
Peaceful Contestation

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Polycentricity implies the diffusion of sovereignty over several levels of governance and numerous institutions.¹ It envisages an explicit role for non-governmental bodies, such as private and community-based organisations and it puts the individual at the heart of society and social construction.² Polycentricity presents a normative alternative to federalism, multilevel governance that prioritises self-governance, or individual autonomy,³ as a goal.⁴

Peaceful contestation plays a special role within the polycentric theory, a role of an institutional essential.⁵ This means that peaceful contestation needs to be constantly enabled in a polycentric society in order for the society to be able to maintain its polycentric character. Peaceful contestation is the peaceful challenge of any existing legal and political situation in view of ensuring the values of polycentric theory, particularly self-governance. Polycentric theory and peaceful contestation thus need to be understood dynamically: many decision centres with autonomous and limited prerogatives need to be able to and should in fact constantly contest existing norms and policies as well as their own autonomy and prerogatives. NGOs, cities, individuals, corporations, states or expert groups are just some of the loci of decision making and contestation that are involved in a constant reconfiguration of society. Once this dispersed process of social reconfiguration stops or is limited, the system will revert to another type of pluricentric governance, such as federalism or multilevel governance.

¹ See, in this Volume, Introduction by J. van Zeben and A. Bobić, 2.

² V. Ostrom, *The Meaning of American Federalism: Constituting a Self-Governing Society* (ICS Press, 1991).

³ See, in this Volume, Chapter 3 by F. Cheneval.

⁴ J. van Zeben (n. 1) 3.

⁵ P. D. Aligica and V. Tarko, 'Polycentricity: From Polanyi to Ostrom, and Beyond', *Governance: An International Journal of Policy, Administration, and Institutions* 25 (2) (2012), 237, 238; J. van Zeben and A. Bobić (n. 1) 4.

This chapter sets out the notion of peaceful contestation within the framework of polycentric theory. Part I discusses the most important premises of peaceful contestation as addressed in the framework of the polycentric theory, and the notion of ‘peaceful’ contestation within that framework. Part II discusses the realisation of the goal of polycentricity – self-governance – through peaceful contestation within the framework of the theory of polycentricity. It develops the notion of ‘trust-producing conflicts’ and the notion of a social actor or ‘public entrepreneur’, explaining the role of a public entrepreneur with an example of an infringement procedure of the European Commission. Part III concludes. The overall aim of this chapter is to develop an ideal type of peaceful contestation that is needed for the maintenance of a polycentric system, one that prioritises self-governance or individual autonomy.

I Peaceful Contestation within the Polycentric Theory

Peaceful contestation is fundamental to liberal political theory. John Stuart Mill sees constant contestation of opinions as crucial for productive human discourse and the preservation of liberty. This is because it is only through the constant contestation of our opinions that we can begin to sort out what we believe to be true from what we believe to be false.⁶ There are several definitions of peaceful contestation in liberal political theory, with several goals of this process in mind, such as the upholding of social discourse and legitimacy.⁷ These are not the goals of peaceful contestation per se in a polycentric world. While peaceful contestation is not precisely defined in polycentric theory, there are several elements that the theory offers for its interpretation.

A *Contestation in Polycentric Theory*

Polycentric theory acknowledges the highly fragmented and decentralised network of sociopolitical relationships and overlapping authority. A polycentric political system is one where ‘many officials and decision structures are assigned limited and relatively autonomous prerogatives to determine, enforce and alter legal relationships’.⁸ There is a web of

⁶ J. S. Mill, *On Liberty* (Longman, Roberts, and Green, 1869).

⁷ A. Wiener, *Theory of Contestation* (Springer-Verlag, 2014) 1. (Wiener defines contestation as ‘social practices, which discursively express disapproval of norms’.)

