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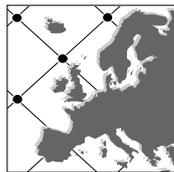
Working papers

A Constitution for Europe?

Beate Kohler-Koch

Arbeitspapiere

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Editorial Note:

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Her main field of research is in International Relations and European integration. Apart from her own research (interest intermediation in Europe, challenges to democratic governance through Europeanization and globalization) she co-ordinates a national research programme on governance in the EU by the German Science Foundation. She is head of the Department of „Comparative and European Integration Studies" at the Mannheim Centre for European Social Research. Currently she is member of in an independent expert group preparing the next European summit.

Her recent book publications are on the role of regions in the EU („Interaktive Politik in Europa. Regionen im Netzwerk der Integration" 1998), on governing beyond the nation state („Regieren in entgrenzten Räumen", ed. 1998) and on „The Transformation of Governance in the European Union", ed. with R. Eising, 1999, in print).

Redaktionelle Notiz:

Prof. Dr. Beate Kohler-Koch ist Lehrstuhlinhaberin an der Universität Mannheim, Jean Monnet Chair for European Integration. Darüber hinaus ist sie im Vorstand des Mannheimer Zentrums für Europäische Sozialforschung und zeichnet dort für die Forschung über "Die politischen Systeme Europas und ihre Integration" verantwortlich. Ihr Spezialgebiet sind Internationale Beziehungen und Europäische Integration. Sie koordiniert den von der Deutschen Forschungsgemeinschaft geförderten bundesweiten Forschungsschwerpunkt "Regieren in der EU" und hat mit Kollegen einen europäischen Forschungsverbund "Governance in Europe – Network" gegründet. Gegenwärtig arbeitet sie in einer unabhängigen Expertengruppe zur Vorbereitung der nächsten Regierungskonferenz. Frau Prof. Kohler-Koch ist verschiedenen nationalen und internationalen Forschungseinrichtungen als Vorsitzende oder Mitglied in Führungs- und Aufsichtsgremien verbunden. Sie ist Mitglied der Berlin-Brandenburgischen Akademie der Wissenschaften.

Abstract

The latest series of European summits leaves us with a puzzle: on the one hand, they hint at a development of the EU towards an "ever closer Union", on the other hand, they reveal a "piecemeal culture", provoking critique and the demand for an encompassing institutional reform proposal. Among the strategic recommendations is the suggestion to draw a constitution for the EU. While at first sight this looks like a struggle between optimists and sceptics of European integration, it is a debate that goes into two different dimensions. First, the debate is about the formation of a European state, second, it is about an adequate constitutional structure. Communication about possible options is difficult since they are based on hypothetical presumptions on the future developments of the EU and they draw on different institutional models.

The present paper is an elaborated version of a presentation at the annual meeting of the Swedish graduate colloquium for Political Science at Göteborg in April 1999. It will be published in Swedish in the yearbook "Europaperspektiv. Arsbok 2000", edited by Sverker Gustavsson, Stockholm. The elaboration of the presentation was promoted by a visiting research fellowship at the Research Institute for International Affairs, Ebenhausen, in summer 1999.

Zusammenfassung

Die jüngste Serie von europäischen Regierungskonferenzen vermittelt einen höchst ambivalenten Eindruck: Zum einen können sie als Indiz für die gesunde Fortentwicklung der EU zu "einer immer engeren Union" gewertet werden, zum anderen manifestiert sich in ihnen eine "Stückwerk" Kultur, die Kritik und die Forderung nach einem großen institutionellen Reformentwurf provoziert. Zu den Strategieempfehlungen gehört der Vorschlag, der Europäischen Union eine Verfassung zu geben. Was von außen betrachtet wie ein Tauziehen zwischen Europa-Optimisten und Europa-Skeptikern ausschaut, ist bei näherem Hinsehen eine Debatte mit doppeltem Boden. Zum einen geht es um die "Staatswerdung" der EU und zum anderen um die ihr angemessene Verfassungsordnung. Die Verständigung über mögliche Optionen ist schwierig, weil sie notgedrungen auf spekulativen Annahmen über die Zukunftsentwicklungen der EU aufbauen und konkurrierende institutionelle Modelle herangezogen werden.

Der Beitrag beruht auf einem Vortrag in Göteborg im April 1999 anläßlich der Jahrestagung des schwedischen Graduiertenkollegs der Politikwissenschaft. Er wird in schwedischer Übersetzung im Jahrbuch "Europaperspektiv. Arsbok 2000", herausgegeben von Sverker Gustavsson, bei Nerenius & Santerus in Stockholm erscheinen. Die Ausarbeitung des Vortrags wurde durch einen Gastaufenthalt in der Stiftung Wissenschaft und Politik im Sommer 1999 gefördert.

