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THE 'DEMOCRATIC PRINCIPLES' OF THE TREATY OF LISBON

Feedback from Practice to Theory

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The 'democratic principles' of the Treaty of Lisbon

Feedback from Practice to Theory

Dedicated to Dimitris Tsatsos at the occasion of his 75th birthday¹

Peter Schiffauer*

Since its very inception, the European integration process was intended as a democratic one. At its origins it was conceived as a democratic alternative to the wars in Europe. Joint action of six democratic countries was per se considered as democratically legitimized. A rather symbolic function was conferred to the Parliament, officially referred to as „the Assembly”. Following the model of other international organizations,² it was composed of delegated members of national parliaments and vested mainly with advisory powers. It played the role of a transnational forum for public debate on issues relating to the integration process, conveyed these debates also to the parliaments of the Member States and provided the process with relevant impetus.

Two historical turning points brought about a different state of affairs. Since the first election of its representatives by direct universal suffrage in 1979, the European Parliament could make a legitimate claim to democratic representation. In any case,³ since the Council⁴ made use of majority voting, the democratic legitimacy scheme could no longer fully apply to the institution's majority decision-making as such decisions could no longer be attributed to a representation of the peoples of all Member States. Theoretically speaking, this lacuna could

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¹ This essay was first published in German: „Die demokratischen Grundsätze des Vertrags von Lissabon. Rückkopplungen von der Praxis zur Theorie, in: Peter Brandt (Hrsg.), Perspektiven der Unionsgrundordnung, Berlin 2013, S. 43 ff.“; see also *Peter Schiffauer*, *Verfassung und Politik der Europäischen Union im Werk von Dimitris Th. Tsatsos*, EuGRZ 2008, 452 ff. The present version was slightly updated in January 2014.

² Council of Europe, Western European Union.

³ It seems justified, however, to put forth a thesis that a lacuna in the democratic legitimacy scheme has emerged at an earlier stage, where, also through the interaction with the independent Commission, the practice of negotiations between government representatives within the Council gained momentum, while at the same time falling outside a full control by Parliaments at the national level.

⁴ In fact since 1986 in the context of the implementation of the internal market program.

only be bridged through a democratic representative body at the transnational level, the function⁵ of which is complementary to the other sources of legitimacy.

The “democratic deficit” has since become a focal point of critical debates on the European Union construction model and its legitimacy. In the successive revisions of the founding treaties, since the Single European Act, through the Maastricht, Amsterdam and Nice Treaties, the perceived legitimacy lacuna was gradually diminished. With a few exceptions, the said lacuna was finally closed through the Treaty of Lisbon which has introduced co-decision by the European Parliament and the Council on an equal footing as the regular procedure of the EU law-making. The entry into force of the Lisbon Treaty has thus enabled to materialize the vision of European institutional reality as outlined in the Spinelli draft⁶. It is noteworthy that the Treaty of Lisbon devotes a separate title to the provisions on democratic principles. Could it therefore be argued that with this Treaty the democratic deficit of the European construction model has finally been overcome?

A. Provisions on democratic principles

This Title of the Treaty on European Union comprises the Articles 9 to 12.

Article 9 contains the definition of citizenship and the principle of equal treatment of citizens by the authorities and other bodies of the Union. Article 10 provides for representative democracy as the basic principle of the Union. Representative democracy at the Union level has a dual character. Citizens are directly represented in the Parliament. Member States are represented in the European Council and the Council by the Executive, which in turn is democratically accountable to the respective national parliament and its citizens. This dual representation reflects the basic structural principle of the European Union⁷ irrespective of the fact that Article I-1 of the Constitutional Treaty was not incorporated into the Treaty of

⁵ This noteworthy observation was made in 'Maastricht' judgement of the Federal Constitutional Court (BVerfGE 89, 155).

⁶ European Parliament Resolution of 14 February 1984 on the Draft Treaty on European Union, OJ. C 77 of 19 March 1984.

⁷ The concept of a dual nature of the Union as a union of states and citizens was elaborated in a Report by I. Mendez de Vigo and D. Tsatsos on the Treaty of Amsterdam, European Parliament's Session Document A4-0347/1997 – resolution of 19 November 1997, O.J. C71 of 8.12.1997 p. 99 ff. The European Convention endorsed this concept in Article I-1 of the draft Constitution for Europe.

Lisbon. Finally, Article 10 emphasizes the important contribution of European political parties to representative democracy at the EU level.

Article 11 adds elements of participatory democracy. They task the institutions of the Union to promote the emergence of a European public sphere. The Union's activity should thus become the subject matter of an exchange both between citizens and representative associations as well as a dialogue between the institutions, representative associations and civil society. For its part, the European Commission is under the obligation to carry out broad consultations with the parties concerned. Finally, Article 11 established with the “Citizens Initiative” a particular participatory right. One million or more EU citizens from a significant number of Member States may bring to the attention of the European Commission, in accordance with procedural rules which following the entry into force of the Treaty of Lisbon were determined at the level of secondary law, proposals for legal acts within the scope of the Union’s competences.

Article 12 provides for a constitutional role of national parliaments in the context of the European Union’s activity, with such a role granted to them for the first time in the history of the founding treaties of the Union. By way of introducing the requirement for all EU Member States to be parliamentary democracies, the provision of the said Article breaks with the earlier tradition where the European treaties had not directly affected the national constitutions of treaty-contracting parties. The involvement of national parliaments in the Union’s activity embraces the examination of EU draft legislative acts, in particular with a view to the observance of the principle of subsidiarity, the evaluation of the implementation of the Union policies in the area of freedom, security and justice, the procedures for the revision of the Treaties, the accession of new Member States as well as the inter-parliamentary cooperation with the European Parliament.

An autonomous terminology is one of the peculiarities of the legal language of European integration. Not only are concepts derivated from national law⁸ denoted in other terms, but also nomenclature applied in national legal language⁹ is assigned to other concepts. After the entry into force of the Treaty of Lisbon the “semantic competence” (the power to define the

⁸ Norms referred to in German law as “Gesetze” (laws) are defined the Union's legal order as “regulations” and “directives”.