⁸ V. Ostrom, ‘Polycentricity’ (Washington D.C. Workshop Working Paper Series, Workshop in Political Theory and Policy Analysis, Presented at the Annual Meeting of

societal actors and identities which is held together by the antagonistic claims based on the actors' self-governance. Various abstract and under-operationalised social ideals cannot be imposed on the participants by an overarching authority. They have to be given content by the web of social actors. The social structure therefore has to allow for the multitude of constantly clashing opinions to exist.⁹

Two broad types of peaceful contestation exist: legal and political contestation. Legal contestation is performed before any legalised bodies and institutions. It can be conducted in administrative procedures, before courts and tribunals as well as before any legalised fora and institutions of international, European Union or national law. Political contestation means participation in the political process, in elections, in parliamentary debates, referenda or in any international, European or national setting that does not perceive its framework or mission as purely legalised. In the context of European Union law, numerous possibilities for peaceful contestation exist. One could imagine enforcement actions, such as the European Commission's infringement procedure or actions to challenge the validity of EU laws, such as an action for annulment. Elections to the European Parliament, a complaint to an Ombudsman, formal or informal contacts with European institutions, or preliminary reference procedures are just some of the forms of peaceful contestation in the European Union.

Polycentric theory aims at a society in which people and organisations constantly contest and produce norms and renegotiate their own legal situation. This simultaneously contributes to constant shaping of the normative predispositions of a social order defined by self-governance, as well as dynamically self-correcting¹⁰ the social order accordingly.

In the European Union setting, this would mean that by constant popular and dispersed contestation of the existing state of affairs, legal and political decisions remain constantly dispersed and articulated in a decentralised and highly democratic manner. Policies and social outcomes would be shaped through the exercise of self-governance by citizens and organisations, organised horizontally, rather than by a hierarchical institutional and social structure. Finally, decisions by actors who are often understood as hierarchically privileged could be constantly challenged,

the American Political Science Association (1972), 5–9; M. D. McGinnis (ed.), *Polycentricity and Local Public Economies* (University of Michigan Press, 1999), 55–6.

⁹ P. D. Aligica and V. Tarko (n. 5); M. Polanyi, *The Logic of Liberty* (University of Chicago Press, 1951).

¹⁰ P. D. Aligica and V. Tarko (n. 5) 246.

contested and amended by various social actors and particularly by individuals and their representatives throughout the European Union. In turn, this would lead to a truly polycentric order in which decision makers initially perceived as hierarchically privileged lose, or keep losing, this capacity. This should result in a discursive shift in the European Union from a focus on the binary between the prerogatives of Member States and European institutions, towards the role of the individual in this binary. Rather, individual self-governance should be perceived as the central constitutive element of European Union governance. It would lead to a society in which policies are shaped through the exercise of private autonomy in a polity that places an emphasis on horizontal rather than vertical policy and decision making.

B When Is Contestation 'Peaceful'?

Having set out the key features of peaceful contestation in a polycentric system, this chapter will now turn to the question of what it means for contestation to be 'peaceful' in a liberal political system in general and within the framework of polycentric theory in particular. This discussion has several important implications. First, as discussed in Part I, there are several avenues and types of political contestation and some, particularly the more political ones and those where individuals do not directly involve legal institutions, could be perceived as going against the overarching rules of the rule of law. Second, polycentricity encourages individual self-governance, which does not only entail creating, but also breaking, legal relationships. It is important to recognise under what circumstances these types of acts are perceived as peaceful. Third, individuals exercise self-governance in countless different ways, such as to enable self-governance or the policy goals of larger entities such as cities, regions and corporations and even states. From the perspective of the individual, self-governance by larger social units shares the same theoretical underpinnings as cases of individual self-governance.

The content and nature of peaceful contestation in liberal political theory is determined by way of opposition to (imaginary) war-like behaviour.¹¹ Overcoming the state of nature in which war is waged by everyone against everyone else is an incessant concern of liberal political

¹¹ Understanding of our social life as a constant struggle is not a part of the polycentric nor general liberal analysis. For the claim that the global society should be understood as a society of constant struggle, see D. Kukovec, 'Hierarchies as Law', *Columbia Journal of European Law* 21 (1) (2014), 131.

theory.¹² This state of nature was not perfectly abolished when liberal institutions were set up. There is a constant possibility of, and there are indeed constant – albeit mostly partial – slippages back into this state that a liberal society needs relentlessly to police.