Contents

1   A Constitutionalist Turn

Integration history quite obviously is speeding up: The founding Treaties of the European Communities have experienced a long and quiet life before they were put under revision. Since the mid 80s, however, three successive Inter-Governmental Conferences amended and changed the Treaties, and at the meeting of the European Council in Cologne in June 1999, just after the Treaty of Amsterdam came into effect, the head of governments decided to convene yet another Inter-Governmental conference in the beginning of the year 2000.[1] All these revisions brought about a widening of the scope of competence and were altering decision-making procedures. Institutional reforms were aimed at adjusting to an enlarged membership that has spread from originally six to now fifteen members and soon will embrace another five, ten or even more states. Furthermore, institutions have to meet grown responsibilities that are now going well beyond creating and regulating a common market. They extend to highly sensitive areas like monetary affairs, fiscal and social policy and cover fields of high politics like foreign and security affairs. The motives and objectives of recent institutional reform have always been the same: to safeguard the capacity to act.

Though each time the negotiations touched upon issues of constitutional choice like the relation between Community organs, their responsibilities and powers, decision-making procedures and the distribution of rights and responsibilities between the member states and the Union, reflections on a European "constitution" were not à la mode. It has been the concern of a minority of enthusiastic federalists to present draft constitutions.[2] This even holds true for the European Parliament, the Community body that by institutional interest and European vocation is most dedicated to carry forward European integration. It was Altiero Spinelli, a staunch federalist who initiated and pushed the constitutional draft of 1984 that was influential for the later proposals, too. At the time, it met a polite but reserved reaction and did neither influence the imminent negotiations on the amendments of the Treaties, i.e. the Single European Act, nor did it stimulate a public debate.

It took another decade before the topic became an issue at least in academic circles. The ruling of the German Constitutional Court on Maastricht in 1993 started a controversy among constitutional lawyers and experts of European public law.[3] The debate concentrated on two main topics: Does Europe need a constitution and what are the requirements to make it compatible with the national constitutional systems and their fundamental constitutional principles. Now, at the end of the decade, the debate on

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[1]   Europäischer Rat, Schlussfolgerungen des Vorsitzes, Absatz 52-54.

[2]   A compilation of draft constitutions and declarations on constitutional principles for the years since 1995 lists only proposals by private organisations like the European Movement, the Union of European Federalists, the Young European Federalist and several action groups like the Euro Citizen Action Service (Brussels), European Citizens (Luxembourg), the Permanent Forum of Civil Society (Brussels), the European Constitutional Group (London). Joachim Held, Verfassungsentwürfe für die Europäische Union, Materialien, Stiftung Wissenschaft und Politik, Reihe C, Nr. 058, Ebenhausen, April 1998, update August 1999.

[3]   For an early but comprehensive documentation of the opposing positions see Ingo Winkelmann, Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktover 1993. Dokumentation des Verfahrens mit Einführung, Berlin 1994.

a constitution for the European Union is gaining momentum, proliferating from small circles of interested citizens to the political discourse and even entering the public space.

Starting the German Presidency, Foreign Minister Fischer in his speech to the European Parliament took up the issue head on.[4] He made the point that after Maastricht and Amsterdam the question of a European constitution will become more pressing than before and that a public debate in the member states will give new impetus to political integration. For him, this is first of all a question of substance and aims rather at an analysis of the legal basis. A discussion about the construction of Europe would in his assessment provide direction and clarity with regard to the „finalité européenne". The question should centre around what kind of common European future we should aim for. What vision of Europe should be embodied in the European construction? What balance of power should there be between Europe, nations and regions? Where do we need more, where perhaps less Europe? Where are Europe's external borders? How can we further the development of a European public space and strengthen the legitimacy of the European Union and its institutions?[5]

Fischer's initiative might be interpreted as reflecting a typical German preoccupation. Compared to other nations the German political elite has always been more focused on constitutionalism than others. His message, however, is not at all in line with the traditional constitutional debate. The latter amounts to a rather narrow discussion on the form and function of the institutional set-up and most of the time is inspired by the German constitutional system. It may not be a majority view but a well accepted position a spokesman of the Liberal party presented in a recent debate of the German Bundestag: He described the task as being to develop and strengthen the well tried German federal system and to transfer it step by step to the European level.[6] Fischer, on his turn, called to „...shake off the shackles imposed by a strictly legalistic interpretation and instead take the term 'constitution' to mean a set of values and basic principles underpinning coexistence in Europe, including the functioning of the European Union as a unique construct"[7], which rules out the one to one translation of a national constitutional system to the European construction. This is well in line with what has been proposed by Christian Democrats.[8] They favour a „constitutional treaty" (Verfassungsvertrag), that will give the still diffuse debate direction. Attention should concentrate on the basic values, convictions and interests of the Europeans, the internal balance and division of labour between member states and the Union, the size, plurality and cohesion of the enterprise and Europe's mission and responsibilities to the outside world. Such a debate would point out the novel character of the European construction that can not be grasped by traditional statist terminology.

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[4] Joschka Fischer, Programm des deutschen Vorsitzes und Lage im Kosovo, Europäisches Parlament, Ausführliche Sitzungsberichte, Strasbourg, 12. Januar 1999.

[5] The official English translation is partly misleading.

[6] Ernst Burgbacher (FDP), Von Europa nichts begriffen, Bundestagsdebatte zur Regierungserklärung und zum EU-Gipfel in Wien, in: Das Parlament, Nr. 53, 25.Dezember 1998, p. 10.

[7] Speech by Foreign Minister Joschka Fischer on the Conclusion of the German Presidency of the European Union to the European Parliament, Strasbourg, July 21, 1999, in: Government and Politics - Statements and Speeches, Archive 1996, http://germany-info.org/content/schroeder_07-21_99.htm.