⁹ Under German law, regulations and directives both have different meaning from that ascribed in the law of the Union.

meaning of the used words) of the contracting parties¹⁰ has the effect that the elements described in Articles 9 to 12 of the Treaty on European Union are identified as characteristics of representative democracy with some participatory elements materialized at the level of the Union.

This does not mean, however, that the compilation of these elements is exhaustive. Relevant democratic constitutional principles feature also in other parts of the new Treaty. Furthermore no answer on the issue of democratic legitimacy may be derived from any definitions made on the grounds of semantic competence. The question how and to what extent representative democracy as established at the level of the European Union may fulfill the standards which would be required for democratic legitimacy requires further reflection.

B. Democratic Constitutional Principles

Democratic principles imply delegating to holders of political office, according to the result of free and fair elections and for a limited time, identified and identifiable functions of public governance. In order to evaluate the democratic quality of the Union legal order, the following innovations of the Treaty of Lisbon are relevant:

- a) it lays down more precisely the distribution of competences and decision-making procedures in the EU;
- b) it sets new procedural rules for the election of office-holders;
- c) it strengthens the representativeness of the decision-making bodies.

a) The division of powers between the European Union and its Member States as laid down in Articles 4 and 5 TEU in conjunction with Articles 2-6 TFEU counters any concern that, through stealthy extension of its powers, the Union could de facto evolve into a *Superstate*. The system of “checks and balances”, which provides also for the involvement of the national parliaments of the Member States, safeguards compliance with the said division of competences. The democratic legitimacy of the political processes at the EU level has thus been strengthened by way of introducing the new modalities of division of competencies in

¹⁰ W. Skouris raised a similar argument at the 1st Symposium of the IEV (“The European Union as a constitutional order”) on 13 February 2004 putting into question whether the Treaty establishing a Constitution for Europe actually establishing a constitution.

the Union. Following the entry into force of the Treaty of Lisbon the contents of EU-legislation is verified by three democratically legitimized authorities, i.e. the European Parliament, national governments and parliaments of the Member States, which gives the Union's legislative process a density of scrutiny that is not achieved in any other constitutional system.¹¹

b) The Treaty of Lisbon creates two new elected offices: President of the European Council (Article 15, paragraph 5 TEU) and the High Representative for the Common Foreign and Security Policy (Article 18 TEU). In institutional terms, the election of the President of the European Council is only a matter for the heads of state and government deciding by a qualified majority. In the same vein, the election of the President of the European Parliament is only a matter for the latter (Article 14, paragraph 4). It is noteworthy that these two offices' holders are both elected for a term of two and a half years.¹²

The election of the High Representative, however, requires an understanding between the three institutions: formally, the European Council decides by qualified majority, with the consent of the President of the Commission. However, the High Representative holds in personal union also the office of a Vice President of the Commission, who may take office only after a vote of approval by Parliament (Article 17, paragraph 7, third subparagraph TEU). Declaration No 12 on Article 18 TEU¹³ therefore already confirms for the first appointment of the High Representative after the entry into force of the Treaty of Lisbon the necessity of contacts with Parliament in the run-up to this election, albeit formally the Treaty does not make mandatory a vote of approval by Parliament for a possible case of renewal of a single Commissioner.

As to the procedure for the election of the Commission President the Treaty of Lisbon provides for a small but politically important change. The Treaty now recognises that the vote of the European Parliament on the European Council's nominee for the office of the Commission President constitutes an election, a qualification which was anticipated in the

¹¹ Similarly in this sense Corbett / Méndez de Vigo, Report on the Treaty of Lisbon, paragraph 2a of the motion for a resolution, EP-session document A6-0013/2008.

¹² For the President of the European Council, it follows from Article 15, paragraph 5 TEU, for the President of the European Parliament from Article 16 of the EP's Rules of Procedure, the change of which is at the discretion of Parliament.

¹³ OJ No. C 306 of 17.12.2007, p. 254.

Rules of Procedure of the European Parliament since the entry into force of the Treaty of Amsterdam. The Treaty on the EU specifies in its Article 17, paragraph 7, first subparagraph, that the European Council, before deciding by majority on the candidate proposed for the office of the Commission's President, needs to proceed to consultations and to take into account a particular outcome of the elections to European Parliament.

Is it possible to predict the consequences of these changes?

Will it become customary that the Commission President belongs to the political family which emerges as the strongest in the European elections?

Will European political parties in their campaigns to European elections regularly designate and support "their" candidate for the office of the President of the Commission?

All this is in the realm of possibility, but by no means certain. The investiture of the highest offices is likely to be subject to a complex political process as long as no particular political family is in a position to govern alone in a majority of the Member States and to obtain more than half of the seats in the European Parliament. The existing political majorities as well as those likely in future require cooperation and compromises amongst political families. It hence seems hardly conceivable that in a certain period the holders of the highest offices of the Union stem exclusively or predominantly from a single political family. Therefore it is likely that the appointments to such offices will be object of intense consultations with the aim to achieve a reasonable political balance and to establish a personal basis for a constructive cooperation between political families within the European Union. In other words, the only thing we can reasonably predict is that the reforms of the Lisbon Treaty generate a field of interacting political forces within which, after upcoming European elections and having regard to their outcome, consensual and workable solutions need to be found.

c) Furthermore, a distinct characteristic of the system of the European Union is that influence and powers conferred to the holders of the highest offices are limited and subject to strong "checks and balances". Democratic legitimacy relies therefore not only on the procedures for the election of political leaders, but even more on the representativeness of the relevant decision-making bodies. Also in this regard the Treaty of Lisbon introduced significant improvements which need to be assessed in their full context, since in the

institutional system of the European Union the Council is not merely a chamber of the states. The principle that all Member States are equal before the Treaty is now endorsed by Article 4, paragraph 2 of the TEU. Nevertheless, the weight of votes of the individual Member States has since the beginning of the integration process been differentiated according to their size having regard to the significant influence of the Council on all EU decisions. However, subsequently to the recent waves of enlargement, this initial rough weighing implied the risk that a large number of Member States with relatively small population could outvote a smaller number of Member States which represent the majority of the Union population. The Treaty of Lisbon now achieves an efficient protection of minorities as well as an appropriate representation of the majority by defining in its new Article 16, paragraph 4 TEU the qualified majority of Member States' representatives in the Council recurring to a duplicate key, i.e. double majority of 55% of the states and 65% of the population of the Union, applicable as of 2014.

