

A Plea for a European Semi-Parliamentary and Semi-Consociational Democracy

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Keywords

democracy, diversity/homogeneity, European identity, globalization, referendum, transparency, law

Abstract

The paper describes the status quo of government in Europe as (slightly) less democratic than the real state of democracy in the Member States and stresses the transparency-deficiencies. It examines the extra-legal factors of a functioning democracy and argues that they are present *in nuce* and can evolve in interaction with the legal institutions. It points out limits of performance of both majority and unanimity voting and pleads for a mixed system. It argues that the size of the Union is no democratic problem as such, and finally draws the attention to the global dimension of the problem, which - in the opinion of the author - forecloses the 'resignative' option of renouncing on further democratization of the Union. Against this background, the prospects for the EC/EU are that of a semi-parliamentary and semi-consociational democracy.

Kurzfassung

Der Aufsatz beschreibt den Zustand des Regierens in Europa als (geringfügig) weniger demokratisch als das reale demokratischen Regieren in den Mitgliedstaaten und betont dabei die Transparenzdefizite. Er untersucht die ausserrechtlichen Faktoren einer funktionierenden Demokratie und stellte fest, dass diese im Ansatz vorhanden sind und sich in Interaktion mit den rechtlichen Institutionen weiter entwickeln können. Der Beitrag zeigt die Grenzen der Leistungskraft sowohl des Mehrheitsprinzips als auch des einstimmigen Abstimmungsverfahrens auf und plädiert für eine prozedurale Mischung. Es wird weiter festgestellt, dass die Grösse der EG/EU nicht per se ein Demokratiehindernis ist. Der Beitrag macht schliesslich auf die globale Dimension des Problems aufmerksam. Diese Dimension macht es nach Ansicht der Verfasserin unmöglich, die "resignative" Option des Verzichts weiterer Demokratisierung der Union zu verfolgen. Vor diesem Hintergrund sind die Aussichten für die EG/EU die einer teilparlamentarisierten Verhandlungsdemokratie.

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 Abstract Back to homepage PDF This paper's comments page Send your comment! to this paper 	

Contents:

- [Introduction](#)
- [1 The Democratic Yardstick](#)
 - [A. Current Transformation of Domestic Democracies](#)
 - [B. European Variations Are in Order](#)
- [2 Composition and Powers of the European Institutions](#)
 - [A. The European Parliament](#)
 - [B. The Council](#)
 - [C. The Commission](#)
 - [D. National Parliaments](#)
 - [E. Transparency and Publicity](#)
- [3 Interim-Observations on the Institutional/Functional Level](#)
 - [A. Diagnosis: Three Functional Deficiencies](#)
 - [B. Possible Responses](#)
- [4 The Subject of Democratic Legitimacy: the European Citizens](#)
 - [A. No European ‘Staatsvolk’ is Needed](#)
 - [B. A European Demos Exists](#)
 - [C. The Carrier of Democracy Can Evolve within Democratic Structures](#)
- [5 Extra-Legal Conditions in a Functioning Democracy](#)
 - [A. The Democratic Infrastructure](#)
 - [B. Homogeneity and Basic Consensus](#)
 - [C. The Multiplicity of European Languages](#)
 - [D. What Really Matters](#)
 - [E. All Extra-Legal Factors Can Evolve within Democratic Structures](#)
- [6 Consensus and Majority Voting, Especially in Council](#)
- [7 The Size of the Democratic Territorial Unit](#)
- [8 Anti-Democratic Effects of Globalization and Compensatory Transnational Democracy](#)
 - [A. Transnational Affectedness without Participation or Representation](#)
 - [B. Decline of the \(Democratic\) State](#)
 - [C. No Democratic Mandate for and Control of Non-State Decisions-Makers](#)
- [9 Directions for the Future](#)
 - [A. A European Semi-Parliamentary Democracy](#)
 - [B. A European Semi-Consociational Democracy](#)
 - [C. Conclusion](#)
- [References](#)

Introduction

Democracy is, according to Abraham Lincoln's famous formula of the Gettysburg address, 'government by the people, through the people, and for the people'.⁽²⁾ One hundred years later, one of the most eminent theorists of democracy wrote: 'Today the term democracy is like an ancient kitchen midden packed with assorted leftovers from twenty-five hundred years of nearly continued usage'.⁽³⁾ So our question today is: What kind of leftovers should be warmed up for the EU?⁽⁴⁾ Or shouldn't we brew a fresh stew? In this article, I first want to analyse the status quo of democratic governance in Europe and ask: How democratic is it actually? Secondly, I wish to make some suggestions for the future of European democratic governance.

1 The Democratic Yardstick ↑

When I ask: 'How democratic is Europe?', then I first have to explain what my democratic yardstick is.⁽⁵⁾ Here I want to stress only two points:

A. Current Transformation of Domestic Democracies ↑

The first one is that any evaluation of the quality of the European democracy as it stands and the evaluation of reform proposals must take into account the real situation of democracy in the Member States, not an abstract ideal.⁽⁶⁾ This means that we must be aware of the current fundamental transformation which the democratic systems in the Nation States undergo. This transformation can be characterised with the following key-words:

- Rise of the executive branch, *inter alia* due to more denationalized regulation.
- Dominance of specialized, not democratically elected technical experts in all subject matters of legislation.⁽⁷⁾
- Para-legislation in form of compacts, codes of conduct or agreed standards and principles.⁽⁸⁾ These norms or rather soft-law are the result of (horizontal) negotiation, not of (vertical, top-down) legislation.⁽⁹⁾
- The circumvention of parliaments by individuals and other interest groups with help of new technologies of direct communication and net-working.⁽¹⁰⁾
- A final, crucial factor is the transformation of domestic democracies through globalization and global governance. I will come to this back in more detail.⁽¹¹⁾

B. European Variations Are in Order ↑

My second point is that we must allow for supranational variations in democratic governance – which certainly does not mean that we must allow any deviation amounting to the deformation of democracy. In this context two elements of European governance are decisive:

- The carrier or the subject of democracy is multinational and not a 'people' in the traditional sense.
- European governance has a network-structure, consisting of horizontal layers and vertical segments. The network is formed by the European institutions and by the Member States acting both within those institutions (as a part of them) and outside of the EU. Democratic legitimacy potentially flows from all layers and segments taken together, not only from one.

2 Composition and Powers of the European Institutions ↑

I will now look at the European institutions. How democratic are they?

A. The European Parliament ↑ (12)

The European Parliament is not composed according to the maxim ‘one man – one vote’ (see Art. 190 cl. 2 of the EC Treaty); and therefore its representativeness is distorted.(13) Elections to the EP are, due to the lack of a uniform electoral procedure(14) and their rootedness in national rather than in European politics, only ‘second-order’ national elections:(15) They are not about past and future European policy choices, but about the performance of the national governments.

The EP’s *legislative powers*(16) have been strengthened steadily, most dramatically with the introduction of the co-decision procedure , established by the Treaty of Maastricht (now Art. 251 EC). The weaker forms of parliamentary participation in legislation are consultation, cooperation and assent.(17) Within the co-decision procedure, parliament is an actual *co-legislator* besides the Council. Currently, the co-decision procedure is required for legislation under more than 30 treaty provisions. The procedure extends to important fields such as anti-discrimination legislation under Art. 12 EC, legislation on the right to move and to reside under Art. 18 EC, provisions on the freedom of movement for workers under Art. 40 EC etc. Approximately 70 to 75 percent of EU-legislation is adopted in the co-decision-procedure.(18)

On the other hand, we must note that the real influence of *domestic* parliaments does not live up to the parliamentary ideal. In the Member States’ reality, legislation is dominated by the executive,(19) often dependent on expert votes on eminently technical issues, and side-stepped by bargaining between the government and societal actors. But even taking these facts into account, the EP’s influence on European legislation is still smaller than ‘ordinary’ parliaments’ influence on their domestic law-making. Even in the co-decision procedure, the EP is *not the sole or principal legislator*, but shares the legislative power with the Council.

The *creative powers* of the EP as well are somewhat underdeveloped in comparison to the parallel functions of domestic parliaments. The European Parliament only has a veto-power against the Commission as a whole (Art. 214 sec. 2, cl. 3 EC) and no influence whatsoever on the composition of the Council. However, in most Member States, governments are not formally invested by their respective parliament either.(20)

Arguably the most important parliamentary function is the *control of the government*.(21) Within the EU, executive powers are vested in the Commission and in the Council. EP control of the Commission is exercised by the EP’s discharge to the Commission in respect of the implementation of the budget (Art. 276 EC), by the discussion of the general annual reports submitted by the Commission (Art. 200 EC), by motion of censure on the activities of the Commission (Art. 201 EC) and other instruments.(22)

The Council, on the other hand, is not legally responsible towards the EP, although it does function as part of the European government. It is even argued that such an accountability would not only be not feasible, given the current power constellation, but even counterproductive, because the Council members, being members of the national governments, must be first of all accountable to their national constituencies. In any case, the lack of accountability of the Council to the EP is again put into perspective by the observation that – in fact – national parliaments hardly make use of their existing power to control their government, for political and technical reasons.(23)

B. The Council ↑

The Council members are members of the national governments and enjoy some degree of

democratic legitimacy via national elections. However, an electoral connection of all Council members to all European citizens is lacking. The normal modus of decision-making in Council, especially in all important issues, is by consensus.⁽²⁴⁾ I will come back to the assertion that an expansion of majority-voting in Council would be even more un-democratic.⁽²⁵⁾ A more important aspect seems to be the fact that the voting-power in Council is not oriented at the maxim ‘one man – one vote’, but rather at the principle ‘one state – one vote’, with slight ponderation (Art. 205 sec. 2 EC).⁽²⁶⁾

C. The Commission ↑

The main democratic problem of the Commission seems to be the intransparency of decision-making. The Comitology-procedures⁽²⁷⁾ are somewhat ambiguous from a democratic point of view. On the one hand, they allow diverse interest groups and experts to bring in their views,⁽²⁸⁾ even if not really in an even-handed, representative fashion. On the other hand, comitology eclipses parliamentary participation and public deliberation. As *Paul Craig* has concluded: ‘There is a problem here for the Community. We should, however, be mindful of the fact that the legitimization of secondary norms is an endemic problem for all domestic political systems.’⁽²⁹⁾

D. National Parliaments ↑

National parliaments can only in a quite limited way function as European co-legislators and co-supervisors.⁽³⁰⁾ Proposals to enlarge their respective role face inherent limitations arising from the inevitable complexity of the legislative process. The national parliaments do not have the capacity to deal with more than fractions of the European legislation. Moreover, a tighter integration of the national Parliaments would in turn aggravate the intransparency of the whole process.

