU's competences, and Grimm's opposition to greater powers for the European Parliament.[3]

De-constitutionalisation of the Treaties

The EU, according to Grimm, is suffering from a crisis in acceptance, with the 'least noticed source'[4] being the 'constitutionalisation' of the Treaties.[5] Grimm uses this term to describe that the Treaties are elevated to the status of a constitution and that the Treaties' provisions are relied upon in assessing secondary European law and national law (including national constitutional law).[6] In *Van Gend en Loos*[7] and *Costa/ENEL*,[8] the Court of Justice famously articulated its doctrines of direct effect and supremacy. This opened a new, judicial pathway towards European integration, as it enabled the Court to spearhead European integration by means of (purposive) interpretation of what it called 'the basic constitutional charter, the treaty'.[9]

For Grimm, this development gains its full significance in combination with the breadth and comprehensiveness of the Treaties.[10] National constitutions typically provide for rules on the political process but leave the actual political decision-making to elected politicians. In the EU, however, the Treaties – which like national constitutions are entrenched, as they can only be changed through a complex procedure that requires unanimity – contain a large number of substantive provisions, for example, those regarding the internal market and competition.

[3]In line with the three recommendations made by Grimm in the collection's first essay, *see The Constitution of European Democracy*, p. 35; *see also* Grimm's introduction of his proposals on Latest Thinking, ⟨lt.org/publication/where-does-eus-acceptance-problem-come-and-how-can-it-be-counteracted⟩, last accessed 7 August 2019.

[4]Grimm, *The Constitution of European Democracy*, p. v.

[5]This is a consistent part of Grimm's thinking on this topic, which for example also figures in his contribution to the July 2017 number of *Le Monde Diplomatique*: 'on comprend trop rarement que [le deficit démocratique] trouve sa source principale dans la transformation des traités européens en Constitution'. In this piece, Grimm employs the term 'l'hyperconstitutionnalisation'. *See* p. 19 ff.

[6]Grimm, *The Constitution of European Democracy*, p. 28. *See* for an elaborate discussion of the concept, M. Loughlin, 'What is Constitutionalisation?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) p. 47–69, esp. p. 63-68.

[7]ECJ 5 April 1963, Case 26/62, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen*.

[8]ECJ 15 July 1964, Case 6/64, *Costa* v *ENEL*.

[9]ECJ 23 April 1986, Case 294/83, *Parti Ecologiste 'Les Verts'* v *Parliament*, para. 23.

[10]Grimm, *The Constitution of European Democracy*, p. 195.

This feature of the Treaties, in combination with the doctrines of direct effect and supremacy, means that many areas that in member states would be governed by ordinary law are constitutionalised in the EU. Changing the provisions of primary law requires a politically dangerous Treaty reform and unanimous support from the member states.

Grimm identifies a number of undesirable consequences of constitutionalisation. First, it has led to a situation in which the economic freedoms laid down in the Treaties prevail over cultural, social and other public interests.[11] The Court elevated the free movement of goods, persons, services and capital to subjective rights that could be invoked against member states (and, in some cases, against other private actors).[12] They can only be restricted on grounds of public policy, public security and public health,[13] or in terms of the general interest exception developed by the Court in its case law.[14] The Court, in pursuing the Treaty goal of establishing an internal market, structurally prioritised these economic freedoms.

Second, constitutionalisation requires national courts to ignore or set aside national norms which could impede the effective functioning of the internal market. The asymmetry, first identified by Scharpf, between positive, norm-setting integration, which up until the Single European Act (1987) required unanimity, and such negative, norm-abolishing integration through the jurisprudence of the Court had an essentially deregulatory, liberalising effect.[15] This goes against the duty of member states to secure social justice.[16]

Constitutionalisation, thirdly, means depoliticisation.[17] Harmonisation through the interpretation of the Treaties by the Court is essentially non-political as it does not involve the democratically accountable governments of the member states or the popularly elected European Parliament.[18] The more law is constitutionally embedded, the more democracy's space is minimised, and the less politics can change.

It goes beyond the scope of this review to discuss each of these three consequences. Grimm's main contribution to this debate, in my eyes, is that he goes beyond mere analysis and proposes an innovative solution. He suggests

[11]Ibid., p. 94.

[12]*See* for a discussion of the horizontal effect of these provisions, A. Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', 18 *European Review of Private Law* (2010) p. 527.

[13]Arts. 45(3), 52(1) and 65(1)(b) TFEU.