Mirroring the composition of the Council, which represents the States in a manner that is differentiated according to population size, the European Parliament represents the population of the Union in a way that is differentiated according to its repartition in states. Article 14, paragraph 2 of the Treaty on European Union as amended by the Treaty of Lisbon characterizes the representation of citizens in the European Parliament as “degressively proportional”. It merely provides for the attribution of a minimum number of 6 seats and a maximum of 96 seats per Member State and for a maximum total number of 751 Members of Parliament. For the remainder the determination of the composition of Parliament is left to a decision of the European Council, to be taken on the initiative and with the consent of Parliament. In a resolution of 11 October 2007¹⁴ the European Parliament has elaborated a proposal for the allocation of 750 seats on the basis of the principle of degressive proportionality. The latter is specified as follows:

- the minimum and maximum numbers set by the Treaty must be fully utilised to ensure that the allocation of seats in the European Parliament reflects as closely as possible the range of populations¹⁵ of the Member States;

¹⁴ O.J.C 227E of 11 October 2007, p.132 P6_TA(2007)0429 report Lamassoure/Severin (Doc A6-0351/2007).

¹⁵ Parliament has thereby resorted to demographic statistics developed by the European Statistical Office. No majority was found for the thesis that it is not the number of people living on the Member State's territory, but the number of citizens of the Union belonging to that state that should be accounted for.

- the larger the population of a Member State, the greater its entitlement to a large number of seats;
- the larger the population of a Member State, the more inhabitants are represented by each of its Members of the European Parliament.

The declarations Nos 4 and 5 annexed to the Treaty of Lisbon¹⁶ state that the additional seat in the European Parliament will be attributed to Italy and that the European Council will give its political agreement on the revised draft proposal of the Parliament. In accordance with these principles the composition of the European Parliament elected in May 2014 was determined by European Council decision of 28 June 2013¹⁷, on the basis of a proposal¹⁸ by and with the consent¹⁹ of the European Parliament.

In the system of representative democracy at Union level, the principle of equality is thus modified in a double manner: in the citizens' representation in favor of representing the citizens of small states and in the representation of states in favor of the more populous states.

C. Any remaining doubts

Subsequently to the ratification of the Treaty of Lisbon, the European Union has a fully developed system of institutions and procedures that are recognized as democratic by the democratically elected sovereign of all Member States. Given the degree of positivity which democratic principles have achieved at the Union level, is there still room for any reasonable doubt about the full democratic legitimacy of the exercise of public power at the level of the European Union?

In this context one should remember the concerns raised by the German Federal Constitutional Court in its first “Maastricht”-judgment²⁰. The Court's starting point is that at the level of the European Union two non-legal requirements of democracy are not met: the existence of genuine European political parties and a Union-wide public space. This statement

¹⁶ OJ No. C 306 of 12.12.2007, p. 249.

¹⁷ OJ No. L 181 of 29.6.2013, p. 57.

¹⁸ Adopted on 13 March 2013, P7_TA-PROV(2013)0082, report Gualtieri/Trzaskowski (A7-0041/2013).

¹⁹ Adopted on 12 June 2013, P7_TA(2013)0265 upon recommendation of the Committee on Constitutional Affairs (A7-0213/2013).

²⁰ BVerfGE 89, 155.

which was valid in 1993 is not outdated in 2014 despite the significant progress which has been realized in these areas since then. But this statement does not lead the Federal Constitutional Court to the conclusion that the system of the Union as a whole lacks democratic legitimacy. Rather, it emphasizes the complementary role of different mediators of democratic legitimacy: the European Parliament, democratically elected governments and national parliaments. Since the Treaty of Lisbon reinforces the representative function of all these mediators of democratic legitimacy, no relevant doubt can be raised under this aspect.

A problem can, however, arise because of the low turnout in elections to the European Parliament and its declining trend, since a decrease in the voter turnout diminishes the credibility of a theory of the democratic legitimacy which attributes to the represented citizens any decision taken by their democratically elected representatives. On the one hand, this is not a problem specific to democracy at the transnational level. On the other, the political parties established at European Union level are making serious efforts to illustrate what is at stake in the European elections in order to persuade the voters to submit their vote.

In addition, a minority is raising new doubts about the democratic legitimacy of the European Union in public debates on the Treaty of Lisbon. They tie in with the fact that several Member States²¹ have opted to ratify the Treaty of Lisbon by means of a vote in Parliament while the Treaty establishing a Constitution for Europe was or was due to be subject to a referendum. This change of procedure is discussed against a background of ideas which present referenda as the proper democratic method.²² From the perspective of the Member States' political institutions, however, the procedure of parliamentary approval for this Treaty does not lead to a loss of democratic legitimacy, but conforms to good democratic practice.

Having regard to the constitutional law in force in the Member States and to the primary law of the European Union as amended by the Treaty of Lisbon, there is no longer a point to speak about a democratic deficit of the European integration process. In a free democracy the dissenting opinion of a minority is legitimate, but it cannot determine the law and political practice.

At the level of scientific debates, however, these difficulties may give rise to the further question of whether the conformity of the constitutional norms is sufficient for democratic

²¹ For instance France, the Netherlands and the United Kingdom.

²² This stance is represented mainly by opponents of the Lisbon Treaty, who expected that referenda would result in the rejection of the Treaty in at least one of the Member States.

legitimacy or whether the observance of unwritten constitutional principles may also be required²³.

D. Plurality of theories of democracy

As expressed in Articles 2 and 7 of the Treaty on European Union, the Member States of the European Union consider their constitutions as democratic ones. Democracy is an indispensable part of European constitutional culture, but it cannot be caught in the straitjacket of a universally accepted definition.

