

The Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?

By Niels Petersen*

A. Democracy as Fundamental Value of the European Union

“Our Constitution ... is called democracy because power is in the hands not of a minority but of the greatest number.” This statement by Thukydides preceded the preamble of the draft constitutional treaty elaborated by the European Convention.¹ Although not adopted by the intergovernmental conference, the proposed introduction illustrates that the Convention intended to attribute a central role to the concept of democracy – at least symbolically.

The democratic constitution of the European Communities has not long been an issue in legal discussions. Democratic legitimacy of the European institutions was believed to be unnecessary by many scholars who argued that the creation of an internal market only served the purpose of promoting individual freedom.² However, with the EU’s development from a purely economic to a political cooperation, the topic has frequently appeared on the agenda of scientific discourses in legal and political science.

With the treaty of Amsterdam,³ democracy was expressly introduced as a fundamental value into the foundational treaties.⁴ In the Treaty Establishing a

* The author is research fellow at the Max Planck Institute for Comparative Public Law and International Law. I am grateful to Jürgen Bast, Stephan Bitter, Philipp Dann and Stefan Kadelbach for stimulating discussions and valuable comments on earlier drafts of this article.

¹ Draft Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003.

² E.-J. Mestmäcker, *On the Legitimacy of European Law*, 58 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 615, 631 (1994).

³ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

Constitution for Europe⁵ (CT), democracy is listed in Art. 2 among the core values of the Union. The notion of democracy is concretised in Arts. 45 et seq. CT under the title “The Democratic Life of the Union” as representative⁶ and participatory⁷ democracy.

In spite of these affirmations of the democracy principle, the scholarly critique of the democratic legitimacy of the European Union and its institutions is still considerable.⁸ In the course of this analysis, I shall therefore try to define the democracy principle in the context of the European Union (Section B). Then I will apply the determined normative standards on the institutional design in order to analyse whether the Constitution contains a coherent concept of democracy (Section C). Finally, I will provide a short outlook on future institutional reforms (Section D).

B. Defining the Normative Standards: Democratic Legitimacy in the European Context

I. The Subject of Legitimacy – Communitarianism vs. Individualism

While the necessity of democratic governance is almost universally accepted in the Western scientific discourse, premises and content of the concept are frequently discussed.⁹ The holistic or collectivist approach takes the society or the people as a starting point, pretending that there may be a common good which is distinct from the sum of all individual interests. The individualist position, on the other hand,

⁴ Consolidated Version of the Treaty on European Union Art. 6(1), 1997 O.J. (C 340) 145 [hereinafter TEU].

⁵ Treaty Establishing the European Constitution, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter CT].

⁶ CT art. I-46.

⁷ CT art. I-47.

⁸ See e.g. A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 121 (2005); J.H.H. Weiler, *European Democracy and Its Critics: Polity and System*, in THE CONSTITUTION OF EUROPE 264 (J.H.H. Weiler ed., 1999); G. Lübke-Wolff, *Europäisches und nationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 246, 255 (2001); H. Steinberger, *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft*, 50 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 9, 39 (1991); C. Gusy, *Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU*, 45 ZEITSCHRIFT FÜR POLITIK 267, 271 (1998); F. MÜLLER, *DEMOKRATIE ZWISCHEN STAATSRECHT UND WELTRECHT* 127 (2003).

⁹ A. v. Bogdandy, *Globalization and Europe: How to Square Democracy, Globalisation and International Law*, 15 EUR. J. INT'L L. 885, 890 (2004).

refers to the individual as subject of legitimacy. Thus, public policy has to concentrate on the promotion of individual interests.

In the European context, the question of the subject of legitimacy has consequences for the institutional design. A state-centered collectivist approach has to be reluctant with regard to any further step of integration. The decision-making competences have to remain as much as possible with the national parliaments.¹⁰ On the European level, the Council of Ministers as an intergovernmental organ must play a crucial role. From an individualistic standpoint, the European Parliament as the “voice” of the European citizenry is the main organ procuring democratic legitimacy.¹¹ In the following, I will discuss this issue on a theoretical level (1) and then examine the normative foundations in the Constitutional Treaty (2).

1. Theoretical Foundation

The state-centred democratic vision is only justified under a holistic legitimacy concept, according to which only national peoples are able to be subjects of legitimacy. It is argued that minorities only accept majority decisions if the citizenry has a certain national homogeneity.¹² Legitimacy therefore, has to be derived from national parliaments. Thus, the lack of a European *demos* is perceived as an obstacle to further integration.¹³

However, the plausibility of a state-centred, collectivist approach is debatable. Even assuming that the individual needs society in order to develop its personality, there is no necessary link between society and nation state.¹⁴ Nation states are neither founded on an ethnic or homogenous group¹⁵ nor on a cultural, religious or social

¹⁰ Exemplary D. Grimm, *Does Europe Need a Constitution?*, 1 EUR. L. J. 282, 296 (1995).

¹¹ See Daniele Archibugi, *Cosmopolitical Democracy*, in DEBATING COSMOPOLITICS 1, 8 (Daniele Archibugi ed., 2003).