E. Transparency and Publicity ↑

In my opinion, one of the main democratic shortcomings of the European system of government is its intransparency and in-publicity.⁽³¹⁾ Transparency and publicity of political deliberation and of law-making is an indispensable condition of a functioning democracy, because otherwise citizens cannot give an informed consent to government action, cannot discuss or criticize it in a well-founded manner, and cannot intervene in time in the process.⁽³²⁾

The issue of transparency has various aspects. One is the intransparency, inaccessibility and complicatedness of the European laws, once enacted. This is, however, rather a problem of the rule of law than of democracy. Another aspect is the question of individual access to European documents on demand. This concerns more the administrative than the legislative level. The individual right to access has been much improved by the Treaty of Amsterdam with secondary law based thereupon⁽³³⁾ and by the Court’s case-law.⁽³⁴⁾

But what matters most with view to the functioning of the democratic process is the ‘active’, general duty to publish all kinds of European documents.⁽³⁵⁾ Currently, we do not have a public law-making procedure. Only the EP, the weakest participant in the process, deliberates in public. As regards the Commission, the important comitology procedures are not public. The most serious factor of intransparency is the Council. The Treaty of Amsterdam obliges the Council, acting as legislator, to publish the results of votes, but not the deliberations (Art. 207 sec. 3 sentence 3 EC). In the Council’s Rules of Procedure of 1999 the principle of non-publicity of sessions has been slightly modified, but general publicity is still not the rule.⁽³⁶⁾ My conclusion is that the current intransparency is a major obstacle to genuinely democratic governance, because it favours lobbying by well-organized pressure groups to the detriment of diffuse interests, prevents democratic control and oversight, and impedes the attribution of responsibility.

The question now is, how the transparency of the legislative process, which is badly needed, as we have seen, could be further improved. In this regard, we face inherent barriers to transparency. The first is that a certain degree of complexity, which inevitably causes a certain degree of intransparency, simply results from the fact that Europe is a multi-layered and multi-sectorial political system. Many divergent interests must be accommodated, and therefore a large number of institutions and groups must participate in the process. Intransparency will therefore to a certain degree be irreducible. Another important factor is the bargaining-modus of law-making. Bargaining (with package-deals, trade-offs and so on) needs closed doors. If bargaining took place in public, this would force the negotiators to entrench their position and would make concessions or re-definition of the problem much more difficult. If we open the bargaining-arena to observation of the general public, actual decision-making will evaporate into the corridors and lunch-rooms.⁽³⁷⁾

This means that genuine publicity of the law-making procedure can be achieved only by replacing the consensual, ‘horizontal’, bargaining-modus by ‘hierarchical’, majority-based law-making – but this in turn – if it were realistic – has draw-backs as well, as we will see.⁽³⁸⁾

3 Interim-Observations on the Institutional/Functional Level ↑

A. Diagnosis: Three Functional Deficiencies

Our brief look at the governing institutions in Europe has revealed that their creation, structure and procedures are less democratic than the purely domestic systems of government of the Member States. A serious problem is the lacking transparency of law-making, which is in itself a *conditio sine qua non* for democracy. Viewed in terms of *functions*, we might say that the democratic problem of Europe is at least three-fold:

- As regards the function of *law-making*, we experience in total a transfer of activity from the legislative branch to the executive branch: On the national level, there are parliaments, but they have less and less subject-matters to legislate on. On the European level, substantive legislation happens, but only partly in parliamentary procedures.
- The second parliamentary function of *controlling* government is impaired as well. The representatives of the Member States’ governments acting in Council are not controlled by national parliaments, mainly because of the secret deliberation and voting in Council. They are not controlled by the European Parliament either, because the European Parliament can not legally, that is according to the scheme of the EC Treaty, hold the Council responsible. The parliamentary control of the Commission is not sufficient, because the Commission forms only one part of the European government.
Looking at the creation and composition of the EP on the one hand, and its respective powers on the other hand, a crucial point seems to be that there are *no genuinely European elections on European issues, fought on a European level, to install and remove European governments simply on the basis of political disagreement.*⁽³⁹⁾ This means that effective popular control of government via (parliamentary or other) elections does not take place.
- Moreover, we face democratic deficiencies on the higher-law-level of European constitution-making, that is in the process of amending and transforming the European treaties themselves. European citizens can hardly qualify as ‘pouvoir constituant’.⁽⁴⁰⁾ I will not deal with that superior level here, but only with ordinary law-making.

Caveat: If you compare the European system to the Member States’ democracies as they really work, the ‘deficit’ is somewhat slighter than it appears at a first glance – but it undeniably exists.

B. Possible Responses ↑

There are at least five possible answers to the problem just posed.

- The ostensibly ‘realistic’ option: We might consider the democratic deficit as inherent in the entire enterprise of Europe which was originally not even supposed to be democratic at all.⁽⁴¹⁾ But this option of simply renouncing democratic legitimacy is foreclosed by the fact that democracy is meanwhile acknowledged to be a structural principle of the Union⁽⁴²⁾ and because it is required by the Member States’ constitutions as a condition of the transfer of sovereign powers.⁽⁴³⁾
- The ‘resignative’ option: We might attempt to freeze integration at this point in order not to aggravate the democratic deficit further. This option as well is not viable, with view to the continuing mobility of all production factors and the continuing globalization of all kinds of problems, which can not be solved within the framework of the Nation State.
- The third option would be the genuinely ‘European’ one: We can try to strengthen the power of the European Parliament in order to make the Union itself more democratic. This strategy was applied slowly but steadily throughout all reforms of the European treaties.
- But the genuinely European strategy is criticized by a fourth position, which I wish to call the fundamentalist one: Its proponents argue that European governance is inherently limited in its democratic capacity. The problem is – so the argument runs – not only a parliamentary deficiency, but lies deeper and roots mostly in insurmountable extra-legal deficiencies⁽⁴⁴⁾ (This is a very German proposition).
- The fifth position is the one I share, and for which I want to make the case in this paper: I argue that the European Union needs more democracy, and that it is in principle capable of becoming more democratic – but not necessarily via parliament.

4 The Subject of Democratic Legitimacy: the European Citizens ↑

I will begin to defend my view by questioning the ‘fundamentalist’ assumptions.

A. No European ‘Staatsvolk’ is Needed

The first ‘fundamentalist’ concern relates to the subject or source of a European democratic structure. This aspect is a little bit *une malaise allemande*. Quite a few German lawyers worry about a missing European people as a necessary carrier of a European democracy.⁽⁴⁵⁾ This position considers democracy and the Nation State as corollaries. The intellectual root of this opinion is the political philosophy of *Hegel*, according to which the individual can be free only in and by means of the state.⁽⁴⁶⁾

My response is that although Nation States have historically been the ordinary locus of democracy, there is no logical and necessary link. It is, at least since the nineteen-seventies, widely acknowledged, that democracy is an organizing principle which is not reserved for states, but which can be applied to all kind of societal structures. We therefore do not need a *Staatsvolk* of a European state.

B. A European Demos Exists ↑

The weaker version of the *Hegelian* position just mentioned is the quest for a collective which would be at least *similar* to a people of a Nation State.⁽⁴⁷⁾ However, there is no European consensus on what the decisive characteristics of such a collective body would have to be. On the contrary, we all know that there are divergent philosophies about what makes a people a people throughout Europe. The most prominent conceptions of ‘people’ or ‘nation’ are the German and the French ones. In a very simplified and abbreviated way, we can say that the French tradition of *la nation* is based on a common political will to respect basic political ideals (*liberté, égalité, fraternité*). As *Ernest Renan* put it: ‘Une nation est une âme, un principe spirituel’.⁽⁴⁸⁾ The competing German view of ‘people’ or ‘nation’ focuses more on ethnic origin and on the common culture. Because it rests on elements which are givens rather than elements which can grow and which can be acquired, it is a more determinist and more ‘closed’ conception than – idealtypically – the French one.

The point to make with view to Europe is now that if we rely on a ‘French’ conception of ‘people’, then we can already discern a European ‘demos’, at least in *statu nascendi*. This theme has been elaborated by *Rainer Lepsius, Jürgen Habermas* and *Joseph Weiler*,⁽⁴⁹⁾ partly in reaction to the notorious German Maastricht decision of the German Federal Constitutional Court.⁽⁵⁰⁾

C. The Carrier of Democracy Can Evolve within Democratic Structures ↑

By saying, ‘*in statu nascendi*’, I want to stress that the carrier of democracy can evolve *within democratic structures*. The people or the sovereign, from which democratic government ostensibly emanates, is not a pre-political, natural entity. It is not the origin of a polity, but often a product of deliberate nation-building.⁽⁵¹⁾ So it would be a-historical and unrealistic to ask for an already existing European ‘people’ as a pre-condition of a European democracy.

5 Extra-Legal Conditions in a Functioning Democracy ↑

I will now move from the ‘carrier’ of democracy to the extra-legal conditions of a functioning democracy.

A. The Democratic Infrastructure

A functioning democracy needs the so-called democratic or participatory infrastructure which goes beyond the organization of periodical elections. It needs a common public sphere, in which political discourses over the common good take place in political parties, interest groups, NGOs, media and other forums. However, such a European democratic infrastructure (the ‘European public’, European political parties (cf. Art. 191 EC) and the like) is quite weak, because the respective institutions are still more or less nationally fragmented.⁽⁵²⁾ For instance, the European Convention and the question of a European Constitution have been simply no issue in the Member States’ elections to federal parliaments which occurred in the crucial phase of the work of the Convention.

B. Homogeneity and Basic Consensus ↑

A different issue has been discussed – again mostly in Germany – under the heading of ‘lacking homogeneity’⁽⁵³⁾ (cultural, linguistic, political, social and so forth) and ‘lacking basic consensus’. I object the ‘homogeneity-talk’ for various reasons. One of the most important objections is that the quest for homogeneity bears the danger of homogenization with unacceptable means, such as assimilation or exclusion. The infamous dictum of *Carl Schmitt* on that issue is well known: According to *Schmitt*, *democracy* ‘necessarily needs, firstly, homogeneity, and secondly – eventually

– the exclusion or destruction of heterogeneous elements.... The political power of a democracy manifests itself in the fact that it can extinguish or keep away the alien and unequal, which threatens homogeneity.’⁽⁵⁴⁾ The quest for homogeneity emphasizes difference to and distance towards the ‘other’ and ultimately boils down to *Schmitt’s* distinction of friend and foe.⁽⁵⁵⁾

The idea of homogeneity overlaps with the quest for a societal basic consensus. The basic consensus is – so to speak – the homogeneity of opinions on foundational principles of society. It is considered as the pre-requisite of a viable democracy,⁽⁵⁶⁾ because the basic consensus guarantees the stability of the institutions, serves as a guide-line for deciding controversial issues, discharges politics, because on some issues no vote needs to be taken and because the basic consensus triggers the famous ‘diffuse support’⁽⁵⁷⁾ of the system by its citizens.

The critical stance is now, that because of the diversity of living conditions, mentalities and traditions in the Member States, a basic consensus has not yet emerged.⁽⁵⁸⁾ However, in a secular and pluralistic society, a substantial basic consensus can not mean agreement on absolute and ultimate values. The basic consensus can at best be general and provisional.⁽⁵⁹⁾ It is necessarily vague and only in part articulate, and often only a negative one. That means, one is in agreement about what is not acceptable. The basic consensus is not necessarily rationally justified, but a question of habit and emotion. In this very general and relative sense, a European basic consensus does exist. Public opinion polls show that the idea of democracy and of core fundamental rights are approved of by the citizens throughout all Member States evenly.⁽⁶⁰⁾

C. The Multiplicity of European Languages ↑

Another type of problematic ‘homogeneity’ is the homogeneity of language. The multiplicity of European languages affects European democracy in two ways.

