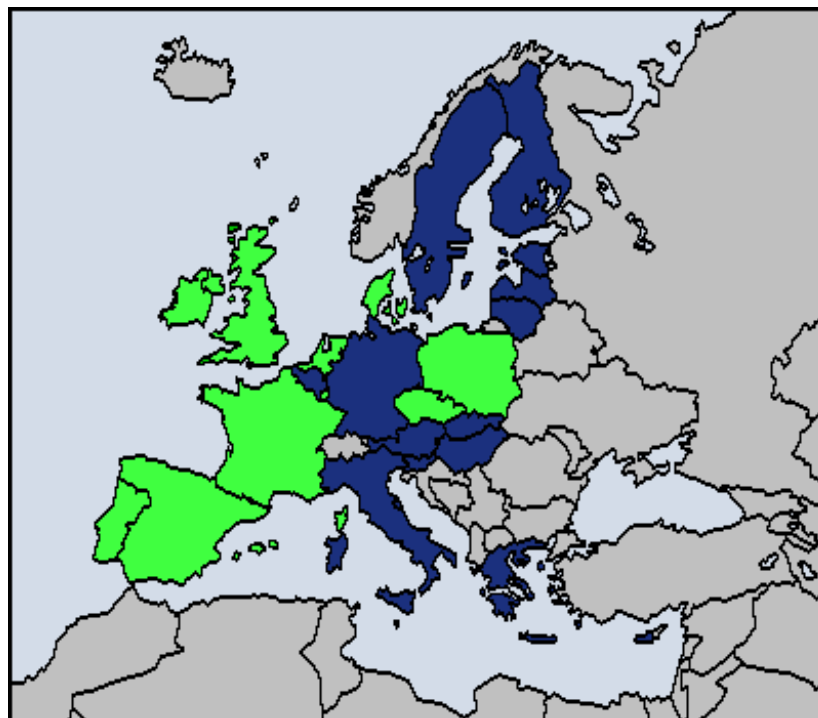





Critical Analysis of the democratic aspects of the EU

English translation of German version dated 5.5.2005



Ratifikation der EU-Verfassung

 mit Referendum

 nur parlamentarisch

[Ratification of the EU-Constitution / by referendum / by parliament alone]

Michael Efler and Percy Rohde
for Mehr Demokratie



Preface

This paper is the result of a series of discussions in the working groups “Issues in Democracy” and “Europe/World” and within the federal (German) board of Mehr Demokratie e.V. Its aim is to serve as background material to help interested citizens, journalists, and politicians arrive at an informed view, and for discussions. Reprinting is expressly permitted on condition that the source and our website www.mehr-demokratie.de be quoted. Please send a complimentary copy to our Berlin office:

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We recommend that the reader of this paper should have at hand a copy of the text of the “Treaty establishing a Constitution for Europe” since source references have been added to the text whenever we refer to the constitution. A copy of the English version of the constitutional treaty is available at: http://europa.eu.int/constitution/index_en.htm]

We express our thanks to Marie Dulaurier for her competent support in drafting this paper. We are grateful to Roman Huber, Martin Tell, Tim Weber, Uwe Krings, Franz Isemann, Daniel Schily, Gerald Häfner, Ronald Pabst and Joachim Tesch for their critical and constructive contributions. We also extend our gratitude to all members of the working groups mentioned above and of the federal board who have been involved in the discussion of this paper.

The intention is to revise and update this paper regularly. May we therefore ask for criticisms and suggestions for improvements to be sent in future to:

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You will find further information on our website: www.mehr-demokratie.de

Mehr Demokratie is funded by donations from citizens. If you share our aims we would be very grateful for your support, for growing tasks mean a greater need for support.

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Michael Efler and Percy Rohde, 5.5.2005



Critical analysis of the democratic aspects of the European Union

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I. Introduction

“We should not lower our normative standards to make them fit the EU reality”

Prof. Dr. Beate Kohler-Koch, University of Mannheim¹

In this paper *Mehr Demokratie* e.V. presents a critical analysis of the EU. It was carried out – in keeping with how *Mehr Demokratie* sees itself – solely on the basis of *democratic* criteria², meaning that we did not look at political *subjects* (such as economic, social, military and agricultural policies) insofar as they do not have any direct impact on democratic aspects. The criticism has been written mainly from the perspective of the Federal Republic of Germany and cannot be translated in every case to other EU member states. The analysis covers the present state of the EU and also potential problems with democratic aspects of the draft constitutional treaty for Europe. We have deliberately focused on describing the democratic *weaknesses* of the EU. The positive aspects of European integration and of the EU Constitution (which no doubt exist) are in any case given first place in most analyses and official statements. As a next step, in 2005 we plan to develop constructive suggestions for a more democratic EU.

We are convinced that a criticism of the EU purely motivated by a concern for democracy and coming from a civic society organisation represents a contribution to the public debate which has been lacking so far, but which is indispensable, for in a democracy the citizens are at the centre; it is from their will that all institutions have to draw their ultimate legitimacy. Since the EU institutions have the power to fundamentally transform our constitutionally-based democracy – and that of other EU countries – the debate about Europe must not be dominated simply by a few representatives of the EU project; democratically-minded citizens, both individually and as members of organisations, must make a contribution. Our aim is to support this process.

In any case, the following arguments - which are used to fend off or weaken a democratic criticism of the EU - have to be rejected:

Rejection of the *sui generis* argument: It is often alleged that the EU cannot be assessed using criteria applicable to a nation state, and therefore not those relating to democracy in a nation state. Rather it is said to be a construction “*sui generis*”, i.e. “in a class of its own”, somewhere between a confederation of states and a federal state. The last statement is certainly correct, but it cannot be used to fend off democratic criticism, since democracy is founded on values, principles and institutions and, for democracy to develop and continue, it must be able to formulate and insist on these. This is why the EU must allow itself to be judged according to established standards for democracy. A criticism of the EU from the standpoint of democratic theory is therefore also justified

- because the German Constitution, for which European integration has considerable consequences, is also based on democratic principles
- because, according to the preamble of the draft constitutional treaty, the EU itself wants to “strengthen” democracy. How could it ever do this without itself implementing democratic values and being conscious of its own impact on existing democracies?



- and because, if the EU does not admit the possibility of a democratic critique, it would have to be rejected for this reason alone.

Refuting the *output* argument: Proponents of the current EU integration process often justify it on grounds of its “positive outcomes” for the citizen. By this they mean, for example, increased economic growth as a result of the internal market, securing peace, cheaper flights, student exchange programmes etc.; i.e. the attempt is made to convince people by means of the political “output” (outcome) in order to get round the problem of the lack of legitimacy. However, such an assessment is not justified, or is even dangerous since:

- isolated developments which are supported by a large majority should not divert attention from the fact that the number of individual controversial issues is probably much higher. Just to mention one example: the controversy over the Euro.
- democracy theorists have time and again pointed out that the assessment of democracies is not possible at all, or only to a very limited extent, using the output criterion³. This appears to be quite obvious, because if it really were beyond dispute as to which are desirable outputs and which are not, democracy with its complicated means for deliberating and deciding would be truly superfluous.
- output arguments are regularly used even by authoritarian regimes to mask their lack of democratic legitimacy by means of the partial satisfaction of the citizens. On this account even developments which the majority regards as desirable are not legitimate if they are not the result of democratic processes!



II. Problems of political democracy in the EU and in the Draft of a Treaty Establishing a Constitution for Europe

Part a) of our analysis focuses on the processes of empowerment and centralisation of the EU at the expense of the democracies in the member states and on the wide-ranging lack of legitimacy of this empowerment process. In Part b) we will analyse the way the EU institutions function at the EU level from a democratic viewpoint.

a) European Integration without appropriate democratic legitimation

The integration process in Europe has been undemocratic from the outset

The EU integration project of the last several decades⁴ was always designed as a continuous creation of facts by an elite which is virtually inaccessible democratically; in the Federal Republic of Germany, this was supported by the expectation of subsequent approval by the citizens⁵. This does not mean that the citizens were fundamentally opposed to co-operation between the countries of Europe – that is not the case. But it is clear that the views of citizens, as revealed by opinion polls, were often enough opposed (often diametrically) to the political aims pursued by the EU (and its predecessors). For example the current accelerated integration process goes contrary to the trend of German public opinion on this policy (see Fig. 1). This contrast, of which EU politicians are certainly aware, between their own aims and the citizens' ideas too often tempts them to purposely conceal their own intentions⁶. This way of going about the integration process can only be called paternalistic and must be rejected.