The discourse on democracy dates back to ancient Greece. Pericles used this term for “the constitution under which we live, ... because the polis is not grounded on a minority, but on a larger number ... In accordance with the Law ... all [citizens] share an equal part, ... we are living freely together in the polis ... [without] allowing ourselves any breach of the Law or disobedience towards the ... Officials.”²⁴. Historical analysis²⁵ shows, however, that there are no continuous lines of development from the ancient to the current conceptions of democracy. The current understanding of democracy and the attribution of a positive connotation to this term are due to the revolutions that have taken place since the beginning of modern times: historical turning points are the change from feudal systems of government to the absolute power of the sovereign and the subsequent depersonalization of the latter towards the idea of popular sovereignty achieved through revolutions or constitutions. Popular sovereignty is one of the basic features of democracy. When expressed in the phrase “All state authority emanates from the people”²⁶ it contains a never ending call to critically ascertain whether this postulate is concretely fulfilled. One of the indispensable conditions of democracy is the need that all acts of the public power may be accounted to the collective sovereign – the demos.

²³ Concern about the democratic legitimacy of European Union economic governance has recently been voiced by Izabela *Jedrzejowska*, A reshaped Economic and Monetary Union – still attractive, but hardly legitimate, Scientific Journal of Wrocław School of Banking, 2014 (forthcoming).

²⁴ Thukydides, *Geschichte des Peloponnesischen Krieges*, Totenrede des Perikles, II, 37, translated from the German version by *Peter Landmann*, Zürich und München 1976; the author of this paper substitutes the term “State” as applied by von Landmann with the notion of “Polis”.

²⁵ See *Luciano Canfora*, *La Democrazia, Storia di un’Ideologia*, Roma-Bari 2004.

²⁶ Article 20 paragraph 2 of the Basic Law of the Federal Republic of Germany.

In the European constitutional culture²⁷ the common starting point of democracy is concretized in a variety of institutions and procedures. Equally diverse is the range of opinions about the content of democracy. Generally, in order to recognize a system as democratic, it is required that governmental authority is awarded for a specific period of time on the basis of elections and that the citizens decide themselves on their collective destiny. A wide spread view in the public opinion therefore sees democracy as a system in which the government and the legislature act in accordance with the wishes of the citizens. This view, however, quickly gets into conflict with the fact that democratic governments (and democratic lawmakers) are frequently forced to take painful decisions, on which citizens have no opinion or that even run counter to the wishes explicitly expressed by a majority of them. Judging from this perspective, the divergence between the decisions taken by accountable politicians and the real actual will of citizens may easily lead to a loss of credibility of the political system.²⁸ Sven Steinmo²⁹, however, described this view as “naïve”. In his view, the core question of democracy lies in the choice of elites which take the necessary decisions for the citizens. Thus the success of democracy depends on whether a workable balance can be established between the accountability of the elites towards the citizens and their autonomy to take decisions in the interest of the citizens. Steinmo identified the decisive power of the majority as a characteristic of European constitutional culture, in the development of which democratic institutions and procedures needed to be wrested from an autocratic monarch. Some authors seem to identify the democratic principle with the “majority rule” and express skepticism over the legitimacy of constitutional judicial review³⁰. In this tradition democracy may appear as a struggle for leadership through election³¹s or as a system of government by parties³². In any case, the European constitutional culture acknowledges the essential role of political parties in the process of forming a political will. The American constitutional culture in which according to Steinmo elements of ancient distrust³³ subsist against the majority rule, has instead developed a system of “checks and balances” as a characteristic feature of

²⁷ The concept of a European constitutional culture was developed by *Peter Häberle*; see in particular *Europäische Verfassungslehre*, 3rd Edition, Baden-Baden, 2005.

²⁸ On the importance of the credibility of a political system for a constitutionally relevant understanding of legitimacy, cf. D. Th. Tsatsos, *Von der Würde des Staates zur Glaubwürdigkeit der Politik*, Berlin 1987.

²⁹ Jeffrey Kopstein / Sven Steinmo (eds.), *Growing Apart? America and Europe in the 21st Century*, Cambridge University Press, 2008.

³⁰ *Richard Bellamy*, *Political Constitutionalism*, School of Public Policy Working Papers, London 2007, www.ucl.ac.uk/spp/.

³¹ *Chris Hanretty*, *How (not to) democratize the Media*, *EUI Review* Winter 2007, www.eui.eu/PUB/EUIReview.shtml.

³² “Model of party government”, see J. J. A. Thomassen (ed.), *The Legitimacy of the European Union after Enlargement*, Oxford University Press 2008.

³³ Cf. in this respect *Luciano Canfora* op. cit. footnote 25.

democracy that restricts the decision making power of the majority. The difficulty of developing a viable conceptual framework into which to classify the different practical experiences of democracy, and the experience of contradictions between the empirically ascertainable will of citizens and democratically legitimized decisions have also brought about skeptical and cynical appraisals, such as to consider democracy as a pompous name for something that does not exist³⁴ or as the worst political system except of all other known systems.³⁵

Pointed phrases of this kind should not, however, be understood as a negation of the feasibility of democracy. Rather, they function as a provocation with the aim to generate a distance to naive ideas about it and to encourage the scientific efforts for deepening its understanding. Democracy is not that what the meaning of this word suggests, but quite a different system which is evolving with great variety in time and space.³⁶ The following comments endeavor to contribute some tesserae to the mosaic of theoretical efforts on this subject, which have a particular relevance for the construction site of political integration that the European Union continues to be.³⁷

E. Constitutional principles of democracy at European Union level

A core problem for the theory of democracy at the level of the European Union is the drifting apart of the views about the European integration process held in the democratically elected representative institutions on the one hand and in the public opinion on the other hand. This phenomenon can be observed since the completion of the internal market and in parallel to the institutional reforms made since then. Although these reforms gradually transformed the European Communities from a partnership of convenience, which was predominantly governed via diplomatic and bureaucratic methods, into a union of states and citizens the action of which is determined through political processes in accordance with conferred

³⁴ *Giovanni Sartori*, *Demokratiethorie*, translated from English by Hermann Vetter, edited by Rudolf Wild Man, 3rd edition, reprint of Sonderausg. 1997, Darmstadt 2006.

