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A Polity without a State?

European Constitutionalism between Evolution and Revolution

By

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Abstract

In this paper the relationship between constitution and state is analysed. The EU's constitutional structure is evaluated according to three ideas of constitutionalism: the evolutionary or functionalist idea; the power-binding idea; and the power-establishing or revolutionary idea. It is found that one can claim that the EU has a constitution both in functional and power-constraining terms. What is lacking though is the revolutionary idea of a democratic constitution made by the people, facilitated through strong publics and authorised through general public debate. It is not the conventions of an elite remote from the public but only the citizens themselves who can turn the legally existing constitutional text books against the reality of European law.

Three Ideas of Constitutionalism¹

Europe still has a constitution without a state. Since the 60s of the last century legal scholars and the judges of higher European and national courts have referred to the treaties *as if* they were the European Constitution.² The European Treaties seem to include all the essential elements of a constitution:

- basic rights - including political rights and even *affirmative action* (Art. 13, 141 TEC) and a variety of social rights (Bogdandy 1999: 26);
- an organizational (or procedural) part (Organisationsrecht): procedural norms, norms dealing with the order of institutions, competences etc;
- a clear distinction between primary law which is on the higher level, and secondary law which is governed by the rules of primary law.

After Maastricht and Amsterdam the treaties of the many European communities constitute one and only one European Community. Before Amsterdam, there was a variety of treaties and the same variety of communities; after Amsterdam, there is a variety of treaties but only one community (Bogdandy 1999: 10, 32f, 38ff). Visible to every European citizen is the unity of Europe in our passports which are first those of the European Community, and then of the member state. Europe today is a *supranational political union* with a single – yet expandable and expanding – territory, and a single citizenship (Bogdandy 1999: 10, 13, 25, 32f; Ipsen 1987: §181, 8, 41, 50, 53-54). Yet here we are confronted with a first problem which seems to be one of the specific problems of this new and unique type of political union. If the European Union (EU) is *one* community with a plurality of treaties, then the Schengen Convention refers to a different territory than the treaties of Maastricht (TEU) and Amsterdam (TEC). Norway, for instance, belongs to the territory inside

¹ I have to thank my colleague Geoff Parker from the English Department of Flensburg University, who did a wonderful (fulltime-) job in correcting my German English.

² BverfG 22, 293 (296); ECJ RS. 294/ 83 Les verts/ Europäisches Parlament, 1986, 1357 (1365); Grimm 2001a: 215f (note 1), 229f; Grimm 1997: 9; see further: Augustin 2000: 249, 274 (note 248); Weiler 1991: 2407; Schwarze 2000: 464f; for critical remarks on the German translation of ‘charte constitutionnelle’ in the ‘les Verts – Decision of the European Court of Justice as ‘Verfassungsurkunde’ see: Möllers 2003, quoted from the copy: 37.

the EU's external borders as defined by Schengen, but it is not a member state of the EU.³ The Norwegians have no European passport, but they do have European borders and, incidentally, European law without being citizens of the EU. They are addressees of European law with a *status negativus* but without *status activus* (Jellinek 1979: 82).

Today, most of the legislation of all member states (and even of non-member states like Norway) stems from the legal bodies of the Union.⁴ In cases of conflict European law breaks national law, including posterior parliamentary legislation and constitutional norms (Ipsen 1987: RN 32; Grimm 2001a: 229f; Augustin 2000: 253; Scharpf 2002: 76; Joerges 1996a: 78ff; Joerges 1996b: 230; Kaufmann 1997: esp. 522, 526f, 534; Alter and Meunier-Aitsahalia 1994; Alter 1996; 1998: 121; Heintzen 1994: 574ff, 585ff; Classen 1994: 240f; 2002: XIVf). Even the German Constitutional Court (*Bundesverfassungsgericht*) has given up its claim to be the last interpreter of basic rights concerning German citizens and German territory.⁵ After the – up to a point - revolutionary Treaty of Amsterdam there exists a European *unity* of civic rights, of budget, of political action, of organisations, an internal and external legal personality, an order of legal steps (*Stufenbau des Rechts*), and the European Court of Justice (ECJ) claims the so-called ‘competence-competence’ (*Kompetenz-Kompetenz*) for its judgments and in all matters concerning the interpretation of European law (Bogdandy 1999: 38ff; Ipsen 1987: RN 9, 13; Brunkhorst 2002a: 531f; Schwarze 2000: cit. 464f; Eriksen 2001: 9; Oeter 1995: 687).

From a *functionalist* point of view there is no doubt that the European Union, which is neither a state nor a state in the making, has a constitution. There exists a ‘structural coupling’ of law and politics, and from the functionalist point of view a constitution that is modern - (and not only a *politeia* or any universal concept or a system of norms that submits law to political power, or *vice versa* political power to the judges) - is the *structural coupling of the legal and the political system* (Luhmann 1990; 1993: 440ff;

³ Where not specified as the Treaty of Maastricht, I use ‘EU’ or ‘European Union’ as the name of the whole community.

⁴ Bogdandy 1999: 33 (note 121); Zürn 1996: 11: In France already by 1992, 53 % of all legal acts had a European background.

⁵ BverfG 2 BvL 1/97, 6 June 2000; see Scharpf 2002: 76.