Such slippages can occur on a ‘macro’ level and on a ‘micro’ level. The macro level could be described as an illegal use of force or an all-out war in international relations. Alleviation of war has been European Union’s *raison d’être* from the start. As the prevention of regression to war or to war-like relationships has been the cornerstone of liberal political theory, the fact that the European Union is an inherently liberal construct should not come as a surprise. While the European Union has been successfully spared a war since 1945, numerous dilemmas in the field of international law can serve as examples of what is considered peaceful and within the bounds of the law and what is considered as beyond the law.¹³

The micro level of a slippage into a state of nature occurs through a use of force and self-help that is not sanctioned by the legal system and is often described as ‘taking the law into one’s own hands’. Examples include retaliatory violence, blood feuds, self-help or another type of behaviour not involving the legal or some other legalised form of dispute settlement and norm contestation. Different legal systems allow for various but always very limited ways of ‘legal’ self-help in resolving disputes or remedying the wrongs imposed by others. Once those limits are overstepped, one cannot speak about peaceful contestation anymore, but about overstepping the boundaries of peaceful resolution of disputes and going beyond the rule of law.

Countless examples could portray the constant social policing of proper boundaries between peaceful contestation and illegal regression to the state of nature. One could imagine an institution faced with the question of the legality of protests by indigenous people or NGOs against the activities of multinational corporations, or a court policing the boundaries of adverse possession. Claims and demands can be made in pursuit of numerous social goals – justice, an array of human rights,

¹² T. Hobbes, *Leviathan* first published 1651 (Oxford University Press, 2008); J. Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration* first published 1689 (Blackwell, 1946).

¹³ For a discussion on the legitimacy of the Iraq war see e.g. A. Paulus, ‘The War Against Iraq and the Future of International Law: Hegemony or Pluralism?’, *Michigan Journal of International Law* 25 (3) (2004), 691.

economic profit, provision of common goods and services or self-governance, to name a few.

II Self-Governance through Peaceful Contestation

This section turns to the specificities of contestation that are required for the system to become and stay polycentric. Vincent Ostrom argued that functional polycentric systems do not emerge spontaneously but require the conscious and conscientious practice of organisational artisanship.¹⁴ Design and spontaneous order reinforce one another in the polycentric theory. Design is possible within the overarching rules and within the broader process of the ever-evolving spontaneous order. Therefore polycentric theory should not adopt a laissez-faire approach to social construction, but rather one of careful social engineering.

How should peaceful contestation be organised and constructed in the framework of the European Union? What type of social activity should be encouraged? Polycentric theory resists fiat and centralised decision making. Freedom to make individual and personal contributions to the management of the social system is at the heart of the theory. Social actors should be contesting and participating in social – legal and political – life. Contesting the content of rules is thus at the heart of social construction.

A Self-Governance and Institutional Design

Peaceful contestation is essential for the maintenance of independent centres of decision making as those centres cannot exist or maintain their existence without being able to peacefully contest their own positions. It is a necessary precondition to ensure continuous competition, cooperation and conflict resolution. Without this institutional essential, no maintenance of the system by autonomous individuals and other decision-making centres can be ensured. There are two ways in which Vincent Ostrom addresses rule contestation. First, Ostrom emphasised the importance of access to rapid, low cost, local arenas to resolve conflict among users or between users and officials.¹⁵ If individuals are going to follow rules over a long period, they must institute some

¹⁴ V. Ostrom, *The Meaning of American Federalism* (n. 2) 199–221; M. Fotos, 'Vincent Ostrom's Revolutionary Science of Association', *Public Choice*, 163 (1) (2015), 67.

¹⁵ V. Ostrom (n. 2).

mechanism for discussing and resolving what is or is not a rule infraction. By devising simple mechanisms to get conflicts aired immediately and make resolutions that are generally known in a community, the number of trust-reducing conflicts can be reduced.¹⁶

Second, peaceful contestation within the polycentric society could not only be understood as an arena of decreasing the number of 'trust-reducing conflicts', but as increasing 'trust-producing conflicts' – conflicts which entail contestation of rules and policies understood as creating the polycentric system itself. Ostrom notes that if individuals or units operating in a polycentric order have incentives to take actions to enforce general rules of conduct, then polycentricism will become an increasingly viable form of organisation.¹⁷ The idea behind 'trust-producing conflicts' is that individuals should be free not only to play the game or have the incentives to self-enforce the rules of the game but also to change those rules in an orderly way.¹⁸ Constant contestation and simultaneous enforcement of general rules of conduct that provide the legal framework for a polycentric order is thus essential for a polycentric system. It is this second understanding of rule contestation that the remaining part of this chapter will address.

