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Democracy and New Modes of Governance in Europe

Some Basic Reflections

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Summary

Today's democratic systems are undergoing dramatic transformations. National governments face increasing restrictions in political agenda setting and determining important policy choices. Important decision-making powers are transferred to supranational and international bodies. The focus is often on the problem-solving capacity of such steps. Efficiency replaces democratic mechanisms to a certain extent; ideal democracy is often rejected as unrealistic. At the same time, the intensity of statal interventions in economic and societal affairs is under scrutiny and subject to criticism, in addition to the effects of globalisation.

In this paper the authors argue that the basic conceptions of democracy are still important and perhaps especially important in a time of transformation. However, the classical approach based on the idea of political steering through representative assemblies and the hierarchical control of administrations by political leaders, who (in a parliamentary democracy) are themselves answerable to the public and their parliamentary representatives, faces difficulties in a complex and globalised world. But this is no justification to ignore the basic ideas of democracy. It is also indisputable that the EU is under the obligation to preserve the basic ideas of democracy as democracy is a constitutional principle common to all Member States, and explicitly guaranteed by the EU Treaty.

The remoteness of European decision making from European citizens is the core of the European democratic deficit. It is not enough that the EU has developed an elaborate system of deliberation at the elite level from which the public is the indirect beneficiary. The European citizens are not sufficiently involved in the process of decision taking and control. Even if decision makers are democratically authorized, this is a very indirect authorisation. The accountability structures are fragmented. There is no possibility to replace the decision makers in one go.

Solving these problems by reforms at the national level or by blocking any further reform at EU level is not a valid option.

The European Parliament is the only European institution that is directly democratically legitimized by the European citizens and therefore of special importance for the European democracy. Enhancing parliamentarism at EU level by making the EP a fully fledged co-legislator together with the Council would be an important step to reduce the so-called democratic deficit. It goes without saying that this could not be a sufficient cure for everything. Generally speaking, additional measures like strengthening the deliberative components of EU lawmaking are desirable, and specific solutions have to be found for "new modes of governance".

Regarding the latter, the contention is that the "new" aspect might to a lesser extent be the *type* of the steering instruments but the *scope and the pattern of their application*. Consequently, it would be important to scrutinise in detail new developments in the fields of privatising public tasks, co-operation strategies between public bodies and private actors, transferring powers to private actors, mechanisms of auto-regulation, and the use of soft law.

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I. Introduction

Today's democratic systems are transforming dramatically due to globalisation, global governance and "internal" challenges including a growing complexity in many areas of decision taking and the changing expectations concerning the role of public authority in the political steering process.¹ National governments face increasing restrictions in political agenda setting and determining important policy choices. Partly, obligations stemming from international law inhibit unilateral statal obstacles to trade and severely restrict domestic regulation; partly, important decision-making powers are shifted to international and supranational bodies. At the same time, the intensity of statal interventions in economic and societal affairs is under scrutiny and subject to criticism.

Especially the process of globalisation enhances the rise of the executive branch and leads to a certain dominance of technical experts in various forms of decision making. Soft law, networks as pluralistic forms of governance as well as "horizontal" negotiation and decision making are of increasing importance. Altogether this means that as a result of globalisation, the growing complexity of issues and the changing role of the State, new modes of governance are evolving. These new forms derive their legitimacy mainly from the problem-solving capacity ascribed to them. They promise to be efficient and able to cope with the growing complexity of decision making. But do they also meet the standards of democratic legitimacy? Do they sufficiently reflect the EU's obligation to preserve the basic ideas of democracy which arguably are at the same time a constitutional principle common to all EU Member States² and consequently a core common value of European citizenry? Or is democracy an outdated concept or a phantom we need not much care about? These questions in relation to the emerging new modes of governance are of the major concerns in this paper.

Part II focuses on the concept of democracy in general by explaining its idea and traditional meaning. Following this, part III exposes major challenges to democracy resulting from important international developments in general and within the EU in particular. Part IV deals with some optimisation conceptions that in the authors' view could possibly help to improve the "democratic quality" of the traditional structures of democracy and of certain new forms of governance. Short interim conclusions in part V are followed in part VI by a preliminary effort to put "under a democracy microscope" various modes of governance identified and classified by our cluster in order to make their possible deficiencies visible and to show their impact on "classical structures" of democratic legitimacy. Several solutions are being proposed to overcome some of the shortcomings.

¹ For a stocktaking on globalisation and democracy in general see von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, *The European Journal of International Law*, Vol. 15 no. 5, 2004, 885 ff.

From the vast literature specifically on the European Union see Greven, *Can the European Union Finally Become a Democracy?* In: Greven/Pauly (eds), *Democracy beyond the State? The European Dilemma and the Emerging Global Order* (2000) 36; Lübke-Wolff, *Europäisches und Nationales Verfassungsrecht*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 60 (2001) 265 ff; Peters, *European Democracy After the 2003 Convention*, *Common Market Law Review* 41 (2004), 37 ff.

² Compare infra III.2. Why Bother?

II. The Idea and the Traditional Meaning of Democracy

II.1. The Idea of Democracy

Nowadays the idea of democracy is often rejected as unrealistic. To some extent, however, this follows from the concept of an idea as such.³ The authors do not suggest that there is a preformed notion of democracy (*Wesensschau*) which is exempt from deliberation and change. However, the contention is that referring to “democracy” be it in academic debates but also in legal documents in general and constitutional provisions in particular includes referring to a presupposed connotation of the concept of democracy even and specifically if this is not reflected or made transparent. Consequently and contrasting to the above scepticism, in this paper it is argued that the search for the essence of democracy and for ways to meet its challenges is still important and perhaps especially important in a time of transformation.

The term “democracy” consists of the constitutive words “*demos*” (people) and “*kratein*” (to govern, to rule) and therefore literally means “a people ruling itself”.⁴ This literal meaning arguably expresses very well the idea which is at least implicitly referred to in the sense mentioned above. This basic idea is the identity of the governing and the governed. Freedom in the sense of popular sovereignty, self-government and equality, meaning the equality of citizens as carriers of democracy are the underlying fundamental values.⁵

“Idealistic” definitions and perceptions of democracy as referred to above do not always help us to understand the details of the mechanisms of an actual polity, but they are still valuable in helping us to measure such mechanisms against. Giovanni Satori points out that “a democracy exists only insofar as its ideals and values bring it into being”;⁶ but he also stresses that “a firm distinction has to be made between the *ought* and the *is* of democracy”⁷ as “an *ought* is not meant to take the place of *is*”⁸. Ideals and reality interact – “without its ideals a democracy cannot materialize and, conversely, without a basis of fact that democratic prescription is self-denying”;⁹ “because of their absolute and excessive nature, ideals are not made to be converted into facts, but to challenge them”¹⁰. The name “democracy”, literally meaning “power of the people”, might be misleading for descriptive purposes, but “helps to keep ever before us the ideal – what democracy ought to be”¹¹.

On these grounds, dealing with “real” democracies provides no justification putting aside, or rejecting the “ideal” definition. In this sense, we need such a definition as a yardstick for actual democracies.

To put it differently: The authors of this paper do not deny that it would be possible, theoretically, to redefine “democracy” in a manner deviating from the idea as sketched out above. However, every such attempt risks, firstly, overthrowing a traditional concept. There should be good reasons for such a step. Such an undertaking would not be what we might call an

³ At least in the sense of ideas developed in the allegory of the cave in the seventh book of Plato’s Republic.

⁴ See Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (2002) 3.

⁵ From the vast literature, compare only Kelsen, *Vom Wesen und Wert der Demokratie* (1929) 14; Satori, *Democratic Theory* (1962) 51 f; Verhoeven, *supra* n 4, 10 ff.

⁶ Satori, *supra* n 5, 4.

⁷ Satori, *supra* n 5, 4 f.

⁸ Satori, *supra* n 5, 64.

⁹ Satori, *supra* n 5, 5; see also Kelsen, *supra* n 5, 14.

¹⁰ Satori, *supra* n 5, 65.

¹¹ Satori, *supra* n 5, 4.

exemplification of the traditional concept making it clearer, more precise, and thus fruitful for scientific discussions, but would rather be the creation of a distinct concept. Secondly, doing so could not avoid a thorough comparison with the notion of democracy as a common constitutional principle at least of the EU Member States. As a legal principle, it is of course open to changes. However, there are limits for the interpreter of the law to introduce them. Rather it would be the legislator to do so, and in a democracy this should be “the people”. In this sense, the room of manoeuvre in creating a “new” concept of “democracy” appears to be limited as soon as the goal is to lay the foundations for a fruitful conceptual and legal discussion. At least it cannot be avoided to recapitulate the core of the traditional concept. To make the point clear at the outset: It is not argued here that democracy could not be the subject of substantial changes; the argument is that such changes cannot simply be introduced by redefinition, but would require substantive discussion.

II.2. Traditional Meaning of Representative Democracy

Based on such rough characterisation, a common understanding of “representative democracy” has evolved in the last two centuries in the “western world”. The aim of this paper is neither to discuss in detail all features of the basic concept of democracy as such nor those of “modern representative democracy”, but to focus on core elements, “on democracy’s irreducible core” in its representative version. All of those elements might be looked at as a further detailing of the underlying idea of the identity of governors and governed. Nevertheless, there is considerably uncertainty included in such an effort.

In line with the above general considerations, the diagnosis might be correct that there is a widespread consensus on the *necessary* requirements for a State to qualify as a representative democracy: “officers of government must ultimately derive their power from citizen-based elections that are general, equal, free and periodic. Moreover, all public power has to be exercised in accordance with the rule of law and has to be restricted through a guaranteed possibility of changing power.”¹² However, the real challenge might still lie in determining the precise composition and the degree of details of those minimum requirements. To illustrate the: the consequences might be very different if democracy exists “as long as the various interest groups have the opportunity to influence the process of decision-making at any of its various levels, and as long as various groups can trigger diverse mechanisms of control of the government”.¹³

Below the basic features of democracy are specified in more detail. The contention is that the quality of these features is differing. A polity without public decision taking being authorised by the citizens, meaning without regular, free and equal elections or without efficient accountability mechanisms including the removal of officials is no democracy at all. But even accepting this does not provide for an operational yardstick for every case: there are certainly different degrees of equal representation as well as of free elections and efficient accountability. There is no sharp borderline for a minimum requirement in each of these points. Consequently even the minimum requirement concept of democracy appears to be vague in the first place. Secondly, what follows is that democracy might be seen as a comparative concept: elections can be “more democratic” compared to others without disqualifying the latter as outright undemocratic. And consequently the EU might have a democracy deficit without being entirely undemocratic.

¹² Von Bogdandy, *supra* n 1, 889 f.

¹³ Peters, *supra* n 1, 85. A major difference lies in the rule of law criterion, irrespective of whether it is understood in a formal or a material sense.

Moreover, there is a second group of features which appear not to be constitutive for the concept of democracy as such.¹⁴ A polity without a more or less undisputed set of common values, or without an “identity” of its own, might be a deficient polity, but it might still be a democracy as long as the above-mentioned criteria are met. Also here there might be different degrees of “identity”. A similar view can be taken vis-à-vis the criterion of transparency; even if transparency is often seen as a “prerequisite” of democracy, it can hardly be upheld that an intransparent democracy is inconceivable. But it should be admitted that a minimum of transparency appears to be included already in the core requirement of free elections: in order to make a choice it must be able to be and consequently get informed on the options. Even more controversial might be the criterion of majority versus consensus voting. While some might argue that a polity with unanimous decision taking as the predominant mode is no “real” democracy at all, others find that unanimity is a very advisable mechanism for certain constellations.