1997: 92ff; Neves 2000: 80ff). This is the *first* - evolutionary - idea of a constitution. European primary law stabilizes the borders that separate the legal from the political system and secures the reciprocal independency of both systems. Yet the point here is that structural coupling fulfils this function of separating two autonomous social systems by organising the reciprocal dependencies that connect both social systems systematically. Independence here grows both through and together with the growth of reciprocal dependency.⁶ A constitution understood in a functionalist way specifies (1) regulative or procedural norms, and (2) constitutive or enabling norms. The *enabling* norms allow the permanent political change of law on the one hand (political legislation), and the autonomous interpretation of law by courts on the other (judicial reinterpretation of political action). The *procedural* norms have the function of legalizing political intervention in the legal system. Legalized political intervention causes a permanent *irritation* of the legal system by changing political will formation. Yet procedural norms also regulate the judicial review of political decisions and actions, and this causes permanent *irritation* of the political system. Because their independence is guaranteed by the constitution, both systems can influence each other, and *learn* from each other through *reciprocal* irritation. There is no doubt that Europe has a constitution in the functionalist meaning of that term. What we have may be called a ‘treaty’, or it may be called a ‘constitution’, but in any case we are in the middle of an ongoing *constitutional evolution*.

Usually the structural coupling of law and politics presupposes the implementation of democratic elections, the separation of powers, the formation of political parties and associations, and the effective guarantee of egalitarian basic rights (Neves 2000: 84ff). But from a mere functionalist point of view this *must* not be the case. The very idea of systems theory is that there exists *nothing* in the world which has no functional equivalent. Therefore – from a functionalist point of view - one can imagine constitutional regimes which are modern but which are not democratic or egalitarian, for instance what John Rawls has called ‘well-ordered hierarchical

⁶ This – as a sociological insight – goes back to Durkheim (1988) (see especially the foreword of Luhmann); see further: Di Fabio 1991.

societies' (Rawls 1993).⁷ As an *evolutionary* advance (Luhmann 1990) the structural coupling of law and politics is not at the same time a *revolutionary* advance (Brunkhorst 2003).

What the *constitutional revolution* (be it factual as in the American and French cases of the late eighteenth century, be it counterfactual as in the case of the German Basic Constitutional Code from 1948 (Grundgesetz)) adds to the *social evolution* of constitutionalism (as in the cases of England, Germany in the nineteenth century, the EU or functionally differentiated global systems today) is more than illusions of feasibility, and celebratory explanations ('*Machbarkeitsillusionen*', '*Gesänge und feierliche Erklärungen*'), as Luhmann once put it ironically (Luhmann 1990: 176, 180, 184). From the *revolutionary* or – more generally – *normative* point of view of the citizens of a polity or – more generally – of those who are affected by binding decisions, constitutions are systems of *egalitarian legal norms that enable democratic politics* (Möllers 2003: 56; Jesch 1961; Habermas 1992; Maus 1992; Brunkhorst 2002b; Ch. I, 3). It is thus not clear that Europe has a fully fledged constitution in the normative meaning of a system of rights and organizational (or procedural) norms that enable democratic politics. There exists, as we have seen, egalitarian rights (TEU Art. 6 Para. 1, 2; TEC Art. 2, 12, 13, 17-22, Art. 144, 255; Para. 3, Title III; and *de lege feranda* the Charter of Basic Rights) and a strong commitment to democracy on the European level (TEU Art. 6 Para. 1, 4; TEC Art. 19, 22). The treaties (as well as the blueprint of the new 'Constitution of Europe') prescribe a system of double legitimation by states *and* peoples or citizens. The legal subjects of the European Union 'are not only the member states but their citizens as well'.⁸ The European Parliament today is no longer only a parliament of a 'more and more closely integrated Union of the peoples of Europe' (TEU, Art. 1, Para. 2 – my translation from the German text) but is also the parliament of a single people or the European citizens, and this notion of a 'people' includes in principle all addressees of European

⁷ One can here argue that non-democratic constitutional regimes are only in a 'nominalist' or 'symbolic' (see: Löwenstein 1997; Neves 1998) and not in a 'normatively' effective way *constitutional* regimes, as Neves argues in Neves 1992; see also Neves 2000: 84. But this, I guess, means to smuggle in some normative arguments into systems theory.

⁸ Heintzen 1994: 570 (my translation); see further: Augustin 2000:225.

law.⁹ Henceforth as a set of legal documents the European treaties are a constitution not only in a functionalist (or evolutionary) way, but also in a normative way.

But here we have to draw a further distinction. In the light of the tradition of a Rule of Law regime that limits political power and domination, Europe has a *normative* constitution. Referring to this (English or German) tradition, a constitution is defined basically as a ‘legalization of state power’ (Grimm 2001a: 229 (‘Verrechtlichung der Staatsgewalt’)). This is the *second* – power binding – idea of a constitution. But this is not the meaning of a fully fledged *revolutionary* constitution which belongs historically to the tradition of the French and American Revolutions of the eighteenth century Möllers 2003: 4ff). Such a constitution is a *foundation of political power* (‘*herrschaftsbegründend*’). A normative constitution that binds state-power can be heteronomous in the sense that it has been imposed on the people, they may accept it or not (for instance, the German Constitution of 1871). Differing from this second case, a normative constitution which is revolutionary is – like the German Constitution of 1918 - a constitution that goes back to the constituting will of the people (*pouvoir constituant*) (Siéyes 1981). The basic constitutional question here is not – as Hannah Arendt once nicely put it – how state power can be ‘limited’, but how the power of a citizenship (or a people) can be ‘established’ (Arendt 1974: 191, 193). Here we have the *third* – power establishing – idea of a constitution which I – following Arendt - will call revolutionary, be it the outcome of an actual revolution or not.¹⁰

Such a revolutionary constitution presupposes the existence of a *strong public*, and I define a strong public here as the normatively effective, constitutional coupling of

⁹ Oeter 1995: 682f; Augustin 2000: 377 (people in the making), further: 108ff, 370ff, on the very concept of a (heterogeneous) people: 310f, 336ff, 345, 347f, 375f, 387, 390, 397, 402f; on the addressee concept of a heterogeneous people, see further: Oeter 1999: 50, 53.