This broader understanding has been echoed in the media. The German press[9] in particular has taken up the call for a constitutional debate and has given room to quite controversial opinions from different political and academic quarters. The French and English[10] media are more reserved; there is less press coverage and a dominant sceptical tone. Nevertheless, the „leitmotiv" is about the same: The Union is facing many challenges, and a successful response will only be found if the Europeans manage to work together closely and strengthen its capacity for political action.

Any critical observer may wonder what has changed around the turn of the year that nourish the federalist aspirations? The challenge of globalisation has been around for quite some time and an unstable international environment has been with us since the withering away of cold war bipolarity. My explanation is that a window of opportunity is opening. Past decisions, incrementally adding up step by step have furnished the Union with competencies and institutions that call for further action. Historic events just highlight the need for going on with the construction of a half-way built house. If we let dynamic forces have their way, not less, but more Europe will be our future.[11]

The general assessment is, that with the coming into force of the European Monetary Union at the beginning of this year and the European engagement in the Kosovo crisis, consolidating of what has been achieved is tantamount to going ahead. We are told that we will be faced by spill-over at its best: What has been agreed in the last three Inter-Governmental Conferences will push Europeanisation ahead whether the members of the Union want it or not. Giving up sovereignty in monetary affairs will demand a better co-ordination or even harmonisation in economic and fiscal policy including bringing into line the divergent social security systems and speeding up common efforts to redress structural unemployment in Europe. Nominating „Mr. Europe" makes the EU in foreign and security relations more visible, but it is seen just as a symbolic move that calls for further action. Appointing a spokesman to give the Union a face and a name, does not bring the EU closer to „speaking with one voice". Therefore, the suggestion comes as no surprise that the EU should be provided with the organisational capacity that would have to match state administrations to transform disparate national aspirations into a common European will. Going to war in the Kosovo has taught two lessons at a time. Fighting a war has always contributed to consolidate a still fragmented political entity and to support centralising tendencies. "The crisis thus speeded up history."[12] But it was not the EU that was fighting the war and securing the peace agreement, but a coalition that was mainly dominated by a big power agreement and relied on the military resources of a non-European actor, i.e. the United States.

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[8]   An elaborated concept has been submitted by Wolfgang Schäuble, chairman of the CDU and Karl Lamers, spokesman for foreign affairs of the CDU/CSU party group in the German Bundestag, Überlegungen zur europäischen Politik II - zum Fortgang des europäischen Einigungsprozesses -, Bonn, 3. Mai 1999.

[9]   I am indebted to Christine Hammann, Stiftung Wissenschaft und Politik, Ebenhausen, for a press survey covering news paper clippings from English, French and German newspapers from November 1998 to August 1999.

[10]   With the exception of „The Independent" which gives much room to the debate on European democracy.

[11]   Klaus-Dieter Frankenberger, Und jetzt eine Verfassung? In: FAZ , 4.3.1999, p. 1: „Denn einiges spricht für die Vermutung, daß es, salopp gesagt, mit der europäischen Einigung erst richtig losgeht."

[12]   Joschka Fischer, July 21, 1999, ibid., p. 1.

There is a generally perceived need to carry European integration forward. Deepening today, however, is of a different quality than in the past. Over decades European integration has been a matter of building a common market. Liberalisation and de-regulation is at heart a political project, but once it had been agreed upon, technocrats could be entrusted with implementation. With growing ambitions for political interventions to correct market failures or get policy outcomes in the field of environment or social affairs that are different from those produced by market forces, matters changed. Positive integration is based on discriminate value judgements and, therefore, its political legitimacy is bound to be questioned. Not just output performance, but input legitimacy becomes a pressing issue. This is even more true when integration gets into high politics close to the core of national sovereign rights. There is an abvious trade off between the scope of decision-making and the demand for political control and participation.

2 Does Europe need a Constitution?

The state of the debate still is kind of muddled. On the one side people claim that the treaties are the Union's constitution, on the other they call for writing a constitution. To clarify the issue I will make an ideal type distinction between 3 positions:

- Multilevel constitutionalism
- Constitution-making a matter of state building
- A penetrated system of constitutional development

2.1 Multilevel Constitutionalism

„Multilevel constitutionalism"[13] is taking a monist approach. It takes issue with two views on the relationship between national and European constitutional right. Firstly, it challenges the interpretation that the European Treaties can be treated as any other rule of international law. Though it is widely acknowledged that the European Communities and now the European Union have created their own legal system and established institutions endowed with sovereign rights, the German Constitutional Court and more recently, the Danish Supreme Court[14] have subjected the decisions of Community organs to national constitutional constraint. The Danish Supreme Court followed the Maastricht verdict of the German Constitutional Court and made it quite clear that it has the competence to control whether or not legal actions taken by European institutions keep within the limits of its conceded sphere of competence or go beyond that. The opposite view holds that the member states by bringing into effect the European Treaties or signing a treaty of accession have limited their sovereign rights.

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[13] Ingolf Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited? To be published in: Common Market Law Review, Aug. 1999. Quotations are taken from the manuscript.

