

DEMOCRACY IN EUROPE

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Legitimising Politics in a Non-State Polity

Heidrun Abromeit



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FOREWORD

This book serves a double purpose: It submits a practical proposal for the democratisation of the European Union; and by doing so the book is meant to contribute to the current academic debate on how to make democracy fit to survive in an age of globalisation. It is not difficult to detect 'democratic deficits' in the modern world in general and in the European Union in particular; but it is apparently very difficult to find remedies for them. For some time now a frustrated public has been looking on in a kind of stupor at how political integration in Europe seems to be going all awry, while baffled academics have in vain been rummaging in the tool box of (parliamentary) democratic theory, seeking instruments fit to tackle the obvious political dilemmas. Up to now only a few authors have gone any further than to state the necessity of a new 'transformation' of democracy; fewer still have set about devising new models of a (possibly) 'post-parliamentary' democracy.

This book undertakes to do just that. It contends that the answer to the riddle of European democracy is not the basically statist one of constitutionalisation-cum-parliamentarisation, but the more flexible one of supplementing the European decision-making process with various direct-democratic instruments. Such a model of post-parliamentary democracy (or so the author hopes) should be of interest to political practitioners as well as to political theorists. Attempting not to bore the political audience by taking too long to come to the point, I have tried to unfold my argument as briefly as possible – a procedure which I hope will not alienate an academic audience who might have preferred a more detailed discussion of the theoretical aspects.

This book (as all others) would not have been completed without the help, comments, criticism and support of the author's friends and colleagues. Hence I duly thank all of them. In particular, my thanks are to Anna Geis, Natalie Fryde and Anne Schneidau-Lappi who did their best to 'de-Germanise' my English; to

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Darmstadt, March 1998.

H. Abromeit

LIST OF ABBREVIATIONS

BDA	Bundesvereinigung der Deutschen Arbeitgeberverbände
BDI	Bundesverband der Deutschen Industrie
BVerfG	Bundesverfassungsgericht
BVerfGE	Bundesverfassungsgericht Entscheidungen
CoR	Committee of the Regions
CSU	Christlich-Soziale Union
EC	European Community
ECG	European Constitutional Group
ECJ	European Court of Justice
EMU	European Monetary Union
EP	European Parliament
EPP	European People's Party
ESC	Economic and Social Committee
ESK	Europäische Strukturkommission
ESP	European Socialist Party
EU	European Union
FRG	Federal Republic of Germany
GDP	Gross Domestic Product
GG	Grundgesetz
GMO	Genetically-Modified Organism
IGC	Intergovernmental Conference
MEP	Member of the European Parliament
MP	Member of Parliament
NGO	Non-Governmental Organisation
PMI	Philip Morris Institute
QMV	Qualified Majority Voting
SEA	Single European Act
TEC	Treaty of the European Community
TEU	Treaty of the European Union
UNICE	Union des Confédérations de l'Industrie et des Employeurs d'Europe
VAT	Value Added Tax

INTRODUCTION

What Kind of Animal is the European Union?

Ever since the European Community came into being, students of political science and of international relations as well as those of international and of constitutional law (less though, surprisingly, the ‘informed public’) have been wondering what kind of animal it is – and what it is going to become, once the integration process has come to an end. For the EC Treaty of 1957 envisages a steady and dynamic progress towards the completion of a European unified or ‘Single Market’. As the European Court of Justice (ECJ) made clear at an early stage this *telos* and such progress are to take definite precedence over all other considerations; hence the treaty (as interpreted by the Court) has set in motion a continuous drive to increase the powers of the community. Yet while the treaty left no doubt as to the goal of *economic* integration, it was mute about the latter’s *political* implications which since then have kept political analysts busy.

In the beginning, the political practice of European integration took the shape of intergovernmental cooperation. To this day the member-state governments take their pride in remaining the ‘masters of the treaty’ – after ‘Maastricht I’ perhaps even more than in the years before. From the start, however, the community had institutions of its own, namely the Commission and the ECJ as the main agents intended to keep the integration process in motion. As a consequence, the national governments may still be ‘masters of the treaty’, that means those who determine the EC’s primary law which consists of the treaties and possesses a quasi-constitutional quality; but they are not the only source of its secondary law which consists of ‘regulations’ and ‘directives’ (i.e., its quasi-normal legislation), rounded off by European Court

rulings. And what is more: while the primary law requires ratification by the national parliaments, the secondary law nowadays mostly does not; it is binding law in all member states without any further ratification.