¹² J. Isensee, *Die alte Frage nach der Rechtfertigung des Staates*, 54 JURISTENZEITUNG 265, 274 (1999).

¹³ *Id.*; M. KAUFMANN, EUROPÄISCHE INTEGRATION UND DEMOKRATIEPRINZIP 262 (1997); Grimm, *supra* note 10, at 296.

¹⁴ R. Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 498 (1989).

¹⁵ See S. Kadelbach, *Union Citizenship*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & J. Bast eds. forthcoming 2005); see also J.H.H. Weiler, *Does Europe need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219, 240 (1995).

consensus.¹⁶ The sharing of common values and ethical disparities transcend national borders.¹⁷ Belonging to a political community therefore cannot be based on substantial elements, but rather requires a will to belong.¹⁸ Hence, it presupposes the existence of a political order every citizen will agree to.¹⁹ This will to belong is the key characteristic of the individualist concept being expressed by the fiction of the social contract.

2. Subject of Legitimacy in the Constitutional Treaty

The individualistic conception of democracy has in principle been adopted by the Constitutional Treaty. Art. 2 CT mentions dignity and individual liberty first in its list of the Union's fundamental values. As liberty is expressly mentioned distinctly from human rights and fundamental freedoms the first principle has to be understood as going beyond the latter.²⁰ Art. 2 CT has to be perceived as a normative transformation of the Kantian postulation that liberty is the original human right.²¹ This understanding of liberty would correspond with the protection of human dignity. For in the philosophical debate, dignity is perceived as serving the purpose of protecting human autonomy.²² Consequently, Art. 2 CT places the individual into the centre of the European legal order.

This result is further punctuated by the guarantee of equality prescribed in Arts. 2 and 45 CT.²³ According to these provisions, every European citizen has equal rights²⁴ notwithstanding his nationality. Thus, a mediation of citizen's rights by a

¹⁶ See U. Haltern, *Integration als Mythos*, 45 JAHRBUCH DES ÖFFENTLICHEN RECHTS 31, 52 (1997); H. Abromeit & T. Schmidt, *Grenzprobleme der Demokratie: Konzeptionelle Überlegungen*, in REGIEREN IN ENTGRENZTEN RÄUMEN 293, 306 (B. Kohler-Koch ed., 1998).

¹⁷ M. Mahlmann, *Constitutional Identity and the Politics of Homogeneity*, 6 GERMAN L. J. 307, 316 (2005).

¹⁸ S. Dellavalle, *Für einen normativen Begriff von Europa: Nationalstaat und europäische Einigung im Lichte der politischen Theorie*, in DIE EUROPÄISCHE OPTION 237, 257 (A. v. Bogdandy ed., 1993).

¹⁹ However, the capability of consent is sufficient, actual consent not necessary.

²⁰ A. v. Bogdandy, *Constitutional Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogdandy & Bast eds. forthcoming 2005).

²¹ IMMANUEL KANT, METAPHYSICS OF MORALS 30 (M. Gregor trans., 1996).

²² See, e.g. J. NIDA-RUMELIN, UBER MENSCHLICHE FREIHEIT (2005)

²³ See A. Peters, *European Democracy after the 2003 Convention*, 41 COMMON MKT. L. REV. 37, 43 (2004).

²⁴ Actually, CT art. 45 seems at first glance not to be a very effective right, as it (only) guarantees the reception of "equal attention from [the Union's] institutions." However the provision has to be read in its context. In the first half sentence the Union is obligated to observe the "principle of equality of its

state or nation as in classical public international law is not necessary. Therefore, both the guarantee of liberty and equality illustrate that the European Constitution is based on an individualistic concept of democracy.²⁵

However, several allusions to the member states and the Union's peoples stress the federal structure of the EU. In Art. 1 (1) CT, the will of the member states to build a common future is mentioned beneath the will of the citizens. Furthermore, Art. 46 (2) CT establishes the Council of Ministers as an organ representing the member states. Because both provisions refer to the member states and the citizens they do not undermine the general individualistic concept of the European Constitution. Instead they point out that the European Union has no centralistic system of governance, but that it is characterised by a strong federal structure, in which the member states still play a vital role.

II. Participation and Efficiency: Complement or Contradiction?

1. Input and Output Legitimacy

The insight that democracy in the European context is meant as individualistic democracy provides our first guideline for concretising the concept of legitimacy. According to the classical concept, democracy presupposes that every citizen has the opportunity to participate at least indirectly in collective decisions of the community. If democracy is supposed to implement individual self-determination, every decision with sovereign character has to be traced back to the citizenry via a chain of legitimisation.²⁶

Evidence for such an understanding can be found in Arts. 46 et seq. CT, where the European democracy is characterised as participatory and representative. In Art. 46 (2) CT the accountability of the Union's legislative organs to the citizens is particularly stressed. The citizens are supposed to be directly represented by the European Parliament, while the democratic legitimacy of the Council of Ministers is guaranteed by the fact that the governments represented therein are either directly or indirectly accountable to their national electorate.²⁷

citizens." Furthermore, the norm is superscribed with the title "Principle of Democratic Equality." Therefore the headline has to be taken literally and the right of equality is to be interpreted broadly.