[14] Danish Supreme Court, Judgement of 6 April 1998; for a comparative legal interpretation see Line Olsen-Ring, Dänemarks EU-Mitgliedschaft zwischen Politik und Recht. Schwierige freiwillige Abgabe von Hoheitsrechten, in: Neue Zürcher Zeitung, Nr. 121, 28. Mai 1998, p. 7.

And indeed, several members have written a clause into their constitution to the effect that they may confer sovereign rights to international organisations. This applies first of all to the exercise of legislative powers and normal judicial review. The doctrine of „direct effect" and the „supremacy" of European law has already been established in the early years of Community life.[15] More recent is a claim that member state constitutions now are under Union scrutiny. Agreements reached at Amsterdam now have introduced two articles into the EU Treaty that make the Union the watch dog of the member states' constitutional development.[16] According to this reading it is no longer the Constitutional Courts of the member states that watch over the normative consistency of European law with the basic human rights established in national constitutions but the other way round, the Union is in charge of looking for system homogeneity.

The second point is that the alleged conflict between European constitutionalism and the constitutionalism of the member states does not exist because both are seen as a systemic entity to which the principle of divided sovereignty applies. We are faced with a federal system, i.e. "a divided exercise of the people's sovereignty at different levels of action within an integrated legal system".[17] A nation's dedication to self-government does not necessarily create a unitary state which demands exclusive sovereignty over its people. Citizens may chose to install public authority on quite different levels, the local, regional, national, and the European one. In so far this transfer of power is democratically founded, each level of authority enjoys equal legitimacy. Any kind of agreement that clearly expresses the will of the people to establish a public decision-making authority should qualify a constitution. From this perspective, calling for any kind of constitutive assembly to draw up a constitution that for once and forever would design the political order of the European polity would be a step back. It would interrupt the incremental process of constitutional development that has been characteristic of European integration. And it would restrict our constitutional imaginations to the model of the state.[18]

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[15] On the basis of the ruling of the European Court of Justice, case 26/ 62, Van Genden Loos v. Nederlandse Administratie der Belastingen (1963); 6/ 64 Costa v. ENEL (1964).

[16] Armin von Bogdandy, Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform. Zur Gestalt der Europäischen Union nach Amsterdam, Baden-Baden 1999, p. 14-17.

[17] Ingolf Pernice, Multilevel Constitutionalism, op. cit., p.6; "Although formally distinct, the Member States' constitutions and the treaties constituting the European Union are comprehended as a unity in substance and a coherent institutional system within which competence for action, public authority or, as one may say, the power to exercise sovereign rights is divided among two or more levels." (3f)

[18] See Joseph H. H. Weiler, The Case against the Case for Statehood, in: European Law Journal, No. 4/1998, p. 43-62.

2.2 Constitution-Making a Matter of State Building

The opposing view[19] restricts the term constitution to the basic law of a state just to mark the difference between a state and other polities. It does so not for academic reasons like terminological clarity but to bring the debate down to the point of democratic rule.

The dualistic approach does not deny that the European Treaties form the basic law of the European Union. The German Constitutional Court in the famous ruling on the Treaty of Maastricht even called it „in a certain sense the Constitution of Europe"[20]. „In a certain sense" refers to particular functional properties that are equal to the constitution of a state: (a) it subjects the exercise of political power to the rule of law, (b) it entails (few) provisions for basic human rights, (c) it establishes a set of institutions and binding regulations for the exercise of public authority.

Nevertheless, there are two main distinctions: First of all, the Treaties do not constitute a state just because they do not command „totality". This finds expression in two ways, namely (a) Community competence is limited to the enumeration written into the Treaties, (b) primary Community law, i.e. allocating competence to the EU is dependent on the member states, they have the "competence-competence". The second point is that institutionalising a constitution has a particular procedural quality: (a) it is supposed to be a deliberate act constituting a „state", i.e. a political community aiming at self-rule and demanding „ultimate authority", and (b) a voluntary act in which the people participates directly. Up to now member states are „masters of the Treaties", parliaments have to ratify treaties of accession and in some member states referenda are held to give the people voice on matters of accession or revising the treaties. But in all those cases it is a partial national vote, not a vote of the people of Europe. Therefore, writing a constitution would and should depart from institutional reforms agreed upon in Inter-Governmental Conferences: It would be a deliberate act of writing a „contrat social" and of transforming a supra-national community into a „state".

Just because the "ultimate authority" would then rest with the European Union it needs democratic foundation. And this is exactly the point where opinions differ. The proponents of the constitution-state equation have serious doubt that the European Union fulfils the material conditions of democracy. To them it is not a matter of formal procedures that could rather easily be introduced. A European wide obligatory referendum could decide upon the next treaty amendments to get a vote of the Europeans. The European Parliament could be given full legislative and elective powers. The Council might be transformed into a Second Chamber representing the territorial units and the Commission could be installed as government, perhaps even with a directly elected president at the top. Writing a European

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[19] For a particularly clear cut presentation of the argument see Dieter Grimm, Braucht Europa eine Verfassung? In: Juristen Zeitung, vol. 50, 16. Juni 1995, p. 581-591; for the English version see Dieter Grimm, Does Europe need a constitution? in: European Law Journal, vol. 1, no. 3, November 1995, reprinted in: Peter Gowan and Perry Anderson (ed.), The Question of Europe, London-New York 1997, p. 239-258.

