The European Union as a model for the development of Mercosur? Transnational orders between economic efficiency and political legitimacy

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Wenzel Matiaske, Hauke Brunkhorst, Gerd Grözinger, Marcelo Neves (Eds.): **The European Union as a Model for the Development of Mercosur? Transnational Orders between Economic Efficiency and Political Legitimacy**

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It is rarely questioned that the European Union can be considered a model for other world regions. Comparable initiatives elsewhere are much less integrated, and up until now less successful, even if like Mercosur they are based on the European model.

Although elements of the democratic rule of law in the EU are more developed than in all comparable projects and organisations, the model character of the EU is highly questionable in terms of democratic theory, and we should ask what scholars concerned with the European Union can learn from similar experiments in other world regions. Perhaps experience from the Mercosur countries with deliberative citizen democracy at the local level, the double perspective of the still ongoing transition from a 'nominalistic' to a 'normative' constitutional regime within nation states, and the simultaneous continental networking of law, economics, and policy could also be instructive for the current EU with its new problems in the realm of democracy and rights. Transcontinental social capital can only build-up if the learning processes are opened in both directions.

The individual contributions to this volume move between the poles 'effectiveness' and 'democracy'. It is the result of an international workshop organized by scholars from Flensburg University and from the Fundação Getúlio Vargas in Sao Paulo.

Keywords: democracy, rule of law, globalization, supranational policy coordination

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European Union as a Model for the Development of Mercorsur?

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Introduction

Wenzel Matiaske, Hauke Brunkhorst, Gerd Grözinger, and Marcelo Neves

It is rarely questioned that the European Union can be considered a model for other world regions. Marvelled around the world is the fact that it has clearly been possible in Europe to create 'an area of freedom, security and justice' (Preamble, Charter of Fundamental Rights of the European Union) to which no region outside the OECD can compare. Even within the OECD, the EU represents an evolutionary innovation. Comparable initiatives in other world regions are much less integrated, and up until now less successful, even if like Mercosur they are oriented based on the European model.

The success of the EU is directly dependent on the economic prosperity of the European region. But comparable prosperity exists in other countries of the OECD and some Southeast Asian countries as well. But what is lacking in these cases is a transnational or even *supranational* organisation of states and peoples that as a whole, that is, also *between* the member states and *beyond* them, has been able to achieve a high level of social security and the rule of law. The freedom and freedom of mobility, but also the legal and social security of the individual European citizen are in all of Europe greater and more multifaceted than in all other regions of the world.

The model character of the EU consists quite clearly in the unique character of a closely interwoven, supranational legal order produced by the EU organs and independent organisations, which goes just as unquestioned and is as effectively implemented by the member states as the law generated by national parliaments, administrations, governments, and courts. Within individual national states, European law today makes up far more than half of the legal norms, and its spread into other legal realms goes much further than the ever denser, mutual interpenetration of national and supranational law.

But not just in comparison to other world regions: the EU has realized more elements of the rule of law, even internal organisational democracy, than all another post-national, international, and transnational legal associations, also in comparison to supranational legal orders and organisations as they today exist globally in the area of economics and trade (WTO) or human rights and international law (United Nations, global and regional human rights pacts), Nowhere else has an international court for human rights achieved such a strong position as it has in Europe, and not only in the European Union but (with weakened power) in the entire former KSZE.

By way of treaty law and its interpretation and extension in the conferences of the heads of government (European Council) and the European Court, law, politics,

and economics in Europe have become increasingly more closely networked, and the exchange among subsystems has been subjected to thorough regulation. For already long before the constitutional convention – whose draft of course failed in France and the Netherlands – the notion of a European 'constitution' having existed in a material sense since the Treaties of Rome has been a commonplace in the expert discourse. Even the German Federal Constitutional Court already referred to the treaties as the 'constitution' of the community in the 1960s, albeit with the reservation of its being 'virtual'. The notion of a European constitution is also justified from the perspective of systems theory. Higher-level law (constitutional law) ensures the cultural interlinkage of law, economics, and politics in Europe. The EU not only links processes of market deregulation (disembedding) with new forms of re-regulation in the world of business and labour (reembedding); by way of its strong standing in the outside world it also protects the citizens of Europe from the negative effects of globalisation, more than the individual member states would be able to. Of course, it also insures the easy implementation of global norms across the Union, norms that the European Union itself has played a part in negotiating. But in each case, quite apart from the eternal peace of the union, its 'model character for other parts of the world' (Dieter Grimm) seems well founded.

But the 'effectiveness' (Fritz Scharpf) of the Union comes at no small price. The astonishing advancements in terms of juridification, the spread of rights and the rule of law, correspond to no less significant trends toward the loss or rights and dejuridification if we compare the law created by the Union with that demanded by the constitutions of the member states. This includes not just the many exceptions in European law, the virtually uncontrolled growth of executive authority in securing Europe's outer borders and in the struggle against the new threats of global terrorism, or in the shaping of the EU's penal code. If legal interventions in the freedoms of the citizen are no longer subject to parliamentary approval, and in the end even the foundational norm of the democratic penal code, *nullum crimen sine lege parlamentaria*, is substituted by gubernatorial legislation in the coming European penal code, the rule of law will be massively destabilized by the non-egalitarian nature of its emergence.

These tendencies towards dejuridification strengthen the oft-bemoaned democracy deficit of the union, in particular because they create significant leeway for the formation of *informal executive power* that is being used freely and with growing effectiveness by the European governments. An especially good example is the European Council, called into existence by Helmut Schmidt and the former French president Giscard, which brought heads of government and state presidents together with their foreign ministers and the president of the European Commission in a single power that sets all decisive tracks in Europe. Legally speaking, the Council is hardly existent: it is only mentioned in a few places in the treaties and outfitted with vague powers. The unified executive power of Europe thus largely eludes all control by European and national parliaments and courts. Undoubtedly the council functions highly effectively, and has promoted European integration in large steps. But it also has marginalized democracy in Europe

nationally and internationally, and despite the significant increase in the power of the European Parliament.

The daily, indeed hourly production of legal norms on the European level without adequate democratic legitimacy in combination with the constitutionally fixed, massive limitation of the national political room to manoeuvre already leads to a structural weakening of national democracies. Over the long term, it is quite an open question whether the symptoms of de-democratisation and dejuridification that in the course of the formation and stabilisation of supranational organisations like the EU exhibit through new kinds of citizen democracy (deliberative democracy) a reparliamentarisation – by strengthening the EU parliament, national parliamentary associations, etc. – or the integration of elements of direct democracy into the union structure can be compensated for or not. If not, the gains in terms of the political union of Europe would in fact lead to an 'end of democracy' (Guéhenno). And what kind of rule of law would that be, if it is not democratic? Rights alone do not make up a 'space of freedom' (Preamble, Human Rights Charta) for 'slaves can be outfitted with rights and legal means. But the guarantee of basic rights that are lent to us from others and from above does not emancipate us; it is far from making us *citoyens*. Long before women and Jews became self-determined citizens, they could enjoy the direct exercise of their rights' (J.H.H. Weiler).

Even if elements of the democratic rule of law in the EU are more developed than in all comparable projects and organisations, the model character of the EU is highly questionable in terms of democracy theory, and we should ask whether scholars concerned with the European Union (and the citizens affected by its law) might not be able to learn something from similar experiments in other world regions that are still much less integrated. Perhaps experience from the Mercosur countries with deliberative citizen democracy on the local level, the double perspective of the long finished transition from a 'nominalistic' to a 'normative' constitutional regime within nation states, and the simultaneous continental networking of law, economics, and policy could also be instructive for the current EU with its new problems in the realm of democracy and rights. Transcontinental social capital can only form if the learning processes are opened in both directions.

Europeans should be proud of their great achievements in terms of permanent peace, securing human and citizen rights, and establishing the rule of law and democracy: but not all too proud, for there is no justification for arrogance. Peace has existed in Latin America between countries much longer than it has in Europe. The establishment of international human rights regimes and international human rights courts is a Latin American, not a European success story. The securing of human rights is in Europe indeed more effective than in almost any other region in the world, but this is especially thanks to the post-war development of the European nation state. Bonapartism, originally a European invention, did leave Europe and find a new home in Latin America, and the 'delegative democracies' (O'Donnell) are stronger in terms of populism and weaker in terms of implementation – and thus less amenable to reform – presidial regimes are its

(post-dictatorial) legacy. But Bonapartism is also returning in a new form to Europe. The European Union has prepared its return at least to the extent that it has everywhere strengthened, transnationally bound, and autonomised executive powers to a 'gentle Bonapartism'. Its European basis is the 'silent development of a supranational administrative system in the shadow of the law' (Rainer Nickel). Perhaps not too far in the future, the models of postnational, transnational, international democracy developing in Latin America will be more attractive than those of today's Europe, even if at the moment the union of police and secret service functions still seems more evolved than democracy.

The individual contributions to this volume move between the poles 'effectiveness' and 'democracy', the poles in which years ago Fritz Scharpf already attempted to determine the European Union's perspective for the future. One of the most important reasons for EU's effectiveness is the relative smooth implementation of European law by the member states, which in turn weakens the democratic legitimacy of the respective national legal systems. The far lesser effectiveness of Mercosur can therefore be explained not on the basis of the much less dense organisation and the now still weak integration of the Latin American economic community, but also due to the incapacity of nominalistically constitutional regimes to implement treaties, agreements, decisions, laws with national or international sources in a juridically effective way. This problem becomes a vicious circle when compounded by Latin America's problems of economic development. This is at least the generalizable result of the contributions of Michelle Raton Sanchez and Arne Heise. The essay by Gerd Grözinger analyses tax policy in the EU under the aspects of deregulation and harmonisation. Wenzel Matiaske discusses the problems of integration in terms of 'social capital.'

Even in the case of the problem of democracy, there is a fundamental difference between the EU and Mercosur. While Europe's problem is the growing imbalance of norms produced by the EU with insufficient democratic legitimacy, Mercosur's problem is the insufficient binding power of democratic constitutions in the member states. This problem and possible democratic alternatives (deliberative and participatory democracy) are at issue in the contributions by Marcos Aurelio Guedes de Oliveira, Hauke Brunkorst, Guilherme Figueiredo Leite Gosnçalve, and Rainer Nickel. The mediation between democracy and economy, and thus the fate of the European economic constitution is the subject of Christian Jörges' contribution, while Agustín Gordillo discusses the economic constitution of Latin America in a global context.

As Rainer Nickel in particular shows, the EU is particularly problematic as model not just in terms of its nature as a supranational organisation, but also as an economic and political force that motivates the formation of corresponding counterpowers in other regions of the world. These new, expansive polities, that up until now exhibit no familiar pattern of classical state formation (and seem more to strengthen extant trends of society's degovernmentalisation) must not only position themselves in relation to one another, but also in relation to the all-surpassing power of the US and the large atomic powers China and Russia. The contributions

of Rüdiger Voigt and Agustín Gordillo are about the global relationship of power and space, the situation of the EU and Mercosur in the context of imperialism/neo-imperialism/hegemony and cosmopolitan orders of equality.

This volume is a result of an international workshop at Universität Flensburg and Fundação Getúlio Vargas in September 2004 in São Paulo. We would like to thank the organisation team of FGV Escola de Direito São Paulo and the Deutsche Forschungsgemeinschaft for supporting this conference and this publication.

Flensburg and Sao Paulo, October 2006

Translated by Brian Currid

Political Development and Comparative Issues with EU

Marcos Aurelio Guedes de Oliveira

In the last ten years Mercosur has become a viable instrument for the creation of a South American pole of economic development and integration as well as to enhance regional power in face of inter-regional and global negotiations. For many Europeans, Mercosur is a child of the EU process and structures and should closely follow its model of integration; for many North-Americans it is being portrayed as nothing more than a regional political arrangement in order to better negotiate with the US. They argue that Latin Americans do not have conditions to create a stable integration process. Surprisingly for everyone Mercosur is there and is growing despite all adversities. This essay discusses key aspects that Mercosur shares with the EU and stresses the particularities that once produced and maintain Mercosur as an original regional integration model.

1. Origins

It is undeniable that the project of the European common market, developed just after WWII, affected tremendously Latin America views on the need to link economic development to a free trade arrangement. Of course the European case was related to security implications not found in Latin America.

To understand that, we have to look at the historic context of European states. Its birth was during the 14th and 15th centuries where the Holy Roman domination started to fade away and Europe lived a succession of empires under leadership of different European states. From the 17th Century onward Europe entered a period of continuous and growing warfare among its main states. This situation produced a concern with the future of the continent that indicated unification as a way out of the anarchic system based on war. The Congress of Vienna (1814-15) was a breakthrough by forwarding the first relevant international system, the Concert of Europe, and its methodology, the balance of power.

A counter-force to emerging integration ideas was a new wave of nationalism, particularly in Germany and Italy, states of late consolidation. Their leaders' actions together with the fear and aspirations of small national groups spread suspicious and produced an arms race in Europe, pre-conditions for break out of the First and the Second World Wars. By the end of the Second War there were two dominant ideas: one on the declining of European states and a second that a federal Europe was a next and needed step for the survival of the continent. The

terrible consequences of the two world wars have ended the European condition as center of power, science, culture and civilization. It had become a frontier area of disputes between two superpowers, had lost its scientific and cultural hegemony and was put under the constant menace of nuclear destruction. What could have been worse? In this unforeseen context, Europeans with the support of the US begun to take seriously the road towards integration.

South and Central Americas were not involved in a global war and they were not bound to be in the center of a bipolar Cold War. Latin America was never so well protected under US umbrella than in the aftermath of WWII. Regional integration has become for European nations a matter of life or death; for Latin America it was seen as a facilitator to overcome backwardness.

The Latin America project looks back to colonial exploitation, to the backward heritage of European domination and indicates a way to overcome this past and to foster economic and social development. Differently, the European project is associated to the historic crisis of their powerful states, to the undeniable need to stop waves of European destructive wars that created global crisis and fostered US projection towards world hegemony, to the desire to rebuilt Europe as the center of civilization, power and hope.

The European states can look at themselves as decaying political structures in need of a common economic framework while the Latin Americans look at themselves as building up economic structures based on industry, urban life and thus creating and enhancing newly-independent states. Europe was at the center of US attention and worry about its future position as hegemonic power, not Latin America.

This perception is the key to understand the slow development of integration in the south. The decades following the end of the war were marked by a wish for a father-like US support followed by frustration with US denial to recognize the region as strategic in face of its growing involvement on conflicts in Asia and Europe. Gradually as a result of this dilemma Brazil, as well as Argentina, started moving in the direction of creating national development strategies that would depend less in the US will and more in state-oriented guidelines.

The United Nations became in the 1950s instrumental for Latin America cries for economic support. The creation of United Nation' s CECLAC (Economic Commission for Latin America and the Caribbean) represented its most important step. By the end of the 1950s development was at last gaining momentum in regional politics. Industrialization had firmly started in Brazil and President Kennedy – after the Cuban revolution – admitted the need for a response to regional cries. It was created the Alliance for Progress.

The assassination of Kennedy and the reemergence of military dictatorships in Latin America stopped this development for two decades. The military were good in cooperating in intelligence and torture, but kept the feeling of secrecy, suspicious and national competition that transformed economic development in a national security and nationalistic matter.

As a common market arrangement the European Economic Community was doing well. The power of its democratic institutions and its economic superiority to Eastern Europe were visible. Differently to this, ALALC (Latin American Free Trade Association) was powerless and its methods unrealistic. This situation changed only in the 1980 e 1990s with the decline and fall of the Cold War. A new global reality demanded new strategies. Europe felt secure to move towards a more daring structured union. In Latin America the creation of ALADI (Latin American Integration Association), in 1980, permitted more flexibility in regional negotiations. The general perception that the new global economic reality would reduce even more South America importance gave a new flow of energy to the existed free trade initiatives.

The decline of state-orientated development, the emergence of the debt crisis and the fear of negative consequences of globalization forced Brazil and Argentina into cooperation. One can establish a comparison on two common sources of origins between the European (the sources behind the creation of the Coal and Steel Community are quite different from these behind the EU) and Mercosur projects: security and infrastructure (energy and communication).

(a) If one sees the conflict over the construction of Parana hydroelectric as a problem of regional security, one can affirm that in the case of Mercosur, the first drive was a matter of security. Very much as it was in the European case. (b) But if the fear of loosing economic importance in the emerging globalized world is to be seen as a main force then Mercosur is a product of a post-Cold War and globalization era. Thus it corresponds to the concerns that fostered lately the European Union. (c) Last but not least, if the need by Brazil and its partners to use common natural resources in order to enhance regional infrastructure is seen as a first drive then the forces behind Mercosur are similar to the force behind the Coal and Steel community and not the forces of globalization that lately drove the EU.

One can clearly argue that the origins of Mercosur reflect a combination of challenges and problems that were dominant in different moments of the European integration history. Democratic stability, security and infrastructure development are faced at the same time as the search for adaptation to global economy and to deal with new problems brought by the XXIth century agenda. To a certain extent I agree with that. I think there is one main driving force in it connecting and giving directions to all initiatives to deal with these challenges.

The concerns with regional security and infrastructure development date back to the 1940s and 1950s and were never sufficient relevant to provoke a common initiative towards integration. Until this date the United States was conceived as an unchallenged and solid leader for the whole region in terms of economic development and an ally in security issues. This changed after the Malvinas war when, at last, regional elite realized that they could not count on the US for both development and security. Although there were surely security aspects behind the emergence of Mercosur, its main drive was and still is the fear to be left behind in economic development and to become unimportant to international economy due to the negative consequences of the debt crisis and globalization.

The view of South America as a system or as a sub-system within the international system –and not as an extension of US power- was enhanced and the elements that characterize it have since the end of the Cold War become more significant. They are shared believes about: belonging to a region with a common identity; a need to increase interaction and integration among states in order to achieve common strategic goals. Regionalization was perceived as a processes that could remake relations within the region and give it broader room for common economic and political action; in other words to follow the regional strategic move towards economic and political independence from the powerful developed countries; to enhance the South American economic and political pole or sub-system.

2. The Nature of Political Institutions

Quite often one criticizes Mercosur for not having political structures that resemble those of the EU. It is depicted as not being supranational, being weak and bearing powerless institutions common to intergovernmental political arrangements. These views are product of readings of Mercosur from the dominant theories made to understand European integration. As it is being argued so far, historic background and context are key factors for understanding any integration process. Views that undermine regional context do not acknowledge the important progress of Mercosur through its intergovernmental structures and mechanisms as well as the constraints of the slow but steady transition that regional countries undertake towards democracy, economic stability and global insertion.

In the early 1990s a debate was in progress about the shape of Mercosur political mechanisms. On one hand the defenders of a supranational power supported their view very much from a functionalist perspective. For them, the need of such institutional form would give a independent dynamic to Mercosur as well as provoking a spill over process. On the other hand a less ambitious view supported that corresponding to the level of development and to the regional external and internal economic and political limitations, a prudent and pragmatic set of intergovernmental structures should be sufficient and certainly functional to the challenges Mercosur had ahead.

From the Iguaçu Declaration in 1985 to the Assunçion Treaty in 1991 the cooperation between Argentina and Brazil moved rapidly from security to economic concerns. In seven years both countries together with Paraguay and Uruguay were convening for the creation of a common market. The immediate effect was a renewed international interest on the region and an enhancement of the democratic transition.

The 1994 Ouro Preto protocol represented the consolidation of former agreements and it gave Mercosur international legal status. It created an intergovernmental Council composed by ministers and high-level officials of all sides empowered with a decision-making process that would accommodate

national interests and a set of technical committees specialized on economic areas aiming at finding solutions to forward integration in the direction of a common market. Two other important intergovernmental bodies created were: Mercosur's Joint Parliamentary Commission and the Social and Economic Forum, a space for the participation of non-governmental actors. (see chart on last page).

Though it could be argued that Mercosur institutions resemble that of the 1949 statute of the Council of Europe, it is undeniable that since its heyday the nature of institutions in the EU have been a combination of intergovernmental and supranational while in Mercosur it is only intergovernmental.

The declining European states demanded such structures due to their need to move towards a more interconnected unity and enhance their particular cultural interests as well as economic and social standards already achieved through social democractic means. The guarantee of regional and global security; the need to attract by economic and political advantages a growing number of European countries to a unifying project were grounded on issues and interests different from that Mercosur institutions emerged.

Differently from the European case, Latin American countries still see their states as "under construction" or as young states in need to achieve its economic and political aims. The economic situation facing these states is a problematic one. They face debts; social exclusion; corruption; lack of social security network; poverty; uneven internal economic development and need to enhance a democratic and entrepreneurial culture. The reemergence of democratic governments have brought these issues to the center of political concerns.

A succession of neoliberal economic policies during the 1990s proved to be insufficient to deal with most of the problems above and to foster the progress of Mercosur. One could say that the challenges that South American countries face demand a long and persistent set of policies. They are basically related to three points. First, the stabilization of economic structures by reducing the burden of the debt and orienting externally the economy. Secondly, by creating a sustainable growth that would spread benefits all over South America. Lastly, the demise of an aristocratic and unfair state, and the shaping of a democratic and less partial one.

The privatization of state companies and the initiatives on developing a social network for the very poor were positive steps taken in this decade. Nevertheless these policies were still national-centered, transitional and the region was hit by a series of international economic crises that undermined major changes. Only in 2003-04, Brazil and Argentina have begun to see first results on their move on the direction of an export-oriented model. Due to the importance of internal reforms, for a decade not much was done in order to forward common macroeconomic policies in Brazil and Argentina. In spite of a set of concrete initiatives, during nearly a decade, Mercosur was taken by a neopopulist discourse in favor of unrealistic proposals such as immediate monetary unification. Mercosur agenda was also during this period limited to a debate on the growth of inter-bloc trade and the increase of trade among South American countries.

At that time commentators were quite skeptical on the continuity of regional integration and for many Mercosur was a dying and mistaken initiative. Mercosur supporters were not silent. They reminded these critics that the EU resulted from a process of ups and downs and in Europe an even deeper skepticism was present in many moments. On the side of Mercosur, this was a period of maturation in which common business interests were consolidated, such as in the agriculture sector.

The new century brought renewed combination of soft brands of neopopulism to the region with new leftist governments. Brazil, Argentina and Uruguay are upgrading their commitment to regional integration. As a leading country, Brazil took the step to enhance Mercosur links to the Andean Pact countries and proposed negotiations for the integration of the two blocs. It also invited Peru and Venezuela to join Bolivia and Chile as associated members. One even daring step, what appeared for some as an unrealistic initiative, was the launch of the South American Community, a renewed version of the South American free trade initiative taken by former President Sarney and that represents an additional move to keep the debate on the need for regional integration at the center of South American countries concerns.

Mercosur negotiations with the EU and with the US for the establishment of a free trade area gained a new impetus. It also took important steps towards Africa, Asia and North-America. There are ongoing negotiations with Australia, Canada, Mexico and with Arab countries. There are recent successful trade agreements with India and South African countries, the result of which will prove how a priority Mercosur has become for the present governments of Brazil and Argentina.

Perhaps the most important initiative has been directed to the region's infra-structural projects, some of which are depending on financing for decades. Being able to reduce its debt and enter into a period of sustainable development, Brazil directed the brazilian development bank, Banco Nacional de Desenvolvimento Economico e Social, (BNDES), to finance projects that would create and develop the integration of communications (roads, railroads, waterways and ports) the common production of energy (dams, the use of natural gas and other common natural resources such as water). This initiative is of uttermost importance for the region because it deals with the issue of intra-regional asymmetries.

In August 2003, 23 projects for the integration of South American infra-structure were presented by 12 South American countries worth US$ 5,5 billion. Most of these projects are near the frontier of Mercosur countries and they aim at transforming what used to be a security issue into an area of economic prosperity. The growing investments from big regional enterprises as well as multinationals are about to consolidate a new pole of economic growth at the heart of South America. Only in 2004 foreign investment from brazilian business was US$ 9,5 billion and most of it went to Mercosur area (Valor Econômico 03/28/2005). There has been a continuous growth on small and middle-sized regional enterprises as well as on investment from Europe, North-America and Asia. A proposal for the creation of structural funds and rules for regional governmental purchase have been approved.

On the political side it was created COREPER a committee directed by former Argentine President Eduardo Duhalde to support members initiatives towards third parties. The formation of a dispute-resolution tribunal, the establishment in 2006 of a parliament for Mercosur and the newly-created Mercosur Forum of Federative States and Cities, point out that for the time being new intergovernmental mechanisms are the region's reply to growing integration demands.

Obviously a waited consequence of this is an increase of common regional pressure groups in favor of more Mercosur political institutions. This would represent a spillover that still depends on intergovernmental action but that has already involved non-governmental actors. Thus, frontiers in South America will be less and less a matter of security and more and more a matter of development, integration and growth.

If the stability and the positive economic framework of recent years is kept, then the discussion on more effective political institutions and mechanisms will naturally emerge and the intergovernmental institutions created 15 years ago in a very hostile and uncertain environment will be replaced by more functional ones.

3. Two Meanings of Deepening and Widening

The European Union has set the processes of deepening and widening as the two main challenges to consolidate itself. This fits well to the economic level and the strategic ambition Europe search for itself. The context of Mercosur indicates two other meaning for deepening and widening. The first can be translated into creating an infra-structure of communication, transport and energy to enhance economic links among South American countries, attracting the non-Mercosur members to join-in a common integration and regional development process. The second as establishing as much as possible free trade agreements and common strategies with countries and blocs of countries all over the globe.

The aims of Mercosur are to deal with regional economic development in a way that in the end the region will become more relevant and integrated into the global economy than it is now, to avoid being swallowed by the two huge blocs and to keep relative interdependence in order to be capable of having options for increasing its international economic and political power. Mercosur has lived through different governments –five only in Brazil- and is undoubtedly a strategic project for its member countries.

Critics argue that in order to achieve its aims, Mercosur must enhance its institutional structures. So far all important decisions taken are by the presidents and ministers of the countries involved. This breaks and limits the institutional dynamics of integration. Firstly, because presidents and ministers cannot meet frequently. And when they do, instead of discussing a positive agenda, they are forced to deal with problems that where once small ones and that could have been solved at the level of Mercosur's lower bodies. Secondly, all intergovernmental arrangement needs a dispute-solution mechanism empowered and capable to deal

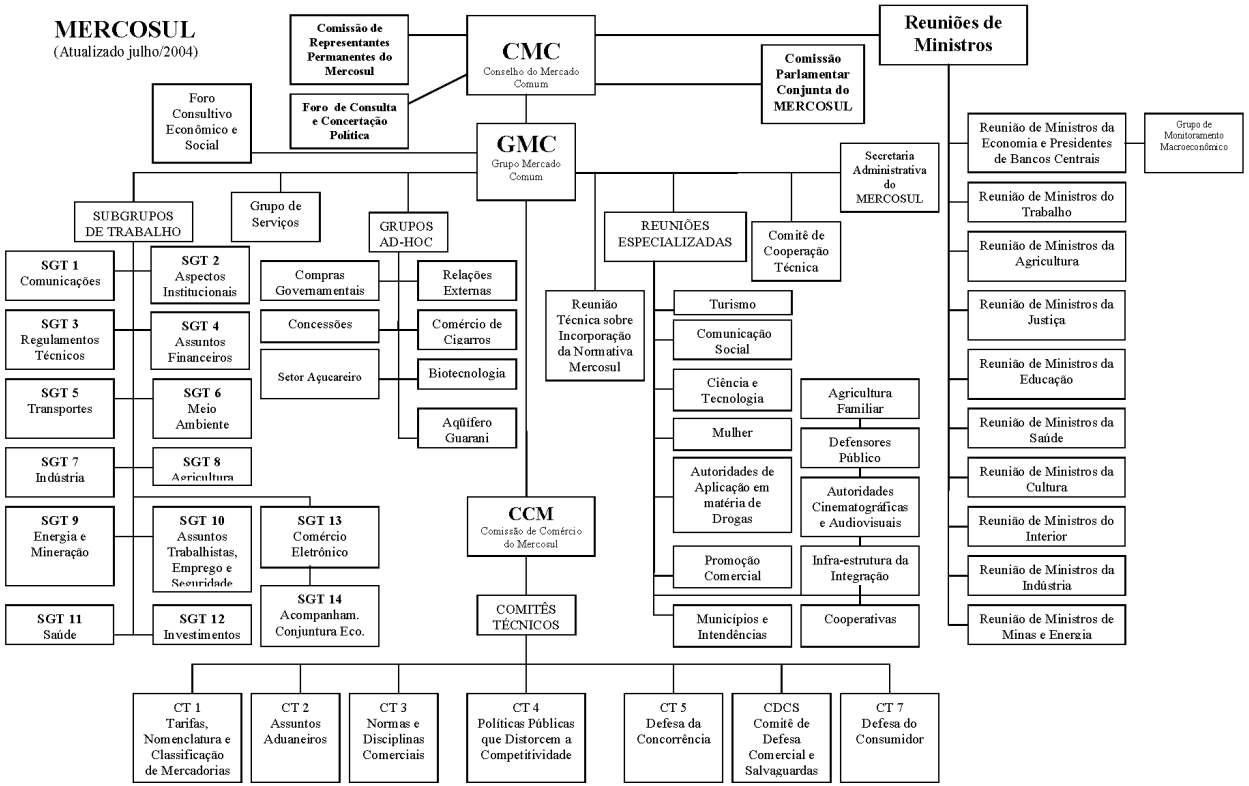
with conflicts in a way that creates a pattern that is acceptable by all sides and that is able to remove the obstructions to the flow of conflict and conciliation proper of growing integration. There are hopes that the newly-created tribunal will accomplish its mission.

Thirdly, there is a concern that Brazil as the most powerful partner might be tempted to adopt an hegemonic stand and instead of enhancing regional regimes and institutions as a mean to face regional problems, act unilaterally focusing on its own economic and political interest and at the expenses of its neighbors. This would increase asymmetry and in a long run would jeopardize the very precious gains associated to the transition for democracy and the emergence of regional integration, gains that are so fundamentally dear to all South American countries today, Brazil included.

Finally a number of critics and supporters of supranationalism poses the following question: can Mercosur continue to exist within its limited intergovernmental institutions and mechanisms and be functional? My reply is yes. Intergovernmentalism has been for centuries a viable mechanism for dealing with international issues. It can present itself in different forms from a modest set of periodical meetings of national leaders or policy-makers to discuss common problems to a well-defined and bureaucratically dominated institutional body. The option taken in favor of minimum institutions for Mercosur avoided the creation of a large and expensive set of organizations that would not have political power. Organizations that would conflict with national institutions that already have special bodies dedicated to international issues. It was a concern not to create organizations that would not be functional. The transformation of national states, the search for economic stability and adaptation to a export-oriented model are preconditions still to be met and necessary for more substantial an concrete integration initiatives such as common macroeconomic policies.

The above must not be interpreted as Mercosur does not need to change. The functions of its intergovernmental institutions are not fully explored and many ongoing conflicts would not exist if these institutions were active.

Mercosur has a long way ahead in order to accomplish its ambitions. So far it has been very successful in offering a framework for responding to the region's challenges without conceding to the temptations of adopting automatically other models. Taking into consideration the historic and political contexts of the region and taking a pragmatic approach instead of an ideological one, Mercosur project maintains alive the dream of an independent, democratic, politically and economically strong Latin America in a world increasingly asymmetrical.


MERCOSUL
(Atualizado julho/2004)
Comissão de Representantes Permanentes do Mercosul
CMC
Conselho do Mercado Comum
Reuniões de Ministros
Comissão Parlamentar Conjunta do MERCOSUL
Foro Consultivo Econômico e Social
Foro de Consulta e Concertação Política
GMC
Grupo Mercado Comum
Secretaria Administrativa do MERCOSUL
Reunião de Ministros da Economia e Presidentes de Bancos Centrais
Grupo de Monitoramento Macroeconômico
Reunião de Ministros do Trabalho
Reunião de Ministros da Agricultura
Reunião de Ministros da Justiça
Reunião de Ministros da Educação
Reunião de Ministros da Saúde
Reunião de Ministros da Cultura
Reunião de Ministros do Interior
Reunião de Ministros da Indústria
Reunião de Ministros de Minas e Energia
SUBGRUPOS DE TRABALHO
Grupo de Serviços
GRUPOS AD-HOC
REUNIÕES ESPECIALIZADAS
Comitê de Cooperação Técnica
SGT 1 Comunicações
SGT 2 Aspectos Institucionais
SGT 3 Regulamentos Técnicos
SGT 4 Assuntos Financeiros
SGT 5 Transportes
SGT 6 Meio Ambiente
SGT 7 Indústria
SGT 8 Agricultura
SGT 9 Energia e Mineração
SGT 10 Assuntos Trabalhistas, Emprego e Seguridade
SGT 11 Saúde
SGT 12 Investimentos
Compras Governamentais
Concessões
Setor Açucareiro
Relações Externas
Comércio de Cigarros
Biotecnologia
Aqüífero Guarani
SGT 13 Comércio Eletrônico
SGT 14 Acompanham. Conjuntura Eco.
CCM
Comissão de Comércio do Mercosul
COMITÊS TÉCNICOS
Reunião Técnica sobre Incorporação da Normativa Mercosul
Turismo
Comunicação Social
Ciência e Tecnologia
Mulher
Autoridades de Aplicação em matéria de Drogas
Promoção Comercial
Municípios e Intendências
Agricultura Familiar
Defensores Público
Autoridades Cinematográficas e Audiovisuais
Infra-estrutura da Integração
Cooperativas
CT 1 Tarifas, Nomenclatura e Classificação de Mercadorias
CT 2 Assuntos Aduaneiros
CT 3 Normas e Disciplinas Comerciais
CT 4 Políticas Públicas que Distorcem a Competitividade
CT 5 Defesa da Concorrência
CDCS Comitê de Defesa Comercial e Salvaguardas
CT 7 Defesa do Consumidor

What is Left of the European Economic Constitution?*

Christian Joerges

1. Introduction: The Many Faces of an Historical Event

"What is Left?" was the title of a series of articles in the *Frankfurter Allgemeine Zeitung*, which the social philosopher Stephen Lukes, then Professor at the European University Institute in Florence, had inspired after the fall of the Berlin Wall on 9 November 1989. The contributors to the series reflected on this event, and its historical dimensions and repercussions. Did the breakdown of the Soviet empire and the end of the Cold War also signal the end of the critique of capitalism and of the political left in the West? The title of the series was, indeed, a question. The authors were all from the West, all from the Left, and were concerned with the future of their political affiliations and the various facets of Social Democracy. *The Frankfurter Allgemeine Zeitung* appreciated these scrupulous questions and opened its *Feuilleton*, translating everything, without, however, finding a German equivalent for Stephen Lukes' melancholic *leitmotiv*.

The title of this essay insinuates that the queries raised in 1989 are still very much on the European agenda. This is certainly a discomforting message, one which is not in harmony with the recent seminal accomplishments of the integration progress, in particular, the deepened constitutionalization of the European Union and the Union's enlargement towards Eastern Europe. But it is, at the same time, an unsurprising observation. Can the welfare state survive globalisation?[1] Can "the" European social model survive Europeanization?[2] The intensity of the debate on these issues is an indicator of their importance and this importance is uncontested. Does this imply that the efforts to cure the "democracy deficit" of the integration project will remain deficient if they fail to overcome Europe's "social deficit"? It is one thing to agree with such a suggestion: it is quite another to iden-

* Elaboration of the introductory lecture of the Academy European Law – Session on European Union Law – at the European University Institute in Florence delivered on 5 July 2004. I am indebted to Marc Amstutz, Milena Büchs, Damian Chalmers, Philip Manow, John McCormick, Rainer Nickel, Tommi Ralli, Florian Rödl and Stephen Weatherill for their encouraging comments and constructive suggestions.