1. Barrier to a Democratic Discourse?

First, the formation of a European public opinion and of democratic institutions is certainly more difficult in the absence of one language. This is why already *John Stuart Mill* asserted in his ‘Considerations on Representative Government’ that ‘[f]ree institutions are next to impossible in a country made up of different nationalities.’⁽⁶¹⁾ For sure, a functioning democracy depends on information of the public, communication of the citizens with the governing institutions, on public debate and participation. All this presupposes that communication is possible.

However, a uniform language is no *conditio sine qua non* for this. What matters is a uniform space of communication, not of language. The space of communication and the space of a common language are not necessarily identical. Even within a single language-community, we need not have a common discourse. Those Austrian citizens who read the *Kronenzeitung* do not participate in the same public discourse as those who read *Die Presse* or the *Frankfurter Allgemeine Zeitung*. The fact that both groups speak German (or Austrian), does not link their discourses. Inversely, a single space of communication can encompass various languages, as all multilingual democracies demonstrate. More important than the common language seems to be a common media-scene in which European issues are reported and discussed without focussing exclusively on the question to what extent a certain policy favours or damages one’s own country.

2. Barrier to a European Identity?

The lack of a European language touches a second aspect, which is also important for a European

democracy. It is the question of a European collective identity.⁽⁶²⁾ Some commentators consider the linguistic diversity as an especially important barrier to the evolution of a common identity. This assertion is, however, based on an outdated theory, which exaggerates the role of language among the multiple factors of identity-formation.⁽⁶³⁾ Despite the lack of a common language, a common European cultural heritage exists⁽⁶⁴⁾ and with it at least a cultural, to a lesser degree also a political European identity. *Jean-Jacques Rousseau* asserted already in 1772: 'Il n'y a plus aujourd'hui de Français, d'Allemands, d'Espagnols, d'Anglois même, quoi qu'en dise; il n'y a que des Européens.'⁽⁶⁵⁾ Although this statement is in part wishful thinking, it demonstrates that at least among European intellectuals a European consciousness has been existing for a long time. But is this consciousness shared by the population? In this regard, opinion polls offer a mixed picture. For example, no specific European attribute (culture and education, religion, morals or the like) has been named by more than 15 % of the Germans asked in April 1999 for European characteristics. But 21 % said that Europeans do *not* differ from other nations in the World.⁽⁶⁶⁾ On the other hand, in particular in Germany, the accession of countries such as Poland, Hungary or the Czech Republic is welcomed, mostly (by 52%) with the argument that 'they are Europeans and all Europeans are supposed to be in the Union'.⁽⁶⁷⁾ According to other polls in spring 1999, 56% of the Europeans felt 'very' or 'pretty much' aligned to Europe (most (78%) in Luxembourg; 58% in Germany, the least (37%) in the UK).⁽⁶⁸⁾ Apparently, no clear self-image exists, but a diffuse, irrational sense of European-ness.

This observation is countered by the objection that a further strengthening of the European identity would undermine the national identities. My response to this criticism is that every individual has multiple identities, as a German, a woman, a mother, a Christian, and so on. The European and the national identities are not competing, but they are complementary. This is correctly expressed in the EC Treaty, saying that: 'Citizenship of the Union shall complement and not replace national citizenship.' (Art. 17 sec. 1 sentence 2 EC). The affiliations need not be ranked in an abstract hierarchy, so that the European identity would not necessarily trump the national one. This is so because the actual weight of the respective identity depends on the concrete circumstances. In some instances, the self-perception as a European may be more important than the national identity, in other situations the inverse will be true. Multiple identities do not lead to a *loyauté zéro*⁽⁶⁹⁾ towards the different communities, because we are not playing a zero-sum-game. The European identity does not grow at the cost of the national identity, but we are experiencing an enlargement of identity.⁽⁷⁰⁾

D. What Really Matters ↑

To conclude this part of the analysis, I want to suggest to do completely away with the homogeneity- and identity-talk.

1. The Absence of Fixed Segmentation

The kernel of truth in the homogeneity-talk is that majority-decisions binding also the minority will be accepted by the latter only if the members of the defeated group can hope for gaining the majority at another occasion. In representative democracies, this is possible only if group-affiliations (ethnic, religious, economic etc.) are not so dominant that they determine the votes of the group members in all subject matter decisions. If they are so dominant, we have a strictly segmented society which will be democratically not viable. So what counts is not 'homogeneity', but the absence of fixed segmentation – both is not identical.

Of course, the European citizenry is divided by comparatively strong national affiliations. But this is not the only divide. We have changing coalitions and overlapping memberships in different groups:

Opinions and votes of the citizens depend also on their political philosophy, which is trans-boundary. Dividing lines may run between large Member States and small ones, between industrial and agricultural Member States, between those with high environmental standards and those with lower ones, and so forth. Consequently, we have a relatively high number of sub-cultures, which lie crosswise, so that no dominating cleavage emerges. And the more European policy-making proliferates and covers diverse subject matters, the more improbable becomes a permanent marginalization of a specific group.

2. Cognitive and Ethical Capacities of the Citizens

If we look closer at the idea of 'European identity', we must admit that this collective identity is not as such or in itself a pre-requisite of democratic culture, but the virtues which ostensibly flow from it, namely responsibility, solidarity, willingness to compromise, trust, and tolerance. These virtues do not require a common identity. Solidarity, for instance, does not only emerge via the opposition of 'Us' and 'Them', but from compassion with the well-being of other individuals. The formation and growth of these virtues however, require, minimum ethical and cognitive capacities of the citizens. The European citizens must, first of all, know something about European society. This knowledge can for the most part not be learnt from the books, but can be acquired mainly by living in that society. Secondly, citizens must possess a minimum of ethical capacity(71) in relation to this society. To give an example: A union-wide majority vote (in Council or in Parliament) on traffic policies which burden different regions very unevenly appears to be unfair, if the voters do not take into consideration the special burdening of a transit country such as Germany. The reason for lacking consideration lies, however, not in essential group-specific difference or other-ness, but in the fact that most European voters do not know the traffic situation in a transit country from their own life-experience. More knowledge and more sense of responsibility would influence voter behaviour, but would not determine the outcome of the vote.

3. A Procedural, not Substantial Basic Consensus

As regards the so-called basic consensus, I have just said that it is, in any pluralistic society, and also on the European level, necessarily extremely general. Therefore, a procedural consensus, for instance on the validity of the majority principle for the resolution of conflicts, is perhaps more important. (72) If we focus on the cognitive and ethical capacities and on a procedural basic consensus, as opposed to homogeneity and a substantial consensus, then we do not pre-determine the outcome of political decisions. And only open-ended criteria are appropriate for an open society.

E. All Extra-Legal Factors Can Evolve within Democratic Structures ↑

To finish the discussion of the extra-legal factors of a functioning democracy, I want to stress that none of these factors is a natural, absolute prerequisite of democratic governance which would have to be present in full before beginning to govern. The cultural-societal factors are no a-priori, but we must reckon with their evolution within and through democracy. The legal institutions interact with the cultural factors. The citizens' ethical capacities and the public discourse enhance and support the functioning of the institutions, but those institutions in turn are apt to improve the democratic virtues and capacities of the citizens. Moreover, it is understandable that the average citizen becomes involved only when he or she realizes that engagement makes sense. Correspondingly, it can be expected that citizens become interested in the EP and seek information about it when it possesses real political power. In short, all extra-legal factors are dynamic. The existing deficiencies are no absolute impediment for a European democracy.

6 Consensus and Majority Voting, Especially in Council ↑

Moving beyond the foundational issues, I now want to discuss a particular procedural aspect: The question of consensus or majority-voting. This is currently especially relevant for decision-making in Council. Democracy is normally associated with majority-voting, so that the current dominance of consensual decision-making in the Union is often considered as undemocratic and as a manifestation of the intergovernmental character of the Union, as ‘diplomacy’ in contrast to ‘democracy’.⁽⁷³⁾

This is, however, misleading – for two reasons. One is that – on the one hand – public international law is no longer strictly consensus-based, but is becoming more and more ‘majoritarian’. On the other hand, there are national democratic systems in which majority voting is avoided. This type of democracy is called the ‘consociational’ or ‘consensual’ democracy.⁽⁷⁴⁾ EU-decision-making, as it is currently practised, could be interpreted as a type of consociational democracy, hence not as anti-democratic, but just as a particular form of democracy.⁽⁷⁵⁾ This might also be one way for the future. I will come back to this in my conclusions.⁽⁷⁶⁾

Still, we must inquire about the pros and cons of consensual voting when evaluating reform-proposals regarding the Council. Under utility-aspects, the main concern today – facing the enlargement of the Union – is that unanimity is cumbersome and is the more impracticable the more members the Council will have. Under legitimacy-aspects however, it has been argued that an extension of the majority principle within the Council – which is desirable for practical reasons – would *aggravate* its democratic deficit⁽⁷⁷⁾ for two reasons: First, because in majority voting, the defeated nation’s preferences (which have been determined in a democratic procedure) would be completely ignored. And second, because a minister defeated in the vote is legally not responsible for the majority-decision and must not defend it at home.

This proposition appears to be formally correct, but I think that it does not sufficiently take into account the real way of decision-making. In my opinion, the bargaining modus of consensual decision-making behind closed doors always allows the agents to neglect their constituencies’ preferences to a certain extent as well, if this appears opportune. Moreover, national parliaments more often than not do not exercise parliamentary control over ‘their’ member of government. It therefore seems to matter less whether they do have formal powers in that respect or not. For these reasons, the assertion that the veto-power is the ‘most legitimating element’⁽⁷⁸⁾ in the process of decision-making seems exaggerated.⁽⁷⁹⁾

On the other hand, majority voting in Council does not, given the current apportionment of votes per Member State, mean that a particular decision is supported by a majority of citizens. If we take into account that the national governments have been elected only by a certain percentage of the national population, and if we further take into account the comparatively lesser number of Council-votes per capita in the bigger Member States, a majoritarian Council decision may only represent a minority of citizens. So if we want to assure that – within the current system – Council-decisions are based on the votes of at least half of the EU-citizens, we have to ask for highly qualified majority votes or for unanimity.⁽⁸⁰⁾

The alternative would be a new scheme of double-majority-voting. The requirement of a double majority (majority of states plus majority of citizens),⁽⁸¹⁾ as it has as yet been only very roughly approximated by the Treaty of Nice,⁽⁸²⁾ would reflect the fact that the Council is currently *both* the federal organ in the EU (representing the Member States) *and* – because of the weakness of Parliament – the most important representative of the citizens as well.