Both the juridical side of the matter and the 'state-like' institutions of the Commission, European Parliament (EP) and ECJ have caused what may be called the 'statist analogy': the longer it exists, the more the EC resembles a normal state. In fact (as Weiler argues, 1996, p. 517ff.) it has achieved a sort of 'constitutional order' marked by the elements of 'Supremacy' (of EC law), 'Direct Effect' (of EC law on member-state citizens) and the judicial *Kompetenz-Kompetenz* which the ECJ allots to itself. Yet its state-like quality seemed for a long time to be restricted to the (admittedly wide) field of economics. In most other areas even intergovernmental cooperation has remained scant. Put in the words of the ECJ (in the Van Gend & Loos case of 1962) 'the Community constitutes a new legal order ... albeit within limited fields'. It would be too simple, however, to define the EC as a state-like structure with jurisdictional competence in a comparatively narrow range of issues. The treaty's inherent teleology prevented a neat and orderly division of competences between the nation-states and the community. The latter is, in actual fact, neither truly restricted to one or few policy area(s) nor has it blanket coverage. Instead in an apparently unsystematic fashion it covers 'bits and pieces', more or less great chunks of various policy areas.¹ The logic hidden behind the resulting muddle (if there is one) is that of 'implied powers' accruing in the process of establishing a Single Market or, in 'Euro-speak', simply that of the 'effet utile'.

In recent years the Single European Act and the Maastricht Treaty have added new dimensions to the muddle. (1) There are issues and political questions which can be decided by a majority (in the Council of Ministers), while others require unanimity. (2) Depending upon the type of decision, more or fewer actors – and more or less institutionalised ones – participate. (3) In a 'Europe of variable geometries' (due to opt-outs and the 'Europe of different speeds'), varying sets of member states take part in 'common' policies or in arrangements for mutual coordination. To complete the picture of the muddle which is currently prevailing, one may add that actual decision-making is increasingly occurring in informal policy networks rather than in the formal institutions –

1 See the list given in Marks et al. 1996, p. 125f.

not least because of the uneven and asynchronous allocation of policy making powers just mentioned.

From this sketchy diagnosis we may conclude (1) that the EC (or, now, EU) is not the kind of *confederation* of states one has got accustomed to in history which leaves members both free to enter and exit as they please and free to organise and enact policies at home as they like. The EU binds members too closely together – and to the community itself – and restricts their internal autonomy too much to be called a confederation. At the same time it is too flexible in its range of coordinated policies as well as in the allocation of competences to resemble the typical *confederatio*. (2) Nor can the EU for similar reasons be classified as an international ‘*policy regime*’: members are bound too closely and over too wide a range of policy issues; its regulating powers are not restricted to firmly specified policy areas. In this respect one might at best call it a disjunct *number* of ‘regimes’. (3) Above all, the EU is no *federation* – not least because it is not and does not want to be a state (although Euro-sceptics feel that it increasingly looks like one). In other words, we are dealing with a polity that is ‘horizontal, polycentred, infranational’ (Weiler 1996, p. 519) on the one hand but that has managed to constitute firm hierarchies of norms, in various fields, on the other.

To put a name to this strange sort of polity and to allow classification, other types of associations have been introduced into the debate as, for instance, the ‘*Nationalitätenstaat*’ or multinational state based on the model of the Austrian-Hungarian ‘*Doppelmonarchie*’ of former times, which granted a relatively high degree of internal autonomy to ‘nationalities’ (Lepsius 1991); the *consortio* based on the model of the association of firms cooperating ‘in the performance of functional tasks that are variable, dispersed and overlapping’ (Schmitter 1996, p. 136); the *condominio* ‘based on variation in both territorial and functional constituencies’ (ibid.). As far as I can make out, this latter variant is the only one to combine the two distinct dimensions of European policy making: the territorial (regional) and the functional (sectoral) one. While it seems to have become quite a fashion to characterise the EU as a ‘*dynamic multi-level political system*’ (Jachtenfuchs & Kohler-Koch 1996), emphasising the three-level structure of community, member states and subnational units, the sectoral dimension as it is embodied in the informal policy networks is rarely taken into consideration.