1 For a recent systematic overview, see St. Leibfried and M. Zürn, "The Unravelling Golden Age State", in St. Leibfried and M. Zürn (eds.), *Transformations of the State?*, Cambridge University Press 2005 [*European Review* 2005 (13) 1], available at http://www.sfb597.uni-bremen.de/transformations/.

2 Cf., among many, C. Offe, "The European model of 'social' capitalism. Can it survive European integration?" *Journal of Political Philosophy* 11 (2003), 437 ff.

tify an adequate theoretical framework in which the constitutional discourse can, and should, address it. The effort that this essay undertakes rests upon three interdependent (bundles of) premises.

The first: constitutionalism must reach down into the economic system and the social fabric of society. If it fails to do so, it loses its democratic credentials. This strong statement needs much explanation. Three references need to be given: one historical precedent is the debate within the *Staatsarechtslehre* of the Weimar Republic[3] Not at the core, but significant, too, were the ideas of *Wirtschaftsdemokratie* (economic democracy) and *Sozialverfassung* (social constitution) as promoted by Franz Neumann, Hugo Sinzheimer, and Ernst Fraenkel.[4] All this was taken up after World War II under the new German constitution.[5] Just a *Sonderweg* of German constitutional theory? Certainly more than that. The tensions between law and social justice and its "juridification" are of general importance.[6] And to take the ar-

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3 Particularly well documented in English by P.C. Caldwell and W.E. Scheuerman (eds.), *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic*, Boston 2000; A.J. Jacobsen, and B. Schlink (eds.), *Weimar. A Jurisprudence of Crisis*, Berkeley-Los Angeles-London 2000; J.P. McCormick (ed.), *Mass Democracy and Industrial Technology. Political and Social theory from Nietzsche to Habermas*, Durham, NC-London 2002.

4 See, on Franz Neumann, recently, M. Iser and D. Strecker (eds.), *Kritische Theorie der Politik*. *Franz L. Neumann – eine Bilanz*, Baden-Baden 2002. On Fraenkel, see W.E. Scheuerman, "Social Democracy and the Rule of Law: The Legacy of Ernst Fraenkel" (*ibid*.), 74 ff.

5 P.C. Caldwell, "Is a Social *Rechtsstaat* Possible? The Weimar Roots of a Bonn Controversy", (*ibid*., note 4), 136 ff.

6 Cf., the Special Issue of the *Canadian Journal of Law and Jurisprudence on Social Democracy* (Guest Editor: Colin Harvey); to cite just one contributor: R. Burchill, "The EU and European Democracy – Social Democracy or Democracy with a Social Dimension?", 185 ff, 186 argues: "In addressing the 'wider issues' of democracy, we are taken beyond the political sphere to engage with the social and economic organisation of society. Once we move in this direction, agreement about the nature, scope and content of democracy becomes very contentious. If the overall purpose of democracy is "to provide the conditions for the full and free development of the essential human capacities of all the members of the society" [referring to M Loughlin, "Rights, Democracy, and Law" in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights*, Oxford 1992, 42 ff.]. He goes on "….[D]emocracy needs to be something more than the existence of a few basic political procedures. By bringing the idea of 'social' into the frame, we then begin to address the wider issues by incorporating the social and economic aspects of society into our understanding of democracy. However, as this involves making normative claims in relation to democracy, it is widely felt that this stretches the understanding of democracy too far". And there is even more continuity with Weimar scholarship: "Constitutionalisation" has become a quest which affects ever more spheres of "secondary" law, including private law and under the label of "societal constitutionalism". See G. Teubner, "Societal Constitutionalism. Alternatives to State-centred Constitutional Theory?", in Ch. Joerges, I.-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism*, Oxford 2004, 3 ff. Continuity in the discussion of

gument a step further into an uncharted sea: this debate is linked to the project of modernity itself: to the tension and conflict "between the project of political modernity defined as collective self-determination, and economic modernity defined as the autonomous determination of the ways in which human needs are satisfied".[7]

The second premise can be explained by a reference "Economy and Society", Max Weber's famous notion and project of a social theory which includes sociology of law. This type of a sociologically informed jurisprudence is under-represented the agenda of European constitutionalists. The law of the economy, of industrial relations, and the ever deeper involvement of the European Union with social policy[8] did not, of course, go unnoticed. But these matters were handed over to the experts of the fields that were under scrutiny.[9] The Theory of the European Economic Constitution to which the title of this essay alludes is a great exception. This theory is a truly constitutional response in its crafting of the interdependence of the *Rechtsstaat*, the ordering of the European economy, and the assignment of social policy to the nation states. In this way, the Theory of the European Economic Constitution has contributed to the *decoupling* (Scharpf)[10] of social policy from the European project.[11] This normative objection is, however, linked to a

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the tensions between the political objectives of social democracy and the rule of law in liberal democracies seems particularly relevant in the context of this paper. However, it is clear that it does not cover the relationship between constitutionalism and society comprehensively and that it fails to specify the reasons for the deepening of the interest in a "European social model".

What is true for both these traditions and the notion of an "economic constitution" applies, of course, also to "economic law". This term cannot be adequately translated into English, as neither its ordo-liberal nor its critical understanding – represented by titles such as *Wirtschaftsrecht als Kritik des Privatrechts* ("economic law as critique of private law"), H.-D. Assmann, G. Brüggemeier, D. Hart and Ch. Joerges, Königstein/Ts. 1980) have an equivalent in the English speaking world; cf., very briefly, Ch. Joerges, "Economic Law, the Nation-State and the Maastricht Treaty", in R. Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?*, Munich 1994, 29 ff., 30-32.

7 F. Block, Towards a New Understanding of Economic Modernity, in Ch. Joerges, B. Stråth and P. Wagner (eds.), *The economy as a polity. The political construction of modern capitalism – an interdisciplinary perspective*, London (GlassHouse) 2004, ch. 1 (forthcoming).

8 "Creeping Europeanization" in the analysis of C. Offe (note 2).

9 Cf., the Review Essay of J.P. McCormick, "Democratic Theory Confronts the European Union. Prospects for Constitutional and Social Democracy in a Supranational *Sektoralstaat*" (forthcoming in *Political Theory*).

10 F.W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", *Journal of Common Market Studies*, 40 (2002), 645 ff., at 646.

11 A political science version of this thesis is Fritz Scharpf's well-known contention that democracies which prove to be unable to resolve problems of economic and social stability risk the loss of social legitimacy [*e.g.*, "Democratic Policy in Europe", *European Law Journal* 2 (1996), 136-155], a thesis closely linked to Scharpf's famous analysis of Europe's "political deficit": "The Joint-Decision Trap: Lessons from German Federalism and European Integration", *Public Administration* 86 (1988), 239-278 ("Die Poli-

more "sociological" critique. The theory's potential to guide the European project is exhausted, and the efforts to revive it have failed or are bound to be unsuccessful.

In an important sense, however, the exhaustion of the economic constitution is a mixed blessing. To anticipate the thesis which Section IV of this essay will defend: the erosion of the economic constitution did not pave the way to "social Europe" or to the reconstruction of a European social democracy. Neither the commitments of the Constitutional Treaty to a "social market economy" nor the new social rights or the turn to "new modes of governance" are really trustworthy and highly ambivalent. In particular, the "Open Method of Co-ordination" threatens the very idea of constitutionalism, namely, the idea of law mediated, and rule-of-law bound governance. This argument is based on a third premise which is "conservative" in that it insists that European "governance" practices must not take the rule of law lightly.

In the elaboration of this three dimensional theoretical framework, this essay will take a reconstructive approach. The following section will first point to the origins of the theory of the economic constitution, and explain its specific notion of constitutionalism (II.1). It will then deal with the transformation of this theoretical heritage in post World War II Germany into the "social market economy" (*Soziale Marktwirtschaft*) (II.2). The concluding part of this section will seek to explain why the theory of the economic constitution provided such an attractive design for the formative era of the European integration project. It will, however, be added that the importation of this theory into the European project came at a price. It prepared the ground for Europe's "social deficit", which remains so difficult to overcome (II.3).

The leading proponents of this approach had fundamentally renewed their theoretical basis by the 1960s and 1970s, in such a way that they seemed well prepared for the new dynamics of European integration in the 1980s (Section III.1). However, the new dynamics and the striving for an "ever closer Union" in the Maastricht Treaty led to a strengthening of European regulatory policies and a broadening of their scope, both of which were no longer compatible with the traditional and the renewed theoretical design (III.2). The support of the theory of the economic constitution which the German Constitutional Court's Maastricht judgment provided has proved to be a pyrrhic victory. The political constraints which this judgment confirmed damaged the economic viability of Europe and deepened the schism between national social models striving and institutionalized Europe (Section III.3).

The turn to new modes of governance presents itself as the most important remedy, which, thanks to the European Convention, even became a candidate for

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tikverflechtungs-Falle. Europäische Integration und deutscher Föderalismus im Vergleich", *Politische Vierteljahresschrift* 26, 1985, 323-356); for an update, cf., "The European Social Model" (note 10) and "Problem-Solving Effectiveness and Democratic Accountability in the EU", Ms. Cologne 2004.

constitutionalization. However, the account submitted in Section IV will not be so positive.

There is not much left of the Economic Constitution and there is not much of it which is Left, either. But, this resume is not to announce an exercise in deconstruction. Throughout the whole essay a background agenda will be pursued in each of its sections, which seek to reveal another dimension of the integration process. To indicate at least the perspective: markets, so the theory of the economic constitution argues, are not self-sustaining, they need institutional backing. Yes, but markets are social institutions which cannot be governed through some objective mechanism and do not simply respond to some functional needs – they are, in the last instance, "polities". The opening of our national economies (*Volkswirtschaften*) requires responses, on the one hand, to the erosion of the political powers of the nation state, and, on the other, to the risks of unaccountable transnational governance arrangements. It is the great merit of the theory of the European economic constitution to have addressed this challenge. Its responses, however, remained one-dimensionally restricted to an institutionalization of economic rationality criteria at transnational levels of governance. The post-national constellations in which we find ourselves require more complex and socially more sensitive responses to the tensions between the opening of formerly national economies and the pre-requisites of social solidarity. Such answers are not readily available. They need to be discovered in reflective practices – and Europe's constitutionalization need, therefore, to be conceptualized as a process, in which Law has to supervise and to discipline the practices of governance.

2. What is an Economic Constitution?

It is – or should have become – impossible to use the term constitutional law without reflecting the theoretical yardsticks which are invoked to assign specific functions and justify specific validity claims of "constitutional" norms. It is hence insufficient to point to the supremacy doctrine, direct effect, or the resistance to change on the part of core elements of European law, to characterize them as constitutional.[12] This kind of definition is particularly popular among European lawyers, because it allows them to talk about a European constitution without discussing discrepancies with the juridification of political processes, institutional states, or the democracy deficits of European governance practices. The use of the word constitution in relation to European economic law is, then, nothing spectacular. But it is also empty because such a notion does not inform us about the validity

[12] See Ch. Möllers, "Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung", in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundlagen*, Berlin-Heidelberg-NewYork 2003, 1 ff.

claims of the economic constitution, let alone, its (normative) legitimacy.[13] This, and nothing less, is the promise and the aspiration of the theory of the economic constitution, and only because of these ambitions can it claim constitutional status.

In order to understand these ambitions, we have to take a detour and a glance, first, at the origins, and, then, at the development of our notion.[14] The "economic constitution" originated in the social turmoil and intellectual laboratory of Weimar – and this is so for very transparent reasons.[15] It was not so absurd, and was, at any

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13 "Economic constitutional law consists of the constitutional rules that deal with economic matters". This definition from J. Baquero Cruz, *Between competition and free movement: the economic constitutional law of the European Community,* Oxford 2002, 29 is not simply self-referential, because the author has first laid out a meta-positivist "notion of constitution" which is "inscribed within the Western legal tradition" (*ibid*., at 12). But it seems not sufficiently substantiated to provide a basis for determining the recognition which the internal market, European competition law and the four freedoms deserve.

14 The literature in German is abundant, in English less so [recent analyses: D.J. Gerber "Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the 'New' Europe", *American Journal of Comparative Law* 42 (1994), 25 ff.; W. Sauter, *Competition Law and Industrial Policy in the EU*, Oxford 1997, 26 ff.], comprehensively, albeit with only scarce references to the legal "branch" of Ordo-liberalism and *Ordnungstheorie* Ch. Mantzavinos*, Individuals, Institutions, and Markets,* Cambridge 2001. There seems to be little available in French (but see L. Azoulay, "L'ordre concurrentiel et le droit communautaire", in M.-A. Frison-Roche (ed.), *L'ordre concurrentiel, Mélanges en l'honneur d'Antoine Pirovano,* ed.), Paris 2003, 277-310.

15 In the account of J. Baquero Cruz (*op. cit.*, note 13, at 26) the meaning that this tradition gave to the concept is "creating confusion and turning, as it were, against certain basic conceptions and functions of constitutionalism". This harsh judgement is directed only at "the original ordo-liberal version defined in *The Ordo Mainfesto of 1936*" (signed by Franz Böhm, Walter Eucken, Hans Großmann-Doerth), in which he finds a "strong Schmittian flavour". It is difficult to understand, however, why we should assign the status of a foundational document to the 1936 *Manifesto* and neglect other, often more famous, writings (see notes 18-19 below). It seems equally problematical not to take into consideration how generations of scholars have developed the theory further and adapted it to the various phases of the European integration process. J. Baquero Cruz's note made "more in passing" on the Schmittian flavour does, however, concern an interesting affinity (see note 25 below), although it is also problematical for two reasons. First, because it is for obvious historical reasons likely to evoke the wrong political and moral connotations. The Ordo-liberals were an opposition group in Nazi Germany. Their common – religious – concern over the *Reichskristallnacht* had brought the group together. Franz Böhm and Walter Eucken were members of the *Bekennende Kirche.* Some Members of the Freiburg School risked their lives in the resistance against Hitler. Großmann-Doerth, 42 years old in the *Manifesto* year of 1936, and drafted into the *Wehrmacht* in July 1939, died in 1944. Alexander Rüstow and Wilhelm Röpke had left Germany. On all this, see D. Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft. Gesellschaft und Politik im Ordoliberalismus*, Baden-Baden 1991, and, more recently, Ph. Manow, "Ordoliberalismus als ökonomische Ordnungstheologie" *Leviathan* 2001, 179 ff. and his unpublished *Habilitationsschrift* on "Social Protection and Capitalist Production. The Bismarckian Welfare State and the German Political Eco-

rate, a widely held view that the economic crises and social tensions of post-First World War Germany were becoming out of control and that the Republic was threatened by strong and bitter opponents both from the radical right and from the radical left. Ordo-liberalism sought a liberal answer to this crisis. This answer had to distance itself from the *laissez-faire* ideas which Alexander Rüstow, which were discredited as "paleo-liberalism".[16] Two famous manifestos, often characterized as the foundational manifestos of Ordo-liberalism, were published at the peak of the crisis in 1932: Walter Eucken's "*staatliche Strukturwandlungen und die Krise des Kapitalismus*",[17] and Alexander Rüstow's "*Interessenpolitik oder Staatspolitik*".[18] Other subsequently famous protagonists followed suit in the same year:[19] Franz Böhm's seminal monograph on *Wettbewerb und Monopolkampf* followed only one year later.[20] The answer was liberal in its rejection of the two state-focused contemporary competitors, the Historic School of Economics on the one side, and

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nomy, 1880-1990", Cologne 2004, 76 ff., 93 ff.); and second, Baquero Cruz seems to misinterpret the "Schmittian flavour". The "strong state" that the Ordo-liberals asked for was certainly not a pluralist democracy (see K.W. Nörr, *Die Leiden des Privatrechts. Kartelle in Deutschland von der Holzstoffkartellentscheidung bis zum Gesetz gegen Wettbewerbsbeschränkungen*, Tübingen 1994, 174). But this does not mean that they were striving for the same type of "qualitatively strong" state which Carl Schmitt had called for in his famous 1932 speech ["Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern" ("A Strong State and a Healthy Economy. A Lecture for Business Leaders"), held on 23 November 1932, published, for example, in *Volk und Reich. Politische Monatshefte* 1933, 81 ff.]. Schmitt's strong state claimed the political primacy of politics over the economy, whereas the Ordo-liberals sought to impose a stable legal framework on the economy which the political system, for its part, was to respect (cf., R. Wiethölter, "Franz Böhm (1895 - 1977)", in B. Diestelkamp and M. Stolleis (eds.), *Juristen an der Universität Frankfurt a.M.*, Baden-Baden 1989, 208 ff. – No economic theory remains the same over decades, however. On the development of the economic theory side of Ordo-liberalism cf., very lucidly, for example, Ch. Mantzavinos*, Wettbewerbstheorie. Eine kritische Auseinandersetzung,* Berlin 1993 and more recently his *Individuals, Institutions, and Markets, Cambridge 2001.*

16 "Paläoliberalismus, Kollektivismus und Neoliberalismus in der Wirtschafts- und Sozialordnung", in K. Förster (ed.), *Christentum und Liberalismus – Studien und Berichte der Katholischen Akademie in Bayern*, Vol. 13, 149-178; see, also, his "Interessenpolitik oder Staatspolitik?" in *Der Deutsche Volkswirt* 6 (1932), 169 ff.; *idem*, "Freie Wirtschaft – starker Staat", in Franz Bosse (ed.), *Deutschland und die Weltkrise* (Schriften des Vereins für Socialpolitik 187). Munich 1932, 62 – 69.

17 In *Weltwirtschaftkliches Archiv* 36, 297-321, reprinted in *Ordo* 48 (1997), 5-25.

18 In *Der Deutsche Volkswirt* 6 (cited from the reprint in W. Engels and H. Froels (eds.), *Querschnitte*, Düsseldorf 1986, 66-71.

19 A. Müller-Armack, *Entwicklungsgesetze des Kapitalismus. Ökonomische, geschichtstheoretische und soziologische Studien zur modernen Wirtschaftsverfassung*, Berlin 1932. – On Müller-Armack's biography and work, see D. Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft. Gesellschaft und Politik im Ordoliberalismus*, Baden-Baden 1991, 117 ff.

20 Berlin 1933.

socialist ideas as propagated by the labour movement on the other.[21] It was post-*laissez-faire* in that it assigned the task of ensuring the *ordo* of the economic sphere to the state. Walter Röpke used the oxymoron "liberal interventionism" to characterize this function.[22] The old paleo-liberal *Nachtwächterstaat* (*laisser-faire* state) was to be replaced by a "strong state".[23] And the intellectual *primus* of the constitutionalist Weimar Left immediately understood this: Ordo-liberalism is an *authoritarian* liberalism, Hermann Heller responded.[24] His response hit a nerve. Only recently, William E. Scheuerman has taken up Heller's line of argument and applied it to the institutional suggestions of the master-mind of the second generation of Ordo-liberals, the paleo-liberal economist and social philosopher Friedrich von Hayek.[25]

2.1 The Social Market Economy: An Economical Christian Project

But this is an anticipation of some of the aspects and developments to which we will have to return.[26] More important for the impact of Ordo-liberalism in post-war Germany is another dimension, which Philip Manow has carved out in a series of fascinating studies.[27] The social question which generated so much unrest in early capitalism was a challenge to the Christian churches, and the institutional varieties of European welfarism mirrored religious affinities. This is not major news concerning political Catholicism. But the story which Manow recounts about the im-

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21 W. Abelshauser, *Kulturkampf. Der deutsche Weg in die neue Wirtschaft und die amerikanische Herausforderung*, Berlin 2003, 158 ff.

22 See W. Röpke, *German Commercial Policy*, London 1934, 40 ff.; see, also, *Die Lehre von der Wirtschaft*, Vienna 1937; on Röpke, cf., M. Glasmann, *op. cit.*, 52 ff.

23 A. Rüstow in 1932 before the *Verein für Socialpolitik*: "Einen starken Staat, einen Staat oberhalb der Wirtschaft, da, wo er hingehört" ("a strong state, a state situated at a level above the economy, as appropriate"), note 16 above; cf., W. Abelshauser, *op. cit*. (note 21) 159.

24 H. Heller, "Autoritärer Liberalismus", *Die Neue Rundschau* 44 (1933), 289 ff.

25 W.E. Scheuerman, "The Unholy Alliance of Carl Schmitt and Friedrich A. Hayek", *Constellations* 4 (1997), 172 ff.; see note 57 *infra*.

26 *Infra* Section III.

27 Ph. Manow, "Modell Deutschland as an interdenominational compromise", Minda De Gunzburg Centre for European Studies, Working Paper 003/2001; *idem*, "Ordoliberalismus als ökonomische Ordnungstheologie" *Leviathan* 2001, 179 ff.; *idem*, "'The Good, the Bad, and the Ugly'. Esping-Anderson's Sozialstaatstypologie und die konfessionellen wurzeln des westlichen Wohlfahrtsstaats", *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 54 (2002), 203 ff. (English version at http://www.mpi-fg-koeln.mpg.de/people/pm/download_de.html) and his unpublished *Habilitationsschrift* on "Social Protection and Capitalist Production. The Bismarckian Welfare State and the German Political Economy, 1880-1990", Cologne 2004.

portance of social Protestantism is new,[28] and this is of particular importance for the students of the "economic constitution". "Ordo" is a Catholic notion. Yet, the Ordo-liberals who embraced it – Walter Eucken, Alexander Rüstow, Wilhelm Röpke – were all strongly linked to Protestantism.[29] What both the Protestants and the Catholics sought was a third way between capitalism and socialism – and this alliance was the underpinning of Germany's post-war social market economy; this was their ecumenical project and became the common project of the Protestants and the Catholics in the Christian Democratic Union.

2.2 The Economic Constitution: "Authoritarian Liberalism" Revisited?

The alliance of churches, political Protestantism and Catholicism in the early post-war years extended itself to the trade unions – Germany's social market economy was their common project and became a political, social and economic success.[30] But this alliance was not to last for long. Germany had neither overcome secularization nor the political factioning which it had cultivated ever since the Kaiserreich. As Manow documents, the heritage of mistrust of Social Catholicism against economic liberalism resurfaced, and the old alliances between Catholicism, economic corporatism and Bismarckian welfarism were rebuilt.[31]

The Protestant Ordo-liberals did not appreciate this restoration of patterns which looked all too similar to what they had tried to overcome back in the 1920s. And now, in the new Bonn Republic, they had another prestigious standing. The group had grown and its views dominated a good deal of academic life, public opinion, and the officious communications of the Christian Democratic government. Confidently and coherently, Ordo-liberalism revitalized its programme. A core element of its constitutional messages and perspectives was the theory of the "economic constitution", the thesis that the constitution should respect the interdependence of a system of undistorted competition, individual freedoms and the rule of law – and protect this precious balance against discretionary political influence.[32]

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28 "New" is, of course, a relative concept. In the core Chapter 3.5 on "Social Protestantism and the Redefinition of Social Reforms", Manow points not just to primary sources but also to an impressive range of historical studies.

29 Ph. Manow, "Social Protection" (*op. cit.*), at 76, note 5. So was the great spokesman of the Social market economy in the Early Bonn Republic, Alfred Müller-Armack; on his religious background, see D. Haselbach, *Autoritärer Liberalismus* (note 19), 119.

30 For a concise analysis, see M. Glasman, *Unnecessary Suffering. Managing Market Utopia*, London-New York 1996, especially at 50 ff. (on Ordo-liberalism) and 56 ff. (on post-war Germany).

31 Ph. Manow, "Social Protection", 84 ff.; W. Abelshauser, *Kulturkampf* (note 23), 93 ff.

32 Cf., out of a rich literature, for example, G. Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*, Vol. 2, Frankfurt a.M. 1979, 322 ff. (the reasons for the benign neglect of this book by Germany's *Rechtswissenschaft* are one of its well-kept secrets); F. Kübler, "Wirtschaftsrecht in der Bundesrepublik – Versuch einer wissen-

The return of political Catholicism and Ordo-liberalism to their distinct routes/paths renewed an old schism – as well as other historical controversies. In his studies on the history of German private law in the Weimar and Bonn Republic, Knut Wolfgang Nörr[33] distinguishes two concepts in the (German) history of economic law: the "organized economy" and the "social market economy". He downplays the tensions within the second camp, but rightly underlines that the coexistence of the "organized economy" tradition, on the one hand, and Ordo-liberalism, on the other, amounted to the institutionalization of a paradox: Germany cultivated both the ordo-liberal credo and its concepts while the majority of its Staatsrechslehrer (professors of constitutional and administrative law) did not take the ordo-liberal "constitutionalization" of the economy seriously.[34] Nörr accordingly diagnoses "a basic phenomenon in the history of the emergence of the Bonn Republic … [a] dual line, in economic policy and economic constitutional law".[35]

Paradox or List der Vernunft? Yet, the dual structure which Nörr finds so contradictory in theory proved to be very successful in practice. The social dimension of Germany's post-war market economy survived and flourished.[36] This is well-known and explains why "a highly competitive social market economy" figures now in Article I-3 of the Constitutional Treaty, and also figures as one of the objectives of the European Union.[37] Its hopes for a prestabilized harmony between economic competitiveness and social solidarity are well-founded. In Manow's account of the German example, the success of the social market economy resulted from the inability of both laissez-faire and authoritarian liberalism to determine the policies of the Bonn Republic. Instead, Germany institutionalized "a system of

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schaftshistorischen Bestandsaufnahme", in D. Simon (ed.), *Rechtswissenschaft in der Bonner Republik*, Frankfurt a.M. 1994, 364 ff.

33 *Die Republik der Wirtschaft. Teil I: Von der Besatzungszeit bis zur Großen Koalition*, Tübingen 1999, 5 ff.; cf., earlier his *Zwischen den Mühlsteinen. Eine Privatrechtsgeschichte der Weimarer Republik*, Tübingen 1988, and *Die Leiden des Privatrechts. Kartelle in Deutschland von der Holzstoffkartellentscheidung bis zum Gesetz gegen Wettbewerbsbeschränkungen*, Tübingen 1994.

34 And *vice versa*: The Ordo-liberals dominated economic law and private law. They remained unimpressed by mainstream *Staatsrechtslehre*; even the explicit rejection of the theory of the economic constitution by the *Bundesverfassungsgericht* (*Entscheidungen des Bundesverfassungsgerichts* 7, 377 (1958) – Investment aids) did not irritate them.

35 K.W. Nörr, *Die Republik der Wirtschaft* (note 33), 84 (my translation).

36 W. Abelshauser, *Die Langen Fünfziger Jahre. Wirtschaft und Gesellschaft in Deutschland 1949 - 1966*, Frankfurt a.M. 1987.

37 See Ch. Joerges and F. Rödl, "The 'Social Market Economy' as Europe's Social Model?", EUI Working Paper Law No. 2004-8 (https://www.iue.it.UB/law/04-8.pdf) on the Draft Treaty establishing a Constitution for Europe, CONV 850/03, Brussels, 18 July 2003; the amendment of Article I-3 by the EU Intergovernmental Conference on 22 June 2004 (Annex 3, doc. 82/04, is accessible at http://www.statewatch.org/news/2004/jun/constitution-amendments-june22.pdf

decentralized and functional interventionism".[38] In Glasman's brilliant summary: "No one 'designed' post-war Germany, it was hewn out of far more durable and sophisticated moral and ethical materials than those provided by economic theory or any other social science methodology".[39]

2.3 Ordo-liberalism in the European Community: the Decoupling of Economic Integration from the Welfare State and its Social Policy

The real existing compromise, a Wirtschaftsverfassung with strong corporatist elements, the economic democracy aspirations in political Catholicism and the reconstruction of the Bismarckian welfare state under the Catholic Chancellor Adenauer were anathema to the leading Ordo-liberals. They saw Germany again "on the road to serfdom". And, indeed, their institutional agenda, on which the quest for strong bodies dedicated to the defence of free competition and insulated from both the pluralism of interest groups and governmental political insinuations ranked so highly, was very often frustrated in Germany's Verhandlungsdemokratie.[40] Thus, it is small wonder that they embraced the integration project, supporting its establishment with all their considerable energy – and crafted their views into this emerging institution.

The formative phase of the European Economic Community has often been recounted in many languages and in various disciplines – especially by lawyers, political scientists, and historians.[41] The history of the European economic constitution is well documented.[42] I myself have published short versions of it on many

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38 *Ibid.*, Ch. 3.6, at 96.

39 *Op. cit.*, 55.

40 The *Kartellgesetz* was enacted only in 1957 under the chancellorship of Konrad Adenauer with Ludwig Erhard, the strongest political ally of the Ordo-liberals, acting as its promotor; it was presented as "the Basic Law of the Social Market Economy", but did, by no means, realize the ordo-liberal ideals comprehensively. See the reconstruction of the whole process in G. Brüggemeier, *Entwicklung des Rechts im organisierten Kapitalismus*, Vol. 2, Frankfurt a.M. 1979, 383 ff.

41 Masterly by J.H.H. Weiler for law [see his "Transformation of Europe", *Yale L.J.* 100 (1991), 2 ff.; *The Constitution of Europe. "Do the new Clothes have an Emperor?",* Cambridge 1999, 10 ff.], by A. Moravscik for political science (*The Choice for Europe. Social Purpose/State Power from Messina to Maastricht*, Ithaca, NY 1998, 86 ff., for history by Alan S. Milward (*The European Rescue of the Nation-State*, 2nd ed., London-New York 1999). Interestingly enough, legal history has treated Europe with un-benign neglect, and equally revealing, none of the master tales cited takes note of Ordo-liberalism and its "economic constitution" (for an explanation, see note 42).

42 M.E. Streit and W. Mussler, "The Economic Constitution of the European Community. From 'Rome' to 'Maastricht'", *European Law Journal* 1 (1995), 5-30; W. Mussler, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel. Von Rom nach Maastricht*, Baden-Baden 1998; P. Behrens, "Die Wirtschaftsverfassung der Europäischen Gemeinschaft", in G. Brüggemeier (ed.), *Verfassungen für ein ziviles Europa*, Ba-

occasions.[43] Let me repeat this much here: the affinities between Ordo-liberalism and the integration project of 1958 were manifold - for a series of reasons. As a concept, Ordo-liberalism appeared particularly appropriate for the legitimization and orientation of the integration project. The freedoms guaranteed in the EEC Treaty, the opening up of national economies, and anti-discrimination rules and the commitment to a system of undistorted competition, were interpreted as a "decision" which supported an economic constitution that matched the ordo-liberal conceptions of the framework conditions for a market economic system (at least to the degree that the many departures from the system might be classified as exceptions,

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den-Baden 1994, 73-90; for a recent summary, see A. Hatje, "Wirtschaftsverfassung", in A. v. Bogdandy (ed.), *Europäisches Verfassungsrecht., op. cit.* (note 12), , 683 ff. – Valuable reconstructions in English include W. Sauter, *Competition Law and Industrial Policy in the EU,* Oxford 1997, 26 ff.; D.J. Gerber, "Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the 'New' Europe", *American Journal of Comparative Law* 42 (1994), 25 ff. – "But how does all that relate to the real World?", Damian Chalmers (London) commented: "One point I have always thought is that France, Belgium, Italy were unconcerned by Ordo-liberalism, because of Article 86 (ex Article 90 EC) which they saw as a derogation from its structures (particularly the seocnd paragraph) for all their public sector. Of course, that interpretation was shattered by Höfner, but a plausible interpretation of the first 15 years of integration was that it did follow the French model. None of the Treaty provisions were directly effective. Agriculture, external commercial policy, transport, coal and steel – huge parts of the trading regimes of the 6 – all proceeded on legislative harmonisation. It was only for a period from the mid 1970s to the mid 1990s, I would argue that an ordo-liberal model– with the development of Article 30 EC and Article 86 EC – began to get hegemony. Of course, during that period there was only limited harmonisation. Moreover, in the late 1970s, it was offset by substantial legislation in the labour and environmental law fields. My point is that there have been competing visions of the EC Treaty which have swapped predominance at different times". A good question which can be complemented: if Ordo-liberalism is so important, why did hardly anyone outside Germany and hardly any political scientist become aware this? [Philip Manow, in the work cited in notes 15 and 27, is not covering Europe; but, see recently, Ph. Manow, A. Schäfer and H. Zorn, "European Social Policy and Europe's Center of Gravity, 1957-2003", Cologne 2004; see, also, Ph. Genschel, "Markt und Staat in Europa", *Politische Vierteljahresschrift* 39 (1998), 55 ff.]. The easy answer would be: so few people read German. A more complex answer is: political scientists do not take normative theories seriously enough. Ordo-liberalism itself, however, was always unimpressed by such benign neglect. After all, in Germany's advisory boards and institutions, lawyers and economists rank higher than political scientists. What is true for German economists working and advising in the ordo-liberal tradition is, of course, not true for economists in general. Important books such as that of M. Motta, *CompetitionPolicy. Theory and Practice*, Cambridge 2004, make no mention of the first or second or third generation of Ordo-liberals, nor of the legal or of the economic proponents.

[43] Ever since "Markt ohne Staat" [The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics, European Integration online Papers (EIoP) Vol. 1 (1997) No 19; http://eiop.or.at/eiop/texte/1997-019a.htm].

and a blind eye could be (had to be!) turned to the original sin of the Common Agricultural Policy. The fact that Europe had started its integrationist path as a mere economic community lent plausibility to ordo-liberal arguments – and even required them: in the ordo-liberal account, the Community acquired a legitimacy of its own by interpreting its pertinent provisions as prescribing a law-based order committed to guaranteeing economic freedoms and protecting competition by supranational institutions. This legitimacy was independent of the state's democratic constitutional institutions. By the same token, it imposed limits upon the Community: discretionary economic policies seemed illegitimate and unlawful.[44]

Thus, the prospects for institutionalizing an ordo-liberal style economic constitution looked bright. But what about Germany's social market economy? In one of his recent pertinent analyses, F.W. Scharpf hypothesises about "the road not taken" back in 1950s. "Where would we now be", he asks, "if, in the 1956 negotiations leading to the Treaties of Rome and the creation of the EEC, the French (Socialist) Prime Minister Guy Mollet had had his way? Mollet, supported by French industry, had tried to make the harmonization of social regulations and fiscal burdens a precondition for the integration of industrial markets. Could attempts to harmonize social policies have succeeded or would they have blocked European integration altogether?"[45] An interesting question, but, as Scharpf himself adds, an unanswerable one.

We can only know what was actually accomplished, namely, the "decoupling" of the social dimension from the institutionalization of the Europeanized "system of undistorted competition". This was quite to the liking of the Ordo-liberals. In their view, the European level of governance could not, and, indeed, should not, be burdened with political tasks that required the legitimation provided by the institutions of constitutional democracies. Regardless of one's affinity for the argument, it is coherent and compatible with the institutional order of the European Economic Community as it was originally conceived.[46] The ordo-liberal European polity has

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44 Significant, here, is A. Müller-Armack, "Die Wirtschaftsordnung des Gemeinsamen Marktes", in *Wirtschaftsordnung und Wirtschaftspolitik*, Freiburg i.Br. 1966, 401 ff. For a topical restatement, see J. Drexl, "Wettbewerbsverfassung", in A. v. Bogdandy, *op. cit.* (note 12), 747-802.