All in all, we have to make a trade-off between the specific advantages of consensual decision-making and the advantages of majority-voting. Re-phrased in terms of constitutional economics, the ‘calculus of consent’ (*Gordon Tullock* and *James M. Buchanan*) consists in balancing two types of costs against each other:⁽⁸³⁾ The ‘internal’ costs of the consensus-principle in form of delays, and of not reaching a decision at all or only the smallest common denominator, against the ‘external’ costs of majoritarian decision-making in form of burdening the minority, provocation of societal tensions, and so on.⁽⁸⁴⁾ This roughly means that, the more important the issue is (equalling high external costs for the minority), the higher internal costs we have to tolerate. And this means that fundamental issues have to be decided by consensus or by a qualified majority.⁽⁸⁵⁾

The upshot is that we should not simply propagate the broad use of the majority principle, but have to design a nuanced system in which consensus and majority-voting are combined. Such a combination is – by the way – the current reality in domestic democracies, because here the formal majority voting procedures are completed by informal bargaining, hence consensual, mechanisms.⁽⁸⁶⁾

7 The Size of the Democratic Territorial Unit ↑

Some fear that European democracy might fail because of the Union’s sheer size.⁽⁸⁷⁾ But a difference in kind seems to lie only between those very small communities in which a popular assembly can decide and larger ones which require a system of representation. Once beyond that point, and within a representative system, no simple line can be drawn between large and ‘too large.’⁽⁸⁸⁾

It has been argued that, even if the EU reduplicated exactly the system of the Member States, it would still be less democratic than the individual states, because the impact of each single citizen’s vote is diminished in relation to the whole.⁽⁸⁹⁾ But this argument reduces democracy to the democratic input. However, democracy does not only result from citizens’ participation in decision-making, but also from the fact that decisions matter and have an impact on their lives.⁽⁹⁰⁾

Roughly speaking, the citizens’ input is generally maximized in smaller entities, and the democratic output may require a larger entity – although this is a simplification. In smaller units, the citizens can communicate easier with the political leaders, and the institutions tend to be more responsive.⁽⁹¹⁾ On the other hand, a dissenting citizen can not easily voice his objections, because the social pressure is higher in a smaller unit. On the output-side, we must acknowledge that there is no optimum size of a political unit for efficient problem-solving. Larger entities can specialize and have more options for action. On the other hand, they are cumbersome. All depends on the concrete problem. In any case, neither the aspect of democratic input, nor the aspect of democratic output, and certainly not both together, lead to an ideal size of a democratic polity.⁽⁹²⁾

The mere size of the EU may even be a democratic advantage, because minority-protection and conflict-management seem to be easier in a larger unit. In large democracies, conflicts are not so personalized. This means that, although there are more conflicts, they are less apt to polarize society.⁽⁹³⁾ In sum, the EU’s size is not barrier to a viable democracy.

8 Anti-Democratic Effects of Globalization and Compensatory Transnational Democracy ↑

The European discussion on democracy neglects the global dimension of the problem. Globalization undermines the premise of traditional democratic theory, namely that democratic states are comparatively closed, clearly definable entities.⁽⁹⁴⁾ In contrast, economic, political, military and legal problems, relations and power structures are becoming increasingly global. This has led to three democratic deficiencies.

A. Transnational Affectedness without Participation or Representation ↑

The first deficiency stems from the fact that state activities have become – because of global interdependencies – more far-reaching and more extraterritorial. This means that political decisions (e.g., on tax reduction, on raising the environmental standard, on building a nuclear plant, etc.) affect people in other states, who have not elected the decision-makers and can in no way control them.

B. Decline of the (Democratic) State ↑

The second aspect is that the transnational character of issues, the mobility and interaction of individuals, firms, and NGOs has (despite more extraterritorial effects of regulation) on the whole reduced the power of Nation States to tackle and solve problems by itself. This general loss of effectiveness reduces, with regard to democratic states, the effectivity of self-determination, in other words, the democratic output. So we here face a kind of *indirect* decline of democracy.⁽⁹⁵⁾

C. No Democratic Mandate for and Control of Non-State Decisions-Makers ↑

In order to regain control, states must co-operate in International Organizations, through bi- and multilateral treaties and so forth. But these conventional methods of global governance aggravate the democratic deficit, because the link between voters and decision-makers is loosened. Non-state law-making is, not only in the EU, but in all international institutions, law-making by the executive branch, not by parliaments.⁽⁹⁶⁾ The still remaining formal power of parliaments to ratify international treaties is further undermined by law-making of the UN Security-Council substituting ordinary treaty-making on important issues such as criminal tribunals or combating terrorism.⁽⁹⁷⁾ Moreover, the complexity of the process blurs responsibilities of the actors in the international regimes and further threatens the functioning of the institutions of control and of call-back.⁽⁹⁸⁾

The conclusion to draw from all this is that, if we want to preserve a minimum level of democratic governance, then we have to move beyond the state and establish compensatory, transnational democratic structures.⁽⁹⁹⁾ In that sense, models of cosmopolitan democracy have already been developed. They are of course quite idealistic, if not to say utopian.

But this does not concern us here. The point I wanted to make is simply that the so-called democratic deficit is not a genuinely European, but a global problem. This observation is important in two respects: First, it puts into perspective the European deficiencies. These deficiencies are only one (small) part of a more general development. Second, it shows that lowering our democratic standards and accepting the status quo in Europe is not a wise course to take, because this would create an unfortunate precedent. The overall threat to democracy does require creative strategies, if we do not want to give up the idea of democracy altogether.

9 Directions for the Future ↑

In my interim-observations on the institutional level, I had described the status quo of government in Europe as (slightly) less democratic than the real state of democracy in the Member States and I have stressed the transparency-deficiencies. I have examined the extra-legal factors of a functioning democracy and have argued that they are present *in nuce* and can evolve in interaction with the legal institutions. I have pointed out limits of performance of both majority and unanimity voting and have pleaded for a mixed system. I have argued that the size of the Union is no democratic problem as such, and finally I have drawn the attention to the global dimension of the problem, which – in my

opinion – forecloses the ‘resignative’ option of renouncing on further democratization of the Union. Against this background, the prospects for the EC/EU are that of a semi-parliamentary and semi-consociational democracy.

13

A. A European Semi-Parliamentary Democracy ↑

Within European democracy, Parliament will play a different and a minor role than the traditional ideal of parliamentarism supposes.⁽¹⁰⁰⁾ This foreseeable evolution is no specifically supranational one, but corresponds to the general decline of parliaments.

The weakness of the European Parliament is put into perspective by a fundamental modification of parliamentary functions in the Nation State. This trend has been already described and appraised by some as post-parliamentarism.⁽¹⁰¹⁾ At present, national parliaments are far from sovereign. They are to some extent dominated by political parties’ discipline and coalition agreements. They are marginalized due to executive preponderance in the legislative process and the powerlessness of the parliamentary opposition. They are dependent on technical experts and are bypassed by secret negotiations and by direct networking of individual citizens.

The theory of deliberative democracy has consoled us about this decline of parliaments. The general idea of deliberative democracy is that the democratic process is not in the first place justified by citizens’ isolated acts of participation, but by the general accessibility of a deliberative process.⁽¹⁰²⁾ Deliberative theorists argue that the traditional two-fold role of parliaments: (1) decision-making and (2) democratic control is already and will even further be taken over (albeit not completely) by public, deliberative mechanisms.⁽¹⁰³⁾ Ad (1): The legitimacy of law-making stems and will stem from improved, representative deliberating networks (such as committees of experts or NGOs), not primarily from parliamentary activity. Ad (2): Public control of government is no longer exercised by parliaments, but through additional forms of institutionalized control.⁽¹⁰⁴⁾ Such supplementary mechanisms of control might be elected expert committees and – with reservation – also NGOs.⁽¹⁰⁵⁾

This means that the legitimatory function of conventional votes and elections to parliament is complemented and to a certain extent replaced by a functioning public discourse and by the quality of deliberation. And this also means that the functions of parliament can and should be reformulated. Maybe parliaments are acquiring a new role as mediators of deliberative politics. They could become the ‘communicative relay’⁽¹⁰⁶⁾ between the citizens and the institutions, or they might be considered as a ‘symbolic incarnation of the locus of popular sovereignty.’⁽¹⁰⁷⁾ These roles are in part already fulfilled by the European Parliament.

On the European level, one strategy to complement parliamentary activity might be European referendums.⁽¹⁰⁸⁾ Of course, there are issues which are not suited for direct popular decision, for instance distributive policies involving the distribution of wealth. But referendums could be resorted to selectively in order to decide simple questions of constitutional importance, such as defence or environmental issues.

B. A European Semi-Consociational Democracy ↑

Besides the semi-parliamentary nature of the emerging European democracy, its second characteristics is its consensual or consociational nature.⁽¹⁰⁹⁾ I have already pointed out that the current dominance of the consensual modus of decision-making in the EU can be interpreted as a manifestation of a consensus-type democracy, as opposed to a majoritarian democratic system.

Consociational elements of government feature more or less prominently in countries such as Switzerland, Austria, Belgium and Luxembourg. In an idealtypical consociational democracy, consensual or nearly consensual decision-making is the rule. All societal groups and minorities are integrated into the political system. Government and other political and societal bodies are made up by proportionate representation.⁽¹¹⁰⁾ The drawbacks of consensual democracy are well-known. The most serious one is the fact that the lack of a real political alternative provokes the formation of populist and extremist groups or parties. However, a consociational democracy may be appropriate for periods of transition, applicable in societies which lack the prerequisites for a smooth functioning of the majority rule.⁽¹¹¹⁾ We have seen that the EU is in such a transitional phase, so that the consensual model roughly ‘fits’ in that regard.

14

Viewed through the lenses of transnational consociational democracy, the reduction of parliamentary functions is consistent. Those states which practise consensual democracy build consensus foremostly through extra-parliamentary channels, such as referendums. This proceeding integrates minorities into the decision-making process. Consequently, in order to transform the EU into a consociational system, it would have to move beyond the merely *intergovernmental consensus* and acquire a *popular consensus*. This brings us back to the quest for complementary European referendums.

C. Conclusion ↑

All in all, a desirable and realistic direction for reform might be the move towards a semi-parliamentary and semi-consociational democracy. It may be objected that this reform-proposal, which implies a certain reformulation of the democratic yardstick, is in reality a distortion which privileges the status quo, blurs the already blurry concept of democracy even further and sells an undemocratic regime under a misleading, but prestigious label.

My response to this objection is that a regime may, without abusing the term, be called ‘democratic’ as long as the various interest groups have the opportunity to influence the process of decision at any of its various levels and as long as various groups can trigger diverse mechanisms of control of the government – even if governmental decisions may not be the expression of an electoral majority.

In any case, the label does not matter so much, because democracy is no end or value in itself, but serves material objectives. ‘Democracy is’, as *Winston Churchill said*, ‘the worst form of Government except all those other forms that have been tried from time to time’.⁽¹¹²⁾ The proposal to replace consensual decision-making only in part by majority voting and to supplement the inherently deficient parliamentary control by other, decentralized mechanisms of public control⁽¹¹³⁾ is intended as one (of multiple) devices for strengthening moral autonomy and self-determination of the citizens, for deepening their understanding of public affairs, for protecting the interests of individuals and for creating a pool of expertise. Because it seems both feasible and likely to generate at least some of the mentioned positive effects, not for its own sake, a semi-parliamentary, semi-consociational democracy may be worth trying.

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Endnotes ↑

(1) This paper builds on ideas published in A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001), Part 6 (at 626 et seq.).