²⁵ Bogdandy, *supra* note 20.

²⁶ See E.-W. Böckenförde, *Demokratie als Verfassungsprinzip*, in HANDBUCH DES STAATSRICHTS, VOL. II, PARA. 24, NO. 16 (3d ed., J. Isensee & P. Kirchhof eds., 2004).

²⁷ See A.V. Bogdandy, *Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung*, 83 KRITISCHE VIERTELJAHRSSCHRIFT 284 (2000) (on the strategy of double legitimisation).

However, the normative postulate of self-government of a people,²⁸ the ideal of a political community without rule, which is the foundation of participation-based democracy concepts,²⁹ has practical shortcomings. Even in direct democracies, the majority always reigns over the minority. Moreover, collective decisions may have significant external effects, either of extraterritorial³⁰ or of inter-temporal³¹ character. Therefore, not every person who is affected by a public decision is involved in the decision-making process.

In representative democracies, sovereign power is, in addition, not exercised by the citizenry, but by its representatives. Thus, there may be considerable differences between the interests of the representatives and those of the represented.³² Because of this divergence, parliamentary decisions are not always in the interest of the affected society.³³ Furthermore, the electoral decision will only refer to certain parts of a candidate's or a party's programme and consequently always be a compromise. This can be demonstrated by the so-called "Ostrogorski-paradoxon." This paradoxon illustrates that a vote concerning the combination of different topics might result in results opposite of distinct votes on the individual topics.³⁴ Elections in representative systems however necessarily imply a combination of diverse subjects. Democratic legitimacy therefore cannot solely be determined by the electoral decision and the degree of participation.

Instead, the yardstick must be the quality of collective decisions. Thus, legitimacy must be determined by the degree of problem solving capacity of public

²⁸ See M.T. Greven, *Grenzen und politischer Raum*, in REGIEREN IN ENTGRENZTEN RÄUMEN 249, 255 (Kohler-Koch ed., 1998).

²⁹ F.W. SCHARPF, DEMOKRATIETHEORIE ZWISCHEN UTOPIE UND ANPASSUNG 25 (1970).

³⁰ D. Held, *Democracy and the New International Order*, in COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER 96, 99 (D. Held & D. Archibugi eds., 1995); Peters, *supra* note 23, at 40.

³¹ N. Petersen, *Book Review*, 64 HEIDELBERG J. OF INT'L L. 851, 853 (2004).

³² G. Majone, *Independence versus Accountability? Non-Majoritarian Institutions and Democratic Governance in Europe*, in THE EUROPEAN YEARBOOK OF COMPARATIVE GOVERNMENT AND PUBLIC ADMINISTRATION 117, 133 (J.J. Hesse & T. Toonen eds., 1994); W.H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 433 (1980).

³³ See R. Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135, 155 (J.H.H. Weiler & Marlene Wind eds., 2003).

³⁴ Claus Offe, *Politische Legitimation durch Mehrheitsentscheidung?*, in AN DEN GRENZEN DER MEHRHEITSDEMOKRATIE 150, 163 (B. Guggenberger & Claus Offe eds., 1984).

institutions.³⁵ As the evaluation of decisions is always dependent on individual conceptions of value, it is certainly not possible to assess the quality of a decision *ex post* according to the attained results. The analysis must concentrate on whether institutional design and decision-making process lead to the expectation of decisions aiming to promote the common good.³⁶

2. *The Differentiation Between Political Goals and Strategies of Implementation*

Political decisions can principally be divided into two categories: the determination of political goals or policy choices on the one hand and the implementation of these aims by concrete strategies of action on the other.³⁷ While the former are principally decisions of value every society must adopt as its own, the latter can, at least in theory, be evaluated more or less objectively by scientific methods. Thus, the legitimacy of both kinds of decisions follows different standards.³⁸

As decisions of value are personal decisions, they presuppose that all persons affected by them have the opportunity to participate equally in the decision-making process in order to express their preferences. Certainly, there are practical obstacles to consulting the whole electorate for every such decision. Therefore, indirect participation via the election of representatives has to be considered sufficient. However, the quality of policy choices is better the more the criteria of equal participation and immediacy are met. Consequently, in a representative system, the political accountability of the decision-makers plays a vital role in this context.

The strategies for the implementation of democratic ideas must be applied in a procedure that is as rational as possible.³⁹ Examples in the European context are particularly regulative decisions. The major problem these decisions face is that strong particular interests compete with the diffuse interests of a considerable part of the population. While the benefit for the latter is low with regard to each individual, there is often no incentive to organize lobbying. In party dominated political systems, such constellations often lead to a policy favoring different

³⁵ See F.W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1999); M. Jachtenfuchs, *Theoretical Perspectives on European Governance*, 1 EUR. L. J. 115, 129 (1995).

³⁶ N. Petersen, *Europäische Verfassung und europäische Legitimität*, 64 HEIDELBERG J. INT'L L. 429, 456 (2004); see also M. Nettesheim, *Decision-Making in the EU: Identity, Efficiency, and Democratic Legitimacy*, 16 EUR. REV. PUB. L. 197, 215 (2004).