³⁵ Yves Meny (Searching and Researching Democracy, EUI Review) refers to these familiar quotations asking the question what would happen if all other systems gradually disappeared from the political map.

³⁶ *Yves Meny*, op.cit. footnote 35.

³⁷ The great attention paid to this subject matter by the European University Institute, not least through the establishment of the European Union Democracy Observatory, is beyond doubt praiseworthy. Also of note is the interest of European think tanks for this theme, e.g. Stefano Micossi, *Democracy in the European Union*, Centre for European Policy Studies, Brussels, 2008, <http://www.ceps.eu>.

competencies and powers, the reservations about the democratic legitimacy of Union action rather increase in the public opinion. Thus paradoxically the reservations against the democratic legitimacy of the Union action increase the more it is achieved in accordance with democratic procedures. Are there any insights in the fields of constitutional culture and theory of democracy which can shed light on this paradox?

I argue that this paradox is based on a twofold flawed and tacit assumption of equality:

- a) the identification of democracy in the nation-state with democracy in a supranational political order;
- b) the identification of the will of the demos (the “volonté générale”) with the empirically ascertainable will of the citizens.

To a):

When Democracy is understood as the rule of the majority, it will only function well if there is a relatively homogeneous demos capable to show solidarity. Only under such preconditions it can be expected that on the whole the preferences of the majority also meet the needs of minority and that the latter, insofar as this were not always the case, would give precedence to the continuation of the political entity of which it is a part over their vested interests. The largest entities in which such conditions may approximately be expected are the nation-states which have grown together in history. This process has favored the development of common features and the convergence of interests within the population of nation states, including the readiness of citizens to make certain sacrifices to the extent that they are imposed in the name and in the interest of the sovereign nation. This may, however, not lead to the conclusion that a (national) state is a precondition for democracy³⁸. The representatives of the theory conceiving democracy as the government of the majority³⁹ are aware of the need for federally organized states to modulate the majority rule through institutions and procedures in order to effectively protect the interests of minorities. This shows in turn that the question whether the action of a political entity is democratically legitimate or not, cannot be answered without reflecting on the structure and characteristics of the demos, which this action is to be

³⁸ In this sense e.g. the thesis of *Paul Kirchhof*, formulated on the basis of Carl Schmitt's theory of democracy.

³⁹ *Richard Bellamy*, op.cit; footnote 24.

attributed. State action may be regarded as democratically legitimate when it can be credibly⁴⁰ accounted to a demos. Democracy may, however, take quite different forms, depending on how the demos is structured and what characteristics it has. Just as democratic models of central government may not be transferred to federal states, they may also not be transferred from the state to the supranational level. The answer to the question of how democratic legitimacy may be achieved at the level of the European Union has to start with the determination of the demos which the Union action is to be accounted to. Representative democracy as conceived at the level of the European Union⁴¹ is founded on the representation of citizens and of the Member States. The Union's demos does not display a homogeneous structure, but is divided into two levels, a civic and a governmental one. On each of these levels in turn many folds appear. There are folds in languages and ethnic groups of different sizes, and folds in demographic, cultural and interest groups⁴², the borderlines of which transcend the division into States. Under such conditions, procedures that claim to produce democratic legitimacy may not simply consist in determining the position of the majority. Where within a given entity several groups are pursuing more than two mutually incompatible desiderata, there is no majority for any of them when solely majority decisions are possible. Policy development decisions and actions can credibly be accounted to a complex demos only when mechanisms, procedures and political culture are interacting in the decision-making processes in a way allowing to isolate single parts from inconsistent options for decision-making or courses of action, and to reconnect such parts with a result that indeed does not correspond to the priorities and the current will of any individual grouping concerned, but that sufficiently meets the interests of a large majority of them so that it is accepted or at least tolerated. In other words, democratic legitimacy requires that the complexity of a demos is properly represented in the system of decision making and a political practice takes this into account by developing a culture of bargaining compromises. This principle could be developed into a guideline for the practice of political parties.

Institutions and procedures of democracy at the level of the European Union are therefore necessarily different from those which have evolved in the different democratic traditions of

⁴⁰ This important criterion was elaborated on by D. Th. Tsatsos.

⁴¹ Article 10 paragraphs 1-3 TEU as amended by the Treaty of Lisbon.

⁴² On the specificity of the Demos of the European Union, see D. Th. Tsatsos, *Sympoliteia*, now also in English edition of 2008; cf. also P. Schiffauer, *Versuch über die Transformation des Staates in der Europäischen Union*, in: P. Häberle / M. Morlok / V. Skouris (ed.), *Festschrift für Dimitris Th. Tsatsos*, Baden Baden 2003, p. 592 ff.; or the same author's: *Leviathan oder Hydra*, in: F. Müller / I. Burr (eds), *Rechtssprache Europas*, Berlin 2004, p. 23 ff.

its Member States. Still there are sufficient family resemblances that lead to premature or naive transfers from one level to the other. Decisions taken by majorities or their representatives at the level of the Union, too, count among the indispensable elements of democracy. When decisions may only be taken by consensus, paralysis and the dictatorship of particular interests become inevitable. In contrast to the democratic order of quite a few Member States which admit the procedure of a referendum at the national level, at the level of the Union more complex procedures are required for representing the relevant majorities. The Treaties of Amsterdam and Lisbon gradually expanded the democratic institutions and procedures at the level of the European Union to a system in which the number of levels involved and the scrutiny and deliberative efforts are more intense than in the Member States. This may be interpreted as a process of optimization which developed institutions and procedures sufficiently representing the complexity of the demos of the European Union. Concomitantly with the emergence of a political European Union the efforts were increased to develop European political parties that are apt to carry out key integration features within such complex institutional arrangements.