How can the goal of self-governance, the main virtue in a polycentric system, be realised in the context of peaceful contestation, so that the system constantly keeps its polycentric nature? A democratic institutional set-up should be understood as a precondition for successful peaceful contestation.¹⁹ At least since the adoption of the Maastricht Treaty, there has been an emphasis on the development of a democratic institutional set-up in the EU. This was pursued through constant expansion of institutional opportunities for citizens to play a direct role in agenda setting or in influencing the actual decision making in the European Union. However, how precisely should the institutional setting change following the insights of the polycentric theory? Polycentric theory's emphasis on self-governance could lead to a simplified conclusion that this theory favours 'private' enforcement over 'public' forms of enforcement.²⁰

¹⁶ *ibid.*

¹⁷ P. D. Aligica and V. Tarko (n. 5) 246.

¹⁸ P. D. Aligica and V. Tarko (n. 5) 247.

¹⁹ See, in this Volume, Chapter 2 by J. van Zeben.

²⁰ In this sense, see M. D. McGinnis, 'Costs and Challenges of Polycentric Governance' (2005) Paper presented at Workshop on Analyzing Problems of Polycentric Governance in the

One could argue that private enforcement is from a purely conceptual perspective more desirable than public enforcement, as it reflects the wishes of individuals rather than of (possibly unelected) officials or hierarchically privileged institutions. Enforcement of competition law illustrates some of the dilemmas and benefits of private and public enforcement. Private enforcement of competition law occurs through the invoking of Articles 101 and 102 TFEU in litigation between private parties in the courts of the EU Member States, as opposed to public enforcement. Public enforcement refers to proceedings conducted or brought by competition authorities (either the European Commission or the competition authorities of the EU Member States), including such proceedings that are triggered by complaints from private parties to such authorities.²¹

Despite a possible initial perception of the generally beneficial nature of private enforcement, several arguments, independent of the demands of polycentric theory, could be made favouring public enforcement. Wouter Wils, for instance, lists several benefits of public enforcement. First, as to the level of the monetary sanctions (fines or damages), public enforcement has the additional advantage of allowing better control in setting the optimal amount of the sanction. When the sanction consists of damages awarded as a result of private litigation, it becomes virtually impossible to target the optimal amount. Damages will be calculated not by reference to the offender's gain, but by reference to the losses which those plaintiffs who happen to bring claims manage to prove.

Second, private actions for damages are inevitably driven by the private gains and expenses of the parties concerned. These private interests will often diverge from the general interest. Cases that should be brought to clarify the law and generate deterrence in the general interest may never arise through private litigation, because no private party has a sufficient interest to bring an action, or because cases are settled without any clarification of the law. Conversely, private plaintiffs will try to obtain interpretations of the law that are to their financial or commercial benefit, irrespective of their general merit, or to win cases in which they have

Growing EU, Humboldt University, Berlin (available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.529.2214&rep=rep1&type=pdf>) accessed 18 October 2018, 2.

²¹ W. Wils, 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future', *World Competition: Law and Economics Review* 40 (1) (2017), 3.

large financial or commercial stakes, irrespective of the merit of the interpretation of the law on which the case is won.²²

Would polycentric theory insist on private enforcement, enhancing self-governance, despite several arguments such as those above in favour of public enforcement? Indeed, polycentricity's requirement that policies and social outcomes are shaped through the exercise of self-governance by citizens and organisations, organised horizontally by constant dispersed contestation of the existing state of affairs, could lead to a conclusion that the enforcement and challenge of European Union norms should be exercised by individuals as fully-empowered agents. In other words, it could lead to a conclusion that individuals should be constantly and, in any situation, empowered to enforce and challenge European Union law directly, without an institutional medium.