¹⁰ Möllers in the quoted manuscript draws a similar distinction between evolutionary and revolutionary ideas of a constitution, but does not restrict the term ‘evolution’ to the process of ‘structural coupling’. For a more restricted idea of a revolutionary constitution which binds constitution to sacrifice (and hence to a substantial notion of ‘collective identity’), and therefore rejects the idea of a European constitution, see: Haltern 2003. On Arendt’s idea of a revolution: Wellmer 1999: 125-156.

moral *influence* and political or administrative *power*, in other words: the constitutional coupling of convincing *discussions* – the very source of moral influence – and *binding decisions* – the very source of political power. In a fully-fledged constitutional regime the moral influence of a public is enabled by:

(1) a working system of *basic rights*.

They have to guarantee the inclusion of everybody's *voice*. This is enough of normatively egalitarian constitutionalism to constitute a *weak* public. But for the formation of a *strong* public, discussions and moral influence regularly have to be transformed into binding decisions and administrative power. This can be done only by means of :

(2) a working system of *egalitarian organizational and procedural norms* (universal suffrage, general elections, popular votes, political parties, egalitarian representation etc).

These norms have to guarantee the inclusion of everybody's *vote*. Together with the social condition of any public influence which relies on:

(3) the communicative use of mass-media of dissemination and the formation of associations of civil society,

a revolutionary constitution constitutes, and is reinforced by a strong public. Such a strong public does not presuppose any homogeneity of culture or language, and can be designed with a variety of different cultures and languages, but it presupposes that there exists a working egalitarian procedure to transform public discussions into binding decisions.¹¹ There is some reasonable doubt that Europe today has, or tomorrow – after the ratification of the new Constitution of Europe – will have a democratically appropriate revolutionary constitution.

¹¹ See now for a strong criticism of Grimm's and others' *single language* thesis: Hanschmann 2003; see further: Oeter 2002: 55.

Constitutional Evolution in Europe – Planned and Unplanned Change

The existing European constitution is a constitution *in* permanent, deliberative *making*: a ‘constitution-in-the-making’ (*Wandelverfassung*: Ipsen) (Ipsen 1983: 32; Schuppert 2000: 246). This European Constitution-in-the-making has a *latent* and a *manifest* aspect. European constitutionalism on the side of social *latency* is mere evolutionary development, whereas on the side of *manifest* politics it is a deliberately planned process, the *making* of a constitution. In the evolutionary process the national and the European legal professionals together with the new class of European bureaucrats, lobbies, councillors, agents and politicians play a major part. Case-studies made by e.g. Karen Alter or Susanne Schmidt have shown especially that legal dogmas from European Court decisions of the 60s, such as those of *European law supremacy* or *direct effect*, and the growing constitutional power of the Court and the Commission are the effect of a silent evolutionary process.¹²

During the 60s the power of the European Court of Justice (ECJ) was weak, and major European states like France or the UK were on a track away from the European Community. Precisely at that time, however, *national courts* started to apply more and more European norms. After some experiences with the rejection of their judgments through higher courts, they found it more convenient to accept the offer of the ECJ to back their decisions with legal expertise (the so-called ‘Vorabentscheidungsverfahren’ (Ipsen 1987: RN 35, 58-63. 85-86). The effect was that the higher national courts usually did not then dare to cancel a decision of a lower court that was backed by ECJ reports. So by a great *variety* of single court decisions European law became step by step prior to national law and a new level of European legal integration – security of expectations through the national application of European law (Luhmann 1987: 99, 105; 1993: 126, 131f, 152) – was evolutionarily *selected*, and *re-stabilized* through the functional differentiation of an autonomous legal system on the supranational level of the EU (Alter 1996). The centre of this system now is the system of courts (Luhmann 1993: 321). The same type of

¹² Alter 1996: 458ff; Schmidt 1998; for the legal foundations, see Ipsen 1987: RN 16, 58-61 (on ‘supremacy’ and ‘direct effect’).

evolutionary process is observable in the politics of liberalizing European telecommunications or electricity energy markets in the 80s. Here the European Commission's legislative power grew to a new level, and the Commission – usually backed by the now stronger ECJ – became the first guardian of the Treaties.¹³ Another example of the silent evolution of European constitutional institutions is the politics of re-regulating the common market which was conducted by European legislative bodies during the 80s and 90s. Re-regulating politics were 'largely unforeseen by the European Treaties', and they functioned as a necessary compensation of the negative side-effects of de-regulating national markets which was foreseen by the treaties (Everson 1999: 282ff; Eriksen 2001: 7). In any case the centre of the now *restabilized* autonomous political system of Europe is not – as in the constitutional design of the nation state – the parliament but the executive bodies (Commission, Council). Here we have a clear case of 'gubernative *Rechtsetzung*' (governmental legislation) (Bogdandy 2000). But different from the case of the nation state where governmental legislation still can be described as most important but *additional* to parliamentary legislation and *under control* of the parliament, this is no longer the case with supranational organisations like the EU (Bogdandy 2000: 91). Here governmental legislation is mostly out of parliamentary control, and *replaces* most of parliamentary legislation.

On the other hand there are the great decisions of consensual treaty change by the Council of Ministers like Maastricht, Amsterdam, or Nice, and there are also major political and economic problems, which are usually solved by the permanently cooperating leaders of state governments. Here planned changes, backed by great power, are the rule, and political action is located on the *intergovernmental* level – driven primarily by national economic interest. Whereas unplanned evolution is more on the side of *supranational* institutions, deliberative intervention and planned change – as Moravcsik has shown – is the role of *intergovernmental* consent.¹⁴

¹³ Schmidt 1998; see further: Scharpf 1999.

¹⁴ Moravcsik 1998: 3ff, 18, 84 ('Wheat, not nuclear weapons or French grandeur, was the vital interest that fundamentally motivated de Gaulle's European policy'), 150, 317.

