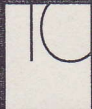


Helge Høibraten / Jochen Hille (eds.)

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## The 'United Parliaments of Europe' and further Considerations on Subsidiary Democracy\*

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The European Union is almost ritually criticized for its democracy deficit. Almost as automatically, this leads to calls to strengthen the European Parliament, sometimes even garnished with some elements of direct democracy. But this need not represent the sole solution. For if the element of "subsidiarity" is constitutive for the EU's self-conception, that is, an emphasis on closeness to the citizenry, is taken seriously, then an expanded role for the national parliaments should also be considered. In the following, I will explore a practical suggestion for their direct inclusion in debating and deciding questions on the European level.

First of all, we need to clarify exactly what is meant by this democracy deficit, something usually taken as self-evident. A few general rules for reform can be distilled from this discussion, which in the next step are applied in three concrete suggestions for remedying the problem. In particular, a United Parliaments of Europe should in the future be given a determining role. The discussion of this includes an exploration of a suitable voting system: ExCumLex. This is followed by discussing the generalization of possible national deviations from the European standard in the form of a Principle of Advantage. Thirdly, a proposal for a future process for selecting members of the European Commission will be presented, arguing for a transition towards a new Switzerland/Athens/Westminster mix. The two latter considerations are intended to strengthen the parliaments of the member states, integrating them more fully into European policy, so that an intensification of *subsidiary democracy* is obtained in all three ways. Beside functional subsidiarity, where particular areas, usually the less important, are delegated to the member states, democratic decision making in the EU needs to be strengthened by delegating relevant decisions of European importance to the elected representative bodies of the member states.

\* Slightly updated and translated version of a contribution to Claus Offe (Ed.), *Demokratisierung der Demokratie. Diagnosen und Reformvorschläge*, Frankfurt/M. 2003.



## Is the EU a democratic institution?

In political theory, three things are usually considered crucial characteristics of a democracy.<sup>1</sup>

These necessary characteristics for granting a political body the “democratic” seal of quality are:

- Equality of citizens in the political sphere,
- Transparency of decision-making processes
- Accountability of elected representatives

The first criterion requires first and foremost the equal weighting of votes in elections. Differences in weighting, often unavoidable in voting district apportionment, must be kept to an absolute minimum. If minority protection – for example the population of smaller states in a union – is considered a further goal of a free constitution, this goal should be openly achieved by way of veto rights, not secretly smuggled in via the unbalanced weighting of votes. Such a veto in a federation could for example be the stipulation that a measure not only needs the consent of a majority of voters, but also a majority of member states.

This equality of citizen power is quite questionable in the EU, for both in the representation in European Parliament as well as in the Council of Ministers<sup>2</sup> there are excessive distortions. As points of orientation for determining the extent of inequality, consider the two countries Germany and Luxemburg, extremes when it comes to population.

In 1995, the number of residents per representative in Germany was 820 000 and 70 000 in Luxemburg. A single Luxemburg vote was thus relatively speaking almost twelve times more influential than a German one. Also, in votes with qualified majority each vote in the Council of Ministers represents anywhere between 8.1 and

1 Føllesdal, Andreas: “Democracy and the European Union: Challenges.” In: Andreas Føllesdal and Peter Koslowski (eds.): *Democracy and the European Union*, Heidelberg 1998, 1–12, here 7 ff.

2 Unfortunately, the EU gave two of its institutions almost identical names: the European Council and the Council of Europe. The first is made of all executive heads – premiers, presidents, chancellors – plus the President of the Commission. It is an almost informal body, but one responsible for the large negotiations and compromises: like Maastricht, Amsterdam, Nice. In contrast, everyday work is undertaken by the Council of the European Union, which consists of the relevant ministers. With the exception of the defense ministers, all important policy areas have their own council. To keep the distinction to the first clear, in the following the term “council of ministers” will be used.

just 0.2 million residents.<sup>3</sup> The new Treaty of Nice shows that after expansion hardly anything has changed about these disparities.<sup>4</sup>

If such distortion existed within a national state as a classed system of voting rights, where, for example, the poor and rich or men and women were subject to unequal treatment, the public outcry would be guaranteed. But when it comes to the European level, not only is this protest lacking; despite multiple revisions of the treaties, there seems to be no real will to eliminate the discrepancy. So the first result of testing the democratic quality of the EU reveals that there is no real equality of citizen power.

Things do not look much better when we come to the second criterion: transparency. Transparency is crucial, because without awareness of the political behavior of elected representatives it is difficult, if not impossible, to evaluate their work. When it comes to the EU, the extremely high complexity of decision-making structures already makes it practically impossible for voters to follow the process. For example, there are for the European Parliament alone eight different ways of effecting legislation, from the facultative hearing to obligatory vote.<sup>5</sup>

The Council of Ministers is even less transparent. Around 70 percent of its decisions are quietly worked out on the civil servant level, and only formally nodded through by the deciding body.<sup>6</sup> Controversial issues, in other words, those things where the electorate could perhaps see how various positions collide, arguments are exchanged, and how this results in a decision, are not really visible to the public. EU politics consist primarily of covert diplomacy. All the minutes on meetings and votes held by the Council of Ministers are not public.<sup>7</sup> When it comes to transparency, the EU fails another criterion.