The Ostroms' work does not seem to support such sweeping conclusions. Vincent does not argue for a complete transcendence of the public/private distinction or for a reduction or elimination of the public for the benefit of the private; entrepreneurship plays a key role in the private sector since entrepreneurs are the ones who must discover strategies to put heterogeneous factors of production together in new and complementary ways given the availability of resources and technology.²³ The profit motive is the driving force for private entrepreneurs on the market.²⁴ Elinor Ostrom's work similarly argued that the market and provision of public goods and common-pool resources are importantly different and often complementary. On the other hand, providing and producing public goods and common-pool resources – including public safety; conflict resolution at international, national, regional and local levels; public education; and public health, as well as sustaining natural resource systems – require different institutions than an open, competitive market. Even the market itself is not a viable, independent institution without the presence of effective public property arrangements, courts of law and police.²⁵

²² *ibid.*

²³ V. Ostrom, *The Meaning of American Federalism* (n. 2) and M. Fotos, 'Vincent Ostrom's revolutionary science of association' (n. 14).

²⁴ *ibid.*

²⁵ E. Ostrom, 'Polycentric Systems as One approach for Solving Collective Action Problems' (2008), available at: http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4417/W08-6_Ostrom_DLC.pdf accessed 4 June 2018. See also, in this Volume, Chapter 5 by J. van Zeben and A. Bobić.

The Ostroms found that the language used by many analysts divides the rich world of institutions into a barren dichotomy of the market versus the state. Markets are considered by most to be open realms where many individuals and firms of diverse sizes and assets compete, whereas the depiction of the public sector is one of a top-down hierarchy with little room for problem solving except by top level government officials. Elinor Ostrom argues that the public sector should encourage human development at local, regional, national, and international levels and enable, encourage and engage actors constantly to contest and reshape the system in an orderly manner; to be polycentric with small units nested in larger systems.²⁶ In the context of the EU's common fisheries policies, for example, Elinor's work demonstrates the necessity of a constant interaction of scientists, fishing vessels, government agencies and marine conservation groups²⁷ who communicate, develop their own agreements, establish positions or monitor and sanction those who do not conform to rules. The goal of polycentric contestation is therefore the constant enabling of private and public actors to intelligently and mutually engage.

B *The Notion of 'Public Entrepreneur'*

The principles expounded by the Ostroms are not necessarily aimed at enabling each citizen *directly* to contest any legal or political position or enabling them to enforce the system privately. A complete shift to a private system of enforcement or to a completely dispersed system of legal and political contestation without an institutional medium would thus not find its place within the polycentric theory. Analysis of peaceful contestation within the framework of polycentric theory should address systemic elements of the theory that promote self-governance and advance the cause of enabling of private and public actors to engage intelligently with the public and the private. The development of 'the conscious and conscientious practice of organizational artisanship'²⁸ requires an analytical focus on ensuring self-governance through an active and knowledgeable social actor who actively and peacefully challenges existing legal and political situations.²⁹

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ V. Ostrom (n. 8); M. Fotos (n. 14) 24.

²⁹ See, in this Volume, Chapter 12 by S. Garben.

This analytical turn goes far beyond the question of any particular institutional set-up. Even if the theory of polycentricity offered precise pointers on institutional restructuring, such restructuring would not necessarily achieve a polycentric society. Creation of institutional alleys for contestation does not necessarily mean that citizens will actually use them nor that levels of participation and contestation would be effective and fulfil the requirements of a polycentric system. The direct elections of the Members of the European Parliament, while extremely important for the democratic life of the Union, are just one example of the under usage of avenues of participation in political life.³⁰ The elections in 2014 witnessed a mere 42.61 per cent turnout. While the low level of participation in direct elections may be a result of indifference – a problem that a system aiming at polycentricity should certainly address – there are other reasons which may prevent the system from keeping its polycentric features in terms of active dispersed decision making.

The European Union's complexity can be said to be one of the main obstacles to its full democratic potential.³¹ It is thus vital that individuals and other entities are able to navigate this complex system which requires a lot of resources, organisation and activity by individuals and other actors to make the democratic and polycentric system work at all. It requires active and motivated social actors and a great deal of knowledge of the complexity of the system so that social actors are able to navigate it to exercise their self-governance.³²

Successful and legitimate exercise of self-governance is, according to the Ostroms, vitally dependent on knowledge and learning. Elinor Ostrom argued that for the creation of all human artefacts, knowledgeable experimenters who know what they are doing are required.³³ Vincent Ostrom's insight into the interplay of design and spontaneous order further explains the fundamental importance of knowledge and learning in the shaping of the polycentric system as well as of peaceful contestation. According to Vincent, design and spontaneous order reinforce one another in the polycentric theory. Design is possible within the overarching rules and within the broader process of the ever-evolving

³⁰ European Parliament, 'Results of the 2014 European elections' (Europa, 2014), available at: www.europarl.europa.eu/elections2014-results/en/turnout.html accessed 5 June 2018.