[20] Entscheidungen des Bundesverfassungsgerichts [BVerfG], 89, 155 – Maastricht-Urteil, http://www.uni-wuerzburg.de/glaw/bv089155.html.

constitution, however, does not by itself produce a working democracy.[21] What Europe needs in order to live up to our democratic standards is (1) a "demos", (2) a European wide public space, and (3) a transnational political infrastructure.[22]

"Demos" is not to be confused with notions of "primordial communities". When talking about demos in our context, it is the idea of a European society that is willing across all divergence of opinion and interests to live under common rule. To meet democratic standards, it is necessary that citizens have consented voluntarily and that the members of the community are willing to share the same basic liberal, political and social rights with all other citizens. In view of the heterogeneity of the European societies in a Union of 15, 20, 25 or even more members, it is difficult to imagine that a European demos is in the making. There is a convergence in the plurality of political outlook and a general, though declining permissive consensus towards European integration.[23] Still there is but a weak European identity and a centre-periphery descent in trust that has hardly changed over the years. Even more difficult to imagine is that there will be public space in which European citizens are able to communicate about their preferences in tastes and values. The heterogeneity in language, culture and tradition may be overcome by the cosmopolitan elite but not by the ordinary citizen. Without a public space there is no political discourse and without a mediator structure in terms of European wide media and a transnational party system there are no transmission belts that can make the voice of the European citizens heard.

2.3 A Penetrated System of Constitutional Development

In my assessment of constitutional development I am close to the monistic view. Firstly, not being a layer, I am less hesitant to apply the term constitution to the basic law of the European Union. Secondly, I will argue that there is a close interdependence between constitutional developments at the European and the national level. Nevertheless, I follow the conclusion of the dualistic approach that we should not advance constitution building of the European Union without testing the material pre-conditions of democracy.

We live in a penetrated system of governance in the sense that external actors can not just influence decisions-making but have a legitimate right to authoritatively intervene by giving „directives". Any transfer of competence degrades national democracy because democratic governance is a „two-sided

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[21] Peter Graf Kielmansegg, Integration und Demokratie, in: Markus Jachtenfuchs and Beate Kohler-Koch (ed.), Europäische Integration, Opladen 1996, p. 47-71; quote p. 58; Dieter Grimm, Ohne Volk keine Verfassung. Eine demokratische EU braucht bessere Institutionen, aber kein Grundgesetz, in: Die Zeit, 18. März 1999, p. 4.

[22] For a perfect summary of the arguments see Heidrun Abromeit, Democracy in Europe. Legitimising Politics in a Non-State Polity, New York-Oxford 1998; Christopher Lord, Democracy in the European Union, Sheffield 1998; Joseph H.H. Weiler, Demos, Telos, Ethos and the Maastricht Decision, in: European Law Journal, vol. 1, no. 3, November 1995, reprinted in Peter Gowan and Perry Anderson (ed.), The Question of Europe, London-New York 1997, p. 265-296.

[23] Angelika Scheuer, A Political Community? In: Hermann Schmitt and Jacques Thomassen (ed.), Political Representation and Legitimacy in the European Union, Oxford 1999, p. 25-46.

problem", it is about „governing and representing".[24] National parliaments and governments still represent the people and are held accountable but have lost their autonomy to act. Allocating competence at the EU level, fixing constitutional principles member states have to adhere to, is transforming the constitutional structures of the member states. What is needed, therefore, is an awareness that with any institutional reform at whatever level, we are in a process of multilevel constitutionalism.

This is the conventional argument. There is another argument that is hardly ever considered in the public debate: The „living constitution" of the EU changes the pattern of governing in the member states and by doing so affects their „living constitution", too. This is done by political practice and changes in belief systems.

The European Union predominantly is a negotiating system that has to accommodate actors with a high exit option and, therefore, has developed a type of "network governance"[25]. It is mainly the executive's job to ensure „good performance". In order to ensure compliance, state agents do not look for political support from parliament but aim at „appropriate" solutions by drawing on expert knowledge and giving voice to those who will be affected. The Commission, endowed with the right of initiative, has established routines to draw upon the expertise of external actors - be they public or private - in order to get its proposals accepted. For years it has supported transnational interest formation and played an active role in 'networking', encouraging the build up of transnational policy communities around policy issues which it has an interest in promoting. These strategies have been successful because they were supported or at least tolerated by national governments and private actors alike. Private actors are in favour because it provides channels of influence. Governments support it because it increases the quality of European policy making and by doing so, it contributes to output legitimacy.

"Network governance" disseminates into the member states in various ways. Societal actors adapt their strategies and organisations to the new way of governing. They translate their behaviour from the European to the national level: Big business and interest groups ask that the direct access open to them in Brussels should be granted in their national capitals, too. Apart from establishing networking routines, the political practice in the EU becomes part of a general belief system. „Good governance" is more and more equated with efficient problem solving and not with choosing between political alternatives. This way it is favouring an elite system that grows at the expense of democratic participation.