Fundamentally, the lack of legitimacy of integration is a result of the structure of the EU, since its principles are based on international treaties, and in almost all modern democracies international treaties - like foreign policy as a whole – are not sufficiently legitimated, because the initiative is mostly restricted to the government executive⁷. Parliaments tend to “rubber stamp” what has been tabled without criticism. German Bundestag member Herrmann Scheer explains:

“In practice there are hardly any possibilities left to correct international treaties in the event that their implementation turns out to be disproportionate, inadequate, mistaken, or even disastrous – at least none which can be taken at the right time and out of ones own resources - without faith in the treaty being undermined. A national parliament can amend a faulty law several times within the course of a legislative period. In contrast, international treaties are cast in stone.... To this extent the increasing trend towards an outright inflationary regulatory thicket of international treaties is a political abuse of international contract law.”⁸

The international character and the moral pressure exerted by proponents of integration eventually leads to the “passed-on-the-nod mentality” which ultimately also characterizes our own parliament:

“... most members of parliament, at least those of the German Bundestag, [are in the habit of] blindly agreeing to the community treaties ...; since to oppose them is deemed politically incorrect. The parliamentarians do not have any measurable influence on the treaties above all because the subject-matter of the treaties is fixed by international law and the government is bound by it.”⁹

The question of the democratisation of European integration is thus closely related to the question of the democratisation of foreign policy.

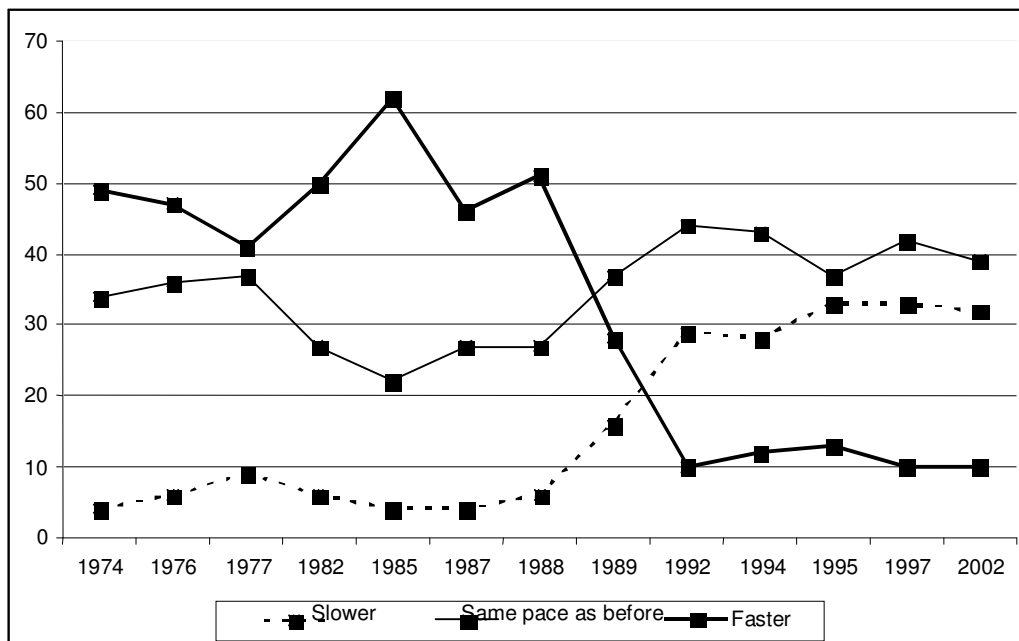


Fig. 1. The preferred speeds of European integration (as percentages) according to opinion polls by Eurobarometer and the IfD. West Germany until 1989, united Germany thereafter.¹⁰

Undemocratic constitutive process

The draft of a treaty for Europe which is currently up for ratification does not differ formally from previous treaty stages of the European Union: it a treaty between states. The initiators conferred on it the significance of a constitution by referring to it as a “constitution” and through choosing the Convention process for working out the draft. Because of this self-selected claim the draft treaty, too, must allow itself to be gauged according to the same criteria as for normal constitutive processes. It is plain that from a democratic perspective, the process from the drafting stage to ratification is disappointing:

Constitutional convention lacking in legitimacy and remote from the citizen: The Convention, having given itself the task of drafting a constitutional treaty, lacked democratic legitimacy. The citizens of Europe had neither appointed, elected nor confirmed the Convention. Without the direct backing of the citizens, neither the governments nor the EU institutions are authorized to give the EU a constitution.

Fictitious transparency: Even though the plenary sessions of the Convention were held in public and the proposals were also published on the Internet, the Convention itself did not make any decisions by vote. Decisions were taken solely by the Convention presidium which met in private and whose deliberations were not recorded in minutes. The transparency on which the Convention congratulated itself was therefore lacking at the decisive point. The real gestation of the constitution thus remained obscure to the observer, even to the members of the Convention.

High-handed presidium: The draft constitution we have today is based on the unknown, but in any case non-legitimised decision-making mode of a handful of presidium members (above



all its president Giscard d'Estaing), which high-handedly decided whether to consider or reject proposals by the Convention and thus establish a “consensus”.¹¹

Insufficient deliberations: The really substantive work of the Convention was carried out under considerable time pressure, because in the course of the convention process definitive texts of the constitution were not submitted until very late, and then only piecemeal. It was impossible to properly discuss important parts of the draft, such as the whole of Part III (321 out of a total of 448 articles of the constitution). Even when the constitutional treaty was submitted to the intergovernmental conference, there was no in-depth discussion. At first, during the Italian and then the Irish presidency, the heads of state and government dealt with the draft. The Italian presidency was notable for its undemocratic plan (which fortunately did not succeed in the end) to wave the draft through without substantial discussions and unchanged (!). Even under the Irish presidency the heads of states and government discussed the draft only on a few occasions and then only the most controversial points.¹² The time pressure and the unsatisfactory structures of the Convention make the constitutive process very problematic.

Undemocratic ratification process: Ratification of the constitution by referendum will take place in only 10 out of the 25 member states of the EU¹³; in the remaining countries ratification will be by parliament – even in those where the large majority of the population and many constitutional experts are in favour of a referendum. The referendums in the 10 member states do not take place simultaneously, allowing the timing to be manipulated for politico-strategic ends. That is why Spain was the first country to be allowed to vote on the constitution – that was where consent was highest according to the opinion polls. It was hoped that a good result there would have a beneficial effect on the later referendums. This staggering of referendums puts greater pressure on the individual countries. It is telling that the Dutch prime minister has publicly considered not holding the referendum in the Netherlands if the French vote against the constitution in their referendum.

In many states public debates on the EU constitution seem to be unwelcome. In Spain, a whole raft of neutrality criteria were violated. Inter alia, the Yes-side received ten times as much public finance as the No-side; reporting in the media was extremely one-sided.¹⁴ Lithuania presents a particularly crass example of a ratification without a debate: the government ratified the draft even before it had been published in the EU's Official Journal. Only after ratification did it emerge publicly that the Lithuanian translation of the constitutional text contained 400 (!) translation errors.

Another problem in the ratification process is the partial premature implementation of some parts of the constitution. Several innovations in the draft constitution have been introduced even before it has been ratified. An example is the European Defence Agency, which the European defence industry had been demanding for years and succeeded in getting into the draft through its lobbying; it began operations in 2004. Leaving aside the legal problems, the political question poses itself as to why the draft constitution should have been subjected to ratification at all, in some cases by referendum, if important provisions are already implemented beforehand.¹⁶ This is a fundamental disregard of basic democratic values, because parliaments and citizens are faced with faits accomplis.

Ratification of the constitution in Germany: As will be described in some detail below, the most important problems in terms of democracy are perpetuated in the EU constitution. Since there has never been a referendum in Germany on any important step of European integration it would have been important to have a (fair) referendum, especially for the EU constitution. In contrast to most of our neighbours, however, the German federal government has decided



against such a course of action and is pursuing the “safe” path of ratification through both chambers (Bundestag and Bundesrat). Scheduling of the decisions takes place not according to objective criteria, but according to strategic ones. For example the ratification dates (May 12 and May 27 for the Bundestag and Bundesrat respectively) were scheduled as closely as possible to the referendum on the constitution in France in order to support the ‘Yes’ campaign by the French government.

It is often argued that parliamentary ratification is sufficient since we are dealing with an international treaty and not a constitution.¹⁷ This has to be countered by saying that, from a democratic point of view, it is not the formal aspect of the constitution which makes a referendum appear necessary, but rather the degree to which competences (powers) are transferred i.e. the ceding of sovereignty. In the opinion of *Mehr Demokratie*, even the stages of the treaty prior to the draft should have been put to referendum, as is common in Denmark and Switzerland. The omissions of the past must not serve as justifications for further omissions. On top of this, even countries such as Luxembourg and the Netherlands, which have never held a referendum in their entire history, will have a referendum on the draft constitution. Evidently, this treaty stage is seen as particularly in need of legitimacy.