It might be useful to expose another premise at the beginning which the authors do not intend elaborating in detail: the relation between the democratic principle and other constitutional principles in modern polities. It goes without saying that democracy is certainly not the only principle of fundamental relevance. It has to be balanced against other principles like that of checks and balances and the rule of law, including the protection of legitimate expectations, legal certainty, fundamental rights including minority rights, the independence of the judiciary and the existence of a constitutional court.¹⁵ Although these rule-of-law-elements as well as the institutional balance principle are of vital importance for a functioning democracy, the core of the latter cannot, as is sometimes explicitly or implicitly suggested, be substituted by some or all of these other constitutional elements. The authors also do not share the perspective that democracy is inextricably linked with those other principles in so far as a “true” democracy would inevitably produce these features. Another aspect is that there might be a trade-off between those principles in the sense that balancing them against each other requires at the same time abandoning the idea of realising one or more of them in its pure version. But this is something different. In this paper, the focus is on the core of the democratic principle.

II.2.1. Authorizing the Decision-Makers: Elections and the “Chain of Legitimation”

In a democracy, all authority has to be derived from its citizens who are the last and only source of sovereignty.¹⁶ The citizens are the carriers of democracy; they are the ultimate bearer of public authority. Actually two kinds of democratic authorisation are required: First, the citizens’ approval to the structure of power relations and the institutional architecture of the polity; second, the authorisation of the actual decision makers including political leadership.¹⁷ In this paper the superior higher-law-level of constitution making is to a large extent excluded, the focus is instead on ordinary rule and decision making.

¹⁴ Eg Peters, *supra* n 1, 72 ff, 78 f: “extra-legal conditions” or “factors”.

¹⁵ See Bleckmann, *Vom Sinn und Zweck des Demokratieprinzips. Ein Beitrag zur teleologischen Auslegung des Staatsorganisationsrechts* (1998) 140; Böckenförde, *Demokratie als Verfassungsprinzip*, in Isensee/Kirchhof (eds), *Handbuch des Staatsrechts*, Bd I (1987) Rn 83 ff; Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (1997) 293.

¹⁶ Sovereignty here means that *within* the respective polity (the State) power rests with the people, if it is a democracy; compare Griller, *The Impact of the Constitution for Europe on National Sovereignty*, in Pernice/Zemánek (eds), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, ECLN-Series, Vol 5 (2005) 151 (159 f).

¹⁷ See Lord, *Democracy in the European Union* (1998) 16 ff; Böckenförde, *supra* n 15, Rn 5 ff; Greven, *supra* n 1, 41.

Thus, it is not enough that the exercise of public authority serves the “public interest” and improves the people’s welfare, the performance of public tasks first and before all needs to be legitimised by the people: “... it is not enough that those who rule us should do what we want; we also require that they should have been elected by us to do what we want.”¹⁸

Once established, representative power may not become autonomous but needs consistent feedback to and by the people. Representatives are responsible for their activities.¹⁹ Consequently, they also have to take responsibility for a possible delegation of powers.²⁰ The exercise of state powers through other organs than the representatives themselves is without further complication under the condition of a continuous “chain of legitimisation” originating in the people.²¹

II.2.2. Equality of the Citizens as the Subjects of Democracy

Freedom and equality are keywords not only in every fundamental rights theory, but also in democratic theory. Freedom in a political sense means that the citizens as carriers of democracy have the right to determine the political process, as exemplified above. Equality in this context means that every citizen in this specific capacity disposes of the same bundle of rights (and duties), notably political rights and duties, and the right to actively participate in the political process. Equality in this specific sense as a part of democratic theory, however, does not entail a right to equality in economic and social matters.²²

Citizens are the ultimate source of power and the subjects of a democracy; the collective is called the *demos* of a polity. The prevailing view appears to be that no ethnically homogeneous *demos* is needed as a precondition for democracy, “a basic public-interest orientation”²³ suffices for the functioning of the system. The *demos* of a democratic polity consequently can be underpinned or even constituted by a basic consensus, by common core values. A “fully cultivated public-interest orientation” can evolve gradually within democratic structures but is no precondition at the outset.²⁴

II.2.3. Consensus versus Majority Voting

The mode of decision making applied within a democratic polity can be oriented towards the majoritarian model of representative democracy or towards the model of consensus democracy.²⁵ Majority rule is a highly demanding mode of political decision making as it presup-

¹⁸ Lord, *supra* n 17, 16.

¹⁹ For this “accountability”-feature see in the text below.

²⁰ It is obvious at the outset that the “delegation” or the “transfer” of powers to international bodies, but also agencies or societal groups lacking such dependence more or less, creates a tension to democracy itself, for decisions are taken by other organs than the representatives impacting on accountability. Suffice it to so say at this point that the existence and the eventual bearings of restrictions on delegating power is far from being undisputed, not only in the international dimension of the phenomenon, and that this is one of the facets where we can observe huge differences in existing democracies.

²¹ Böckenförde, *supra* n 15, para. 11. The term is lent from the German discussion; however, the argument is that the substance is of general importance.

²² See Greven, *supra* n 1, 41 f; Verhoeven, *supra* n 4, 11 f; Böckenförde, *supra* n 15, Rn 35 ff.

²³ Zürn, Democratic Governance beyond the Nation-State, in: *supra* n 1, 99.

²⁴ See e.g. Zürn, *supra* n 23, 98 f; Peters, *supra* n 1, 71 f, 78 f; Weiler/Halter/Mayer, European Democracy and Its Critique, Jean Monnet Working Papers, Sept 1995, 9 ff. It goes without saying that this is one of the most disputed points.

²⁵ See Grande, Post-National Democracy in Europe, in: *supra* n 1, 121 ff; Lord, A Democratic Audit of the European Union (2004) 23 f. For the purpose of this paper, consensus shall be used as a synonym to unanimity.

poses a collective identity based on common norms and shared values, a stable legal framework, and its entails that decisions can be reversed relatively easily. Being outvoted is easier to accept in a polity with common foundations and values than in a community lacking such fundamental underpinning. Thus, the higher the degree of socio-cultural heterogeneity in a political system, the less likely is the acceptance of majority decisions as democratically legitimate and the more controversial is the application of the majority rule as the dominant mode of political decision making. In a rather heterogeneous polity, so the argument runs, a more consensus-oriented model of decision making is more adequate.

Even on these grounds it is admitted that there is a trade-off between the specific advantages of consensual decision making and the advantages of majority voting. Costs of the consensus principle arise from delays or the failure in reaching decisions, whereas the costs of the majoritarian rule are burdening minorities or provoking societal tensions. Thus, it is important to design a nuanced system of consensus and majority voting according to the socio-cultural heterogeneity of the polity and the importance of the issue for the society. In most modern democracies, majority rule is complemented by consensual forms of decision making.²⁶

It is contended that there is an additional and crucial facet of the issue which is often ignored, not only but also in the EU related discussion. Within polities which are doubtlessly underpinned by common values, or by a homogeneous ethnicity (where such common grounds are often presupposed), the simple majority as a voting rule comes closest to the basic idea of the identity of rulers and ruled. This is so for lawmaking in a polity is not a static but a dynamic process. Unanimity in such a process would entail a veto right against any changes even for the smallest number being entitled to cast a vote. Simple majority, by contrast, ensures that the existing legal order at any given point of time reflects the will of the greatest possible number. As a consequence, a principled voting rule in a democratic system should be simple majority voting, not unanimity.²⁷ Qualified majority or unanimity requirements are justifiable exceptions serving the protection of minorities or the preservation of essential prerequisites of democracy such as the functioning and the relation of the statal powers, fundamental rights protection etc.

By contrast, in “traditional international” relations, that is in a group of sovereign States, majority voting is rather an irregularity in the interest of efficiency but not of democracy. Within such a group, a common identity as a within a polity cannot be assumed. Consequently, majority decisions in such a situation might not reflect the will of the “people” but might instead lead to illegitimate majority dictate. The majority might be accused of oppressing the self-determination of the people which might be (constantly) outvoted. Instead, unanimity, e.g. for the conclusion of an international treaty, is the rule, and in those cases where being outvoted is possible like in international organisations, withdrawal is an option which would reactivate political self-determination. More and more, however, the latter is rather a theoretical option, in international relations, but the more so within the EU.

II.2.4. Input or Output Democracy?

As mentioned, elections are the central mechanism of authorisation in a representative democracy. Competitive elections allow voters to choose between rival agendas for public policy and between rival office holders; such elections “guarantee” that elected officials respond to

²⁶ See Grande, *supra* n 25, 122 f; Peters, *supra* n 1, 53 f, 83 f.

²⁷ See Kelsen, *supra* n 5, 6 ff, esp 9 f. Arguments to the contrary e.g. in Bleckmann, *supra* n 15, 117 f.

the wishes of the citizens.²⁸ Elections are, therefore, the crucial element of the input and the output dimension of democracy.

The input element in a democracy reflects the “will of the people”, whereas the output aspect addresses the desire that decisions should be taken in “the interest of the represented”; input-oriented democracy, according to Scharpf,²⁹ is “government by the people”, whereas output-oriented democracy is “government for the people”. However, both aspects are closely intertwined. Democracy cannot be based solely on one or the other. Input and output oriented legitimacy reinforce and complement each other; “input-oriented authenticity, and output-oriented efficiency are equally essential elements of democratic self-determination”³⁰.

In a democratic polity the lawmaking and the executive function can be legitimised in different ways.³¹ In presidential systems, the head of the executive and the parliament are elected separately, which means that their democratic legitimacy is of equal weight. The executive might even be disconnected from the parliamentary majority and not being dismissible through a parliamentary motion of censure. The president instead is directly accountable to the voters; he appoints and discharges cabinet ministers.

In parliamentary systems government and parliament depend upon each other in the way that the executive has to be supported by parliament, is accountable to the parliamentary majority and can be discharged by parliamentary vote. In parliamentary systems, the parliament is always the essential link between the voters and the decision takers in the public administration in the way that it mediates democratic legitimisation.³² It goes without saying that also mixed systems exist.

II.2.5. Transparency

Transparency, both for the citizens and their representatives in Parliament, is an indispensable condition for a functioning democracy. The executive has to be transparent to the people’s representatives; to that end, they must have the power to investigate executive decisions and be able to assert political control.³³ But also vis-à-vis the citizens transparency is indispensable. Only under this condition can citizens discuss and criticise government output in a well-founded manner, can give an informed approval of government action or can decide to replace one set of decision makers by another by way of elections in a well-founded manner.³⁴ Political parties, but also other intermediaries like unions, associations, NGOs and, of course, the media provide a vital link in connecting governments, parliaments and voters. An informed public debate about different policy options is again only possible if decision making is adequately transparent.

²⁸ See Hix, *The Political System of the European Union* (2005) 175 ff.

²⁹ Scharpf, *Governing in Europe: Effective and Democratic?* (1999) 6.

³⁰ Scharpf, *Economic Integration, Democracy and the Welfare State*, MPIfG Working Paper 96/2, July 1996, 1 f.

³¹ See Hix, *supra* n 28, 175 ff; for a detailed comparison between these systems see Satori, *Comparative Constitutional Engineering* (1994), 83 ff.

³² Böckenförde, *supra* n 15, Rn 16.

³³ Lord, *supra* n 17, 86.

³⁴ See for example Lodge, *Transparency and Democratic Legitimacy*, 32 *Journal of Common Market Studies* 1994, 343 ff.

II.2.6. Accountability and Responsiveness

Once political leadership is in place it shall be used on behalf and in the interest of the electorate. Leadership must never become autonomous. In a democratic system, two mechanisms guarantee that the exercise of authority meets this criterion.

The first is that only parliament (the legislative body) has the right of law making, and all other organs are consequently bound by these laws. The second mechanism is that of democratic accountability, also called the principle of political or ministerial responsibility.³⁵ Decision makers have to be politically accountable to the citizens of their polity – directly through elections or referenda, or indirectly via the Parliament. Accountability (responsibility) therefore is a key element of democratic politics.³⁶ Christopher Lord points out that “it is political responsibility that ensures that the terms on which political power is authorized are duly observed; and it is the need for power-holders to compete for re-election that gives them an incentive to be responsive to the public.”³⁷

Accountability

Christopher Lord identifies four elements of effective democratic accountability³⁸ that “could provide a basis for a common understanding of the concept in most of the Member States of the European Union”:³⁹ “*Administrative accountability* of bureaucracies to political leaders; *continuous parliamentary accountability*⁴⁰ of political leaders to democratic actors; *electoral accountability* based on a radical simplification of voter choice by democratic intermediaries, such as political parties, and on opportunities for the public to sanction their political leaders, notably by removing them from office; and a system of *judicial accountability* that any citizen can access with a complaint that power-holders are seeking to evade or distort the rules by which they are themselves brought to account.”