45 F.W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", *Journal of Common Market Studies*, 40 (2002), 645-670, at 645 ff.; see, also, Ph. Manow, A. Schäfer and H. Zorn, "European Social Policy and Europe's Centre of Gravity, 1957-2003" (note 42), 16 ff., and their reference to A. Milward, *The European Rescue* (note 41), 213 ff.

46 E.-J. Mestmäcker is the uncontested and outstanding intellectual head of the ordo-liberal tradition. He has recently published his most important essays on the constitutionalization of the economy in the EU *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration,* Baden-Baden 2003. The time span ranges from 1965 to 2001. All the stages of the integration process are considered and all grand issues discussed. Less impressive in terms of theoretical grounding, however, is the new edition of his *Europäisches Wettbewerbsrecht*, Munich

a twofold structure: at supranational level, it is committed to economic rationality and a system of undistorted competition. At national level, re-distributive (social) policies may be pursued and developed further.

To summarize: Europe was constituted as a dual polity. Its "economic constitution" was un-political in the sense that it was not subject to political interventions. This was its constitutional-supranational raison d'être. Social policy was treated as a categorically distinct subject. It was a/the? domain of political legislation and, thus, had to remain national. The social embeddedness of the market could, and should, be accomplished by the Member States in differentiated ways – and, for a decade or so, the balance seemed stable. [47]

3. The Ambivalences of the post-1985 Developments

The Delors Commission's "White Paper on Completion of the Internal Market" of 1985[48] is widely, and with good reason, perceived as a turning point and breakthrough. After years of stagnation, the integration project developed a new dynamic – thanks to the well-chosen focus of all political energies. The evaluations of the Commission's initiative and of the processes it triggered are, of course, controversial. The protagonists of a European "economic constitution" responded very positively at first (1). However, the Maastricht Treaty of 1992, which was to transform the Community into an "ever closer Union", met with strong critique precisely because of the broadening of the European ambitions (2). Monetary Union, as agreed upon in Maastricht and then interpreted affirmatively by the German Constitutional Court, opened up yet another page (3).

3.1 "Invasions of the Market"?

The Commission's Internal Market initiative could be interpreted as an effort to strengthen and prioritize the institutionalization of economic rationality in the integration project.[49] This interpretation was, of course, shared and promoted by observers committed to the ordo-liberal tradition. The reasons were explained in

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1974: E.-J. Mestmacker and H. Schweitzer, *Europäisches Wettbewerbsrecht*, 2nd ed., Munich 2004.

47 It may be worth noting that the whole construct has structural affinities, or is at least compatible with, J.H.H. Weiler's analysis of the co-existence of, and interdependence between, legal supranationalism and political intergovernmentalism in the EEC (see note 41 above) and pathbreaking "The Community system: the dual character of supranationalism", *Yearbook of European Law* 1 (1981), 257 ff.

48 Commission of the EC, "Commission White Paper to the European Council on Completion of the Internal Market", COM(85) 310 final of 14 June 1985.

49 Ch. Joerges, "Economic Law, the Nation-State and the Maastricht Treaty" (note 6), 37 ff.

pertinent publications of ordo-liberal strongholds, such as the Advisory Board of the German Ministry of the Economics[50] and the Monopolies Commission.[51]

The White Paper had presented its rejection of traditional harmonization policies as a consequence of the – at the time already legendary – Cassis de Dijon judgment,[52] and the new emphasis on the principle of mutual recognition. In conjunction with the strengthening of the four freedoms, this legal background could be interpreted as providing a framework which would further processes of regulatory competition and hence expose national legislation to economic rationality tests. The ECJ's readiness to supervise national legislation under Article 30 (now 28) was complemented by new developments in competition law and policy. The attention shifted from market failures to regulatory failures, from the control of the anti-competitive practices of private actors to anti-competitive regulation and state aid. And from such premises, the plea for de-regulation and privatization followed with a compelling logic.

How did this re-orientation fit into the ordo-liberal economic constitution? It did not fit into it at all. But traditional Ordo-liberalism had already been thoroughly revised by its leading exponents in the late 60s. Their theoretical allegiance shifted from Walter Eucken to Friedrich A. von Hayek. The latter's "Wettbewerb als Entdeckungsverfahren"[53] became the new manifesto and credo of a new generation of scholars working in the ordo-liberal tradition.[54] The legal and policy implications of the revised theoretical framework were spelled out in great detail, first at national, but soon also at European level. However, these implications cannot be dealt with here. The second generation is, at any rate, in one important sense, faithful to the ordo-liberal tradition. The framework within which the integration project is supposed to develop further is un-political in that it is not subjected to political debate or deliberation. This framework again seeks to institutionalize economic liberties and economic rationality. It does so more flexibly, but also more compre-

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50 Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft, *Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt* (Schriften-Reihe 51), Bonn 1986.

51 Monopolkommission, "Achtes Hauptgutachten der Monopolkommission 1988/1989", BT.-Drucksache 11/7582 of 16. July 1990, 401

52 Case 120/78, ECR [1979] 649 - Cassis de Dijon.

53 (Competition as discovery procedure) Kiel 1968, reprinted in F.A. von Hayek, *Freiburger Studien. Gesammelte Aufsätze*, Tübingen 1969, 249-265.

54 The leading economist of the Freiburg school in that period was Erich Hoppmann. The most important and fascinating among the many lawyers is Ernst-Joachim Mestmäcker, a disciple of Franz Böhm (see notes 17, 48); also noteworthy in the present context is his submission to the European Convention: see the "Report to the European Convention on Economic Liberties", submitted by E.-J. Mestmäcker on 29 October 2002, which is available on the Convention Website (but did apparently not come to the attention of the Working Group VI on Economic Governance/*Ordnungspolitik*; see Section V.1 below).

hensively than was originally envisaged by the ordo-liberal school. It therefore deserves to be called an "economic constitution".[55]

The hopes that leading exponents of the school articulated corresponded to the expectations that many critics had retained of the new orientation of the integration project. This schism between proponents and opponents forms part of a wider debate concerning the benefits and the costs of market governance.[56] This debate is, of course, relevant for an assessment of the 1992 project. But it is not "directly applicable", simply because the implementation of this project disappointed the hopes of its proponents as much as it did not confirm the anxieties of its critics. What had started out as a collective effort to strengthen Europe's competitiveness and accomplish this objective through new (de-regulatory) strategies soon led to the entanglement of the EU in ever more policy fields and the development of ever more sophisticated regulatory machinery.[57] It was, in particular, the concern of the European legislation and the Commission with "social regulation" (health and safety of consumers and workers, and environmental protection) which proved to be irrefutable. The weight and dynamics of these policy fields had been thoroughly underestimated by the proponents of the "economic constitution".[58]

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55 The turn from Walter Eucken to Friedrich A. von Hayek, and, in particular, the shift of emphasis from private to public distortions of competition affects the role of the state and state institutions. W.E. Scheuerman argues in a recent essay [Carl Schmitt and Friedrich A. Hayek, *Constellations* 4 (1997), 172 ff.], that the differences are not as significant as most observers assume. Indeed, von Hayek shared the ordo-liberal, and, for that matter, the Schmittian mistrust in the institutions of pluralist polities and their performance. But this convergence in the analysis does not extend to the consequence. Both may share the view that welfare interventionism leads into a "qantitatively" strong state (see C. Schmitt, note 17 *supra*). But Hayek certainly did not opt for the "qualitatively" strong state Carl Schmitt welcomed after 1933. This is not what Scheuerman insinuates. He is instead concerned with the chain of events that a radical dismantling of the welfare state, and the social and political risks of von Hayek's "curious institutional proposal" in *Law, Legislation and Liberty* (Scheuerman is referring to vol. 3, Chicago, Ill. 1979, 113) entails.

56 For a recent summary of the "case against the market, see S. Lukes, "Invasions of the Market", in R. Dworkin *et al*. (eds.), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis*, Budapest-New York 2004, Ch. 4.

57 For a comprehensive account, see V. Eichener, *Entscheidungsprozesse in der regulativen Politik der Europäischen Union*, Opladen, 1997.

58 "Underestimated" is an empirical concept and hence not a sufficient basis for an evaluation of the neo-ordo-liberal agenda. It would also be too simplistic to suggest that economic theories might in principle be incapable of addressing and dealing adequately with the problems of the "risk society" (cf., K.-H. Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation*, Tübingen 2000, especially at 171 ff.; A. Arcuri, "The Case for a Procedural Version of the Precautionary Principle Erring on the Side of Environmental Preservation", in D. Mortimor (ed.) *Frontiers on Regulation and Liability*, Aldershot: Ashgate (forthcoming). What remains true, however, is that the protagonists of the "economic constitution" have remained silent and thereby contributed to the devaluation of their approach.

3.2 Erosions of the Market?

The praise of the Internal Market Programme was not to last long: the preparation and adoption of the Maastricht Treaty in 1992, widely perceived as a deepening and consolidation of the integration project, met with fierce criticism.[59] The reasons are manifold and – within the (neo)-ordo-liberal theoretical framework – are comprehensible and conclusive. How can one continue to assign a constitutive function to the "system of undistorted competition", when the promotion of that system is only one among many other competing objectives, and its relative weight has to be determined in political processes?[60] How can one reconcile the commitment to competition as the discovery procedure in economic affairs with the acknowledgement of industrial policy as a constitutionally legitimated concern? The Maastricht Treaty was the end of the "economic constitution". From then onwards, the ordo-liberal school redefined itself as an oppositional movement.[61] This is not to say that its adherents would have given up their cause. Quite to the contrary. They continued to develop the approach further and to explore all the possibilities of strengthening its (now relative) weight and impact.[62] The turn was one from self-confident identification with the integration project to a critique of its course.

3.3 Rules versus Politics? Monetary Union, the Maastricht Judgment and the Stability Pact

A grand opportunity to promote the ordo-liberal cause seemed to arise in the context of the objections against the Maastricht Treaty, which were brought to the Constitutional Court in Germany (Bundesverfassungsgericht).[63] Their legal framing was interesting, if not elegant, and fits well into the first set of premises named

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59 See W. Mussler, *op. cit* (note 42), 166 ff.; M. Streit and W. Mussler, "The Economic Constitution …" (note 42).; P. Behrens, "Die Wirtschaftsverfassung der Europäischen Gemeinschaft", in G. Brüggemeier, *op. cit.* (note 41), 73 ff.; W. Mussler, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel. Von Rom nach Maastricht*, 1998, 166 ff.; most elegantly, E.-J. Mestmäcker, "On the Legitimacy of European Law" (1993), reprinted in *idem* (note 46), 133 ff.

60 See Article 2 ad 3 (g) of the Treaty as amended by G (2) and (3) TEU.

61 See, particularly clearly, M.E. Streit and W. Mussler; P. Behrens (as cited in note 59).

62 P. Behrens, "Das wirtschaftsverfassungsrechtliche Profil des Konventsentwurfs eines Vertrags über eine Verfassung für Europa", forthcoming in *Festschrift Ulrich Immenga* 2004, is somewhat more cautious with the tone of his assessment of the Convention's Draft Constitution than he was with the Maaastricht Treaty (note 61 above). But the gist of the argument is the same. The multiplicity of constitutional commitments read in conjunction with the consistency postulate of Article III-1 renders the weight of the system of undistorted competition indeterminate.

63 Judgement on the Maastricht Treaty of 12 October 1993, *Entscheidungen des Bundesverfassungsgerichts* 89, 155, [1994] 1 *CMLR* 57.

in the Introduction:[64] the competences of the European Community, now the European Union, are enumerated and thus limited. They were, nevertheless, considerable and entailed, so the plaintiff argued, a disempowerment of the nation state. Was such a disempowered state still a democratic constitutional state under its own constitution? In its response to this query, the Bundesverfassungsgericht promised to defend Germany's constitutional democracy against the erosion of ever more statehood. But the judgment ended up legalising European integration, confirming the constitutional legitimacy of ordo-liberal institutional ideas and curtailing the control that Member States had over their economies.

How was this achieved and why did hardly anybody notice it? The essential paradox in the Court's reasoning is readily apparent. True, the Bundesverfassungsgericht called it a constitutional "must" that the German Parliament retained "essential" competencies. But then the Court took an argumentative turn which was, in its substance, strictly ordo-liberal: economic integration was qualified as a non-political phenomenon occurring autonomously outside the Member States. All Monetary Union needed was a functional legitimacy based upon the institutionally guarantied commitment to price stability and provisions against excessive fiscal deficits. With such an institutional design, the Court concluded, economic integration would not be exposed to further questioning of its democratic legitimacy. To put it slightly differently: Europe could remain a "market without a state" while its sub-units, once called the "Masters of the Treaties" (Herren der Verträge) would be downgraded to "states without markets".[65]

This reading is obviously inspired by the interpretative framework used in this essay. Outside Germany (and also inside Germany in the public law factions of European scholarship), the paradoxical side of the Court's argument went unnoticed. Instead, the Bundesverfassungsgericht's defence of nation state democracies was blamed as echoing Schmittian ideas.[66] Even if this were so, the point underlined here seems more critical. The Court's reasoning implied that Germany was, as a matter of its constitutional law, barred from joining the monetary union, unless all of Europe subscribed to Germany's monetary philosophy.

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64 Text accompanying notes 2 ff.

65 Ch. Joerges, "States without a Market. Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses", NISER Working-Paper, Utrecht, 1996, also at http://eiop.or.at/eiop/texte/1997-020.htm. Clearly, one has to ask how serious the Court wanted to be taken when imposing these restraints. "Not too literally" is the answer one can infer from the *Bundesverfassungsgericht's* response to the subsequent complaint against the entry into the third pase of Monetary Union: The competent political institutions can rely on a prerogative in the assessment of the economic and monetary situation. See *Entscheidungen des Bundesverfassungsgerichts 97*, 350 – Euro.

66 See J.H.H. Weiler, "Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision" in *European Law Journal* 1 (1995), 219 ff. (also in O. Due, M. Lutter and J. Schwarze, *Festschrift für Ulrich Everling,* Vol. 2*,* Baden-Baden 1995, 1651 ff.).

There is little reason to be proud of the imposition of ordo-liberal concepts on the rest of Europe. There is much more reason to believe that this was only, and at best, a pyrrhic victory. In terms of economic policy and political democracy, the most problematical aspect of the 1992 amendments concern fiscal policy. They seek to ensure a budgetary reasonableness/rationale? not through a political process but through "juridification", namely, the rules laid down in Article 104 and in the Protocol "On the Excessive Deficit Procedure and the Monitoring of these provisions by the European Commission". The replacement of fiscal policy with prefabricated, albeit, in many respects, indeterminate rules, mirrors the precarious political legitimacy of the whole construct. Fiscal policy is economic policy. And if it is nevertheless political, some actors, identifiable to the citizen, should be accountable for it. Framework rules and their "implementation" through the European Commission constitute the typical pattern. Wherever Europe needs to organize a policy field in which the legal powers and/or administrative resources at the European level of governance are insufficient, it will (have to) resort to such techniques.

This indicates that the Member States are neither able and nor willing to comply with an institutional compromise, which was born out of the need to find a non-political supranational answer to a policy area which was once a core area of national sovereignty and parliamentary control. Not only Germany, once the self-confident promoter of rule-bound stability, but also France, the Netherlands, and six out of the new Member States are exceeding the 3% deficit limit. Could it be that the assumptions on which these rules of the Stability Pact builds, are shaky? Barry Eichengreen, an American observer of Europe's monetary policy during the negotiations of the Maastricht Treaty,[67] holds such an opinion. One of the mild formulae he uses is that the 3% "numerical threshold is not well grounded in theory".[68] At times, his language is stronger.[69] However, he is just one economist among many. What is uncontroversial, however, is the "fact" that there is controversy about the reasonableness/rationale? of the rules that the Member States have signed.

Lawyers are not supposed to examine the reasons, but are supposed to obey authorities, Immanuel Kant once remarked somewhat sarcastically.[70] In a field so strongly infiltrated by non-legal expert knowledge and so difficult to programme in advance by sound and stable criteria, there are other reasons for being cautious

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67 See his "Should the Maastricht Treaty be Saved?" (Princeton studies in international finance no. 74), Princeton, NJ 1992.

68 In his Working Paper PEIF-6 on "Institutions for Fiscal Stability", which he prepared for the Munich Economic Summit of 2-3 May, 2003.

69 A harsher one: the "3 percent ceiling is at best silly and at worst perverse" – which he wrote in a contribution to DIE ZEIT of 20 November 2003.

70 Immanuel Kant, "The Contest of Faculties", in Kant: *Political Writings* (Hans Reiss, ed., 2nd ed. 1991).

about taking decisions qua law.[71] Would institutional actors be well advised not to search for legal answers?

That is a question which the ECJ had to deal with in a recent judgment.[72] On 27 January 2004, the European Commission had brought an action against the Council of the EU before the ECJ.[73] The Commission asked the Court to declare inter alia that the (economic and financial affairs) Council's refusal, in its "conclusions" of 25 November 2003, "to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC … are unlawful and should be annulled". The Commission had initiated an excessive deficit procedure in relation to Germany in November 2002, and the Council had confirmed, by a decision of 21 January 2003, that an excessive deficit existed. An excessive deficit procedure had also been initiated in relation to France in April 2003 and the existence of an excessive deficit been confirmed by the Council on 3 June 2003. The Commission then recommended the Council on 8 October "to establish that the French Republic had undertaken no effective action", and on 21 October "to decide, under Article 104(9) EC, to give notice to the French Republic to take measures to reduce its deficit";[74] Germany was treated likewise.[75] The Council took a vote on the requests without achieving the majority required in Article 104(13). It also took votes on the Commission's recommendations under Article 104(9) EC. In its conclusions, the Council explained that it had "decided not to act, at this point in time, on the basis of the Commission Recommendation for a Council decision under Article 104(9)" and "agreed" to hold the Excessive Deficit Procedure "in abeyance for the time being".[76]

What could one expect the ECJ to do? Go by the books? To be cautious with powerful Member States?[77] The ECJ did not indicate what it thought about the controversy on the soundness of the Stability Pact. Instead, it underlined the high

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71 M.J. Herdegen, "Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom", *Common Market Law Review* 35 (1968), 9 ff.

72 On the following cf. R. Streinz, Ch. Ohler and Ch. Herrmann, "Todgesagte leben länger – oder doch nicht? Der Stabilitäts- und Wachstumspakt nach dem Beschluß des Rates vom 25. 11. 2003 über das Ruhen des Defizitverfahrens gegen Frankreich und Deutschland", *Neue Juristische Wochenschrift* 57 (2004), 1553 ff. and the reconstruction of the events in para.s 7 ff. of the ECJ Judgment (Full Court) of 13 July 2004 in Case C-27/04 - *Commission v. Council* (nyr).

73 Case C-27/04; cf., OJ C 354 of 7 February 2004.

74 Case C-27/04, paras. 9-10.

75 Case C-27/04, paras. 11-12.

76 Case C-27/04, para. 20.

77 Cf., the *Bundesverfassungsgericht's* cautious, if not evasive, response to the "four professors" asking it to examine the legality of the Community's allegedly much too lax application of the Maastricht convergence criteria (see *Entscheidungen des Bundesverfassungsgerichts* 97, 350 and note 65 *supra*).

importance that all institutional actors had attached to it.[78] It observed that it was simply not legally foreseen in the pertinent provisions to hold procedures "in abeyance" and concluded that "the Council's conclusions adopted in respect of the French Republic and the Federal Republic of Germany respectively must … be annulled in so far as they contain a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously adopted by the Council under Article 104(7) EC".[79] It also underlined, however, that the Council has "a discretion" and that "it may, in particular on the basis of a different assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned, modify the measure recommended by the Commission…"[80] Hence, the Commission's "action is inadmissible in so far as it seeks annulment of the Council's failure to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC".[81]

Could the Court have done more? Should it have indicated that the restraints that the Stability Pact imposes on democratically legitimized governments should be reconsidered in the light of Europe's current efforts to address its democracy deficit? It is worth noting that the ECJ exercised more prudence than most of the commentators on the Draft Constitutional Treaty, who simply defended the views which the Maastricht rules had incorporated, and warned against any softening of that discipline. Thus, Paul Kirchhof, co-author of the Maastricht judgment,[82] wonders whether the expectation, expressed in Article I-29(2), that the Central Bank should support general economic policies in the Union, might weaken its dedication to the price stability objective.[83] Peter Behrens, in his careful textual analysis, appreciates that the pertinent provisions have not significantly changed.[84] The widely articulated[85] concern about the wording of Article 1-3(3) in the Draft Treaty found its resonance: after the amendment by the Intergovernmental Conference of June 2004, "price stability" is now named among the objectives to which that provision assigns constitutional dignity. Can we sleep well again? "The stability pact is dead and gone",[86] argued Barry Eichengreen at the beginning of the controversy. Compliance with it would further damage the German economy, in particular. This would not be in the European interest. Who knows that? Maybe, we lawyers should not take responsibility for decision-making in which we risk discrediting

78 Case C-27/04, paras. 67 ff.

79 Case C-27/04, para 97.

80 Case 27/04, para 80.

81 Case 27/04, para 36

82 *Supra* note 63.

83 P. Kirchhof, "Europa auf dem Weg zu einer Verfassung?", *Zeitschrift für Staats- und Europawissenschaften* 2003, 358 ff. at 379.

84 *Supra* note 62 (in Section V.4).

85 Most prominently by the ECB: Opinion of the European Central Bank of 19 September 2003 on the draft Treaty establishing a Constitution for Europe (CON/2003/20), para. 8.

86 Hence the title of his contribution in DIE ZEIT (note 69).

the law.[87] The constitutional risk inherent in a misconceived "juridification" of monetary and fiscal policy responsibilities is to create a vacuum in which political actors cannot be held accountable and the very idea of law-mediated legitimacy gets destroyed.[88] The sad concluding message is that the Maastricht Treaty and the Maastricht judgment were a pyrrhic victory for a twofold reason: (1) Maastricht confirmed the decoupling of the social from the economic constitution thereby deepening Europe's social deficit. (2) Rather than establishing the supremacy of law over monetary and fiscal policy, Maastricht has "de-juridified" the economic constitution – and now it seems that the effort to cure the social deficit has run into the same trap.

4. Are we About to Bring the Law to Trial? Some Queries with the Open Method of Co-ordination

What, then, is left of the European Economic Constitution and what is Left of it? If we think about the "*l*" in small letters, we might conclude: not very much! An abstract normative idea losing ground in conceptual debates and in European political arenas. But when we take a capital letter "*L*", a widespread reaction is that there are prospects for a new mode of governance which seems tailored to overcome Europe's social deficit, namely, the Open Method of Co-ordination (OMC).

4.1 The Career of the Concept

Like everything else in this world, the OMC has its precursors.[89] But it is cum grano salis safe to take the Lisbon Council of 2000 as the birthday of the OMC.[90] This Council was primarily dedicated to knowledge society issues and to setting very ambitious goals for Europe in pertinent industries. However, it also renewed

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87 See M.J. Herdegen, *op. cit*. (note 73).

88 See F. Snyder, "EMU Revisited: Are we Making a Constitution? What Constitution are we Making?", EUI Working Paper Law 98/6 (abbreviated version in P. Craig/G. de Búrca (eds.), *The Evolution of EU Law,* Oxford 1999, 417 ff.); M. Everson, "The Constitutional Law of the Euro? Disciplining European Governance", in P. Beaumont and N. Walker (eds.), *Legal Fframework of the Single European Currency*, Oxford 1999, 119 ff.

89 One could name here the co-ordination of economic policies under Article 99. The Stability Pact is of another quality, however, because it restricts the ways leading to sustainable budgetary policies quite strictly. Much more important, however, is the more general "turn to governance" in the EU (cf. extensively Ch. Joerges, "The Law in the Process of Constitutionalising Europe", EUI Working Paper Law 4/2002 and Ch Joerges and M. Everson, "Law, economics and politics in the constitutionalization of Europe", in E.O. Eriksen, J.E. Fossum and A.J. Menéndez, *Developing a Constitution for Europe,* London-New York 2004, 162 ff., 173 ff.

90 Http://europa.eu.int/council/off/conclu/mar2000/index.htm.

the agenda of "social Europe" and tried to turn what, until then, had been perceived as a deficit, namely, the lack of genuine European competences and the unavailability of the traditional "Community method", into a virtue. The OMC, so Jonathan Zeitlin argues, promises to be:

> *"an attractive model of how a non-coercive form of policy co-ordination emphasizing mutual learning and exchange of good practices could be applied to a politically sensitive field such as social protection which is characterized by wide institutional variations across EU Member States, where harmonization is considered by many to be neither practicable nor desirable".*[91]

A European Employment Strategy was the first objective. Employment is a pressing problem in so many European states. At the European level of governance, it cannot be directly addressed with the means that the Union has at its disposal. But it can be discussed, non-binding objectives substantiated, and guidelines offered. These recommendations can then be adapted in the Member States to their specific contexts. This type of implementation cannot be subjected to the controls through which the Community seeks to ensure compliance with its legislative frameworks and policies. But the activities at Member State level can be "benchmarked" and evaluated. The accompanying hope is that this will open chances for mutual learning and better performance.[92]

The OMC approach has since been applied to other areas, such as social inclusion and pensions. It has even become something like a Leitbild on the political Left.[93] It has also attracted much attention in the Convention Process. The final report of Working Group VI on "Economic Governance" stated: "The Working Group considers that the Open Method of Co-ordination has proved to be a useful instrument in policy areas where no stronger co-ordination instrument exists."[94]

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91 J. Zeitlin, "Comments on Jacobsson and Vifell, Employment Policy Co-ordination: Between Deliberation and Discipline?", Ms. Madison,WI 2004.

92 As was underlined on the Lisbon summit, the OMC procedure is "a fully decentralised approach" which can be applied "in line with the principle of subsidiarity"; the Union, the Member States, the regional and local levels, as well as the social partners and civil society can and should be actively involved, using variable forms of partnership'. Presidency Conclusions, Lisbon European Council, March 23-24, 2000 (http://europa.eu.int/council/off/conclu/mar2000/index.htm).

93 Most prominently: Maria João Rodrigues, Professor at the University of Lisbon and Special Adviser to the Prime Minister, Coordinator of the Lisbon Council (see her edited *The New Knowledge Economy in Europe*, Cheltenham 2002), and Frank Vandenbroucke, Minister for Employment and Pensions in the Belgian Federal Government; cf., his lecture on "Promoting active welfare states in the EU" at the University Of Wisconsin, Madison of 30 October 2003 (on file with author); see, also, his "Foreword", in G. Esping-Andersen *et al*. (eds.), *Why We Need a New Welfare State*, Oxford 2003, viii-xxiv.

94 CONV 516/1/03 Working Group XI on Social Europe: 18, 19; cf., "Tomorrow Europe", July 2003, no. 17, at 3: "Those opposed to including such a reference had advanced

Such positive evaluations were shared by other Working Groups. The quest for "constitutionalization" through the Constitutional Treaty was but a logical step.[95]

There has never been unanimity, however, in the evaluation of the OMC within the Convention or elsewhere. Milena Büchs,[96] in a comprehensive and particularly thoughtful analysis of pertinent debates, distinguishes between three types of issues: (1) one concerns the efficacy of the OMC. What made Working Group VI believe that the OMC had proved to be a useful instrument? (2) Such primarily empirical enquiries are complemented by analyses of the relations between the political structures of the EU, the dilemmas of European social policy and the search for explanations of why the OMC may overcome, or fail to overcome, these impasses. (3) The third debate concerns the legitimacy of the OMC in both senses of this term: will the OMC find acceptance, e.g., because of the beneficial outcome it generates for the majority of Europeans? Do the OMC practices deserve recognition because they strengthen democracy and enhance the normative quality of EU governance?

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three sets of arguments: the fear of incorporating an intergovernmental method liable to compromise the definition of hard-won competences; a lack of transparency and democratic control; but also a lack of legitimacy owing to the involvement of a large number of experts in the process".

95 See G. de Búrca and J. Zeitlin, "Constitutionalizing the Open Method of Co-ordination. A Note for the Convention", Florence-Madison, WI 2002; Ch.F. Sabel and J. Zeitlin, "Networked Governance and Pragmatic Constitutionalism: The New Transformation of Europe", New York-Madison,WI 2003. See http://eucenter.wisc.edu/OMC/index.htm .

96 Dilemmas of post-regulatory European social policy co-ordination. The European Enployment strategy in Germany and the United Kingdom", Berlin 2004 – Are the Germans taking a *Sonderweg* in the assessment of the OMC?

4.2 Output Legitimacy?[97]

Uncertainty about the effects of the OMC is unsurprising and statements which present it as something like a Wunderwaffe that will win the battle against Europe's social model are not to taken literally. David M. Trubek, however, one of the Method's most eloquent exponents, stresses that we should understand the emergence of the OMC as a potentially workable response to the dilemmas of national welfare state politics, and design our research agendas accordingly. We should analyse its potential to "re-calibrate" social policies in a more flexible, participatory, experimental mode and to accomplish this objective as a multi-level governance system.[98] The OMC, we read in a recent paper, will "create transnational expertise networks that: transmit new ways of thinking about social policy across borders; broaden participation in such transnational policy networks to ensure legitimacy and effectiveness; merge technical insight with practical knowledge and new normative visions; combine a problem-solving technical approach with participatory deliberation; facilitate lower level experiments; produce learning through decentralized experimentation, wide-spread bench-marking, exchange of best practices, and peer review; bring various policy worlds together; foster public-private co-operation; and avoid a race to the bottom via multi-lateral surveillance

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97 The distinction between output and input legitimacy is as widely used as it is problematic (see B. Peters, "Public Discourse, Identity, and the Problem of Democratic Legitimacy", in E.O. Eriksen (ed.), *Making the Euro-Polity. Reflexive Integration in Europe*. London (forthcoming). The use in the text refers to distinctions between objections against the efficacy of the method and its recognition as a legitimate alternative to law-bound governance. For a strong critique of output-oriented defences of the OMC cf. A. Schäfer, *Zwischen internationalen Zielen und nationaler Politik: wirtschaftspolitische Koordinierung in der Europäischen Union, der OECD und dem internationalen Währungsfonds*, Frankfurt a.M.(forthcoming). He insists that we should first seek to explain why and in which institutional and political context OMC was adopted and argues that the softness of the Method reflects the divergence of national views and strategies as well as the unwillingness to commit national systems to policy changes. In his analysis, OMC complements the turn from Keynesianism to Monetarism as institutionalized in the harder Monetary Union and the Stability Pact, it thus confirms the old schism between the welfare state(s) and economic integration.

98 D.M Trubek and J. Mosher, "New Governance, EU Employment Policy, and the European Social Model", in Ch. Joerges, Y. Mény and J.H.H. Weiler (eds.), *Mountain or Molehill?, Symposium on the Commission White Paper on Governance*, New York University School of Law 2001, accessible at www.iue.it/RSC/e-texts/WPgovernance.pdf/ [also in J. Zeitlin and D. Trubek (eds), *Governing Work and Welfare in a New economy: American and European Experiences*, Oxford 2003, 51 ff.]; D.M. Trubek and L. Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination", Center for World Affairs and the Global Economy, European Union Center and Law School, University of Wisconsin-Madison 2004.

and shaming", adding , however, that such claims must be "subjected to rigorous testing".[99]

4.3 Normative Queries

It is difficult not to agree with such an understanding of the OMC. And yet, we must consider the risks that we run once this machinery is set in motion. This is, in particular, Claus Offe's disquieting objection:[100] The OMC has effects, but not the promised ones. It will instead destroy the non-Anglo-Saxon modes of welfarism in Europe. How should the Law know? But it is by no means exceptional for lawyers and law to be confronted with contests over issues they do not understand and with uncertainties over the implications of their decisions. They should, therefore, understand their task of designing responses to such difficulties. The OMC is an institution designed to find, not to implement, solutions. Is it a good design?

4.3.1 Democratic Experimentalism?

The theoretical background on which the advocates of the OMC rely has been developed outside European frameworks.[101] The have then be tried out in American administrative law,[102] before they were presented in Europe[103] and the merger with OMC occurred.[104]

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99 Not so rigorous but with some reserves: B. Bercusson, "Social Rights in the European Constitution", Ms. London 2004: "It remains to be seen whether the OMC, hitherto criticised as to its effectiveness when implemented by Member States' administrations in the field of employment policy, is appropriate for the Work Programme of the Social Partners on Employment. If joint opinions and other non-regulatory instruments continue to be ineffective, their failure may imply other, more rigorous steps towards effectiveness, including regulatory agreements and/or legislation" (at 21).

100 Note 7; similarly, D Chalmers and M. Lodge, The Open Method of Co-ordination and the European Welfare State ESCR Discussion Paper 11, London (LSE) 2003.

101 Cf., the reconstruction by W.E. Scheuerman, "Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy", *Canadian Journal of Law and Jurisprudence* 17 (2004), 101-127, 108 ff.; cf. earlier Ch.F. Sabel, "Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions" *Pol. & Soc.* 23 (1995), 5 ff.; J. Cohen and Ch.F. Sabel, Sovereignty and Solidarity: EU and US", in J. Zeitlin and D.M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford 2003, 345-375.

102 M.C. Dorf and Ch.F. Sabel, "A Constitution of Democratic Experimentalism", *Colum. L. Rev.* 98 (1998)267 ff.

103 J. Cohen and Ch.F. Sabel, "Directly-Deliberative Polyarchy", *European Law Journal* 3 (1997), 313 ff.

104 Cf., J. Scott and D.M. Trubek, Mind the Gap: Law and New Approaches to Governance in the European Union, *European Law Journal* 8 (2002), 1-18O. Gerstenberg and Ch.F. Sabel, Directly-Deliberative Polyarchy, An Institutional Ideal for Europe?, in Ch. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market,*

It is important to remember that the whole approach of democratic experimentalism received its inspirations from a societal sphere, which European constitutionalism tends to treat with (un)benign neglect, namely, the organizational practices of private business. In a daring and fascinating move,[105] Charles Sabel and his followers have applied the lessons to be learnt from the Japanese variety of capitalism about their practices of benchmarking, the need to adapt to incessant change,[106] the commitment to permanent experimentation, an interest and a readiness in mutual learning from independent monitoring, the establishment of systems of measurement and evaluation, *etc*., to *administrative bodies*, and argued that their regulatory practices should follow these examples from economy and society. Democratic experimentalists promise that "a successful institutionalization of the principles of benchmarking, simultaneous engineering, and independent monitoring allows us to tackle volatility and diversity best" – not just within firms.[107]

At first sight, this message might look like a strange loop which begins in the public sphere, then goes into the private realm, and then brings messages from there to its point of departure. Have we not all been taught to use all sorts of legal instruments – company law, antitrust, and economic regulation – to tame private enterprise? Why is there such a widely felt need to extend the reach of fundamental rights into the private sphere if private governance develops superior qualities, anyway? Are all the quests for a constitutionalization of the sub-constitutional spheres of the legal system and the search for a "societal constitutionalism" superfluous.[108] In an ironic sense, democratic experimentalism can be called a methodological heir to first generation Ordo-liberalism. It invokes qualities inherent in the economic sphere as a yardstick that public governance should respect and internalize; and the affinities with the Hayekian discovery procedure may seem even stronger because von Hayek has substituted the strong state of the ordo-liberals by the smoother governance of general legal rules.[109] These affinities are, however,

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Oxford 2002, 289-341; J. Zeitlin and D.M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford-New York 2003.