Centralisation of areas of competence and power at the EU level

The sharing out of areas of competence and how these are exercised is one of most important questions of power there is.¹⁸ In the course of its history, the EU has extended the scope of its power bit by bit to ever more important policy areas. Far more than half of all new laws emanate from the institutions in Brussels, not the national parliaments.

The draft of the constitution cements this process and transfers further areas of competence to the EU. In addition, future extensions to the range of EU power are already being *de facto* fixed in numerous potent clauses. Contrary to the task set by the Laeken Declaration, no return of individual policy areas to members states was ever seriously considered by the Convention or the Intergovernmental Conference.

1. Far-reaching empowerment of the EU

According to the draft treaty, the EU can legislate or take action in virtually every area of policy – though the means of doing so may vary considerably. The areas of competence between the EU and the member states fall into three groups:

- **Exclusive competence of the Union:** In these policy areas only the EU may legislate and adopt legally binding acts (Art. I-12 (1)). Art. I-13 lists the areas concerned: monetary policy, customs, marine biological resources, establishing the competition rules necessary for the functioning of the internal market, common trade policy.
- **Shared competence:** It is important to understand what exactly is meant by “shared competence”. This is specified in Art. I-12 (2): “When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. *The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence*” (emphasis added). In reality, the areas with shared competence are areas with the *right of primacy* of the EU over the member states.¹⁹ Art. I-14 lists the areas of “shared competence”: the internal market; home affairs and justice; agriculture and fisheries; transport and trans-European networks; energy; social policy; the environment; consumer protec-



tion; common safety concerns in public health matters; economic, social and territorial cohesion.

The competences of the EU and the members states are really “shared” in practice i.e. exercised in parallel, only in the areas of research, technological development and space; development cooperation and humanitarian aid. (Art. I-14 (3) and (4)).

- **Coordination and supplementary competences of the Union:** In accordance with Art. I-12 (5) the EU may carry out actions to support, coordinate and supplement “without thereby superseding their competence in these areas.” These actions are mainly in the form of financial support.²⁰ Actions on the part of the Union therefore do not entail harmonisation. Art. I-17 lists the areas intended for this type of competence: industry, protection and improvement of human health, education, youth, sport and vocational training, culture, civil protection, tourism and administrative cooperation.

Added to this are the very highly regulated special areas, such as CFSP (see below), and coordination of the economic, employment and social policy of the member states. Together with sport, tourism, administrative cooperation and civil protection, the draft treaty confers on the EU completely new policy areas.²¹

2. Flexibility clause

A central fundamental principle of the EU is that of “conferral“ (Art. I-11(2)). This means that the union is responsible only for those areas for which tasks were conferred on it by the member states. However, according to the flexibility clause (Art. I-18) the EU can circumvent this principle and take measures if the Council of Ministers approves this unanimously and the European Parliament agrees. There is a similar clause in the Nice Treaty (Art. 308), whose applicability is however restricted to the internal market. In the past, this general internal market clause was one of the most frequently used legal bases of the EU. The instrument was even used to pass legislation on the fight against terrorism, despite the lack of authority to use such powers²², which only goes to show how strongly Brussels is tempted to circumvent the principle of conferral. According to the draft treaty, the intention now is to extend the areas to which the flexibility clause can be applied to all the policy areas mentioned in Part III of the draft treaty. Thus the new flexibility clause offers an instrument which is at the service of further centralisation without legitimation by the member states.

3. Ineffective control of subsidiarity²³

There is a lack of effective preventive control of subsidiarity, above all for those organs which would most depend on it – the national parliaments. According to the draft treaty (Protocol on the Application of the Principles of Subsidiarity and Proportionality), they only have the right to complain, and that only if a third of all the national parliaments submit a reasoned opinion within six weeks. Within such a short period of time it is hardly possible for national parliaments, in addition to keeping an eye on the national governments and national legislation, to check the numerous draft legislative acts of the EU for compliance with the principle of subsidiarity. An even if a third of all the national parliaments manage to submit a claim that this principle had been violated within the time allowed, this only leads to a “review” of the draft legislation by the European Commission.²⁴

4. Method of open coordination (MOC)

A central instrument of the creeping expansion of competences is the so-called “method of open coordination”.²⁵ This is an instrument of “*indirect policy harmonisation where objectives are formulated at the council level whose implementation at the level of the nation states*”



is being mutually tracked by a ... system of transnational monitoring.“²⁶ In a last-minute initiative in the Convention, the MOC was extended to other areas (health, social policy, research and technological development and industry). In the opinion of the authors Bauer and Knöll (see previous footnote) the MOC effects an “expansion, questionable in terms of democratic theory, of horizontally interwoven structures” and leads “*from the point of view of legitimacy ... to further transfers of political power to the executive*”.

5. Extension of qualified decisions in the Council of Ministers

Closely related to the competence issue is the increasing expansion of qualified majority voting (QMV) in the Council of Ministers. As a clear, non-centralistic allocation of competences this is to be welcomed, since it prevents a single state from blocking measures and thus makes the Union more effective. However, in view of the above-mentioned defects in the distribution of powers, the trend to ever more majority decisions in fact strengthens centralism.

6. Revisions of the constitution without parliamentary ratification

In contrast to the previous treaties, the draft constitution contains two possibilities, termed **passarelle**, of modifying parts of the constitution without the previous requirements of unanimity and ratification. There is the “*simplified revision procedure*”, which enables the move on the one hand from the principle of unanimity to qualified majority, and on the other hand from the special legislative procedure to the ordinary legislative procedure (IV-444). What is required is a unanimous vote in the Council and the consent of the European Parliament. Each national parliament has a right of veto. However, a national referendum, which is compulsory in some member states, would not be possible. Thus, for example, the transition to majority voting in the area of CFSP could be carried out against the wishes of the citizens of the EU member states – and that in light of the very problematic provisions, still to be described, of this policy area from a democratic perspective.

The second possibility is the so-called “*simplified revision procedure concerning internal Union policies and action*” (IV-445). It permits an alteration to 154 out of the 321 provisions of Part III of the constitution (the main exceptions are the CFSP and the institutional provisions) without an intergovernmental conference and without the consent of the European Parliament, as long as there is no expansion of the competences of the Union. All member states have to agree to such a unanimous Council vote, whereby, in contrast to the ordinary legislative procedure (IV-443), this not termed a “ratification”, but simply an “approval”. It is therefore not clear whether approval by national parliaments or by referendums is required. The proviso that no extension of competences is permitted does not mean a great deal, for this refers to areas of policy. The Union already has competences in almost all policy areas. What is of primary importance is the authority to act within the policy areas which have already been transferred (also called supplementation of competences). These may very well be expanded by means of the passarelle.

The conclusion to be drawn from this first part of our critical analysis is that the European process of integration is being carried out by the political elite in a way that bypasses the citizens. The proposed EU Constitution would perpetuate this development, because it contains effective automatic mechanisms for further empowering the EU which are highly problematic from the point of view of democracy. There is therefore no question of the division of powers



between the EU and the member states being arranged as one would expect from a “genuine” constitution. This is how political scientist Heidrun Abromeit summarises the situation:

“At the heart of the much lamented “European democratic deficit” ... is the fact that the proportion of European law which impacts on the level of the nation states is increasing, while the opportunities for participation in the member states are being devalued. The national parliaments now have only limited responsibility for those decisions to which the citizens are then subjected; the rights and competences of the regions (in those federal states of the EU) are safe neither from the “European grasp”, nor even from their own federal level”.²⁷

In the meantime, the German Federal Constitutional Court has now become involved. Judge Winfried Hassemer was quoted by the weekly paper DIE ZEIT as saying “We have to check whether we have not already transferred too much of our statehood to Europe.”²⁸

b) Democracy in the EU institutions

Whilst Part a) of our critique dealt primarily with the question as to whether the way the project of European integration as a whole, and the division of competences between the EU and the governments and parliaments of the member states, are proceeding in a democratically legitimate manner, Part b) deals with the EU institutions themselves and looks at the degree to which the powers given to them are being democratically exercised. Although the two aspects of the situation inevitably overlap and interpenetrate, a democratic evaluation needs to consider them separately, for from a democratic perspective the process of surrender of national powers to the EU and its lack of legitimacy must come before the installation and thus the evaluation of the new institutions.