To b):

The above considerations may demonstrate why at the level of the European Union it is excluded to conceptualize democracy as a system of majority voting only. They do, however, not provide an answer to the specific problem of remoteness of citizens which the European Union faces despite all official and seriously meant affirmations⁴³. The achievements of the European integration are often considered as a natural acquit. They are frequently attributed to the merits of other actors. In exceptional cases only⁴⁴ it is possible to focus the controversies in the public opinion on the great themes of the legislation at European Union level. Public attention rather shows interest in cases of maladministration which may occur at all levels of public action. Public criticism of abuses is healthy for any system, but when the public perception of a system does not go beyond the criticism of abuses, there is a danger that an attitude of rejection propagates. Elected Members of Parliament, who concretely work for generating democratic legitimacy, know how important it is to bridge the gap between the citizens and the institutions⁴⁵. The referenda in France and the Netherlands, which had led to

⁴³ See Article 10 paragraph 3 TEU as amended by the Treaty of Lisbon: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."

⁴⁴ E.g. the debates on the further liberalization of the provision of services (Bolkestein Directive).

⁴⁵ See European Parliament resolution of 19 January 2006 on the reflection period, P6_TA (2006) 0027.

the rejection of the Constitutional Treaty, showed that the bridge had broken. In some other Member States a mood had spread that made a rejection probable if a referendum on that Treaty were held. Political analysts have identified complex causes for such postures of rejection. In particular they underlined the substantial impact of the national political context. Regardless of the assumed or established cause for the result of a vote, democratic tradition requires without exception, that the will of the people actually expressed in a vote be respected. The views are, however, controversial with regard to the question whether the democratic legitimacy of decisions or acts is questionable when the democratically legitimate representative bodies take decisions that differ from the explicit will of a majority of the represented citizens.

According to the ideas of Rousseau the decisions taken by representative democratic institutions reflect the "volonté générale". This concept is a theoretical construct that is not empirically verifiable. The „volonté générale“ is not necessarily identical with the „volonté de tous“ – or even with the will of the majority. According to what has been stated above in section a) about the demos, the one-dimensional construct of „volonté générale“ appears to be inappropriate for the complex constitutional structures of the present times.⁴⁶ Anybody who would claim to bring the often contradictory and convoluted interests and wishes of the citizens of the European Union on the common denominator of a general will, would rather have to be called arrogant than credible. In the democratic decision-making processes, a challenge of optimization as well as of generalization is at stake: it is about pacifying competing and often incompatible interests and desires by means of defining an optimum solution in a manner which proves to be generally acceptable.

Authoritative scholars of the Member States' constitutional law therefore understand democracy in a manner that is characterized by the concrete shape into which it has developed in the course of the history of a legally recognized constitutional ordinance. Konrad Hesse qualifies the democratic authority of parliament and government as an „authority of a limited scope and limited in time which is entrusted by the majority of the people and accountable to the latter, subject to its criticism and scrutiny as well as open to modify or supplement its action through the participation of the people in political decision-making“⁴⁷. Hesse rejects

⁴⁶ D. Th. Tsatsos (Von der Würde des Staats zur Glaubwürdigkeit der Politik, Berlin 1987) rejects the use of the „volonté générale“ as a necessarily fictitious level of acceptance and demands that credibility must be developed in concreto.

⁴⁷ Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20 reprinted edition, Heidelberg 1999, para. 134, , own translation.

the understanding of democracy as self-government of the people. In his view any attempt to implement the *identity of the rulers and the ruled*⁴⁸ without mediation into reality carries the risk to revert into a totalitarian regime.⁴⁹

Two practical examples may shed light on how the democratic tradition relativizes the relevance of the citizens' actual will:

Prior to democratic elections, during the campaign the candidates regularly make campaign pledges. It would be naïve, though, to understand such promises as binding commitments in terms of civil law or merely in terms of a code of honor. Campaign pledges allow conclusions on the value scale and basic political orientations of the candidate, but in the case of being elected, the political circumstances after the election determine the extent to which they may be redeemed. The concrete meaning of campaign pledges may only be understood taking into account the constitutional prohibition of an imperative mandate.

Referenda are viewed as procedures of direct democracy; some people even consider them as the epitome of democracy in general. They are a direct expression of the will of the citizens called to vote. But it is easy to imagine subjects on which a referendum would lead to a predictable outcome, such as the case of a referendum on a proposal to lower the income-tax to half its current rate, or to grant citizens full protection against the risks of accidents, illness or unemployment. Proposals of this kind correspond to the interests of each individual, but their implementation would likely cause an existential problem for every community. Thus it depends crucially on the question asked, whether the result of a referendum may be relevant for political action. Where the citizens called to vote cannot sufficiently identify the impact of the options put to the vote or where one of these options jeopardizes the survival of the community, the legitimacy of the vote itself is questionable.

Future-shaping strategic decisions such as the approval of an international treaty having a constitutional quality⁵⁰ or its rejection imply incalculable consequences. As much as the European Union proves to function as an ordinance of peace, any political strategy leading to its paralysis or even to a retreat from itself would become a security risk. With regard to decisions on questions of this kind, referendums do not provide more legitimacy than

⁴⁸ Hesse uses this concept which was framed by *Carl Schmitt*, see: *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923), p. 30 ff. and *Verfassungslehre* (1928) p. 234 ff.

⁴⁹ *Konrad Hesse*, op.cit. footnote 47, para. 131.

⁵⁰ On the constitutional aspects of the Treaty of Lisbon, see: *Peter Schiffauer*, *Zum Verfassungszustand der Europäischen Union nach Unterzeichnung des Vertrags von Lissabon*, EuGRZ 2008, 1 ff.

decisions of representative bodies. In democratic systems it will always be necessary to listen to the empirically ascertainable will of the citizens. But those to whom elections have entrusted leadership offices also have the responsibility when exercising their duties to resist to the will of a majority, when they reach the conclusion that this is necessary in the interest of the citizens they represent.