(2) A. Lincoln, 'Gettysburg address' of 19 November 1863, reprinted in Lincoln, *His Speeches and Writings*, ed. by R. P. Basler (1946), at 734. See for comprehensive introductions into the subject B. DeWiel, *Democracy: A History of Ideas* (2001); A. Weale, *Democracy* (1999); S. Lakoff, *Democracy: History, Theory, Practice* (1996); G. Sartori, *Democratic Theory* (1973, orig. 1962).

(3) R. A. Dahl, *Dilemmas of Pluralist Democracy* (1982), at 5.

(4) Recent monographs on the subject include C. Lord, *Democracy in the European Union* (1999); F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999); C. Karlsson, *Democracy, Legitimacy and the European Union* (2001).

(5) A helpful contribution to clarification of the yardstick is Lord, 'Assessing Democracy in a Contested Polity', 39 *Journal of Common Market Studies* (2001), 641-661.

(6) See in this sense Armingeon, 'Comment: The Democratic Deficit of the European Union', 50 *Aussenwirtschaft* (1995) 67-76.

(7) A recent example from Germany is the National Council on Ethics (*Nationaler Ethikrat*), inaugurated in June 2001 as a national forum for dialogue on ethical issues in the life sciences. Its up to 25 members were appointed by the Federal Chancellor (see

http://www.ethikrat.org/_english/about_us/function.htm). Further examples are the Commission on Immigration (*Zuwanderungskommission*, final report handed over to the German federal government on 4 July 2001) or the *Hartz*-Commission for the reform of the labour-market, installed by the German Federal government. See in scholarship on the ‘threat’ of technocracy *F. Fischer, Technocracy and the Politics of Expertise* (1990), at 15-20 and at 30-35; seminal *H. Schelsky, Der Mensch in der wissenschaftlichen Zivilisation* (1961), at 29-30.

(8) See for example the latest recommendations of the German Research Society (*Deutsche Forschungsgemeinschaft*) on research on human embryonic stem cells of May 2001, which appear to substitute legislation on that issue

(http://www.dfg.de/english/press/releases/Archive/presse_2001_16_eng.html). Another example is the German compact for work (‘*Bündnis für Arbeit, Ausbildung und Wettbewerbsfähigkeit*’), concluded in 1997 by the Federal government, representatives of the economy and unions (see <http://www.igmetall.de/buendnis/>). In February 2003, the German Corporate Governance Code, drawn up by experts from different areas of German business, was issued (http://www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf). It contains recommendations on standards and disclosure duties for listed companies within six months. The object of this ‘soft law’-self-commitment by business is to enhance transparency for investors and to improve the access of the listed companies to the international financial markets. It purposefully supplements the ‘hard’ German Transparency- and Disclosure Law.

(9) See in scholarship already T. Eschenburg, *Herrschaft der Verbände?* (1963, orig. 1955), at 32; Ritter, ‘Der kooperative Staat: Bemerkungen zum Verhältnis von Staat und Wirtschaft’, 104 *Archiv des öffentlichen Rechts* (1979) 389, at 410; Scharpf, ‘Versuch über die Demokratie im verhandelnden Staat’, in R. Czada and M. G. Schmidt (eds), *Verhandlungsdemokratie, Interessenvermittlung, Regierbarkeit: Festschrift für Gerhard Lehmbruch* (1993) 25-50; Grande, ‘Auflösung, Modernisierung oder Transformation? Zum Wandel des modernen Staates in Europa’, in E. Grande and R. Prätorius (eds), *Modernisierung des Staates?* (1997) 45, at 57. Hence, in economic politics, high ranking representatives of the administration and of associations typically negotiate results that are no longer understandable for the parliamentary bodies of the involved territorial units. Parliaments can only accept these results or disavow their representatives.

Parliamentary bills as well are negotiated between political departments and the lobbies and are present to parliament without alternatives. In that situation, either parliamentary control is realized and complicates or prevents the negotiations, or the negotiations are successful and invalidate the democratic procedure (Benz, ‘Verhandlungssysteme und Mehrebenenverflechtung im kooperativen Staat’, in A. Benz and W. Seibel (eds), *Regierungssystem und Verwaltungspolitik: Beiträge zu Ehren von Thomas Ellwein* (1995) 83, at 90-91). See also von Beyme, ‘Niedergang der Parlamente’, 53 *Internationale Politik* (1998) 21, at 29; K. von Beyme, *Die Parlamentarische Demokratie: Entstehung und Funktionsweise 1789-1999* (1999), at 537-538 (on ‘disempowerment’ of the national parliament solely by the amount of issues); Grimm, ‘Das Grundgesetz nach 50 Jahren – Versuch einer staatsrechtlichen Würdigung’, in Bundesministerium des Innern (ed.), *Bewährung und Herausforderung: Die Verfassung der Zukunft* (1999) 39, at 57-58; Klein, ‘Staat der Bürger: Zum 50. Jahrestag des Grundgesetzes’, in Bundesministerium des Innern (ed.), *Bewährung und Herausforderung: Die Verfassung der Zukunft* (1999) 133, at 139 (marginalization of parliament by networks and informal agreements).

(10) See the pertinent contributions in B. Holznagel and A. Grünwald and A. Hanssmann (eds), *Elektronische Demokratie: Bürgerbeteiligung per Internet zwischen Wissenschaft und Praxis* (2001). See on the effects of the internet on state authority and parliamentarism the excellent analysis of Engel, ‘Das Internet und der Nationalstaat’, 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1999) 353, esp. at 374–389.

(11) Infra part 8.

(12) See for an overview A. Kreppel, *The European Parliament and Supranational Party System: A Study in Institutional Development* (2002).

(13) Even leaving aside the extreme case of Luxembourg, the vote of one citizen of the next poor-populated country, Ireland, still weighs three and a half times as much as a German vote. One German Euro MP represents 820,000 Germans; an Irish Euro MP represents 240,000 Irishmen, and a Luxembourgian representative represents 7000 Luxembourgers; the European average are 600,000 citizens per representative. Figures as of 1995, see the table in Føllesdahl, 'Democracy and Federalism in the European Union', in A. Føllesdahl and P. Koslowski (eds), *Democracy and the European Union* (1997) 231, at 234. Put differently: In Germany live 21.97 % of the EU-population and the country has 15.81 % of the seats in the EP. Luxembourg accounts for 0.11 % of the population and 0.96 % of the seats. Ireland accounts for 0.97 % of the population and 2.40 % of the seats (survey of the *Konrad-Adenauer-Stiftung* (B. Neuss and W. Hilz), 'Deutsche personelle Präsenz in der EU-Kommission', November 1999, reprinted in 279 *Frankfurter Allgemeine Zeitung* (30 November 1999), at 29. See also the discussion and figures in Karlsson, *supra* n. 4, at 93-99.

(14) Art. 190 cl. 4 EC has as not yet been implemented. Cf. Art. 35 of the preliminary draft Constitutional Treaty of 28 October 2002, CONV 369/02.

(15) Katz, 'Models of Democracy', 2/1 *European Union Politics* (2001) 53, at 56.

(16) Cf. Craig, 'Democracy and Rulemaking within the EC: An Empirical and Normative Assessment', in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (1998) 33, at 35-43 (also published as: *Harvard Jean Monnet Working Paper* 2/97 (1997)); Crombez and Steunenberg and Corbett, 'Understanding the EU Legislative Process: Political Scientists' and Practitioners' Perspectives', 1 *European Union Politics* (2000) 363-383.

(17) A simple *parliamentary consultation* of the EP is foreseen, e.g., in Art. 37 sec. 2 cl. 3. EC or in Art. 175 EC (random examples). Within the *cooperation procedure* (Art. 252 EC), Parliament may influence Council decisions by exercising its amending power. The scope of the cooperation procedure is limited to the Economic and Monetary Union (Arts. 99; 102 cl. 2; 103, cl. 2; 106 cl. 2 EC). However, under the said articles of the treaty, no important legislation has been taken. Therefore, the cooperation procedure is in practice negligible. Within the *procedure of assent*, an Act cannot be definitely adopted without parliament's agreement. Parliamentary assent is provided for Acts concerning the European Central Bank and certain funds (Art. 105 cl. 6; 107, cl. 5; 161 EC), in Art. 190 cl. 4 EC (uniform electoral procedure), in Art. 300 cl. 3 EC (certain international agreements) and in Art. 49 EU (accession of new Member States).

(18) According to EP statistics on legislative activities in the period of October 1997 to December 2002, 1046 Acts have been adopted upon mere consultation of the EP, 55 Acts in the cooperation procedure, 522 Acts in the co-decision procedure and 102 Acts with EP assent (http://wwwdb.europarl.eu.int/oeil/oeil4.FR211_en#top).

(19) In France, laws are made in a *collaboration inégalitaire* of the executive and parliament (P. Pactet, *Institutions politiques, Droit constitutionnel* (1998), at 435-460). In England, it has been argued that 'the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is the cabinet' (W. Bagehot, *The English Constitution*, reprinted in *The World's Classics* (1936, 1st ed. 1867), at 9). The English majority principle has as a consequence that the executive is supported by a very strong parliamentary majority. This leads, according to Lord Hailsham, to an 'elective dictatorship', that is a situation in which the executive controls the legislative (Lord Hailsham, 'Current Topics: "Elective Dictatorship"', in 120 *The Solicitors' Journal*

(1976) 693; H. Barnett, *Constitutional and Administrative Law* (1998), at 142-143). See on the division of law-making power between government and parliament in other Member States part I 3 of the Danish Constitution of 5 June 1953 (folketing and King); Art. 26 of the Greek Constitution of 7 June 1975 (parliament and president); Art. 34, 46 of the Luxembourg Constitution of 17 October 1868 (archduke and parliament); Art. 81 of the Dutch Constitution of 17 February 1983 (government and parliament); power to delegate from parliament to government in Art. 66 II and Art. 82 of the Spanish Constitution of 29 December 1978; Art. 70 and 76 et seq. of the Italian Constitution of 22 December 1947. See also the provisions in Art. 164 and Art. 201 lit. d) of the Portuguese Constitution of 2 April 1976; Art. 18 of the Finnish Constitution of 17 July 1919/1994; Art. 36 of the Belgian Constitution of 17 February 1994. On the other hand the Irish parliament has an explicit monopoly of law-making (Art. 15,2,1· of the Irish Constitution of 1 July 1937); see also Art. 24 of the Austrian Constitution of 10 November 1920 (law-making by the National Council and the Federal Council). Another case in point is the German practice of the *Zustimmungsverordnung*, a system of law-making by the executive authority with approval of parliament. *Zustimmungsverordnungen* are issued in cases which are important enough to require parliamentary participation, but which still need flexible and quick treatment. See German Federal Constitutional Court, BVerfGE 8, 274, 321-322 (1958); German Federal Administrative Court, BVerwGE 57, 130, 139-140. (1978).

In most parliamentary democracies, actors not belonging to the executive can hardly influence the legislative process in a significant manner (De Winter, ‘The Role of Parliament in Government Formation and Resignation’, in H. Döring (ed.), *Parliaments and Majority Rule in Western Europe* (1995) 115, at 148; see also M. Laver and K. A. Shepsle, *Making and Breaking Governments* (1996), at 3-4, 280: ‘Whatever else it might be, parliamentary democracy is not rule by the legislature.’