But planned or unplanned, voluntary or involuntary, latent or manifest – constitutional social change in Europe has an asymmetrical structure. In spite of a lot social welfare efforts, social embedding politics, new regulatory institutions, equality politics, affirmative action, environmental politics etc., most of social change in the Union is directed towards *negative integration* (Scharpf 1999: 47ff; 2002: 76f). Positive integration through social welfare politics, distributive justice etc. needs a system of domestic resources based on individual European taxes. This is still foreseen in the treaties, and it seems to be feasible *in principle*, especially if it comes to taxes whose loss on the national level is partly due to the enforcement of the common market. These are primarily taxes on savings and incomes and corporation taxes (Menéndez 2003a). But even the Constitutional Convention did not dare to put this on the agenda. This is only partly due to a (not very democratically established) economic theory of neo-liberalism which still provides the background philosophy for the convergence and deficit criteria of the Union and the politics of its completely independent central bank (Guehenno 1996).

More important here is the fact that the European Constitution in permanent change (*Wandelverfassung*) as a whole is the product of an evolutionary process *without a revolutionary backing* or any functional equivalent for a revolutionary constitution that constitutes a new political and social regime by the will of the people. In particular, the most powerful institutions of supranational government, the Central Bank, the Commission, the Court, have – contrary to their national equivalents - no direct democratic legitimation at all, and to change their legal competencies needs consent and not only qualified majorities, as in the case of national constitutional change (Scharpf 2002: 75f). Without a direct democratic backing these institutions are powerful when it comes to negative integration, which is completely backed by the *intergovernmental* consensus of the Treaties. Yet positive integration (taxes, redistributive politics, European welfare etc.) lacks even the indirect democratic backing of intergovernmentalism. This – in my view – is the main difference that separates the existing (and coming) constitution of the EU from the formation of the US constitutional regime in the eighteenth and twentieth centuries, or from the ‘mega constitutional politics’ of Canada, which in a lot of other aspects, as Fossum has shown, is more comparable with the European constitutional system than the United

States (Fossum 2003). Whereas a lot of pressure for all the major changes within the 1982 constitutional regime of Canada stemmed from *below*, from citizens' appeals and movements, from civil society, all important constitutional change in the EU – including the Constitutional Convention – has come from *above*, the product of a more or less closed elitist politics, which is the politics of a ruling elite of governmental, administrative, and legal professional agents and agencies. When it comes to the US, the instructive comparison with the early US system of taxation, undertaken by Menéndez, is convincing in regard to the close relation between taxation and democratic representation, but a major difference remains (Menéndez 2003a: 35ff). It is much easier to call for the democratisation of an externally imposed, and undemocratic but existing system of taxes, than to call first for a new tax base of all public expenditure, and then for representation (Menéndez 2003a: 50).

The Democratic Deficit of Supranationalism

The so-called democratic deficit of the Union is based on the social structure. The great winners by the Union is the new ruling class of governmental leaders, administrative agencies and legal and scientific professionals. States conduct themselves as one single, internally united actor only in legal terms. The idea of an indivisible subject stands behind the fiction of states as masters of the treaty. The legal fiction of sovereign states presumes that governments and all internationally acting national actors can be controlled by their national parliaments and by their peoples. But this is more or less mere fiction, and at the very least an ideology to keep the politically ruling class in power (Wolf 2000). If it comes to the question of winners and losers, of social class interest and political power, we have to draw distinctions between the nation and the government, between national interest and that of the so-called political class, between those who are actually in power, and those who are more or less disempowered but should be in power, if we take the constitutional norms seriously.

A democratic regime that takes the egalitarian norms of the constitution seriously needs *transparency* of decision-making and a *short* chain of legitimacy (Krajewsky 2001: 167ff, 176f; Oeter 1995: 695f, 699ff; 2002:49). The first paradigm cases of

fully-fledged democracy, therefore, are all *constitutional regimes of direct or parliamentary democracy* (see Fig. 1, box 1).

In the second case of a *long* chain of legitimacy and *transparent* decision-making we are concerned with *democratic intergovernmentalism*. This case is sometimes democratically problematic because of the *long* chain of legitimacy. One example may be NATO - if we look at it from the point of view of its basic idea (see Fig. 1, box 2).¹⁵ Another example could be the branches of intergovernmental regimes (Council of Ministers and Prime Ministers) within the EU. But here we have to take into account the fact that only the first consent to the Treaties has sufficient democratic backing, because all subsequent changes can be implemented only with the consent of all other member states (Scharpf 2002: 74, note 15).

The third case is that of a regime with a *short* chain of legitimacy and a decision-making procedure which is *non-transparent*. This actually is the case with *populist regimes*, or what O'Donnell has called in a more specific way *delegative democracies* (O'Donnell 1994: 55-68). Here we have for example a directly elected president, but there is neither sufficient (legal) access of the public nor sufficient (legal) control of the people or their direct representatives over those who are really in power. Therefore most of the Latin-American (or the Russian) presidential regimes are omnipotent when it comes to decision-making, but impotent when it comes to the implementation of their advanced legal programs (O'Donnell 1994: 55ff). Even if in such a regime the system of public communication and civil society (newspapers, television, NGOs, protest movements etc.) works well, there are – for example - no charges brought against those who are responsible for criminal acts of state-power. This was the case with the Brazilian 'street kids' or the anti-corruption campaigns in most Latin American states: 'Cases of corruption are reported daily in the mass media but very little juridical investigation takes place' (de Souza Santos 1999: 59) (Fig. 1, box 3).

¹⁵ Meyer 1997: 110; Tomuschat 1997: 114. Due to its democratic control by national parliaments the NATO was not very useful to support a war of aggression during the Iraq-crisis in February 2003.