The joint action of Member States within the European Union generates an additional feature which is due to the specific shape of a „sympoliteia“⁵¹ which that political ordinance has taken. In a sympoliteia which is equally based on States and on citizens the demos, i.e. the subject from which democratic legitimacy emanates, takes a particular shape. The entanglement of nation states and their demos established at national level with the demos of a transnational European sympoliteia which is fold into its dual structure, has more far-reaching implications than the development of the concrete form of democracy at the level of sympoliteia. Where the demos of a nation-state has decided to integrate into a sympoliteia, such a decision also causes some repercussions on the freedom of its own will and restrictions of its sovereignty. The latter do not go so far as to exclude a withdrawal from the sympoliteia if a will to do so was formed in a legitimate manner in a democratic process. Consequently, the Treaty of Lisbon explicitly provides for the possibility of a withdrawal from the European Union. Restrictions of sovereignty may, however, arise in such a way that in a sympoliteia it becomes illegitimate that a national demos at the expense of the sympoliteia and its other members is blocking developments that are essential for the good functioning and survival of the sympoliteia. In the European treaties no remedy is provided for such a situation. The diplomatic methods traditionally used in European affairs have often allowed to avoid threatening blockages or, when they occurred, to overcome them with time. At the diplomatic level negotiators are always aware that they need to find support for their position not only in the here and now, but also that the partner should not be treated in a manner to become an enemy in future conflicts. Such a consciousness of continuous reciprocal dependence which is present at the diplomatic level and in negotiations between governments, is instead lacking in national referendums where there is rather a danger that diverging views add up to negative majorities. But which quality may be attributed to democratic legitimacy if it flows from

⁵¹ See in this respect *D. Th. Tsatsos, Sympoliteia européenne*, Athens 2007; an initial summary of these ideas can be found in: *D. Th. Tsatsos, La transformation du principe démocratique dans l'ordre juridique européen*, communication présentée le 1 juin 2006 lors du IIème Colloque international des Droits de l'homme.

decision making procedures that for structural reasons do not render transparent the relevant historical and political interrelationships?

F. Borders of knowledge

Any responsibility for taking policy decisions seems to require the availability of better knowledge. The elites resulting from political elections⁵² regularly dispose of more comprehensive information than their voters. The advantage of being provided with better information becomes even more significant where the elected are entrusted with governmental responsibilities. All the sources of information from science and the state apparatus are at their disposal including the intelligence services. It is part of the habit of members of government to claim that their decisions are based on knowledge. External expertise is increasingly consulted in the course of legislative and political decision-making⁵³. The demands for prior regulatory impact assessment suggest that the consequences of political decisions are predictable, calculable in advance. Scientific evidence of the possibility that better knowledge is available to the elites could solve a problem of legitimacy of representative democracy. Empirical observations and epistemological considerations, however, rather lead to the expectation that no such proof is possible. Government systems that lay claim to dispose of objective knowledge, not only risk to degenerate quickly into totalitarian forms, but are also particularly exposed to the risk of taking wrong decisions and, in most cases, incapable to correct them. The claim to dispose of objective scientific knowledge about future developments is based on deterministic philosophical systems in which any impact can be traced to a specific cause. The results of mathematical research and quantum physics teach us, however, that the universe in which man lives may not be represented as a deterministic system.⁵⁴ This conclusion provides comfort, since it allows for the idea of an area of freedom, and at the same time it creates uncertainty, because it puts the idea of a knowledge-based action in question. Probabilistic calculations may provide a useful

⁵² This name for the “elected” is used here without any judgment of value by recourse to its Latin roots.

⁵³ Concerning best practices of scientific advice for political actors cf. *Peter Schiffauer*, Bemerkungen zur wissenschaftlichen Methodik der Untersuchung des Einflusses von Experten in einem spezifischen Politikfeld, in: Arthur Benz (Hrsg.), *Politikberatung in Verfassungsreformen*, Berlin 2012, S. 167 ff.

⁵⁴ See in this regard *Klaus Mainzer*, *Der kreative Zufall – Wie das Neue in die Welt kommt*, München 2007, and notably the consequences described by him as to the Heisenberg uncertainty relation and Gödel's theory of incompleteness. The author comes to the conclusion that alone the high computing power of today's computers renders the limits of predictability clear.

tool when individual fates do not matter, for example, in actuarial mathematics. But such calculations do not allow for any reliable prediction about whether a particular event will occur soon or not. Even if the lowest possible probability was assumed for a given event, it could become a reality at the next moment. Furthermore, in cases where several causal chains interact, the possible development opportunities are growing exponentially after a few steps, so that, even if we disregard the problem of hazard, the future development of complex systems may only be calculated for relatively few development steps.⁵⁵ The conclusion from the above deliberations is that the decisions of political leaders, albeit they may be well prepared, examining foreseeable consequences and considering the possibility of unforeseen development, finally are not taken on the basis of sufficient knowledge. Political decisions tend to fall within an area of freedom and imply the personal responsibility of those involved in their making.

Confronted with an empirically ascertainable will of citizens, political elites from case to case, may invoke to dispose of more information which not always may be possible to verify, but they cannot claim full knowledge. It is therefore not easy to explain why a decision taken by democratically elected representatives which is contrary to the empirically verifiable will of the represented citizens may benefit of democratic legitimacy and be considered as an act of self-government. The concepts of democracy as previously described do not provide such an explanation. Is it necessary to add more elements to these ideas in order to be able to understand why and under which conditions democratic systems do provide the benefits expected from them?

G. Patterns of a game theoretical interpretation

When democracy is conceived as self-government of a demos by political representatives and/or referenda, internal contradictions and credibility problems may occur. Taking the theory of systems developed by Niklas Luhmann as the point of departure, democratic forms of government may be represented as a (sub)system of a society, but this would not help to understand why they work. Despite all the doubts, criticisms and publicly denounced shortcomings and failures, there is large consensus that democratic forms of government have proved to be the most successful ones in recent history. Nevertheless, the lack of insight into

⁵⁵ Cf. on this *Klaus Mainzer*, op.cit. footnote 54.

the reasons why democratic forms of government work raises some concern. Where in the eyes of the citizens the democratic institutions lose their credibility, the democratic system itself falls into danger. There is more than a single case in history, where a totalitarian system has taken over the power with the support of a majority of the population. Long struggles were, however, always necessary to overcome totalitarian rule and the suffering it caused to the population. In the long term the survival of democracy depends on whether citizens understand why their participation in elections and in public life is indispensable for the viability of democracy, although any single vote only has a marginal impact on the overall result.