The remaining third condition, accountability, is considered by most commentators to be the central criterion for a democracy. The action of the political representatives must be brought to acceptably coincide with the majority will of the voters, as expressed in elections and/or referenda. According to the general view, the European Parliament is insufficiently accountable; despite the expansion of its role

3 Føllesdal, Andreas: “Democracy and Federalism in the European Union.” In: Andreas Føllesdal, Peter Koslowski (Hg.): *Democracy and the European Union*. Heidelberg 1998, 231–253, here 234.

4 Fischer, Klemens H.: *Der Vertrag von Nizza*. Baden-Baden 2001, 246 f.

5 Decker, Frank: „Mehr Demokratie wagen: Die Europäische Union braucht einen institutionellen Sprung nach vorne.“ In: *Aus Politik und Zeitgeschichte B* (2001), 33–37, here 35.

6 Gretschmann, Klaus: „Traum oder Alptraum? Politikgestaltung im Spannungsfeld von Nationalstaat und Europäischer Union.“ In: *Aus Politik und Zeitgeschichte B* (2001), 25–32, here 28.

7 Føllesdal 1998, as footnote 1, 5.



in recent years it remains a relatively powerless institution. Instead, we have a powerful ersatz legislative branch in the Council of Ministers and the European Council.

The problem of this construction can be made clear by way of analogy. To translate the European distribution of powers to the German context: it is as if the Bundesrat were the true parliament that passes legislation and determines the government, while the Bundestag plays only a very modest secondary role. We can be sure that such a weighting of power in Germany could hardly survive over the long term. First of all, it would be seen as ineffective, for state governments are too focused on their relative regional interests. And on the other hand, the chain of legitimization would be quite weak. Democracy theory assumes that the degree of legitimacy depends on the number of stations separating voter and political act. In the EU, with the strong position of the ersatz legislative of the two councils, this chain is unnecessarily long. Thus, the criterion of accountability is also not met.

The insufficient fulfillment of all three conditions together results in a paradoxical situation, as Juliet Lodge describes it: if the Union were to apply for membership, by no means could it be sure of acceptance, because of its weak democratic structures.<sup>8</sup> The usual response to the EU's democracy deficit is now to strengthen the European Parliament at the cost of the influence of the Council of Ministers and the European Commission.

Beside the standard descriptions of democracy among political scientists, which seems to suggest this advice, there are also positions specific to Europe that warn precisely against this. Fritz Scharpf, for example, has emphasized that the acceptance of democracy rests on two columns: according to Abraham Lincoln's classical definition of democracy as "government of the people, by the people, for the people" we cannot solely look at the system's input, that is, "through the people," but its output as well: "for the people."

As in national politics, there is a tension between these aspects. An example of this is the existence of constitutions: on the level of the EU, a simple strengthening of voter participation could lead to a decline in effectiveness. The astonishing success of the EU, the argument goes, probably lives from the mix of a technocracy protected from the direct will of the people and the policy network of the executives.

Just as there is skepticism when it comes to chances for the success of democratization, there are equally skeptical views when it comes to the question of the existence of a European people: it is argued that a European people perhaps does not really exist, and is thus not truly capable of sovereignty. Such positions also seem to come primarily from Germany. The representatives include such prom-

8 Lodge, Juliet: „Strengthening the European Parliament and its Alternatives.“ In: Eugen Antalovsky, Josef Mechior and Sonja Puntcher Rieckmann (eds.): *Integration durch Demokratie? Neue Impulse für die Europäische Union*. Marburg 1997, 167–192, here 168.

inent authors as Grimm, Kielmansegg, Offe, Lepsius, Habermas and again Scharpf.<sup>9</sup> In the words of the latter, the EU has a threefold deficit:

“... the lack of a pre-existing collective identity, the lack of Europe-wide political debates, and the absence of a European infrastructure of political parties and common media that could insure the political accountability of office holders to a European body of voters”.<sup>10</sup>

Many contrary opinions can be found in the literature, particularly when it comes to the first claim, the lack of a collective identity. It is pointed out that the inherent hypothesis that state formation needs to be preceded by a mythical formation of a nation is quite disputable if one looks at European history.<sup>11</sup> The question is posed whether the EU's functionality, seemingly lacking an overarching idea, is not itself based on a powerful modern myth, the principle of rationality.<sup>12</sup>

There is, for example, a great deal of empirical plausibility for the hypothesis that the formation of a collective identity is gradually progressing in the populations of the EU member states. For example, at the end of the 1990s, the Eurobarometer showed that only every twentieth European defined him or herself exclusively as European. But the number of those who claimed a solely national identity no longer formed a larger group than those who claim a mixed identity as both a citizen of a particular state and a citizen of Europe.<sup>13</sup>

Above all, the question poses itself: what alternatives do the skeptics have to offer? The deepening of the EU achieved in the past years seems irreversible. To stop halfway not only risks the effectiveness of the now much larger Union; it could also have negative reverse impacts on the democratic structure of the member states. If decisions are increasingly made in Brussels, and this process is marked by “bureaucratization, informalization, and arcanization”<sup>14</sup>, the accompanying dominance of the executive and the diffusion of accountabilities at home could lead

9 Fuchs, Dieter: „Demos und Nation in der Europäischen Union.“ In: Hans-Dieter Klingemann and Friedhelm Neidhardt (eds.): *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung*. Berlin 2000, 215–236, here 216.