³⁷ See A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 4 (1965).

³⁸ Petersen, *supra* note 36, at 461.

³⁹ See, A. v. Aaken, *Rational Choice*, in *DER RECHTWSISSENCHAFT* 300 (2003).

clienteles.⁴⁰ The decisive standard for the quality of regulative decisions therefore is technical expertise rather than a high degree of participation.⁴¹ In this context, the political independence of the decision-makers is not a downfall, but a virtue.⁴²

Certainly, it is not always possible to distinguish clearly between policy choices and implementation strategies. Decisions often contain both elements. Therefore, it is necessary to find a balance between participation on the one hand and decision-making efficiency on the other. Moreover, it seems appropriate to differentiate the decision-making procedures according to the goals to be achieved.

A striking example for the division of policy choices and implementation strategies is the institutional design of the European Central Bank (ECB).⁴³ The objectives the ECB is supposed to pursue are prescribed in Art. 30 (2) and 185 (1) CT. As the constitution has to be accepted by the national parliaments or by popular referenda during the ratification process, these policy choices have been defined in an input-based procedure. In order to implement these objectives, the members of the ECB have been vested with a high degree of independence⁴⁴ and a correspondingly low level of political accountability.

C. Democratic Legitimacy of the European Institutional Design

In the following, the normative standards developed in this paper will be applied to the European institutional framework. I will analyze whether the general principle of democracy is coherently implemented in the Draft Constitutional Treaty or whether there are remaining disparities. In order to answer the question, we will have a look at the three main organs involved in the legislative process according to the standard legislative procedure prescribed in Art. 396 CT: the European Parliament (Section I), the Council (Section II), and the Commission (Section III). Finally, the Constitutional Treaty also seems to have introduced a fourth actor: the citizenry by means of direct participation in the legislative process (Section IV).

⁴⁰ G. Majone, *Redistributive und sozialregulative Politik*, in *EUROPÄISCHE INTEGRATION* 225, 242 (Markus Jachtenfuchs & Beate Kohler-Koch eds., 1996); W. Hoffmann-Riem, *Gesetz und Gesetzesvorbehalt im Umbruch: Zur Qualitäts-Gewährleistung durch Normen*, 130 *ARCHIV DES ÖFFENTLICHEN RECHTS* 5, 31 (2005).

⁴¹ Majone, *supra* note 32, at 118.

⁴² Petersen, *supra* note 36, at 462.

⁴³ See Tohidipur, in this volume.

⁴⁴ CT art. 30(3).

I. European Parliament

In the standard legislative procedure, the European Parliament and the Council equally co-decide on the European laws and framework laws proposed by the Commission. Thus, the Parliament is together with the Council the principal legislative organ of the European Union.⁴⁵

Contrary to Art. 190 TEC, Art. 20 (2) CT prescribes that the European Parliament represents the European citizens, not the European peoples.⁴⁶ However, the representatives are not elected by the European citizenry as a whole. On the contrary, the Parliament is composed by representatives of the individual member states. Moreover, the member states are not represented equally, but on the basis of a “digressive proportionality.” According to the Nice Protocol on Enlargement,⁴⁷ one delegate of Luxemburg currently represents 72 thousand citizens, a Dutch delegate 632 thousand citizens, a Polish delegate 713 thousand citizens, and a German delegate 828 thousand citizens.

Such a significant disproportionality in the representation of the Union’s citizens runs counter to the general principles of political equality laid down in Art. 45 CT, and democratic representation prescribed in Art. 46 (1) CT.⁴⁸ The choice of a digressive system of representation has practical reasons. If Germany had the same ratio of representation as Luxemburg, the Parliament would have a total number of delegates that would put its working capability into question.⁴⁹

However, it is not required that the Parliament be composed of representatives of the individual member states. On the contrary, such a system contains collectivist

⁴⁵ A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 130 (2005) (there are still important fields remaining in which the Parliament is not equally involved in the legislative process).

⁴⁶ S. Kadelbach, *Bedingungen einer demokratischen Europäischen Union*, 32 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT (forthcoming 2005).

⁴⁷ The Treaty of Nice Amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain Related Acts, Mar. 10, 2001, 2001 O.J. (C 80) 1, 49 (the protocol on the enlargement of the EU).

⁴⁸ G. Lübke-Wolff, *Europäisches und nationales Verfassungsrecht*, 60 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 246, 248 (2001); C. Gusy, *Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der EU*, 45 ZEITSCHRIFT FÜR POLITIK 267, 271 (1998); F. MÜLLER, *DEMOKRATIE ZWISCHEN STAATSRECHT UND WELTRECHT* 127, 269 (2003); J. Sack, *Die Staatswerdung Europas – kaum eine Spur von Stern und Stunde*, 44 DER STAAT 67, 89 (2005).

⁴⁹ *Id.*

elements, tracing back the chain of legitimacy not to a European citizenry, but to the individual peoples of the member states. As we have seen,⁵⁰ the Union's concept of democracy refers to the individual and not to the nation state's people as subject of legitimacy.