This means that in a classical representative parliamentary democracy the administration is affected by the principle of “ministerial responsibility” whereby ministers themselves are accountable for the actions of “their” civil servants. The ministers are expected to exert their guiding administrative powers in order to ensure not running the risk of being censured by parliament. The parliament has the power to investigate executive decisions and to hold ministers to account including the right of censure. Elections empower the citizens to remove or re-elect their parliamentary representatives, in fact give them the opportunity to select the political leadership. Judicial accountability complements this system.⁴¹

Responsiveness

The monopoly of law making for the parliament and the mentioned accountability mechanisms are closely related to the concept of responsiveness. One could even say that responsiveness is only the other side of the coin. The term addresses the sensibility of decision mak-

³⁵ See Böckenförde, *supra* n 15, Rn 21; Harlow, *Accountability in the European Union* (2002) 22.

³⁶ E.g. van Gerven, *The European Union* (2005) 62 ff.

³⁷ Lord, *supra* n 17, 80.

³⁸ Lord, *supra* n 17, 80.

³⁹ The authors agree with Harlow that these elements could provide a basis for a common understanding of the concept in most of the Member States of the European Union. Harlow, *supra* n 35, 24.

⁴⁰ In a presidential system the head of the executive is not accountable to the parliament, but directly accountable to the voters.

⁴¹ See for example Hix, *supra* n 28, 59 ff.

ers for the wishes and needs of the electorate.⁴² Hanna Pitkin describes the relation between representation and responsiveness by stating that “a representative government requires that there be machinery for the expression of the wishes of the represented, and that government responds to these wishes unless there are good reasons to the contrary. There need not be a constant activity of responding, but there must be a constant condition of responsiveness, of potential readiness to respond. It is not that a government represents only when it is acting in response to an express popular wish; a representative government is one which is responsive to popular wishes when there are some.”⁴³

Excursus: Responsiveness and Accountability in the New Public Management Theory, Managerial Accountability and “the Responsive Public Service”

Sometimes, misunderstandings occur by using the same terms for different things. The above-described understanding of responsiveness has to be contrasted with the concept in New Public Management Theory (NPM);⁴⁴ here the state is conceptualised in terms of the market and citizens are seen as consumers. In this understanding, responsiveness is equated with a “client focus” and politicians are expected to “find out what people are likely to want and then continuously adjust their policy programmes and output to voter preference”⁴⁵. Public accountability is conceived in terms of a “responsive” public service.⁴⁶

The type of managerial and audit accountability “New Public Management” promotes is radically different from the political accountability described above. These managerial systems of accountability “have been borrowed from the profession of accountancy and from private-sector management and inserted into the public service”⁴⁷. Thus, the concept of managerial accountability is given a very different emphasis from the traditional political concept of responsibility.⁴⁸

“Managerial and audit accountability” refers to a system of audit, supervisory control, peer reviews and reporting requirements – mechanisms which can perhaps complement, but never substitute “democratic accountability”. There might be a certain similarity regarding the control techniques applied. However, the agenda and the context are very different and should not be confounded: “managerial efficiency and effectiveness can never be the end of the story”.⁴⁹ Pushing up efficiency and managerial accountability on to the top of the agenda could never

⁴² Württenberger, *Zeitgeist und Recht* (1991) 205.

⁴³ Pitkin, *The Concept of Representation* (1967) 232.

⁴⁴ Harlow, *supra* n 35, 20, explains the New Public Management Theory (NPM) as follows: “NPM was born in the United States, a by-product of market economics and of public-choice theory. It allows state or public-service activities to be conceptualized in terms of market and informs the expectations that citizens, described in the rhetoric of the NPM as consumers, have of their public services.” Hood (*Public Management for All Seasons*, 1991, 69, *Public Administration* 3, cit after Harlow, *supra* n 35, 20) lists as important elements in NPM: hands-on professional management, explicit standards and measures of performance, rewards linked to measured performance, control and parsimony in the use of resources, disaggregation of public-sector systems and institutions, open competition and private-sector management styles.“

⁴⁵ Lord, *supra* n 17, 44, criticizes this understanding of accountability and responsiveness: “citizens may also feel that representatives who spend their time trying to find out what the public wants – rather than using their own judgment – are somehow falling down the job.”

⁴⁶ Harlow, *supra* n 35, 20 f; The OECD, for example, has used responsiveness and accountability as synonymous terms. OECD, *Administration as Service: The Public as Client*, OECD 1987.

⁴⁷ Harlow, *supra* n 35, 24.

⁴⁸ See Harlow, *supra* n 35, 20 ff.

⁴⁹ Harlow, *supra* n 35, 190.

make up for the absence of deliberation and political leadership. Mechanisms of managerial accountability can be valuable complements to the mechanisms of democratic accountability, but the mentioned difference should be reflected.

III. Postnational Democracy?

III.1. Shortcomings, Causes, and Symptoms

The transformation of today's regulatory systems due to globalisation and the growing complexity of issues challenge the classical theory and the traditional mechanisms of democracy at the national and the supranational level. Many areas, both economic and non-economic, are deemed to need internationally coordinated measures instead of more or less isolated national ones. This is a common feature of otherwise very distinct matters such as the prevention of unfair competition or unfair restrictions to trade, environmental protection, or combating terrorism. The traditional mechanism would have been concluding international treaties which are subject to the consent of each participating state and also subject to withdrawal – both of which making sure that the regulatory power remained at the national level, in the case of a democracy subject to the decision of the people or its representatives. However, to continue with this mechanism would have been far too clumsy for the sheer number of subjects. Consequently, there is a case for the transfer of powers to international bodies simply resulting from the quest for practicality and efficiency, without excluding additional other motives.⁵⁰ Majority decisions which are binding for the members of the respective organisation promise more speedy solutions which are less spoilt by the need to come to terms with each of the negotiators. This is also, to a lesser extent, true for unanimous decisions which are binding *per se* and not subject to the ratification or the withdrawal of each member state.

Clearly, the scope, the frequency, and the efficiency of such “international legislation” differ enormously between international organisations. It is comparatively limited in organisations like the WHO or the Council of Europe. It is also limited regarding the scope within the UN, but with far-reaching competences of the Security Council in safeguarding international peace and security. This is at the same time an example for decisions which might be binding for members not even represented in the Security Council (the “lawmaking” organ). Things are again different in the WTO where most of the (controversial) issues are part of the existing treaties which were concluded by all WTO members and not produced by the WTO itself. However, there is an inbuilt agenda for amendments of these treaties creating pressure even under the condition of unanimity, and there is a comparatively efficient mechanism of dispute settlement which allows for the enforcement of the existing obligations which are at the same time interpreted, sometimes with surprising and controversial results, by the responsible Panels and the Appellate Body.

Such transfer of powers, limited in scope and distributed between many different organisations, can to a certain extent be, from the angle of a democratic state, looked at as an irregularity of national democratic lawmaking which has to be and can be accepted in the interest of international co-operation, if the national parliament has agreed. Such justification loses its force for an organisation like the EU or the EC respectively with their enormous competences to legislate in nearly every field, and unprecedented in intensity – including majority voting, directly applicable law which supersedes conflicting national law – in any other international organisation.

⁵⁰ Of course, additional motives mainly resulting from interest maximisation are not excluded. However, the authors share the view of those that globalisation is primarily an evolutionary development: compare for the debate von Bogdandy, *supra* n 1, 890 ff.

The challenge for democracy is resulting from the consequences of this development *at national level* in the first place. The “identity of rulers and ruled” includes, as mentioned, the power to eventually influence the outcome of the legislative process. The more remote from the citizens and their influence decisions are taken, the less democratic the system is. The exercise of powers in representative democracies requires a continuous chain of democratic legitimisation which originates in the people. Once established, this power must not become autonomous. It needs consistent feedback from the people and accountability to the people. Exercise of authority must be limited in time and permanently accounted for.

In this sense, “democracy” is a comparative term, and the European Union for sure is not anti-democratic or autocratic, but it has a democracy deficit.⁵¹ The Council replaces the democratically elected national parliaments at Community level as (still) the most important decision-making institution. Its members legislate for the whole of the Union but are legitimised by a part of the population only. This legitimisation is furthermore indirect and mediated through the national parliaments. Accountability of representatives in the Council does not work appropriately in the decision-making procedure. This is rather undisputed in cases of majority voting, since the representative may be outvoted. But it has to be stressed that this is also true in cases of a unanimity requirement. This is so since law making is not static but dynamic in character: Amendments of unanimously adopted decisions require unanimity which makes it impossible for a single national parliament to enforce desired reforms, even if the representative in the (European) Council is fully accountable to this parliament.⁵² Thus, democratic accountability under the unanimity requirement is only assured as long as no decision is taken,⁵³ or if all the ministers unanimously agree on the uniform amendment desires of their parliaments.

The right of the European Parliament to participate in the legislative procedure is not covering all important fields. But even where the European Parliament is, like in the co-decision procedure, on equal footing with the Council, the critique is that the Parliament is not representative in so far as it does not meet the fundamental requirement of equal weight of votes, and that the election procedures differ remarkably between the Member States.

The problems emerging at the level of the states apparently can not really be solved there without spoiling the advantages of internationalisation. Back to unanimity and a ratification requirement for all international obligations is unrealistic and not desirable. Consequently the focus changes to the level of the international organisation, in our case the EU. The quest is for a solution primarily at this level, probably in combination with national reforms.

Detailing the above point further, the deficiencies calling for a cure at EU level are the following:

Political leadership is not always adequately authorised, especially the Council as a collective political leadership cannot be adequately authorised through the election of its parts.⁵⁴ Neither the electorate nor the national parliamentarians can remove the supranational political leadership of the Union “in one go”. In the words of Weiler, Haltern and Mayer, “there is no real sense in which the European political process allows the electorate ‘to throw the scoundrels

⁵¹ E.g. Ress, Über die Notwendigkeit der parlamentarischen Legitimierung der Rechtsetzung der Europäischen Gemeinschaften, in: Fiedler/Ress (eds), *Verfassungsrecht und Völkerrecht*, Gedächtnisschrift für Wilhelm Karl Geck (1989) 625 (628 ff); Lübbe-Wolf, *supra* n 1, 246 ff.

⁵² See Griller, Zur demokratischen Legitimation der Rechtsetzung in der EU, JRP 1995, 164 ff, and Lübbe-Wolf, *supra* n 1, 249 ff, esp at 257 f.

⁵³ And only if in this case the Member States remain free to legislate in the respective field.

⁵⁴ See in detail Lord, *supra* n 17, 23 ff.

out’, to take what is often the only ultimate power left to the people which is to replace one set of ‘governors’ by another.”⁵⁵

- “There is no electoral contest about the political leadership at the European level or the basic direction of the EU policy agenda”⁵⁶; elections to the European Parliament are treated as second-class elections.
- The fragmentation of the executive power, the trend toward horizontal decision making, does not meet with the classic notion of democratic accountability that builds on the idea of hierarchical control of administrations by political leaders that (in a parliamentary democracy) are answerable to the public and their representatives.
- Deficiencies in transparency are hampering the emergence of a European public debate and the citizens’ ability to judge on government action in a well-founded manner.

To sum up: The very strength of the Union as a consensus oriented leadership at the elite level is at the same time an important cause of its problems. The EU has developed an elaborate system of deliberation at the leadership level and is also characterised by a system of inter-elite accountability from which the public is the indirect beneficiary. But the public, that means, the European citizens are not sufficiently involved in this process of deliberation, contestation, decision taking and control⁵⁷; a consequence is the very limited opportunity for the public to dismiss key office-holders. The remoteness of European decision taking from the European citizens is the core of the European democratic deficit.