No referendums or popular decision-making procedures

The draft constitution does provide for a citizens’ initiative i.e. a submission, signed by at least one million citizens of the Union, to the EU Commission to pass a new law (Art. I-47 (4)); however, the Commission is only required to consider the initiative, not to act upon it. Other than this the EU has no forms of direct-democratic participation such as, for example, Europe-wide citizen-initiated referendums, or obligatory and facultative referendums.²⁹ In this respect, the EU differs from almost all of its member states. An initiative right in the proper sense remains as before solely with the EU Commission (see below).

In Germany, at least, European integration is a *top-down* process managed by the political elites. German citizens have never been consulted on any treaty reform. Whether it was the European internal market, the Maastricht Treaty or the Euro, it was never thought necessary to submit such fundamental changes of direction to referendum. It is no surprise, therefore, that in Germany there is a very low level of interest in European politics³⁰.

Separation of powers breached

The principle of the separation of powers between the executive, the legislative and the judiciary developed by the philosophers Locke, Montesquieu and others found its first expression in the 1776 American Constitution. Since then, it has been an essential component of all (representative) democracies. The separation of powers is designed to minimise the abuse of political power. In the EU, the principle of the separation of powers is breached in respect of the separation of the executive and the legislative powers. Ministers of member states, who execute or initiate laws at their own national level, have the power to pass laws at the European level (Art. I-23 (1))³¹. The European Commission, which is closest to being an executive



within the EU, enjoys the *right of initiative* i.e. the right to propose legislation. The actual legislative organ – the European Parliament – has not so far possessed this right (see below).

The European Parliament is not a genuine parliament

The European Parliament is directly elected by the citizens of the EU, giving it the greatest legitimacy of any organ of the EU. Yet despite continuous strengthening of its powers, it is still not a genuine parliament. It still lacks some essential features (and this lack persists in the EU Constitution), for:

1. It has no right of initiative.³² The European Commission (with its merely indirect claim to legitimacy) enjoys a monopoly on the right to propose new laws (Art. I-26 (2)). That is why thousands of lobbyists jostle around the European Commission (see below for more detail). The Commission's monopoly on initiatives also hampers the introduction of Europe-wide citizen-initiated referendums; their introduction would give the citizens of Europe a higher power than the European Parliament possesses. This might well be resisted both psychologically (the EP does not see itself as subordinate to the EU's citizens) and juridically (in Germany, at least, the principle of the equality of parliamentary and referendum decisions enjoys unwritten constitutional status).
2. It does not have the right to nominate and elect the members of the Commission. In national democracies it is normally parliament which elects the whole or part of the executive. At the EU level this would correspond to the European Parliament electing the Commission, or at least the President of the Commission. But the EP does not have this right. Even in the draft Constitution (Art. I-27), the EP has only a kind of right of ratification, for it is the Council of Europe which proposes a candidate to the EP, taking into account the results of elections to the European Parliament. It is thus the Council of Europe which has the decisive choice. The EP can only block a nomination, but not put forward and elect candidates itself.

To be sure, this critique is based on nation-state criteria for a parliament and is not meant to prejudge the question – which must be answered democratically – as to whether the EU Parliament should be made more like a “genuine” parliament or not. It is nonetheless important to make the point that the title of “parliament” is not really appropriate for this organ of the EU.

The EU's overweighted executive

The Commission's monopoly on initiative just described leads to an overweighting of the executive as against the legislative. The result is that, in contrast to the situation in national democracies, policy initiatives derive less from elected officials and more from very indirectly appointed and temporary officials (the Commissioners) and their civil servants. The elections to the European Parliament are devalued by virtue of the Commission being in reality the dominant institution in the European legislative process. The citizens have only a very indirect influence on the Commission³³ - by means of the election of their national parliaments, which then nominate one EU Commissioner each. In addition, the Commissioners are appointed for five years (Art. I-26 (3)), longer than the term of office of many national heads of state and government, further strengthening the relative influence of the executive Commission over the legislative.

The dominance of the Commission over the European Parliament is also revealed by a comparison of the relative number of staff they employ. Of the 38,959 people employed by the



EU as civil servants or fixed-term staff, no less than 26,648 work for the Commission, while a mere 5,531 are employed by the Parliament and only 3,280 by the Council of Europe. The remaining 3,500 are distributed among the many varied agencies of the EU.³⁴

This overweighting of the executive is now being further exacerbated by the growing number of EU Commissioners in the wake of the expansion of the EU to the east. According to the Constitutional Treaty (Art. I-26 (5)), the principle of “one Commissioner per country” will remain until 2014. From the point of view of equality this is of course to be welcomed, because it gives each country its own representative in the Commission. But the rule also has serious drawbacks. After the expansion to the East, there are now 25 Commissioners; after 2007, there will be 27 or 28, all of them with their own area of responsibility. The pressure on the Commission to propose new regulations is likely to increase further, because every Commissioner will want to be seen to be doing a good job. This is likely to lead to an even higher ratio of EU regulation to domestic (member-state) legislation. Only after 2014 is there to be a reduction in the number of Commissioners to two-thirds that of the number of member states (Art. I-26 (6)) – but that will probably still leave 18-20 Commissioners.

In addition to the regulatory and advisory organs, the draft Constitution creates no less than nine standing committees and other committees at the level of the Council of Europe or the Commission: Economic and Financial Committee (III-192); Employment Committee (III-208); Social Protection Committee (III-217); Advisory Committee of Transport Experts (III-244); Standing Committee on Internal Security (III-261); Political and Security Committee (III-307); a special Committee for Negotiations on International Treaties on Commercial Matters (III-315, the current, influential, Article 133 Committee); special Committee for Negotiations on International Treaties (III-325); Permanent Representatives Committee (III-344, also known as COREPER). All these bodies are staffed by civil servants from the member states or the Commission. Except for the Permanent Representatives’ Committee, which can even make decisions on procedure, they are primarily authorised to undertake preparatory work. But the actual importance of these committees is far greater than this suggests, since as a result of their dual responsibility as both national and European politicians, the members of the Council of Europe in particular are heavily reliant on the committees’ professional expertise. The tendency already observable at the national political level – of decisions being in practice farmed out to groups of experts (so-called ‘quangos’ – quasi-autonomous-non-governmental-organisations) which lack democratic legitimacy – has been not only carried forward, but even institutionalised, at the EU level.

Powerful influence of lobbyists in the EU

Brussels is the Mecca of lobbyism.³⁵ Currently it is home to 15,000 special interest representatives. As of 11.4.2005, there were 6401 lobbyists registered in the European Parliament alone. Almost all the national interest groups are currently represented in Brussels. In addition to the trade unions and other organisations, more than 200 multinational companies have representations. Numerous lobby agencies have been in existence since the mid-80s. There are now around 250 agency offices and consultancy firms.

Although lobbyism is also a problem at the national level³⁶, it is of far greater importance in Brussels. Scarcely a single EU regulation comes about without lobbyists being involved in some way. In contrast to the German Federal Parliament, for example, where – unlike the EU Parliament – there is an official office of technical assistance, it is far more common at the EU level for lobbyists to be directly used as political advisers. MEPs see the information supplied to them by companies and NGOs as important grass-roots data. But the real reason why lobbyism presents an especially grave problem for democracy in the EU is the aforementioned



overweighting of the executive, which makes it much easier for lobbyists to have access to the decision-makers.



Excursus: the European Arrest Warrant – a risk for states based on the rule of law and constitutional rights

Up to 2004, the extradition of German citizens was constitutionally prohibited. But the European Arrest Warrant Framework Decision³⁷, which has been integrated into national law by 24 of the 25 EU member states, introduces a constitutionally problematic instrument into the field of juridical cooperation. A European Arrest Warrant can apply to all indictable offences which carry a minimum custodial sentence of 12 months in the country issuing the warrant (Art. 2 (1) Framework Decision). Where an offence carries a minimum 3-year custodial sentence and can be assigned to an (expandable) list of 32 punishable offences³⁸, the arrest warrant must be executed i.e. the suspect must be arrested and surrendered. In such cases a suspect can only defend himself against extradition by claiming procedural irregularity. It is not a defence that the act is not judged to be a punishable offence in the state which carries out the arrest (the ‘executing state’) (Art. 2 (2)). It is not even absolutely necessary for the act to have been committed within the territory of the country which issues the warrant. For all other punishable offences, culpability *can* be ascertained in the executing state.

The following example may help to highlight the problem: according to the European Arrest Warrant, a German citizen *has to be* handed over to Italy – providing that the prescribed pre-conditions have been met – even if the act is not a punishable offence in Germany. Handing over *can* still occur even if the act took place in Germany and has no connection with Italy.

The warrant makes it possible for the general principle of law *Ne bis in idem* (one cannot be tried twice for the same offence) to be circumvented. Someone who has been convicted and punished in another country (not a member-state of the EU) can now be surrendered to an EU country and prosecuted again for the same offence. A states’ duty to protect its own citizens is also affected: “The European Arrest Warrant means that foreign legal standards- in whose creation Germany’s elected representatives played no part - now apply to Germany”³⁹.