Furthermore, the present composition of the European Parliament is not compatible with the idea of "[p]olitical parties at European level contribut[ing] to [...] expressing the will of citizens of the Union," as it is sketched by Art. 46 (4) CT. For, the latter provision aims at a representation of the European citizenry as a whole and not via a mediation by the individual member states.

There are voices who justify the present composition of the European Parliament by pointing out that the federal element of the European Union is strengthened if the Parliament consists of member states' delegates.⁵¹ However, the main characteristic of federal systems is the vertical allocation of competences. The involvement of the member states in the decision-making process of the federal level thus already needs to be justified.⁵²

In order to relieve these internal tensions, the European Parliament should *de lege ferenda* be elected by Europe-wide party lists. Such a procedure would not only eliminate the existing inequalities with regard to parliamentary representation, but would also have other positive side effects. The national parties would be forced to cooperate closer during the election campaign, which would fill the idea of the European party expressed in Art. 46 (4) CT with life. Moreover, the election promises would concentrate on common European topics rather than on national concerns like they do today.⁵³ Elections for the European Parliament would no longer be *referenda* on national governments. On the contrary, the citizens could express their preferences concerning European politics, which would strengthen the Parliament's legitimacy.⁵⁴

⁵⁰ See Part B I 2 of this piece.

⁵¹ F. Arndt, *Distribution of Seats at the European Parliament: Democratic Political Equality, Protection of Diversity and the Enlargement Process*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION – GERMAN AND POLISH PERSPECTIVES* 93, 102 (A. Bodnar, M. Kowlaski, K. Raible, & F. Schorkopf eds., 2003).

⁵² See Part C II 2 of this piece.

⁵³ See P. Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, 9 *EUR. L. J.* 549, 571 (2003) (on the latter point); see also A. Peters, *European Democracy after the 2003 Convention*, 41 *COMMON MKT. L. REV.* 37, 46 (2004).

⁵⁴ See C. Möllers, *Pouvoir Constituant – Constitution – Constitutionalisation*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (A. v. Bogandy & Bast eds., forthcoming 2005); Sack, *supra* note 48, at 87 et seq.; M. Rau, *Overcoming the Democratic Deficit in the European Union – the Neglected Role of Political Parties*, in

II. Council of Ministers

The Council of Ministers is the second legislative organ of the EU. Contrary to the European Parliament, the Council does not represent the European citizenry, but the member states. Even if the votes are weighted according to the size of the population, the Council is composed of representatives from each member state, which have to vote *en bloc*. Different opinions within the member state's population cannot be expressed in this forum.

1. Representativeness of Council Decisions

With regard to the basic principle of individual democracy, this structure of the Council has some negative implications.⁵⁵ The sole representation of the member state's citizenry by their governments presupposes that a uniform national interest can be identified. Interestingly this implies that the underlying idea is a holistic conception of the people. As we have seen, this holistic conception does not reflect the reality of modern societies.⁵⁶ Therefore, governments represent, at best, a majority of their nationals. The minority, who has voted for the opposition in their national elections remains unrepresented in the Council. Thus, there is no assurance that a decision meeting the quorum of qualified majority is really representing the majority of the European citizens.⁵⁷

In order to solve this deficiency, some legal scholars propose to raise the quorum for Council decisions.⁵⁸ To guarantee that Council decisions are representative, this proposition suggests increasing decision-making costs. It consequently presupposes that in cases of doubt the *status quo* is preferable to any changes because a high quorum might also halt the success of proposals that are supported by a majority of citizens.

Moreover, one has to bear in mind that in the regular legislative procedure the Council has equal decision-making power with the European Parliament. The involvement of the European Parliament already guarantees that the decisions will

THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION – GERMAN AND POLISH PERSPECTIVES 133, 148 (A. Bodnar, M. Kowlaski, K. Raible, & F. Schorkopf eds., 2003).

⁵⁵ See A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 126 (2005) (the critique of Menéndez).

⁵⁶ See Part B I 1 of this piece.

⁵⁷ A. Peters, *European Democracy after the 2003 Convention*, 41 COMMON MKT. L. REV. 37, 54 (2004).

⁵⁸ *Id.*

be representative. To have the Council as the second organ in the decision-making process leads to an increase in decision-making costs.⁵⁹ A further increase of these costs by raising the decision-making quorum is therefore not necessary to ensure that decisions represent the views of the citizens. It would only render the procedure less effective.

2. *Functional Legitimacy of State Representations in Federal Systems*

The identified lack of representativeness of Council decisions is not unique to the European Union. It is a common phenomenon in every federal system with two parliamentary chambers. In the US Senate, the two senator rule does not allow an exact representation of the state's citizenry. This deficit is increased by the fact that every state is represented by the same amount of Senators notwithstanding the size of its population.⁶⁰ Because the German *Bundesrat* (Federal Council of States) is composed of delegates of the state governments, it suffers from the same deficit; the citizens who have not elected the government remain unrepresented in the decision-making process.

The democratic logic of federal systems can be traced back to the insight that the degree of individual participation in collective decisions increases as the number of participants decreases. Yet, in certain cases a great number of participators may be desirable. These incidences can principally be divided into two categories.