In this last case we have no democracy at all, and this is the case of *non-transparency* combined with *long* chains of legitimacy which is true for all *transnational or supranational organisations* today, like the UN, WTO, or EU. They are, if we regard matters pessimistically, *post-democratic* (Guéhenno 1994), or, if we regard matters optimistically, *pre-democratic* regimes – on the road to a ‘third democratic transformation’ that comes after the ancient *polis* and the modern nation-state (Dahl 1989) (*Fig. 1, box 4*). These regimes are regimes of *hegemonic law* (Brunkhorst 2002b: 171ff). They are in favour of the social class structure described at the beginning of this paragraph because they tend to become – as Max Weber once suggested with reference to the German Imperial State (*Kaiserreich*) – a ‘system of organized irresponsibility’ (*‘System organisierter Verantwortungslosigkeit’*).¹⁶

Figure 1

<i>long</i>	2 - democratic intergovernmentalism	4 - trans-/ supranational organisations
<i>short</i>	1 - direct or parliamentary democracy	3 - delegative democracy/ populist regimes
chain of legitimacy/ /decision-making	<i>transparent</i>	<i>non-transparent</i>

So it seems clear that in a political order that has long chains of legitimacy and highly non-transparent processes of decision-making like the EU, this structure is good only to keep those groups and organizations of the united European nation states in power who *are* actually in power. The thesis of the states as sovereign masters of the treaties is so far nothing other than an *ideology*. Keeping the states masters of the treaties actually weakens democracy, internal *and* external to state borders. The united political class of state executives needs only *output* legitimation, an efficient but not very democratic Europe. *Input* legitimation therefore is *only* in the interests of the

¹⁶ For an application to the EU: Oeter 1995: 696, 699; the quote is: Weber 1921: 126ff.

present losers in the unification process, the parliaments, the unions, the peoples. Fritz Scharpf's important question: Europe – efficient *or* democratic?, has a realistic background in the fragmented and socially differentiated power structure of Europe which is usually shadowed in the political and scientific discourse.

Deliberative Democracy

Is deliberative democracy a way out of the democratic deficit of supranationalism?¹⁷ It depends. In relation to the EU, the idea of deliberation first at all allows a conceptually as well as empirically reasonable distinction to be drawn between *supranational* and *intergovernmental* modes of decision-making. Whereas intergovernmental decision-making is the effect of power-backed *bargaining* processes, supranational decision-making (Commission, Court and Parliament) has become more and more a matter of *arguing*, backed by convincing reasons, primarily in the European Commission's Committees.¹⁸ For some scientific observers comitology has become the realisation of communicative rationality on earth. There is something true about that, because expert deliberation is essential for democratic legitimation in complex societies. Every specialized discourse is internally linked with democracy in the specific sense that the cognitive value, truth and validity of all expert judgments (of the scientific or the legal system) presupposes that *all* objecting voices have to be heard or taken into account - at least counterfactually. This is the basic idea of Peirce, Dewey, Habermas, Apel or Putnam. Consequently John Dewey or today Hilary Putnam suggest that the growth of *democratic* communication is the condition of possibility for the *solution* of social, political, economic and even technical problems and 'a requirement for experimental inquiry in *any* area' (Putnam 1991a: 64; Putnam 1991b: 217; Dewey 1984; Kloppenborg 2000). It is here where the enormous career of deliberative democracy in the present discourse on national, European and global political institutions starts.

¹⁷ See Bohman 1996; Bohman and Rehg 1997; Cohen and Sabel 1997; for a critical perspective, see: Schmalz-Bruns 1999; van Aaken 2002.

¹⁸ Joerges and Vos 1999; for the distinction between arguing and bargaining see: Elster 1991; for an application to supranationalism: Krajewsky 2001: 177.

But insight turns into blindness if we identify deliberation with democracy, because there is no democracy at all without *egalitarian procedures of decision-making*. We must therefore distinguish sharply between *deliberation* and *decision*. Democratic self-determination needs more than a right to express yourself (Möllers 2002). If democracy is rule by discussion, then it is not only discussion but also ruling, and if ruling is not organized by egalitarian procedures, then there is no democracy at all. The paradigm cases of deliberation are those of scientific or juridical discourse. The paradigm cases of democratic decision-making are those of the parliamentary debate or the public debate which lead to egalitarian votes and elections, hence binding decisions. These are *linked to, but not backed by* argumentative consent (or reasonable dissent) like court decisions (judgements) or scientific assertions. The highly specialized deliberation of professionals is linked to democracy only in the material fact-based (*sachlich*) sense that a true *problem-solving discourse* has to take into account all possible perspectives concerned, all possible objections, criticism, proposals, and if it comes to the application of law: all interests and even needs which are affected by a legal decision (Günther 1988). EC Committees have to deliberate about the BSE crisis, technical standards, the health of consumers and all further relevant issues. In all these cases as well as in court decisions, a broad spectrum of NGOs, legal and scientific experts, party-members, lobbyists, minority groups, sexes, ages, outsiders and so on, are very important to keep committees or courts open for new, neglected or silenced voices. But deliberations which have to be *materially inclusive* in respect of all the facts need not be *socially inclusive*, like parliamentary decisions, popular elections, or voting. The deliberative supranationalism of EC Committees (or the ECJ) is not, and – at the price of its problem-solving capacity – cannot be *socially* inclusive. Therefore, deliberative supranationalism is not, and cannot be, a normatively appropriate equivalent or alternative to democratic legitimation and pluralistic representation. There is no hope for compensation of the representative deficit of supranational organisations only through deliberation (Everson 1999: 292, 296f, 298). Deliberative democracy, administrative action closer to the citizens (*bürgernahe Verwaltung*), a ‘cooperative state’ etc.:

- *first* ‘cannot guarantee that *each* member of the society is only represented *once*,’ and

- *second* ‘does not guarantee that *all* members of the society are *actually* represented’ (Krajewsky 2001: 185f).