Even more widely spread – and longstanding – is the mode of depicting the EC/EU as an entity or polity ‘*sui generis*’, which is of

little use either for classification or for clarification. The same can be said of a new trend to refer to 'postmodernism' and throw into the wind all the above-named analogies as relics of bygone modernity. In fact the whole debate and the quest for the adequate categorisation might be viewed as a mere *l'art pour l'art*, were it not for two necessities: (1) to be quite clear about the non-state character of the European polity, and (2) to find a clue to the structure of European policy making (in case there is one that is stable) which describes it as accurately as possible.

The Legitimatory Gap

Both necessities are equally important when it comes to the question of *legitimate* political decision-making. Obviously European decisions result in law and in regulations which bind the member states and affect their citizens directly. Ever since the war-cry 'no taxation without representation' the core idea of modern democracy has been that no one shall be forced to do (or pay for) things he would not do of his own free will without his having had a say in the matter, either directly or via representatives; any alternative must be considered 'illegitimate'. The core of every representative system is its parliament. Hence the widespread conviction is that 'the main challenge for the EU is the current impossibility of creating a true parliamentary basis for democracy' (Andersen & Eliassen 1996, p. 3). There is, of course, an institution called the European Parliament. But it is neither a true legislative body: only since Maastricht does it possess certain powers of 'co-decision' with the Council, which means that in effect it has a modicum of blocking power. Nor is it a body to enforce 'political responsibility', that is, to hold a government responsible to its electorate. Reasons for this may be manifold and in due course I shall come back to them in greater detail; but at the bottom of them all lie the two basic facts that the EU is no 'normal', i.e., state-like, polity and that there is no European electorate in the proper sense.

While direct parliamentary legitimacy is lacking, it used to be argued that community policy making could rely on the indirect legitimacy provided by the national parliaments holding the 'masters of the treaty', the member-state governments, responsible at home. For at least two reasons this indirect link has proved rather fragile and dubious almost from the start: (1) Council decisions are

usually more or less precarious compromises based on complicated package-deals. Governing majorities in national parliaments are put under some pressure not to wilfully destroy those precious achievements of negotiative art; to withhold their consent would be a downright snub to their own government. (2) As has already been mentioned, the EC's secondary law does not require ratification by member-state parliaments. Furthermore, a steady process of 'creeping' expansion of community powers has taken place which was never put to the test of ratification because it was set in motion and driven forward by Court rulings lying beyond the reach of parliamentary control. (3) If indirect legitimacy is to be more than merely formal the national electorates ought to be given the opportunity, in national elections, to express an opinion on European issues, a prerequisite which is clearly lacking in reality. (4) Since the Single European Act of 1986 prescribed (qualified) majority voting for a number of Council decisions the indirect legitimisation has become even more threadbare: in those countries whose governments had been outvoted in the Council the latter's decision would be flatly illegitimate.

Not much seems to be gained then by way of indirect legitimisation. As parliamentary – or democratic – legitimisation can neither directly nor indirectly be won some Euro-politicians and a number of political scientists have looked around for other ways in which European policy making might be rendered legitimate. They believe they have found the solution in something called 'functional legitimacy'.² The problem with this notion is that it is rather imprecise. In principle it could mean two things: (1) It could refer to a specific kind of participation or representation along the lines of sectoral ('functional') groups instead of territories. Thus corporatist systems could be said to be functionally legitimised. (2) It could refer to the performance of the system, again defined along functional lines. Thus a system solving problems efficiently could be said to be functionally legitimised. Authors have not always been very clear about which of the two notions they prefer; sometimes they even muddle them. This is the case, for example, when reference to the 'functional effectiveness' of community policy making is coupled with that to the participation of many and different actors in it (Wessels 1996, pp. 559, 63). In reality, however, in quite a number of issues it is just the 'functional effectiveness' which is in doubt. And what is

2 See, for instance, Wolfgang Wessels, in: Andersen & Eliassen 1996, p. 59ff.

also dubious is the way in which the actions of those manifold European actors are linked to the interests of citizens, group members, etc. In both respects the Common Agricultural Policy may serve as a vivid example of a policy which has produced discontent instead of functional legitimacy. The fact that the EC is nonetheless attractive to political and business élites of countries outside (*ibid.*, p.64) can hardly make up for such shortcomings which are somewhat bitterly registered inside the Union.