The first category is related to democratic fairness and includes decisions having a territorial external effect. Otherwise the citizens who have the opportunity to participate at least indirectly in the decision-making process would not fully correspond to those who are effected by the decision.⁶¹ The second category comprises cases in which the efficiency of collective decisions is increased by an increase of the size of a system because a public good can be better supplied on the federal level.⁶² This has, for example, been the reason for the establishment of a European common market.

⁵⁹ J.M. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 235 (1962).

⁶⁰ U.S. CONST. art. I, § 3, cl. 1.

⁶¹ D. Held, *Democracy and the New International Order*, in *COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER* 96, 99 (D. Held & D. Archibugi eds., 1995).

⁶² C. Kirchner, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, 6 *TUL. J. INT'L & COMP. L.* 291, 303 (1998).

These deliberations reveal that the ideal size for collective decisions may vary according to their content. Therefore federal systems consist of several levels on which decision-making takes place. Decisions should be made on the federal level if democratic fairness or effectiveness can be increased.⁶³ Otherwise, the principle of subsidiarity demands that a competence has to be attributed to the national or even local level.⁶⁴

If the main function of federal systems is the vertical division of competences, what is the role of state representing bodies in the decision-making process on the federal level? According to the preponderant scholarly opinion, the Council serves for the representation of the member states' national interests at the Union level.⁶⁵ But as we have seen, the idea of the existence of a national interest distinct from the sum of individual interests is in principle not compatible with an individualist concept of democracy. Therefore strategies of justification have to be developed, which do not merely refer to the representation of national interests.

The lack of representativeness is a restriction on the input-based principle of equality of participation. However, the European democracy concept is not solely input-related.⁶⁶ Instead, there is a strong accentuation of result-oriented elements. Consequently, this analysis shall in the following sections consider whether output-considerations may justify restrictions on the principle of equal participation. In this respect, we have to differentiate between the ordinary decision-making procedure (Section 3) and consensus decisions within the Council (Section 4).

⁶³ M.G. SCHMIDT, *DEMOKRATIETHEORIEN* 435 (3rd ed., 2000).

⁶⁴ A. Follesdal, *Subsidiarity and democratic deliberation*, in *DEMOCRACY IN THE EUROPEAN UNION. INTEGRATION THROUGH DELIBERATION?* 85, 104 (E.O. Eriksen & J.E. Fossum eds., 2000).

⁶⁵ P. Raworth, *A Timid Step Forwards: Maastricht and the Democratisation of the European Community*, 19 *EUR. L. REV.* 16, 26 (1994).

⁶⁶ See Part B I 2 of this piece.

3. *Executive Federalism*

The role of the Council of Ministers in the legislative process can be explained by the model of executive federalism.⁶⁷ This model explains the involvement of executive representatives in the EU's law making process with the divergence of law-making and law-implementing powers. While the legislative power in many fields has been transferred to the Union level, the enforcement of EU law rests with the member states.⁶⁸ Even in the case of direct implementation of EU law the Union depends on the cooperation with national administrations and courts.⁶⁹ Because of these interwoven competencies, there is a strong need of cooperation in law adopting as well as in law implementing procedures. This process has been institutionalised by the involvement of the Council of Ministers in the legislature.⁷⁰

By involving representatives of the member states' executives in the legislative procedure, the costs of the decision-making process are increased. On the other hand, the implementation of laws is simplified. Legislative acts are more easily applicable and thus are of a higher quality. In other words, the higher decision-making costs are balanced by reduced costs of law implementation. Consequently, the involvement of the Council of Ministers in the law-making process can be justified by output-considerations.

4. *Consociational Democracy*

The model of executive federalism however, cannot explain the elements of intergovernmental decision-making within the Union. Even under the regime of the Constitutional Treaty, there are still crucial matters, not subject to the normal co-decision procedure, that require a unanimous decision in the Council.⁷¹ The rationale for intergovernmental decision-making can be found in consociational

⁶⁷ P. DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS 21 (2004); P. Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & J. Bast eds. forthcoming 2005).

⁶⁸ S. KADELBACH, ALLEGMEINES VERWALTUNGSCRECHT UNTER EUROPÄISCHEM EINFLUß 131 (1999).

⁶⁹ S. Bitter, *Zwangsmittel im Recht der Europäischen Union: Geteilte Rechtsmacht in Europa*, in EUROPA ALS RAUM DER FREIHEIT, DER SICHERHEIT UND DES RECHTS (Hofmann & Kadelbach eds., forthcoming 2005).

⁷⁰ P. Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. v. Bogandy & J. Bast eds. forthcoming 2005).

⁷¹ G. della Cananea, *Procedures in the New (Draft) Constitution of the European Union*, 16 EUROPEAN REV. PUB. L. 221, 228 (2004); A.J. Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 130 (2005);

democratic theory.⁷² According to this theory, consensual decision-making provides for stability in sharply segmented societal sectors.⁷³ Consequently, with regard to the EU, consensus is appropriate under two conditions. First, a substantive commonality among the member states has to be lacking.⁷⁴ Second, the existence of a relatively homogenous conviction within the national citizenry is required. Otherwise, a considerable part of the citizenry would not feel represented in the decision-making process and therefore be reluctant to accept the Council decision.