The notorious and decade-long debate on widening the scope of (qualified) majority voting in the Council can be seen as a revealing symptom for the ambiguous state of the Union and the identified democracy problems. Upholding unanimity guarantees a blocking right to every single member state. On the one hand side, this appears to be not only inefficient but also anachronistic in a Union claiming to be based on common values. Being outvoted should be acceptable in such a polity.⁵⁸ On the other hand, again and again majority voting in politically sensitive matters (e.g. taxation, combating terrorism, certain elements of environmental protection, social standards, foreign and security policy) is still unacceptable for many Member States feeling that the correct forum for decision taking in these fields was still the national level. It is argued that it is still the nation state legitimacy is primarily vested with. On the basis of such reasoning, unanimity should continue to play an important role in European decision making, and sufficient influence has to remain with national parliaments representing the (national) people.⁵⁹ It is this view which apparently has influenced the German Constitutional Court in its Maastricht judgement.⁶⁰ In other words: In the absence of a consensus that the nation state should and could be abandoned as the focus of the “social contract” between the

⁵⁵ Weiler/Halter/Mayer, *supra* n 24, 27.

⁵⁶ See Follesdal/Hix, Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik, European Governance Papers No C-05-02, 18; see also Scharpf, *supra* n 30, 3.

⁵⁷ See Lord, *supra* n 17, 106, 129; Mény, De la Démocratie en Europe: Old Concepts and New Challenges, JCMS 2002, Vol 41, No 1, 4.

⁵⁸ Compare the argument for majority voting instead of unanimity in a developed democracy *supra* in the text near n 27.

⁵⁹ Compare eg Huber, Europäisches und nationales Verfassungsrecht, Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 60 (2001) 194 ff.

⁶⁰ BVerfGE 89, 155.

citizens, majority voting – and thereby the integration process as such – will not only increasingly endanger legitimacy but even cause far-reaching systemical crisis.⁶¹

The existing mixture of qualified majority and unanimity requirements represents quite well the uneasy relationship of the EU and its Member States with this core issue of democracy.

Most of the mentioned deficiencies and structural problems traditional democratic mechanisms face at the European level are structural features embedded in the very character of the Union itself. At the beginning of the European integration process, when the ECSC Treaty was signed in 1951, limited to a narrow field and in the absence of the revolutionary ECJ jurisprudence on direct effect and supremacy, this might have had the face of a traditional international organisation where the traditional justification for the exceptional transfer of power was probably very well acceptable. The constant continuation with transferring powers and fostering the efficiency of the legal order over the decades, however, at the same time undermined that justification. Today the need for reform in order to preserve or reconfirm the basic standards of democracy is widely acknowledged.

III.2. Why Bother?

Of course there are objections to the above mentioned stance. The Maastricht judgement of the German Federal Constitutional Court⁶² could be interpreted to the end that there is not much to criticise regarding the democratic legitimacy of EU decision-making, as long as the national parliaments have the power to control further integration steps, be it through the ratification of Treaty amendments, be it through the accountability of the representatives of the Member States in the Council.⁶³ Based on such reasoning, the Court held that EU membership of the Federal Republic of Germany was in conformity with its constitution, including the requirement to respect democratic principles in the sense of Article 23 of the German Basic Law.⁶⁴ Also the European Commission, in its White Paper on European Governance, expressed the view that the Union “has a double democratic mandate through a Parliament representing EU citizens and a Council representing the elected governments of the Member States”.⁶⁵

However, the reasons given above, and especially against the background of an ever extending scope and intensity of EU legislation render such reassurance unconvincing. While these indirect mechanisms of democratic legitimacy might be acceptable with regard to more traditional international organisations, as mentioned, such consolation misses the essential elements of transformation in the EU which make it so unique.

Even if the above position is accepted, the conclusion drawn might be that this is in essence a problem for the Member States, but not for the EU as such which has to be measured against other criteria. But such a position would be misleading. Democracy is a constitutional principle in all Member States of the European Union *and an integral principle of EU law*. The Treaty on European Union (TEU) is very clear on that. Art 6 para 1 TEU holds: “The Union

⁶¹ Compare the discussion in H Schneider, Alternativen der Verfassungsfinalität: Föderation, Konföderation - oder was sonst?, integration 2000, 171 ff.

⁶² BVerfGE 89, 155, esp at 186.

⁶³ E.g. in this sense Huber, *supra* n 59, No 18 and 19.

⁶⁴ The authors do not suggest that the BVerfG should have declared the treaty unconstitutional. It might well be that the Grundgesetz allows for compromising the national concept of democracy as a consequence of EU membership to a sufficient extent. However, the possible conclusion that there is no democracy problem at all would be flawed.

⁶⁵ COM(2001) 428 final, 25 July 2001, at p. 8.

is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

If the Constitutional Treaty (CT) enters into force, the core principles of democracy will in addition explicitly be laid down in the European Union’s Constitution. In the CT a whole title, Title VI “The Democratic Life of the Union”, is dedicated to the democratic principle. Title VI contains three important elements of democracy: equality, representation and participation; it also highlights transparency as a fundamental condition for the functioning of democracy.

Every debate on democracy at European level including the debate on new modes of governance has to reflect on the fact that the CT stipulates under the heading “The principle of democratic equality” (Art I-45) that the Union “shall observe the principle of the equality of its citizens”, that it stipulates that “every citizen shall have the right to participate in the democratic life of the Union” (Art I-46.3) and that the functioning of the Union “shall be founded on representative democracy” (Art I-46.1). Furthermore, Art I-47 (“The principle of participatory democracy”) addresses some ideas of deliberative democracy and contains the clause on the citizens’ initiative.

It is important to note in this respect that the mentioned Articles do not, as far as the core elements are concerned, contain any novel features, but reflect the traditional elements of the common European understanding of democracy. Arguably this is even the case with Art I-47 referring to the deliberative ideal of democracy that attributes much weight to the process of public debate and deliberation.⁶⁶

It might very well be argued that the mentioned provisions only make explicit what is currently scattered over the treaties and only shortly addressed in the guarantee of democracy in Article 6 TEU. These constitutional guarantees at EU level correspond to the constitutional obligation in the Member States’ national constitutions to preserve the essential elements of democracy. There is no convincing way to show that by authorising EU membership national constitutions would at the same time allow jeopardising democracy as such. Consequently, in any event, even if the Constitutional Treaty should never enter into force, is Europe under the obligation to preserve the basic ideas of democracy.

IV. Optimising Democracy at EU level

IV.1. Introductory Remarks

As explained, the difficulties of the classical democratic principle in a complex and globalised world do not justify putting to rest democracy concerns altogether. Democracy still remains a guiding principle for organising a polity; moreover, it is a legally binding element not only of national constitutional law of EU Member States but of the EU itself. Consequently, traditional mechanisms of democracy cannot simply be substituted by “alternative modes of governance” irrespective of their democratic quality. However, there is certainly room for adapting democratic mechanisms to the new challenges. The quest is for adaptations which at the same time preserve the basic ideas of democracy and cope with new developments.

⁶⁶ It should be added by creating the new organs of a President of the European Council and a Minister of Foreign Affairs, the CT arguably even adds to the remoteness of decision taking from the citizens and thus to the democracy problem. The respective post holders are in principle determined by the European Council, and their accountability exists primarily vis-à-vis this Council, and only in a very limited manner also vis-à-vis the European Parliament (regarding the minister). Efficiency and “visibility” of Europe might consequently be enhanced, in contrast to democracy.

In the following subchapters we shall address two aspects which we estimate to be of central importance and at the same time at the focus of academic discussion. The first is the role of the European Parliament, and the debate is on a possible alternative design for this Parliament. The second is the conception of deliberative democracy which is not only proposed for the European Union but appears to be of specific relevance for the latter.

What the authors are skipping at this point are possible remedies focusing at the national level and on the interplay between national parliaments and EP. At stake are primarily decisions of the national parliaments binding the behaviour of the national representative in the Council, and mechanisms ensuring that the objections of national parliaments against draft European legislation are duly taken into account.⁶⁷ This is not to say that such efforts are insignificant. However, while they can certainly enhance cooperation between the national and the EU level, they are unapt to solve the shortcomings resulting from the fragmentation of democratic legitimacy in the Council. Furthermore, and apart from the legal argument, the underlying rationale that the dangers of globalisation might successfully be countered primarily at the national level is not convincing.⁶⁸

IV.2. Enhancing Parliamentarism

IV.2.1. General Remarks

The EU's multi-layered governance structure fundamentally influences its institutional structure and institutional interplay. It is characterised by a strong need for intensive cooperation of the unified national executives as a decisive part of the EU legislature within the Council.⁶⁹ Regarding the executive, the major part lies with the Member States, be it through legislation or national administrative measures. Implementation and enforcement by the Commission is important but covers only selected areas such as parts of competition law or common commercial policy. In certain areas, mainly in the field of agricultural policy, the implementing capacity of the Commission comes near legislative activities, especially when it is laying down the details of market orders. At this point, the question arises how such a system of "executive federalism"⁷⁰ – meaning implementation and enforcement apart from those issues which are attributed to the Commission – affects the European Parliament in its functions and what position the EP can have in such a system.

Among the proposed institutional solutions is that the EU should either develop into the direction of a full parliamentary democracy or more into the direction of a more presidential system.⁷¹ A way of promoting the latter and at the same time generating more of a European de-

⁶⁷ Compare for the latter the so-called "early warning system" in Article 7 of the second Protocol attached to the Constitutional Treaty on the application of the principles of subsidiarity and proportionality. It entitles national parliaments to issue reasoned opinions on draft legislative acts. If more than one third of the votes cast are claiming a violation of the principle of subsidiarity, the draft must be reviewed but can eventually be maintained (if reasons are given).

⁶⁸ E.g. Habermas, *Die postnationale Konstellation* (1998) 145 ff.

This is also the critique of the authors vis-à-vis the stance that the actual problems could be solved by stopping the deepening of European integration, as is voiced by some eminent scholars; compare e.g. Böckenförde, *Staat, Nation, Europa* (1999) 89 ff, especially at 92 ff.

⁶⁹ Dann, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, *European Law Journal*, Vol 9, No 5, Dec 2003, 550 ff.

⁷⁰ See, for example, Scharpf, *Joint-decision trap: Lessons from German Federalism and European Integration*, *Public Administration*, 1988, 239 ff, cit after Dann, 550.

⁷¹ See e.g. Lord, *supra* n 17, 130 ff; Lübke-Wolf, *supra* n 1, 263 f. For this and other solutions compare also Peters, *supra* n 1, 69 ff.

bate and contestation about EU politics would certainly be allowing for contestation of the most powerful executive position in the EU, the office of the Commission President.⁷² Such developments could on the one hand be successful in introducing more electoral contest for the EU system and establish a better link to the European citizens. A drawback on the other hand would be that the ability of the Commission to act as an impartial broker in the EU political process could be reduced and that such a development could be a huge step towards a more integrated Europe. The pros and cons of such developments have been discussed elsewhere,⁷³ and it is not the aim of this paper to reflect on it in detail.

However, it shall be revealed that the authors are intrigued by the idea that the European Parliament could evolve as the centre of European democracy. That would not necessarily include the creation of a “European government” modelled after national systems, as it would generally be a misconception to transfer national solutions to the European level. It would equally not prejudice the complementary enhancing of mechanisms of deliberative democracy. However, European Parliamentarism could instead be a genuine feature of European democracy, together with the Council and the Commission as partners and counterparts.