105 See, in particular, Ch.F. Sabel, "Learning By Monitoring: The Institutions of Economic Development" in N. Smelser and R. Swedberg (eds.), *The Handbook of Economic Sociology,* Princeton, NJ 1994, 137 ff.

106 "High-speed capitalism" is the category Scheuerman uses referring to David Harvey, *Justice, Nature and the Geography of Difference*, Oxford 1996) when explaining his own analytical basis and normative perspectives; see, also, W.E. Scheuerman, "Reflexive Law and the Challenges of Globalization", *J. Pol. Phil*. 9 (2001), 81 ff.

107 W.E. Scheuerman (note 105), at 111. See O. Gerstenberg, "Law's Polyarchy: A Comment on Cohen and Sabel" *European Law Journal* 3 (1997), 343 ff.; also, R. Schmalz-Bruns, "Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaats" *Zeitschrift für Internationale Beziehungen* 6 (1999), 185 ff., at 236-38.

108 On this notion, see note 6 *supra*.

109 See, for a systematic analysis, H.-G. Graf, *"Muster-Voraussagen "und Erklärungen des Prinzips" bei F.A. von Hayek,* Tübingen 1978; M. Amstutz, *Evolutorisches Wirtschaftsrecht,* Baden-Baden 2001, 30 ff., 219 ff.; Ch. Mantzavinos, "Das institutionenökono-

very limited. Whereas Ordo-liberalism sought to protect the *ordo* of the economy through a strong state which would rigorously enforce laws against restrictive business practices and abuse of private power, democratic experimentalism is relying on political processes, softer modes of co-ordination and the subtle power of transparency and exposure to public critique. And, in contrast to the Hayekian discovery process, the proposals to "institutionalize" democratic experimentalism invoke the imagination not just of entrepreneurs and market participants but also of deliberating political citizens, and trust in their readiness to engage in problem-solving and in their interest to learn from one another.

"Sweet melodies", to be sure. The question, however, of whether we should listen to them and trust "a law so 'soft' to be no law at all"?[110] This soft supranational power may not be so innocent, opines Alexander Somek. The "new modes of governance", he observes, "are marked by two characteristics: first, they are informal in that they are based on information-gathering, the drawing up of 'action-plans', the allocation of public praise for 'best practice' and the shaming of under-achievers; second, even though they have been designed for special policy areas, they are nonetheless 'holistic', which means, in the words of the European Commission, that they commit 'Governments as a whole, as well as a wide range of stakeholders'. A diffuse soft power is exercising its hold without being constrained by the norms which govern competence allocation.[111] Similar concerns have been articulated by Marc Amstutz on a systems theory basis. His concern is the law's *proprium*, namely, its function and task to respond to conflicts which cannot be resolved in the societal sub-systems in which they originate.[112] In a discourse theory version, what may function at the level of local "government councils" will be much more difficult to achieve when experimentalists meet with national, European and international standardization bodies,[113] or face administrators who are keen to promote the institutional prestige and power of their organisations, or welfare bureaucracies which seek to defend their own practices and/or the political interests of their superiors. Can we really believe that arrangements will be found, implemented and sustained, in which stakeholders engage with sufficient intensity and continuity in the definition and discussion of their concerns so that legitimacy can be said to rest on the deliberative processes of all the affected parties. Democ-

misch-evolutionäre Wettbewerbsleitbild", Preprints des Max-Planck-Instituts für öffentliche Güter, Bonn 2004/1.

110 M. Everson, "The Constitutional Law of the Euro?" (note 88), 120.

111 A. Somek, "The age of constitutional law. Decline and fall of an empowering idea", Ms. Iowa 2004, 9.

112 M. Amstutz, "Zwischenwelten. Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht", in Ch. Joerges and G. Teubner (eds.), *Rechtsverfassungsrecht, Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, Baden-Baden 2003, 213 ff, #.

113 An interesting exception is the interpretation of the "New Approach" offered by J. Scott, "International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO", *European Journal of International Law* 15 (2004), 307 ff.

ratic experimentalism asks us to take the traditional virtues of the rule of law lightly. It asks us to loosen the ties between law and enforcement, and, instead, to trust that our societies will manage with much less governmental powers. But it does not tell us how we might find the post-national criteria that will enable and legitimate a "benchmarking" of national experiences, histories, and aspirations. It fails to explain how the insights that the exposure to the experiences of others might lead to co-ordinated policies and how they might be implemented against unconvinced opponents. More importantly, it fails to address the risks that its own implementation in the EU entails. There is nothing wrong with bureaucracies and experts exchanging experiences and learning about new possibilities. There is a great deal wrong with building up opaque networks which get entrusted with the task of seeking to carry through what they have learned or agreed upon in democratic societies. Such a model of governance may be soft because it no longer relies on mandatory provisions. It is, for the same reason, strong because it risks empowering the executive and removing the virtues of democratic accountability, of rule-bound public governance and its judicial control.[114] Should we, by taking the rule of law so lightly, promote but executive governance instead of deliberate polyarchy?

W.E. Scheuerman has complemented these sceptical queries by a sociological observation. He summarizes one key assumption of democratic experimentalism as the assertion "that we increasingly encounter evidence of diversity in terms of local conditions and regulatory needs". He confronts this claim with the tendencies of "high-speed" capitalism "to compress and even 'annihilate' geographical space or distance. High-speed social activity dramatically heightens the possibilities for interaction across both geographical and the existing political divides, opening the door to historically unprecedented opportunities for simultaneity and instantaneousness in human experience".[115] Democratic experimentalists, he continues, fail "to provide an adequate place in their theory, in both normative and institutional terms, for those facets of contemporary social experience poorly captured by its repeated references to local diversity in social conditions".[116]

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[114] Similar objections have been raised by democratic experimentalists, and, in a similar vein by E.-J. Mestmäcker ["Wandlungen in der Verfasstheit der europäischen Gemeinschaft", in *idem*, *Wirtschaft und Verfassung* (note 46), 49 ff., 69 ff.] against comitology and the idea of "deliberative supranationalism" as defended by this writer. Why the OMC should be a democratically superior mode of governance than comitology is difficult to understand. Comitology operates in much narrower and better defined realms. Its social and legal embeddedness is more intense. Its successful "constitutionalization" is imperfect but seems at least conceivable; cf., Ch. Joerges, "'Comitology and the European model?' Towards a *Recht-Fertigungs-Recht* in the Europeanisation Process", in E.O. Eriksen, Ch. Joerges and J. Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation*, EUI-RSCA/Arena (Arena Report 2/2003. Oslo), 501 ff.

[115] "Democratic Experimentalism" (note 101), 119 ff.

[116] *Ibid*., 120.

4.3.2 Bringing the Eighties Back In?

The turn to soft governance in the EU and the turn away from the very idea of law-mediated governance are risky. And it seems that this risk is not really necessary. It may be an all too hasty disregard of the alternatives that were elaborated decades ago. The intense debates of the 1970s about the failures of welfare-state juridification strategies were guided by normative concerns about the intrusion of bureaucratic machineries into the economy and the life-world. It was the broadly experienced disappointment with "purposive" legal programmes *and* a new sensitivity towards "intrusions into the life-world" through a juridification of social policy goals that triggered the search for models of legal rationality that would fill the gaps left open by formalist legal techniques, and, at the same time, cure the failures of the law's grip on social reality on the basis of some "grand theory" (such as economic theories of law, systems theory or discourse theories).[117] "Proceduralisation" and "reflexive law" were, at the same time, concerned with very practical matters, namely, the problems of implementation and compliance. Discrepancies between legal programmes – especially between "purposive" legislation designed to achieve specific objectives and the actual impact of such laws on society – were a core concern of legal sociology, of effectiveness and implementation research.[118] The normative and the pragmatic critique of purposive programmes and of command-and-control regulation have motivated a search for alternatives such as self-regulation and soft law. Such strategies responded to the same concerns that the proponents of the OMC now invoke. But they sought to keep the rule of law alive.

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[117] See G. Teubner, "Substantive and Reflexive Elements in Modern Law", *Law and Society Review* 17 (1983), 239-285; R. Wiethölter, "Materialisation and Proceduralisation of Law", in G. Teubner (ed,), *Dilemmas of Law in the Welfare State*, Berlin-New York 1986, 221 ff.; "Proceduralisation of the Category of Law", in Ch. Joerges and D.M. Trubek (eds.), *Critical Legal Thought: An American-German Debate*, Baden-Baden, 1989, 501 ff.; J. Habermas, *Between Facts and Norms*, Cambridge, MA 1999 427 ff; *idem*., "Paradigms of Law", in M. Rosenfeld and A. Arato (eds.) *On Law and Democracy: Critical Exchanges*, Berkeley-Los Angeles, CA, 13 ff. Earlier German contributions include R. Wiethölter, "Entwicklung des Rechtsbegriffs", in V. Gessner and G. Winter (eds.), *Rechtsformen der Verflechtung von Staat und* Wirtschaft, Opladen 1982, 82 ff; Ch. Joerges and G. Brüggemeier (eds.), *Workshop zu Konzepten des postinterventionistischen Rechts,* Zentrum für Europäische Rechtspolitik, Materialien 4, Bremen 1984, 25-64.

[118] Famously summarised and analysed by G. Teubner, "Juridification – Concepts, Aspects, Limits, Solutions", in *idem* (ed.), *Juridification of Social Spheres*, Berlin-New York 1987, 3 ff.

5. A Resumé

So much for the critique. And what has the critic to offer instead? The law is a normative exercise; the whole discipline is engaged in the production of valid answers which distinguish between the legal and the illegal, and equate this distinction with justice as opposed to injustice. Ambivalent messages are not particularly welcome and are difficult to endure.

And yet, the uncertainties of the state of the (European) Union may require exactly that – at least, if lawyers seek to take up the three issues denoted in the introduction:[119] Does the constitutionalization of Europe reach out into the "Economy and Society"? Are there alternatives to the OMC alternative to the exhausted economic constitution? Can we ensure that European governance remains rule-bound and its legitimacy continues to be meditated by law?

5.1 The Constitutional Treaty

The obvious first object is to look for answers to these questions in the new Constitutional Treaty as amended on 22 June 2004,[120] in particular, in the provisions that prmise to reach out into "Economy and Society": the "social market economy" has become a constitutional objective,[121] and access to services of general economic interest is recognised and respected[122] by Article II-36, which incorporates the new "social rights".[123] Last but not least, elements of the OMC can be seen in various places.[124] We find a first reference in Article I-1(4) which states: "the Union may adopt initiatives to ensure the co-ordination of the Member States' social policies"; Part III (Policies and Functions) refers to the OMC four times, once in

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119 Section I, text accompanying notes 4 ff.

120 Note 37.

121 According to Article 1-3 (3) CT the "Union shall work for … a highly competitive social market economy".

122 Article II-36; this is an important signal, because it confirms the right of Member States to pursue distributional objectives. The compatibility of such policies with the opening of national or regional markets to "foreign" competitors is a complex issue of constitutional importance. It is one of the many fields where "constitutionalisation" has to occur incrementally.

123 The Rights' Charter as solemnly declared in Nice was incorporated into the Constitutional Treaty which now contains social rights especially in Title IV on solidarity.

124 Article I-14 (4): "the Union may adopt initiatives to ensure co-ordination of Member States' social policies"; Part III, section on Social Policy (Article III-107 CDT), on Public Health (Article III-179 CDT). The assignment of a *competence* "to promote and coordinate the economic and employment policies of the Member States" has been repealed. Article I-11(3) as amended on 22 June 2004 (note 37) reads: "The Member States shall co-ordinate their economic and employment policies…"

the section on Social Policy (Article III-107), and once in Chapter V Section 1, on Public Health (Article III-179).[125]

Most of these topics have already been mentioned and those not mentioned are too big to be dealt with en passant. Suffice it to restate here that the invocation of the "social market economy" in the Constitutional Treaty is conceptually flawed, and is, politically, an all too risky promise, because it may raise expectations which it will subsequently fail to deliver. Instead of saying "flawed", one might also say "empty": the historical compromise that the concept once embodied is no longer alive. Not even the ordo-liberal component of this legacy was present in the deliberations of the Convention. However, one linguistic detail does deserve a particular mention here: "Ordnungspolitik" was the German name of Working Group VI. The English name was "economic governance". Was this an innovative translation? Not really. It was the Convention Secretariat who was responsible for the introduction of the term, in which someone remembered the fierce controversies between "Ordnungspolitik" and "industrial policy" in the Maastricht Intergovernmental Conference. A case of "linguistic-discursive path-dependency", according to Andreas Maurer,[126] which became definite when Joschka Fischer and Dominique de Villepin submitted a common position on Ordnungspolitik just before Christmas 2002,[127] after/when Working Group VI had already closed its files.[128]

Will the "social rights" serve as an Ersatz? The easy answer is that this is difficult to predict and that we should wait and see what the ECJ tells us. This answer sounds easy but is not trivial. It is not trivial because it implies that we, the citizens, should entrust the Court with the shaping of a "social Europe". Should the Court take over where the citizens' representatives in the Convention and elsewhere failed to produce clear constitutional guidance? These are puzzling and, to a certain extent, worrying consequences, which are hardly reconcilable with the inherited notions of democracy and of the normative weight of constitutional norms. In addition, we have to assume that the Constitutional Treaty could serve as a sufficiently stable basis for daring activism. This is a somewhat heroic assumption with regard to the social rights in the light of Article II-52 (5) which provides:

"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".[129]

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[125] See the following section.

[126] In a letter to the author; A. Maurer is Head of the Research Group on European Integration of the German Institute for International and Security Affairs in Berlin.

[127] CONV 470/02.

[128] A detail, but a noteworthy one after decades of disagreement between the German proponents of *Ordnungspolitik* on the one hand, and the French defenders of *planification* on the other.

[129] See G. de Búrca, "Fundamental rights and Citizenship", in B. de Witte, *10 Reflections on the Constitutional Treaty for Europe*, RSCAS 2003, 11 ff., 22 ff.

5.2 Constitutionalization as Process

"L'éssentiel est invisible pour les yeux", is comfort that Antoine de Saint Exupéry's Petit Prince give us. What is not so visible, because it seems so unexciting and trivial, is the performance of the European machinery, the innumerable, small and not so small, indicators of good European governance. Europeanization is an instigator of countless innovative projects. Directly behind or lying in the shadow of grand designs, such as that of the theory of the economic constitution or directly-deliberative polyarchy, there is another Europe at work. It is not so easy to discover, not so coherent, and often ambivalent. But we can approach it in three steps: (1) one is analytical and interdisciplinary. We have some well-discussed and elaborated hypotheses about the structures of the European multi-level system of governance and the conceptualisation of this system in legal categories; (2) the second step concerns our experiences with and insights into the Europeanization processes. Nobody can claim to know and understand the complex processes of Europeanization in their entirety. But if one studies some of them in some depth, one will discover patterns of change in both successful learning processes and in failures.[130] The "law of the European economy" which becomes visible in such endeavours is very different – and much more interesting – than the law in the books. Europeanization functions as an instigator of change and learning. It is an exercise in transformation, and modernization; (3) there is a theoretical background to this kind of cautious optimism. One, underestimated, virtue of law is its concreteness, the need to take decisions and give reasons for them to actors, litigants, experts and to the wider public; the chance/opportunity and, indeed, duty to reconsider what once seemed settled. Law is a Product guided by reasoning, it is Recht-Fertigung which reflects the justice and fairness of its production processes.[131] In such perspectives, "constitutionalization" can be conceived not as merely being the writing of a text and its formal acceptance by those who govern us and/or us the people.

Can we expect "constitutionalization as process" not only to ensure the compatibility of open markets with regulatory concerns and preserve the social dimension of private law, but also to overcome Europe's social deficit? This seems highly unlikely but is not unconceivable. "All political projects are inherently unrealistic, in that they strive for a not yet realized objective". This was Wolfgang Streeck's

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[130] I refrain from an effort to elaborate the following remarks in the abstract. They need to be substantiated and concretized in the context of much more detailed analyses of specific fields. For a recent attempt cf. Ch. Joerges, "The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline", forthcoming in *Duke Journal for Comparative and International Law.*

[131] Cf., R. Wiethölter, "Recht-Fertigungen eines Gesellschafts-Rechts", in Ch. Joerges and G. Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie,* Baden-Baden 2004, 13 ff.; cf., the analysis by G. Teubner, "Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter", in O. Perez and G. Teubner (eds.), *On Paradoxes and Self-reference in Law* (forthcoming 2004).

response[132] to the lecture which Jürgen Habermas delivered in Hamburg on 26 June 2001.[133] The philosopher argued that a European constitution could help to defend the "European social model". Streeck substantiated his response: too much voluntarism will downgrade a project to mere wishful thinking. This is why it should be accompanied by empirical research. And, at some point, we should be prepared to take the discrepancies which we find between our aspirations and our observations seriously. But when and how? "Constitutionalization as process" is no answer to these questions. Nevertheless, it is a response to the state of the integration project which seeks to take the core idea of constitutionalism seriously.

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[132] "Das 'soziale Europa' und seine Verfassung: Fragen zu einem politischen Projekt", Ms. Cologne 2001. The paper has not been published. But W. Streeck has explained his position more comprehensively elsewhere. Cf., *e.g.*, "From Market-Making to State-Building? Reflections on the Political Economy of European Social Policy", in Stephan Leibfried and Paul Pierson (eds.), *European Social Policy: Between Fragmentation and Integration*, Washington, DC 1995, 389 ff. : "The Internationalization of Industrial Relations in Europe: Prospects and Problems", *Politics and Society* 26 (1998), 429 ff.

[133] "Warum braucht Europa eine Verfassung? Nur als politisches Gemeinwesen kann der Kontinent seine in Gefahr geratene Kultur und Lebensform verteidigen", first published in DIE ZEIT of 29 Juni 2001, reprinted in J. Habermas, *Zeit der Übergänge*, Frankfurt a.M. 2001, 104 ff.; English translation ("Why Europe Needs a Constitution") in E.O. Eriksen, J.E. Fossum and J. Menéndez (eds.), *Developing a Constitution for Europe,* London 2004, 19-34.

European Democratic Legitimation after the Failure of the Constitution

Hauke Brunkhorst

Introduction

The European Constitution has been rejected in France and Netherlands a few weeks ago. Has Europe no constitution now? – No, it has a constitution. The treaties are the constitution of Europe, the jurists tell us, and they are right. There are a lot of differences between the structures of the *European Treaties* (ET) and the constitution of Germany, France, USA or Serbia, which are all of the same type. But there are also a lot of essential conincidences between the ET and democratic state constitutions. The ET are full fledged *functional equivalents* of a constitution of a state: 1. The ET are higher level or *reflexive law* (law to produce law). 2. The ET secure the *normative priority* of European law over the law of the member-states ("European Law Supremacy"). In cases of conflict European law breaks national law, including posterior parliamentary legislation and constitutional norms.[1] Even the German Constitutional Court has given up its claim to be the last interpreter of basic rights concerning German citizens and German territory.[2] They now interpret even the German constitution in cooperation with the ECJ and vice versa: There still exists a European "*Verfassungsgerichtsverbund*".[3] 3. The ET constitute *independent legal bodies* of the Union who make law by their own po-

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1 *Hans Peter Ipsen*, "Die Bundesrepublik Deutschland in den Europäischen Gemeinschaften", in: *Josef Isensee/ Paul Kirchhof*, ed., Handbuch des Staatsrechts der Bundesrepublik Deutschland, Heidelberg: Müller 1987, § 181, RN 32; *D. Grimm*, Braucht Europa eine Verfassung?, 229f; *A. Augustin*, 253; *Fritz Scharpf*, „Regieren im europäischen Mehrebenensystem – Ansätze zu einer Theorie", in: Leviathan 1/ 2002, 65-92, 76; *C. Joerges*, „Rechtswissenschaftliche Integrationstheorien", in: *Beate Kohler-Koch/ Wichard Woyke*, Hg., Die Europäische Union. Lexikon der Politik, Bd. 5, München:Beck 1996, 229-232, 230; *Marcel Kaufmann*, „Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäischen Staatenverbund", in: Der Staat 4/ 1997, 521-546, hier: 522, 526f, 534; *Marcus Heintzen*, „Die ‚Herrschaft' über die europäischen Gemeinschaftsverträge", in: Archiv des öffentlichen Rechts119/ 1994, 564-589, 574ff, 585ff; *Claus Dieter Classen*, „Europäische Integration und demokratische Legitimation", in: Archiv des öffentlichen Rechts, 119/ 1994, 238-260, 240f; *C. D. Claessen*, „Einführung", in: Europa-Recht, München: dtv 2001, XIVf.

2 Bverf G 2 Bvl 1/97, June 6/2000; *Scharpf*, 76

3 *Udo DiFabio*, Der Verfassungsstaat in der Weltgesellschaft, Tübingen: Mohr 2001, 76, 78f, 96.

wer. 4. The ET create new *rights* for European Citizens which are directly related to the citizens of the EU, and no longer mediated through the law of the member-states. 5. Even the *word "constitution"* regularly has been applied to the ET by the highest European Courts (like ECJ or BverfG, the Spanish Supreme Court etc.). The European court has called the Roman Treaties a *charté constitutionelle*.[4]

The naming of the ET as a *charté constitutionelle* might be taken as a hint on the very problem of the existing ET as well as with the new (and now rejected) *Treaty for a Constitution of Europe*. The first time in history the expression *charté constitutionelle* was used, was in 1814 for the counterrevolutionary constitution of the French restored monarchy. This was a constitution in the modern meaning of this word but not a constitution for the people. It was a constitution for the ruling social classes. The ET are much different from the *charté constitutionelle* from 1814 (as well as from the later one from 1830), but in one respect we have the same situation as in 1814 or 1830 on the European level in 2005. The word "constitution" used for the new *Treaty for a Constitution of Europe* does not add any new constitutional meaning to the former ET. The new constitution is still a treaty, and the old treaties were already a constitution. The problem now is that the voters did not know that and could not know it. The existing treaties are a constitution in the *self-description of legal scholars*, they are a *constitution for the courts* and other legal bodies of the EU and it's member states: national and European parliaments and governments, the Commission and the Council, national and trans-national administrations etc, in short: They are a *constitution for the political class* who revealingly are called and describe themselves as a social *class*. But the European constitutions old and new are not, and up to now never were a *constitution in the public opinion of the European people*, and this is the very problem with the EU constitutional system that came to the fore dramatically the last weeks.

The existing European constitution is a constitution without a state. The European existing constitution constitutes a clearly *supra*national organisation.[5] After the revolutionary Treaty of Amsterdam there exists a *single European Unity* of civic rights, of budget, of political action, of organisation, an internal and external legal personality, an order of legal steps and competences and the ECJ claims the

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4 ECJ RS. 294/83 Les Verts / Europäisches Parlament 1986, 1357 (1365); *Dieter Grimm*, „Braucht Europa eine Verfassung?", in: *D. Grimm*, Die Verfassung und die Politik. Einsprüche in Störfällen, München: Beck 2001, 215-254, 215f (note 1), 229f; *D. Grimm*, „Vertrag oder Verfassung?", in: *D. Grimm/ J. J. Hesse/ R. Jochimsen/ F.W. Scharpf*, ed., Zur Neuordnung der Europäischen Union, Baden-Baden: Nomos 1997, 9-31, 9; see further: *Angela Augustin*, Das Volk der Europäischen Union, Berlin: Duncker & Humblot 2000, 249, 274 (note 248); *Joseph H.H. Weiler*, „The Transformation of Europe", in: The Yale Law Review, vol. 100, 1991, 2403-2483, 2407; *Jürgen Schwarze*, „Die Entstehung einer europäischen Verfassungsordnung", in: *J. Schwarze*, ed., Die Entstehung einer europäischen Verfassungsordnung, Baden-Baden: Nomos 2000, 463-570, 464f.

5 *Heinhard Steiger*, Staatlichkeit und Überstaatlichkeit, Berlin: Duncker & Humblot 1966; *Armin von Bogdandy*, Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform, Baden-Baden: Nomos 1999.

so-called 'competence-competence' for its judgements and in all matters concerning the interpretation of European law.[6] In legal terms there exists a clear hierarchy of subordination between European and the law of the Member-States, but in a realistic description it would be better to describe it as a mix of the law of subordination ("Subordinationsrecht") and the law of cooperation ("Koordinationsrecht").

Anyway, if we apply Jellineks three criteria of a state (people, power, territory) then one thing becomes very clear: Europe is not a state. (1) *People*: Even if we accept as I do that there is a European *people in the making*, it is still not clear if this process of making will ever come to an end. Something what seems to be unique with the EU is that the now again posed question about the final destiny and final identity of Europe *has no answer*. May be it should be kept open because the European people are in a permanent process of defining again and again who belongs to this people and who they are, as they have done that during the last referenda. Even today it is not so easy to answer the question: Who is a European citizen? The European passport does not cover the whole number of European *de facto* citizens. Think on the Norwegians or even the citizens of Swizzerland? – They are completely (or close to be completely) under European law, and they have subjective rights and judicial remedies within the EU, and they have a common territorial order together with the European Union (Schengen-convention). But they have no European passport, and they have no *status activus*. (2) *Power*: What the European Union further completely lacks is any own *power* to enforce European law. It has only one court in Luxemburgs, and only 25000 officials (much less than the *Frankfurter Stadtverwaltung*) because there is no executive body in Brussels. This by the way shows that one objection against the EU is completely unreasonable, that there might be too much burocracy in Brussels (3) *Territory*: Even if it is every instant clear what the actual borders of the European Union are, the unique logic of permanent and peaceful enlargement does not really fit to the classical modern idea of a clear cut states *territory*, and even the meanwhile (since Amsterdam) legalized idea of a possible closer Union of some member states does not fit to the concept of a states territory. In this respect the EU comes closer to a classical Empire or "Großraum" (Carl Schmidt) than to a nation-state.[7]

If there is a European constitution that is supranational, and not the constitution of a nation state, what kind of a constitution is it? To deal with this question I draw a distinction between three levels of constitutional integration: 1. *functional integration*, 2. *Rule of law integration* (what the German jurists of the 19th Century have called "Rechtsstaat" or "Konstitutionalismus"), and 3. foundational, grounding or *revolutionary integration* by a constitution. The *first*, functional level of constitutional integration must be fulfilled by all constitutions that work, the *second*, rule of law level of constitutional integration has it's paradigm cases in England since the 18th and Prussia and Germany in the 19th Century, whereas the *third*, revolutionary level of constitutional integration has its paradigm cases in the French and Ameri-

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6 *A. v. Bogdandy*, 10, 32f, 38ff.

7 *Ulrich Beck* / *Edgar Grande*, Das kosmopolitische Europa, Frankfurt: Suhrkamp 2004.

can Revolution of the 18th Century, and the constitutional traditions found by these two Revolutions.

1. Functional constitutionalism

There is no doubt that on the level of a *functional constitution* Europe has a constitution. European primary law (the law of the treaties) stabilizes the borders that separate the legal from the political system, and the borders that separate the legal from the economic system as well, and European primary law regulates a system of well ordered relationships between law, politics and economy. What European primary law precisely does is securing the autonomy of the legal, political and economic systems by organising the reciprocal dependencies that connect law, politics and economy. This is what Niklas Luhmann calls *structural coupling*, and the structural coupling especially of law and politics is the functional achievement of all regimes that are constitutional.[8] What a constitution (together with a system of basic rights[9]) in the functional meaning of this term enables, is the *controlled explosion of all forces of productivity of functionally specialized communication*. For Luhmann the achievement of the constitutional law of check and balances (in German: "Staatsorganisationsrecht") is in particular the structural coupling of *law and polities*, and that means that *all law can be changed by political power*, and at the same time that *all use of political power is under control of legal norms*. The functional effect of constitutionalising the relation between law and polities is *first* a growing independency and a stable autopoietic closure of the legal system, and *second* the growth (and not the shrinking) of political power (with all its dangers and ambivalences, as for example Foucault has analysed them). That's one of the reasons that usually democratic governments usually have much more and much more effective power than autocratic dictatorships. *Third* the specific function of individual rights (in particular if they are interpreted as "institutional guarantees"[10]) is to stabilize the borders between politics and law or economy and religion or economy and politics, family and science and so on, in short: The function of a constitution is to stabilize the borders between functionally differenciated systems and to organize legally controlled exchange between them, so that the systems can support one another with their special achievements.

The problem with a mere functionalist understanding of a constitution is that it fits as well to the constitution of the German Bismarck-Reich as to the present day constitution of France or the present constitution of the EU, and it fits even to the

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8 *N. Luhmann*, "Verfassung als evolutionäre Errungenschaft", in: Rechtshistorisches Journal 9/ 1990; *N. Luhmann*, Das Recht der Gesellschaft, Frankfurt: Suhrkamp 1993, 440ff; *N. Luhmann.*, Die Gesellschaft der Gesellschaft, Frankfurt: Suhrkamp 1997, 92ff; *Marcelo Neves*, Zwischen Themis und Leviathan: Eine schwierige Beziehung, Baden-Baden: Nomos, 2000, 80ff.

9 *N. Luhmann*, Grundrechte als Institution, Berlin: Duncker & Humblot 1986 (1965).

10 *Carl Schmitt*, Verfassungslehre, Berlin: Duncker & Humblot 170ff.

(by Carl Schmidt) so called constitution of the German "Third Reich", even if the latter proposition is true only if we (for sake of the argument) extend the concept of law to what Schmitt called during the Thirties a *konkrete Rechtsordnung* (concrete legal order) which blurs the distinctions between law and justice, legalism and moralism as well as the distinction between law and power. Anyway, the problem with a mere functional understanding of a constitution is that it leaves us without any normative criteria to draw a categorical distinction between structurally different types of constitutions. As long as higher level legal rules order the relations between law and politics and secure the borders between some of the most important functionally differentiated social systems we have a full fledged *functional* constitution. Such a functional or *Hobbesian* constitutional regime enables the more or less peaceful growth of legal decisions, political power, economic capital, scientific knowledge, popular education etc. But the *peaceful growth* of power, capital, knowledge etc. does not mean automatically the growth of *individual and democratic freedom* for all who are subject to law.

2. Rule of law constitutionalism

Rule of law limits the power that states or other legal bodies (like state governments or the EU-Commission or the SC) can enforce against the individual freedom of citizens and individual human beings, or other legal subjects like organisations or states (in international law). Written or unwritten, rule of law means that legal subjects have rights which *limit* not the growth but a particular use of political (and today even economic[11]) power. Different from mere functional constitutionalism, law-of-rule-constitutionalism implies a *normative idea*, and this is the idea of the "self-binding of state power" (Jellinek).

European citizens today have more rights than ever before, and this to a great deal is due to the emergence of the European Union which constitutes a new type of rule of law regime. But to collect rights and legal claims does not mean necessarily that the rule of law or the "Rechtsstaatlichkeit" in Europe today in *all* respects is better off with than without the Union. There is the gain of some important new rights for European citizens (in particular the right to move) but also a loss or weakening of some of the rights of state citizens (for example against transportation to another EU-country).

Anyway, the existing European constitution is not only a *first level* functional constitution but as well a *second level* rule of law constitution. European law legalizes state power[12] and imposes constitutional constraints on the use of power. There exists a complex system of check and balances between the European legal and political bodies. The European Court has developed some important measures to secure basic rights of me as a European citizen even against the legal orders of

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[11] So the *Drittwirkungslehre* of the German constitutional court.

[12] *D. Grimm*, Braucht Europa eine Verfassung? 229. ("Verrechtlichung der Staatsgewalt").

my own national sovereign.[13] The EU today fulfils further as Hilf and Reuß write, a "Scharnierfunktion", a function of mediation between global economic, commercial and consumer norms on the one hand, and on the other the law of the member states.[14] This protects the EU-citizens from an otherwise more unequal and arbitrary implementation of WTO-norms etc. What constitutionalism on this let me say *Lockean* level enables is the peaceful growth of primarily *private autonomy*.

The greatest evolutionary advance in Questions of rights within the EU was the construction and effective implementation of the *new subjective right to move and transcend state borders*, to have an unrestricted right to live and work everywhere in Europe, and to enjoy equal rights all over Europe. What is so new with this right or even a new dimension or generation of rights is *first* that I as a European citizen can go and stay everywhere in Europe (EU) and to *take* (nearly) *all my rights* (which I enjoy as a German citizen) with me, and *second* the right to move and all other rights I enjoy as a European citizen has the so called *direct effect*. That means that I can go to Court to enforce my rights as a European citizen everywhere in Europe. Our national courts are now European courts at the same time. This is – as the ECJ has shown already in 1963 – an important *independent source of legitimation of European law*. The EU is latest since the ECJ´s famous decision on *European law supremancy* and *direct effect* in 1963 no longer legitimated by the contracting states alone but at the same time by European (and in this respect no longer German, French…) citizens. Therefore the court concluded that European citizens must have *direct effect* as European citizens.

The interesting question here is what does *legitimation* mean? Legitimation of law in democratic legal communities has one and only one meaning. It means *democratic legitimation*. But democratic legitimation of law is not only tested and implement at the *input*-side of the legislative processes (public discussion, party-Building, free will formation, votings and elections etc.) – democratic legitimation means the whole process for concretizing and implementing law from the discussion in a bar and television news through parliamentary legislation via governmental administrative and judicial decisions towards the concrete action of a policeman,[15] and latest here *we, the people* again come back to the fore as *immediate decision makers*. Using our private autonomy as single individuals we can go to court and compel the judges to open a judicial process which in the end has to implement a new norm or confirm an old one.

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13 *Christian Tietje*, „Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen der Europäisierung und Internationalisierung", in: Deutsches Verwaltungsblatt 17/ 2003, 1081-1146; *C. Joerges*, Zur Legitimität des Eurpäischen Privatrechts (FN 11), 10ff. On the Centros – judgement of the ECJ.

14 *Meinhard Hilf / Mathias Reuß*, „Verfassungsfragen lebensmittelrechtlicher Normierung", in: Zeitschrift für das gesamte Lebensmittelrecht, 1997, 293ff, 296, 300.

15 *Hermann Heller*, „Der Begriff des Gesetzes in der Reichsverfassung" (1927), in: Gesammelte Schriften, Leiden: Sijthoff 1971, 225 ff; grundlegend: Adolf Merkl, Allgemeines Verwaltungsrecht. Wien/ Berlin: Julius Springer 1927.

One can call this with Christoph Möllers in a broad sense "individual legitimation"[16], or better, as I would suggest, *private legitimation* – if one keeps in mind that this type of legitimation is *part of the whole process of democratic legislation and implementation of law*. Private legitimation is an indispensable aspect of democratic legislation which is as necessary as *public legitimation* to make law that is democratic. Just at this point we are confronted with the basic problem of European constitutionalism which now has become the *constituional crisis* of the Union.

Thanks to the French and Dutch people this problem for the first time in the history of the *elitist* European project now has become the problem of an *egalitarian public*. The *non*-voters may have underestimated the small but real democratic progress with the new constitution, and their misunderstanding of the growth of *private autonomy* within the Union as being the execution of a mere neo-liberal political programme, even if not deeply wrong, was more than one-sided, at best the half of the truth. One has to draw a clear distinction between a rich concept of private autonomy that includes *all* individual basic rights,[17] and which is indispensable for any politics that is democratic on the one hand – and on the other hand the *reduction* of private autonomy to neo-liberal economic freedom. But the *non*-voters were completely right to question the *public autonomy* of the Union.[18] To support public autonomy a constitution that is worth this name in a non-expert discourse, needs a system of norms which enables the citizens *to decide about political alternatives*.[19] As long as they are not clear with this point all treaties for a Constitution of Europe will and should never be understood by citizens as *their* constitution, and therefore the objections concerning the public autonomy of the European citizens were very well founded. With this point I come to the third level of revolutionary or democratic constitutionalism.