10 Scharpf, Fritz W.: *Regieren in Europa. Effektiv und demokratisch?* Frankfurt/M. 1999, 167.

11 Fuchs 2000, as footnote 9, 230.

12 Hansen, Lene and Michael C. Williams: “The Myths of Europe: Legitimacy, Community and the 'Crisis' of the EU.” In: *Journal of Common Market Studies* 37 (1999:2), 233–249.

13 Fuchs 2000, as footnote 9, 226.

14 Bach, Maurizio: „Die europäische Integration und die unerfüllten Versprechen der Demokratie.“ In: Hans-Dieter Klingemann and Friedhelm Neidhardt (eds.): *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung*. Berlin 2000, 185–214, here 201.



to a combination of paralyzing voter dissatisfaction and eruptive electoral successes for right wing populist parties. For this reason alone, an issue can no longer be *whether* the democracy deficit should be overcome – but simply *how* this should be achieved.

Four things can be learned from the skeptics of a simple transfer of national democratic principles to the EU. First, a European identity cannot be considered secure, but is at best a fragile construction in need of improvement – or in the worst case has yet to be achieved. This requires measures to build up trust between the citizenries of the member states, and these can first of all be imagined as the beginning of a trans-border discourse. Second, political opinion formation on European questions still takes place primarily on the level of the nation-state. It is thus central to include the nation states, both as forums for generating opinions and decision-making. Third, Europe cannot consist solely of empty rules determining process. It should also have thematic goals, a purpose for its existence alongside other powers, like the US. Fourth, the inclusion of all EU member states, which up until now has limited losses due to internal friction, should not be abandoned too quickly for a purely input-oriented democratization.

In combining these skeptical points with the general criteria for a democracy, a robust catalogue of reform requirements could be formulated as follows:

- Political equal weighting of citizens in European political life needs to be established.
- The transparency of decisions needs to be improved.
- National political arenas should be used to debate European questions.
- All arguments from all member states need to be given a forum.
- Appropriate veto rights on the national level need to be guaranteed.
- Elements of a specifically European identity need to be protected and strengthened.
- Appropriate national representation in executive institutions needs to be secured.
- Political elements should be strengthened in selecting those to fill leadership positions

In the following, this catalogue will be given three applications. In so doing, in individual suggestion it will not always be possible to address all points equally, but their combination does provide a balanced consideration of all the demands mentioned here.

## The United Parliaments of Europe

Is there an alternative to the common position of simply strengthening the rights of the European Parliament? One possibility would consist in opening national parliaments to European questions. This approach finds itself in good company: as a leit-motif for the following, let us take the following statement by Jürgen Habermas:

Now such arenas of public opinion and will formation have existed up until now only within individual nation-states. But the missing European public cannot be understood solely as the projective enlargement of such an intra-state public sphere. It can only emerge by opening the intact communication flows of the national arenas.

The national media of one country must pick up the substance of the controversies held in the other member states. Then, parallel opinions and counter-opinions could form in all member states around the same kind of issues, information, and reasons, regardless of where they come from.<sup>15</sup>

What here is formulated as a wish can be practically carried out by networking the national parliaments of member states. Similar to the way mega-computers no longer consist of a single gigantic apparatus, but are made up of many smaller independent computers working together, a federal political process can be constructed in an analogous way.

This means constructing a centripetal process of European discourse and decision-making. The formation of the United Parliaments of Europe could take place in the following way:

- Any country in the EU can propose European regulations if supported by a majority of its parliamentary representatives
- This proposal is submitted to all the other parliaments.
- All other parliaments have the right to introduce within an appropriate time frame a counter-proposal approved by a majority of its representatives
- After this deadline, all parliaments hold hearings on the proposals, to which representatives from the parliaments making the proposals are also invited.
- All proposals are then at the same time set to a vote in all parliaments, decided by the appropriate majority.
- For this, the parliaments are combined to form a network, forming a “virtual” European general assembly.

A practical example for illustration purposes: in the Danish parliament, a majority of representatives approves a proposal that provides for a Europe-wide CO<sub>2</sub> tax.

15 Habermas, Jürgen: „Warum braucht Europa eine Verfassung? Nur als politisches Gemeinwesen kann der Kontinent seine in Gefahr geratene Kultur und Lebensform verteidigen.“ In: *DIE ZEIT*, 28.6.2001, 7.



This is translated by the EU into all official languages, and passed on to the various legislatures. Each member state then has, say, three months to present one counter-proposal, if a majority of representatives can be obtained for it.