³¹ D. Kukovec (n. 11).

³² See, in this sense, V. Ostrom, *The Meaning of American Federalism* (n. 2), 272.

³³ M. Fotos (n. 14) 17.

spontaneous order. The link between spontaneity and design is given by the notion of knowledge and its correlate concepts such as learning.³⁴

The process of learning needs to be understood as dynamically as peaceful contestation and the polycentric society itself. For this reason, Vincent Ostrom brings the idea of an experimentalist and problem-solving private entrepreneur to the management of public affairs and to the process of learning. This idea appears to be more important to Ostrom than a particular type of a site or of an agent of contestation. He would argue that effective solving of collective action problems requires opening public as well as private spheres of activities, ranging from the small to the very large.³⁵ Any actor of society, small or large, should be encouraged to participate in problem solving.³⁶ Individuals, whose conduct may cause the problem, such as depletion of fish stocks by overfishing, should act collectively rather than individually to solve the problem at hand.³⁷ All social actors involved in the production of public goods and common-pool resources should thus be understood as ‘public entrepreneurs’,³⁸ as decision-making actors motivated by diverse interests, but by common social goals to peacefully contest norms and situations, thus constantly reconstituting a polycentric society by exercising their self-governance.

Public entrepreneurs – individuals, NGOs, cities, corporations, states, regions, or expert groups and countless others – are all loci of decision making and contestation that are involved in a constant reconfiguration of society. Public entrepreneurs are constantly learning from their experience in participating in peaceful contestation. They should thus know the art and science of association and need to conduct their affairs in multi-organisational settings characterised by a culture of deliberation conducted in a spirit of curious enquiry and self-interest.³⁹ They constitute and maintain dispersed decision making by constantly contesting their autonomy, their prerogatives as well as existing norms and policies. Once this dispersed process of social reconfiguration stops or is limited, the system cannot claim to be polycentric.

³⁴ V. Ostrom (n 8). See also S. Garben, Chapter 12 in this Volume.

³⁵ V. Ostrom (n. 8) 1.

³⁶ *ibid.*

³⁷ E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

³⁸ V. Ostrom (n. 8) 2.

³⁹ V. Ostrom (n. 8); M. Fotos (n. 14) 24.

The polycentric theory is therefore conducive to Marc Galanter's portrayal of society as a legal regime in which parties of several different types constantly interact with one another. However, the distinction as set out by Galanter between repeat players, those who constantly participate in contestation and those who are one-shooters and engage with it only once in their lifetime or very occasionally,⁴⁰ should be alleviated or at least reduced as much as possible in a polycentric society. Ideally, a polycentric society should be one of horizontal repeat players, involved in a constant process of learning, experimentation and social development by utilising any type and site of peaceful contestation.

C Public Entrepreneur in a Public Enforcement Procedure

The European Commission is a repeat player in the infringement procedure under Articles 258 and 260 TFEU. It has the sole power of enforcement of law in the scope of these articles. The infringement procedure could thus be described as the most 'public' form of EU law enforcement. The Commission launches this procedure when a Member State of the Union is alleged to violate a provision of EU law. The nature of the infringement procedure does not mean, however, that other social actors could not be repeat players in the process. This subsection explores how NGOs, individuals, various stakeholders or even other institutions and entities, acting as 'public entrepreneurs', could importantly shape this procedure.

The Commission has a discretion to bring to Court both the infringement procedure under Article 258 TFEU as well as the procedure for penalties under Article 260 TFEU. The procedure follows a number of steps laid out in the EU Treaties, including sending a letter of formal notice requesting further information to the country concerned and sending a reasoned opinion, a formal request to comply with EU law. Finally, the Commission may decide to refer the matter to the Court of Justice.