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[24] Giovanni Sartori (1968), Representation II. Representational Systems, in: International Encyclopedia of Social Sciences 13, 465-474; quote:469.
[25] The concept of "network governance" and how it proliferates into national systems is more extensively developed in Beate Kohler-Koch, The evolution and transformation of European Governance, in: Beate Kohler-Koch and Rainer Eising (ed.), The Transformation of European Governance, London-New York 1999, p. 14-35 and in Rainer Eising and Beate Kohler-Koch, Governance in the European Union. A comparative assessment, ibid., p. 473-507.

2.4 Promises and Pitfalls of a Constitutional Debate

A constitutional debate is conditional and not predictable. It may bring the alternatives of constitutional evolution into the open. It may, however, as well rehearse institutional myths. A constitutional debate looks promising as long as it is part of a public discourse and is open to alternative options. An Inter-Governmental Conference, even when it is preceded or accompanied by a „reflection group" is no substitute for a public debate. Bringing in the parliaments of the member states would broaden the participation in the discourse and public awareness considerably. Entrusting the EU institutions with the task to draft a constitutional treaty would neither give it a public resonance nor keep it open for alternative options. The proposal of the European Parliament[26] to adopt the „Community method" will only work in favour of further deepening the Union and push its transformation along the lines of a federal state. The idea is to entrust the Commission with drawing up a preliminary preparatory document to be used as the basis for interinstitutional co-ordination between Parliament and Commission. The agreement will then be negotiated between Parliament and Council similar to the codecision procedure and finally be adopted within the framework of the Inter-Governmental Conference and by ratification of the national parliaments. Looking at earlier draft proposals and recent reports of the Institutional Committee of the EP[27], it is not difficult to project how such a proposal would look like.

The normative reference quite obviously is the Westminster model irrespective of the fact that this does neither meet the reality of the EU of today[28] nor takes account of the structural deficits of European-wide representation. The Westminster model, though widely established in Western Europe, is least likely to be the appropriate one for a European federation. It demands a high level of social homogeneity in order to support a government that is functioning according to the logic of „minimum winning coalitions". Majority rule is only accepted when social conflict constellations are such that in case of poor performance the government in power will be substituted in the next election and the minority of today will have a chance to become the majority of tomorrow. In a very heterogeneous society the minority will not accept majority rule. All systems that are built on strong allegiances to communities of any kind have established a system of consociationalism. The Swiss system of government looks as the most appropriate model for a working European constitution, but so far has found little interest among European constitutionalists.

The European Parliament, however, does not stand alone when it is taking formal provisions for material reality. The advocates of „multilevel constitutionalism" and „supranational federalism" argue along the same line. I do agree that several conditions that have been stressed by the German

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[26] European Parliament, Committee on Institutional Affairs, Report by Biagio De Giovanni, April 27, 1999. See also Speech Delivered by the President of the European Parliament, Mr. José Gil-Robles to the European Council on Thursday, 3 June 1999 in Cologne, EP President speech at Cologne European Council (03-06-1999), http://www.europart.eu.int/dg7/summits/en/kol-pres.htm.

[27] Most revealing is the Report on the Institutional Implications of the Approval by the European Parliament of the President of the Commission by the Committee on Institutional Affairs, 8 December 1998, Doc_en\367\367914, PE 226.877/fin.

[28] This was pointed out in the minority opinion to the report, see ibid., p.19.

Constitutional Court in order to meet the requirements of democratic legitimacy have already been covered by the provisions of the Amsterdam Treaty. However, to introduce an article defining the role of political parties is no insurance that they may ever fulfil the function attributed to them: The Amsterdam Treaty stipulates that European parties will contribute „... to expressing the political will of the citizens of the Union"[29]. For a legal expert this change in text may be decisive: „There could not be a more telling description of the concept behind Union citizenship, political parties and the democratic foundation of the Union."[30] A social scientist will turn to the empirical analysis of the state of societal integration and the conditions that have to be met to make the institutional mechanisms work the way they are supposed to. In this respect the German Constitutional Court was closer to the social sciences than to many of the law colleagues. Democracy, according to the opinion of the Court, is based on the regular free exchange of ideas, on the interaction of social forces and interests that stimulate the definition and re-definition of political objectives and generate a public opinion that gives policy-making direction.[31] These are the conditions that make members of a political entity a „demos".

3 European Constitutionalism with and without a Demos

3.1 Multiple Demoi – in search for an Emergent European Demos

When we agree that today there is no European demos, where do we go from here? There are three avenues open: One is to consolidate European integration at - or even below - the present level. The other one is to build on past experiences and look for incentives and forces that might contribute to a European nation building. The third, and least tried one, is to conceptualise a different understanding of demos that might be in line with the dominant mode of European integration, i.e. functional integration.

When communication is at the heart of forming a demos - not necessarily the actual communication but as Luhmann has pointed out the potential communication - how and in what form may a European demos evolve?

There is little empirical research on the subject. Public opinion analyses- mainly on the basis of the surveys of the EUROBAROMETER - document past trends and try to project future developments. They produce robust empirical findings on factors correlating with pro-European attitudes – gender

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[29] Consolidated Version of the Treaty establishing the European Community (1997), Article 191.

[30] Ingolf Pernice, Multilevel Constitutionalism, op. cit., p. 17.