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16 *C. Möllers*, Gewaltengliederung, Habilitationsschrift, Heidelberg 2003.

17 See *Ronald Dworkin*, Bürgerrechte ernstgenommen, Frankfurt: Suhrkamp.

18 On the co-originality of private and public autonomy: *Jürgen Habermas*, Faktizität und Geltung, Frankfurt: Suhrkamp 1992.

19 This point is emphazised in: *Hauke Brunkhorst*, Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft, Frankfurt: Suhrkamp 2002; *H. Brunkhorst*, „Verfassung ohne Staat? Das Schicksal der Demokratie in der europäischen Rechtsgenossenschaft", in: Leviathan 30/ 2002, 530-543; *H. Brunkhorst*, „Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism", in: Millenium: Journal of International Studies 31/ 2002, 675-690; *H. Brunkhorst*, **"**A Polity Without a State? European Constitutionalism between Evolution and Revolution", in: Erikson, Fossum, Menendez, Hg., Developing a Constitution for Europe, London: Routledge, 2003; *H. Brunkhorst*, „Demokratie in der globalen Rechtsgenossenschaft - Einige Überlegungen zur poststaatlichen Verfassung der Weltgesellschaft", erscheint in: Sonderheft Weltgesellschaft der Zeitschrift für Soziologie 2005. For a similiar point of view in direct reaction to the lost referenda in Europe: *J. Habermas*, "Über die Köpfe hinweggerollt" in: Süddeutsche Zeitung 6. Juni 2005.

3. Democratic Constitutionalism

What the constitutional revolution adds to the social evolution of constitutionalism is more than "illusions of feasibility" and "celebratory explanations" ("Machbarkeitsillusionen", "Gesänge und feierliche Erklärungen") as Luhmann once put it ironically.[20] From the revolutionary or *Rousseauean* point of view constitutions are *systems of egalitarian legal norms that enable democratic politics*.[21] The basic constitutional question and the very meaning of the modern idea of a constitution is not – as Hannah Arendt once nicely put it – how state power can be "limited" through rule of law, but how the power of the people can be "established".[22]

This is the very constitutional question because even the limitation of state power and other powers like that of private actors ("Drittwirkung" of basic rights) or that of supranational organisations *has to be established by the democratic or communicative power of the people*.[23] If those who are concerned by legal norms (*quod omnis tangit ...*[24]) cannot understand themselves as their authors, rule of law, rights, judicial remedies of the famous direct effect of European law would not constitute well-ordered *freedom* but well-ordered and convenient *slavery*, or to quote Josef Weiler: "But you could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and jews were made citizens they enjoyed direct effect".[25]

If supranational norms, created by independent supranational bodies bind states and states citizens, and if these norms impose legal supremacy and direct effect, then intergovernmental legitimation from the point of view of democracy is no longer sufficient. If supranational law has two sources of legitimacy, the states *and* the citizens then supranational rule of law regimes are sufficiently legitimised only if they have the *public and democratic backing of the citizenship* that still has rights within the particular organisation.

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20 *N. Luhmann* Verfassung als evolutionäre Errungenschaft (FN 10).

21 *C. Möllers* (note 2); *Ingeborg Maus*; Zur Aufklärung der Demokratietheorie, Frankfurt: Suhrkamp 1992; *Hauke Brunkhorst*, Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft, Frankfurt: Suhrkamp 2002 (english translation forthcoming: Solidarity. From Civic Friendship to a Global Legal Comminity), Kap. I, 3.

22 *Hannah Arendt*, Über die Revolution, München: Hanser 1974, 191, 193.

23 *J. Habermas*, Fayktizität und Geltung, Frankfurt: Suhrkamp, 167 ff.

24 *Quod omnes tangit, omnibus tractari et approbari debet*. (What everybody concerns has to be deliberated and accepted by evrybody). On the roman and christian history and transformation of this rule: *Harold Berman*, Recht und Revolution, Frankfurt: Suhrkamp 1991, 366; *Graham Maddox*, Religion and the Rise of Democracy, Londen: Routledge 1996, 99; *Peter Landau*, „Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien", in: *Heinrich Scholler*, Hg., Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien, 23-47, 42.

25 *J.H.H. Weiler*, „To be a European citizen – Eros and civilisation", in: Journal of European Public Policy 4:4/ 1997, 495-519, 503.

This eventually is the reason why the EU-Treaties (TEU Art. 6 Para 1,4,; TEC Art. 19, 22) as well as the UN-Charter (Preamble), and implicitly even the founding conventions of the WTO (DSU Art. 3 para 2) refer (explicitly: EU, UN or implicitly: WTO) to *peoples* and *citizens* as an indispensable subject of legitimation. This in a lot of cases is lip service but it demonstrates that even on inter- and supranational levels of constitutionalizing law and politics there exists no other idea of law that is legitimized than the idea of democratic legitimation.

These references on democracy and popular sovereignty in the legal text books of supranational organisations are not only words but *constitutional legal norms*. Taken seriously, they can "strike back".[26] And there are people, social movements and non governmental organisations who take them seriously. In particular the NGO's have got some important influence during the last years within the global public, the United Nations and the WTO-regime.[27]

Some observers have described the increasingly important role of NGO's within the still existing global civil society, together with some impressive new political phenomena like the EU-system of commitology as "deliberative democracy".[28] To some observers the deliberative democracy of global NGO's and European commitology now seems to be the realisation of communicative rationality on earth. But – if one wants to avoid a disaster like the last referenda on the European constitution – one should be careful, not to identify deliberative public and deliberative administration with democracy too early, because there is no democracy at all without *egalitarian procedures of decision making*.[29] We – or from the top down perspective of Schröder, Fischer, Girac, Junker, Verheugen and so on – *they*, the people ("*Die Menschen da draußen*…") know that. They are not as stupid as the so called European "political elites" think they are.

Democracy, they know, needs some "guarantee that each member of the society is only represented once", and democracy needs some "guarantee that all members

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[26] *Friedrich Müller*, Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie VI, Berlin: Duncker & Humblot 1997, 56.

[27] *Andreas Fischer-Lescano*, "Globalverfassung: Verfassung der Weltgesellschaft", in: ARSP Vol. 88, 2002, Heft 3, 349-378.; *Rahmatullah Khan*, "The Anti-Globalization Protests: Side-show of Global Governance, or Law-making on the Streets?", in: Zeitschr. f. ausl. öffentl. Recht und Völkerrecht Jg. 61, 2001, 323-355; *Stephan Hobe*, Global Challenges to Statehood: The Incrre4asingly Important Role of Nongovernmental Organizations, http:/www.globalpolicy.org/role/intro/def/2000/chaleng.htm.

[28] *James Boman*, Public Deliberation. Pluralism, Complexity, and Democracy, Cambridge: MIT 1996; *J. Bohman/ William Rehg*, Hg., Deliberative Democracy, Cambridge: MIT 1997; *Joshua Cohen/ Charles Sables*, „Directly-Deliberative Polyarchy", in: European Law Journal, Vol. 3, No. 4/ 1997; *Rainer Schmalz-Bruns*, „Deliberativer Supranationalismus", in: Zetschr. F. int. Bez. 2/ 1999, 185-243; *Christian Joerges/ Jürgen Neyer*, „From Intergovernmental Bargaining to Deliberative Democracy", in: European Law Journal, 3/ 1997, 274-300; *C. Joerges/ Ellen Vos*, Hg., EU Committees: Social Regulation, Law and Politica, Oxford: Hart 1999.

[29] See also: *C. Möllers* (note 2); *M. Krajewski* (note 38).

of the society are actually represented."[30] The referenda in France and Netherlands have justified the truth of the sentence that inclusive *deliberation* is a necessary condition for egalitarian *decision-making* but never can be a *substitute*. Without a real chance of the people to *decide about programmatic alternatives* in Europe (and not only sometimes in some countries about the yes and no of the legal validity of 500 pages) there even will be no *inclusive* deliberation, and there will be no serious public discussion with public impact on politics at all. This still is the very difference between the constitutions of the member states and the European constitution of the treaties. What the EU-treaties or the EU-Constitution urgently needs are democratic reforms which make it harder for the politicians in power to *avoid any egalitarian public discussion about European politics*, as they have done in the past so long. Europe needs a strong public and a strong parliament *because* the only body of state power that has been constitutionally implemented by the European treaties are *legislative bodies without a government and a burocracy* (executive bodies) and even *without a court-system* (judicative bodies not only on the supreme court level)), and there is no democratic legislation without a parliament (or some real functional equivalent which up to now has not been found) that allows to pose political alternative (left/right, government/opposition). The rejection of the *Treaty for a Constitution of Europe* by the French and Dutch people who for the first time acted as the anticipatory representative of a single European people was the last wake up call to take democracy seriously.

[30] *Krajewski, M.*, 2001: Democratic Legitimacy and Constitutional Perspectives of WTO Law. Journal of World Trade 35: 166-186.

"People's" Position in Regional Integration: an Alternative to the Theory of Consensus

Guilherme Leite Gonçalves

1. Generalization of the inclusion principle in the economic system and its effect on politics and law

The recent discussion involving the elaboration of a Constitution for Europe is the result of a lack of linearity in the regional integration process that began with the Treaty of Paris in 1951. Originally created for essentially economic purposes – to allocate the losses produced by the Second World War and the funds generated by the Marshall Plan –, the process has gradually extended into the domains of politics and law. The accomplishment of objectives set by various supranational commissions for liberalizing the market produced effects which overcame economic limits, but were also transformed into operational problems for other social systems, especially the legal and political systems. The free circulation of goods and capital, for example, unleashed an unprecedented set of tribulations for the tax laws and public reserves of the member States. As with all planning processes, the greatest obstacle for the European Union has been uncertainty about the future, generating undesired and sometimes harmful results that could not be foreseen at the time of making the plans. Faced with this reality, what is needed is a new project able to act in the face of present problems and renew the contingency of the future. The efforts of the European Convention are moving in this direction: seeking to correct the legal-democratic deficits produced by the European regional integration process (ZAGREBELSKY (Org.) 2003).

The advent of regional integration created disturbances and rearrangements in the relations between politics, law and economics. In modern society, these three spheres can be defined as differentiated partial subsystems, each exercising a specific and un-interchangeable function. This presupposition is not compatible with the totalizing or universal conceptions of pre-modernity, which tended to concentrate social action and limit differences through a religious or moral identity. Contemporary high-contingency conditions require less-simplified forms that are more appropriate to organizing the hypercomplexity of the environment. Modern social subsystems are endowed with a reproductive recursiveness that allows them to reach a closure where politics only refers to politics, law only to law and economics only to economics. This closure emerges from the structures and operations of the systems: a legal decision can only occur within the legal system.

Be that as it may, this does not mean that the systems are autistic or closed to each other. To the contrary, each system can observe its respective environment, be "irritated" by it and offer contributes to other systems. Paradoxically, the operative closure of the system is a condition for its cognitive opening. The relations between the legal, political and economic systems illustrate this definition rather well: higher taxes, for example, could result in a drop in profits for the economy, questions of constitutional rights laws and greater income for politics. Each system is differentiated and each appears to the other as part of its respective environment. External demands are processed by the system according its internal structures: there is no determination or causality. Due to environmental inflow, the system produces irritations – in truth, self-irritations – which are operationalized in a self-referential fashion. In other words: the systems open to their environment without losing their identity, or better yet, they maintain their differences.

Due to the preeminence attributed to economic questions, the regional integration process created requirements, demands and interferences that could lead to a questioning of the system/environment distinction. Regionalization signified a generalization of the inclusion principle in the functional ambit of the economic system. Differently to pre-modernity, when the inclusion/exclusion distinction was resolved with natural criteria – birth defined who was noble or plebeian –, modern society is characterized by the inclusion of all individuals in the social systems.[1] Exclusion is not the consequence of an external universal determination anymore, but rather self-referential criteria produced by the social systems: criteria internal to the educational system, for example, determine a good or bad student. In economics, this operational change in the inclusion/exclusion distinction first occurred with the transition from collective feudal property to private property and its subsequent monetarization. In other words: the acquisition of a movable or immovable good (inclusion) through the medium of money necessarily entails the non-ownership (exclusion) of the seller, who, with the amount obtained, is able to regenerate his purchasing capacity. The inclusion/exclusion duality constrains the economic system to constant dynamism and circularity. If, during the pre-monetary phase, the dependence of property on power limited the inclusion capacity of the economy, this gradually became reverted: first through the process of monetarization and then from generalized inclusion via regional economic integration.

Economic regionalization signifies the integration of the entire population into the functions of the economic system. The same end was attributed by Niklas Luhmann to the Social Welfare State within the political system (LUHMANN 1997). Based on this strategy, the economic system seeks to eliminate social marginalization through generalized access to the wealth that is produced. In this sense, good examples are the social development obtained by peripheral countries like Portugal, Spain and Greece after entering the European Union, and the growth

[1] For a critical view of this postulate, see NEVES 1992.

expectations emerging in Eastern European countries that have entered this institution.

The task of the economy is to manage the problem of scarcity. The availability of many goods is restricted due to physical limitations. This reinforces the inclusion/exclusion distinction in the economic system: when one individual acquires a property, another is excluded from it. This shortage raises a temporary problem, which is to guard in the present against the possibility of scarcity in the future. On this is founded the paradox of the economy[2]: a reduction in scarcity through acquiring a good necessarily entails an increase in the shortage of what was not acquired which, however, endowed with money, has the capacity to eliminate its own scarcity. This is the operational circularity of the economic system. Regional integration tries to obscure this paradox and interrupt this circularity. Through attempting the generalized inclusion of all individuals in the economic functions, regionalism aims to substitute shortage for abundance and, therefore, interrupt the paradoxical "zero sum" circuit – if A has something, B does not – in favor of a "positive sum" solution – A has and B as well. It aims to suppress future scarcity by increasing the amount and circulation of wealth in the present. It is in this sense that we can consider the European Union the result of a project, a planning process. We ask, nevertheless: are the structural limits of the economic system compatible with this goal? Doesn't the substitution of a shortage for abundance produce, to the contrary, excessive scarcity or the complete absence of goods in the future? If everyone is the owner, who sells and who buys? The economic difficulties currently facing the two principal countries of the European bloc – Germany and France – clearly illustrate the problems of trying to include a logic in the operations of a system that has a greater scope than the system itself.

One cannot think of an economy without scarcity, since it is exactly that which assigns a value to a certain good, thereby continually reproducing the circularity of the system. A scarce good can be quantified. This permits, on the one hand, the creation of payment capacity and on the other, payment incapacity. As a result of this basic alternation, the economy is able to stabilize a forecast for the future – acquire a good to fulfill a need – but offers no certainty for the future because in supplying the shortage the scarcity of another good was generated, which in turn produces an alternation between payment capacity/incapacity. In short, scarcity is a permanent problem of the economic system. When economic integration seeks to suppress it, it blocks the passage from one side to the other of the have/have-not polarity: if everyone has, there is no incentive for production or innovation. Moreover, the attempts to establish abundance as a rule for economic operations by eliminating the problem of shortage and fixing an "a posteriori" certainty to trade relations actually increase the risk of producing an excess of scarcity greater than the normal levels of the system: when there is a situation of full abundance, there is no payment, no circulation of money. Evidently, the European economists are conscientious of the circularity of the scarcity in the economic system.

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[2] On the task and the paradox of the economic system, see LUHMANN 1988a; LUHMANN 1988b: 101-123 and ESPOSITO 1995a: 103-105.

Nevertheless, in the last years, the neoliberal ideology – which has deeply influenced the last stages of the European union process – seems to attribute the solution to the social needs to the market potential. It has therefore introduced a strong normative component in the distinction between wealth scarcity/abundance.

By ignoring its structural limits, the economic system loses control over its operations: unexpected consequences emerge from the planning which are outside its own domain. The economic system begins demanding and pushing towards other social systems a complexity incapable of being processed by its self-referentiality. These excessive requirements are especially forced onto politics and law, which in turn have become the means for accomplishing the regional economic integration. In other words: since the economy, in imposing the logic of abundance, burdens its own operations – because its structural limits are unable to absorb this type of program –, it begins making demands on the political and legal systems in order to accomplish its ends. As can be observed, supranational economic decisions provoked a rearrangement of existing legal institutions, which, based on classic notions of territoriality, population and sovereignty, thwarted greater trade cooperation among the member States. The imposition by the European Union of minimum rates of productivity and lower public deficits on the part of national governments, not to mention its adoption of the principle of the primoatè – the primacy of European legal norms over state law –, can be analyzed in this context of recomposing state political-legal functions so as to be guided by economic principles that are defined as indispensable to the unification process.

2. Law and politics as means of regional integration

In the idea of regional integration, the economic system employs political and legal power to accomplish its aim of widespread inclusion. These are the means by which the economy exercises its functions and activities. To a certain degree, they are efficient instruments for materializing the project of economic integration. Since they operate through rigid structures and institutionalized procedures, the organizations of the political system – the State – and the legal system – the Courts – have a high level of authority that facilitates decision-making under extremely complex conditions. Moreover: these systems are endowed with a series of mechanisms – legitimate monopoly of force, coerciveness of the law, res judicata – that can impose these decisions even if their effects are considered undesirable. The notion of ceding sovereignty behind the process of forming the European Union and community law, for example, is only possible thanks to political and legal decisions made on the State level. As affirms Sousa Santos, reforms implemented by the State beginning in the 1980s have been characterized by a high degree of transnationality (SANTOS 1997: 3). Only a strong State is capable of maintaining the financial goals stipulated by the European Central Bank, applying the principle of the primoatè even when the European norm contradicts constitutional precepts and implements reforms capable of adapting social

complexities to the new needs of the economy. The presumed theory that economic globalization presupposes a weakening of the State (BECK 1997: 52-56) is constantly refuted by the facts: "without a strong State," argues Campilongo, "the chances of being inserted into the new economy are minimal" (CAMPILONGO 2000: 120). The paradox of regional integration is that a reduction in the role of the State depends on its being strengthened. The same idea, obviously, applies to the Courts.

If it is true that the means – political and legal – are fundamental for implementing the regional integration plan, it is no less certain that this strategy has its own limits, negative consequences and disadvantages. The economic ends stipulated by supranational organs depend on political and legal action, but their results cannot be controlled by these means. They expose the economy to the errors and deviations that their decisions necessarily acquire due to contemporary uncertainty. This forces the economic system to constantly change its strategies for accomplishing the goal proposed by regional integration – distributing abundance and eliminating scarcity –, which entails expanding the demands and claims on the legal and political systems. The new demands increase the exposure to new mistakes: this circularity destabilizes the regional integration process. On the one hand, the political and legal systems become overloaded due to the intensification of the economic demands, and on the other, economic action is limited exactly because of this overload.

With respect to the political system, this overload presents itself in the form of excessive dissensus produced by regional integration, since supranational decisions transcend the representation formulas for interests exercised at the level of national governments: programs are applied which were not selected by the political process. On the other hand, the legal overload occurs through the practice of deconstitutionalization produced by the primoatè principle. This overloading blocks the functional and operative autonomy of the political and legal systems, which are determined by the economic interests of regional integration. Nonetheless, it is interesting to note that the rupture of political and legal unity creates difficulties and restrictions for the very economic system itself instead of producing the longing imposed by it. The process of political dissension and deconstitutionalization amplifies the damages produced by supranational decisions. It is sufficient to note, for example, the negative impact from implementing the unified European currency on the public opinion of each member country. In other words, it creates a legitimacy problem for the supra-state organizations. How can damages from a European Union decision be accepted if they are not directly in the interest of a national citizen and disrespect a country's own Constitution? A supranational decision of an economic nature is applied through politics and law at the cost of not observing the democratic process: how to legitimate these decisions and absorb their consequences?

3. Crises of legitimacy and attachment to values: the notion of a "European people" as a solution?

The use of politics and law as means for the economy – in other words, the attempt to colonize these two systems on the part of the economic system –, results in a legitimacy problem or, as it is called, a democratic deficit, for the supranational formal organization. National politics and law are submitted to an external logic that is arbitrarily imposed on procedures and institutions without considering two hundred years of democratic achievement. At first, the power of the European Parliament was increased in an effort to reduce its legitimacy deficit (Article 251 of the European Economic Community Treaty). The formula was simple: if the supranational organ, which is founded on the principle of universal suffrage, interferes decisively in the deliberative process, the acceptance of a supra-state decision would become natural as much on the part of the population as the national organs, because the community norm would be formed in the same way as the state norm – that is to say, based on the congruence of interests between the representative/represented. It was thought that through this disposition the autonomy of the political system would be restituted. But is democracy resumed to political representation? To the contrary, democracy is synonymous with the maintenance of complexity, the reproduction of alternatives. The political system presupposes a series of procedures, parties, institutions, unions, bureaucracies and organizations that act in the selection of the policies that will be adopted. These structures antecede parliamentary choice and in the electoral process are fundamental in defining who will be the government or the opposition. Which are the European parties? Who is the government or opposition in the supranational Parliament? The democratic deficit persists: why should the same decision be valid for an Italian citizen who chose the conservative right and a German citizen who, for his part, voted for the progressive left? The Parliament was adopted as an ideal, a democratic value, but the values are not enough, nor very operative. Procedures and institutions are needed to ensure the rules of the game and to keep politics, law and the economy separate from each other as a way of producing legitimacy.

From a legal standpoint, the solution to the democratic deficit decrease was equally a decision of valorative merit. It was believed that international human rights treaties ought to be respected in the decisions made by the European Community Court of Justice (PIOVESAN 2002: 54 and BAZO 2002: 242). This would allow the affirmation of rights in the ambit of supranational decisions and also legitimize deconstitutionalization, since the observance of personal dignity and human values would be present in each norm of community law. But which rights? What is the dignity of a human person? How can we establish priorities among human values? The European Community Court of Justice was created to ensure the adequate functioning of the European Union. A long list of laws without procedures and institutionalization are diluted in the exercising of this function.

Whenever a complex reality arises that produces descriptive confusion, an appeal is made to benevolent values, as if all problems could be resolved in this

way. The current discussion over the European Constitution emerges in this context. Its elaboration or non-elaboration is connected to the production of a European identity. The debate is concentrated into two antagonistic positions (ZAGREBELSKY 2003: V-XIX). On the one side, as proposes Dieter Grimm, it is understood that the absence of a consolidated European public sphere constitutes an obstacle to affirming a Constitution. An attempt of this kind would entail an increase in irresponsible bureaucratic power. Grimm therefore conditions the political and legal structures on the necessity of a common cultural, linguistic, historical and economic identity. In other words: a European people is needed to sustain a European Constitution (GRIMM 2003: 5-21). On the other side, Habermas, in a famous article Why the Europe needs a Constitution?, understands the European people not as a pre-political community but the result of an act of will – that is to say, as the fruit of an artificial decision, a political decision. It is the choice of those who want to establish a unit motivated by the common good. In this sense, the "people" would be built through the constitutional process: the Constitution would motivate the public sphere (HABERMAS 2003: 94-118). Both postures are based on the concept of a European people, on the idea of identity. They diverge only insofar as the moment: in the first position, "people" is the starting point; for the second, it is the arrival point. But what does "people" mean for the political system? How does society and particularly its partial subsystems operate with the notion of identity? What is the value of identity?

4. From bi-dimensionality to tri-dimensionality of power: overcoming the "people" value with the self-referentiality of the political system

Identity is only one side of difference and is not an absolute value. On the other side of difference we have difference; in other words, identity appears in modern society as one side of the identity/difference distinction. This means that one does not exist without the other, or better said, difference is a condition for the existence of identity. Fixing an identity depends on the capacity of differentiation acquired by that which is not part of the identity. It is the fruit of a constant reference to itself, which is only possible because it is not the other. These identities, however, are defined negatively (LUHMANN 1990a: 14-30 and ESPOSITO 1995b: 122-125). In this sense, society is an identity to the extent that it differs from the environment which surrounds it. Since the identity/difference distinction is not a static formula but susceptible to alternation, it is perfectly plausible that the condensation of an identity produces internal differences that can form into other identities and other differences. This is why subsocial system differentiates from society. These social subsystems, for their part, constitute an identity while differing among themselves. As can be observed, identity is neither – as is currently being discussed with respect to the European Union – a beginning nor an end in itself, but presupposes and is the product of differences. A European person

as an identity is a condition for eliminating its differences? What is a people: identity or difference?

"People," as Niklas Luhmann said, is a myth created in the 18th Century to justify political representation and the relations of power that formed at the inception of modernity (LUHMANN 2002: 333). People were considered the source, the guarantee of legitimacy and the foundation for the valid manifestation of political power. The formula was well known: "all power emanates from the people." But since it was accepted that the people could not govern themselves, it became necessary, as Montesquieu said, that the people do everything they were not able to do through their representatives (MONTESQUIEU 1996: 170). In other words: the people chose who should govern them. The unity of power obtained in such a fashion revealed a paradox whereby the people were at the same time sovereign and subject (LUHMANN 2002: 257). In this way it gave continuity to a conception of bi-dimensional and hierarchical power that was predominant in the stratified society at the time, where the social structure was divided into an upper and lower part. The theory of power in late modernity has repeated and reinforced this upper/lower differentiation through modern political institutions (LUHMANN 2002: 256). The stratification hierarchy was merely translated in to a hierarchy of orders in the political organizations: on the one side, representative; on the other side, represented (LUHMANN 1997: 61).

Bi-dimensional in these terms means the possibility of distributing and restricting political communication to only two poles – people and representative –, which are in turn guided according to the principle of hierarchy (LUHMANN 1997: 62). Such a perspective sees politics as something socially diffuse that is confused with other social spheres and not as an autonomous system of society. The power is extracted from a source – the people –, which then delegates the management of its interests to a political representative. The political power does not originate from politics but rather an external element (the people) which first acts as the order giver – upper stratum – so as to later obey – lower stratum – the representative. This hierarchy presupposes the identity, and not difference, between power and people. Under these conditions the political alternative are few and not very dynamic, since they are also limited to the upper/lower dichotomy. In other words, there is no level of complexity compatible with the contemporary structures of the political system. Identifying people with power is a simplification of the mechanism of modern power, which reflects political relations that are much closer to stratification than the modern concept of democracy.

In the political system, the passage from stratified to modern society is reflected in the substitution of bi-dimensional with tri-dimensional forms for communicating power (LUHMANN 1997: 61 and LUHMANN 2002: 255-256). Modern political structures are not reduced to a congruence between command and obedience as in the domination relation between the upper and lower stratum. They are separated into a tripartite differentiation between public, political and administrative. In this way they expand the sources of power and increase the complexity of the political system, which, guiding in accordance with its own elements, departs from the

external reference produced by the upper/lower asymmetry and attains autonomy in relation to external sources of power. More dependence is generated on the part of internal communication and greater autonomy is created in relation to environment. Each of the spheres – public, political and administrative – are internal political communications, differing among themselves but reciprocally interdependent. In other words: the political system is transformed into an identity to the extent that it differs from the rest of society and, in referring to it as such, is reproduced in other differences. This is the manner by which the political system acquires its self-referentiality in modern society.

Each of the levels of organization in the political system – public, political and administrative – play a relevant role in guiding the interaction of this system; that is to say, in forming its identity with respect to the environment. According to Luhmann, the public is not an organization per se but entails a process demanding a considerable organizational cost (LUHMANN 2002: 253) As can be observed during political elections, the public manifests itself as a vote; in other words, as an organized, reduced, procedural and self-directed complexity. It is not in fact organization, but it is also not chaos. It is an organized action capable of selecting the premises for politics, which, as an internal differentiation of the political system, prepares each decision that binds the collectivity. It characterizes itself as the political thought behind the decision. This influence in political procedure can only be exercised through an organization, such as, for example, political parties, associations and unions. It can also be present in the very administration, which, as the ultimate differentiated sphere, is the organization par excellence where binding decisions are made (LUHMANN 2002: 254-255). The great problem with the conception of power defined at the inception of modernity is that all this complexity was reduced to the "people" myth: it defined what was administration, what was political and what was public. There was no organizational separation among these spheres but an external determination of political power from the people through the figure of the representative (LUHMANN 2002: 256). Under the new conditions presented, political representation cannot serve anymore to legitimize political power through a non-political foundation for validity (LUHMANN 2002: 333).

Under the aegis of the theory of popular power, even though no organizational differentiation exists, the public, political and administrative circuit can be seen as a circular movement that obeys a hierarchical direction: the public, once synonymous with the people, chooses the politicians – called Parliament –, which, in turn, produces the laws or means for the administration – or Executive – to make the decisions that will govern the people (LUHMANN 1997: 64). The perversity of this hierarchical circularity is that the people as an abstract identity defines the operations of both the Legislative and the Executive and as such, submits the decisions to the collectivity. The abstraction of the "people" concept as the source of power binds the people to the decisions without respecting popular differences of a cultural, historic, economic etc. nature. In modern power, on the other hand, a simultaneous countermovement is established to the described circular movement

(LUHMANN 1997: 64-66 and LUHMANN 2002: 258) the administration produces proposals for politics that in turn suggests to the public through the parties who should be elected. The circularity of the dual direction is the result of separating the spheres within the political system (CAMPILONGO 2002: 90). The circularity and counter-circularity block the hierarchical order, destroy the distinction of sovereign and subject and consider the people, in any circumstance, to be a multiplicity.

5. People as an environment of the political system

To be established as an identity, the political system cannot coexist with the idea of a people as long as absolute identity or abstract value determines political relations.[3] "People" is difference, an excess of possibilities, hypercomplexity. There is no unity in people, but indetermination. Within "people" are many different points of view – rich and poor, educated and uneducated, healthy and sick. "People" is an environment of the political system[4]: it can irritate, disturb and influence the system but cannot conceive its internal structures. As we have already affirmed, popular political sovereignty paradoxically generates the submission of the people. The tri-dimensionality among public, politics and administration resolves this paradox because it allows the political system to form a network that refers only to its own elements and binds together all the information generated by the system itself. This does not mean that the operative closure of the political system produces cloistering. The system observes its environment and detects its demands, but only reacts to them according to its structures and operations. It is such that "people" should be interpreted: independently of politics. Only like this can there be no more subjects. If it is true that this perspective builds autonomous politics, it is also certain that it authorizes popular emancipation.

The public is the element of the political system most sensitive to the complexity present in the people. It can detect the individual problems and expectations that compose what is called the "people." Through political filters that select out this diversity, the public chooses popular manifestations in a political manner and translates them according to the political code. After this selection it influences policies, which in turn limit the administration. The administrative

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3 This would be a transformation of the ideal normative hetero-observation of the political system in self-observation of this system; in other words, using political philosophy to make political decisions. This possibility leads to a blocking of the autonomy of the political system, which cannot support this type of inversion. With respect to ideal normative hetero-observation, but in this case specific to the legal system, see NEVES 2004: 2-3.

4 Luhmann does not assume this posture explicitly, but he admits that through the concept of "people," the traditional theory justifies political representation from outside the political system (LUHMANN 2002: 333).

decisions then bind the public and produce effects on the people, who react in a nonpolitical manner. Obviously, the inverse effect or counter-circularity is produced simultaneously with this process. When the political power acquires autonomy, it liberates the people from the burden of the hierarchy. It encourages the recognition of differences and complexity, which are no longer reducible to a single absolute value. According to Luhmann, if, for traditional power, the hierarchical order can be expressed by the formula according to which People = Politics + Public + Administration, the circularity and counter-circularity of modern power reproduces the People/Politics/Public/Administration scheme (LUHMANN 2002: 257 -258). Differenthy from Luhmann, who according to this scheme includes people as another internal sphere of the political sistem, I prefer to redescribe the formula as follows: People ≠ Politics/Administration/Public. With this it can be demonstrated that the difference between people and the other elements is more salient because it (people) does not belong to the political system, as Luhmann otherwise suggests. This is the only conception of political power compatible with democracy, because – as affirms De Giorgi – it allows "the maintenance of a high degree of complexity while continually producing new decision possibilities" (DE GIORGI 1998: 41).

6. The European Constitution as a reconstruction of legal and political autonomy in the supranational sphere

Resuming the discussion with respect to the European Constitution, it is possible to affirm that the problem is less concentrated on the figure of the European people and more on the construction of procedures and institutions that create autonomy for the political system at the level of regional integration. The European people already exist. It is composed of a multiplicity, differences of all types: cultural, economic, social, linguistic, historical etc. In order to filter this complexity and stabilize it in the form of political decisions, it is necessary to establish a public, politics and administration in the supra-regional political system. Appealing to an identity for the European people as a solution for political problems would maintain hierarchical operations that are already being unconsciously practiced by the preeminence of the economy in the European integration process. The autonomy of political power – and this is also true for law – depends on the formation of an organization capable of processing political communication; in other words, always connecting internal and external references through internal operations. Only a political system with tri-dimensional differentiation among public, politics and administration can fulfill this function.

The creation of a European Constitution is fundamental for attaining political and legal autonomy in the face of the de-differentiation produced by the primacy of the economy in the supranational blocs. The Constitution is the form through which the political system reacts to its own autonomy: it requires a decision-making forum for each element of the tri-dimensionality. In this way it immunizes

itself from the power of external interventions like the economy, for example. The Constitution should be seen as an act that produces institutions and procedures which reinforce the circularity – and counter-circularity – of political power, and not as an appeal to the construction of an identity or European people. Viewed as a mechanism for creating institutions and procedures, the Constitution is also fundamental for the legal system because it introduces internal rules not just for applying the individual norms of law but also to produce the general and abstract norms of law.[5] In this way the legal system creates forms for controlling the intervention of money in its code and blocks the possibility of non-differentiation with its environment. In producing autonomy, the Constitution creates relations among these social systems. As separate units, politics, law and the economy can be linked without any pretension of colonization on the part of any of these systems. This is the function of the Constitution as a structural coupling: it connects the systems because it separates them. This is the form through which political and legal mechanisms could block economic interventions into the political and legal systems. In other words: it maintains the functional differentiation between law, politics and the economy in the regional integration process.

The Constitution is indeed important, but its relevance is not focused on constructing an identity or a "European people." As has been said, the people already exist. The Constitution is a fundamental instrument for creating a circuit of law and power at the level of regional integration, guaranteeing the legal and political interests of popular diversity: it blocks the imperialistic pretensions of the economic system As one can notice, the idea of structural coupling, inherent to the concept of a Constitution, is more important. Structural coupling are evolutional acquisition, are decisions product. Decisions are choices between alternatives. In the decision process, possibilities are rejected. For this reason, legitimating institutions and procedures are necessary. It is, from this perspective, that one can sustain the choice of a structural coupling formation instead of a frustrating search for identity or consensus. It seems that the current discussion about the European Constitution does not walk the path here defended. That is what shows in the disillusions of the French and Dutch "no"s and the consensus reconstruction policies used afterwards.

Regional integration involves generalizing the principle of inclusion in the economic system. This is a big evolutionary achievement for modern society. But since the economic system is incapable of executing a task of this size on its own, it resorts to the political and legal systems to further its pretensions. The major problem here is that this resource departs from the functional autonomy of each of these social systems. In essence, this is the current legitimacy crisis of the European Union, its democratic deficit. Contemporary political, legal and sociological theories attribute the reconstruction of the identities of law and politics

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[5] With respect to the Constitution as an element that paradoxically produces cognitive opening and operative closure for the political and legal systems, see LUHMANN 1990b: 176-220; NEVES 1994: 61-75 and CORSI 2001: 253-266.

to the value "people." Such an abstraction, however, says little about procedures and institutions capable of setting limits for economic excess. The European Constitution should be immersed in these concerns: creating legal and political power mechanisms that can oppose the hegemonic pretension of the economy at the level of regional integration.