Both Articles 258 and 260 expressly envisage the Commission's discretion to pursue these proceedings. Commission's discretion is an understandable institutional prerogative, given the limited resources and given that any individual or institution must have some discretion

⁴⁰ M. Galanter argues in the context of litigation that there is a continuum between one-shooters and repeat players. See M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review* 9 (1) (1974), 95–160.

in pursuing litigation. While the European Commission does have significant resources, particularly in terms of knowledge and manpower, those resources are finite, which warrants granting the Commission discretion in this regard. This is where an essential role of various public entrepreneurs becomes visible. The Commission can identify possible infringements of EU law on the basis of its own investigations, particularly in cases of non-transposition or incorrect transposition of Directives or in cases where informing the Commission is an obligatory step in particular procedures on a national level. In other cases, the Commission is very reliant on the information from the complainants – individuals, NGOs, businesses or other stakeholders who encounter violations of European Union law on a daily basis. Any individual, NGO or other actor can inform the Commission of the alleged violation of EU law. Thus, in the proverbially ‘public’ form of enforcement action, the main initiative for launching a procedure may actually come from the individual. Only social actors in their daily lives have insight into EU law’s operation and performance on a daily basis. The input from an active citizen or another public entrepreneur is thus vital already at the stage of launching the procedure.

Most infringement cases are settled before being referred to the Court and the input of a ‘public entrepreneur’ at the stage of pre-court settlement is equally important. The orientation to problem solving and solutions which could satisfy various parties are fundamental in this stage. A public entrepreneur needs to inform the Commission about the situation on site, provide photographs, legal reasoning, facts and especially explain the consequences of the alleged infringement. If the Court finds that a Member State has breached EU law, the national authorities must take action to comply with the Court judgment. If, despite the Court’s judgment, the EU country still doesn’t rectify the situation, the Commission may refer the country back to the Court, proposing that the Court imposes financial penalties, which can be either a lump sum and/or a daily payment. Again, while individuals may only be used as a source of information, or of support rather than being agents themselves, they can play an invaluable and crucial role in articulating the continued infringement on the ground and on providing necessary information.

A public entrepreneur learns and solves problems while participating in the infringement proceedings, even if his ideas and suggestions are not necessarily taken up. Moreover, the European Commission learns with the assistance of other public entrepreneurs in its own role as a public

entrepreneur. Individuals' skills, resources, knowledge, the culture of openness to participation, and the actual activity of social actors become more important than precisely regulated institutional settings. In other words, skilful and engaged public entrepreneurs can play a more important role in peaceful contestation than a particular institutional design.

D An Ideal Type of Peaceful Contestation in Polycentric Theory

The discussion brings us to an ideal type of peaceful contestation under the polycentric theory. Polycentric peaceful contestation is exercised in a democratic institutional setting which enables constant dispersed decision making. However, hierarchical imposition of particular interpretations of various abstract and underoperationalised social ideals on the participants by an overarching authority cannot be accepted in a polycentric system. Decisions by actors who are often understood as hierarchically privileged can be constantly challenged, contested and amended by various social actors and particularly by individuals and their representatives throughout the Union. This leads to a truly polycentric situation in which decisions, initially perceived as hierarchically privileged, lose, or keep losing, this capacity.

Ostrom argues that Hobbes' state of nature does not account for the human capacity for language and learning used to develop a community of understanding that would oblige members of the community to abide by mutually agreed-upon restraints.⁴¹ A notion of dialogue and peaceful contestation is thus ingrained in the polycentric theory, one where claims of rule of law are dynamically reshaped through a dialogue rather than unilaterally imposed. The dispersion of decision-making capabilities associated with polycentricity allows for substantial discretion or freedom of individuals and for effective and regular constraint upon the actions of governmental officials.⁴² Such reasoning enables communities of persons to construct a sovereign who is bound by human law and thus the capacity for self-governance is within the reach of human intelligence.⁴³

Social ideals have to be given content by the horizontal web of social actors. The social structure has to allow for the multitude of constantly clashing opinions to exist.⁴⁴ 'Public entrepreneurs' – repeat players

⁴¹ M. Fotos, (n. 14) 16

⁴² V. Ostrom (n. 8)

⁴³ M. Fotos (n. 22) 15

⁴⁴ P. D. Aligica and V. Tarko (n. 5) 238; M. Polanyi (n. 9)

dispersed throughout the Union – should be able and encouraged to frame their concerns and aspirations peacefully. This certainly includes demands for more self-governance. Peaceful demands to leave a particular legal system, such as the European Union or a nation-state system – or demands to leave any legal relationship on a micro level – need to be acknowledged and treated peacefully.