[31] The original text reads as follows: „Demokratie, soll sie nicht lediglich formales Zurechnungsprinzip bleiben, ist vom Vorhandensein bestimmter vorrechtlicher Voraussetzungen abhängig, wie einer ständigen freien Auseinandersetzung zwischen sich begegnenden sozialen Kräften, Interessen und Ideen, in der sich auch politische Ziele klären und wandeln und aus der heraus eine öffentliche Meinung den politischen Willen vorformt."

(male), level of education and income (high), occupation – but disagree on causal analysis.[32] Few studies try to evaluate the structure of the media or of transnational political organisations like the European party federations or European-wide social movements in their contribution to form a European-wide public space. A more recent approach is to look into the relevance of particular policies to find out how they shape a common European outlook. The introduction of the Euro has stimulated the debate whether or not a common currency and the need to co-operate more closely in economic and fiscal policy will stimulate a common identity and sense of European solidarity.[33] The findings of comparative empirical research is that support for the Euro is stimulated by a European vision, but that this European vision is generated by the individual national belief systems.[34] The implicit assumption in all this research is that transnational communication and the evolution of a spirit of communality will embrace the general public. Quite another approach is to look into changes within particular segments of society.[35]

As we know policy-making in the EU is highly sectorialised. Policy networks have been established in individual policy fields; the organisation of interested parties and the emergence of transnational networks has been triggered by Community activities and often supported by active interference of the Commission. Is it plausible that such cross border networks will form the nucleus of a transnational public space? Will they become permanent, i.e. independent from EU policy initiatives and support? Will such sectorialised public spaces proliferate and how do they feed back in a larger, not issue specific public debate?

The conceptualisation of that research is of interest. It deprives us from the illusion as if there would be one national public space in which each individual takes part irrespective of social stratification and divergent social milieus. Taking a close look at sectoral public spaces matches well with two other research approaches. Both deal with the formation of transnational political communities. Research on migration and migrant communities in Europe reveals that (1) borders become increasingly irrelevant and that (2) for the delineation of social communities the concept of territoriality just does not apply. Even in border regions with a high level of transborder migration, the political geography is not rearranged in a way that we get clear cut new borders. Territoriality is less and less a point of

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[32] Martin Schmidberger, Regionen und Legitimität. Der Einfluß des regionalen Umfeldes auf Bevölkerungseinstellungen zur EU, Frankfurt 1997 and M. J. Gabel, Interests and Integration: Market Liberalization, Public Opinion and Europan Union, Ann Arbour 1998 come to opposite conclusions.

[33] Werner Weidenfeld, The Euro and the New Face of the European Union, in: The Washington Quarterly, vol. 22, no. 1, winter 1999, p. 67-80.

[34] Thomas Risse, Daniela Engelmann-Martin, Hans-Joachim Knopf, Klaus Roscher, To Euro or not to Euro? The EMU and Identity Politics in the European Union, in: European Journal of International Relations, vol. 5, no. 2 (1999), p. 147-187.

[35] Klaus Eder, Kai-Uwe Hellmann, Hans-Jörg Trenz, Regieren in Europa jenseits öffentlicher Legitimation? Eine Untersuchung zur Rolle von politischer Öffentlichkeit in Europa, in: Beate Kohler-Koch (ed.), Regieren in entgrenzten Räumen, Politische Vierteljahresschrift, Sonderheft 29/1998, p. 321-344; Heidrun Abromeit and Thomas Schmidt, Grenzprobleme der Demokratie: Konzeptionelle Überlegungen, in: Beate Kohler-Koch (ed.), Regieren in entgrenzten Räumen, op. cit., p. 293-320.

reference for social and political identification.[36] Social research and political theory now both take an interest to investigate changes in the social and political stratification of our societies. It is the starting point for reflections of the emergence not of one European demos but of multiple European demoi around which a new political order in Europe could be clustered.

The parallel existence of a plurality of transnational communities would render any federal concept that is based on balancing the interests of regions, nation states and EU in a multi-level system of territorialities obsolete. Not territorial representation but either functional representation or the representation of social communities could be the organising principle. It would be the end of the state of modern times and the emergence of some post-modern polity that today is still difficult to imagine.

3.2 Federal Engineering

More down to earth and focused on a medium term perspective are those propositions that aim at making the present Community system work.[37] The basic idea is that in order to get a more democratic European system any institutional new design must pay tribute (1) to the multilevel character of the EU, (2) the co-existence of different principles of democratic representation, namely parliamentary, governmental and functional representation, (3) the particular mix of decision-making procedures at different stages of the policy process, i.e. majority vote, negotiations and deliberation, and last not least (4) the tradition of incrementalism in institutional reforms.

What we have to look for is a system of checks and balances, attributing particular functions to different political bodies at different stages of the decision-making process. The danger in the present system is that when combining parliamentary responsibilities with negotiating systems this will produce deadlock situations and might de-legitimise both procedures: The readiness to come to a consensus and to get committed to negotiated agreements will be upset when negotiations take place in the shadow of parliamentary decision-making authority. Parliaments decide on political grounds following the logic of competition about value preferences and power. Parliaments need autonomy from network governance because this, by nature, is neither transparent nor accountable. If their decisions are to tightly coupled to agreements of expert committees they loose legitimacy.