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Civil Society Participation in Mercosur: Some Critical Points

Michelle Ratton Sanchez

Abstract

The Mercosur Council Working Program 2004-2006 (MERCOSUR/CMC/DEC n° 26/03) employs the term "civil society" with the purpose of increasing its participation in the institutional structure of Mercosur. As such an expression has never been applied in any formal document of that regional integration process, in this article firstly I intend to investigate the concepts related to "civil society" in Mercosur, identifying the groups of actors that have participated during recent years. The analysis also comprehends an evaluation of the Mercosur institutional channels for "civil society" participation, which might be revised according to Ouro Preto 2nd Round Decisions.

1. Introduction

Due to the increasing complexity of economic relations in regional integration processes, with more interaction between the productive chains and a greater scope and technicality in the regulation of social and economic life, new forms of representation and participation are required on the different levels of political decision.

Currently Mercosur is undergoing a process of questioning its economic and political viability. Among the factors that have been identified are its weak institutionalization and the poor social cohesion of the bloc. In this article I intend to analyze the relation between these two factors.

Decision No. 09/95 of the Common Market Council (CMC) – the Mercosur 1995-2000 Action Program –foresaw in paragraph 3.2 that: The strengthening of the integration process requires a more intensive participation on the part of society. To this end, the Joint Parliamentary Commission (JPC) and the Economic and Social Advisory Forum (ESAF) shall ensure the due participation of the sectors involved. After the Mercosur Relaunching Project in 2000 and its Institutional Strengthening Project in 2001, the 2004-2006 Mercosur Work Program was finally launched in 2003.[1] This work program defines lines of action

[1] For access to the official documents, see CMC Decisions: CMC/DEC/22/2000, CMC/DEC/23/2000, CMC/DEC/24/2000, CMC/DEC/25/2000, CMC/DEC/26/2000,

for affirming and expanding the integration project, articulating for the first time the idea of participation on the part of "civil society" (paragraph 2.1 of the 2004-2006 Mercosur Work Program).

Two points are worth noting in the mentioned documents: one is the fact that in the 1995-2000 Action Program reference is made to mechanisms for both representation (JPC) and direct participation (ESAF); the other point is the employment, beginning with the 2004-2006 Mercosur Work Program, of the term "civil society."

Attention is called to the use of the expression "civil society" in an official Mercosur document considering that a detailed search for its content: (i) defines the group of interests involved (and represented); and (ii) establishes lines to identify its interlocutors.[2] I understand that this exercise is essential when applying the concept of "civil society" in international or regional fora. In spite of there being a terminological coincidence with respect to the theory of the modern State, the political structure on which the new usage is based is distinct. Moreover, the term has been applied with specific content in each international forum.

Considering the proposal for revising the institutional structure of Mercosur – known as "Ouro Preto II" and which defines the participation of "civil society" as one of its central elements –, it has yet to be confirmed if the institutional reform indeed favors the participation of "civil society."

Though I recognize that the existence of a participatory culture is essential, it is also true that the creation of institutions encourages and ensures "civil society" participation.[3] In order to confirm this last hypothesis, in this article I intend to explore how mechanisms were created for the participation of actors other than representatives of the bureaucratic body of Mercosur member-States, and how such mechanisms have worked during last years. The purpose is to ally the identification of potential actors embraced by the concept of "civil society" with the existing mechanisms, as well as to demonstrate some critical points of that relation in Mercosur.

To this end, besides this brief introduction and the final notes, this article is organized around three other topics that seek to identify in Mercosur: (i) its institutional structure and the provisions for representation and participation mechanisms; (ii) some concepts related to the idea of "civil society" employed in the integration process documents and the concerned interests; and (iii) all forms of participation that have been admitted until today. In each of the following items, not only will the legal provision be analyzed but also the evolution of the tense

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CMC/DEC/27/2000, CMC/DEC/28/2000, CMC/DEC/30/2000, CMC/DEC/31/2000 and CMC/DEC/32/2000 (Mercosur Relaunching Project); CMC/DEC/01/2002 and CMC/DEC/16/2002 (Institutional Strengthening Project); and CMC/DEC/26/2003 (2004-2006 Mercosur Work Program). All available at <http://www.mercosur.org.uy>.

2 For example, a similar exercise was developed in SANCHEZ (2003) with respect to the use of the expression "civil society" in the negotiations process for the FTAA.

3 ALVIM (2000:59) and FESUR (2004:6 ff.) are works that defend a strong relation between civil society participation and institutional culture in Mercosur.

relation between "civil society" (in other words, different actors of a non-state nature) and the Mercosur institutions.

2. Participation and representation mechanisms in Mercosur

The processes of economic, political and/or social integration within a legal framework of a regional character – as per integration or community laws operate today – are relatively recent. In general, the historical process of the European Community and the creation of its institutes have been taken as a reference to analyze and justify similar phenomena. In spite of the particularities of each integration process, a common aspect among them is the fact of not replicating the constitution of the Nation-State, thus establishing new political institutes and responsive organizations.[4] This is the first assumption I take for the analysis in this article.

Besides that, current examples evidence that regional integration processes are not exclusively restricted to an interstate logic anymore (as with other intergovernmental fora). Therefore, the second assumption is that classic international law postulates might not provide the most adequate categories to explain those new institutes[5]

Both premises illustrate the difficulty in currently dealing with the question of the representativeness and participation of "civil society" in the international system – in this specific case, Mercosur. In Mercosur member-States, representativeness in intergovernmental fora has been based on the electoral system and the delegation of power in conducting the foreign policy negotiation and implementation.[6] On the other hand, the idea of participation comprehends the direct presence of actors other than those represented by the traditional politics of state bureaucracy.[7] Thus, as employed in this article, participation is not an

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4 In this respect, ALVIM (2000:44) emphasizes a difference between functional authority (for the regional integration process) and regional authority (for the State).

5 I use here the concept of classic international law founded on the Westphalian model, with an identification of international relations restricted to the interstate system; in other words, to actors endowed with sovereignty and, consequently, the acceptation of the State as the only actor for which international law grants personality. In this respect, QUOC DINH (1999:83 ff.)

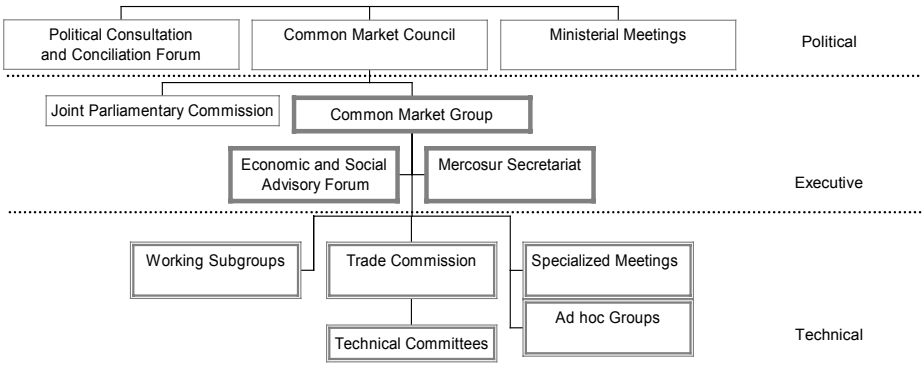
6 For a direct relation between the Westphalian interstate system and the idea of representation in international relations, see BATORA (2003).

7 With respect to this counterpoint, SHELL (1995:915) elucidates the relation between representation and participation in another intergovernmental forum – the World Trade Organization – when referring to the theories that such mechanisms are based on: "The WTO brings out the same tensions discussed in the civic republicanism literature between the traditional 'representative' model of governance, which in the WTO context relies on states to represent collective interests of their citizens, and the civic republican 'participatory' model, which seeks to expand deliberative processes to a broad array of

alternative to representation, but rather a complementary constituent for the incorporation of specific interests of the society.

In this respect, one particular characteristic of the direct participation in a regional integration process is the fact that, being based on the specific concerns of the actors involved, it acknowledges the presence of local groups, national leaderships and regional alliances on the regional mechanisms.[8] This means that different spatial dimensions and perceptions of the world may be recognized and considered legitimate by the forum.

The structure of Mercosur today organized around two hundred and fifty bodies, some of a permanent character and others ad hoc.[9] The basic and most important bodies to be analyzed in this article are listed in the organizational chart below, with an indication of whether their functions are primarily political, executive or technical:



Source: Elaborated by the author, based on the Ouro Preto Protocol (1994) and the organizational chart available at < http://www.mercosur.org.uy > in September 2004.

parties and interest groups so that 'all interests potentially affected by [an action will have] meaningful opportunities to engage in discussion about the action." I explored the question of participation and representation in the WTO and the negotiations process for the FTAA in SANCHEZ (2004:98 ff; 2003:213 ff.).

8 Such dimensions are here also brought to the State perspective, as municipal authorities in the integration process. In this respect, see the collection VIGEVANI *et al* (2004). These municipal authorities, thus, will not be included in the non-state actors group for the purpose of this article.

9 For access to the complete list of bodies existing up to 2003, see VENTURA (2003:678 ff.), Annex 3, Table 7. Updated information can also be obtained from the official Mercosur website (<http://www.mercosur.org.uy>) and the COMISEC - *Comisión Sectorial para el Mercosur* website (<http://www.mercosur-comisec.gub.uy>).

The structure of Mercosur was essentially defined in 1994 by the Additional Protocol to the Treaty of Asuncion on the Institutional Structure of Mercosur, otherwise known as the Ouro Preto Protocol (OPP).[10] In such structure representativeness prevails, especially with respect to the bodies having a deliberative power[11] (the Common Market Council, the Common Market Group and the Mercosur Trade Commission).

The Common Market Council (CMC), responsible for the political guidance of Mercosur, is composed of authorities at the Ministerial level. The Common Market Group (CMG), Mercosur's executive body, integrates four representatives from each member-State, among whom one is from the Ministry of Foreign Relations, one from the Finance Ministry and one from the Central Bank. Finally, the Mercosur Trade Commission (MTC), responsible for providing the CMG with technical subsidies; is composed of four representatives from each member-State and coordinated by the Foreign Relations Ministries together.

Note, therefore, that the deliberative axis of Mercosur is basically composed of representatives of the state bureaucracy who not directly elected by the citizens of the member-States. The only exception to this rule is the guaranteed participation of the Presidents of Mercosur member-States in the CMC meetings each six months (article 6 of the OPP).

The presence of directly-elected representatives also appears in the Joint Parliamentary Commission (JPC). However, as stipulated in the OPP (article 22 and followings), the JPC represents the Legislatures of the member-States and not their citizens. According to articles 25 and 26 of the OPP, the JPC is responsible for: (i) accompanying the integration of Mercosur's rules into the domestic legal systems and (ii) making recommendations to the CMC, through the CMG. Therefore, in the institutional structure of Mercosur, the JPC assumes a mere advisory role.[12]

A consulting role is also ascribed to the Economic and Social Advisory Forum (ESAF). This forum represents the "economic and social sectors" of each of the

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[10] Additional Protocol to the Treaty of Asuncion on the Institutional Structure of Mercosur (Ouro Preto Protocol), signed on December 17, 1994. The structure of Mercosur is defined in the first article of the OPP. The basic organization has been complemented with working and ad hoc groups over the past ten years, as admitted by the protocol itself. The Mercosur Secretariat was also modified from an Administrative Secretariat to a Technical one according to CMC Decision CMC/DEC/30/2002 dated December 6, 2002.

[11] The concept of deliberation applied here has a specific meaning restricted to the right to vote in the adoption of binding rules. The concept will be developed in more detail in item 4 of this article. To identify the binding rules for Mercosur, see article 41 of the OPP.

[12] In the 2004-2006 Mercosur Work Program, paragraph 3.1, reference is made to the intent of creating a Mercosur Parliament. However, even if a regional Parliament integrates the structure of Mercosur, for the concepts expounded in this article this would not be considered as a direct participation mechanism. Therefore, it will also not be the object of analysis in this article. As a counterpoint on the theme of Parliament as participation, see FESUR (2004:19 ff.) and PEÑA (2003a).

member-States (article 28 of the OPP), with the right to make recommendations to the CMG. According to the OPP, the ESAF is the only mechanism for the exclusive direct and participation of non-state actors. Participation in the ESAF is, however, limited to thirty-six representatives, with nine seats reserved for each Member state (it is not compulsory to appoint entities for all nine seats).

There are other possibilities of direct participation in Mercosur bodies not exclusive of non-state actors. Among them are the preparatory meetings for the Work Subgroups (WSGs) and respective Commissions linked to the CMG.[13] Currently there are fourteen WSGs distributed according to specific issues, and forty-five Commissions.[14] Participation in these bodies is limited to three representatives of the "private sector" per meeting. A similar provision is stipulated for the Technical Committees, which can request at any time advice from experts and consult representatives from the "private sector."[15]

Besides the provisions appointed above, empirical data shows that there are also bodies in Mercosur which admit informal and ad hoc input. Clear examples are the cases of the Specialized Meetings and the Ad Hoc Groups[16]. In considering that the provisions for the WSGs, the Specialized Meetings and the Ad Hoc Groups are all stipulated in Chapter VI, an extensive interpretation of the CMG Working Procedures allows the understanding that the provisions of Chapter VII with respect to the participation of the private sector are valid for all these bodies of the bloc (and not only to the WSGs explicitly referred). However, such an interpretation should also consider the participation in the Specialized Meetings and Ad Hoc Groups restricted to a preparatory phase for these encounters, with the limitation of three representatives per meeting.

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[13] Under the terms of the Working Procedures of the CMG, approved by a CMC Decision in 1991 (MERCOSUR/CMC/DEC04/91), chapter VII (articles 26 to 31), the WSGs and the Commissions organize their activities in: a preparatory stage and a decisional one.

[14] The provision for establishing WSGs is in article 13 of the Treaty of Asuncion. The WSGs in the current structure of Mercosur are organized under the issues: Communications (WSG1); Institutional Aspects (WSG2); Technical Regulations (WSG3); Financial Aspects (WSG4); Transportation (WSG5); Environment (WSG6); Industry (WSG7); Agriculture (WSG8); Energy and Mining (WSG9); Labor, Employment and Social Security Questions (WSG10); Health (WSG11); Investments (WSG12); Electronic Commerce (WSG13); and Economic Monitoring (WSG14). For more information on the WSGs and their respective Commissions, see the Mercosur website and VENTURA (2003:681 ff.).

[15] Cf. MTC Working Procedures (CCM/DIR/05/1996, article 18). The Technical Committees in the current structure of Mercosur are: Tariffs, Nomenclature and Classification of Merchandise (CT-1); Customs Issues (CT-2); Trade Norms and Regulations (CT-3); Public Policies Distorting Competitiveness (CT-4); Competition (CT-5); and Consumer Rights (CT-7). In this respect, see VENTURA (2003:687 ff.).

[16] The minutes of meetings of such bodies records the participation of non-state actors, what is not explicitly established by Mercosur set of regulation. For access to these documents it is necessary to consult the files of the Mercosur Secretariat *in loco*.

As per the description above, it is worth noting that in the composition of all Mercosur bodies there is always a concern for maintaining parity among the number of participants from each of the member-States. Such a criterion is applied to the formal mechanisms of both representation and participation. Up to now, there is no institute in the bloc that assumes or recognizes a regional logic in the decision-making process.[17]

In a few words, it is possible to note that the structure of Mercosur favors indirect participation with traditional representation from non-elected state bureaucracies. Mechanisms for direct participation are in a small number, being concentrated at the executive level and few at the technical level. Moreover, when it does occur, it has a restricted (limited number of participants) and, sometimes, informal character and often with neither transparent criteria nor clear procedures.

3. The concept of "civil society" in Mercosur and concerned interests

3.1 Terms related to "civil society" and usage in official documents

In order to analyze the operation of the participation mechanisms, it is important to first consider which non-state actors are recognized in the Mercosur decision-making process.

As already mentioned, the term "civil society" is not applied in the agreements, protocols and rulings of Mercosur.[18] A plurality of other expressions has been used since Mercosur constitution by the Treaty of Asuncion (TA), in 1991. Even though it is worth questioning whether the application of the concepts has adhered to a terminological rigor and an evaluation of the resulting practice in the bloc daily activities, it is important to develop this exercise. The objective is to co-relate the content of the expressions applied on the Mercosur regulation with the practice of

[17] A regional logic could be identified either (i) in the case of representative(s) named on behalf of the entire bloc to exercise a regional function or (ii) in the case of proportional representation for each member-State in order to attend to their economic/ social differences and particularities. Only in October 2003, it was established the Commission of Permanent Mercosur Representatives (CPMR) (as per Decision MERCOSUL/IVCMCEXT/DEC11/03). The CPMR is a Mercosur body that includes representatives from each of the member-States and a President. The position of President, currently occupied by Eduardo Duhalde (Decision MERCOSUL/IVCMCEXT/DEC14/03), is somehow related to the regional logic (i) appointed above. However, in spite of representing the unity of the bloc, the CPMR President has an eminently political function without any deliberative power or even the competence to participate in the decision-making process.

[18] Beginning in 1997, in some ESAF Recommendations the nomenclature "civil society" does appear. Even though the CMG shall recognize such Recommendations, the term starts to be used by the deliberative axis just after the 2004-2006 Work Plan.

its bodies, as well as identify still-pending demands for participation that can corroborate a definition of "civil society" in the bloc.

One of the most frequent expressions applied by official Mercosur documents is "private sector". This expression is found in the TA (article 14) and in some working procedures of Mercosur bodies, such as those of the CMG (article 26 ff.), the MTC (article 18) and the ESAF (article 3). The CMG Working Procedure is the only document that describes the meaning of the term: that which has a direct interest in any of the stages of the production, distribution and consumption processes (article 29).

Such a description is enough ambiguous to allow different interpretations. A restrictive meaning may consider as "private sector" groups directly related to the economic chain – that is, "production" for industry, "distribution" for retail and "consumption" for consumers. And, a broader interpretation may consider a broad array of any and all interest related to the production, distribution and consumption processes and it opens the possibility of including all and any group or individual in a capitalist society.[19]

The application of the term "private sector" in 1991 was more coherent with the objectives of Mercosur at the time, which was to first create a customs union. The TA had provisions for an integration restricted to the economic affairs in the region. Moreover, until 1994, a regional institutional structure did not even exist.

Nevertheless, in 1994, when the organizational structure of the bloc and the steps toward forming a common market were defined, the term "private sector" was still used. Its application has been reiterated in regulations passed by the CMG (1991), the MTC (1996) and the ESAF (1996). The application of the term "private sector" in these documents seems not to have been thought about or to have been a merely repetition of an expression already employed in earlier integration documents.

The application of the term "private sector" in 1994 contrasts with the new expression "economic and social sectors" introduced into the bloc regulation at that stage, as per article 28 of the OPP and article 1 ff. of the ESAF Working Procedure.[20] The ESAF working procedure illustrates the content of this expression: entrepreneurs, workers and other economic and social sectors (article 12.2). In principle, this new conception allows the recognition of a wider range of interests related to the integration process than the restricted interpretation of the "private sector."

Another term present in formal Mercosur documents that can refer to the concept of "civil society" is "private party": persons and/or companies with an interest in defending themselves under the Mercosur dispute settlement system (article 25 of the Brasilia Protocol and article 40 of the Olivos Protocol). The use of the term "private party" also does not reveal much in the way of terminological

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19 Aggregated to this broad interpretation, and not coincidentally, is the understanding that the term "private sector" is composed of everything that does not have a state component.

20 Cf. CMG Resolution approved on June 20, 1996, MERCOSUR/GMC/RES68/96.

precision, since requesting a consultation can involve a person and/or company, either individually or collectively. However, I will examine this mechanism here as the participation of "private party" occurs before the National Section of the CMG and the presentation of the demand is made on behalf of the State, what is not part of the nucleus axis of concern in this article.[21]

3.2 Empirical application of the terms: limits and critical points

A complementary exercise is the analysis of how the Mercosur bodies have applied those legal definitions during last years. That is, to identify (i) which actors effectively participate in such mechanisms and (ii) which other actors do not currently participate due to current institutional limitations (pending demands).

The ESAF started its activities in 1996, with in a first moment predominantly representatives of the "economic and social sectors" in the meetings: representatives of national business associations (industrial and agricultural) and labor unions.[22]

Upon the development of the ESAF activities and new negotiations in the bloc, other non-state actors started having an interest in participating. This demand thus provided consistency to guaranteeing the right of participation from "other economic and social sectors," as foreseen in the ESAF Working Procedures (article 12.2).

An important point in the composition of the ESAF is that the National Section of each member-State must select according to its internal particularities, the economic and social sectors that will comprise it (as per article 3of the ESAF Working Procedures). The only common rules to all National Sections are the following: (i) the actors enrolled must be the most representative of the sector at the domestic level, (ii) parity in designating representatives for labor and business organizations and (iii) the limited number of delegates (nine) for each Section (articles 3.1 and 6.2 of the ESAF Working Procedures).

Discretionarily, each National Section defines its own working procedures, including form of organization and composition. Their articles of incorporation and the working procedures shall be registered with the ESAF, in order to make them

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[21] This exclusion is justified in order to concentrate on analyzing the decision-making process. The participation of civil society in the Mercosur dispute settlement system might be analyzed in a separate study. Though such mechanism has a traditional inter-State character, it does not prevent the participation from "civil society" in it. An example of this is the practice of amicus curiae in other intergovernmental fora dispute settlement system, as is the case of the WTO. In this respect, see DUNOFF (1998), SHELL (1995) and SANCHEZ (2004).

[22] For a list of non-state actors that participated in the first ESAF meeting in May 1996, see Appendix (Table 1). More details on this meeting can be found in SEIXAS *et al* (2000:21 ff.).

available to all Mercosur members.[23] However, in their rulings, the National Sections have neither defined uniform criteria for selecting the national actors nor indicated similar procedures for their decision-making process.[24]

Such incoherence among the National Section regulations suggests potential dissonance in the overall participation in the ESAF. Of which an initial possible difficulty is that in selecting the representatives: the profiles of the actors enrolled might be different, above all with respect to their areas of activity (especially when selecting the undefined "other economic and social sectors").

The few uniform criteria among the National Sections are also problematic in themselves, be it due to their precariousness in dealing with a complex organization of the society in the Mercosur region. The criterion of national representation limits the participation of actors with a relevant influence at the local level or those derived from regional alliances (on the Mercosur region). Moreover, in the Mercosur member-States, national representativeness is a very sensitive concept since all four members have their population concentrated in a few urban centers.[25]

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[23] Cf. article 25 of the ESAF Working Procedures. The National Section for Argentina was created in December 1995, Brazil's and Paraguay's at the beginning of 1996, and the Section for Uruguay in November 1995. The Regulations for each of the National Sections have undergone changes in recent years. For more information on the creation of the National Sections and the difficulties in their establishment and organization, see PADRON (n/r); for access to the Working Procedures of each Section, it is necessary to consult the files of the Mercosur Secretariat *in loco*.

[24] The institutional structure of the National Section for Argentina in the ESAF is composed of a Plenary Session, Coordinating Bench and Advisory Bodies (article 5 of its Working Procedures); Brazil's Section has a Plenary Session, International Representation Committee, Coordinating Bench and Advisory Bodies (article 4 of its Working Procedures); Paraguay's Section is composed of a Plenary Session and Coordinating Bench (article 12 of its Working Procedures); while Uruguay has a Plenary Session, Executive Council, Deliberative Board and Advisory and Administrative Support Bodies (article 5 of its Working Procedures). In principle, the structure does not seem to cause problems. The dilemma is the composition of each of the National Sections' bodies and their procedures for deliberation, which, among other consequences, affect the representativeness of the different sectors in each Section's decision-making process. Other details on the ESAF National Sections are listed in the Appendix (Table 2).

[25] In the case of Argentina, 7.6% of its population lives in Buenos Aires; in Brazil, of the 169,799,170 citizens, 24,333,465 (14.3%) are concentrated in two metropolitan areas (São Paulo and Rio de Janeiro), both located in the Southeast region of the country; in Paraguay, 9.8% of the population lives in Asuncion; and in Uruguay, 42.5% of its population resides in Montevideo. All these data are available at the websites of the official statistical agencies: INDEC (Argentina), IBGE (Brazil), DGEEC (Paraguay) and INE (Uruguay). Those regions and cities become the main economic centre(s) of each Mercosur member-State. As a result many of the entities representing the "economic and social sectors" are located in specific areas. Thus, it is possible to question how much

The criterion of national representativeness defined by each National Section can also favor elitist representation, and it might not be sufficiently flexible to allow the recognition of new actors interested in participating in the regional decision-making process.[26] Greater flexibility could favor an expansion of the number of eligible actors, thereby increasing the diversity of points-of-views in Mercosur institutional bodies.

The second criterion of uniformity (parity) has nevertheless not been respected by most National Sections (Uruguay is the exception). This is reflected in the working procedures of the Sections and the ESAF's minutes. It should be emphasized that the Working Procedures of the four National Sections make reference to the parity criterion. However, such criterion was not foreseen in the composition of the founding-institutions board of the Brazilian, Paraguayan and Uruguayan National Sections, having their Working Procedures registered a disproportion favorable to entities representing entrepreneurs in relation to those of workers.[27] Besides this, it remains the problem of no-minimum quota for the representation of the "other economic and social sectors", in each of the National Sections.[28]

The quantitative restriction for each National Section also raises the criticism that the mechanism does represent the bloc or even the diversities existing among each of the member-States (domestic and foreign differences in relation to each other), especially with respect to economic and social participation in the composition of the bloc. There are examples of other intergovernmental fora that establish criteria for meeting such diversity, as is the case of the European Economic and Social Council, which establishes a formula based on the population of each State in composition with a single coefficient,[29] or the example of agencies

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such entities might represent the complexity, as well as the diversity and extension of a broad array of structures that may exist in those States (beyond those centers).

26 The National Sections made that criteria event more restrictive, when appointed in their Working Procedures some permanent representatives before the ESAF. In order to substitute any of these entities, their regulations have to be amended. Cf. Appendix (Table 2).

27 In the case of the Argentinean National Section, for example, the founding entities include three business entities, one for workers and one for consumers; in the case of the Brazilian one, four are entrepreneurial, three are for workers and one is for consumers; and for the Paraguayan, five entities are for entrepreneurs, three for workers and one for cooperatives. The only National Section that has been more coherent is that of Uruguay, which establishes in article 14.1 of its Working Procedures four seats for institutions representing entrepreneurs, four for institutions representing workers and two for other sectors. More details in the Appendix (Tables 1 and 2).

28 As there is no criterion to "other economic and social sectors", the National Sections have admitted the participation of other business entities (such as associations for insurance companies, cooperatives and the agricultural sector) under this category. This data accentuate the disproportion on the representativeness of the different sectors mentioned above, again favoring entrepreneurs.

29 For more information, see CESE (2003) and additional data at <http://www.esc.eu.int>.

like the United Nations Conference on Trade and Development (UNCTAD), which seeks to promote regional balance (geographical diversity) in participation.[30]

In addition, other non-state actors than those active at ESAF also participate in other intergovernmental fora related to the theme of economic cooperation, such as the ministerial conferences and meetings of the World Trade Organization (WTO), UNCTAD, and the negotiations for the Free Trade Area of the Americas (FTAA). In these cases, there are not so strict pre-established criteria for the selection of the non-state actors, as for a national section or the requirement of representativeness with a national scope or the obligation of a minimum delegation for each State. Participation in these other fora results from specific interests on the issues under negotiation and/or the co-relation between the activities of the entities and those of the intergovernmental forum.

A surprising observation is that the participation in these other fora – in comparison to the ESAF – largely involves entities that are distinct from (or beyond) those in the Mercosur forum.[31] There are many reasons for participating in other international fora and not in Mercosur; one of them might be the formal limitation on participation in the ESAF.

Although there are problems on the starting points of the National Sections, since the launch of their activities in 1996, their composition and representation in the ESAF has changed.[32] Currently the profile of entities comprising the National Sections is quite similar, consisting basically of: industrial and agricultural confederations (as representatives of business), labor unions (workers' representatives) and as representatives of other sectors, cooperative and consumer associations, with occasional exceptions.[33]

Based on an analysis of data on the ESAF mechanism, we can note, however, that some actors which were not on the initial list for the National Sections later demanded the right to participate, among them entities representing cooperatives,

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30 Cf. ICTSD (1999:9). Additional information at UNCTAD website: <http://www.unctad.org/>.

31 The lists of non-state actors from the Mercosur region that attended the ministerial meetings and conferences for the aforementioned fora are available at FTAA, WTO and UNCTAD XI websites: <http://www.ftaa-alca.org/spcomm/commcs_e.asp>, <http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm>, <http://www.unctadxi.org/sections/u11/docs/105_CsosAccredited_en.pdf>. Data on the number of actors in these fora and the proportion in relation to the total population of each member-State are highlighted in the Appendix (Table 3).

32 A list of the founding entities for each National Section is in the Appendix (Tables 1 and 2).

33 This observation reduces criticism of potential incoherence in the ESAF, but nonetheless corroborates complaints relative to an elitist tendency on the part of the National Sections. For a list of entities that currently comprise the ESAF, see the Appendix (Table 1).

insurance companies and insurance brokers, and some universities.[34] For the latter, it is possible that specific interests with respect to negotiation themes and/or research projects encouraged the demands. In the case of the cooperative associations, the interest demonstrated does not seem to be related to a specific theme but rather insufficient representativeness on the part of previously-registered producers' associations.[35] There are also pending demands such as from stakeholders for environmental and gender issues.[36]

The interests that fuel demands for participation can be diverse; what is important is to note that in many cases participation in ESAF meetings has been sporadic. Such distancing from the ESAF's activities by some actors allows the formulation of certain hypotheses: (i) focused interest in a specific negotiation; (ii) lack of human or financial resources to attend the ESAF meetings; (iii) satisfaction with other forms of participation or even representation in the bloc's decision-making process. These hypotheses do not invalidate one another. A combination of these and other factors might have contributed to the decision not to participate and should be taken into consideration when revising the participation mechanisms for "civil society" in Mercosur.

Notwithstanding the organizational fragilities of the National Sections, their formalization has been a great advance in foreign policy procedures of the Mercosur member-States. The formalization evidence the elitism usually present in the formulation of foreign policy and it able anyone to identify the actors, who, lacking formal mechanisms, would normally operate through the lobbies and personal acquaintances.[37]

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[34] For more details, including the identification of other demands, see the Appendix (Table 1). VIGEVANI (1998:332) pointed out the risk of questioning this limitation for participation mechanisms in the institutional structure of Mercosur.

[35] Such a case reinforces the previously-demonstrated hypothesis on the ESAF's operation and its composition: the insufficient or restricted procedures for the selection of entities qualified to participate by the National Sections.

[36] With respect to the pending demands, see ABONG, ALOP, MLAL (1998:32) and MELLO (2001). According to Fátima Mello, an international relations advisor for FASE and a member of REBRIP – a Brazilian movement with growing interest and participation in international negotiations –, the initiatives presented so far by these movements is still at a very initial stage. At the time this author expect that in the near future some Brazilian NGOs shall obtain approval for a seat on the ESAF. Cf. MELLO (2001:11).

[37] Working the idea of direct participation in an intergovernmental forum require also an analysis of the traditional lobbies, as a form of influence for the elite in the foreign policy of each State. It is important to note that, as for participation and representation, participation and lobbying are not exclusive mechanisms. In this respect, REALE (2003:13/14) distinguishes the particularities of each mechanism: "In the attempt to qualify the model implemented at the European level of participation of social partners, several authors have not hesitated to qualify it as openly 'corporatist' or 'protocorporatist'. The pragmatic acceptance of functional interest-representation in policy-making is in fact a main feature of corporatist systems. While lobbying is intended as a mechanism of interest articulation in a system based on open competition,

Besides the ESAF, there are also other Mercosur bodies that, although equipped with formal provisions, lack criteria and more explicit procedures for participation. As indicated above, such is the case of the WSGs, the Technical Committees, the Specialized Meetings and the Ad Hoc Groups. It is possible to identify the presence of non-state actors in the meetings of these bodies from their minutes. Up to now, there were participants with different profiles, such as isolated companies, associations of companies, industrial and agricultural confederations and union representatives. These entities participate according to their interest or the speciality and the topic of work being developed by the body. It should also be mentioned, nevertheless, that perhaps due to the fact that this participation lacks explicit rules it is not possible to know with certainty all of the non-state actors that might have attended such meetings, nor the procedures by in which such participation was admitted.

It is interesting to note that international civil servants of other intergovernmental organizations and functionaries of non-Mercosur States have attended in some meetings of Mercosur bodies either.[38] Taking into account such participation, it comes the question if such actors could not also be classified as of a non-state character (due to the fact that they do not represent the bloc's member-States but rather another set of actors in a participative system) This question has a provocative purpose, in order to merely illustrate the complexity of global relations and the difficulty in appointing the legitimate actors to participate in international fora nowadays. Though mentioned, such actors are not part of the analysis in this paper; one of the reasons for this is my central concern with actors from the Mercosur region.

3.3 Synthesis and observations

After the exercise of identifying the terms used in official Mercosur documents and their application in the bodies that allow participation, it is possible to draw some generic lines regarding the relation of these practices to a concept of "civil society" for the bloc, as well as some of the current difficulties to have a normative definition for "civil society".

Of the different terms applied in Mercosur norms (" private sector," "economic and social sectors," "other economic and social sectors," "sectorial groups" and

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in the corporatist view the integrated participation in public decision-making is realized through a small number of interest associations." (footnotes omitted). The recent transformations in the intergovernmental fora have, besides participation, also promoted direct lobbying in the intergovernmental mechanisms. In this respect, the article by BÖRZEL, RISSE (2000) develops this analysis reporting the influence of these new interaction levels on the domestic policy of each State.

38 Among the intergovernmental organizations represented are: the World Health Organization (WHO), UNCTAD and the International Labor Organization (ILO). For a list of such organizations that have attended ESAF meetings as observers, see the Appendix (Table 1).

"private party") and the empiric experience of the past decade and a half, the objective of defining criteria or elements to identify a "civil society" for the bloc at this time does not seem to be an easy task.[39] Some of the reasons presented above can be synthesized into: (i) the variety of concepts applied; (ii) no strict terminology correlation with the set of actors involved; (iii) pending participation demands; (iv) the lack of objective and uniform criteria in the National Sections to select entities capable of participating in the mechanisms of the bloc; (v) the absence of concepts and methods that recognize the participation of actors of a local and regional character; and (vi) the lack of a regional and/or national mechanism to promote the participation of new actors (in order to avoid elitism and to identify potential actors with an interest in participating in the regional decision-making process[40]).

Due to all those reasons, and bearing in mind the current criteria and their shortcomings, it can be concluded that in order to integrate a broader conception of the participation of "civil society" a revision of the criteria for selecting actors to participate in the decision-making process is essential.

It is possible to observe that the conceptual precision for defining the actors of a non-state character might also be related to the type of mechanism that admits direct participation. For this reason, the forms of participation allowed in the bloc constitute an element of very important analysis. Since there could be more than one form of participation in more than one mechanism of the integration process, it could also be necessary to apply more than one concept in a single integration process in order to identify the interests and actors according to the respective mechanism and its level of activity political, executive or technical.