By September 2004, 2,603 warrants had been issued, 633 people arrested and 104 handed over⁴⁰. The implementation of the Framework Decision has meant that the German Constitution has had to be altered, an exception to Art. 16 (2) GG “No German citizen may be extradited to another country” being provided for surrenders to other member states of the EU⁴¹. So far, 19 German citizens have been handed over, by no means all for capital offences. In one case, a man was extradited to Lithuania for breaching a maintenance order⁴².

During the course of 2005 the German Federal Constitutional Court will decide whether the European Arrest Warrant is compatible with the German constitution. The process has already attracted a great deal of media attention⁴³. It has emerged from the preliminary discussions that parliamentary approval of the arrest warrant in Germany was placed under severe time constraints and was marred by a misunderstanding of the legal position. In fact, framework decisions on aspects of EU domestic and legal policy allow national parliaments a relatively generous amount of time for implementation into national law, but the Federal Parliament did not take advantage of this⁴⁴.

A lack of democratic control in the Common Foreign and Security Policy (CFSP)

The Constitutional Treaty provides for far-reaching changes to the Common Foreign and Security Policy (CFSP) (Art. I-40, 41, III-294 ff.). These include the obligation on all member states to improve military capabilities (Art I-41 (3))⁴⁵, and a “European Defence Agency” (initially termed an “armaments agency”, which has already been set up and which is respon-



sible, among other things, for ensuring compliance with the obligation to improve military capabilities⁴⁶ (Art. I-41 (3)), as well as enabling the deployment of forces beyond the borders of the EU (Art. III-309 (1)).

It is possible to have all manner of conflicting views on all these points. *Mehr Demokratie* does not adopt a particular stance. On the other hand, it is doubtful if there is sufficient democratic control in this policy area. It is true that decisions on Common Security and Defence Policy (CSDP) require unanimity, but a change to majority voting is not ruled out, except in relation to defence policy (Art. III-300 (1), (3) and (4)). The EU Parliament plays no part in decision-making on any aspect of the CFSP. The Parliament only has a right to be “consulted” and “kept informed” (Art. I-41 (8)). There is no judicial control, either - the European Union Court of Justice has no jurisdiction (Art. III-376). This raises the question as to whether the parliamentary approval for required deployment of the army in Germany will be undermined. The particular democratic deficit of the CFSP lies in this combination of far-reaching powers to authorise action and the lack of mechanisms of democratic control.

Mr. Europe – the European “Foreign Minister”

If and when the European Constitution enters into force, the post of “European Foreign Minister” (Art. I-28) may quite possibly become the most powerful position within the entire nexus of EU institutions. Certainly in terms of the areas of policy assigned to him his power is considerable – in comparison with what is common in democratic nation-states. The “Foreign Minister” is responsible (Art. I-28 (1) + (4)) for:

- Foreign and security policy
- Security and defence policy
- Common Trade policy (WTO, GATS, etc.)
- Cooperation with non-EU countries and humanitarian aid
- Cooperation on development
- International agreements/treaties and
- Relationships with international organisations.

The “Foreign Minister” is also a member of the Commission, as its Vice-President (Art. I-28 (4)) and takes part in all Council of Europe discussions (Art. I-21 (2)). As the CoE reaches its decisions by consensus, the “Foreign Minister” is thus a de facto member of this most important of all the EU bodies. He chairs the meetings dealing with foreign affairs (Art. I-28 (3)). (This is, moreover, the only permanent ministerial post on the Council; all the other ministerial posts are held in rotation on the team presidency principle.)

From the point of view of political democracy the following problems arise: a fundamental concept of democracy is setting limits to and controlling the use of power⁴⁷. Even if it is currently not yet clear that the heads of government of the member-states are prepared to relinquish control of foreign policy, the post of the Foreign Minister could become a central institution of power because of the areas of policy assigned to it under the Treaty. It would then be something more like the role of a President of Europe, in which case it would need to be recognised as such and given proper legitimacy. There is also a risk in the lack of parliamentary and judicial control of CFSP, where the foreign minister will play an important role. Beyond this, responsibility for all the policy areas listed above reverses the ministerial separation of foreign and defence policy which is taken for granted in all democracies.



Immunity of EU officials and civil servants

In contrast to their national colleagues in the member states, EU officials and civil servants are immune from prosecution. Art. 11 of the protocol on privileges and exemptions of the European Union protects EU civil servants from prosecution in relation to their official actions, including their spoken and written remarks. This applies even after they have left office. The protocol dates from 1965 and has been incorporated unchanged – except for some changes of wording – in the draft constitution. The principle is only waived in the case of disputes between the Union and its civil servants and in respect of legal liability towards the Union, but not in relation to the Union's citizens.

The idea has its roots in diplomatic tradition and has long ceased to be appropriate to a supranational organisation such as the EU, which intervenes in citizens' lives in a host of ways. It ought to be in the European institutions' own interests to abolish this immunity, especially in view of the increasing number of cases of corruption and fraud in recent years, which have further shaken the public's trust in the EU.

Lack of a European polity

There is a serious problem in the fact that there is still no adequate 'European public or polity'. European issues rarely play a role in national elections. This has meant that the expansion of the EU's responsibilities and power has taken place largely unnoticed by the public. The heads of state and government of the EU countries are rarely challenged by a critical public. It is also remarkable that despite successive increases in the powers and responsibilities of the EU Parliament, turnout in the European elections continues to fall. This results in an overall deficit of legitimacy for EU politics.

This second part of the analysis has exposed some further democratic deficits in the EU. Overall, the problems are predominantly at the level of democratic control, responsibility⁴⁸ and participation. If and when the EU Constitutional Treaty enters into force, the famous statement of EU Commissioner Günter Verheugen will remain true: "If the EU were to apply to us for membership, we would have to say: democratically deficient".



III. Concluding remarks

“Taken as a whole, and judged from almost any normative point of view, the European decision-making system demonstrates a seriously large democratic deficit ... To democratise it will require a great deal of imagination from its institutions.”

Prof. Dr. Heidrun Abromeit, Technical University, Darmstadt.⁴⁹

This is the first critical assessment that *Mehr Demokratie* has undertaken in relation to the democratic processes within the EU. Later versions will offer updated, more comprehensive and more precise critiques, for which we also look to help from our readers.

Let us once again emphasise that *Mehr Demokratie* is neither for nor against an EU constitutional treaty as such. To adopt such a position in relation to the content of politics would be contrary to the way our organisation sees itself. Our critique derives solely from the point of view of democratic theory, which emphasises the principle of popular sovereignty. This is why we believe, firstly, that the wide-ranging ceding of powers and responsibilities within the framework of the European project requires a higher level of legitimacy than has been the case in the past; and secondly, that the surrender of powers can only be justified if equally high democratic standards are applied at the new level as at the level from which the powers are being surrendered. On both points, major opportunities have been, and are still being, ignored during both the drafting and ratification stages of the EU Constitution. In Germany, for example, both the government and the federal parliament simply refused outright to make use of the available room for manoeuvre and enable a referendum to be held just for the EU constitutional treaty. The treaty itself only partially fulfils the promises made in the Laeken Declaration for a democratisation of the EU, so that there is no question of the “democratic deficit” having been removed. From the citizens’ point of view, the EU remains (even with the constitutional treaty) a structure lacking adequate legitimacy, democratic control, responsibility, public debate and opportunities for direct participation.

In making our critique, we have quite consciously avoided including any alternative proposals for the democratic reform of the EU institutions, but have concentrated on pointing out where they are democratically deficient. Making the effort to understand, to scrutinise, to bring matters to people’s attention and to stimulate public debate has value in itself. In Germany, bringing the problems to public (as opposed to academic) attention has not yet properly begun. The next step is for *Mehr Demokratie* to offer specific, practical proposals for reform.

Summarising the results of our analysis leads to the following assessment. The EU appears as a dynamic association of states somewhere along the line between a federal state and a confederation of sovereign (nation)-states, to which – due to the multiplicity of powers and responsibilities ceded to it - the same high standards of democracy must apply as do to national democracies. The democratic balance sheet for the EU integration process is currently in the red. More and more powers are being withdrawn from the member states – generally speaking, the relatively more democratic systems – in the absence of any appropriate democratic control and legitimation. At the same time, the EU level displays a host of breaches of what are in part fundamental principles of democracy (separation of powers, parliamentary rights,



government accountability, constitutional referendums etc.). The EU Constitution continues in the same direction, by being content to make what are only half-hearted institutional reforms. An EU which takes on more and more characteristics of a state without an appropriate level of involvement of the sovereign power – the people – cannot avoid a deep crisis of democratic legitimacy, in which ultimately everyone will be the loser: the idea of a united Europe, the citizens, and democracy itself. That is why we very much hope to see in the near future the start of a real public debate on the EU and on its significance for democracy in Europe, involving the general public, civil society organisations, journalists, politicians and academics alike.