However, it must be noted that not all competences requiring a unanimous decision in the Council fulfill these two conditions. In these cases, the intergovernmental process serves the purpose of preserving power for national governments without having a theoretical justification. Here, the unanimity requirement must be conceived as a transitional stage. This is punctuated by the possibility of a simplified revision procedure prescribed in Art. 444 (1) CT allowing the introduction of qualified majority decision-making in fields where presently only unanimous adoption of legislative acts is possible.

As a consequence of the Council's unanimity requirement, Council decisions already represent at least a majority of the European citizenry. Further involvement of the European Parliament in the decision-making process would only increase the already high decision-making costs and consequently render legislation in this field even less effective. It is therefore theoretically consistent that the European Parliament has only an advisory role when the decision-making procedure has intergovernmental character.⁷⁵

5. Summary

These reflections show that the Council of Ministers still has an important role to play in the EU's law-making process. Contrary to the predominant scholarly opinion, its main function is not ensuring the representation of member states' interests. Instead its main function is simplifying how the laws are implemented. On the other hand, intergovernmental decision-making has to be reduced.

⁷² See J.H.H. Weiler, U. Haltern, & F.C. Mayer, *European Democracy and Its Critique*, 18 WEST EUR. POL. 4, 29 (1995).

⁷³ See J. Bast, *The Constitutional Treaty as a Reflexive Constitution*, in this volume.

⁷⁴ Weiler, *supra* note 72, at 29.

⁷⁵ Trübe, in this volume; compare Bast, *supra* note 73 (in favour of an involvement of the EP in cases where unanimity in the Council is required - it is paradoxical to exclude the Parliament as main representative organ from the decisions having the highest political importance).

Although the consensus requirement within the Council is justified in certain fields, the Constitutional Treaty applies this decision-making procedure in areas where unanimous decisions do not seem to be appropriate.

III. European Commission

The Commission has two important functions in the EU's law making process. First, it has a quasi monopoly in legislative initiatives.⁷⁶ Second, legislative power may be transferred to the Commission.⁷⁷ This strong role of the Commission is often criticized because of its weak political accountability.⁷⁸ The political independence of the Commissioners is expressly prescribed in Art. 26 (7) CT. The Commissioners are accountable to the European Parliament, which has to approve the Commission by a majority decision and may force the Commission to resign by the way of a censure motion in accordance with Art. 340 CT. Nevertheless, the latter instrument is quite weak because it has to meet the quorum of a two-thirds majority.⁷⁹

But as we have seen, a strong political accountability is not necessary for all kinds of political decisions.⁸⁰ Following the proposed differentiation,⁸¹ independence and expertise are dominant criteria for determining the quality of decisions regarding implementation strategies. The Commission's monopoly over legislative initiatives principally concerns economic regulation. In other fields, including foreign policy,⁸² monetary policy,⁸³ the area of freedom, security and justice⁸⁴ or the intra-organic

⁷⁶ See CT art. 26(2).

⁷⁷ CT art. 36(1).

⁷⁸ See B.-O. Bryde, *Demokratisches Europa und Europäische Demokratie*, in *EUROPA UND SEINE VERFASSUNG, FESTSCHRIFT MANFRED ZULEEG* 131, 138 (C. Gaitandes, S. Kadelbach, & G.C. Rodriguez Iglesias eds., 2005); see also B. Stråth, *Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community*, 6 *GERMAN L. J.* 255, 268 (2005); see also J.-L. Dewost, *La Commission ou comment s'en débarrasser?*, in *L'EUROPE ET LE DROIT. MELANGES EN HOMAGE A JEAN BOULOUIS* 181, 190 (Charles Debbasch & Jean-Claude Venezia eds., 1991).

⁷⁹ CT art. 340, para. 2.

⁸⁰ See A. Menon & S. Weatherill, *Legitimacy, Accountability and Delegation in the European Union*, in *ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION* 113, 117 (A. Arnall & D. Wincott eds., 2002); see also A. Dashwood & A. Johnston, *The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty*, 41 *COMMON MKT. L. REV.* 1481, 1486 (2004).

⁸¹ See Part B II 2 of this piece.

⁸² E.g. CT art. 313 (3), para. 3; CT art. 322 (1); CT arts. 325, 329, 420 (2), para. 2.

⁸³ CT art. 187 (3) lit. b, (4) lit. b.

organization,⁸⁵ this monopoly is restricted as these decisions are based on political evaluations instead of technical reasons.

Certainly, regulative decisions are not free of evaluative elements. However, the Commission does not have the exclusive decision making competence, but only the right to submit a proposal. The decision is then taken jointly by Council and Parliament as politically accountable organs.

With respect to the delegated regulatory competences prescribed in Art. 36 (1) CT, the political control of the Commission is exercised *ex ante*. According to Art. 36 (1) CT, objectives, content, scope and duration of the delegation of power have to be explicitly defined in the enabling act. The basic decision of value is therefore taken by Council and Parliament in the authorizing act, while the Commission is solely concerned with the question of implementation.