Looking at the jurisprudence of the ECJ in Luxembourg and the ECHR in Strasbourg might suggest that this has already happened. However, the authors would like to submit that there is still a long way to go.⁷⁴ But there is no doubt that both courts, and rightly so, put specific emphasis on the role of the European Parliament. The ECJ, by ensuring the participatory rights of the European Parliament in the Community law-making procedure, did not only hold that the Parliament’s right to play a significant role in the legislative process of the Community “represents an essential factor in the institutional balance intended by the Treaty”. The Court continued that this power “reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly”.⁷⁵ In another case before the ECHR it was of central importance that according to Article 3 of the First Protocol to the ECHR, the contracting parties “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. The ECHR did not hesitate, in this context, to address the European Parliament as the centre of democracy in the EU: “As to the context in which the European Parliament operates, the Court is of the view that the European Parliament represents the principal form of democratic, political accountability in the Community system. The Court considers that whatever its limitations, the European Parliament, which derives democratic legitimation from the direct elections by universal suffrage, must be seen as that part of the European Community structure which best reflects concerns as to ‘effective political democracy’.”⁷⁶

Fostering the European Parliament as the core organ of the legislature at EU level side by side and on equal footing with the Council arguably would require the formation of a polity which its based on own values allowing the citizens to accept being outvoted even in important matters—arguably this will only happen if it is a reasonable expectation that being outvoted is not

For the purpose of this paper is the authors are skipping those positions arguing that there is no democracy problem at all and/or that globalisation can be seen as a cure for the deficiencies of national democracies; compare the references in von Bogdandy, *supra* n 1, 894 f.

⁷² See Follesdal/Hix, *supra* n 56, 21.

⁷³ See for example Lord, *supra* n 17, 130 ff; Hix, *supra* n 28, 202 ff.

⁷⁴ For some proposals see below in the text after n 78.

⁷⁵ Case 138/79, *Roquette Frères*, [1980] ECR, 3333, para 33. Repeated in Case C-300/89, *Commission v Council (Titanium Dioxide)*, [1991] ECR, I-2867, para 20.

⁷⁶ ECHR, 18 February 1999, Appl No 24833/94, § 52.

an inescapable regular pattern for the people of one or the other Member State. In other words, there is a need for a “European demos” which would, however, not necessarily replace but rather complement national demoi. Consequently, a possible solution in the medium and long run in the European context might be the emergence of “multiple demoi”, the identification of citizens not only with the common values of their own ethnicity, but also with that of the supranational Community.⁷⁷ At least in principle, this would allow for extending majority voting in the Council. However, there is still strong opposition against the contention that this state of affair has already been reached, or even that this would be desirable.

IV.2.2. Rectifying Some Flaws of the Current System

But would the creation of a “fully fledged parliament” be the right solution, as it is often offered?⁷⁸ We are immediately confronted with a fundamental “constitutional” argument: such a parliament would create or at least prepare a federal state, it would marginalize the Member States’ parliaments.⁷⁹ And apart from that, it is often argued that the European Parliament would not be able to play the role of a fully fledged parliament, not the least for the already mentioned reason of the accused lack of a European demos.

To make things short: It is submitted that strengthening the European Parliament would not lead to a federal state. It would not necessarily include the transfer of additional competences to the Communities and the Union respectively, but would mean that those competences already transferred would be used in a more democratic manner. Implied is the contention that there is no convincing alternative to representative democracy in the EU – on the grounds that decision taking by referenda can only be an exception, not the rule.⁸⁰

But it is by no means implied that there is only one, meticulously determined model of democratic legislative process, and neither that it is the example of nation-state democracies which should be transposed one by one to the EU. Conceivable are rather several possibilities of democratic legitimisation, which may include elements of direct democracy as well as the

⁷⁷ Compare Habermas, *supra* n 68, 153 f; Weiler, *The Constitution of Europe* (1999) 344.

See already, even with regard to traditional states, the analysis in Heller, *Allgemeine Staatslehre* (1934), 148 ff, 158 ff, who concludes at 164: “Weder das Volk noch die Nation dürfen als die gleichsam natürliche Einheit angesehen werden, die der staatlichen Einheit vorgegeben wäre und sie selbsttätig konstituierte. Oft genug war es ... umgekehrt die staatliche Einheit, welche die ‘natürliche’ Einheit des Volkes und der Nation erst gezüchtet hat ... Es zeigt sich also..., daß eine Relativierung der staatlichen Einheit auf ihre Substanz, das Volk, nicht möglich ist.“

⁷⁸ See *above* n 71. Compare also J Fischer, *Vom Staatenbund zur Föderation - Gedanken über die Finalität der europäischen Integration*. Rede am 12. Mai 2000 in der Humboldt-Universität zu Berlin, *integration* 2000, 149 ff.

⁷⁹ Already Badura, *Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften*, *VVDStRL* 23 (1966) 34 73 f; see also the discussion in Schneider, *supra* n 61, 175 f.

⁸⁰ On parliamentarism in general, the fictitious character of the idea of representativity, and the compromise between freedom and labour sharing in a parliamentary democracy, compare the enlightening analysis in Kelsen, *supra* n 5, 26 ff. It is submitted that the basic problems have remained the same, while the concrete circumstances in the EU are significantly different from those in traditional nation states. It can also be added already on that point that the ideas of deliberative democracy are in a way complementary to these basic considerations.

Specifically for the EU see the discussion in van Gerven, *supra* n 36, 309 ff, esp 344 ff.

requirement of qualified majorities for decisions on important topics, different degrees of independence of the executive and ways for the creation of executive bodies.⁸¹

Consequently, and on the basis of the general observations above, the diagnosis and the proposal for future reforms as presented in the Commission's White Paper on Governance appear to be justified: "In the context of a gradual extension of the areas where decisions are taken jointly by the Council and the European Parliament (the so called co-decision procedure), those two Institutions should enjoy equal roles. That is not the case under the current Treaty."⁸² Taking into account the concerns on such development, reforms could be introduced step by step, but the ultimate goals should be the following:

- The realization of "appropriate representation of the peoples of the States brought together in the Community"⁸³ in the European Parliament. This should at least gradually ensure equal representation of the citizens as an element of the desired equal weight of their votes. This could include the introduction of a minimum of seats to ensure the representation of the smallest Member States.⁸⁴ It has to be said in this context that doubts may arise whether the condition of "appropriate representation" is fully met by the amendments included in the Nice Treaty.⁸⁵ Obviously the allocation of seats to the Member States is far from being proportionate to the size of the population.

The establishment of a uniform procedure of universal suffrage to the EP should in this context also be accomplished.⁸⁶

- A rebalancing effect preventing to marginalize smaller Member States could be a gradual decoupling of Member States' size in population and voting rights in the Council. The pursuit of Member State's interests would thus depend less on the size of the country represented. That would not include the introduction of a two-chamber system; the Council could still be composed of the ministers of the Member States. It would also not be necessary to change the role of the Commission into that of a "European Government".⁸⁷
- Very important would be, as has often be said, the further extension of the co-decision procedure – say: majority decision taking involving the European Parliament – to most

⁸¹ It is worth while consulting again the thorough deliberations of Kelsen, *supra* n 5, 26 ff, 38 ff, 53 ff, 69 ff, 78 ff.

⁸² COM(2001) 428 final, 25 July 2001, at p 35. Dann, *supra* n 69, 569, speaks of a "policy-shaping" legislature. The Commission is also right in stressing that a better dividing of the powers between the legislature and the executive would make it easier to apply the principles of subsidiarity and proportionality. However, it is a slight exaggeration to conclude that it could only be the Commission "to assume full executive responsibility".

⁸³ Article 190 para 2 subpara 2 TEC. For the progress in this and other respects the Constitutional Treaty would bring about, see Peters, *supra* n 1, 45 ff.

⁸⁴ See Griller/Drouzas/Falkner/Forgó/Nentwich, *The Treaty of Amsterdam. Facts, Analysis, Prospects* (2000) 285 ff.

⁸⁵ However, it is clear that as a rule of the same rank, Article 190 para 2 subpara 2 TEC is necessarily a *lex imperfecta vis-à-vis* amendments of subpara 1.

⁸⁶ This task can be achieved by secondary legislation. The conditions were made easier by the Amsterdam Treaty, which allows for provisions "in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States" (Article 190 para 4 TEC).

⁸⁷ Of course this is a much more "conservative" approach than other proposals, e.g. that of Schmitter, *How to Democratize the European Union ... and Why Bother?* (2000) esp at 81 ff. However, this is deliberately so. It is contended that *Schmitter's* proposals (on purpose) include a far-reaching departure from the principle of equal representation of the citizens. This is rather high a price for the protection of smaller countries, which arguably can also be achieved by a re-weighting of the votes in the Council.

fields of law-making by the Union. According to the position taken here, this is not only a matter of efficiency against the background of EU enlargement. It is at the same time implied in the goal to enhance democracy in the Union. Obviously there might be good reasons to avoid majority decisions in cases like the establishment of a common defence, or law making under Article 308 TEC. Nevertheless, co-decision should be the rule. We should also keep in mind that Treaty amendments would still be a special case – and we might add that the above exceptions come near Treaty amendments.

Majority decision making should also be seen as a precaution against the dangers of enhanced cooperation. Obviously this mechanism includes the threat of splitting the Union up into various groups of Member States at the expense of “economic and social cohesion”⁸⁸. Enhanced cooperation as a “last resort, when ... the objectives of such cooperation cannot be attained within a reasonable period”⁸⁹ will be much less likely if it is possible to come to a solution by qualified majority voting.

- There are a number of additional options which should be evaluated carefully, like the introduction of elements of direct democracy;⁹⁰ an interesting proposal is to combine the elections to the EP with a limited number of referenda, to be decided e.g. by the EP or on the request of several Member States, or of a qualified number of citizens.⁹¹ It should also be said that there are a number of non-specific, meaning: not EU-specific concerns of democracy⁹² which should be contemplated, and are indeed to a considerable extent addressed by the so-called new modes of governance to be discussed below.

IV.2.3. A “Working” or “Controlling” Parliament?

Some authors point to the fact that the European Parliament is “an extreme example of a committee-based parliament” as twice as much time is spent in committees than in the plenary and “the deals brokered on the committees will normally bear a close relationship to those finally adopted by the Parliament as a whole.”⁹³ Contrasted with two ideal types of parliaments, “the debating parliament, characterised by a fusion of parliamentary majority and government as well as plenary debates (like the British House of Commons)” and the “working parliament, separated from the executive branch and centred around strong committees (like the US Congress)”,⁹⁴ it is contended that the EP resembles the working parliament type in many ways. Still, the EP also has similarities with the debating parliament type. It therefore has been labelled a “controlling parliament”⁹⁵, a parliamentary type that is in many ways similar to a working parliament but has – contrasting to that – especially strong controlling powers.

⁸⁸ Article 2 TEU.

⁸⁹ Article 43a TEU as amended by the Treaty of Nice.

⁹⁰ See the introduction of a citizens’ initiative in Article I-47 para 4 of the Constitutional Treaty.

⁹¹ Weiler, *supra* n 77, 350 f; Schmitter, *supra* n 87, 36 f.

⁹² Compare only Lübke-Wolf, *supra* n 1, 265 ff.

⁹³ Lord, *supra* n 17, 70; see also, for example, Mamadouh/Raunio, The Committee System: Powers, Appointments and Report Allocation, JCMS 2003, Vol 41, No 2, 333.

⁹⁴ See Dann, *supra* n 69, 549 ff. Compare also Mamadouh/Raunio, *supra* n 93, 333: “Embedded in a separation of power system, and considering the weakness of Europarties, the Parliament resembles the US Congress with its strong committees and heterogeneous parties.” See also at 334: “When parties are heterogeneous, the legislature probably becomes more committee oriented.”

If this characterisation of the EP is correct it should be added that presumably a majority of the continental national parliaments come closer to the type of a working Parliament than to that of a debating Parliament.

⁹⁵ Dann, *supra* n 69, 551.

It can also be observed that the “system of governance” within the EU is characterised by the separation of power principle, which might equally be called the principle of power sharing, being coined in the ECJ’s jurisprudence on the institutional balance.⁹⁶ Also in this respect there is a certain similarity to the US Constitution to the extent that also in the United States the institutions are separated with respect to their election. In the US both Houses of Congress and the President are elected by individual procedure and personally separated.⁹⁷ Both in the EU and the US institutions are separated with respect to their election, but intertwine when using their powers. Membership in the EU institutions of the legislature is mutually exclusive.

Against this background, the “working parliament characteristics” of the EP are mainly fuelled by the need for consensus-building between the participants.⁹⁸ It is a long and complicated bargaining process between the EP, the Council and also the Commission that acts as a broker between the other two institutions. The whole lawmaking process is characterised by a wide range of informal meetings between the institutions.