Footnotes

¹ From: Kohler-Koch, B. (1999). Europe in Search of Legitimate Governance. *ARENA Working Papers, WP 99/27*, http://www.arena.uio.no/publications/wp99_27.htm.

² We are working here from an idea of democracy which is close to that of Hans-Joachim Lauth: Lauth, H.-J. (2004). *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich*. Wiesbaden: VS Verlag für Sozialwissenschaften.

³ On the subject of “output legitimation” we offer the following quotes:

Nelson, W. N. (1980). *On justifying democracy*. London: Routledge:

“Democracy´ is to be defined in terms of procedures, not in terms of substantive policy” (S. 3).

Abromeit, H. (2002). *Wozu braucht man Demokratie? Die postnationale Herausforderung der Demokratietheorie*. (What is democracy for? The post-national challenge to the theory of democracy) Opladen: Leske+Budrich:

“..... in order to demonstrate the democratic deficiency of the thesis that output legitimation can replace (democratic) input legitimation it is sufficient to advance two systematic considerations. One of these relates to the question as to when the solution to a problem can be held to be “effective, good and right”. For most substantive issues requiring a collective decision there is no irrefutable “good and right”, as can clearly be seen from the fact that even the most distinguished experts rarely agree on anything This points to the fact that it is in general advisable to try to solve problems by negotiation; but once again, we do not have the clear criteria for evaluating the compromises reached in this way” (p.18)

“The long and short of it is that from a democratic point of view there can be no ‘self-legitimizing’ policies, regardless of how good their makers believe them to be output legitimation does not really work; it needs to be complemented by input legitimation – at least in the sense that a consensus is generated for a transfer of decisions to agencies which are not ‘formally’ political: a transfer which is limited both as to its duration and its function and which has clearly defined objectives”. (p.19)

“Achievement of the best possible outcomes – whether this refers to effective, problem-solving or common-sense governance – could justify a republic of experts and managers, or a republic of the wise. But if so, why would they need democracy? Unfortunately, views on what constitutes the “right” or “just” solution to a problem in any instance differ considerably; ask any two experts and one gets three different opinions. No-one actually knows what ‘wisdom’ is – just ask the social scientists and philosophers. The decisive thing is always what works ‘down there’, at the basis of society. This means that taking account of individuals and their preferences remains indispensable, regardless of how incompetent or ‘unwise’ they are. The only quality standard to be applied to the outcomes of decisions is then that of fairness and justice; and that - in line with the definition advanced above – can only be decided through a process: it is ‘unfair’ and ‘unjust’ for one to be subject to a decision from whose making one has been excluded”. (p.166)

“Democracy is essentially about participation and to that extent it is essentially procedural. If it is identified with individual self-determination, it cannot simultaneously be defined through policy outcomes, whether these are understood ‘ideally’ (rationally) or ‘materially’ (the welfare state)”. (p.173)

Lauth, H.-J. (2004). *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich*. (Democracy and the measurement of democracy. A conceptual foundation for cross-cultural comparison) Wiesbaden: VS Verlag für Sozialwissenschaften:

„ ... to define the concept of “democracy” only in terms of the outcome - the ‘output’ – and not in terms of participation in politics, is to violate some of the basic principles of democracy. The decision-takers are not only claiming a monopoly on knowledge and insight, but they are simultaneously degrading the citizen into a mere object, subject to the paternalistic care of the state”. (p.38)



“If democracies can also produce nonsensical solutions, then it is not appropriate to use the evaluation of (socio-economic) performance as a criterion for classifying regimes. It is certainly possible for authoritarian regimes also to produce outcomes which can prove to be good for the development of the country and which are even supported by a majority of the population. Under certain circumstances authoritarian regimes actually make this their deliberate aim, since the creation of *output* is the only way that the regime can increase its legitimacy (in the sense of a specific legitimation) alongside its ideological basis”. (p.44f.)

“In a democracy, due to the uncertainty immanent in democratic decision-making processes, there can be no *a priori* determination of material contents: these can only emerge *a posteriori*, as the outcome of the processes. However, some outcomes can be ruled out ... What needs to be ruled out are ... precisely those decisions which undermine the basis of the processes themselves ... so that the goals of democratic action are not entirely indeterminate.” (p.45f)

⁴ A historical survey of the integration process can be found, for example, in Brunn, G. (2002). *Die Europäische Einigung von 1945 bis heute* (European Unification from 1945 to the Present) (Vol. 472). Bonn: Bundeszentrale für politische Bildung.

⁵ Cf. the commentary by Heribert Prantl (22/04/2005). ‘Das Irgendwann-Europa’ (‘The sometime Europe’). *Süddeutsche Zeitung*, S. 4. In many other countries there have been referendums on accession to the EU or for significant steps in integration such as the Maastricht Treaty or EMU.

⁶ In this context, the following quotation acquired a certain notoriety: “We decide something, release it into the public domain and then wait for a while to see what happens. If there’s no great hue and cry, and no revolts – because most people simply don’t understand what has been decided – then we continue, step by step, until there is no going back”. (The Prime Minister of Luxembourg Jean-Claude Juncker in *DER SPIEGEL* 52/1999). Another quotation in this connection comes from Giuliano Amato, the vice-president of the EU Convention: “In Europe one needs to act ‘as if’ - as if what was wanted was little, in order to obtain much; as if states were to remain sovereign in order to convince them to cede sovereignty ... The Commission in Brussels, for example, should act as if it were a technical instrument, in order to be able to be treated as a government. And so on by disguise and subterfuge.” From an interview with Barbara Spinelli, *La Stampa*, 13-7-2000.

⁷ Cf. Besson, W., & Jasper, G. (1991). *Das Leitbild der modernen Demokratie. Bausteine einer freiheitlichen Staatsordnung*. München: Paul List Verlag, Kapitel 7: Demokratie und Außenpolitik Der permanente Konflikt.

⁸ Scheer, H. (2003). *Die Politiker*. München: Antje Kunstmann, S. 133.

⁹ (Schachtschneider, K. A. (2004). „Deutschland nach dem Konventsentwurf einer `Verfassung für Europa““. *Recht und Politik*, 39, 202-215.)

¹⁰ Daten aus: Noelle-Neumann, E., & Petersen, T. (2002). *Die Bürger in Deutschland*. In W. Weidenfeld (Hrsg.), *Europa-Handbuch* (S. 618-635): Bundeszentrale für politische Bildung.

¹¹ Gisela Stuart, a member of the Convention praesidium, has given a valuable insider’s view of the questionable way of working of the Convention: Gisela Stuart (07/12/2003). Caught in the coils of Giscard’s folly. *TIMES* online, <http://www.timesonline.co.uk/article/0,,2092-921964,00.html> A more detailed description is to be found in the book by the same author: Gisela Stuart (2003). “The Making of Europe’s Constitution”, Fabian Society. http://www.fabian-society.org.uk/press_office/display.asp?id=231&type=news&cat=24

¹² Fischer, K.: *Der Europäische Verfassungsvertrag*, 2005, S. 19-94.

¹³ Arguments for a referendum on the EU Constitution in Germany can be found in the Strempt Declaration at http://www.mehr-demokratie.de/fileadmin/bund/fotos_strempt/strempt_erklaerung_bund.pdf

¹⁴: democracy international / Mas Democracia: Monitoring report on the Spanish Referendum. Madrid, Cologne 2005. www.democracy-international.org/monitoring.html

¹⁵ In the Convention draft the ‘Defence Agency’ was still called ‘The Agency for Armaments, Research and Military Capabilities’ (Art. 40 (3) p.3).

¹⁶ It is within this context that demands by the Austrian and EP Greens to use the Citizens’ Initiative even before it comes into force must be assessed.

¹⁷ Z.B. Bernd Ulrich: „Blöken gegen Europa. Die EU-Verfassung bedarf keiner Volksabstimmung“. *DIE ZEIT*, 32, 2004. At: http://www.zeit.de/2004/32/Glosse_1

¹⁸ The at least temporary collapse of the German ‘Federalism Commission’ highlights the relevance of this point.