If materially inclusive factual deliberation goes together with non-democratic or democratically insufficient, hence socially exclusive representation, nothing (and not the best Habermasian discursive rules) can guarantee that deliberation does not fall back into an ideology which only disguises particular social class interests. It is here where *legal formalism* comes in: ‘The fact that deliberation is just and civic now is no guarantee that it will always be so, and some measure of formal legal intervention may nonetheless be required to ensure that the deliberative process does not fall prey to powerful and organized interests.’¹⁹ The usual scientific discourse does not require much legal formalism, because specialized scientific argumentation does not change the world by itself. *Problem-solving procedures* need only open doors to ‘let all noises in’ (John Cage), because it could be an unheard voice (Jürgen Habermas). But *decision-making procedures* require some more compulsory means of guaranteeing legal equality.²⁰ If the search for scientific and technical insight is directly related to the implementation and interpretation of law’s binding decisions, then the (Deweyite) scientific ‘culture of dynamism’ must be replaced by a ‘culture of formalism’ (Koskenniemi 2001: 494ff). Legal formalism is the only guarantee for the voices of the weak, silenced and poor citizens to be taken into account, even in cases where the goodwill of those who have strong, elaborated and rich voices turns into the bad will of their particular interests.

Nothing other than legal formalism prevents material fact based, inclusive deliberation from producing social class biases. This is so because: ‘Deliberative models are often favoured by the deliberative class – primarily professors who are, naturally, empowered by any process which privileges that which they have and which legitimates, even aggrandises, their status and actual or pretended *modus operandi*, and in which the model for ideal government is a well-conducted seminar’ (Weiler 1999: 348). A social class bias – be it the class of university professors,

¹⁹ Everson 1999: 306; in the same direction with regard to citizens participation in governmental legislation: Bogdandy 2000: 86.

jurists, politicians, higher officials, ecology activists, or industrial leaders – seems to be unavoidable if democratic deliberation goes together with undemocratic representation. If the weak public of deliberative bodies – the so-called ‘auditive democracy’ (Eriksen and Fossum 2002: 420) - does replace the strong public of representative political bodies, then we are approaching the case of an ‘unconstitutional role of a constitutional body’ (Eriksen and Fossum 2003). The finality of the Union then will no longer be democratic, but at best ‘good governance’, enlightened absolutism, and firm policing (*‘gute Polizey’*).

State Sovereignty, Popular Sovereignty, and the Internal Contradiction of European Constitutionalism

Since Maastricht and Amsterdam at the latest the European Treaty constitutional system is no longer legitimated by the intergovernmental treaties alone, but *firstly* by the ever more closely integrated (plurality of) peoples of Europe, and *secondly* by the *Union citizens as a whole* who are a *single European people in the making*.²¹ European citizenship is backed by the principle of European (and not member state) democracy which is acknowledged explicitly in Art. 6, Para. 1 TEU, and in the system of citizens’ rights in part two of the TEC, and backed by the increasing (but still too weak) power of the European Parliament. Therefore the secession of one or even all member states is *legally bound* to the participation of the Union citizens or Union people: they have to be asked (Brunkhorst 2002a: 534ff). The Union now has a ‘double legitimation’ (Classen 1994: 259f). Yet the *intergovernmental* track of legitimation is formally democratic but materially undemocratic, because it combines lack of transparency with long chains of legitimacy. And the other track, the *supranational* track of legitimacy is insufficiently democratically institutionalised, from a formal point of view as well as from a substantial point of view.

²⁰ For the distinction between these two types of procedural rationality, see: Habermas 1990: 125f.

²¹ Augustin 2000: 108ff, 377, 393; Fossum 2003: 9, 26 (with the interference: ‘Citizens as rights bearers cannot be content with a system of constitution making in which the heads of government negotiate among themselves’). Fossum 2001: 15 (with reference to the ‘Charter’).

The old idea of *state sovereignty*, which is deeply rooted in German constitutional discourse of the nineteenth century (Möllers 2001; Schönberger 1997; Oeter 1995), is presupposed only by the intergovernmental track of legitimation. But this legal fiction is - *firstly* - deeply relativised by the inclusive principle of a democratic people. In the constitutions of the member states the meaning of ‘people’ is procedural and not substantial, and this idea goes back to the constitutional revolutions of the eighteenth century in France and America (Maus 1994: 602ff; Hofmann 1995: 17). The procedural meaning of ‘people’ includes the idea that those who are the addressees of law should be the authors of law (Habermas 1992; Oeter 1999: 38, 50ff; Augustin 2000: 370ff, 397, 400, 402f; Brunkhorst 2002b: 102ff, 226ff). Because borders concern always both sides of a border line, *secondly* the will of both sides - if we follow the principle of democracy - has to be taken into account in all questions concerning state borders. Moreover, *thirdly*, the legal fiction of state sovereignty is relativized e.g. by the Art. 24 Para. 1 of the German Constitution (‘Der Bund kann durch Gesetz Hoheitsrechte auf zwischenstaatliche Einrichtungen übertragen’) (see Oeter 1995). *Fourthly* and at the very least, state sovereignty today is relativised by the reciprocal interpenetration of European and national law, which mediates and even assimilates the law of all states of the Union and abolishes the nineteenth century fiction of impermeable states.²²

Contrary to the notion of state sovereignty, the notion of *popular sovereignty* must be strictly separated from the former.²³ The clear-cut distinction between autonomous legal self-determination (*Selbstbestimmung*) and heteronomous determination by another’s alien will (*Fremdbestimmung*) therefore no longer implies the distinction between statehood and not.²⁴ Popular sovereignty only means that those who are affected by binding legal decisions have to be included as free and equal members in the procedures of producing these decisions. Popular sovereignty has no substantial meaning at all and aims only at the completely constructive formation of a common

²² Bogdandy 1999: 27f; in general: Langer 1994: 17ff; Maus 2001; Brunkhorst 2002b: 146ff).