Then, Belgium for example might consider the Danish proposal in principle worthy of support, but thinks an additional tax on fissionable material is lacking, and proposes an alternative solution. Germany agrees to the Belgian variant, but suggests somewhat lower tax rates. Spain in contrast would like to block the EU from striving for any harmonization in this area, and makes a counterproposal. And so on and so forth ...

All proposals are then translated and distributed. What follows is a further period – perhaps again three months – in which in all parliaments hold hearings, to which representatives from each country making a proposal are also invited to explain their point of view and motivations.

Then, on a single selected day at the same time, a vote takes place in all parliaments; the individual results are reported to Brussels and/or Strasburg, then aggregated and announced in the form of an overall result. The discrepancies in the sizes of the parliaments can be easily neutralized by weighting by respective population. This allows for an actual equal treatment of the political influence of all citizens.

But how does this result in building up mutual trust among the citizenries of Europe, one of the main goals of this proposal? It does so in three ways: first of all, in order to improve chances in the voting process, shared proposals made by multiple parliaments are likely. In this way, an exchange takes place not among the executives, but among the legislative branches. This encourages not only collaboration among states with similar structural interests but also among countries possessing similar majorities, thus strengthening the formation of Europe-wide party alliances. There will thus not only be Benelux or Scandinavian proposals, but Social Democratic or Christian Democratic proposals, where countries as different as Austria, Spain, Ireland, and Poland could find their way to one another.

Secondly, and over the long term most importantly, there is then a subsequent Europe-wide phase of consultation. Undoubtedly with great media attention, the representatives of one parliament must explain to the representatives of another member state why they are presenting a particular proposal. Standpoints driven purely by national self-interest already have low chances at the very start of such a process, for they run the danger of being torn apart in argumentation, resulting in a significant loss of prestige for the governmental majority of the proposing country. Conversely, well-grounded positions could provide a foundation for a European people to emerge as a community of deliberation.

Third, it implies on the formal level a certain overcoming of a merely national point of view. Individual representatives are less compelled to follow narrowly defined national interests than are governments. And when a parliament for example votes 51 percent for proposal A, 49 percent proposal B, the votes for B are not lost. In

contrast to governments, which only represent majorities, and often narrow ones, in the gathering the results to an overall European result, all positions will be considered in coming to a European result. For example, the French and English and Italian and Iberian oppositions, along with parliamentary majorities in Germany and Scandinavia, could be able to achieve their ends, although it forms fewer governments.

By way of example, I have assumed the simple case of a simple majority. When it comes to gathering majorities for the centripetal decision making process, we could at first be satisfied with transferring current voting modalities according to the treaties of Maastricht, Amsterdam, and Nice. Aside from issues that at the moment demand unanimity, there are questions that require a simple majority and questions that require the so-called "qualified majority," the latter representing a 71 percent majority.<sup>16</sup>

This high hurdle seems sufficient protection for the interests of small states. But should these states demand further security, due to the transition to correct representation of the population, a strengthening of veto rights could be easily introduced. This could take place for example by way of the introduction of a "double majority" principle – a majority of votes of all European parliamentarians as well as parliaments. Many federal constitutions, like that of the US or Switzerland, and to certain extent Germany as well, have such a way of securing important decisions.

But this is quite a hard condition, especially when a community also includes very small member states-like Luxemburg, and most recently Malta and Cyprus. As an alternative, Philippe C. Schmitter has therefore suggested a group representation in the form of three "collegii" for the smaller, mid-sized, and large states, where any proposal also need to be internally approved.<sup>17</sup> However, this presumes, for example, that the vital interests of member states are defined solely by their size, and not their regional location, and is thus not very plausible. A less restrictive, and hence more elegant, purely formal alternative will be discussed in the next section, along with an especially suitable technique of voting.

Allow me to explore a number of possible questions or objections to this proposal. First, would this not lead to an overburdening of the national parliaments? This cannot be ruled out, so a procedure of admittance needs to be established. Here, the European Parliament could play the role of a "gate-keeper," by ordering issues according to political relevance, and perhaps allowing for no more than three or four votes per year.<sup>18</sup> In any case, it would be easy to establish purely organiza-

16 Fischer 2001, as footnote 4, 192.

17 Schmitter, Phillippe C.: *How to Democratize the European Union And Why Bother?* Lanham 2000, 83 ff.

18 And if the parliament – for example for reasons of self-interest, if a proposal threatens to interfere with its authority – were to repeatedly delay an vote, then simple contin-



tional limitations in the interest of workability. In contrast, the suggestion of the former German Foreign Minister<sup>19</sup> and a few others, also aiming at a better connection between national and European legislatures, to introduce representatives with a double mandate – as dual members of both a national parliament and a second EU chamber – would truly represent an inhumane overburdening of the deputies.

Should all questions be admissible? In the framework of the treaties: yes. It is not really clear why limitations should be necessary, and what these limitations should be.