So we are left with a definite legitimacy gap which is nowadays mostly called 'democratic deficit'. This did not make itself very much felt in the days of the 'permissive consensus'; however, these days are gone.³ According to the Eurobarometer all possible indicators for support of the EU on the part of the citizens in its member countries have been going down consistently since early 1991.

This very statistical fact seems to have taken European and national politicians by surprise. While the political science debate in the last decade at least had been full of references to and remedies for the 'democratic deficit' of the EC, politicians had been blind to the decline in acceptance which became abundantly clear when the ratification of the Maastricht Treaty threatened to get stuck in those countries where a referendum was a legal prerequisite. With the laudable aim of making amends for the former neglect of public opinion, in the run-up to the 1996 Intergovernmental Conference a 'Reflection Group' was installed with the explicit task of finding ways of reducing the deplorable gap between the community and the ordinary citizen. The Group's proposals were rather modest (see Reflection Group 1995). Few of them were of an institutional kind; what is more, those proposals which were concrete enough to be put into practice were qualified and substantially modified in the following sentence, thus mirroring the lack of consensus between member states about the further development of the EU. Apparently, in the matter of making the Union more democratic and bringing it closer to its wider populace agreement could only be reached upon two items: that of making European politics more 'transparent' (which means issuing more information and includes such impressive demands as that to render the treaty itself more readable), and that of simplifying its decision-making procedures.

Meanwhile the political debate has again moved miles away from the issue of improving the EU's institutions and procedures,

3 For the early 'permissive consensus' see Inglehart 1971; for its further development see the Eurobarometer surveys, as well as Noelle-Neumann 1992; Reif 1993.

leave alone the issue of remedying its democratic deficit. Lately the all-encompassing question has been the economic one of how to achieve monetary union in the teeth of sluggish economic performance, high and growing unemployment as well as high and growing public sector deficits nearly everywhere. Put more precisely, the question was how the 'convergence criteria' agreed upon in Maastricht can be met by how many members in what time, and whether the requirement of the states' new borrowings not exceeding 3 per cent of the GDP should mean 3.0 or 'three point something'. The debate upon the Euro and the size of the 'core Europe' has cast into the shadow all other issues, including the fairly fundamental one of whether one wants a 'wider' or a 'deeper' Union. The Intergovernmental Conference has tried hard to stick both to the agenda and to the timetable envisaged for 'Maastricht II' but Chancellor Kohl hinted at the end of the Dublin summit (of 4-6 October 1996) that a 'Maastricht III' might be necessary to deal with the institutional and constitutional problems. Yet there are doubts whether they will ever be dealt with at all.

The Aim of this Book

In a situation such as this a book dealing with just these latter problems might look a trifle out of place. The dwindling acceptance by the Union's member peoples, however, cannot be 'trifled with' much longer, especially since the Union is unavoidably becoming ever more 'political'. At least since 'Maastricht I' the EU has been saddled with a constitutional problem⁴ which cannot be solved by ignoring it. On the contrary, the problem will not only make itself increasingly felt in Brussels but is bound to have repercussions in member states, causing severe legitimacy problems at that level too. The constitutional issue is the more pungent because of the elusive and complex nature of the polity which is to be 'constitutionalised', and which is threatening to grow into an ogre, in the eyes of beholders, if it is not restrained. There seems to be but one other alternative, that is, to turn back the clock and return to 'stage one', to the initial common market. There are observers (as

4 Weiler (1996, p. 518) gives a specific interpretation of this problem: 'The condition of Europe ... is not, as is often implied, that of constitutionalism without a constitution, but of a constitution without constitutionalism. What Europe needs ... is not a constitution but an ethos and a *telos* to justify ... the constitutional order it has already embraced.' This view, however, may appear a trifle over-modest.

well as Euro-sceptic politicians) who believe that this is exactly what will – and should – happen, particularly in the case of further enlargement of the community. But whoever thinks that the EU has passed the ‘point of no return’ (see Schmitter 1996, p. 122) will have to look very hard for both adequate and practicable solutions for its constitutional problems.