[14]*See* e.g. ECJ 30 November 1995, Case C-55/94, *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*.

[15]*See* e.g. F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) p. 43 ff.

[16]Grimm, *The Constitution of European Democracy* p. 30, p. 98-99.

[17]Ibid., p. 98, p. 128.

[18]It is, in the words of Majone, 'integration by stealth'. *See* G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005).

restructuring the Treaties and relegating substantial provisions to secondary law, retaining only those provisions typically found in national constitutions.[19] In another essay, Grimm suggests the reclassification of 'all provisions of a non-constitutional nature as ordinary law – basically the entire Treaty on the Functioning of the European Union (TFEU)'.[20] This reclassification would allow the legislature to correct the course of the Court's case law and re-politicise the decision-making as regards substantial policy areas.

Grimm argues that this reclassification is necessary because the member states lack effective means to 'stop' the Court. Inhibiting the effect of the decisions of the Court legislatively through the adoption of secondary EU law is complicated due to the Commission's exclusive right of initiative, the divergent interests of member states and the difficulty of reaching the necessary qualified majority.[21] Amending the Treaties is accordingly the 'only means of correction', yet this is 'as good as unattainable' with all member states needing to agree and ratify the changes.[22]

I would remark here that most provisions of the Treaties are broadly-phrased and need further implementation in secondary law. In such secondary legislation, the political bodies of the EU can influence the interpretation of Treaty provisions and steer Court doctrine. Treaty amendment has indeed become increasingly difficult and politically treacherous following the rejection of the Constitutional Treaty and the growth of the EU's membership. Still, during the various Treaty amendments, no steps have been taken to revise the Court's case law through amending certain provisions or to de-constitutionalise the Treaties. This does not take anything away from the negative consequences of constitutionalisation that Grimm identifies, but it does seem to indicate that the member states, in their capacity as 'Masters of the Treaties', have been in a position to reverse the effects of the Court's decisions and address constitutionalisation, yet have not done so (in fact, in the Lisbon Treaty, the member states agreed to attach a declaration re-affirming the principle of primacy).[23]

It might be questioned, furthermore, whether the overhaul Grimm suggests would be effective in addressing the EU's acceptance problem. In recent years, Euroscepticism has, inter alia, been linked to the EU's response to the sovereign debt crisis and the migration crisis. Of course, Grimm nowhere claims that his suggestion would be a panacea for all the problems that the EU is coping with, but it might nonetheless be remarked that the way these crises have been handled was not framed by the constitutionalisation Grimm describes.

[19]Grimm, *The Constitution of European Democracy*, p. 35-36; *see also* p. 76.
[20]Ibid., p. 18.
[21]Ibid., p. 9.
[22]Ibid., p. 32.
[23]Declaration 17 concerning primacy.

Addressing subsidiarity's ineffectiveness: a division of powers

A second recurring theme in Grimm's book is the erosion of national competences and the transfer of powers to the European level. The subsidiarity principle laid down in Article 5(3) TFEU, according to which the EU should only act if the objectives of the proposed action cannot be sufficiently achieved by member states, was introduced in the Maastricht Treaty to safeguard those national competences and curb the growth of the powers of the EU. Grimm, however, deems the principle 'utterly ineffectual',[24] 'ineffective and non-justiciable'[25] and 'a failure'.[26] The principle, according to Grimm, can serve as a 'legal-political maxim'[27] but is too inexact to allow courts to adjudicate concrete disputes: as such, the Court is forced to either dismiss the claim or to take essentially political decisions under the pretention of applying a legal principle.[28]

Grimm's claim that the subsidiarity principle lacks effectiveness as a ground for judicial review has been made before.[29] Very few subsidiarity cases have been brought before the Court – in 2012, Craig counted 'just over ten' such cases over the 20 preceding years.[30] What is more, the Court has never found any legal act to breach the principle of subsidiarity. The Court's subsidiarity jurisprudence has consequently been dubbed 'an embarrassment'[31] and 'a placebo'.[32] The ineffectiveness of the principle as a ground for judicial review is virtually uncontested.

The Lisbon Treaty introduced the early warning mechanism (known as the 'yellow card procedure') to strengthen subsidiarity checks. The mechanism enables national parliaments to send a 'reasoned opinion' stating why a draft legislative act does not comply with the subsidiarity principle. The draft must be reviewed if the reasoned opinions represent one-third of the parliaments.[33] The institution that produced the draft legislative act may decide to maintain,

[24]Grimm, *The Constitution of European Democracy*, p. 177.