4. Forms of participation in the Mercosur decision-making process

Based on methodology already applied in some of my previous works,[41] I identify four possible forms of participation in intergovernmental fora, which are:

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[39] This is a crucial point on the participation of "civil society" and its different interest groups in intergovernmental fora, being a recurring issue in non-state actors demands. For some analyses, see ABONG (2004), UNO (2003).

[40] It should be noted that the problem of elitism or even the restrictive profile of "civil society" defined by the participation criteria in mechanisms for intergovernmental fora is not limited to Mercosur. For an example of this issue in the European Union, see REALE (2003:16): "Magnette holds that the involvement currently fostered is based on an extremely limited conception of participation, dominated by the monopoly of organized groups (and the social partners are among them) and not by the idea of 'enlarged' participation to ordinary citizens. Moreover, the involvement of citizens and groups currently envisaged is limited to defined procedures, without enhancing the 'general level of civic consciousness and participation'" (footnotes omitted).

[41] In this respect, see SANCHEZ (2004, 2003).

information, consultation, cooperation and deliberation. I will briefly describe their conception in order to afterwards identify the forms of participation currently admitted in Mercosur.

Information is a unilateral process, by which there is a manifestation of one institution in relation to another (in this case, from Mercosur to civil society or vice versa). Consultation, cooperation and deliberation, on the other hand, are based on the active performance of all the agents involved. Consultation is a two-sided relationship conducted for specific topics or questions and cooperation involves a more permanent and intense degree in the interaction. Deliberation, *stricto sensu*, has a direct relation with the right to vote, which in Mercosur is restricted to representatives of the state bureaucracy (the deliberative axis). For this reason deliberation is not the object of analysis in this article. Of the four ideal-types, the first three forms of participation can be part of the decision-making process, with information considered a requirement for any form of participation[42] and deliberation synthesizing the relation between all the others.

Just as with the previous item, the order of analysis is first the provisions in official Mercosur documents for each of the forms of participation and after the evolution of each in recent years.

4.1 Information as a condition for participation

Due access to information implies that, when provided, it contents be: complete, objective, reliable, useful and easy to find and understand. It is also important to aggregate to these elements the idea of predictability with respect to when and where to find the information.

In an integration process, information can be assured by the publication of documents and works developed by the organization, as well as by access to meetings and events promoted through its institutional structure. In the case of Mercosur, neither the TA nor the OPP include a principle of integrating public access to information on intergovernmental actions and decisions.[43] What does exist in the bloc are specific dispositions related to the idea of information in Mercosur agreements and official documents, besides certain mechanisms that have been developed from practice.

In principle, under the terms of article 15 of the TA and articles 31 to 33 of the OPP, the obligation to render information seems to be concentrated in the Mercosur Secretariat. According to article 32 of the OPP, the duty to render

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42 In this respect, see PEÑA (2004, 2003).

43 The term "external transparency" should be applied to this form of transparency, as opposed to the idea of "internal transparency." The latter refers to transparency among Members of the bloc and their mechanisms. An example of internal transparency in Mercosur is the possibility of representatives of Mercosur bodies and employees attending meetings of other bodies in the institutional structure of the bloc. In this respect, see articles 12 and 29 of the OPP and articles 2 and 7 of the ESAF Working Procedures.

information is limited to: (i) maintaining an official Mercosur database; (ii) publishing and divulging decisions adopted in the Mercosur institutional structure; and, (iii) editing the Mercosur Official Bulletin. Beyond these, the Secretariat produces a periodic report on its own activities; but since it is an operational support body for the CMG, the report may or may not to be published as decided by the CMG.[44]

On the Mercosur electronic page maintained by the Secretariat, legal documents of the bloc are available (the TA and its protocols, CMC Decisions, CMG Resolutions and MTC Guidelines), besides some agreements signed between Mercosur and other international organizations. In addition, the minutes of meetings held by the deliberative axis (the CMC, CMG and MTC) are also made available.

What usually occurs, however, it is an incomplete publication of these documents. For example, a large number of them do not contain their annexes, according to the original information.[45] Furthermore, the minutes of the other bodies are not available at Mercosur website (not even the bodies that count on direct participation like the ESAF, the WSGs, the Committees, the Specialized Meetings and the Ad Hoc Groups). The publication of these minutes could entail a possible form of control by "civil society" in relation to the other non-state actors that actively participate in the available mechanisms.

The result of partially publishing information (of each of the minutes and all the minutes of the Mercosur bodies) has been to increase the degree of difficulty in understanding the content and, possibly, the consequences that each of the decisions may have on the integration process and even economic and social relations at a national level.

The Mercosur Secretariat also publishes a schedule of meetings and the Mercosur Bulletin on its website. However, once again, such information is made available disconnected one from another, generating a low degree of trust and cognition. The schedule of meetings often contains an indication of provisional dates "to be confirmed" –even for meetings that should have already occurred – and in the case of the bodies in the deliberative axis, the expected agenda for each of the indicated meetings is also not published. Notification of the agenda and publication of the deliberations are only divulged to bodies which are dependent on that axis, on a post hoc basis.[46]

The Mercosur Bulletin, which is expected to be a periodical with information on all the activities in the bloc's mechanisms, contains in fact quite a restricted

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44 Cf. articles 14.XIII and 31 ff. of the OPP.

45 The CMG minutes and their annexes (including a list of who attended the meeting) must be published, as stipulated in article 9 of the CMG Working Procedures. Nevertheless, this obligation is not honored.

46 For example, in November 2004, the information available (basically work programs and negotiating agendas) were of activities that took place almost a year earlier (. In this respect, see Mercosur website (< http://www.mercosur.org.uy >). For criticism on this specific point, see PENÃ (2003b:8 ff.).

content,[47] besides its printed version having a very high cost.[48] Moreover, until now the Bulletin has not been published with a defined periodicity, which hinders the logic of information in the printed Mercosur material, as well as a monitoring of the bloc's work based on an official information for the general public.

The high costs of the printed version of the Bulletin result in more accessibility to information by electronic means (Internet). However, this may be also considered a restrictive factor in access to such a type of participation for civil society in Mercosur, especially considering the socioeconomic conditions in the region and the level of digital exclusion in its societies.[49] Mercosur until today has never launched a campaign for information about its bodies and activities to the broad public (or "civil society").

In addition to information rendered by Mercosur Secretariat, there are legal provisions conferring the responsibility for spreading information to each Member's National Section, which includes the elaboration of studies and the organization of seminars and events.[50] Finally, another form of obtaining information can be the direct participation in ESAF meetings as an observer (i.e., without the right to speak) (art. 6.5 of the ESAF Working Procedures).

From this brief description, a number of obvious deficiencies in the rendering information by the institutional structure of Mercosur can be identified: the information is not complete, objective, coherent within itself (or even useful) nor easy to obtain. And there is no way of controlling when the information might be made available for access. Another flaw is the absence of explanatory works and reports in accessible language on the integration process and its official documents.

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47 The limitation on content in the Mercosur Bulletin is due to a legal restriction. According to article 39 of the OPP, the Bulletin should contain MTC Decisions, CMG Resolutions, MTC Guidelines and Arbitration Awards. Other information can be added, if and only if, the MTC or CMG believe it necessary to attribute official publicity. Observing this rule, the ESAF can also ask the CMG to publish its Recommendations (article 19 of the ESAF Working Procedures). In this respect, see the request by the ESAF to publish its Recommendations in the Bulletin at a joint CMG/ESAF meeting, cf. CMG XXXV/Ata 03/99, which did not receive an effective answer from the CMG.

48 The cost stipulated for acquiring a copy of the Bulletin varies between US$20 and US$80 for versions from 1991 to 2000, in the event the interested party resides in the member-States. Cf. Mercosur website (< http://www.mercosur.org.uy >).

49 In Brazil, for example, according to the "digital exclusion map" published by INTEGRAÇÃO (the electronic magazine of the Third Sector): only 12.46% of the Brazilian population has access to computers and only 8.31% is connected to the Internet. For access to the magazine's content, see <http://integracao.fgvsp.br/ano6/06/pesquisas.htm > (last visit in November 2004).

50 See, in this respect, the ESAF's National Sections Working Procedures: Argentina (article 2.V), Brazil (article 2.II), Paraguay (article 5, (e)) and Uruguay (article 2.VI). This information must be directly obtained in the National Section for each of the member-States. In the case of Brazil, there is no official document with respect to the National Section and its activities that can be easily accessed by the public (see, for example, the Foreign Relations Ministry's page on the Internet).

The providing of information today in Mercosur is essentially limited to an incomplete database in electronic format.

In conclusion, due to the fact that transparency is not a principle of the integration process nor is the duty to provide it explicit in the legal regulation of the bloc, in the current institutional structure there is no mechanism of control or through which information can be collected by actors who may eventually integrate "civil society."

To complete the cycle of information as a form of participation, it is necessary to also consider two other possibilities: (i) that the different actors in "civil society" have a mechanism for communicating their positions and considerations about the bloc and its activities to the institutional framework (mechanisms known as "resonance boxes" in the institutional structure)[51] and, furthermore, (ii) that the bloc's bodies can actively request information to develop their works, from any of the entities in "civil society."

With respect to the first possibility, there is no structure in the bloc that allows this type of communication (and when it does occur, it is usually informal).[52] For the second possibility, there are some dispositions whereby some bodies can request information from specialists or actors in "civil society," such as: the Technical Committees (articles 17 (b) and 18 of the MTC Working Procedures), the ESAF (articles 20 and 21 of the ESAF Working Procedures) and the WSGs (article 27 of the CMG Working Procedures). In a more systematic manner and with mutual participation, the solicitation of information can acquire the character of consultations. Notwithstanding, from the minutes of the meetings it is not possible to identify whether this information had been requested before in the decision-making processes of these bodies.

4.2 Consultation as a proposal for dialogue

Consultations can be held on specific themes in order to obtain opinions and positions from representatives of some sectors, as well as technical advices. Three different conceptions can be identified as consultation mechanisms for "civil

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[51] In this respect, PEÑA (2003b) supports the creation of an ombudsman position in the structure of the bloc: "La puesta en práctica de esta idea podría comenzar, en forma experimental, con la apertura de un espacio de 'quejas y reclamos' en la página Web oficial del Mercosur, el embrión de una especie de 'ombudsman' electrónico. Un funcionario de la Secretaría Técnica debería, en tal caso, tener a su cargo la derivación de los reclamos a las instancias nacionales correspondientes y el reclamante debería poder seguir por la página Web el estado del proceso de eventual respuesta."

[52] As an example of how this has developed in other intergovernmental fora, there is the possibility of receiving position papers in the negotiations for the FTAA [cf. SANCHEZ (2003) and the official FTAA website] and also the WTO and the NGO Room, which provides with discussion fora, posting of position papers and activity reports from actors of a non-state character [analyzed in more detail in SANCHEZ (2004), with information available on the WTO website].

society" groups in Mercosur: (i) the actual operations of the ESAF (which includes the works of each Member's National Section and voluntary recommendations made by the ESAF to the CMG); (ii) the consultation provisions of the other bodies with respect to the ESAF (as the representation of "civil society" in the bloc's structure); and (iii) the possibility of direct consultations made by Mercosur bodies to any entities of "civil society."

As shown previously, in the ESAF mechanism there are specific dispositions in the Mercosur agreements with regard to how its activities should be organized. In principle, part of the activities is developed in the National Sections and should be presented in a report to the ESAF before each joint meeting. Based on the practice in recent last years, it can be observed that not all Sections communicate their activities and, when they do, they rarely follow minimum standards for describing their activities[53] in order to permit a monitoring of the dynamics of each one's work and its influence in the ESAF's deliberations. It can also be noted from the minutes that in all of the National Sections there is an internal work division according to thematic and sub-sectorial interests.

Besides this dynamic in each National Section, the ESAF Working Procedures also admits the possibility of forming sectorial groups for studies and discussions on themes of specific interest (article 12.2).[54]

According to the operating dynamics stipulated in Chapter V of the ESAF Working Procedures, the forum holds a Plenary Session at least once every six months. Before each meeting, the coordinating National Section shall notify the other sections of the planned agenda for the Plenary Session at least fifteen days beforehand. And, the ESAF's decisions shall be adopted by consensus; in the event this is not possible, all divergent positions are subsequently forwarded to the CMG (articles 15 and 16 of the ESAF Working Procedures). Another point worth highlighting is that the costs of participating in the ESAF meetings are the

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[53] There is a certain inconstancy in the providing of information on the part of each National Section. The first communication was presented in writing by Argentina at a meeting in December 1997; during the following years one or another Section presented a report and only in 2002 and 2004 did all of the Sections fulfill the commitment to present reports on their activities.

[54] In this respect, an ad hoc Commission Report on the operations of the ESAF in October 1998 proposed the creation of four thematic areas: Consolidation and Improvement of the Customs Union, Deepening the Process of Integration, Foreign Relations of Mercosur, and Social Aspects of Mercosur. One of the paradigmatic cases was a verification on the part of labor unions that the logic adopted by the National Section could favor a consensus with entrepreneurs; after this, the Southern Cone Labor Union Coalition (CCSCS) proposed a coordination of the ESAF's works by sector (entrepreneurs, unions and social organizations). Regarding such a proposal, see PORTELLA (2000) and VIGEVANI, MARIANO (1999:230). Furthermore, this manifestation works the idea of giving a regional character to different interest groups in order to strengthen their alliances in the integration process and their position with relative autonomy with respect to their States. For a detailed description of the trade union movements in Mercosur, see VIGEVANI, MARIANO (1999:223).

responsibility of each of the non-state actors (article 23 of the ESAF Working Procedures).[55]

Through a decision by the Plenary Session, the ESAF can also allow observers selected by the National Sections to manifest orally at its meetings (articles 6.5 and 8.V of the ESAF Working Procedures). This form of participation can also be typified as consultation by the ESAF with other non-state actors.

Besides its internal dynamics, with the participation of actors selected by each National Section, the ESAF can also promote consultations with national or international and public or private entities to develop its functions (articles 2.VI and 20 of the ESAF Working Procedures).

Based on the ESAF's works, its members may formulate recommendations to the CMG. In principle, a strict interpretation of the ESAF's function, as established on article 29 of the OPP, would lead to the conclusion that the forum could only articulate written opinions when consulted by the CMG. However, article 2.I of the ESAF Working Procedures defines that the forum can manifest on any theme within its competence,[56] be it through its own initiative or consultations with the CMG or any other Mercosur body.[57] The terms of the Working Procedures extends the possibility of consultations by ESAF within the structure of the bloc and also guarantee openness on the part of the ESAF when invited to participate in the meetings of other body's (such as the CMC and CMG; articles 12 and 29 of the OPP and article 7 of the ESAF Working Procedures, the latter also foreseeing JPC meetings).

Since the expanded interpretation of its competence was defined by the ESAF itself in its Working Procedures and through its practices, the current regulation of the bloc does not guarantee the receptivity of voluntary Recommendations made to the CMG, nor even the CMG's need to justify any acceptance (either total or partial) or rejection of an ESAF proposal. Thus a black hole has been formed in Mercosur's structure whereby the ESAF cannot rely on any well-founded evaluation or consideration of its Recommendations.

Except for the functioning of each of the National Sections (under the criticism presented in item 3 above), the internal operation of the ESAF is reasonably descriptive and allows consultations to be duly accomplished. Nevertheless, Mercosur's regulations do not ensure that external transparency is provided to the ESAF's recommendations and, consequently, there is no way to monitor its recommendations and opinions. This has generated a questioning with respect to

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55 This is also a critical point with respect to representativeness in ESAF participation for sectors with less financial and human resources, as pointed out in item 3.2 above.

56 According to article 2 of the Working Procedures, the ESAF's Recommendations can cover as much internal Mercosur questions as its relation with other States, international organizations and other integration processes.

57 It is estimated that in the nine years of the ESAF's existence, more than 90% of its Recommendations to the CMG came from its own initiative.

the credibility and usefulness of the ESAF, as well as the difficulty in correlating its dialogue with other bodies in the Mercosur structure.[58]

The third form of consultation is the possibility of direct consultations by some bodies with any of the entities of "civil society." These provisions are established for the ESAF (as appointed above), the WSGs, the CMG Commissions and the MTC Technical Committees.

Chapter VII of the CMG Working Procedures establishes some of the consultation criteria and procedures for the WSGs and CMG Commissions. First, the consultations can only be held in preparatory meetings; in this phase, joint activities can also be conducted by such bodies with the "private sector" (which is more closely related to the idea of cooperation). The entities that may be consulted by the WSGs and Commissions shall be included on a list of entities that are "representative of the private sector," elaborated by each National Section of the CMG. However, these provisions do not describe how the criterion for selecting the entities to be invited is to be established, who covers the costs of any eventual need to transport the representatives of these entities and how and to what extent the issued opinions were incorporated or not into the final decision of the Mercosur's bodies. The establishment of such criteria could improve transparency and credibility of the consultation mechanism.

In the case of Technical Committees meetings, article 18 of the MTC's Working Procedures foresees the possibility of such bodies requesting the advice of specialists and consulting representatives from the "private sector." No criterion or procedure is stipulated with respect to how and under what circumstances these consultations can and should take place. As can be noted from the minutes of these Committees, some entities have indeed participated, but it is not known how they were selected nor what their contribution was to the meeting.

There are also, in practice, other bodies which have permitted the participation of non-state actors in their meetings. Such is the case of the Specialized Meetings and the Ad Hoc Groups. This participation can be allowed through an extensive interpretation (indicated in item 2) that follows the same criteria as the WSGs and their Commissions. In this case, the same criticism applied to these procedures is valid.

In principle, the accomplishment of consultations should be based on clear objectives and rules and be divulged within a reasonable space of time so that the participating entity can understand how to collaborate and to what extent it can interfere with its input. Ideally, the consultations also include mechanisms of accountability with respect to the use and application of what is presented to the bodies by non-state actors. As for the consultation provisions for Mercosur bodies,

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[58] In spite of the ESAF being considered the most objective and most clearly organized participation mechanism in the institutional structure of Mercosur, a recurring criticism is that it is an empty mechanism within the dynamics of the bloc's decision-making process. With respect to this issue, see, for example, VENTURA's (2003:597) analysis of the lack of consultation with the ESAF and JPC during the reform of the dispute settlement system in 2002 (the Olivos Protocol).

it can be concluded that the objectives and rules are still fragmentary (the ESAF being the body with most comprehensive provisions) and, finally, the consultation procedures in Mercosur fail to take the concern about accountability on the employment of the consultation results and their importance to the decision-making process.

4.3 Cooperation: a deepening interaction

The presence of cooperation mechanisms with "civil society", or better yet, the existence of legal dispositions that allow this form of participation is identified in few Mercosur bodies. Cooperation is a form of participation that almost establishes a partnership between the institutional structure of the bloc and non-state entities, entailing joint projects and activities on the field.

One of the provisions in Mercosur regulation is that the ESAF can communicate directly with national or international entities, including the based on formal cooperation arrangements (articles 20 and 21 of the ESAF Working Procedures). The other forms admitted on the bloc are those indicated previously for consultations with specialists and the "private sector" by the Technical Committees, and with the "private sector" by the WSGs (with the possibility of conducting joint events).

Until today, however, there is no registry of partnerships established between Mercosur bodies and non-state actors. In any event, there are still-pending demands that, in expanding the functions of the ESAF, it be reformed from a mere consultative body to a cooperative body with the deliberative axis of Mercosur.[59]

In spite of cooperation foreseeing this mutual and continuous interaction of contributions, the responsibility for a final decision (or deliberation) might depend on a restricted group that is considered to be representative and legitimate for this end. In the case of Mercosur, such function is concentrated in the deliberative axis.

4.4 Synthesis and observations

For a synthetic evaluation of the forms of participation in Mercosur, its chronological evolution during the following three periods will be considered: (i)

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[59] MELLO (2001:9, note 6) describes that: "In a letter to the presidents of Mercosur in 1999, the São Paulo Forum already indicated the need to expand the available functions and forms of participation for civil society in Mercosur with the manifestation: We understand that the merely advisory role exercised by the Parliamentary Commission and the Economic and Social Forum limits the participation of our people in this process. Mercosur is, for the parties gathered here, a policy of our States and our societies which requires channels for manifesting democratically'."(free translation by the author). In this respect a request was presented to the CMG in December 1997 to expand the ESAF in order to strengthen it, and in 2003 that need was reiterated (cf. CMGLII/Ata04/03, Annex XV).

the creation of Mercosur (1986-1991), (ii) the development of the integration process (1992-1999) and (iii) the reiterated attempts to strengthen Mercosur (2000-present).

In the first period there was much difficulty in access to information, above all due to the lack of institutionalization.[60] At that moment, access to information on the progress of the negotiations was very asymmetrical.[61] As for consultations, once again the lack of institutionalization in the bloc did not favor this form of participation. Nevertheless, pressure from regional coalitions of entrepreneurs and labor unions arose at the time, in a non-systematic way.[62]

The quantity and quality of the information provided gradually increased with the development of the bloc institutions – above all starting in 1994.[63] Beginning with the second period, the basic institutionalization of the CMC and CMG and the dispute settlement system fostered the channels for the interests of different "civil society" groups. In this respect, the creation of the ESAF stands out as an important institutional recognition of direct participation.

The Recommendations of the ESAF provided an important vehicle for expressing demands for more frequent consultations and cooperation mechanisms with "civil society" within the bloc. The ESAF's most active period was from 1997 to 1999. The ESAF's manifestations during this period also promoted regional coalitions of non-state actors dealing with subjects under negotiation between the bloc and other intergovernmental fora. During this period, new demands for participation from other sectors of "civil society" became evident.[64]

The third period has resulted in a questioning process regarding the viability of the commitments assumed within the ambit of the bloc and the integration between member-States. Such lack of confidence had negative effects in the participation of actors from "civil society", especially the reduction in the number of ESAF meetings and actors in attending them. On the other hand, the 2004-2006 Work

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60 For description of this historic moment and the interaction of state-bureaucracy representatives with non-state actors, see PEÑA (2003b:8).

61 Specific comments are presented in PEÑA (2003b), PORTELLA (2000) and VIGEVANI (1998).

62 Creation of the Southern Cone Labor Union Coalition (CCSCS) in 1986 and the Mercosur Industrial Council in 1991.

63 The relation of institutionalization and information improvement is also evident in the recent institutional reform projects. As an example, since the attribution of a technical character to the works of the Mercosur Secretariat, it publishes reports detailing its activities and offering a critical evaluation of the bloc's structure (for access to the first report, see the webpage of the Federal Regional Court for the 4th Region on the Internet).

64 It is worth emphasizing here the importance of democratic systems in the region for consolidating direct participation in regional mechanisms. For the history of the ESAF, see PEÑA (2003b:7 ff.) and PADRON (n/r). For this analysis and an analysis of the ESAF's participation in other international fora and its influence on the participation capacity of civil society in Mercosur, see PEÑA (2003b:9 ff.). Among the bloc's negotiations, those with the FTAA (1994) and the European Union (1995) are the most salient.

Plan, based on the revision plan for strengthening the bloc, seems to sympathize with some of the steady demands from the ESAF to improve the direct participation in the bloc.

5. Final notes

Given the general observations and some specific notes it is possible to identify that the participation mechanisms for "civil society" in Mercosur are still marginal with respect to the decision-making process and count on few (or no) dispositions that ensure full knowledge of their operation.

From what can be observed from the integration process development process, its institutionalization significantly corroborated the participation of different groups of "civil society". And, it happened as much in terms of arousing their interests as in instigating the technical preparation and negotiating ability of the non-state actors.

There are, however, some characteristics of the current institutionalization of the direct participation process that could considerably hinder a further expansion of the presence of "civil society" in the bloc, as planned by the Mercosur 2004-2006 Work Plan.

The present crisis in identifying the objectives of Mercosur is already a factor that hampers the establishment of criteria for selecting and recognizing which interlocutors are necessary in the bloc. This is an obstacle that needs to be overcome in order to identify which categories or groups of actors are to be recognized by each body or forum in each of the three levels of the institutional structure (political, executive and technical), besides the objectives for promoting these forms of direct participation.

The term "civil society" is sufficiently wide-ranging to incorporate a vast number of actors and could be the motto for encouraging a systemic revision of how different interest groups could and should participate in the structures of the bloc (including at this time of revision to strengthen the institutions of the bloc). "Civil society" can offer opinions, contribute with ideas, technical knowledge and the attainment of objectives, but it has the primordial function of supervening the decision-making process.

At the same time, re-imagining the structure of the bloc requires both improving the existing mechanisms and developing new effective ones. These should be simultaneous steps, in order to always consider the totality. To improve the current mechanisms it is necessary to create sufficiently-flexible mechanisms responsive to a dynamic society, in a constant state of rebuilding itself. There is no doubt that the institutional structure can favor participation to the extent that the participation itself favors the recognition of what is "civil society".

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Appendix

Table 1 – List of entities in ESAF meetings*

Date and Place of Meeting	Argentina	Brazil	Paraguay	Uruguay	Observers**
30-31 May 1996 Buenos Aires	ADELCO/ CAC/ **CGT**/ SRA/ UIA	**CNA**/ CNC/ CNI / CNT/ CUT/ FS	ARP/ CyBC/ CIP/ CNT/ CPT/ CUT/ FEPRINCO	CIU/ COSUPEM/ PIT-CNT	*International:* IMO/ ILO *National*: CEFIR(uy)
21-22 April 1997 Asuncion	ADELCO/ CAC/ **CGT**/ SRA/ UIA	CGT/ **CNA**/ CNC/ CNI/ CNT/ CUT/ FS/ **IDEC**	ARP/ CyBCP/ CIP/ CNT/ CPT/ CUT/ FEPRINCO/ FEDEXA/ FEBAFISA/ SNA/ UIP***	COSUPEM/ PIT-CNT	*International:* ILO *National:* **FENASEG** (br)
4-5 Sept. 1997 Montevideo	ADELCO/ CAC/ **CGT**/ SRA/ UIA	CGT/ **CNA**/ CNC/ CNI/ CNT/ CUT/ FS/ **IDEC**	CIP/ CPT/ CNT/ CUT	AUDU/ COSUPEM/ CUDECOOP/ PIT-CNT	*International:* CES/ Consumers International/ ILO National: **AACS**(ar)/ **ANONG**(uy)/ **CIRA**(ar)/ CGE(ar)/ **FENASEG**(br)
12-13 Dec. 1997 Montevideo	ADELCO/ CAC/ **CGT**/ SRA/ **UAC**/ UIA	CGT/ **CNA**/ CNC/ CNI/ CNT/ CUT/ **IDEC**	CyBCP/ CIP/ CNT/ CUT/ FEPRINCO	COSUPEM/ CUDECOOP/ PIT-CNT	*International*: ILO *National:* **AACorS**(ar)/ CGP(ar)/ CGProfessores(ar)/ **CIRA**(ar)/ **FACPCE**(ar)/ UDES(ar)
4-5 May 1998 Buenos Aires	ADELCO/ CAC/ **CGT**/ SRA/ UIA/ CAConst	CGT/ CNC/ CNI/ CNT/ CUT/ FS/ **IDEC**	No entities listed	AUDU/ CUDECOOP/ COSUPEM/ PIT-CNT	*International:* ILO *National*: **AACS**(ar)/ CGP(ar)/ **ABAPRA**(ar)/ CGPRA(ar)/ **CIRA**(ar)/ **CNA**(br)/ **FENASEG**(br)/ **UAC**(ar)/ UDES(ar)/ UB(ar)
22-23 July 1998 Buenos Aires	**ABAPRA**/ **AACS**/ ADELCO/ CAC/ CAConst/ **CIRA**/ **CGT**/ **FACPCE**/ SRA/ **UAC**/ UIA***	CGT/ **CNA**/ CNC/ CNI/ CUT/ FS	CyBCP/ CIP/ CNT/ CPT/ FEPRINCO	AUDU/ CUDECOOP/ COSUPEM/ PIT-CNT	*International*:ILO *National:* CPF(ar)/ r)/ CGPRA(ar)/ CONINAGRO(ar)/ UDES(ar)/ UB(ar)/ Sec.PyME(ar)/ SGMYMG(ar)/ CGE(ar)/ **FENASEG**(br)/ **IDEC**(br)/ **CONPACOOP**(py)
5-6 Nov. 1998 Porto Alegre	CAC/ **CGT**/ SRA/ UIA	CGT/ **CNA**/ CNC/ CNI/ CUT/ **FENASEG**/ FS/	ARP/ CBC/ CUT	COSUPEM/ PIT-CNT	*International*: ORIT *National*: **CAT**(br) *Advisors*: CNI(br)/ FENASEG(br)/ CNC(bt)/ CUT(br)

Date and Place of Meeting	Argentina	Brazil	Paraguay	Uruguay	Observers**
7-9 Dec. 1998 Rio de Janeiro	ADELCO/ CAC/ **CGT**/ SRA	**CAT**/ CGT/ CNC/ CNI/ CUT/ **FENASEG**/ FS/	CNT / CPT/ CUT/ FEPRINCO/ UIP	AUDU/ COSUPEM/ PIT-CNT	*International*: CES *National*:**CTA**(ar); UDES(ar), **CAT**(br) *Advisors:* CNI(br), CUT(br), CAT(br), FS(br), CGT(br) *Guests*: PUC-RIO(br)/ Unb(br)/ Centro de Solidaridad AFL-CIO
26-27 April 1999 Asuncion	ADELCO/ CAC/ **CGT**	**CAT**/ CGT/ CNC/ CNI/ CUT/ **FENASEG**	ARP/ CNT/ **CONPACCOP**/ CPT /CUT FEPRINCO	COSUPEM/ CUDECCOP/ PIT-CNT	No entities listed.
22 June 1999 Rio de Janeiro	ADELCO/ CAC/ CA Const/ **CGT** /SRA/ UIA	**CAT**/ CGT/ CNI/ CUT/ **FENASEG**	CNT/ **CONPACOOP**	COSUPEM/ CUDECCOP/ PIT-CNT	*National:* **CUDECOOP**(uy)/ CAF(uy)**/ OCB**(br) *Advisors*: CTA(ar)/ CGT(br)/ CNT(br)/ CUT(br)/ FS(br)/ FENASEG(br)/ CNI(br)/ CNC(br)/ CAT(br)/ CNA(br)
6-7 Oct. 1999 Montevideo	ADELCO/ CAC/ CA Const/ **CGT** /SRA	**CAT**/ CGT/ CNC/ CNI/ CUT/ **FENASEG/** FS/ SBPC	ARP/ CNCSP / CNT/ **CONPACOOP**/ CUT	AUDU/ COSUPEM/ CUDECCOP/ PIT-CNT	*International*: Conselho Econômico and Social da Espanha/ Asesor del Ministro de Trabajo y Previsión Social de Chile/ Confederación de la Producción y el Comercio de Chile *National*: CEFIR(uy) / ANONG(uy)/ CUDECOOP (uy)/ CTA(ar)/ CUT(br) *Advisors:* CNC(br), CNI(br)
8-9 Dec. 1999 Montevideo	ADELCO/ CAC/ C.A. Const	**CAT**/ CGT/ **CNA**/ CNC/ CNI/ CUT/ **FENASEG/** FS/	ARP/ CIP/ **CONPACOOP**/ CNT/ CUT/ UIP	AUDU/ COSUPEM/ CUDECCOP/ PIT-CNT	*International:* CES/ ALADI *National:* **OCB**(br)/ **COOPERAR**(ar)/ CNC(br) *Advisors:* CIRA(ar)/ CTA(ar)/ CONINAGRO(ar)/ CNI(br), CNC(br)
13-14 June 2001 Asuncion	**CTA**/ **CGT**/ UIA/	CGT/ **CNA** / CNC/ CNI / CUT/ FS	ARP/ CIP/ CNT/ CONPACCOP/ CUT/ FEPRINCO/ UIP	COSUPEM/ CUDECCOP/ PIT-CNT	No entities listed

Date and Place of Meeting	Argentina	Brazil	Paraguay	Uruguay	Observers**
8-10 Oct. 2001 Montevideo	**CGT**/ **CTA**	**CAT**/ CGT/ CNC/ CNI/ CNT/ CUT	CUT	COSUPEM/ CUDECCOP/ PIT-CNT	*National:* CEFIR(uy)/ Facultad de Ciencias Sociales(uy)/ RedMERCOSUR (uy) *Advisors*: CGT (ar) / CNC (br)/ CNI (br)/ ANONG(uy)/ CUDECOOP (uy)/ CIU(uy)
19-20 Dec. 2001 Montevideo	**CTA**/ **CGT**/ UIA/	**CAT**/ CGT/ **CNA**/ CNC/ CNI/ CUT/ FS	**CONPACOOP**/ UIP	COSUPEM/ CUDECCOP/ PIT-CNT	*National:* **CGT**(ar) / COMISEC(uy)/ RedMERCOSUR(uy) *Advisors:* CNC(br), CNI(br), CUT(br)/ CUDECOOP (uy)/ FRU (uy)/ ANONG (uy)/ CNCSP(uy)
21-22 March 2002 Buenos Aires	ADELCO/ CAC/ **CGT**/ **CTA**/ UIA/ SRA	**CAT**/ CGT/ **CNA**/ CNC/ CNI/ CUT/ **FSNASEG**/ FS	CNT/ **CONPACOOP**/ CPT/ CUT	COSUPEM/ CUDECCOP/ PIT-CNT	*National*: **AACS**(ar)/ CGT (ar)/ CGPRA (ar)/ **CNA**(ar) *Advisors:* CNC(br), CNI(br), CUT(br), FS(br), **FENASEG** (br)
18-19 June 2002 Buenos Aires	ADELCO/ **CGT**/ **CIRA**/ **COOPERAR**/ **CTA**/ UIA/ SRA	**CAT**/ CGT/ **CNA**/ CNC/ CNI/ CNT/ CUT/ **FENASEG**/ FS/ **OCB****	**CONPACOOP**/ CUT	COSUPEM/ CUDECCOP/ PIT-CNT	*International:* CES
30-31 March 2004 Buenos Aires	ADELCO/ CAC/ **CGT**/ **CTA**/ UIA/ SRA	**CAT**/ CGT/ CNC/ CNI/ CUT/ FS/ **OCB**	CNCSP / CNT/ CONCACOOP/ CUT	COSUPEM/ CUDECCOP/ PIT-CNT	*International*: AICESIS *National*: Cancillería Argentina (ar) **ABAPPRA**(ar)/ **CNA**(ar), UDES(ar)/ CGPRA(ar)/ **CGT**(ar) Advisors: CUDECOOP(uy)

Table 2 – Main characteristics of the ESAF National Sections (NS)

	Argentina	**Brazil**	**Paraguay**	**Uruguay**
Creation of the NS	01 December 1995	March 1996	May 1996	21 November 1995
Last amendment to the Working Procedures	03 January 2004	No change	21 June 2004	28 July 1997
Types of NS Associates	*Founding Part Entities (UIA, SRA, CAC; CGT, ADELCO)/* Part Entities*/ Observer Members.*	*Instituting Entities (CUT, CGT CNC, CNA, CNI, CNT, FS, IDEC)/ Part Entities/ Observers/ Advisors.*	Plenary members *(FEPRIN-CO, ARP, UIP, CNCS, CIP, CNT, CPT, CUT; CONPACOOP)/ Observers.*	*Founding Organizations (COSUPEM, PIT-CNT)/ Other organizations/ Permanent Observers / Observers/ Advisors.*
Criteria and procedures for admissibility to the NS	*For Part Entity*: national representativity and character; private-sector company with at least 2 years legal existence./ *For Observer Member*: approval by the Directing Table.	*For Part Entities:* national character and more than 2 years legal existence; private-sector company; representativity and scope evaluated by the number of associates/affiliates and/or by the nature and quality of the entity./ *For Observers and Advisors*: invitation by Part Entities.	*For Plenary members:* after 6 months as observers and upon payment of a fee./ *For Observers*: according to antecedents, activities in the sector, representativity and commitment.	*For Other organizations*: decision and criteria of the Plenary Session./ *For Permanent Observers:* decision of the Plenary Session./ *For Observers:* designated by the Executive Council or invited by the Deliberative Junta./ *Advisors:* designated by the Executive Council or Plenary Session.
Institutional structure (status, composition, functions)	*Plenary Session* (superior organ, composed of the Founding Part Entities, decides on ESAF themes and approves the entry of new Entities)/ *Directing Table* (executive and representation organ integrated by Founding Part Entities, executes decision of the Plenary Session and adopts ESAF Recommendations)/ *Advisory Organizations* (studies and analyses, as defined by the Plenary Session).	*Plenary Session* (superior organ, composed of Instituting and Part Entities, decides on ESAF themes, approves the entry of new Entities and elects the Coordinating Table); *International Representation Committee* (representative organ, integrated by the Coordinating Table and other Part Entities designated by the Plenary Session)/ *Coordinating Table* (executive organ, composed of 3 Part Entities elected by the Plenary Session, executes deliberations of the Plenary Session)/ *Advisory Organ* (studies, analyses and elaboration of proposals, as defined by the Plenary Session).	*Plenary Session* (*no clear terms*)/ *National Coordination* (superior organ, composed a Titular Coordinator, Alternate Coordinator and Secretary, representatives from each of the sectors).	*Plenary Session* (superior organ, composed of 20 representatives from different sectors, decides on themes of the ESAF and approves the entry of Other Organizations and Observers), *Executive Council* (executive organ, composed of 10 representatives from different sectors, executes decision of the Plenary Session and adopts Recommendation of the ESAF), *Deliberative Junta* (consulting organ, composed of members of the Plenary Session and one delegate from each of the organizations that are part of the NS)*; Advisory and Administrative Support Organs* (studies, analyses and elaboration of proposals, as defined by the Plenary Session).