Should individual proposals or partial suggestions be excluded? It is conceivable that states will try to smuggle in other issues of importance to them within a proposal. A shocking example of this can be seen in the United States, where such attempts are commonplace in Congress; the president was thus a number of years ago given the right to veto individual components of acts of congress. This does not seem necessary here. There are far too many parties involved, so that it is impossible to be sure that any deals perhaps made are ultimately adhered to. And the large number of voting options will provide a sufficient number of alternatives free of such problematic additives.

Should this centripetal procedure completely replace the Council of Ministers as an ersatz legislature? That seems illusory. Only a few issues are important enough to be decided in large Europe-wide debates. The Council of Ministers (as well as the European Parliament) will thus still have enough work to do. Important here would be a clear hierarchisation: a decision of the Council of Ministers can be revised and corrected by a successful majority vote of the United Parliaments, and such a decision would then be binding for the Council of Ministers.

## ExCumLex

A simultaneous vote on up to 27 alternatives – and with further expansion still more – demands a procedure that should be seen as fair, transparent, and goal oriented. The mode of voting suggested here is based on a combination of three components,

gency clauses could take effect, in which an urgency motion supported by a larger number of national parliaments could do away with this blockade.

19 Fischer, Joschka: „Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration. Rede des Bundesaußenministers am 12. Mai 2000 an der Humboldt-Universität zu Berlin.“ In: *Blätter für deutsche und internationale Politik* 6 (2000), 752–762.

and thus bears the name *ExCumLex*.<sup>20</sup> “*Ex*” refers to the *examination* of alternatives following a given pattern. The second component of the name (“*Cum*”) refers to the possibly necessary *cumulation* of classes of evaluation. Finally, “*Lex*” refers to a *lexicographic* rule in determining the winner.

Although there is not enough space here to examine the individual reasons for this rule of counting in detail: according to criteria given by economists, the technique compares very favorably to others when tested, and cognitive psychologists assure us that human beings order and communicate more in cardinal and not ordinal categories. And cybernetics tells us that the human capacity to process information is quite limited, and as a rule comprises between six and eight categories. Taking only the positive aspect, we arrive at four rating levels, well known from the internationally known academic grading system.

Concretely speaking, the rule entails the following:

- All options are evaluated by the deputies on a scale of 1 to 4 (“very good” to “still acceptable”) or are otherwise considered rejected.
- Then – beginning with the highest level, one – a count is made to see if there is a majority for one option.
- If several options are positively judged on one level, the one with the greatest majority is considered the victor.
- If on the highest level no positive result is achieved, the count is repeated, levels 1 and 2 now added up.
- If this does not lead to a result, first, 1 + 2 + 3, and then if necessary 1 + 2 + 3 + 4 are counted.

This counting procedure corresponds implicitly to a virtual battery of questions that would be directed at the deputies one after the other. The first question would be in principle: “What are in your opinion ‘very good’ options?” If this receives no majority, the next question is: “What are then ‘very good’ or ‘good’ proposals?” If this also does not lead to a result, then the next built-in question “what options do you consider either ‘very good,’ ‘good,’ or at least ‘satisfactory’?” And finally, “what options do you consider ‘very good’, ‘good’, ‘satisfactory’, or ‘still acceptable’?”

What makes *ExCumLex* well-suited for a European procedure of decision making is on the one hand its relative low susceptibility to strategizing. The procedure is transparent in its application, but hardly predictable in the final outcome. It would thus make no sense here to conceal true preferences in order to achieve a better result.

20 Grözinger, Gerd: „Entscheidungskompetenz und Abstimmungslogik. Zur Wahl von Wahlverfahren, nebst Vorstellung einer neuen Variante.“ In: *Staatswissenschaft und Staatspraxis* 2 (1996), 195–232.



Another advantage is its inherent tendency towards consensus formation. More extreme positions can be given higher preference by those voting. If no majority is found for this, the vote is not lost if the final decision also accounts for second, third, and fourth best options. Clever parliaments will foresee this, and already consider possible compromises in their suggestions, since this increases their chance of victory.

ExCumLex also allows for the easy integration of a flexible veto on the member state level. Up until now, only an extremely static variant has been presumed. As a rule, a double majority is required, that is, a majority of the representatives and a majority of the countries must agree to a motion. It would be better if we could also consider the intensity of approval, and then require that the rejection must be just as high in proportion as the approval of the representatives. If for example there is a 60 percent majority among the representatives, then at least 60 percent of the member states need to veto, for 70 percent of the representatives, 70 percent of member states, etc.

Such a flexible veto rule can in principle work with many voting procedures. But in searching for a compromise, ExCumLex allows repeat voting on all levels. It thus further increases the tendency towards compromise. Any member state whose representatives rely solely on blockade instead of cooperation would risk losing out in the last round instead of using their opportunity to participate in choosing the final result.

This is an example to clarify things, using entirely arbitrary numbers and supposing that a simple majority would suffice for the issue in question: Say that for the aforementioned CO<sub>2</sub> regulation, there is for no "very good" or "good" majority for any single proposal. But on the third level of approval – "very good," plus "good," plus "satisfactory" – the Belgian proposal achieves a narrow majority among the representatives of the United Parliaments of Europe, with 52 percent of the vote. However, the proposal can only secure a 46 percent majority of the parliament chambers – 54 percent reject it. As a result, the flexible veto mentioned above takes effect.