Whatever the term knowledge means – it seems to be established that the available knowledge is not sufficient to justify political decisions. If nobody can legitimately claim to dispose of better knowledge, why should not simply the majority decide? If the elected elites do not have better knowledge than the majority of citizens, what is then the function of representative institutions in procedures which aim at providing legitimacy? Would not the technical possibilities already allow citizens to vote on matters of importance themselves from their home computer? If democracy simply were the rule by a majority, why is such an arrangement not yet considered? And if not, how can a well functioning democracy be described properly?

A few examples of direct democracy or of an imperative mandate have been experienced in history. But it is unpleasant to remember the rule of the Jacobins or of the Soviets, albeit in their early stages they may have been supported by the will of a majority. The authors of the ancient world were already well aware of the fact that it is harmful to the community and may revert into terror if an arbitrary will of the majority is immediately converted into political action. Why? Does the problem perhaps consist in the existence of an inflexible will? If nobody knows or is capable to know what is best for the community, it is with certainty bad for the community when a particular volition, even if it is the will of a majority, is imposed with determination and lasting in time. Where it is not possible to reliably assess the correctness or incorrectness of an intended measure, a decision may only become acceptable through openings, middle paths or alternation with time.

The idea of self-government of a demos through elected representatives also implies an overburdening of the elected. Which citizen would like to entrust decisions about his future

fate to people that do not meet the highest ethical and moral requirements, have universal knowledge, can predict the future and who make proof of humanity, reliability and trustworthiness. This is a set of requirements which only a divine being could meet. In their public appearance policy actors are, however, forced to present a picture of them which satisfies these requirements. Although it may be seen at distant view that it is not possible to meet such requirements, in the public controversies of democratic systems individual actors again and again succumb for the fate that they have the same human frailties as their voters. On the other hand, any reduction of the demanded profile would provoke a danger of a relapse into irresponsibility and abuse of power, despotism, corruption and personal enrichment. Thus the good functioning of a democratic system seems to presuppose the acceptance of counterfactual assumptions, such as the belief that democratically legitimized decisions correspond to the will expressed by the citizens.

When investigating which forms of human behavior function well and are successful only where counterfactual assumptions are taken seriously and made the basis of decisions, one easily finds the phenomenon of the game. Before a human being reaches out into the world of knowledge, it acquires experience about the world in games. In games it can test chains of action without any fear or need of personal commitment. Successful procedures are memorized and repeated, unsuccessful ones are abandoned without loss or pain. Variants lead to new configurations and allow for new opportunities. Where they lead to a dead end, they are not existentially threatening, because after all it was just a game. Especially for children games may initially be naive and honest, but under real conditions of human societies games may often be guided by purpose and individual rationales when the players set their own purposes giving them priority over the tentative to debug step by step an environment not yet explored. Such behavior is not without impact on the game. Alike in other societal games, it is frequent in politics, for example, that players in the respect of common rules assume specific roles. This kind of dissimulation does not necessarily distort the good functioning of the game. Playing reconnects human beings in joint activity. Individual breaches of the rules do occur and are sanctioned more or less severely, without putting the game itself into question. A serious risk for the game is only caused by the killjoy who believes to be smarter than all the others, unveils the fictions necessary for the game and thus quits the game.

If we transfer the precedent consideration to the analysis of the functioning of democracy, one might be tempted to recognize in democratic forms of government the specific characteristics

of a game played by a demos, in the course of which a community elaborates the relevant decisions for shaping its future. The actors are elected for a specific period. Their task is to produce political decisions for the benefit of their constituents and in compliance with binding rules. When fulfilling that task they dispose of wide margins of freedom. Where the decisions elaborated during a given period prove to be beneficial, the players have a chance to be elected for a further period. If citizens are dissatisfied with the consequences of political decisions, they can drag their authors to account in the subsequent elections. Otherwise, the elected are exposed to sanctions only for gross violations of the rules. Other actors, elected as their successors, may correct the decisions, perhaps. Since there is no objective criterion for recognizing the correctness or incorrectness of political decisions, such decisions will be accepted by the population to the extent as it perceives the overall conditions as satisfactory and the rules are by and large met. As in every game, a few breaches of the rules do not harm as long as the majority of actors participates loyally. The correctness or incorrectness of every decision is not decisive for the result, but it is important that the killjoys – those who stay away from the elections – remain the exception. Under such conditions the system remains open, renews itself constantly and is capable of learning.⁵⁶

The idea which is launched here for discussion could at first sight appear strange and incomprehensible. It is not intended as replacing the accepted notions of democracy, but rather as a complement necessary for the understanding of its functioning. Recourse to the notion of a game in no way diminishes the esteem of the high responsibility which is carried out in political work, and of the huge personal effort which it requires. This idea may perhaps be summed up and spelled out more precisely as follows: Democratic systems work through complex processes, resulting from synergies between ideologies, issues of power and conflicts of interest, policy objectives and impact assessments, but also unpredictable external factors and random parameters. Therefore, there are good reasons to suspect that a mathematical theory of complex games can contribute to a better understanding of democratic processes. At a conceptual level the following description might mirror this assumption:

Since nobody is able to know which decisions are optimally designed for shaping the future of the demos, in democratic forms of government a demos is shaping its collective future in the

⁵⁶ Under the conditions of permanent historical change as described by *D. Th. Tsatsos* (Die Europäische Unionsgrundordnung im Schatten der Effektivitätsdiskussion, EuGRZ 2000, p. 517 ff), the learning ability of the system constitutes an important pillar of democratic effectiveness and a condition of democratic legitimacy.

form of a complex game. This process is recognized as democratically legitimate if it complies with the fundamental principles which have emerged in the European Constitutional culture. It leads to optimal results when all the actors are carrying out their roles with sincerity, when politicians assume their responsibilities and respect the ethical requirements, when the media fulfill their vocation to provide transparency and when the citizens exercise their rights to vote and participate in public affairs. The compliance of a political decision with the actual will of a majority of citizens may be an indicator for its democratic legitimacy, but it is not required for it in every individual case. The compliance with the actual will of citizens is especially irrelevant when the democratic legitimacy of such a decision has been established through representative procedures which are recognized by the Community of law.