[25]Ibid., p. 35.

[26]Ibid., p. 14.

[27]Ibid.

[28]Ibid., p. 177.

[29]Among many others, G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time', 43 *Common Market Law Review* (2006) p. 63.

[30]P. Craig, 'Subsidiarity: A Political and Legal Analysis', 50 *Journal of Common Market Studies* (2012) p. 72.

[31]P.L. Lindseth, 'Equilibrium, Demoi-cracy, and Delegation in the Crisis of European Integration', 15 *German Law Journal* (2014) p. 529 at p. 558.

[32]G.A. Moens and J. Trone, 'The Principle of Subsidiarity In EU Judicial And Legislative Practice: Panacea Or Placebo?', 41 *Journal of Legislation* (2015) p. 65 at p. 72.

[33]In this context, chambers of bicameral systems have one vote each, while chambers in unicameral systems have two votes.

amend or withdraw the draft, providing reasons for its decision. The early warning mechanism thus transforms national parliaments into guardians of subsidiarity.

Grimm is not persuaded by the effectiveness of such an enhanced role of national parliaments in scrutinising subsidiarity. The early warning mechanism, according to Grimm, cannot compensate for the 'vagueness' of the subsidiarity principle.[34] Indeed, since its introduction in 2009, only three early warnings have been issued.[35] In two of these instances, the Commission rejected the subsidiarity concerns and decided to push ahead with the proposal. The impact of the early warning mechanism on the effectiveness of the subsidiarity principle seems to be limited, although it might be argued that the existence of the mechanism has been effective in increasing the involvement of national parliaments and, accordingly, the monitoring of the Commission's subsidiarity reasoning.

Grimm's answer to the ineffectiveness of the subsidiarity principle, like his solution to the issue of overconstitutionalisation, is a reform of the Treaties. He suggests including 'a division of powers based on subject matter',[36] which would replace the criterion of impact on the internal market and reserve specific policy areas for member states. This division of powers would be leading, even in cases where the national policies would affect the internal market. It is unclear what this list would add to the existing lists of exclusive competences (in Article 3 TFEU) and of shared competences (Article 4 TFEU), as Grimm fails to elaborate on the practical application of his suggestion. A new division of powers would perhaps more clearly spell out the exclusive competences of the member states, but these can already be derived *a contrario* from Article 3 and Article 4 TFEU. It is unclear, furthermore, why this list would be a more effective ground for judicial review than the lists of exclusive and shared competences that are already included in the TFEU. All in all, therefore, Grimm's suggestion does not seem likely to better protect the member states' competences and enhance the subsidiarity principle's effectiveness.

Grimm's proposal to establish a specific division of powers is also striking on a more fundamental level. Drawing up such division would inevitably create borderline cases, which would need to be adjudicated by the Court. This would force the Court to decide on the division of competence, thus strengthening the role of the Court vis-à-vis the EU's democratic institutions and enhancing depoliticisation and constitutionalisation. Grimm tries to turn the Court into the guardian of subsidiarity to compensate for the ineffectiveness of scrutiny by national parliaments, which

[34]Grimm, *The Constitution of European Democracy*, p. 15; *see also* p. 177.

[35]*See*, for a discussion of the latest early warning, D. Fromage and V. Kreilinger, 'National Parliaments' Third Yellow Card and the Struggle over the Revision of the Posted Workers Directive', 10 *European Journal of Legal Studies* (2017) p. 125.

[36]Grimm, *The Constitution of European Democracy*, p. 35; *see also* p. 18.

appears to be at odds with his broader ideas – following Grimm's line of reasoning, one would naturally look at the (indirectly democratically accountable) Council as the best-placed institution to adopt the guardian role.

Plea against further parliamentarisation

In 1979, David Marquand coined the phrase 'democratic deficit' for the situation after the end of national vetoes. Marquand considered the deficit 'inevitable', 'unless the gap were somehow to be filled by the European Parliament'.[37] In the decades following Marquand's book, successive Treaty reforms increased the powers of the European Parliament. The European Parliament transformed from a mere consultative assembly into a directly-elected body, with budgetary powers, an increasing ability to control the Commission and legislative competences to decide on most secondary legislation on an equal footing with the Council.[38]

Further increasing the powers of the European Parliament is an oft-cited suggestion to tackle democratic legitimacy problems of the EU. Grimm, however, is not persuaded that such further parliamentarisation is an answer to the acceptance problem he identifies.[39] He observes that the representativeness of the European Parliament is lacking, partly because its elections and parties are still national.[40] Indeed, while the European Parliament has been directly elected since 1979, a genuinely uniform electoral procedure is still lacking. Important features are left to member states to decide, such as election thresholds, the number of constituencies and even the day on which the election takes place. This has resulted in the European elections spanning four days, with *domestic* parties presenting manifestos and selecting candidates to compete in elections whose rules are *nationally* defined. Grimm supports pleas to Europeanise the elections and the political parties and to change their markedly national character.