Consequently, the cooperation of the Commission on the one hand and Parliament and Council on the other is an example of balancing expertise and participation in the law-making process.⁸⁶ In this context, the weak political accountability of the Commission is an advantage rather than a disadvantage because it increases the decision-making efficiency.⁸⁷ The need of a two-thirds majority guarantees that the Commission is not forced to resign solely on grounds of party policy, but only in cases of abuse of competences.

However, in the absence of personal accountability, the quality of the Commission's decisions has to be guaranteed by procedural requirements.⁸⁸ In this respect, the involvement of committees in the decision-making process plays a vital role.⁸⁹ In order to prepare legislative proposals, the Commission often consults expert committees.⁹⁰ Theoretically, these committees may serve two important

⁸⁴ CT art. 264, lit. b.

⁸⁵ CT arts. 330 (1), 333, 357.

⁸⁶ See P.P. Craig, *Democracy and Rule-making Within the EC: An Empirical and Normative Assessment*, 3 EUR. L. J. 105, 118 (1997).

⁸⁷ G. Majone, *Regulatory Legitimacy*, in REGULATING EUROPE 284, 287 (G. Majone ed., 1996).

⁸⁸ A. VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 238 (2002).

⁸⁹ See K. Lenaerts & A. Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 35, 75 (C. Joerges & R. Dehousse eds., 2002).

⁹⁰ E. Vos, *The Rise of Committees*, 3 EUR. L. J. 210, 228 (1997).

purposes: they should provide the Commission with the necessary expertise and they should work as interface between the Commission and civil society at large.⁹¹

However, the actual design of the committee procedures has several shortcomings. In order to fulfill the described functions, the role and involvement of the committees have to be defined and formalised so that deliberative problem solving is favoured.⁹² To date, such an attempt has only been made with regard to committee involvement in the process of law implementation.⁹³ A similar standardisation is missing in the context of the preparation of legislative proposals. Simultaneously, the transparency of committee procedures must be increased in order to allow the exercise of sufficient public control over the decision-making process.⁹⁴ Moreover, safeguards should be introduced that involve all affected interest groups in the composition of the committees in order to guarantee that all interests at stake are considered.⁹⁵ Unfortunately, the Constitutional Treaty has not brought any substantive improvement in this respect.⁹⁶

IV. The Popular Initiative as New Participatory Element

With the Constitutional Treaty, the citizenry was supposed to be introduced as fourth actor in the legislative process. Art. 47 (4) CT introduced elements of direct democracy in order to strengthen the participatory element. According to this provision, the citizens may *invite* the Commission to initiate a legislative act by means of a popular initiative.

However, the popular initiative seems to be a fig leaf excusing the low degree of participation of Europe's citizenry rather than a forceful innovation. On the one hand, the utilisation of the term "invite" leads to the supposition that the Commission is only obliged to concern itself with the topic of the popular initiative. It is not bound to initiate new legislation and to enact the content of such a possible proposal. Consequently, the popular initiative has only moral force.

⁹¹ R. Dehousse, *Beyond representative democracy: constitutionalism in a polycentric polity*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135, 152 (J.H.H. Weiler & Marlene Wind eds., 2003).

⁹² C. Joerges & J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUROPEAN L. J. 273, 282 (1997).

⁹³ See Council Framework Comitology Decision 1999/468, 1999 O.J. (L 184) 23.

⁹⁴ Dehousse, *supra* note 91.

⁹⁵ Vos, *supra* note 90, at 218.

⁹⁶ See G. della Cananea, *Procedures in the New (Draft) Constitution of the European Union*, 16 EUR. REV. PUB. L. 221, 234 (2004).

This moral force of popular initiatives has, on the other hand, some problematic implications. Art. 47 (4) CT requires a quorum of at least one million citizens. This number is however below one percent of the European electorate and therefore in no way representative. While such a popular initiative is capable of bringing up a matter of almost common concern, it may on the other hand also support the particular interests of a certain group. Therefore, the popular initiative in Art. 47 (4) CT can only serve as an instrument for collecting information, lacking the legitimacy necessary to be binding. Furthermore, a popular initiative would harm the existing system of expertise based legislative proposals.⁹⁷ Therefore Art. 47 (4) CT is foreign to the conception of the institutional design.

D. Outlook: the Constitutional Treaty as Guide for Further Reforms

Despite the prominent role which has been attributed to the concept of democracy in the first part of the European Constitution, there are remaining disparities between the general outline of the democracy concept in Arts. 2, 45 et seq. CT, and the Union's concrete institutional design. In particular the composition and election of the European Parliament are not in line with the concept of individual democracy. As the norms establishing the institutional structure are however *leges speciales*, this disparity has no direct normative consequences.⁹⁸

Even if the Constitutional Treaty should not enter into force, the normative principles laid down in Arts. 45 et seq. may still have an impact on future changes in EU's constitutional law. Because these provisions can be interpreted in a theoretically consistent manner and because the proposed democracy concept is normatively convincing, they may direct further institutional reforms.⁹⁹

⁹⁷ See Part C III of this piece.

⁹⁸ On the relationship between first and third part of the constitution, see J. Bast, *supra* note 73.

⁹⁹ *Id.*