(20)Pactet, *supra* n. 19, at 414. In Austria as well, the president is elected by the people (Art. 60 of the Austrian Constitution), the Chancellor is appointed by the president and merely presented to parliament (Art. 70 paras. 1 and 3). In England, the appointment of the Prime Minister is a royal prerogative. Due to a constitutional convention, the Queen must appoint the leader of the majority party in the House of Commons (Barnett, *supra* n. 19, at 180). In Spain, the King proposes a candidate for the presidency after consulting parliament; parliament has to grant confidence with absolute majority (Art. 99 paras. 1 and 3 of the Spanish Constitution); the rest of the government is appointed by the King on suggestion of the president (Art. 100). See in terms of comparative government de Winter, *supra* n. 19, at 115-151, in particular at 147.

(21)See with regard to the EP, Pescatore, ‘Les exigences de la démocratie et la légitimité de la Communauté européenne’, 10 *Cahiers de droit européen* (1974) 499, at 510.

(22) See Art. 197 cl. 3 EC (interpellation); Art. 230 subclause 3 EC, and Art. 232 EC (standing), Art. 193 EC (temporary committee of inquiry).

(23)Laver and Shepsle, *supra* n. 19, at 281; also Majone, ‘The European Community as a Regulatory State’, V-1 *Collected Courses of the Academy of European Law* (1994) 321, at 401; De Winter, *supra* n. 19, at 147; Lord, *supra* n. 4, at 65.

(24)The treaties have evolved as follows: In the original EEC Treaty, 47 articles asked for a unanimous decision of the Council, 44 articles required a qualified majority vote and one article asked for a simple majority decision. After revision by the Single European Act of 1986, 48 articles required unanimity, 48 articles provided for a qualified majority vote, one article required a simple majority decision and 10 articles asked for procedures of co-operation (common position of the Council with qualified majority, after rejection by the EP unanimity in Council required). With the Treaty of Maastricht of 1992: 48 articles required unanimity, 48 articles required qualified majority, 16 articles foresaw procedures of co-operation and 14 articles asked for a co-decision of the EP, where the Council decides with a qualified majority (former Art. 189 lit. b) of the EC Treaty, now

Art. 251 EC), (figures according to T. König, *Europa auf dem Weg zum Mehrheitssystem* (1997), at 74). Those law-making procedures which involve the EP more intensely: procedures of *co-operation* (since the Single European Act of 1986 in Art. 149 of the EC Treaty, after Maastricht in Art. 189 lit. c) of the EC Treaty, now Art. 252 EC – currently applicable only in four cases, most notably in the field of the Economic and Monetary Union) and the *co-decision* procedure (Art. 251 EC, applicable in 31 areas) all require a qualified majority in Council in all phases of decision-making (exception: unanimity for the Council-decision after rejection of the proposal by the EP in the procedure of co-operation, Art. 252 EC). With the Treaty of Amsterdam of 1997, a new Title IV (Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons) was created (<http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf>). Here, the principle of unanimity will remain operational for a period of transition of five years (Art. 67 EC). Under the Treaty of Amsterdam, about 50 situations still require unanimity. However, those articles which allow for majority-decisions are applied more frequently than those requiring a unanimous decision (König, *supra*, at 87, based on empirical research for the period of 1984–1995). The Treaty of Nice introduced decision-making with a qualified majority in 27 additional provisions (either as a sole mode of decision-making or as an auxiliary mode). The procedures will only in part be effective from the treaty's entry into force. In part, they will come into effect only at a later moment (see the list of provisions in the annex to Doc. SEC (2001), at 99). See for a similar account: European Parliament, D-G for Research (ed.), Working Paper: Co-Governing after Maastricht: The EP's Institutional Performance 1994–1999 (1999), http://www.europarl.eu.int/workingpapers/poli/pdf/104reven_en.pdf.

(25) Infra part 6.

(26) One (German, British, Italian or French) vote in Council represents 8.1 million Germans (5.8 million British, Italians and French respectively). In comparison, one vote in Council represents only 1.7 million Finnish, 1.2 million Irish and 0.2 million Luxembourgian citizens. Figures as of 1995, see the table in *Føllesdahl, supra* n. 13, at 234. See also the discussion and figures in Karlsson, *supra* n. 4, at 93–99.

(27) Council Decision 1999/468/EC of 28 June 1999 laying down procedures for the exercise if implementing powers conferred on the Commission (Second Council Decision on Comitology), OJ 1999 L 184/23, http://europa.eu.int/eur-lex/pri/en/oi/dat/1999/l_184/l_18419990717en00230026.pdf. See generally Kortenberg, ‘Comitologie: le retour’, 34 *Revue trimestrielle de droit européen* (1998) 317–327; Bignami, ‘The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology’, 40 *Harvard International Law Journal* (1999) 451–515 (comparison with U.S. administrative law procedures). See for improvement of public access to Commission documents the preamble, para. 11; Art. 5 cl. 5; Art. 7; Art. 8 of the 1999 Council Decision on Comitology. See Lenaerts and Verhoeven, ‘Towards a Legal Framework for Executive Rule-Making in the EU?, The Contribution of the New Comitology Decision’, 37 *Common Market Law Review* (2000) 645–686 (‘step in the right direction’, but ‘still too vague’, *ibid.*, at 686). See also case T-188/97, *Rothmans v Commission* [1999] ECR, II-2463, paras. 53–64.

(28) This has been forcefully argued by Joerges and Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, 3 *European Law Journal* (1997) 273, at 285.

(29) Craig, ‘The Nature of the Community: Integration Theory and Democratic Theory’, in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (1999) 1, at 25.

(30) Protocol (No. 9) on the role of national parliaments in the European Union (OJ 1997 C 340/113); similarly already the Declaration No. 13 on the role of national parliaments in the European Union annexed to the Final Act of Maastricht (OJ 1992 C 191/100). See in scholarship Katz, ‘Representation, the Locus of Democratic Legitimation, and the Role of the National Parliaments in

the European Union', in R. S. Katz and B. Wessels (eds), *The European Parliament, the National Parliaments, and European Integration* (1999) 21-44; on the constraints on the ability of national parliaments to represent the public at European level Lord, *supra* n. 4, at 56-59.

(31) See Commission of European Communities, European Governance: A White Paper (COM (2001) 428), http://europa.eu.int/comm/governance/white_paper/en.pdf. The White Paper was issued on 25 July 2001 and summarizes reflections on the reform of European governance since 2000. The key-word is *openness*. See for a scholarly assessment the contributions in C. Joerges and Y. Mény and J. H. H. Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance (Jean Monnet Working Paper Series No. 6/01)* (2001).

(32) Lodge, 'Transparency and Democratic Legitimacy', 32 *Journal of Common Market Studies* (1994) 343-368.

(33) Art. 255 EC; Art. 42 Charter of Fundamental Rights; special provision with regard to Council documents (Art. 207 sec. 3 EC). See the amended proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (presented by the Commission pursuant to Article 250 (2) EC, COM/2001/0299 final – COD 2000/0032, OJ 2001, C 240/165-167).

(34) Court of Auditors, case T-194/94, *Carvel and Guardian Newspapers v Council* [1995] ECR, II-2765; case T-105/95, *World Wild Life Fund for Nature v Commission* [1997] ECR, II-313; case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR, II-2289. See generally Broberg, 'Access to documents: A general principle of Community law?', 6 *European Law Review* (2002) 194-205.

(35) Curtin, "Civil Society" and the European Union: Opening Spaces for Deliberative Democracy?", VII-1 *Collected Courses of the Academy of European Law* (1996) 185, at 259.

(36) Council Decision 1999/385 of 31 May 1999 adopting the Council's Rules of Procedure, OJ 1999 L 147/13, Art. 4-8 of the Rules. Cf. Art. 36 of the preliminary draft Constitutional Treaty of 28 October 2002:

'[T]he legislative debates of the European Parliament and of the Council in its legislative form shall be public' (CONV 369/02).

(37) This is exactly what happened on the WTO-conference of ministers in Seattle in December 1999, where developing countries were granted full access.

(38) *Infra part 6.*

(39) Katz, *supra* n. 15, at 56.

(40) See on this problem Peters, 'Verfassungsgesetzgebung: Demokratische Legitimation und direkte Demokratie – aus der Sicht der EU', in N. Michel and A. Epiney (eds), *Une constitution pour l'Europe* (forthcoming March 2003).

(41) See on the inherently anti-democratic *méthode Monnet* Featherstone, 'Jean Monnet and the "Democratic Deficit" in the European Union', 32 *Journal of Common Market Studies* (1994) 149–170; M. Burgess, *Federalism and the European Union: Political Ideas, Influences and Strategies in the European Community, 1972-1987* (1989), at 44–55; D. N. Chrysochoou, *Democracy in the European Union* (1998), at 156. See also J. Laughland, *The Tainted Source: The Undemocratic Origins of the European Idea* (1997).

(42) See Art. 6 sec. 1 EU. Although the Treaties of Rome do not mention the term democracy, the democratic principle was applied to the EU at least since the introduction of direct elections to the EP in 1979. See also cl. 3 of the preamble of the Single European Act of 28 February 1986 (<http://europa.eu.int/abc/obj/treaties/en/entr14a.htm>); cl. 5 of the preamble of the EU Treaty of Maastricht of 7 February 1992 (<http://europa.eu.int/en/record/mt/top.html>) and finally cl. 6 of the preamble EU (Amsterdam) of 2 Oct. 1997 (<http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf>). According to the case-law, the participation of the EP in legislation as provided for in the treaties reflects the community principle of democracy: see case 138/79, *Roquette Frères v Council* [1980] ECR 3333, para. 33; case 139/79, *Maizena v Council* [1980] ECR 3393, para. 34; case C-300/89, *Commission v Council (Titandioxide)* [1991] ECR, I-2867, para. 20.

(43) See, e.g., Art. 23 sec. 1, sentence 1 of the German Basic Law.

(44) Kielmannsegg, ‘Integration und Demokratie’, in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (1996) 47, at 58; in this sense also Grimm, ‘Mit einer Aufwertung des Europa-Parlaments ist es nicht getan – Das Demokratiedefizit der EG hat strukturelle Ursachen’, 6 *Jahrbuch Staats- u. Verwaltungswissenschaft* (1992/93) 13, at 13-14; Ossenbühl, ‘Maastricht und das Grundgesetz – eine verfassungsrechtliche Wende?’, 108 Deutsches Verwaltungsblatt (1993) 629, at 634; A. Schmitt Glaeser, *Grundgesetz und Europarecht als Elemente Europäischen Verfassungsrechts* (1996), at 216; Scharpf, ‘Demokratie in der transnationalen Politik’, in U. Beck (ed.), *Politik der Globalisierung* (1998) 228, at 233.