²³ See: Brunkhorst 2002b: 96ff; Oeter 1995: 671f, 675f; Walker 1998: 359f; see further: Walker 2001.

²⁴ This is the thesis of Grimm (2003) (‘Denn zwischen Fremdbestimmung und Selbstbestimmung hinsichtlich der rechtlichen Grundordnung verläuft die feine Grenze zum Staat.’) For earlier statements in the same direction, see Grimm 2001a: 250ff; Grimm 2001b: 265, 270.

will from case to case.²⁵ Therefore the non-substantial notion of popular sovereignty is not only prior to all concepts of substantial communities or states, it can also be separated from states and any particular community. Explicated in this way, the legal idea of popular sovereignty is presupposed by the second, the supranational track of democratic legitimation of European law.

There is a clear tension between these two tracks of legitimation. On the one hand, the *organizational* norms of the present treaty-based constitution (and the blueprint of the new constitution as well) are clearly in favour of the hegemonic dominance of the executive branches of the intergovernmental and the supranational European institutions (Council and Commission). On the other hand, there are the *rights* of the European citizens, and the explicit acknowledgement of the principle of democracy on the level of the Union, reinforced by a still *as-if-valid* Charter of Rights (which is part of the blueprint of the constitution).²⁶ The European citizens rights are clearly in favour of a European popular sovereignty which is the sovereignty of the people in the singular *and* the (more and more closely united) plurality of peoples of the Union. *The egalitarian rights of the European Citizens clearly contradict the non-egalitarian, hegemonically disturbed organizational and procedural structure of decision-making in the Union.* The democratic deficit of Europe relies on the fact that the citizens of Europe have rights, but have not given these rights to themselves: ‘But you could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and Jews were made citizens they enjoyed direct effect’ (Weiler 1997: 503). Yet Rule of Law without public autonomy is not well-ordered freedom but in the end well-ordered and convenient slavery. The history of the elitist integration of Europe is a paradigm case of *legalization without democratic politics*, effected by the political elites, backed and legitimated by the *freestanding authority* of the courts which apply and interpret European law. It resembles in this respect the old German Reich of 1871. At best, it limits political power, but does not establish it by the will of the people.

²⁵ See for example: Lepsius 2000: 390ff; Brunkhorst 2002b; Oeter 1999; Maus 1992; Habermas 1992; Kelsen 1981: 6ff, 60f, 84f.

²⁶ On this ‘as if’ character, see: Fossum 2001.

A Unique Evolutionary Advance

The European Union is not a state and - as far as we can see – is not on an evolutionary track to statehood. *Étatism* is misleading anyway. The argument of the famous Maastricht ruling of the German Constitutional Court that the Union is neither a federal state (*Bundesstaat*) nor a federation of states (*Staatenbund*) but something in between, an association of states (*Staatenverbund*), goes in the wrong direction. The word ‘state’ (*Staat*) is what all these variants of concepts have in common. But the Union is a unique political entity which is not only a post-national but a post-statist entity. Any constitution of Europe therefore has to be a *constitution without a state*.

There exists no federal force or authority (*Bundeszwang*), no federal army, police, jail, and all the other cruel means of state power (Bogdandy 1999: 33). The Union is an independent union of nation states which are just as independent as the Union itself (Bogdandy 1999: 13). Without an own monopoly of power, and without any material means of coercion to correct recalcitrant or insubordinate member states, the Union works quite well as a legal and political community. European law is implemented everywhere in Europe, applied by national courts, concretized by national parliaments which have no legal alternative, and which cannot reject any European directive. European law meanwhile affects *any* area of national life (Grimm 1997: 26). Henceforth what in social evolutionary terms is most innovative about the European Union is a completely *new division of powers*. This new division of powers is that between a non-statist and supranational legal and political order on the one hand, and on the other a still statist monopoly of power, and a statist dominance over most social welfare concerns.²⁷ Reduced to the important function of the old police state (*Polizey-Staat*) of the seventeenth century, the state has found an evolutionary niche in the storms of globalisation. The new division of powers makes constitutions without a state work. But these new constitutional regimes need strong and democratic nation states for the implementation and enforcement of supranational

²⁷ Alter 1996: 458ff; see further Poscher 2003: 6: ‘Die Nationalstaaten akzeptieren den Vorrang des Gemeinschaftsrechts, sie akzeptieren auch die instantielle Überlegenheit des Europäischen Gerichtshofs über die Rechtsprechung ihrer Gerichte sogar einschliesslich ihre Verfassungsgerichte. Eine eigene, geschweige denn eine ihrem normativen Anspruch nach oder gar faktisch überlegene Vollstreckungsgewalt der Gemeinschaft zeichnet sich hingegen nicht einmal am Horizont ab’.

law. This condition is fulfilled by the European Union but not – for example - by its Latin-American sister MERCOSUR, and not by other transnational or supranational organizations like the United Nations or the World Trade Organization which have a basic constitutional structure (in part) similar to the EU (Brunkhorst 2002c).

There seems to exist only one historical prototype, and this is a *confederation* ('Bund') of states. Historical examples are the North American Confederation from 1778/81-1788, or the *Deutsche Bund* from 1815-1866.²⁸ Here we have a similar division of powers as in Europe today. In some respects, these cases can now be described as 'preadaptive advances' of an evolutionary new type of social system like the EU, UN, WTO etc. (Luhmann 1997: 392f, 501, 512f). As Carl Schmitt in the last chapter of his 'Verfassungslehre' of 1928 has suggested, the unity of a confederation must not rely on the (substantial) unity of a nation, but can rely as well on the family resemblance of political principles like democracy, human rights, international law or else (Schmitt 1989: 376). Carl Schmitt correctly observed that in a working confederation the question of *state sovereignty* has to be kept open as long as the confederation exists (Schmitt 1989:373; Oeter 1995: 674). Further, the member states can no longer be described as impermeable 'legal persons' (as in the theories of Laband, Jellinek or Triepel).²⁹

Yet a political body like the EU is not a confederation of states only. The whole Schmittian idea of a confederation or 'Bund' of states suffers from being fixed to Jellinek's concept of a state as a legal and empirical *subject*, and henceforth falls short when it comes to the new *evolutionary formation* of supranational organisations with a *double* legitimation like the EU. The European Union is, as we have seen, a confederation of states *and* peoples (Bogdandy 1999: 13). It is exactly here where the Schmittian concept of a confederation or 'Bund' ends. Only as a confederation of citizens or *Bürgerbund* is the Union a 'constitutional association' (Bogdandy 1999:

²⁸ Schmitt 1989: 363ff. For a new description of the EU as a confederation: Schönberger 2003; for a comparison of the EU with North American confederalism, see: Menéndez 2003a: 35ff.