All the same, Grimm does not endorse calls for greater parliamentary powers. Grimm, firstly, maintains that 'a European public sphere that even remotely resembles the national public spheres is unlikely to emerge any time soon'.[41] The European Parliament consequently faces difficulties in connecting with the electorate and a full parliamentary system would, therefore, fail to adequately

[37]D.I. Marquand, *Parliament for Europe* (Jonathan Cape Ltd 1979) p. 65.

[38]*See* e.g. B. Rittberger, *Building Europe's Parliament: Democratic Representation beyond the Nation State* (Oxford University Press 2005); S. Hix et al., *Democratic Politics in the European Parliament* (Cambridge University Press 2007).

[39]As has been argued previously, e.g. in S. Fabbrini, *Which European Union? Europe after the Euro Crisis* (Cambridge University Press 2015) p. 172–184. *See also* L. van Middelaar, *De nieuwe politiek van Europa* (Historische Uitgeverij 2017) p. 321–330.

[40]Grimm, *The Constitution of European Democracy* p.117-129 (chapter 7).

[41]Ibid., p. 16.

address the acceptance problem. Second, it would also hinder the flow of legitimacy from member states through the Council, as (in Grimm's conception) the European Parliament would take centre-place in European politics and the Council would merely be a second chamber. As a result, full parliamentarisation would actually, rather counterintuitively, weaken rather than strengthen democratic legitimacy.[42] Third, further parliamentarisation would not address the problem of constitutionalisation (and corresponding de–politicisation) of many substantive areas of law. Grimm thus rejects further parliamentarisation and prefers de-constitutionalisation to 'ensure that political decisions are made in a political manner' and to regain popular support for the European project.[43]

It might be observed here that Grimm's opposition against greater parliamentary powers seems to be at odds with his proposal to re-classify all Treaty provisions of a non-constitutional nature to secondary law. This reclassification would represent an important shift of legislative powers from the member states (as 'Masters of the Treaties') to the European Parliament, as it would enable the Parliament (in its capacity as co-legislator) to, together with the Council, amend the relevant provisions through the ordinary legislative procedure. Accordingly, this would strengthen the Parliament's position and expand its powers, even though the Parliament's representativeness is according to Grimm 'feeble'.[44] Thus, while de-constitutionalisation would ensure politicisation, Grimm might actually prefer these political debates to take place in the national parliaments.

Grimm has no high expectations of the nomination of lead candidates for the Commission presidency by the main political groups in the European Parliament (the so-called *Spitzenkandidaten* procedure). With the *Spitzenkandidaten* innovation, each ballot cast is seen as an indirect vote for the new Commission president. This set-up succeeded in 2014, as Jean-Claude Juncker (the *Spitzenkandidat* of the group that became biggest in the elections) was proposed by the European Council and elected by the European Parliament. A successful attempt, it would seem, to Europeanise the election procedure, politicise decision-making and increase representativeness – and while no *Spitzenkandidat* became Commission president in 2019, some variant of the procedure might well be formalised if EU electoral law is changed (in fact, in her opening statement in the European Parliament, Ursula von der Leyen said she aimed to improve the *Spitzenkandidaten* system and hinted at transnational lists).

Grimm, however, is critical of the *Spitzenkandidaten* procedure and stresses that it 'did nothing to alter this incongruity [of the diverted flow of legitimacy]'[45]

[42]Ibid., p. 32-33; *see also* p. 17 and further, p. 113-114.
[43]Ibid., p. 18.
[44]Ibid., p. 179.
[45]Ibid.

and that it 'promises more democracy than it can deliver'.[46] He remarks that 'personalizing the election' failed to render the elections more attractive and that voter turnout in the 2014 elections was as low as it had been before the *Spitzenkandidaten* innovation.[47] I agree with Grimm that the link between the choice of the electorate and the eventual pick of the European Parliament remains (too) indirect – pan-European parties do not exist and, for lack of EU-wide electoral lists, most voters cannot vote for their preferred *Spitzenkandidat*. The weakness of this link is indeed the principal deficiency of the *Spitzenkandidaten* procedure.[48]