While debating parliaments, it is argued, tend to be “rubber-stamp parliaments”, working parliaments are rather “prickly partners”⁹⁹ that scrutinise and amend what comes from government, especially in their committees. Thus, lawmaking is very much based on bargaining and compromise. The EP fits very well into the consensus system of the EU. The committees are of crucial importance for EP work. They acquire information, discuss and analyse in order to form a political position. Committees file reports for the plenary and pre-determine most of its outcome.¹⁰⁰ They play a pivotal part in the whole policy negotiation process.

Another important task of a working parliament is the oversight of the executive. This control is usually exercised in specialised committees, “which question, block, and amend”.¹⁰¹ Also this work is mainly done in specialised committees. They have the right to interrogate the Commission (Art 164 RoP-EP¹⁰²) and to hold hearings with special experts (Art 166 II RoP-EP).

It has been observed that the EP is successful in shaping EU legislation but less in scrutinising the executive when it comes to implementation.¹⁰³ Enhancing the strengths of the EP through not only the extension of its rights of control but also the improvement of its internal structure including its staff could help to improve the situation.¹⁰⁴

⁹⁶ Compare only Lenaerts, Some Reflections on the Separation of Powers in the European Community, *Common Market Law Review* 1991, 11, esp at 14; Lenaerts/Verhoeven, Institutional Balance as a Guarantee for Democracy in EU Governance, in Joerges/R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (2002) 35 ff; Prechal, Institutional Balance: A Fragile Principle with Uncertain Contents, in Heukels/Blokker/Brus (eds.), *The European Union after Amsterdam*, 273 ff; Jacqué, The Principle of Institutional Balance, *Common Market Law Review* 41 (2004), 383 ff.

⁹⁷ Dann, *supra* n 69, 555. In other respects, of course, the structures of the US and the EU constitution differ a lot.

⁹⁸ For a closer analysis compare Dann, *supra* n 69, 549 ff. Regarding the mode of operating in the 17 Standing Committees of the European Parliament and the interaction of EP committees with other EU institutions see Neuhold, The “Legislative Backbone” keeping the Institution upright? The Role of European Parliament Committees in the EU Policy-Making Process, *EIoP Vol 5*, 2001, No 10, 1 ff.

⁹⁹ Dann, *supra* n 69, 566.

¹⁰⁰ See Dann, *supra* n 69, 564; Lord, *supra* n 17, 70; Mamadouh/Raunio, *supra* n 93, 333, 348.

¹⁰¹ See Dann, *supra* n 69, 561.

¹⁰² EP Rules of Procedure = RoP-EP

¹⁰³ See Mamadouh/Raunio, *supra* n 93, 334.

¹⁰⁴ See Dann, *supra* n 69, 565 f, 570 ff.

While the authors would in principle agree that strengthening the role of the EP should not only relate to its formal rights of control but also to its actual working capacity, the crucial point is whether this could be an alternative to making the EP a fully-fledged co-legislator together with the Council. The answer to this question is negative. It goes without saying that controlling the executive is an important feature of parliamentarism especially in those areas where parliament is unable or unwilling to decide on every detail. The same is true for the control of implementation and enforcement of the law through the executive. However, the decisive point in a representative democracy is that the debate and the decision on policy choices are the prime responsibility of parliament. In this sense, strengthening the controlling capacities of the EP can only be complementary to strengthening its legislative capacity. It has to be conceded, though, that the related issues—eventual limits to the delegation of powers, especially the required extent of determining the executive—are the most controversial and at the same time most crucial aspects of this fundamental principle.

IV.3. Deliberative Democracy

IV.3.1. Starting Point and Core Elements

During the last decades, the idea that a viable public sphere including institutionalized deliberation is an essential element of a functioning democracy has been deeply influenced by the work of Jürgen Habermas. He advocates a procedural understanding of democracy, and stresses: “The point of such an understanding is this: the democratic procedure is institutionalized in discourses and bargaining processes by employing forms of communication that promise that all outcomes reached in conformity with the procedure are reasonable.”¹⁰⁵

The authors agree that “something like Habermas’s idea of the public sphere is indispensable to democratic political practice”.¹⁰⁶ This concept “designates a theatre in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, and hence an institutionalised arena of discursive interaction.”¹⁰⁷

The deliberative perspective posits that opinions are shaped and tested in public debate and that people are able to change their opinions when faced with better arguments; the public sphere is founded on *rationale* debate. Decision makers have to somehow enter the public arena in order to justify their decisions and to gain support. Democratic institutions have to give reasons for their decisions to the ones who are bound by them. Thus, “authority is found in the public ‘reasonable’ discussion”¹⁰⁸; the public sphere is seen as a precondition for realising popular sovereignty.¹⁰⁹

A common space for free communication has to be secured by legal rights of freedom of expression and assembly, so that problems can be thematised, dramatised and formed into opinions. The public sphere is divided into different types and categories, fora and arenas. Sometimes participants meet face to face, there are written public or anonymous spheres made pos-

¹⁰⁵ Habermas, *Between Facts and Norms*. Contributions to a Discourse Theory of Law and Democracy (1996) 304.

¹⁰⁶ Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in: Calhoun (ed), *Habermas and the Public Sphere* (1992) 111.

¹⁰⁷ Fraser, *supra* n 106, 110.

¹⁰⁸ Eriksen/Fossum, *Democracy through strong publics in the European Union? Arena Working Papers*, WP 01/16, 4.

¹⁰⁹ See Eriksen/Fossum, *supra* n 108, 3 f.

sible by the new electronic media.¹¹⁰ Deliberations in organised institutions with decision-making power and outside the formal political system can be distinguished.¹¹¹ A vital interplay between those parts is a crucial facet. Institutionalised procedures of democratic opinion and will-formation, especially in parliamentary bodies, transform the influence of the public sphere into communicative power; this serves to legitimise political decisions.¹¹²

It is not intended to enter into the critical debate of the theory as such. Most salient is the debate on the claims of discourse theory regarding the reasonableness or even the truth of the outcome of a rational discourse, but also the debate on the conditions for such a discourse and the limits in real life.¹¹³ Suffice it to say that also from a much more sceptical position the merits of institutionalised discourse in a democracy are undisputed,¹¹⁴ even if the more or less naive hope for the qualities of public discourse has found its early critics.¹¹⁵

IV.3.2. The European Dimension

At EU level, a functioning political arena does not yet exist. Those in the nation states have been substantially weakened, but not been sufficiently replaced at European level.¹¹⁶ This deficiency has many causes, “including the lack of European wide public parties, the lack of a European wide media and of a European public sphere”¹¹⁷. That the EP has acquired more joint decision-making powers in recent years, in particular in the co-decision procedure, has not really been a cure.¹¹⁸

Deliberation at the elite level, as it is currently realised in the EU, is insufficient and cannot provide the essential links to the public; only through deliberation based on citizen participation will representative democracy be able to realise its full potential.¹¹⁹ Habermas points to the importance of a European-wide, integrated public sphere for a democratic Europe, that means a civil society with interest associations, non-governmental organisations, citizens’ movements and a party system appropriate to the European arena. He holds that this entails public communication transcending the current boundaries; this kind of public sphere enables citizens to take positions at the same time on the same topics of the same relevance.¹²⁰

An important aspect of the democracy deficit of the EU – without denying similar problems at national level – is that decision making is often an “elite game”¹²¹. European citizens are not sufficiently involved in the process of deliberation and decision taking.¹²² Large parts of is-

¹¹⁰ See Eriksen/Fossum, *supra* n 108, 6; Habermas, *supra* n 105, 373 ff.

¹¹¹ For a detailed distinction between the two spheres see Eriksen/Fossum, *supra* n 108, 1 ff.

¹¹² See Eriksen/Fossum, *supra* n 108, 3; Habermas, *supra* n 105, 371.

¹¹³ See in this respect only Alexy, *Recht, Vernunft, Diskurs* (1995) 109 ff, with further references.

¹¹⁴ E.g. Kelsen, *supra* n 5, 93 ff.

¹¹⁵ Heller, *supra* n 77, 173 ff.

¹¹⁶ See Curtin, *Postnational democracy. The European Union in search of a political philosophy* (1997) 43.

¹¹⁷ Curtin, *supra* n 116, 43.

¹¹⁸ See Curtin, *supra* n 116, 43.

¹¹⁹ Curtin, *supra* n 116, 55.

¹²⁰ See Habermas, *Remarks on Dieter Grimm’s “Does Europe Need a Constitution”*, 3 *European Law Journal*, 1995, 306.

¹²¹ Middlemas, *Orchestrating Europe. The Informal Politics of European Union 1973-1995* (1995) 612, cit after Eriksen/Fossum, *supra* n 108, 5.

¹²² See Mörth, *Soft regulation and global democracy*, in: Djelic/Sahlin-Andersson (eds), *Global Regulation*, forthcoming, 15: “Deliberation takes place but only among experts and seldom with ordinary citizens”.

sues under discussion in the EU decision-making institutions are not discussed in public and, if they are, in a very fragmented way.¹²³

Injecting more deliberation into the representative process could indeed be a way of improving democracy at the European level.¹²⁴ A viable public sphere could force decision-makers to justify their decisions vis-à-vis those affected.¹²⁵

The EP could take an active role in improving the situation. However, the absence of strong European political parties makes it harder to establish the necessary links to the European general public; national concerns still dominate European elections. EP committees succeed in involving the interested public via hearings but reach mainly specialised publics. An open and transparent committee policy could help to improve the situation. The EP as an intermediary body should aim at tying the general publics together. It should be positively noted that there are deliberation links between the EP and the national parliaments, not the least through the Conference of European Affairs Committees (COSAC).¹²⁶

Optimising the idea of deliberative democracy includes embedding this public sphere in a “freedom valuing” political culture and supported by a liberal associational structure.¹²⁷ It is also contended that participatory democracy, like active citizenship, cannot be imposed top down, it has to grow bottom up. It is therefore “vital that the top down structures recognise the vitality and significance of the emergent civil society.”¹²⁸ A European-wide civil society with interest associations, citizens’ movements etc should be interconnected with the national public spheres, but should also have some separate existence. The civil society’s role is to widen the public debate.¹²⁹

While the importance of the mentioned improvements shall not be underestimated, two additional aspects deserve being highlighted. First, the idea of a more deliberative polity, of more active citizen participation does not need and should not to be perceived as an alternative to classical representative democracy but rather as a necessary and valuable supplement.¹³⁰ “(M)ore structured citizen participation would *inform* but not determine the process of representative government”¹³¹. It is the role of the political parties to mediate between the spheres of informal public communications and the more institutionalised deliberation and decision processes.¹³² Consequently, “through deliberation representative democracy will be able to realise its full potential.”¹³³ Second, the causality is far from being undisputed: While some see the emergence of an efficient European public sphere as a prerequisite to democratic

¹²³ Curtin, *supra* n 116, 56.

¹²⁴ See Curtin, *supra* n 116, 54.

¹²⁵ Eriksen/Fossum, *supra* n 108, 5.

¹²⁶ See Eriksen/Fossum, *supra* n 108, 13 ff.

¹²⁷ See Habermas, *supra* n 120, 306; Curtin, *supra* n 116, 56.

¹²⁸ Curtin, *supra* n 116, 58. She stresses (at 57): “The emergence of civil society at the European level, albeit still nascent, is potentially a *significant* factor in the construction from below of a public sphere worth its name. The start of self constitution is the realisation that participatory democracy has to grow bottom up. It must come from below, from the people, from the groups of people dedicated to the disinterested search for the public interest of society.”

¹²⁹ See Curtin, *supra* n 116, 57 f.

¹³⁰ See, for example Curtin, *supra* n 116, 55. For a distinction between a radical interpretation of deliberative democracy and a traditional interpretation see Mörth, *supra* n 122, 6 ff.

¹³¹ Curtin, *supra* n 116, 59.

¹³² See Habermas, *supra* n 120, 306; Curtin, *supra* n 116, 56.