²⁹ Schmitt 1989: 371, 378, 381, 383. For the idea of an impermeable state subject, see: Triepel 1899: 111.

13). With the notion of a European confederation of its own citizens (*Bürgerbund*) the democratic moment comes into play, which is of no import in Carl Schmitt's work on constitutional doctrine (the *Verfassungslehre*): If a confederation is not only a confederation of states but also equally based on its own, autonomous citizenship, then only the notion of procedural and intersubjective *popular* sovereignty comes into play. In such a confederation of states *and* citizens the question of state sovereignty has to be kept open, but not the question of popular sovereignty. The latter can be ascribed to any process of will formation which allows all subjects of law equal access to binding decisions. As differentiated from state sovereignty, popular sovereignty is – as we have seen - *always already* organized, procedural, coordinated and divided.³⁰ The metaphysical question of a divine-like last decision is here dissolved into a circular process of revisable decisions which has to be held open for new and better arguments. Yet this constitutional and legislative power of the people(s) allows only as much state sovereignty, gubernative legislation, administrative organization etc. as the constitution itself manifests.³¹ Only popular sovereignty, therefore, fits the double structure of a confederation of states *and* citizens.

The Coming Constitution – A Revolutionary Perspective?

If there is any democracy in Europe, and if it is not less democratic than the former nation states, it will be a democracy within *and* without the nation-state, and it must be more than national democracy *plus* deliberative supranationalism. Otherwise the non-democratic structures of the Union in concert with globalization will destroy what's left of the democratic nation state. Europeans have something to lose in the process of Europeanization. Even if there is no *way* back, we still can *look* back to the democratic nation state and generalize its democratic idea, abstract it from the state and re-specify it for European and global contexts. A democratically 'too modest constitutionalisation could be proved retrospectively to be an evolutionary step towards the autonomy of the European technocracy' (Hofmann 2000: 205 (my translation)).

³⁰ See instead of all others: Oeter 1995: 671f, 675f.

³¹ Arndt 1963: 25, cited from Möllers 2001: 422.

When it comes to the question of the coming European constitution, there seems to be no need for any European monopoly of power, because the new division of powers does work. The coming constitution of Europe ‘only’ has to democratize the European body of political and legal organizations and has to give impulses to revitalize democracy on the level of states and regions. There exist a lot of good ideas, concerning:

- new forms of direct, veto-based democracy, giving more democratic power to the regions (Abromeit 2002),
- the unification of national parliaments, cooperating together with the supranational European Parliament in major decisions which would give much more weight to and public interest in national *and* European parliaments.³²
- suggestions to end European ‘green-room’ politics by different versions of transparent two-chamber systems combined with a much stronger role for the European Parliament (Oeter 2002: 43ff).

Only the latter suggestions have some chance of being partly realized during the present process of reconstitutionalising Europe.

In the end there is only one structural problem that stands against the constitutionalising of European democracy, and that is the existing power structure. All the more or less convincing suggestions to democratize Europe are like long green table games, since the ‘ultimate instruments of control do not rest with the people but with the decision-makers’ (Eriksen 2001: 8). The new European ruling class will allow democratisation only if the pressure from below becomes stronger. In the end, it is not the *conventions* of an elite remote from the public but only the *citizens themselves* who can turn the legally still existing democratic constitutional text books *against* the imperial and hegemonic reality of European law. Legal textbooks, and especially constitutional texts are not only words. They do not follow the particular

³² See, e.g. the very convincing suggestions of Grözinger (2003).

interests of those who have invented them, with the intention of furnishing their undemocratic power with a convenient ideology. Constitutions which are positive law are part of what Hegel once called *objective spirit*. Therefore, they ‘can strike back’ (Müller 1997: 56).

Maybe in this respect the peace demonstration across all European countries from 15 February onwards in 2003 were the beginning or the first sign of a social movement that could mobilize the power used to enforce a new, citizen based European constitution. What was so amazing here was that, for the first time, the citizens of Europe *as* Europeans stood up as a *decentered, network-regulated unit* against the united, but in this question deeply divided political leadership of the European governments. For the emergence of a European public which could enforce the constitutional process from below, the anti-war protest on and after 15 February might have been even more significant than the somewhat clandestine Constitutional Convent.

Here for the first time the European citizens have formed a common will on the streets, which was backed by a constitution-breaking majority. The protest of the European citizens was not only against Blair and Asnar and for Chirac and Schröder, and for a single European voice in basic issues of foreign policy, the protest also made everyone aware that the *representation* of the common will of European citizens in the organic bodies of EU is completely insufficient. And this is since 1776 and 1789 the basic question directly addressed to the constitution: the question of equal representation. It was once: ‘No taxation without representation!’, or more politically as in Paris: ‘The Third Estate *is* the nation.’ It is now: ‘No democratic interventionism without representation!’ Seen this way the demonstration of 15 February were not so much for a small ‘Core-Europe’ (‘Kerneuropa’) but for European democracy and a rule- and power-founding constitution of Europe.

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