The aim of this book is to do just this: to devise ways and mechanisms of legitimising and democratising a political system that is characterised by (1) various levels (community – member states – subnational units) as well as (2) various dimensions (territorial and ‘functional’) of policy making; that combines (3) highly complex formal (institutionalised) as well as (4) equally complex informal ways of decision-making; that binds together, furthermore, (5) actors of various degrees of ‘europeanisation’, acting (6) in policy areas of different degrees of europeanisation and (7) with different numbers of participants, agreeing policies (8) under different decision-making rules. And perhaps this long list of complexities is not even complete. A further point to be kept in mind is the Union’s (actual as well as deliberate) non-state character which from the outset precludes a whole range of constitutional devices as both inadequate (disregarding the enormous complexity of the European puzzle) and impracticable (disregarding the professed intentions of the ‘masters of the treaty’). To sum up: the task of this book is to find an answer to the question of how to democratise the European Union without ‘federalising’ it. That is, this book will not tackle all the EU’s major problems but only deal with one (albeit a decisive one) of them. A second limitation should be made clear from the start: it will be primarily a theoretical exercise, exploring various political theories and trying to deduce elements of a model for the democratisation of a complex, multi-dimensional polity from them.

Yet before it comes to that, I shall briefly discuss a second deficit of the EU, one that is closely related to the legitimacy one: its lack of openness in the sense of being compatible with the member states’ different political systems and their governing constitutional principles (chapter 2). I shall proceed to review the main reform proposals for the EU’s future development which have been discussed in public in recent years and which mostly seem to be inadequate solutions to the constitutional problem (chapter 3). In its major part (chapter 4) the book will then consider the possible theoretical foundations of a model of multi-level and multi-dimensional democracy. The theories to be examined are: (1) contract theory which may give valuable hints at alternative ways

of democratising political systems – or, more precisely, at alternatives to parliamentarisation; (2) the theory of fiscal federalism which federalists as well as their opponents use to consult when it comes to the ‘proper’ way of allocating decision-making powers between territorial units; (3) theories of group representation which may help to find out ways of how to deal with the sectoral (functional) dimension of European politics; (4) game theory and network analysis which I hope are of some use in clarifying the (mostly hidden) structure of decision-making in policy networks and hence in depicting possible ‘intervention points’ for democratic control. (5) Finally, new concepts of democratic theory such as those of ‘reflexive’ or ‘associative’ democracy have made tentative proposals to open up ossified political structures and to democratise complex societies. I shall examine them and try to establish their practical value.

As a result of this exercise, a model based on the use of direct-democratic minority rights and combining the territorial and the sectoral bases of politics will be proposed and submitted for further discussion. Its elements are: (1) a direct-democratic veto of those regions which possess autonomous status and feel materially threatened in that autonomy by European integration or certain European policies; (2) an optional referendum granting a similar veto right to ‘functional groups’, or more precisely, to the assumed reference groups of European issue networks (including those who suffer from their policies); (3) a mandatory referendum to legitimise any new contracts or quasi-constitutional steps. These instruments will be explained in some detail as well as illustrated by some (fictitious) examples in chapter 5, and the most probable objections to be brought forward against them argued with in chapter 6. The impatient reader who is interested in practical political proposals rather than in the theories on which they are founded may be advised to proceed directly to chapter 5.

However convincing my proposal might be, the chances that it will be avidly seized and applied by politicians are unfortunately remote. This is why the concluding chapter will have to come back to current political developments in Europe. It will contrast constitutional necessities with the interests and strategies of the actors in the European arena and deduce from this a prognosis about the likeliest course of events – and about the consequences these developments will have, at supranational and national levels, for democratic legitimacy.