(45) See extensively A. Augustin, *Das Volk in der Europäischen Union: Zu Inhalt und Kritik eines normativen Begriffs* (2000); Kirchhof, ‘Der deutsche Staat im Prozeß der europäischen Integration’, in J. Isensee and P. Kirchhof (eds), VII *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1992) 855, para. 33: ‘Democracy presupposes integration in a state *Volk*’ (translation by the author). According to Udo Di Fabio, the concept of the State and of democracy form an inseparable unit. Renouncing on State sovereignty means to renounce on popular sovereignty (Di Fabio, ‘Der neue Art. 23 des Grundgesetzes’, 32 *Der Staat* (1993) 191, at 200-201, 206, 203). According to Albrecht Rodelzhofer, the ‘democratic deficiency of the EC cannot be overcome by empowerment of the EP, because the EP does not represent a State’s people and certainly not the German People’ (Rodelzhofer, ‘Zum behaupteten Demokratiedefizit in der Europäischen Gemeinschaft’, in P. Hommelhoff and P. Kirchhof (eds), *Der Staatenverbund der Europäischen Union* (1994) 39, at 54; translation by the author).

(46) G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, in Hegel, *Sämtliche Werke Vol. 7*, ed. by H. Glockner (1928, orig. 1821), § 258 (at 329); see also A. Müller, ‘Von der Idee des Staates’, in Müller, *Ausgewählte Abhandlungen* (1921, orig. 1809) 3, at 5: ‘Man is unthinkable outside the State’ (translation by the author).

(47) Kirchhof, *supra* n. 45, para. 53; Ossenbühl, *supra* n. 44, at 634; Grimm, *supra* n. 44, at 16; Di Fabio, *supra* n. 45, at 202-203; Isensee, ‘Nachwort: Europa – die politische Erfindung eines Erdteils’, in J. Isensee (ed.), *Europa als politische Idee und als rechtliche Form* (1994) 103, at 133; Kirchhof, ‘Die Gewaltenbalance zwischen den staatlichen und europäischen Organen’, 53 *Juristenzeitung* (1998) 965, at 972; Chrysochoou, *supra* n. 41, at vii and 16.

(48) E. Renan, ‘Qu’est-ce qu’une nation?’, in Renan, I *Oeuvres complètes* (1947, orig. 1882) 887, at 903.

(49) Lepsius, ‘Ethnos’ und ‘Demos’”, 38 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* (1986) 751, at 756-757; Habermas, ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’, 1 *European Law Journal* (1995) 303 at 305-306; Weiler, ‘The Reformation of European Constitutionalism’, 35 *Journal of Common Market Studies* (1997) 97, at 118–122. See also van Gerven, ‘Toward a Coherent Constitutional System within the European Union’, 2 *European*

Public Law (1996) 81, at 84; Mancini, ‘Europe: The Case for Statehood’, 4 *European Law Journal* (1998) 29, at 35.

(50)The German Federal Constitutional Court (BVerfGE 89, 155, 184 (1993) – *Maastricht*) searched for a ‘permanent legal link’, which is similarly tight as a people’s affiliation to a State and which manifests an ‘existential commonality’ (translation by the author).

(51)See already the assessment of the formation of a unified French nation as a ‘political wonder’ at the time of the French revolution *in consequence of* ‘the love of freedom’ (*Révolutions de Paris, dédiées à la Nation et au District des Petits-Augustins*, ed. by L.-M. Prudhomme, Paris, No. 20, 21 – 28 November 1789, 2-3). See in scholarship Ernest Gellner, *Nations and Nationalism* (1983), at 55 with the assertion that ‘it is nationalism which engenders nations, and not the other way round.’ See also Eric J. Hobsbawm, *Nations and Nationalism since 1780* (1990) 80-100 (chap. 3) on ‘nationalism from above’. Under a different angle, J. A. Schumpeter, *Capitalism, Socialism and Democracy* (1976, 1st ed. 1942), Chap. 21 and 22, esp. at 263: ‘[T]he will of the people is the product and not the motive power of the political process.’

(52)Cf. Larry Siedentop, *Democracy in Europe* (2001), Chap. 7 (122-150) on ‘Creating an Open Political Class’.

(53)Offe, “Homogeneity” and Constitutional Democracy: Coping with Identity Conflicts through Group Rights’, 6 *The Journal of Political Philosophy* (1999) 113, at 119: A stable democracy is homogeneous ‘because all (or at any rate the vast majority) of the people share a commitment to the state and its democratic regime form, they are tied to their fellow citizens through and understanding of the commonality of their fate and the recognition of equal liberties, and they rank these commitments and loyalties higher than the various cleavages that divide national society’. See also Katz, *supra* n. 15, at 61: The higher the perceived level of community, the lower the danger of majorities trampling on the rights or interests of others. The lower the level of community, the more profoundly are interests likely to clash.

(54)C. Schmitt, ‘Der Gegensatz von Parlamentarismus und moderner Massendemokratie’, in Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923-1939* (1988, orig. 1926) 52, at 59 (translation by the author).

(55)C. Schmitt, *Der Begriff des Politischen* (1932), at 14.

(56)See in detail S. Eisel, *Minimalkonsens und freiheitliche Demokratie* (1986) with further references. Siedentop, *supra* n. 52, at 25: ‘Our object should be to create a culture of consent in Europe.’

(57)D. Easton, *A Systems Analysis of Political Life* (1965), at 273-274.

(58)See, e.g., von Bogdandy, ‘Zweierlei Verfassungsrecht: Europäisierung als Gefährdung des gesellschaftlichen Grundkonsenses?’, 39 *Der Staat* (2000) 163, at 171–182.

(59)Albert, ‘Aufklärung und Steuerung: Gesellschaft, Wissenschaft und Politik in der Perspektive des kritischen Rationalismus’, 17 *Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik* (1972) 11, at 25-26. It seems plausible to ask for respect of human dignity and human rights, of democratic rules of the game and for an individual renouncement of resort to violence (Eisel, *supra* n. 56, at 91-92).

(60)Immerfall and Sobisch, ‘Europäische Integration und europäische Identität: Die Europäische Union im Bewusstsein ihrer Bürger’, 47 *Aus Politik und Zeitgeschichte* (1997) B10, 25, at 34 with further references. This basic consensus also seems to carry the diffuse support of the EC/EU.

According to opinion polls from spring 1999, only 74% of the interviewed who support the membership of their respective countries in the EU believe that their country can profit from this membership (51 *Eurobarometer* (July 1999) 27). That is to say that many Europeans are ready to live with the EU even though they perceive it as a disadvantage for their country. This can be seen as a proof of the existence of a diffuse support.

(61)‘Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.... The same books, newspapers, pamphlets, speeches, do not reach [the different sections of the country] ... The same incidents, the same acts, the same system of government, affect them in different ways ...’ J. S. Mill, *Considerations on Representative Government*, ed. by C. Shields (1958, orig. 1861), Chap. 16 (230-231).

(62) See Lord *supra* n. 4, 107-124; D. Teetzmann, *Europäische Identität im Spannungsfeld von Theorie, Empirie und Leitbildern* (2001); Siedentop, *supra* n. 52, Chap. 10 (189-214); Pache, ‘Europäische und nationale Identität: Integration durch Verfassungsrecht?’, 117 *Deutsches Verwaltungsblatt* (2002) 1154-1167.

(63) Hobsbawm, *supra* n. 51, at 20-22; 54-63; 97-100.

(64) See only Stolleis, ‘Das ”europäische” Haus und seine Verfassung’, 78 *Kritische Vierteljahrsschrift für Gesetzgebung und Rechtswissenschaft* (1995) 275, at 279; also Habermas, ‘Die postnationale Konstellation und die Zukunft der Demokratie’, in J. Habermas, *Die Postnationale Konstellation* (1998) 91, at 155-156.

(65) J.-J. Rousseau, *Considérations sur le gouvernement de Pologne et sur sa réformation projetée en avril 1772*, in *Oeuvres Choisies* (undated) 341, at 351.

(66) Noelle-Neumann, ‘Die öffentliche Meinung’, *Jahrbuch der Europäischen Integration* (1998/99) 311, at 315 with more specific indications.

(67) Noelle-Neumann, *supra* n. 66, at 316.

(68) 51 *Eurobarometer* (July 1999) 8-9.

(69) But see Sur, ‘L’état entre l’éclatement et la mondialisation’, 30 *Revue Belge de Droit International* (1997) 5, at 10.

(70) R. Münch, *Globale Dynamik, lokale Lebenswelten* (1998), at 308; contra K. A. Schachtschneider, *Res publica res populi* (1994), at 1189.

(71) This minimum is the recognition of the universal principle of practical ethics, the ‘golden rule’, which asks us to behave toward our neighbour as we expect him to behave towards us (Matth. 7,12; Luc. 6,31; Tob. 4,5). See in detail Schrey and Hoche, ‘Regel, goldene (I. Antike bis Aufklärung; II. Die goldene Regel seit Kant)’, in J. Ritter and K. Gründer (eds), *Historisches Wörterbuch der Philosophie Vol. 8* (1992), column 450–464, with further references, also on pre- and non-christian formulations of this principle.

(72) On the importance of a procedural consensus Fraenkel, ‘Historische Vorbelastungen des deutschen Parlamentarismus’, in E. Fraenkel, *Deutschland und die westlichen Demokratien* (1991, orig. 1960) 23, at 65; DeWiel, *supra* n. 2, at 3-10, 6, 142-179. For the EC/EU von Bogdandy, *supra* n. 58, at 181-182;

(73) D. M. Curtin, *Postnational democracy: The European Union in search of a political philosophy*

(1997), at 27.

(74) J. Steiner and T. Ertmann (eds), *Consociationalism and Corporatism in Western Europe: Still the Politics of Accommodation?* (2002).

(75) Cf. Delwit and De Waele and Magnette, ‘Introduction: Vers un nouveau mode de parlementarisme?’, in P. Delwit and J.-M. De Waele and P. Magnette (eds), *A quoi sert le Parlement européen?* (1999) 11, at 18 (‘un parlementarisme de consensus’).

(76) *Infra part 9. B.*

(77) Weiler, ‘The Transformation of Europe’, 100 *The Yale Law Journal* (1991) 2403, at 2473; Kielmannsegg, *supra* n. 44, at 52.

(78) Weiler, *supra* n. 77, at 2473.

(79) Karl Kaiser calls the idea of preserving legitimacy by unanimity as ‘an effective facade that conceals the ongoing erosion of democratic control over increasingly important matters’ (Kaiser, ‘Transnational Relations as a Threat to the Democratic Process’, 25 *International Organization* (1971) 706, at 715).

(80) If, for example, each of the governments represented in Council has been elected by 55 % of its voters, a Council-decision taken with a qualified majority is supported only by 0.55 times 71.3 %, which means by 39.32 % of the voters. If the majority-coalition consists mostly of the smaller Member States, which have a much higher voting power in Council than their proportion of the EU-population, it is possible that 71.3 % of the Council’s votes will not even represent 30 % of the voters (Vaubel, ‘Die Macht der europäischen Mehrheiten’, 139 *Frankfurter Allgemeine Zeitung* (17 June 2000) 15, columns 2-3). It is difficult to object to this calculation by arguing that a member of Government does not only represent his electors but all his people, because this does not correspond to the reality of client-oriented politics. Vaubel continues: ‘If you want to make sure that at least half of the EU-electors stand behind a law-making of the Council you have to ask for a qualified majority of more than 90% or unanimity.’ (Translation by the author).