Now, another round of counting can be added: counted together are now "very good" to "good" as well as "satisfactory" and "still acceptable." This time, two suggestions are approved: the Spanish one with 62 percent and the Belgian now with 60 percent. The Spanish proposal has even received more votes. But it fails to be approved by the national chambers. Only 36 percent vote yes, and 64 percent reject it, meaning that the proposal has too little acceptance to pass.

Beside the Spanish proposal, the Belgian proposal remains: it improves its voting position among the representatives and at the same time among the countries where now there e. g. is a remainder of 50 percent rejection. Hence, no veto is enacted at this stage: because the rejection quota of member states remains lower than the

positive value given by all deputies combined. The Belgian proposal is thus successful in the final round.

### Principle of Advantage in Relevant Fields on a National Level

In addition to its democracy deficit, the EU is also accused of lacking in terms of identity. Here, I would like to discuss securing a specifically European model. Many see this historical identity endangered above all by the EU institutions themselves, since up until now, primarily so-called "negative integration" has been promoted<sup>21</sup>, meaning the political capacities of the nation-state have been limited, but other than an expansion of market freedoms, little has been achieved in terms of positive impact.

However, for its citizenry Europe generally stands for a more strongly interventionist state than the United States. Good empirical evidence of this difference is provided by a study by Alesina, DiTella, and MacCulloch: evaluating survey data, they concluded that in Europe, but not in the US, a majority of the population desires a reduction in inequality.<sup>22</sup>

But there is little chance that the political shortcomings of negative integration could be done away with in the near future. In particular, new member states will, due to their lower income level, be more reluctant to set higher standards in social or environmental policy. The legitimacy of Europe could then become endangered for the once securely pro-European old member states, whose high density of regulations of a protective nature would be weakened without providing for adequate replacement. At the same time there are also significant differences among the older member states. There are three welfare state models – liberal, conservative, social democratic – that can be found in the EU.<sup>23</sup> Maintaining identity can thus not take place by way of unifying regulations, but rather by opening a spectrum of possibilities. In principle, this has already been realized by the EU: for a number of years the way has been paved towards a "closer collaboration" among a larger part

- 21 Scharpf, Fritz W.: „Wege zur Zivilisierung des Eurokapitalismus.“ In: Eugen Antalovsky, Josef Mechior and Sonja Puntischer Rieckmann (eds.): *Integration durch Demokratie? Neue Impulse für die Europäische Union*, Marburg 1997, 365–375.
- 22 Alesina, Alberto, Rafael Die Tella and Robert MacCulloch (2001): *Inequality and Happiness: Are Europeans and Americans Different?* Cambridge (USA) 2001 (=NBER, Working Paper 8198).
- 23 Lippl, Bodo: „Welten der Gerechtigkeit“ in „Welten wohlfahrtsstaatlicher Regimes“. *Welche Einkommensungerechtigkeit nehmen Menschen in Europa wahr und welche Gerechtigkeitsordnung wollen sie?* International Social Justice Projekt, Working Paper 59, Berlin 2000.



tial group of member states. But a significant impact of this has not yet been noticed, and seems unlikely in the near future.<sup>24</sup>

The treaties also allow for several possibilities of special national regulation in selected areas.<sup>25</sup> But neither can these possibilities be summed up with one common goal, nor are they very clearly defined. Often, the legality of national deviation is only decided in the final round by the European courts. However, this recourse to only partially predictable judicial opinions is an unfavorable development for a democratic federation of states.

As an alternative, I propose that in future there should be a political rather than a judicial decision making process, and that this process should follow transparent rules. One simple rule is represented by the judicial Principle of Advantage (*Günstigkeitsprinzip*). This legal construct says that when there is an asymmetry of power, regional deviations from a basic treaty can only go in favor of the weaker party. In Germany, for example, there are collective labor agreements, and local factory agreements can only deviate from the collective labor agreement in the employees' favor.<sup>26</sup> This corresponds to the Rawlian principle familiar from political philosophy, whereby improving the lot of the underprivileged is made the criterion of the legitimacy of political action.<sup>27</sup>

Taking the political goals formulated in Article 2 of the EU treaty (consolidated version), the tasks of the community are defined as follows:

„to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States”<sup>28</sup>

We can deduce from this five areas where the EU would like to be active, five areas where a power differential can be established:

24 Scharpf 1999, as footnote 10, 155 ff.

25 Pollack, Mark A.: "A Blairite Treaty: Neoliberalism and Regulated Capitalism in the Treaty of Amsterdam." In: Karlheinz Neunreither and Antje Wiener (eds.): *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*. Oxford 2000, 266–289.

26 Section 4, Subsection 2. Similarly, in Germany in so-called international crimes, when the places of act and gain diverge, the principle is applied to choose the place where the better material law for the damaged party applies, Hein, Jan von: *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*. Tübingen 1999.