¹⁹ Our interpretation of Art. I-12 (2) corresponds to that reproduced on the official EU website: “In this particular case [of ‘shared competence’], the Member States and the Union have powers to legislate and adopt legally binding acts in a specific area. The Member States exercise their powers in so far as the Union has not exercised, or has decided to stop exercising, its competence. This is an affirmation of the case law on preemption. Most of the Union’s competences fall into this category. Article I-14 contains a non-exhaustive list of shared competences that correspond more or less to existing ones except that they also include some advances in certain areas such as



freedom, security and justice. This Article also lists certain competences which were previously regarded as parallel. The areas in question are research, technological development, space, development cooperation and humanitarian aid. However, in these areas the principle of preemption does not apply, in that Member States may continue to exercise their competences in parallel with the Union, even if the Union has exercised its own competences in these areas”.

From: http://europa.eu.int/scadplus/constitution/competences_en.htm

²⁰ According to what it says on the EU website at: http://europa.eu.int/scadplus/constitution/competences_en.htm

²¹ Protection against natural disasters and tourism were listed among the Union’s areas of activity in the Nice Treaty, but there was no article dealing with their execution.

²² Wehr, a.a.O., S. S. 65.

²³ “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. (Art. I-11 (3)).

²⁴ Art. 7 of the protocol on the application of the principles of subsidiarity and proportionality reads: “After completing its examination the Commission can decide... to retain the draft, alter it, or withdraw it. Reasons must be given for the decision”.

²⁵ The MOC turns up in the Constitutional Treaty in a number of paragraphs dealing with various areas of policy, almost always in the same forms of words (Arts III-213, 250, 278, 279). As an example here is Art III-279 [Industry] (2): “The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed”.

²⁶ Cf.: Bauer, M.W./ Knöll, R. (2003): „Die Methode der offenen Koordinierung: Zukunft europäischer Politikgestaltung oder schleichende Zentralisierung?“ Aus Politik und Zeitgeschichte, B 1-2, 2003, S. 33-39. Erhältlich unter:

http://www.bpb.de/publikationen/4VUBA4,0,0,Die_Methode_der_offenen_Koordinierung:Zukunft_europ%EAischer_Politikgestaltung_oder_schleichende_Zentralisierung.html

²⁷ Abromeit, H. (2001). „Ein Maß für Demokratie. Europäische Demokratien im Vergleich.“ *Reihe Politikwissenschaft, Institut für Höhere Studien, Wien*, 76, S. 18.

²⁸ In: Martin Klingst (21. April 2005): „Wenn Jecken küssen“, in DIE ZEIT, Nr. 17, S. 13.

²⁹ In obligatory referendums it is legally prescribed as to which issues can be put to referendum. In facultative referendums, citizens are able to call a referendum on a law proposed by parliament. For this reason, this instrument is almost always used as a means of veto.

³⁰ This is regularly confirmed by opinion polls carried out by Eurobarometer.

³¹ In the case if the EU, we have a mixture of breached horizontal and vertical separation of powers. Horizontal separation of powers is the separation of legislative, executive and judiciary already described. Vertical separation of powers, on the other hand, refers to the separation of competences or responsibilities between superordinate or subordinate institutions according to the principle of subsidiarity.

³² This can be granted him under special circumstances (Art. I-34 (2)). But in the draft constitution, this is only made us of in very few instances, e.g. Art. I-330 (1), and it refers solely to issues which affect the European Parliament e.g. a standardised European voting right for the EP.

³³ It remains to be seen what effect the European Citizens’ Initiative will have.

³⁴ That means that over the last ten years, the number of EU civil servants has increased by 12,000. All figures from Friedrich, H.: „Die EU-Bürokratie schafft noch Arbeitsplätze“, FAZ, 8.3.2005, S. 19.

³⁵ Cf., for example, the reader “Lobby Planet - Guide to Brussels” from the Corporate Europe Observatory (CEO). <http://www.corporateeurope.org/docs/lobbycracy/lobbyplanet.pdf>

³⁶ E.g. Thomas Leif, Rudolf Speth (2003): „Die Stille Macht“. Verlag für Sozialwissenschaften.

³⁷ Council of the European Union: Framework decision of the Council on the European Arrest Warrant and surrender procedures between the member states, 7.6.2002.

³⁸ This includes, among other things, terrorism, traffic in people and arms, but also cybercrime, forgery and product piracy.

³⁹ <http://www.heise.de/tp/r4/html/result.xhtml?url=tp/r4/artikel/19/19849/1.html>



⁴⁰ European Commission: Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, 23.2.2005, S. 4.

⁴¹ The text of paragraph 2 of Art. 16 [Citizenship, extradition] of the German Constitution reads in full: “No German may be extradited. A law may allow a divergent ruling to be made for extraditions to a member state of the European Union, as long as constitutional principles are preserved.”

⁴² Hipp, D.: Fehler im Denksystem, Der Spiegel 16/2005, S. 48.

⁴³ Vgl. u.a. Bittner, J.: Gleiches Unrecht für alle, DIE ZEIT v. 6.4.2005, Nr. 15; Darnstädt, T./Hipp, D.: Die Leviathan-Frage, Der Spiegel 11/2005, S. 56-58; Prantl, H.: Karlsruhe contra Brüssel, Süddeutsche Zeitung, 11.4.2005, S. 4; Hipp, a.a.O., S. 48-49.

⁴⁴ Martin Klingst (21. April 2005): „Wenn Jecken küssen“, in DIE ZEIT, Nr. 17, S. 13.

⁴⁵ “Member States shall undertake progressively to improve their military capabilities“, Art. I-41 (3)

⁴⁶ The setting up of the armaments agency came about after years of lobbying by the European arms industry. Cf. Frenzel, M.: Die Ghostwriter, Deutsche Welle, 30.5.2004, abrufbar unter <http://www.dw-wprld.de/dw/article/0,1564,1217551,00.html> . Writing about the Convention process, Deutsche Welle said: “The support goes so far that experts even speak of the lobbyists having secretly been in charge of describing the future defence agency”. BITS (the Berlin Information Center for Transatlantic Security) expects an increase in arms expenditure by the Agency, cf. Steinmetz, C: „Es ist eine Aufrüstung“, Deutsche Welle, 29.5.2004, abrufbar unter <http://dw-worls.de/dw/article/0,1564,1213857,00.html> .

⁴⁷ Cf. Beetham, D., Bracking, S., Kearton, I., & Weir, S. (2002). *International IDEA handbook on democracy assessment*. The Hague, Netherlands: Kluwer Law International; Lauth, H.-J. (2004). *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich*. Wiesbaden: VS Verlag für Sozialwissenschaften.

⁴⁸ Responsivity: a government can be described as ‘responsive’ if the citizens’ views can be seen to have been incorporated into its policies.

⁴⁹ Aus: Abromeit, H. (2001). Ein Maß für Demokratie. Europäische Demokratien im Vergleich. *Reihe Politikwissenschaft, Institut für Höhere Studien, Wien, 76.*

¹³ Argumente für ein Referendum über die EU-Verfassung in Deutschland finden sich in der Erklärung von Strempt unter http://www.mehr-demokratie.de/fileadmin/bund/fotos_strempt/strempt_erklaerung_bund.pdf

¹⁴ Siehe: democracy international / Mas Democracia: Monitoring report on the Spanish Referendum. Madrid, Cologne 2005. www.democracy-international.org/monitoring.html

¹⁶ In diesen Zusammenhang sind auch Forderungen der österreichischen und der EP-Grünen zu bewerten, die europäische Bürgerinitiative bereits vor ihrem Inkrafttreten anzuwenden.



¹⁷ Z.B. Bernd Ulrich: „Blöken gegen Europa. Die EU-Verfassung bedarf keiner Volksabstimmung“. DIE ZEIT, 32, 2004. Erhältlich unter: http://www.zeit.de/2004/32/Glosse_1

¹⁸ Das zumindest vorläufige Scheitern der deutschen Föderalismuskommission verdeutlicht die Relevanz dieses Punktes.