(81) See Art. 1 of the Amsterdam Protocol on the institutions with the prospect of enlargement of the European Union, OJ 1997 C 340/111; Presidency Conclusions of Cologne of 3/4 June 1999, para. 53 (http://europa.eu.int/council/off/conclu/june99/june99_en.htm). See in scholarship for the double-majority-requirement Frank Vibert, *Europe: A Constitution for the Millennium* (1995), at 131, 136-137, 147. As yet (October 2002), no substantial proposition in that regard has been forwarded in the European Convention (see, <http://european-convention.eu.int/glossary.asp?lang=EN&Content=D>).

(82) From 1 January 2005 on, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62 % of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted (Art. 3 of the Protocol on the Enlargement of the European Union, Annex 1 of the Treaty of Nice of 26 February 2001; OJ 2001 C 80/1).

(83) Seminal J. M. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962); see also D. C. Mueller, *Public Choice II* (1989), at 43–176. Application to the EC/EU by Vibert, *supra* n. 81, at 129–149.

(84) Terms by Buchanan and Tullock, *supra* n. 83, at 43–46, see also at 96 and 249.

(85) See already J.-J. Rousseau, *Du contrat social* (1762), Livre IV, Chapitre II, at 154: ‘Deux maximes générales peuvent servir à régler ces rapports: l’une, que plus les délibérations sont

importantes et graves, plus l'avis qui l'emporte doit approcher de l'unanimité; l'autre, que plus l'affaire agitée exige de célérité, plus on doit resserer la différence prescrite dans le partage des avis; ... c'est sur leur combinaison que s'établissent les meilleurs rapports qu'on peut donner à la pluralité pour prononcer.'

(86)Cf. Benz, *supra* n. 9, at 100 and 83.

(87)P. C. Schmitter, *How to democratize the European Union ... and why bother?* (2000), at 8-9; MacCormick, 'Problems of Democracy and Subsidiarity', 6 *European Public Law* (2000) 531, at 534-535.

(88)R. A. Dahl, *Democracy and its Critics* (1989), at 217.

(89)Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision', 1 *European Law Journal* (1995) 219, at 232.

(90)F. Scharpf puts this as follows: Both authenticity and effectivity of the citizens' self-determination must be guaranteed (Scharpf, *supra* n. 9, at 27); seminal already F. Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (1970), at 21-28; see also Scharpf, *supra* n. 4. Building on Scharpf, A. Benz, *Postparlamentarische Demokratie?* (1998), at 202; see also M. Zürn, *Regieren jenseits des Nationalstaats* (1998), at 236, on the input- und output-dimension of democracy.

(91)Robert A. Dahl and Edwad R. Tufte draw from a detailed empirical study the conclusion that these positive effects work only when the units are very small (in Sweden communities of less than 10,000 inhabitants (R. A. Dahl and E. R. Tufte, *Size and Democracy* (1973), at 41-65).

(92)Cf. Dahl and Tufte, *supra* n. 91, at 108-109, 135, 138.

(93)Dahl and Tufte, *supra* n. 91, at 92; see already Federalist No. 10 (Madison), in A. Hamilton and J. Madison and J. Jay, *The Federalist Papers*, ed. by C. Rossiter (1961, orig. 1788), at 83.

(94)Held, 'Democracy, the Nation-State and the Global System', in D. Held, *Political Theory Today* (1991) 197, at 199; Walker, 'On the Spatiotemporal Conditions of Democratic Practice', 16 *Alternatives: Social Transformation and Humane Governance* (1991) 243-261; McGrew, 'Demokratie ohne Grenzen?', in U. Beck (ed.), *Politik der Globalisierung* (1998) 374, at 381-383.

(95)M. J. Sandel, *Democracy's Discontent: America in Search of a Public Policy* (1996), at 202.

(96)See Stein, 'International Integration and Democracy: No Love at first sight', 95 *American Journal of International Law* (2001) 489-534, on democracy-legitimacy deficits in the WHO, WTO, NAFTA and EU.

(97)The International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (39 *International Legal Materials* (2000) 270 et seq.), not yet in force, has been reduplicated and made compulsory by SC Res. 1373 (2001), 40 *International Legal Materials* (2001) 1278 et seq.

(98)Scharpf, *supra* n. 44, at 230; Goodman, 'Die Europäische Union: Neue Demokratieformen jenseits des Nationalstaates', in U. Beck (ed.), *Politik der Globalisierung* (1998) 331, at 350; Kaiser, 'Globalisierung als Problem der Demokratie', 53 *Internationale Politik* (1998) 3, at 4.

(99)'Democracy within a nation-state requires democracy within a network of intersecting international forces and relations. This is the meaning of democratization today.' Held, *supra* n. 94, at 232.

(100) Magnette, ‘L’Union européenne: Un régime semi-parlementaire’, in P. Delwit and J.-M. De Waele and P. Magnette (eds), *A quoi sert le Parlement européen?* (1999) 25-54, esp. at 32-33; P. Magnette, *L’Europe, l’état et la démocratie* (2000), at 221; Coultrap, ‘From Parliamentarism to Pluralism: Models of Democracy and the European Union’s Democratic Deficit’, 11 *Journal of Theoretical Politics* (1999) 107-135 (arguing for the appropriateness of a ‘pluralist’ model of democracy, with emphasis on societal interest groups and a fragmented governmental structure); see also Craig, *supra* n. 16, at 43-64, arguing for a ‘republican conception’ of European democracy, which takes seriously the ‘idea of a democracy based upon institutional balance’ (Craig, *supra* n. 16, at 43).

(101) Andersen and Burns, ‘The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance’, in S. S. Andersen and K. A. Eliassen (eds), *The European Union: How Democratic is it?* (1996) 227–251. The authors state ‘that the conventional idea of popular sovereignty in representative government has been and continues to be marginalised. Such government lacks the structural competence ... to deal with the myriad of differentiated processes and governance challenges of modern societies.... Monitoring, overview, investigation, deliberation, decision-making is far beyond the capacity of parliament (and its membership), no matter how large, how capable, how well organized, how specialized’ (*ibid.*, at 244-245). Therefore, a post-parliamentary system has evolved, which is characterized by the prominent role of interest groups (as opposed to individuals and their ‘territorial’ representatives), the central role of experts, and the shift away from Parliament into informal groupings and networks. ‘These forms [of governance] also realise, in a certain sense, general cultural notions of democracy, namely the right to form groups or organizations in order to advance or protect interests and the right to voice an opinion and to influence policies or laws that affect one’s interests or values’ (*ibid.*, at 240).

(102) Standard works are J. S. Dryzek, *Discursive Democracy* (1990); J. M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (1994); J. S. Fishkin, *Democracy and Deliberation* (1991); C. S. Nino, *The Constitution of Deliberative Democracy* (1996); J. Elster (ed.), *Deliberative Democracy* (1998). A reader is J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on reason and Politics* (1997). See also (in part referring to Europe) Manin, ‘On Legitimacy and Political Deliberation’, 15 *Political Theory* (1987) 338, at 351-352 and 359-360; J. Habermas, *Faktizität und Geltung* (1992), at 532-533; Dryzek, ‘Political and Ecological Communication’, 4 *Environmental Politics* (1995) 13, at 23; Benhabib, ‘Toward a Deliberative Model of Democratic Legitimacy’, in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 67–94, esp. at 68; Habermas, ‘Drei normative Modelle der Demokratie’, in J. Habermas, *Die Einbeziehung des Anderen* (1996) 277, at 284–292. More recent studies include G. Palazzo, *Die Mitte der Demokratie: Über die Theorie deliberativer Demokratie von Jürgen Habermas* (2002); Thürer, ‘Deliberative Demokratie und Abstimmungsdemokratie’, in A. Donatsch and M. Forster and C. Schwarzenegger (eds), *Festschrift für Stefan Trechsel zum 65. Geburtstag* (2002) 169-187. Application of the deliberative model to the EU: Curtin, *supra* n. 35, at 185–280; Curtin, *supra* n. 73, at 53–55; Joerges and Neyer, *supra* n. 28, at 273–299, esp. at 282; Joerges and Neyer, ‘Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector’, 4 *Journal of European Public Policy* (1997) 609–625, esp. at 617–621; Habermas, *supra* n. 64, at 154-155; Eriksen and Fossum, ‘Post-national integration’, in E. O. Eriksen and J. E. Fossum (eds), *Democracy in the EU: Integration through Deliberation?* (2000) 1, at 15-21; Eriksen and Fossum, ‘Conclusion: Legitimacy through deliberation’, in E. O. Eriksen and J. E. Fossum (eds), *Democracy in the EU: Integration through Deliberation?* (2000) 256-269; Eriksen, ‘Deliberative supranationalism in the EU’, in E. O. Eriksen and J. E. Fossum (eds), *Democracy in the EU: Integration through Deliberation?* (2000) 42-62; Karlsson, *supra* n. 4, at 57-75, 227-249.

(103) Habermas, *supra* n. 64, at 166.

(104) See already Federalist No. 51 (Madison), in *Hamilton and Madison and Jay, supra* n. 92, at

320, 322. Seminal for modern government Majone, *supra* n. 23; Majone, ‘Independence versus Accountability? Non-Majoritarian Institutions and Democratic Government in Europe’, 1 *The European Yearbook of Comparative Government and Public Administration* (1994) 117; G. Majone, *Regulating Europe* (1996), esp. at 284–301.

(105) See on NGOs as a functional surrogate for the lacking opposition on the global level S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996), at 198.

(106) Marschall, ‘Parlamentarische Repräsentation in der Informationsgesellschaft’, 45 *Zeitschrift für Politik* (1998) 282, at 294, 298 -299.

(107) Beyme, *Parlamentarische Demokratie*, *supra* n. 9, at 544. See already Andersen and Burns, *supra* n. 101, at 248–251.

(108) Vibert, *supra* n. 81, at 177-178 and 232; Scharpf, *supra* n. 44, at 242; for the constitutional level Pogge, ‘How to Create Supra-National Institutions Democratically’, in A. Føllesdahl and P. Koslowski (eds), *Democracy and the European Union* (1998) 160, at 171–185; Schmitter, *supra* n. 87, at 120-125. See the empirical study on the use of *national* referendums on European issues by accession candidates and Member States S. Hug, *Voices of Europe: Citizens, Referendums and European Integration* (2002).

(109) Lord *supra* n. 4, at 46-54, esp. at 49.

(110) Seminal G. Lehmbruch, *Proporzdemokratie* (1967); see also A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (1984), esp. at 21-23, 207-208; H. Abromeit, *Interessenvermittlung zwischen Konkurrenz und Konkordanz* (1993); M. G. Schmidt, *Demokratietheorien* (1997), at 229–252 (distinction between consensual and consociational democracy at 242).

(111) Vibert, *supra* n. 81, at 159-160; critically Katz, *supra* n. 15, at 74.

(112) Speech of 11 Nov. 1947 in the House of Commons, repr. in W. Churchill, *His Complete Speeches 1897-1963* (1974), at 7563, 7566.

(113) Magnette, *L'Europe*, *supra* n. 100, at 222-227.