¹³³ Curtin, *supra* n 116, 55.

structures and consequently and amongst others as a prerequisite to strengthening lawmaking at EU level and specifically through the EP, the authors would rather share the contention that institutionalising the EP as a true co-legislator could improve public deliberation at European level.

IV.3.3. Comitology and Deliberation

“In the European multi-level system, processes of politicisation and institutionalisation, in which the truly transnational governance structures which are forming have institutionally taken the shape of the European committee system (‘comitology’), have got under way.”¹³⁴ These committees do not only take technical decisions but also political ones as “they are *fora* where the logic of market integration has to be made compatible with the social regulatory concerns and interests in Member States”;¹³⁵ that is why they are also called “mini-Councils”¹³⁶.

The question if comitology contributes to deliberative democratic supranationalism in a positive way is a hotly contested issue. The Commission in its White paper on European Governance¹³⁷ criticises the committee method¹³⁸ and wants to have it abolished. It would prefer “a situation where

- legislation defines the conditions and limits within which the Commission carries out its executive role, and
- a simple legal mechanism allows Council and European Parliament as the legislature to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation.”

This change would, according to the Commission, “make decision-making simpler, faster and easier to understand. It would improve accountability, helping Council and the European Parliament to make political judgements on how well the executive process is working.” The Commission feels that following these orientations would put into question the need to maintain existing committees, notably regulatory and management committees.

Also in the academic debate it is common to deplore the “clear” separation of legislative and executive functions between the Council and the Commission.¹³⁹

Joerges, by contrast, sees comitology as an alternative to technocratic European agencies and indicates that comitology committees are the “most significant institutionalisation of the internal market”¹⁴⁰. He points to their complex internal structure, in which government representatives, representatives of social interests and the economy interact,¹⁴¹ and stresses the

¹³⁴ Joerges, ‘Deliberative Supranationalism’ – A Defence, EIoP, Vol 5, 2001, No 8, 6.

¹³⁵ Joerges, *supra* n 134, 7.

¹³⁶ Joerges, *supra* n 134, 7.

¹³⁷ COM(2001) 428 final, 25 July 2001.

¹³⁸ Compare also Lenaerts, Some Reflections on the Separation of Powers in the European Community, *Common Market Law Review* 1991, 11 (31 f).

¹³⁹ E.g. Lodge, Commission-Council-Parliament: Towards an EU Separation of Powers?, in Breuss/Fink/Griller (eds.), *Vom Schuman-Plan zum Vertrag von Amsterdam* (2000) 127 (131); but compare also the differentiated analysis in Lenaerts/Verhoeven, Towards a Legal Framework for Executive Rule-making in the EU? The Contribution of the New Comitology Decision, *CMLRev* 2000, 645 ff.

¹⁴⁰ See Joerges, *supra* n 134, 6.

¹⁴¹ See Joerges, *supra* n 134, 8.

“coming together of plural publics”¹⁴² and the resulting pluralistic discussion. Furthermore, depending on the attention that an issue attracts and on the insistence of the actors concerned, comitology links with the broader public too.¹⁴³

Comitology certainly is pluralistic; it is a platform for experts and representatives from Member States and affected interest groups. The style of interaction between the “players” can indeed be qualified as deliberative. In this regard, the committee system can be seen as contributing to deliberative supranationalism.

In addition, “Comitology law making” may also be seen as a means of a stage by stage development of secondary legislation starting with framework measures to be concretised in the course of time. And this is actually what the Commission is favouring.¹⁴⁴ Would it not be possible for the Council to interfere in this gradual process, insofar as it is more than a “technical exercise”, it might be much more difficult to find a compromise for the starting point. The other alternative would be that the Council would not include any substantial powers for the Commission to develop the system further. Consequently, every such step would necessitate an amendment of the measure. That would certainly not be the better alternative securing the “prerogatives” of the Commission, but also the deliberative process. Seen from that angle, Comitology involves a trade-off between transparency and efficiency in policy determination, and also the principle of separation of powers is not necessarily tilting the balance in favour of transparency.¹⁴⁵

The other side of the coin, however, is that only selected organised groups are represented in the committees,¹⁴⁶ and it is far from being transparent. From the democratic point of view institutionalised deliberations and, of course, committee deliberations as well, need a connection to the general public where all citizens can participate on an equal basis.¹⁴⁷ Furthermore, the committee accountability structure can at best be qualified as “fragmented”. It would be important for the EP, or the EP committees, to scrutinize comitology – so that expertise would be controlled by counter-expertise.¹⁴⁸ Strengthening the EP committees’ ability to scrutinize comitology could help to improve the situation and establish a better line of accountability.

Another point to be mentioned is the weak position of the European Parliament in the act of decision taking itself if compared to the Council. Even in cases of co-decision the parliament has, under the regulatory procedure, only the right to trigger the re-examination of a draft

¹⁴² Joerges, ‘Deliberative Supranationalism’ – Two Defences, *European Law Journal*, Vol 8, No 1, 2002, 151.

¹⁴³ See Joerges, *supra* n 134, 9.

¹⁴⁴ White Paper on Governance, COM(2001) 428 final, 25 July 2001, 20: “So-called ‘framework directives’ should be used more often. Such texts are less heavy-handed, offer greater flexibility as to their implementation, and tend to be agreed more quickly by Council and the European Parliament. ... Whichever form of legislative instrument is chosen, more use should be made of ‘primary’ legislation limited to essential elements (basic rights and obligations, conditions to implement them), leaving the executive to fill in the technical detail via implementing ‘secondary’ rules.”

¹⁴⁵ Compare also for a complementary perspective Joerges/Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, *European Law Journal* 1997, 273, especially at 285.

¹⁴⁶ See Van Schendelen/Pedler, *Are EU Committees Influential?* In Van Schendelen (ed), *EU Committees as Influential Policymakers* (1998) 288.

¹⁴⁷ See Eriksen/Fossum, *supra* n 108, 7 ff.

¹⁴⁸ See Joerges, *supra* n 134, 10. See also Hesse, *Der unitarische Bundesstaat* (1962); Schaefer, *Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework*, in: Pedler/Schaefer (eds), *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process* (1996) 23.

measure by the Commission if it suspects the draft to “exceed the implementing powers provided for in the basic instrument”¹⁴⁹. If it is correct to qualify at least parts of implementing activities as quasi-legislative measures, it is not easy to defend this asymmetry.¹⁵⁰

¹⁴⁹ Article 8 of Council Dec 99/468/EC.

¹⁵⁰ Compare also The White Paper on Governance, COM(2001) 428 final, 25 July 2001, 31: The “adjustment of the responsibility of the Institutions, giving control of executive competence to the two legislative bodies and reconsidering the existing regulatory and management committees touches the delicate question of the balance of power between the Institutions. It should lead to modifying Treaty Article 202 which permits the Council alone to impose certain requirements on the way the Commission exercises its executive role. That article has become outdated given the co-decision procedure which puts Council and the European Parliament on an equal footing with regard to the adoption of legislation in many areas. Consequently, the Council and the European Parliament should have an equal role in supervising the way in which the Commission exercises its executive role. ...”

For a different evaluation compare Lenaerts/Verhoeven, *supra* n 139, 679 ff.

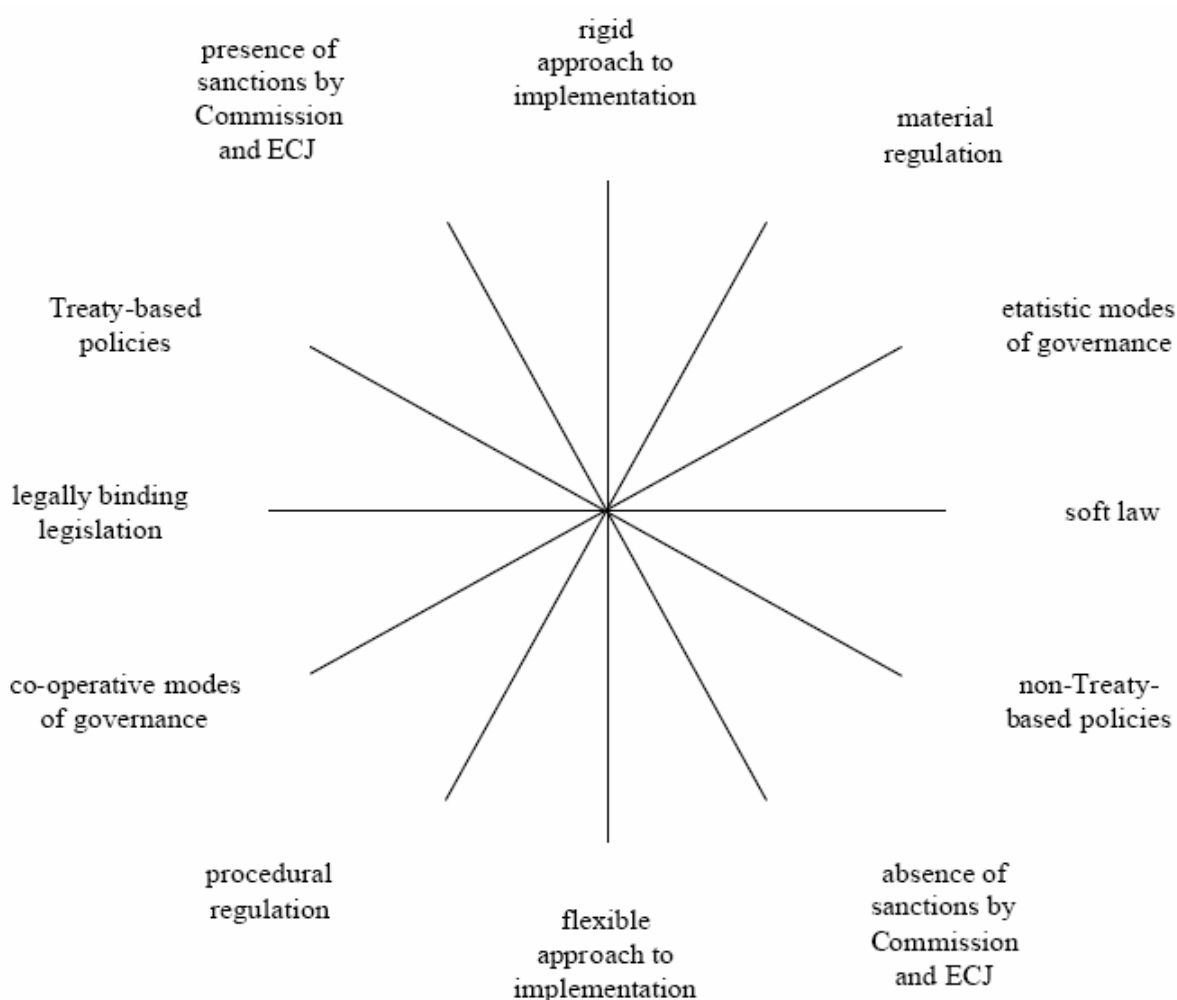
V. New Modes of Governance

V.1. Towards Conceptual Clarification

Falkner, Treib and Bähr¹⁵¹ propose that “governance is ... best understood as political steering, and different modes of governance should be seen as different types of styles of political steering.” The authors of this paper accept this definition and wish to comment on several of the contentions presented in this context.¹⁵²

Falkner, Treib and Bähr identify a number of dimensions to distinguish between different modes of governance. They present six different indicators to characterise EU policies, each of which is conceptualised as a continuum between two poles; policies could, it is argued, be mapped onto these dimensions.

Figure 1: Indicators for Mapping the Development of EU Policies



Source: Falkner, Treib and Bähr (2004)

¹⁵¹ See Treib/Bähr/Falkner, Modes of Governance, Old and New: A Note Towards Conceptual Clarification, NEWGOV Input Paper, Dec 2004, 1 ff; Treib/Bähr/Falkner, A Set of Categories for Mapping EU Policy Areas, NEWGOV Input for Deliverable 02, Feb 2005, 1 ff.

¹⁵² It goes without saying that the following is only a first reaction to the stimulating proposals. It is also not covering those aspects which mainly relate to soft law which will be dealt with by Anne Peters.