27 Rawls, John: *Eine Theorie der Gerechtigkeit*. Frankfurt am Main 1996, 96 ff.

28 Fischer 2001, as footnote 4, 324 f.

- The unemployed vis-à-vis employed
- Consumers vis-à-vis producers
- Nature vs. man
- Women vs. men.

In each case, it seems appropriate to allow parliaments of member states to pass national regulations that surpass EU regulations in favor of the weaker party. To mention a practical example of this: Germany could then freely decide that if foreign construction companies would like to do business in Germany, the collective labor agreements must be adhered to, because this would improve the employee protection from exploitatively low pay.

There should be one reservation here, however: categories like "nature" or "consumers" inherently tend towards regulations that are very broadly conceived, leaving considerable leeway for abuse. The mantle of employee protection, the unemployed, consumers, women, and the environment can be used to keep out all sorts of unwanted competition, and intra-member state lobbies will know to take advantage of this. But it would not be very difficult to introduce protective countermeasures. Today, there is already a practical example of this that can be adopted at least in an analogous fashion. The EU introduced into the Amsterdam Revision in Article 95 that member states on presenting "new scientific findings" in questions of the "protection of the environment or the workplace" can take measures that deviate from the goal of European harmonization. But these deviations are subject to the veto of the commission as well as legal actions filed by other member states.<sup>29</sup>

By introducing the Principle of Advantage into the named dimensions, a judicial examination is to be avoided, relying on political decision making instead. If the equal goal of democratization is also not to be violated, the European Parliament – not the European Commission – must be the deciding power. In each case of when the Principle of Advantage is availed of, the Parliament should vote on whether at issue is merely a concealed form of national self-interest.

As a result, here again one group of parliamentarians, those from a member state, have to explain to the others, those of all of Europe, why they consider such an exception appropriate for their population. The vote in the European Parliament should then be held, analogous to Section 7, Paragraph 5 of the Nice Treaty<sup>30</sup> sensibly be held without the European Parliament members from the affected country, to guarantee the equal treatment of smaller and larger countries. If the objection finds a majority in the European Parliament, this would entail the rejection of the national regulation.

29 Ibid., 375.

30 Ibid., 88.



It cannot be predicted whether countries will in fact take advantage of this right to establish more strict regulations on a national level. But experience up until now, especially in the area of environmental policy, is quite promising. The fear that the pressure to establish improvements of European minimum regulations would then be lost has not manifested itself as such. The initiative of just one larger country quickly led to imitators, and at least in the case of product regulations this forces manufacturers reliant on uniformity to generally conform to the stricter norms. The “California” effect – from the US, termed as such because the consumer powerhouse West Coast state took a leading position in automobile emissions – can also be observed in Europe.<sup>31</sup> The introduction of the Principle of Advantage could strengthen this tendency.

### Constituting the Commission According to a Switzerland/Athens/Westminster Mix

Finally, beside legislative under-representation and a missing secure identity, another regular criticism of the EU is directed at the way the executive is constituted. The citizens of Europe can only very indirectly influence the make-up of the EU Commission, the institution that bears the seed of a European government. The former German Foreign Minister Joschka Fischer therefore suggested the direct election of the commission president, as if this office were something like the American President.<sup>32</sup> But due to a fundamentally different arrangement of tasks, this seems just as unwise as adopting the direct election of state attorneys or sheriffs, something often also practiced in the United States.

The task of the commission is three-fold: it is first of all the motor of integration. As a rule, the council and the parliament can only decide on suggestions made by the commission. It thus has the important right of initiating legislation. It is also the executive in that it makes executive decisions and negotiates international treaties. Third, it is also the keeper of the treaties, reminding member countries of their commitments, especially by taking member state governments to court.<sup>33</sup>

This list makes clear that the power of the commission depends primarily on its negotiating talent. This also implies that it must both reflect the multiple states in the

31 Golub, Jonathan: „Globalization, sovereignty and policy-making. Insights from European integration.” In: Barry Holden (ed.): *Global Democracy: A Debate*. London 2000, 179–201.

32 Fischer 2000, as footnote 18, 758.

33 Wessels, Wolfgang: „Das politische System der EU.” In: Werner Weidenfeld (ed.): *Europa-Handbuch*. Gütersloh 1999, 333–352, here 336 ff.

commission of which it takes its initiatives, as well as with the political majorities of in the European Parliament, which is increasingly tied into the decision-making process. Douglas Verney sees the Commission thus best described as a model of the *Swiss* form of politics: as a “collegial government”.<sup>34</sup> But this can only tolerate a limited politicization if it is still to fulfill its tasks.

However, a certain increase in politicization would be desirable to better realize the preferences of the whole European electorate, which at the moment plays practically no role at all. European issues only play a marginal role in national elections, and the delegation of commissioners is surely even less determining of election results.

A compromise combining the two contrary proposals in the area of politicization seems plausible using the following combination. The European Parliament could be entrusted with electing Commission members. This power to choose the executive would be the “Westminster” part of the proposal. There is no reason to leave this to the European governments when there is a directly elected parliament.