¹⁹ Unsere Interpretation von Art. I-12 (2) entspricht der auf offiziellen Seiten der EU wiedergegebenen: „In diesem Fall [der geteilten Zuständigkeit] haben die Mitgliedstaaten und die Union die Befugnis, in einem bestimmten Bereich gesetzgeberisch tätig zu werden und rechtlich bindende Rechtsakte zu erlassen. Die Mitgliedstaaten nehmen ihre Zuständigkeit wahr, sofern und so weit die Union ihre Zuständigkeit nicht ausgeübt oder entschieden hat, diese nicht mehr auszuüben. Es handelt sich hier um eine Bestätigung der Rechtsprechung in der Frage des Vorrangs. In diese Kategorie fallen die meisten Zuständigkeiten der Union. Artikel I-14 enthält eine nicht erschöpfende Liste der geteilten Zuständigkeiten, die mit Ergänzungen in bestimmten Bereichen, wie dem Raum der Freiheit, der Sicherheit und des Rechts, der aktuellen Liste entspricht. Ferner finden sich hier Zuständigkeiten, die bisher den parallelen Zuständigkeiten zugeordnet waren. Es handelt sich um Zuständigkeiten in den Bereichen Forschung und technologische Entwicklung, Raumfahrt, Entwicklungszusammenarbeit sowie humanitäre Hilfe. In diesen Bereichen greift der Vorrang aber nicht; die Mitgliedstaaten können ihre Zuständigkeit weiterhin parallel zur Union ausüben, selbst wenn die Union die ihre in den betroffenen Bereichen ausgeübt hat.“

Aus: http://europa.eu.int/scadplus/constitution/competences_de.htm

²⁰ Laut Darstellung auf der EU-Webpage http://europa.eu.int/scadplus/constitution/competences_de.htm

²¹ Katastrophenschutz und Fremdenverkehr waren zwar im Vertrag von Nizza unter den Tätigkeitsfeldern der Union benannt, aber es stand dem kein ausführender Artikel entgegen.

²² Wehr, a.a.O., S. 65.

²³ Nach dem Grundsatz der Subsidiarität wird die Union nur in den Bereichen tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen nicht von den Mitgliedsstaaten auf zentraler, regionaler oder kommunaler Ebene besser erreicht werden können (Art. I-11 (3)).

²⁴ Art. 7 des Protokolls über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit lautet: „Nach Abschluss der Überprüfung kann die Kommission ... beschließen, an dem Entwurf festzuhalten, ihn zu ändern oder in zurückzuziehen. Dieser Beschluss muss begründet werden.“

²⁵ Die MOC taucht im Verfassungsvertrag in verschiedenen Absätzen zu verschiedenen Politikfeldern als immer fast gleichlautende Formulierung auf (Art III-213, 250, 278, 279). Hier als Beispiel Art III-279 [Industrie] (2): „Die Mitgliedstaaten konsultieren einander in Verbindung mit der Kommission und koordinieren, soweit erforderlich, ihre Maßnahmen. Die Kommission kann alle Initiativen ergreifen, die dieser Koordinierung förderlich sind, insbesondere Initiativen, die darauf abzielen, Leitlinien und Indikatoren festzulegen, den Austausch bewährter Verfahren durchzuführen und die erforderlichen Elemente für eine regelmäßige Überwachung und Bewertung auszuarbeiten. Das Europäische Parlament wird in vollem Umfang unterrichtet.“

²⁶ Siehe dazu: Bauer, M.W./ Knöll, R. (2003): „Die Methode der offenen Koordinierung: Zukunft europäischer Politikgestaltung oder schleichende Zentralisierung?“ Aus Politik und Zeitgeschichte, B 1-2, 2003, S. 33-39.

Erhältlich unter:

http://www.bpb.de/publikationen/4VUBA4,0,0,Die_Methode_der_offenen_Koordinierung:Zukunft_europ%EAischer_Politikgestaltung_oder_schleichende_Zentralisierung.html

²⁷ Abromeit, H. (2001). „Ein Maß für Demokratie. Europäische Demokratien im Vergleich.“ *Reihe Politikwissenschaft, Institut für Höhere Studien, Wien*, 76, S. 18.

²⁸ In: Martin Klingst (21. April 2005): „Wenn Jecken küssen“, in DIE ZEIT, Nr. 17, S. 13.

²⁹ In obligatory referendums it is legally prescribed as to which issues can be put to referendum. In facultative referendums, citizens are able to call a referendum on a law proposed by parliament. For this reason, this instrument is almost always used as a means of veto.

³⁰ This is regularly confirmed by opinion polls carried out by Eurobarometer.

³¹ Insofern handelt es sich bei der EU um eine Mischung zwischen durchbrochener horizontaler und vertikaler Gewaltenteilung. Horizontale Gewaltenteilung meint die beschriebene Trennung von Legislative, Exekutive und Judikative. Vertikale Gewaltenteilung dagegen meint die Trennung der Zuständigkeiten zwischen einander über- bzw. untergeordneten Institutionen nach dem Subsidiaritätsprinzip.

³² Dieses kann ihm aber in Sonderfällen eingeräumt werden, (Art. I-34 (2)). Davon ist im Verfassungsentwurf aber nur an ganz wenigen Stellen Gebrauch gemacht haben, z.B. Art. I-330 (1). Zudem handelt es sich dabei ausschließlich um Fragen, die das Europäische Parlament betreffen, z.B. ein einheitliches europäisches Wahlrecht zum Europaparlament.



³³ Es bleibt abzuwarten, wie sich die beschriebene europäische Volksinitiative auswirken wird.

³⁴ Innerhalb der letzten 10 Jahre hat sich die EU-Beamten­schar damit um 12.000 erhöht. Alle Zahlen aus Friedrich, H.: „Die EU-Bürokratie schafft noch Arbeitsplätze“, Frankfurter Allgemeine Zeitung, 8.3.2005, S. 19.

³⁵ Siehe etwa den Reader „Lobby Planet - Guide to Brussels“ des Corporate Europe Observatory (CEO). <http://www.corporateeurope.org/docs/lobbycracy/lobbyplanet.pdf>

³⁶ Z.B. Thomas Leif, Rudolf Speth (2003): „Die Stille Macht“. Verlag für Sozialwissenschaften.

³⁷ Rat der Europäischen Union: Rahmenbeschluss des Rates über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten, 7.6.2002.

³⁸ Dazu zählen u.a. Terrorismus, Menschen- und Waffenhandel, aber auch Cyberkriminalität, Nachahmung und Produktpiraterie.

³⁹ <http://www.heise.de/tp/r4/html/result.xhtml?url=/tp/r4/artikel/19/19849/1.html>

⁴⁰ European Commission: Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, 23.2.2005, S. 4.

⁴¹ Der vollständige Absatz 2 des Artikel 16 GG [Staatsangehörigkeit - Auslieferung] lautet: „*Kein Deutscher darf an das Ausland ausgeliefert werden. Durch Gesetz kann eine abweichende Regelung für Auslieferungen an einen Mitgliedstaat der Europäischen Union oder an einen internationalen Gerichtshof getroffen werden, soweit rechtsstaatliche Grundsätze gewahrt sind.*“

⁴² Hipp, D.: Fehler im Denksystem, Der Spiegel 16/2005, S. 48.

⁴³ Vgl. u.a. Bittner, J.: Gleiches Unrecht für alle, DIE ZEIT v. 6.4.2005, Nr. 15; Darnstädt, T./Hipp, D.: Die Leviathan-Frage, Der Spiegel 11/2005, S. 56-58; Prantl, H.: Karlsruhe contra Brüssel, Süddeutsche Zeitung, 11.4.2005, S. 4; Hipp, a.a.O., S. 48-49.

⁴⁴ Martin Klingst (21. April 2005): „Wenn Jecken küssen“, in DIE ZEIT, Nr. 17, S. 13.

⁴⁵ „Die Mitgliedsstaaten verpflichten sich, ihre militärischen Fähigkeiten schrittweise zu verbessern“, Art. I-41 (3)

⁴⁶ Die Einrichtung der Rüstungsagentur geht auf eine jahrelange Lobbyarbeit der europäischen Rüstungsindustrie zurück, vgl. Frenzel, M.: Die Ghostwriter, Deutsche Welle, 30.5.2004, abrufbar unter <http://www.dw-wprld.de/dw/article/0,1564,1217551,00.html>. In Bezug auf den Konventsprozess schreibt die Deutsche Welle ebenda Folgendes: „Die Unterstützung geht soweit, dass Experten sogar davon sprechen, dass die Lobbyisten bei der Beschreibung der zukünftigen Verteidigungsagentur heimlich die Feder geführt hätten.“. BITS (the Berlin Information Center for Transatlantic Security) expects an increase in arms expenditure by the Agency, cf. Steinmetz, C: „Es ist eine Aufrüstung“, Deutsche Welle, 29.5.2004, abrufbar unter <http://dw-works.de/dw/article/0,1564,1213857,00.html>.

⁴⁷ Siehe Beetham, D., Bracking, S., Kearton, I., & Weir, S. (2002). *International IDEA handbook on democracy assessment*. The Hague, Netherlands: Kluwer Law International; Lauth, H.-J. (2004). *Demokratie und Demokratiemessung. Eine konzeptionelle Grundlegung für den interkulturellen Vergleich*. Wiesbaden: VS Verlag für Sozialwissenschaften.

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⁴⁹ Aus: Abromeit, H. (2001). Ein Maß für Demokratie. Europäische Demokratien im Vergleich. *Reihe Politikwissenschaft, Institut für Höhere Studien, Wien, 76.*