The contestation in a polycentric system depends on public entrepreneurs who dare to experiment, but also learn from the mistakes made. Knowledge, education, and constant learning and engagement are vital for a successful public entrepreneur and for a polycentric system to thrive. Public entrepreneurs should be dispersed throughout the society and throughout all social layers. This leads to the question of equality of resources in the Union as well as to the question of the mindset of public entrepreneurs, which is beyond the scope of this chapter.⁴⁵

Any social context and setting should be understood as a site of peaceful contestation in polycentric theory, including domains of social life such as art and education or the media or workplace and other settings of economic activity. Marches, politically motivated strikes, discussions and statements on Twitter, Facebook and on other social media, boycotts and other social movements such as the #MeToo movement are all fundamental avenues of peaceful contestation in a polycentric world. Regardless of the type and site of peaceful contestation, citizens need to know the art and science of social association. They need to have ‘the habits of heart and mind’ to conduct their affairs in multi-organisational settings characterised by culture of deliberation conducted in a spirit of a curious enquiry and self-interest.

It could plausibly be argued that the European Union is governed by a relatively small number of European institutions, state and non-state actors such as NGOs, individuals, corporations, cities and law firms acting as public entrepreneurs. There are many one-shooters, but not many repeat players. This is why institutionalisation and formalisation of the possibilities for the exercise of individual self-governance, as for example described in the infringement procedure, do not stand to deliver a fully polycentric Union. The lack of realisation of the polycentric potential within the scope of peaceful contestation is thus a sociolegal rather than institutional question. It points to the need of further research on the implications of EU law in daily reality and how various actors in

⁴⁵ See D. Kukovec, ‘Law and the Periphery’, *European Law Journal* 21 (3) (2015), 406–28.

the Union experience EU structures and influence actual decision-making.

Questions of legal culture in the Union also come to the fore. Peaceful demands for self-governance need to be met with a peaceful reaction and experimentation should be encouraged and supported. Active, daring and educated public entrepreneurs are crucial, but perceptive institutions prepared to seriously listen to concerns and demands for self-governance are equally indispensable. Culture of responsiveness, education, experimentation and active creation of an empowered individual are all vital components on the road to a polycentric Union. The immense complexity of the Union makes a truly polycentric system hard to achieve or maintain. A public entrepreneur needs to know what she is doing. Polycentricity requires dispersed decision making and it requires democratisation of expertise. The democratic element thus meets the expertise, able to navigate in the system, in the Ostroms' teaching, yet expertise is in fact not evenly spread out in the Union.⁴⁶ Complexity further breeds concentration of expertise, repeat players and power.

III Conclusions

Polycentric theory offers a powerful account of ways of improving the political life of a society in general and of the European Union in particular. Peaceful contestation constitutes one of the vital pieces of the puzzle. It needs to be constantly enabled in a polycentric society in order for society to be able to claim this character. Once this dispersed process of social reconfiguration stops or is limited, the system cannot claim to be polycentric.

All social actors involved in the production of public goods and common-pool resources should thus be understood as 'public entrepreneurs', as active, knowledgeable, and daring decision-making actors motivated by diverse interests and common social goals to peacefully contest norms and situations, thus constantly re-constituting and reconfiguring a polycentric society. The European Union, an unprecedented, necessary and cherished historic democratic achievement, should strive to achieve the polycentric ideal type.

The ideal type of peaceful contestation in a polycentric theory prioritises self-governance or individual autonomy and resists a hierarchical

⁴⁶ *ibid.*

social construction. It requires one in which seemingly hierarchical relationships keep being turned into horizontal ones. The ideal type of peaceful contestation in a polycentric world leads to a conclusion that unless peaceful contestation satisfies the conditions of the polycentric theory, the very idea of peaceful contestation in liberal political theory is not realised.