The merits of the *Spitzenkandidaten* procedure should not, however, be solely judged on the basis of voter turnout or the existence of a direct link between the outcome of the vote and the pick of the Commission president. Grimm, in my opinion, wrongly equates the *Spitzenkandidaten* procedure with personalisation, as the true aim of the innovation was to expand parliamentary power and politicise the Commission. These aims have been met to a certain extent – indeed, 'a more political Commission', 'highly political' even, was the stated aim of Juncker when presenting his political guidelines in July 2014.[49] Five years later, it seems that Juncker indeed used his mandate derived from the *Spitzenkandidaten* procedure to set political priorities and transform the Commission into a more assertive and political body (although this transformation is obviously far from complete).

The politicisation of the Commission is something that Grimm should welcome. In his book, Grimm bemoans the apolitical and technocratic nature of European decision-making. He remarks that 'the Commission, in decisions designed to advance integration, remains unaffected by the outcome of parliamentary elections'.[50] The *Spitzenkandidaten* procedure was designed to counter this problem and establish a link between the elections' results and the figure of the Commission president, and it was because of this intended politicisation that opponents such as then UK Prime Minister David Cameron argued against the procedure.[51] In light of this aim and with an eye to his broader line of

[46]Ibid., p. 107.

[47]Ibid., p. 119.

[48]As I argued previously and more elaborately in 'The Spitzenkandidaten procedure. Genesis and nemesis of a constitutional convention' (LLM thesis, Leiden University, 2015) p. 56-57, available at ⟨njb.nl/Uploads/2015/9/LLM-Thesis—LLM-European-Law—Paul-W.-Post.pdf⟩, visited 7 August 2019.

[49]J-C. Juncker, 'A New Start for Europe', Opening Statement in the European Parliament Plenary Session, 15 July 2014, ⟨europa.eu/rapid/press-release_SPEECH-14-567_en.htm⟩, visited 7 August 2019.

[50]Grimm, *The Constitution of European Democracy*, p. 12.

[51]D. Cameron, 'Presidency of the European Commission: article by David Cameron', 13 June 2014, ⟨www.gov.uk/government/news/presidency-of-the-european-commission-article-by-david-cameron⟩, visited 7 August 2019.

thinking, Grimm's criticism of the *Spitzenkandidaten* procedure seems not completely warranted.

Conclusion

In the collection's final essay, Grimm remarks that the Treaties say nothing about the core questions of European integration or about the EU's final goal, except for the prescription for an 'ever closer union among the peoples of Europe'.[52] European politicians, according to Grimm, elude discussions of finality and ultimate goals – indeed, it has been observed before that avoiding and depoliticising such discussions and creating *faits accomplis* has been crucial to the European integration project's progress and success.[53] Jacques Delors has been credited with saying that Europe needs both a vision and a screwdriver – the latter meaning concrete results.[54] The EU has long focussed on the screwdriver and neglected vision. Grimm thinks that this longstanding avoidance and the emphasis on pragmatism over principles has resulted in the perception that the EU lacks legitimacy and that it has caused distrust amongst Europe's citizens.

In *The Constitution of European Democracy*, Grimm goes beyond Delors' metaphorical screwdriver, presenting provocative and pioneering ideas. Such critical discussions of the Treaties' structure, the existing democratic framework and generally the entire European project are more necessary than ever after the sovereign debt crisis, the migration crisis and the Brexit decision. Macron's accession to power, coupled with the imminent departure of a member state that often functioned as an obstacle to change, raise hopes for more fertile soil for such ideas. Macron certainly does not shun discussions on the EU's objectives and has laid out a radical vision for rediscovering and reinvigorating Europe.[55] Critically rethinking Europe's constitution will be pivotal to the success of such attempts.

[52]Grimm, *The Constitution of European Democracy*, p. 233.

[53]Majone, *supra* n. 18.

[54]E.J-M.F. Macron, 'Discours à Berlin', Lecture at Humboldt University, 10 January 2017, ⟨en-marche.fr/articles/discours/meeting-macron-berlin-discours⟩, visited 7 August 2019.

[55]*See* e.g. E.J-M.F. Macron, 'Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique', Lecture at Paris-Sorbonne University, 26 September 2017, ⟨www.elysee.fr/declarations/article/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique⟩, visited 7 August 2019.