Flexible versus rigid approach to implementation

The regulations on driving hours in road transport and the European works councils directive are contrasted as examples for, on the one hand side, rather rigid and, on the other hand, more flexible in terms of implementation. While the mentioned regulations leave only a very limited range of options for the Member States and private actors, this is different with the mentioned directive.

The authors of this paper observe that this is a good example for the difficulties of the approach. First, the difference is obvious only if we separate the European from the national level. In this regard, harmonisation through regulations and directives for sure entails different degrees of determination. However, if we look at governance in Europe as a multilevel phenomenon involving supranational and national mechanisms, is this really adequate? If we say that legislation in the case of directives is divided between the EU and the Member States, then implementation is what is left for the national executive. In other words: Implementation is only more flexible if we qualify the transposition of the works Council directive as implementation. This is certainly a—rather legalistic—way of looking at it, but not the only possible way. The alternative is to qualify not only the specification of the “results to be achieved”, but also, “the choice of form and methods”¹⁵³ as *political steering*. It might even be that this was the original idea differentiating between regulations and directives. “Governing” the regulatory tasks of the works Council would thus encompass both instruments the directive and national legislation, it would involve both the EU and the national level. This is different in case of driving hours. The overall result would not remain the same; e.g., the options for private actors might not differ at all if we take directive and national legislation together. A consequence might be that we have to look at the whole mechanism of European governance, not only at one part.

Second, if we take a closer look, it turns out that a crucial aspect, namely the details of sanctioning was, for legal reasons, exempted from the harmonisation not only by the directive but also by the regulation on driving hours in road transport. As a consequence, there was a huge margin of discretion for the Member States in terms of enforcement, which led to extreme differences. Some chose to introduce rather Draconian penal sanctions, others opted for administrative fines. The result was an enormous difference in compliance.¹⁵⁴ Consequently, at second glance the difference in terms of rigidity is less fundamental.

Third, addressing the issue in the context of contrasting old and new modes of governance raises the issue which one of the two approaches might be qualified as new or old. If we agree that the entire mechanism of multilevel governance in the European Union is “new”, then both examples can serve as an illustration. But it would certainly not be justified to qualify highly determined harmonisation as the older and more flexibility as the more recent mechanism. Rather, both coexist in different fields and to a different amount.

Fourth, it is not easy to tell how a mapping of policies could be informed by this differentiation. Apart from legal considerations, it might be said that regulating driving hours in road transport is a part of transport policy, but it might also be said that it is a part of social policy in the field of transport.

Etatistic versus co-operative modes

¹⁵³ Article 249 ECT.

¹⁵⁴ Including the “option” for the transport enterprise to look at the administrative fine as an alternative to compliance, if the benefit (e.g. to deliver in time) was higher. This was no valid option in the case of severe penal sanctions.

This indicator refers to the degree of involvement of private actors in policy-making and implementation. Etatism appears as characterised by a hierarchical approach where public actors are active policy shapers and implementers whereas private actors are passive policy takers. The opposite pole refers to co-operative relationships between public and private actors in both policy-making and policy implementation.

The authors of this paper contend that this is certainly an important difference. However, it is neither new nor limited to a specific level of governance. In a sense, “delegating” regulatory solutions to private actors is a very traditional mechanism in the field of private law, which can in a very simplified manner be characterised as those parts of the legal order which are subject to the coordination of private actors under the guarantees of private autonomy. As long as equal (economic) weight can be seen as a guarantee for balanced results respecting the autonomy of the individual there is no need for heteronomous regulation by public authority. In parts this is even true for general norms coming near legislation like collective agreements between the social partners. Again the differentiation does not appear to be of much guiding force for the delimitation of old and new modes of governance. There has always been a sliding transition from autonomous rulemaking by private actors to lawmaking by the state. What might have changed is the scope of “auto-regulation”.

Furthermore, also in this respect multilevel governance poses additional complications. If a piece of legislation requires unanimity at EU level, it is often addressed as consensus oriented or co-operative. This is certainly true as regards the relation between the Member States, or even between the EU institutions and the Member States. From the perspective of the citizen the result might still be “classical” binding law, be it directly or indirectly applicable.

Treaty-based versus non-Treaty-based policies

Falkner, Treib and Bähr point to the fact that policies differ in the degree of formal institutionalisation of decision making and implementation processes. They explain that some policies (especially many of those subject to the Open Method of Coordination—OMC) are less institutionalised than traditional policies since they are not based on the Treaties. This allows for more flexibility, they point out, since decision making and implementation procedures are not constitutionally specified. In contrast, the traditional policies that are characterised by Community legislation are typically based on the Treaties, “with relatively clear rules as to who is involved in decision-making, how decisions may be reached, how they have to be implemented and who is in charge of monitoring compliance”.

First, the notion of “*non-Treaty-based policies*” should be specified. Obviously, an important part of issues which are subject to the so-called Open Method of Coordination are Treaty-based in the sense that the Treaty calls upon the Member States to “conduct their economic policies with a view to contributing to the achievement of the objectives of the Community”¹⁵⁵, and that Member States “shall regard their economic policies as a matter of common concern and shall coordinate them within the Council”¹⁵⁶, and that the EC has supplementing competences in such important fields as education or employment policy. What is obviously meant by that characterisation is that there is no binding determination of these issues at European level.

Second, and also after this clarification, the labelling and its implication remains multifaceted. To take an important example: The Treaty explicitly foresees that the Member States enter into negotiations which each other in several important fields, among which the aboli-

¹⁵⁵ Article 98 ECT.

¹⁵⁶ Article 99 ECT.

tion of double taxation.¹⁵⁷ The respective treaties concluded between the Member States are of crucial importance in the field of taxation. And they are binding law. Our conclusion is that there are not only policy fields which are partly governed by the Treaty and partly not, but that there are also various degrees of “Treaty-based policies”. We should also not forget enhanced cooperation as an option of political steering which has a foundation in the treaties, but is certainly distinct from the usual way of lawmaking.

Third, at this point and specifically with regard to soft law mechanisms like the Open Method of Coordination, democracy concerns are obvious.¹⁵⁸ Accountability is a core element of democracy, and transparency is a prerequisite in the sense that the citizen can only hold accountable whom he came judge to be responsible for mistakes. The drawback of flexible mechanisms like the OMC is the lack in transparency; consequently, also responsibilities become blurred and fragmented.

These are some remarks on the difficulties connected to the proposed “dimensions” of governance modes. While the authors consider these categorisations as inspiring, they are doubtful whether their application might lead to a useful mapping of new modes of governance or of EU policies.

Falkner, Treib and Bähr propose a new typology for modes of governance. They “distinguish modes of governance according to whether they are based on legally binding provisions or soft law and whether they involve a rigid or a flexible approach to implementation”. The result is as follows:

Figure 2: Typology for modes of governance

		<i>Legal Instrument</i>	
		<i>Binding</i>	<i>Non-Binding</i>
<i>Implementation</i>	<i>Rigid</i>	Coercion	Targeting
	<i>Flexible</i>	Framework Regulation	Voluntarism

V. 2. New Instruments or New Variations of Application?

From a legal point of view it is obvious that this typology is representing the classical instruments of “political steering” through law. Commands, prohibitions, and permits¹⁵⁹ are the classical categories of legal instruments. They can be and traditionally are combined; e.g. in the case of legal incentives—for example when a public body is authorised or under the duty to subsidise certain activities or to grant tax benefits. Another possible combination is targeting eventually followed by “hard law” if the targets turn out to have been missed—a strategy which is for instance applied in the field of environmental protection.

“Framework Regulation” is not only the characteristic of EC legislation by directives, but can be found in nearly all federal systems as a means of dividing “political steering” between the central and decentralised authorities. Obviously the implications are different if the legislator

¹⁵⁷ Article 293 ECT.

¹⁵⁸ From the vast literature compare only de Búrca, The constitutional challenge of new governance in the European Union, *European Law Review* 2003, 814 ff, especially at 835 ff.

¹⁵⁹ In its two variations: explicit permit or absence of a prohibition.

decides to leave a huge margin of discretion to the executive, be it at EU level or at national level. In such a situation the typical criticism is that this might result in an unjustifiable delegation of powers from the democratically elected representatives to the executive.

Relatively atypical as a means of political steering through law is of course what is labelled as “Voluntarism”, and it certainly is worth specific attention; but combined with incentive mechanisms, even “Voluntarism” is a well known phenomenon.

To make things short, the authors of this paper contend that the classifications referred to above might not be entirely sufficient to grasp the essential aspect of “new” modes of governance. *The “new” aspect might to a lesser extent be the type of the steering instruments but the scope and the pattern of their application.* This is so even if it were possible to isolate what is happening at the national, at the EU, and at the worldwide level. It is the more so if we take the effects into account resulting from using these instruments in a multilevel setting which does not only include the EU and its Member States as mainly addressed in this paper, but also the worldwide level encompassing not least activities within the UN and the WTO.

Summing up, the authors would like to suggest that the following aspects should be thoroughly analysed when addressing the issue of “new” modes of governance. All of them include issues of democratic legitimacy, in so far as mechanisms of democratic decision taking are being changed or undermined, or powers are transferred to another level or to private actors.

- Effects which are simply resulting from the internationalisation of governance, meaning the effects on traditional modes of governance resulting from the transfer of powers from nation states to international and supranational organisations, notably the EU, the UN and others. It is a main thrust of this paper to point to revolutionary consequences for an “old” mode of governance like democracy.
- The dramatic changes and consequences resulting from privatising “public tasks” which not long ago were and partly still are primarily fulfilled by the state.¹⁶⁰ Examples are services in the general economic interest including telecommunications, energy supply, rail transport, or postal services. The patterns of steering and the responsibilities of the State for these tasks change substantially. While formerly the state was responsible for the execution of these tasks (*Erfüllungsverantwortung*), it is now at best guaranteeing that they are fulfilled by private actors (*Gewährleistungsverantwortung*). To a certain (and much increased) extent there is a mixed market where public enterprises are competing with private actors.
- Other tasks are not privatised, but the state is changing its role from executing the task to using means of public procurement.¹⁶¹ Examples might be the construction of public roads or public buildings. The state is concluding contracts with private enterprises obliging them to perform, or new cooperative mechanisms like public-private partnerships are applied limiting the costs and the risks for the state and at the same time opening the field for more business oriented considerations.
- The scope and the possible limits of transferring powers from public authority to private actors or quasi-private actors, happening both at EU and at national level, at the latter

¹⁶⁰ E.g. Löwer and Holoubek, *Der Staat als Wirtschaftssubjekt und Auftraggeber*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (2001) 416 ff, and 513 ff respectively.

¹⁶¹ E.g. Puhl and Holoubek, *Der Staat als Wirtschaftssubjekt und Auftraggeber*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (2001) 456 ff, and 513 (546 ff) respectively.

partly based in obligations under Community law.¹⁶² In this context, private actors are entitled to use typical instruments of steering through public law like issuing ordinances or heteronomous administrative acts. In parts, these developments are closely linked to the mentioned privatisation dynamic. In order to ensure impartial administration in a field where public enterprises are competing with private ones, Community law, e.g. in the fields of telecommunications, electricity supply, rail transport etc, foresees the establishment of regulators who have to be independent from both sides; consequently, they must not be public authorities.

- The frequency and the degree of “auto-regulation” or “regulated self-regulation” have been increasing enormously.¹⁶³ There is not only the traditional field of social partnership but also new developments in fields like environmental policy.
- Last but not least the phenomenon of soft law,¹⁶⁴ also not new, but increasingly applied, shall be mentioned. The most topical example of the Open Method of Coordination was already mentioned. This is only one prominent example for a steadily spreading phenomenon.

¹⁶² E.g. the discussion in Heintzen and Voßkuhle, *Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 62 (2003), 220 ff, and 266 ff respectively.

¹⁶³ E.g. the discussion in Schmidt-Preuß and Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 56 (1997), 160 ff, and 235 ff respectively.

¹⁶⁴ E.g. at EU level Senden, *Soft law in European Community law* (2003).

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