To circumvent such pitfalls, one has to design a system that allows for loose coupling and balances the influence of different bodies according to the phase of the decision-making process. It has been suggested, for example, to increase the power of national parliaments in agenda setting in order to give the national electorate a say in the decision on what issues should be dealt with at the European

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[36] This is confirmed by empirical studies on border regions along the Mexican-US border; for the theoretical and empirical analysis see Mathias Albert, Entgrenzung und Formierung neuer politischer Räume, in: Beate Kohler-Koch (ed.), Regieren in entgrenzten Räumen, op. cit., p. 49-75.

[37] Arthur Benz, Ansatzpunkte für ein europafähiges Demokratiekonzept, in: Beate Kohler-Koch (ed.), Regieren in entgrenzten Räumen, op. cit., p. 345-368; Arthur Benz, Postparlamentarische Demokratie? Demokratische Legitimation im kooperativen Staat, in: Michael Th. Greven (ed.), Demokratie - Eine Kultur des Westens? Opladen 1998, P. 201-222.

level. When it comes to policy formulation in the field now covered by the first pillar, the Commission would retain its role as a powerful mediator between private interests groups and governments. Decision-making would follow the procedures of codecision between Council and EP, and implementation would be a matter of national administrations under legal control of national courts and the European Court of Justice, but not the Commission. Such a combination of parliamentary, governmental and functional interest representation would, however, not apply to more sensitive policy issues as covered by the second and third pillar. The proposal is very close to the present system of supranational decision-making. It is still a complex system with limited transparency just because of diverging patterns of consensual negotiations between interested parties and majority decisions along political lines. It would still subordinate the Parliament to the Council and keep the Commission independent from the European Parliament. This way it would make it obvious that European politics is by nature different compared to national politics.

4   Conclusion

In view of the next Intergovernmental Conference the suggested institutional reforms look far more promising than speculations about how the European society may look like in a more distant future. What European governments are looking for are pragmatic small steps that bring about change in an incremental way and will not disarrange the established system. There is, however, a profound difference between the „federal pragmatism" advocated here and the intergovernmental constitutional debate. (1) The main objective of the institutional reforms after Amsterdam is to safeguard the EU's „capacity to act", to make sure that an enlarged and more heterogeneous Union will be able to take and implement decisions. The focus is on efficiency, not on democratic responsibility. (2) When negotiating institutional reforms governments were eager to give the issue a low profile and not to talk about constitutional change. What has been negotiated, however, is a matter of constitutional choice. Choice is based on preference, and institutional preferences are framed by constitutional ideas. What we have witnessed in the past intergovernmental negotiations and what will not be different in the next one is that all member states argue on the basis of constitutional ideas.[38] These constitutional ideas are, however, only implicit, they are „hidden theories"[39] and they are strongly influenced by national traditions in terms of political thinking, constitutional experience and political culture. Because they are hidden, it is difficult to come to rational, well argued agreements, and because they are so divergent, it is difficult to come to an agreement at all.

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[38] Markus Jachtenfuchs, Thomas Diez, Sabine Jung, Which Europe? Conflicting Models of a Legitimate European Political Order, in: European Journal of International Relations, 4/1998, p. 409-445; Markus Jachtenfuchs, Ideen und Integration. Verfassungsideen in Deutschland, Frankreich und Großbritannien und die Entwicklung der EU, Habilitationsschrift, Mannheim 1999.

[39] Jeanette Hoffmann, Implicit Theories in Policy Discourse: An Inquiry into the Interpretation of Reality in German Technology Policy; in: Policy Science 28/1995, p.127-148.

The contribution of the social sciences should be to stimulate a constitutional debate that is open, i.e. that refers explicitly to fundamental constitutional ideas and that is genuine „European" in the sense that it pays tribute to the particular character of the EU system. One of the main particularities is that it is a system without a demos and, therefore, no easy candidate for representative democracy. This is exactly the starting point for the „pragmatic federalist" proposal. The basic assumption is that -so far - it is a polity without a demos and for this very reason it can not be transformed into a copy of the democratic systems of the member states. Therefore, it will and should be a political system well below the threshold of a „state". A new type of federalism has to be developed that pays tribute to the particular properties of the system and to our aspiration of democratic government. And because we live under conditions of high institutional interdependence, institutional reforms at the EU level need to be „member states' friendly", i.e. introducing institutional reforms at the European level that will not work to the detriment of responsive and responsible governance at the national level.

From this point, the „pragmatic federalism" is not at all a short term view on an ongoing process of institutional reforms. It is well founded on a long term assessment of societal and political developments in the European Union. And here it meets the deliberations about the European demoi. The emergence of transnational communities would ask for a new institutional design. Again a different mix of principles of representation would have to be devised and again this design would look quite different compared to our national models of democracy.

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European Constitution did not appear until the start of the twenty-first century, several European. officials previously advocated for a United States of Europe, including Francois de Menthon, former chairman of the Legal Affairs Committee of the European Parliamentary Union (EPU).6. In June 1948, prior to the creation of the European Coal and Steel Community (ECSC), de. Menthon wrote and submitted a draft European Constitution to the Secretary of the EPU, Richard Coudenhove-Kalergi. Though little became of this particular document, efforts by those such as de Menthon laid the foundation for f