While the European Parliament with its 80 parties might be structurally unable to form something like coherent and stable governing coalitions at this time, it is most certainly in the position to carry out the single act of a vote. Michael Laver once tried to group the different parties into overarching families.<sup>35</sup> His result: there are clearly distinguishable camps in the Strasbourg parliament: two dominant ones – social democratic and conservative – and a slightly smaller liberal group in their middle. That should be enough to form political majorities.

The president, who is also supposed to be a symbolic figure, could also be freely selected by the European Parliament. In the case of the other commissioners, a certain national balance is advantageous to insure that Europe’s variety is also reflected on the commission. Since all analyses suggest that even now there are too many members in the Commission for it to work effectively, a quantitative restriction needs to be set in the future. Not every member country will be able to provide a commissioner.

An arbitrary procedure would be suited to guarantee fairness in determining the number of commission seats for which a particular country is eligible during a single term of office: the classical instrument to insure neutrality in the democracy of ancient *Athens*. The basic criterion in weighting the random selection should be

34 Verney, Douglas V.: „Modelle für ein föderales Europa.” In: *Blätter für deutsche und internationale Politik* 5 (2001), 565–573, here 569.

35 Laver, Michael: “Government Formation in the European Government.” In: Peter Moser, Gerald Schneider and Gebhard Kirchgässner (eds.): *Decision Rules in the European Union. A Rational Choice Perspective*. Basingstoke 2000, 201–228.



population size, to ensure representativeness over the long term.<sup>36</sup> But it is additionally conceivable that adequately large<sup>37</sup> groups of countries could always be represented with at least one seat, e. g. the Scandinavians, or the smaller Mediterranean countries, or the new Eastern European member states. It could be left up to each country whether and which group it would like to join, and each group could be free to decide whether it is willing to incorporate this or that country.

In addition, after this random process, for each seat to be filled by a country or group of countries, there should be two (or three) candidates for each position. The European Parliament must have something to choose from, both in terms of personal skills and political beliefs. It would be more difficult with more than two (or three) candidates, because well-qualified figures might not participate if the chances of being elected are too low.

These candidates should be proposed by the national parliaments – or in the case of groups of member states by the combined parliaments – and not the governments. This insures the participation of each country's opposition. A European Parliament, either more or less conservative or social democratic in terms of its majority, requires candidates from both sides.

In every member state's parliament, a representative selection is relatively easy to organize by way of a "zipper technique" that ensures the fair reflection of power without forcing the parties to agree on mutual candidates. For example, say that after the European random lottery, Germany was to send two commissioners to Brussels: this would then require four candidates, assuming two candidates per seat are required. Currently, this would mean two from the left and two from the right. Depending on the political majority in the European Parliament, which determines its own position not entirely along German party lines, the German parliamentary groups would try to nominate those candidates who because of their abilities would have chances in Strasbourg even in the face of a quite contrary majority. This would insure that the commissioner post would not be abused as a well-paid political prize for former national service.

The commission would thus enjoy much more legitimacy than today. On the national level, the quality of the politicians chosen would be the subject of more discussion and debate. Their final election in Strasbourg would then result from a parliamentary act undertaken by the responsible authority. The well-balanced rep-

36 If a country in the first round already has received a seat, the corresponding necessary average population can be subtracted in the next round, to guarantee as balanced a distribution as possible. Smaller countries thus receive a maximum of one seat, the larger never more than corresponding to their weight.

37 An "adequately large" group can be best defined as a group where the total population would at least "statistically" always expect to receive one seat.

resentation of the nations would ensure that regional minority rights were violated as little as possible.

## Summary

The goal of this contribution was to propose ways of improving subsidiary democracy in Europe. Beginning with the premise of a democracy deficit in the EU, but at the same time skeptical about an unreflected strengthening of the central authority, three suggestions were presented, each providing for a stronger role for national parliaments. First, it was proposed that the parliaments networked together as *United Parliaments of Europe* should be able to present and decide European initiatives, the European Parliament serving as a gate-keeper. The relevant issue of how to find an appropriate way of voting with so many participants and proposals was explored with a detailed presentation of the *ExCumLex*-model. The integration of the national legislatures as a final deciding authority might be understood as an attempt to diminish the power of the European Parliament. But this is not the aim; instead, the intention was a reallocation of tasks with more rights for both levels, as becomes apparent with the other suggestions. The second proposal explored here is introducing the *Principle of Advantage*. A strengthening of Europe's welfare state identity is seen in the possibility of establishing regulations that deviate from the European norm for the relatively structurally weaker party in important areas of social conflict. The European Parliament as the conscience and the advocate of the interests of Europe as a whole should be given the opportunity to veto any national deviation from EU norms. Thirdly, the suggestion is made that the European Parliament votes on the members of the European Commission, which in the future will include fewer members. These members should be selected from a shortlist, nominated by national parliaments, reflecting the relative political strength of the parties in the respective parliaments. To increase the representativeness of the commission the number of the seats occupied by a country or group of countries would be randomly drawn beforehand, making the practice a *Switzerland/Athens/Westminster* mix.