Source: Elaborated by the author based on the Working Procedures of the National Sections.

Table 3 – Total number of non-state actors registered for the Ministerial Meetings of the WTO, UNCTAD XI and the activities of the Committee of Governmental Representatives on the Participation of Civil Society in the FTAA / Proportion in relation to the total population of each member-State

	Argentina		**Brazil**		**Paraguay**		**Uruguay**	
	Total	Proportion	Total	Proportion	Total	Proportion	Total	Proportion
FTAA	11	3.03	43	2.53	-	-	2	5.9
WTO	6	1.65	20	1.17	3	5.44	4	11.77
UNCTAD XI	1	0.27	32	1.88	-	-	1	2.94
MERCOSUR	22	6.06	14	0.82	13	23.57	12	35.30

Source: Elaboration by the author based on information available at the WTO, UNCTAD and the FTAA websites, and data collected on Mercosur (Table 1).

Obs: This table does not intend to demonstrate an absolute relation with respect to proportion. It is recognized that the participation of the entities is not constant and could be related to circumstantial elements. The basic conclusion it offers regards the plurality of interested entities in each member-State due to participation in these intergovernmental forums.

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[*] Acronyms: **ARGENTINA**: Asociación Argentina de Compañías de Seguros (AACS); Assoc. Argentina de Corretores de Seguro (AACorS); Asociación de Bancos Públicos y Privados de la República Argentina (ABAPPRA); Acción del Consumidor (ADELCO); Cámara Argentina del Comercio (CAC); Cámara Argentina de la Construcción (CAConst); Cámara de Importadores de la República Argentina (CIRA); Confederación General Económica (CGE); Confederación General de Profesionales de la República Argentina (CGPRA/CGP); Confederação Geral de Professores da Argentina (CGProfessores); Cámara Naviera Argentina (CNA); Confederación Intercooperativa Argentina de Agropecuarias (CONINAGRO); Confederación General del Trabajo (CGT); Central Trabajadores Argentina (CTA); Confederación Cooperativa de la República Argentina Ltda.(COOPERAR); Federación Argentina de Consejos Profesionales de Ciencias Económicas (FACPCE); Sociedad Rural Argentina (SRA); (SGMYMG); Unión Argentina de la Construcción (UAC); Universidad de Belgrano (UB); Unión Argentina de Entidades de Servicios (UDES) e Unión Industrial Argentina (UIA). **BRAZIL**: Central Autônoma dos Trabalhadores (CAT); Central Única dos Trabalhadores (CUT); Confederação Geral dos Trabalhadores (CGT); Confederação Nacional da Agricultura (CNA); Confederação Nacional do Comércio (CNC); Confederação Nacional da Indústria (CNI); Confederação Nacional do Transporte (CNT); Força Sindical (FS); Federação Nacional de Empresas de Seguros Privados e de Capitalização (FENASEG); Instituto Brasileiro de Defesa do Consumidor (IDEC); Organização das Cooperativas Brasileiras (OCB);

Pontifícia Universidade Católica do Rio de Janeiro (PUC-RIO); Sociedade Brasileira para o Progresso da Ciência (SBPC) e Universidade de Brasília (Unb). **PARAGUAY:** Asociación Rural del Paraguay (ARP); Cámara y Bolsa de Comercio (CyBC); Centro de Importadores (CIP); Cámara Nacional de Comercio y Servicios de Paraguay (CNCSP); Central Nacional de Trabajadores (CNT); Confederación Paraguaya de Cooperativas (CONPACOOP); Confederación Paraguaya de Trabajadores (CPT); Central Unitaria de Trabajadores (CUT); Federación de Exportadores Agroindustriales (FEDEXA); Federación de la Producción, la Industria y el Comercio (FEPRINCO); Federación de Bancos, Financieras y Sociedades de Ahorro y Préstamo para la Vivienda (FEBAFISA); Unión Industrial Paraguaya (UIP) e Sociedad Nacional de Agricultura (SNA). **URUGUAY:** Asociación de Organizaciones No Gubernamentales de Uruguay (ANONG); Agrupación Universitaria del Uruguay (AUDU); Centro de Informação para a Integração Regional (CEFIR); Comisión Sectorial para el Mercosur do Governo Uruguaio (COMISEC); Consejo Superior Empresarial (COSUPEM) - Integrado por nove entidades de cúpula[Cámara de Industrias del Uruguay (CIU); Cámara Nacional de Comercio (CNC); Cámara Mercantil de Productos del País (CMPP); Asociación Rural del Uruguay (ARU); Federación Rural del Uruguay (FRU); Cámara de la Construcción; Asociación de Bancos del Uruguay (ABU); Cámara Uruguaya de Turismo
Asociación Nacional de Broadcasters del Uruguay (ANBU)]; Confederación Uruguaya de Entidades Cooperativas (CUDECOOP) [Integrada por: Asociación de Cooperativas de Ahorro y Crédito (ACAC); Cooperativas Agrarias Federadas (CAF); Cooperativa de Ahorro y Crédito de Uruguay (CAYCU); Centro Cooperativistas Uruguayo (CCU); Comisión Nacional de Fomento Rural (CNFR); Cooperativa Nacional de Ahorro y Crédito (COFAC); Federación de Cooperativas de Producción del Uruguay (FCPU); Federación de Cooperativas de Ahorro y Crédito (FECOAC); Federación de Cooperativas de Vivienda por Ahorro Previo (FECOVI); Federación Médica del Interior (FEMI); Federación Uruguaya de Cooperativas de Ahorro y Crédito (FUCAC); Federación Uruguaya de Cooperativas de Consumo (FUCC); Federación Uruguaya de Cooperativas de Vivienda por Ayuda Mutua (FUCVAM); Compañía Cooperativa de Seguros (SURCO); Primera Cooperativa de Ahorro y Crédito de Paysandú (CACDU); Cooperativa de Ahorro y Crédito del Uruguay (CAYCU)]; Facultad de Ciencias Sociales; Plenario Intersindical de Trabajadores - Convención Nacional de Trabajadores (PIT-CNT) e Red de Investigaciones Económicas del MERCOSUR (RedMERCOSUR).
INTERNATIONAL: Association Internationale des Conseils Economiques et Sociaux et Institutions Similaires (AICESIS); Associação Latinoamericana de Integração (ALADI); Centro de Solidaridad AFL-CIO (American Federation of Labor - Congress of Industrial Organizations); Conselho Econômico e Social da União Européia (CES); Conselho Econômico e Social da Espanha (CES-Espanha); International Migration Organization (IMO); International Labor Organization (ILO); Organização Regional Interamericana de Trabalhadores (ORIT).

** Entities which were sometimes as observers and at other times as delegates of the National Sections of their respective countries of origin appear in bold in order to indicate some of the demands for participation in the ESAF by new entities “representative of the economic and social sectors.”

*** Possibly some of these entities were present as observers without the right to vote. However, such a status does not appear in the ESAF’s minutes.

The European Union's Social Capital

Wenzel Matiaske

1. Introduction

Certainly "social capital" is currently one of the most overtaxed terms in the social sciences. Or to put it somewhat ironically: if there were a competition for the next big trend in the social sciences, the debate on social capital over the past decade would be a hot candidate. All the same, the current prominence of the concept is rather astonishing, and thus demands some explanation.

Social capital, in contrast to other epochal social scientific terms like the "lonely crowd", "post-industrial society", or the "silent revolution" was by no means a catchy phrase coined to sum up a practical problem, movement, or development. Even a quarter century ago – in the meantime, the search for predecessors has located earlier sources[1] – the term was only familiar to those Francophile social scientists not horrified by the hypercomplexity of Pierre Bourdieu's writings. He first used his concept in his ethnological study on the Kabylia (1972), later systematically elaborating it in his class-oriented analysis of French society (1979). Economic, cultural, and social capital are the theoretical and empirical dimensions of Bourdieu's social analysis (1992). Regardless of how significant one considers Bourdieu's sociology as a whole, at the start of his work's reception nobody could have predicted that two decades later the World Bank would classify social capital as a central factor of sustainable economic development (Grootaert et al. 2003). The rapid rise of the concept was thanks on the one hand to the fact that the term has found application in various theoretical and empirical studies, entirely divorced of Bourdieu's sociology. Putnam in particular promoted this concept with his study of political and social development in Italy (1992) and especially his work on the (purported)[2] decline of public life in the US. At the same time, however, the concept was also used in work with a different thematic focus, in particular Coleman's microsociological theory (1990). On the theoretical level Coleman's work attempts to bridge the gap between sociology and economics, while on the methodological level exploring the usefulness of the category of social capital for analysing social networks.

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1 In the meantime, Hanifan's study of community, which Putnam recently referred to in a virtual discussion, has been established as the earliest source (1920, pp. 78 f.).

2 This is not the place for a detailed critique of Putnam's complex study. Allow me to note, however, that the study might overemphasise the decline of older forms of exchange in comparison to the rise of new forms of community. In contrast to the pessimistic view of 'bowling alone', the more optimistic perspective or 'skating' or 'chatting' is given too little attention.

At the same time, in addition to the elasticity of the term in both theoretical and empirical analyses the normative connotation should be considered the second factor in the term's rapid rise. Social capital promises not only to solve an old problem of the social sciences – the theoretical linkage of "community" and "society", or in its contemporary formulation the problem of "embeddedness" (Granovetter 1985), but furthermore offers a recipe for how civil society might be promoted. Social capital points to the social relations between individuals and the trust placed in social networks. It is this faith in the norms of reciprocity and trustworthiness that makes the concept so attractive for policymakers. In Putnam's words, "When trust and social networks flourish, individuals, firms, neighborhoods, and even nations prosper" (2000, p. 167).

This contribution will not primarily circle around such theoretical problems. Instead, using the example of the European Union's (EU) social capital it will be show how various aspects of social capital can be made fruitful on a theoretical and a practical level. The conceptual difficulties of the term will thus largely be set aside. Nonetheless, in the following section I will discuss my understanding of the concept used here. The remainder of the article will proceed on two levels: in the third section, I will explore the aspect of generalised reciprocity and trust within the member states and in regard to the EU as a political institution. In the fourth section, the network analytical dimension of formal and informal relations between member states will be examined. Based on EU supported instruments and data, I will finally used secondary analyses to illustrate these comments empirically, closing with a comprehensive overview.

2. Theoretical and Political Aspects of Social Capital

2.1 Theoretical Perspectives on Social Capital

As I see it, the dazzling term 'social capital' implies two dimensions: first, the term is related to the aspect of generalised trust, that is, faith in a collective. In sociological terminology, this is intended as a specific medium, or to put it more precisely, it address a mediating mechanism of social action.[3] In so doing, the trust-based exchange is typically related to a generalised other – be it an organisation, a state, or a supranational institution. In any case, the term as a rule refers to a collective, and usually addresses the functionality of social cooperation, as the above quotation from Putnam illustrates.

[3] Regarding the classical conception of symbolic media of social exchange, at that is based on Parsons (1977), scepticism is clearly demanded when it comes to its generalisation. More narrowly generalisable is certainly the medium of economic exchange: money. Personalised trust, in contrast, is a medium that is only generalisable to a limited extent, and thus a medium that further mediates interactions (Matiaske 1999).

This conceptualisation, which I term collective social capital, is to be distinguished from a conceptualisation that does not primarily focus on the collective but rather the individual side of action (Matiaske 1999). On this level, the relations of *ego* to *alter* are central to the analysis. That is, significant here are the links – and thus the trust – between one actor and another on a lateral level. Empirically speaking, the category of social capital in this perspective – which I term "individual social capital" – is tied to the analysis of social networks.

Obviously these levels cannot be clearly distinguished from one another. At least in terms of exchange theory, trust in a collective and thus the validity or enforceability of norms is dependent on their collective acceptance and institutional constitution. The selectivity of the two layers suffers significantly when, as is the case here, the focus is placed on trust in a collective actor (the EU) on the one hand, a collective actor that on the other hand at least partially guarantees the validity of norms and supports the direct exchange between member states, regions, local government, and citizens.

Nonetheless, in regard to the following discussion it will be useful to maintain the analytic division between collective and individual social capital, for this division is typically linked to various optionalisations. While collective social capital is often the object of survey research, individual social capital can be investigated, observed, or explored by way of secondary analysis in an approach based in network analysis. The discussion of the material presented in the following follows this operational definition and first presents material from surveys on the trust of citizens among one another and regarding the EU. The following section will then present network analytic considerations and findings.

2.1 The EU Policy Framework

Social capital is no longer just a category for sociological and economic analysis, but also a concept that also guides political decision-making and policy shaping. In the case of the EU, this is clearly shown by a series of current Commission positions and programs that emphasise the role of human and social capital for economic and social development.[4] These papers recognise that local actors can significantly contribute to regional cohesion, innovation and entrepreneurship, or in the words of Rita Soares (2003, p. 4): 'Fostering social capital through integrated intervention is a key component of local development strategies, pursued by different Commission financial instruments'. The commission emphasises three goals for its programs:

- the role of citizen involvement
- the importance of linking social dialogue with civil society

[4] See especially Commission (2001; 2003; 2004) as well as European Commission: Employment and Social Affairs DG (2002).

- the construction and reestablishment of trust in institutions

In the future, the EU will seek to establish a social capital monitoring system. The new Social Situation Report will seek to highlight differences in social capital among the member states, develop social capital indicators (participation, trust in institutions), and provide new data on these indicators. The EU has however already promoted a number of instruments – both in terms of policy making as well as social scientific reporting – that serve these goals. The following secondary analyses will explore some of these instruments.

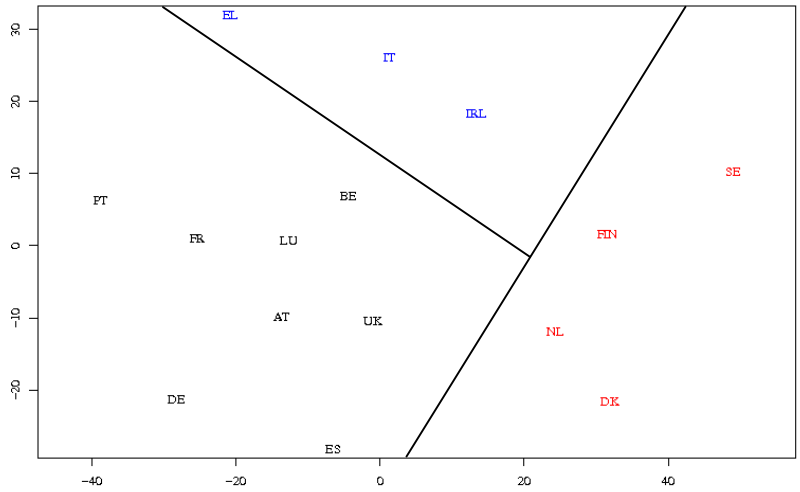
3. Generalised Reciprocity

The concept of generalised reciprocity is used in various ways in empirical studies. In relation to the community [*Gemeinschaft*], the operationalisations focus as a rule on interpersonal trust and commitment (solidarity) (Brunkhorst 2005). In comparative intercultural studies, occasionally the aspect of shared values is emphasised, an aspect that is neglected here. On a social level, the concept implies trust in organisations and institutions. In relation to the EU, the trust in European institutions and the commitment to Europe are central.

3.1 Social Trust

One of the most important sources of social-scientific reporting in and around the EU and its member states is the so-called Eurobarometer: the European Social Survey and the European Value Survey. These survey studies have in part since the early 1970s been carried out regularly out as cross-sectional studies in the member states of Europe and are available to interested researchers. The subject of these surveys is the attitude of citizens in the member states to Europe. Furthermore, special surveys are carried out on current problematic areas and issues. In the past decade, this set of instruments has been further differentiated, and beside the standard Eurobarometer special regular studies of central issues, for example on working conditions in Europe, have been carried out.

An emphasis of the more recent studies in the member states were indicators of social capital in the sense of a generalised trust (van Schaik 2002). Typical indicators of social capital in these surveys are social contacts ('meeting friends/family weekly', 'satisfaction with social contact', 'feeling lonesome'), the subjective level of trust (“you can trust other people', 'other people would be fair to me', 'people are willing to help each other') and the willingness of others to help as experienced by the person asked ('other will help me if I'm depressed', '. . . I have problems with money') or experience in social commitment ('helping old people', 'helping the handicapped').



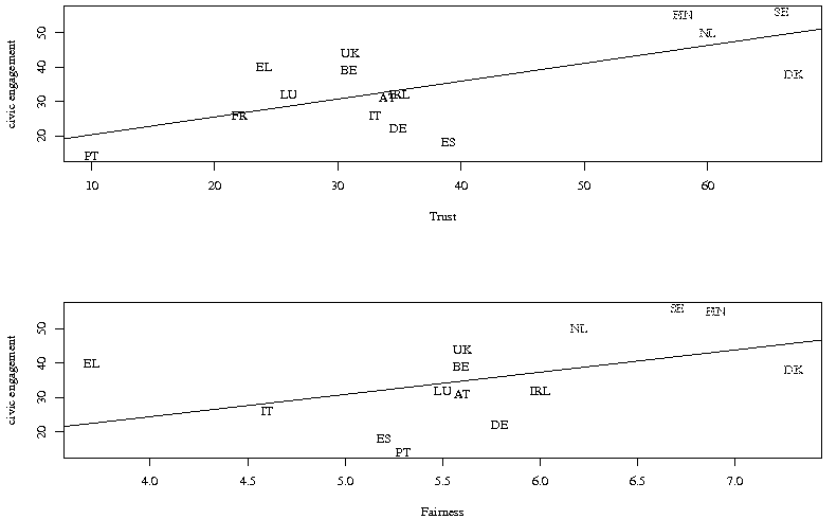
MDS Stress = 0.024, HCA (Ward) based on euclidian distances
Sources: Eurobarometer 2001, European Social Survey 2002, European Value Survey 1999/00

Fig. 1: Social Capital in the EU 15

Typically speaking, national distinctions of the level of social capital are analysed on the basis of these surveys. Figure 1 shows such an analysis on the basis of the relevant secondary data: the group of smaller countries measured in terms of population (Cluster 1, right) and Holland is quite stably differentiated from the other member countries. In these countries, high quotas can be found in the surveys for the questions on tradition (family) and modern social contacts (friends) as well as the perceived willingness to help others or be helped. In the larger countries, this level is lower (Cluster 2, left). A special role is played by Greece, Italy, and Ireland, which exhibit high values in some indicators (readiness to help the old and handicapped in Italy and Ireland) high, and in others low values (meeting the family in Greece).

More interesting than such theory-poor country comparisons are correlative studies of the determinants of social commitment. Figure 2 shows the extent of trust (in percent) or fairness (in average per country) and the perceived level of social commitment. The correlations show that the perceived social commitment correlates positively with the subjective level of trust (r = 0.69) and fairness experienced (r = 0.46). Of course, these analyses require more precise

examination. But if we leave aside difficulties in terms of the quality of data and the level of aggregation, a number of things attest to the efforts of the EU commission to take the controllability of social capital seriously and thus to undertake efforts to increase the level of trust or fairness in everyday interactions with the goal of increasing civic commitment.



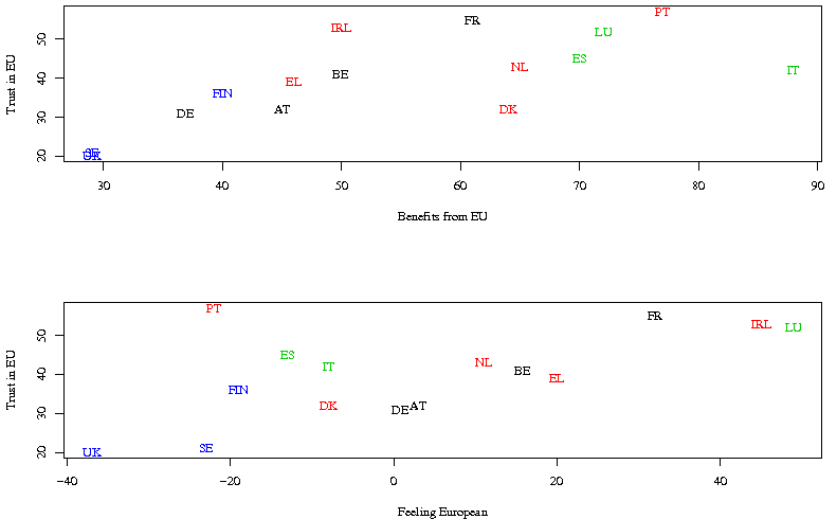
Sources: Eurobarometer 2001, European Social Survey 2002, European Value Survey 1999/00

Fig. 2: Civil Engagement, Trust, and Fairness in the EU 15

3.2 Commitment

For the cooperative actor EU, it is perhaps more significant to sound out the level of commitment to Europe and increase it. It is thus not very surprising that the commitment to Europe and the European idea stands under constant observation among the member states and candidate countries. The current standstill in the referendum on a common constitution makes clear not only the significance of this observation, but also the urgent need to identify legitimate foundations for the EU for the citizens of Europe. The above quoted standard surveys of long-term observation in the EU, like the Eurobarometer, accordingly inquire on a regular basis about support for national EU membership, the state of awareness about the

Union, or satisfaction with democracy on a European level. Interesting for our purposes is the level of trust in Europe.



Source: Eurobarometer 1999

Fig. 3: Trust in the EU, Benefits from the EU, and feeling European

Figure 3 shows an example of three findings on the basis of the Eurobarometer surveys: the expressed faith in the EU in correlation with perceived advantages from the EU and the feeling of belonging to the EU. In bivariate observation, positive correlations are shown ($r = 0.71$, $r = 0.61$). The correlation between these determinants, that both provided significant findings on the level of trust, (OLS Regression, $R2 = .71$) is merely $r = 0.22$ when considered multivariately. On the basis of this highly aggregate data, there is no confirmation for the widespread prejudice that the integration mechanism of the EU is largely to be attributed to perceived material advantages. Instead, there are additional determinants that serve to promote commitment to Europe, and thus the faith in European social institutions.

4. Social Connectedness

In the terminology here proposed, the consideration of individual social capital directs attention to the direct relationships between the member states of the EU.

This membership can be distinguished among various layers – countries, provinces or states, local government etc., and finally citizens. Links between functionally structured organisations and their members are transverse to the hierarchy of governmental institutions. Theoretically more significant that these empirical terms is a differentiation in the EU between formal and informal relationship networks. The EU is active in both formal and informal networking. It provides instruments of formal network formation and enables contacts between member countries on various levels.

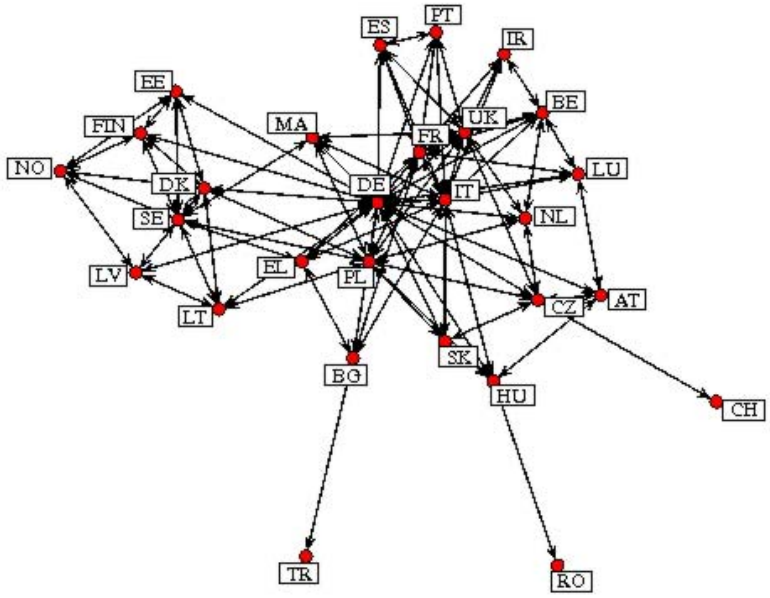
4.1 Formal Memberships

The EU contributes to formal relations between its member countries on various levels: the financial and institutional promotion of networking in the border regions of the European member countries, networks among research institutions, universities, schools, and cultural institutions, or state institutions like government administrations, the police, etc. In other functionally differentiated areas, the EU presents the legal framework for integration—in the area of economy, for example, with the Euro-Companies Act or the Euro-works council—or stimulates collaboration among national associations and organisations like industrial associations or unions. Town twinning has proven to be an especially effective instrument for integration. The idea goes back to the immediate post-war years. In 1946, Orleans (France) and Dundee (UK) founded a city partnership. The partnership could pick up on a 700-year-old alliance between the two cities ("Auld Alliance") and had as its goal the strengthening of the European idea. Just a short time later, already at the start of the 1950s, town twinnings began between Germany and France; these were to become a central instrument in promoting understanding between the two former "archenemies."

A twinning agreement between two municipalities establishes a formal framework that encourages:

- mutual understanding between citizens
- the exchange of experience for managing local affairs and sharing solutions between diverse groups
- launching initiatives in such fields as employment or social affairs, and
- celebrating diverse cultural heritages.

Perhaps this final aspect is the most important. For twinning agreements are in a sense framing treaties that stimulate civic exchange beneath the level of formal partnership between municipalities and their representatives. Mutual visits of cultural or sport associations for festivals or celebrations in the partner towns, has from the German perspective at least, played a quite essential role in contributing to reconciliation with our European neighbours.



Source: Council of European Municipalities and Regions, 2003

Fig. 4: Towntwinning in the EU

The success of this institution can be shown more clearly in terms of numbers. Since 1990, more than 11,000 municipalities have participated in twinning actions funded by the European Commission. The largest member countries make the top five of the overall statistics (France 2.804, Germany 2.327, Italy 1054, UK 557, Spain 557). Poland and Hungary are on the top of the (candidate/new member) countries (Poland 477, Hungary 292, Czech Rep. 172, Slovakia 66).

Figure 4 depicts the network of the European countries, showing the twinnings between municipalities founded since 1990.

- The five large countries (ES, FR, GR, IT, UK) have their main partner from one of the other large countries.
- Towns from peripheral regions tend to prefer partners from central countries.
- Their are relatively limited links between towns from the northern and southern Europe.

- Towns in the countries of the Baltic region mostly team up with each other.

The city partnerships cross Europe with a dense network, and it can be expected that this network will become ever tighter in coming years, especially in the direction of the new member countries.

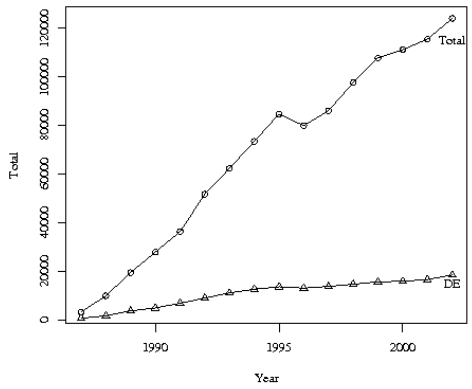
4.2 Informal Social Networks

Europe's cultural diversity is both a problem and a challenge. Living together in Europe means crossing borders on various levels: trade, production, and thus working abroad just as well as tourism, cultural exchange, and learning foreign languages. Europe's *informal growing together* can be shown in everyday culture – consider the enrichment of national cuisines by way of influences from European neighbouring countries, as seen in restaurant menus or the rapid publication of cookbooks – as well as in high culture. Special efforts of the Commission are made in the area of education. On the one hand at issue is promoting the mobility and the creation of a European educational region. On the other hand, these exchanges especially help the younger generation to experience Europe, allowing them to study and make personal contacts across borders.

A few figures to clarify the volume of this exchange:

- About 15,000 (annually) young adults make use of EU programs as trainees abroad
- About 10,000 Europeans make use of EU programs for language training.
- Ca. 6,000 teachers (annually) make use of EU programs.

Among these measures, the exchange of students has developed to become the most significant in quantitative terms (Teichler 2000). Figure 5 shows the development of numbers of student participants in the so-called ERASMUS program, a program that supports institutions of higher education in formal exchange relations. In the meantime, around 125,000 students take part in the ERASMUS exchange (figures for 2002/03). At the start of the program in winter semester 1987/88 the number was just 3,244. This area is also being expanded further: beside the direct promotion of mobility, especially the creation of a European realm of higher education, in particular the creation of a European realm of higher education is to strength the mobility of students in Europe (“Bologna Process”, Conference of Ministers 2003).



Source: European Commission: Education and Training, 2004.

Fig. 5: Number of ERASMUS Students 1987/88-2002/03

5. Summary

The sketch of the social capital of the EU shows the multifacetedness of this inviting term. Its imprecision is both an advantage and a disadvantage: imprecise terms invite discussion, and encourage dialogue across disciplinary boundaries. But the discussion has long since reached the level of policy makers, who have discovered a significant need for information. A negative aspect of the term is thus its immaturity: due to the short-term demands of the world of politics, social researchers quickly transform "old" indicators – for example, shared value orientation – into operational definitions of social capital. There is thus a significant need for more precise conceptualisation as well as the exploration and establishment of new operationalisations. This should be recalled when the quoted instruments of long-term social scientific observation are to be applied to this new field.

Social capital is above all also a category of practical discourse. Living together in Europe: this means crossing borders and networking organisations and people. To that extent, the EU shapes Europe's social capital. Emphasised are the activities of the EU towards developing a European educational realm and the *exchange* among younger generations. This is a promise for the future that the members of

younger cohorts will increasingly understand themselves primarily as Europeans, not limited to the education elites. With town twinnings, a broadly effective instrument of networking is presented that has developed to become a model for success. For belong the formal partnership, these arrangements offer the possibility of informal meetings of citizens from various communities.

The second dimension of social capital refers to the trust of the citizens among one another and in regard to the EU as a corporative actor. For EU citizens, Brussels is still far away. The task at hand is not just so spread knowledge about the EU and its institutions. Over the long term, the legitimacy of the EU cannot solely rest on economic advantage, since the EU increasingly also allocates burdens. Trust can form in interaction – this is shown by the success of the networking by way of exchange within the EU. On the level of political decision-making, this means first of all participation. To that extent, the expansion of European democracy will also increase social capital.

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Between Non-Regulation and Harmonisation: Tax Policy in the European Union

Gerd Grözinger

There's a German saying that there are two things unavoidable in life: death and taxes. But this might be wisdom from times past. More recently, you get the impression that if you belong to the richer classes or the bigger enterprises, you have a good chance of constantly having your tax obligations lowered or even getting away without any payments at all. The widely accepted explanation behind this is, of course, the process of globalisation and the free flow of capital that comes with it. I will later discuss how substantiated this claim is.

But it is certainly real in the sense that it shapes tax policies. Governments react to the challenge of globalisation by making the financial environment more attractive for 'investors'– which is a synonym for the wealthy and large corporations. For just one example, let's have a short look at the recent situation in my own country. For eight years (1998–2005) Germany had a so-called Red-Green administration, made up of the Social Democrats and the more ecologically-oriented Greens. This is the equivalent of a Lula government, and can with some justification be seen as the most progressive one possible in Germany at the moment. It ended by loosing popular support – presumably due to so-called labour market reforms – bringing on early elections and the change to a new coalition, now made up of the conservative Christian Democrats and the Social Democrats.

This somewhat left-of-centre red-green government changed three main laws in the tax realm. First, it lowered in steps the statutory tax rates on personal income at all levels, inclusive and even most visible the higher ones. Until 1998 the top rate was 53%, it now stands at only 45%. Secondly, it lowered the federal standard tax rate on profits (there are additional local and minor extra taxes). For corporations in 1998, the rate was 53%, when earnings were paid out as dividends and 45% in the case of a retention of earnings. It is now uniformly only 25%. And thirdly, it introduced a generous pardon for tax evaders: income from economic activities in Germany that was not declared but instead illegally smuggled abroad could be then legally re-channelled to Germany and legalised by paying a discounted tax rate and penalty.

There are many other examples of similar developments in the tax policies of the member states of the European Union. I would like to propose however that the process of globalisation does not automatically lead to shrinking public budgets due to the increased capital mobility. The picture is rather more complicated. Beginning with a short look at some relevant data about the income situation from taxes in the OECD world, I will in this paper explore EU initiatives to date in the

realm of tax coordination. I will then conclude by offering two proposals for better coordination in the future, proposals that I consider equally appropriate for the EU and Mercosur. The first is about output (instead of input) coordination in the case of taxes on profits for corporations. The second argues for the introduction of a citizenship (instead of a residence) principle in income taxation. This short list of necessary reforms is by no ways complete, but in my view covers the most relevant dimensions.

The empirical situation

Beginning with long term empirical trends, one first has to notice that lowering direct tax rates in many countries might be quite prominent in policy-making today, but it is not that new. Actually, this wave is already at the end of its second decade. The OECD writes in one of their most recent yearly reports on tax revenues: 'After the mid-1980s, most OECD countries substantially reduced the statutory rates of their personal and corporate income tax' (OECD 2004:20).

Does this lead to lower tax income for the state? Not necessarily, for at the same time there was also a broadening of the tax base. The OECD continues, 'But the negative revenue impact of widespread tax reforms remained limited because the drain on tax revenues following rate reductions was often offset by reducing or abolishing tax reliefs.'

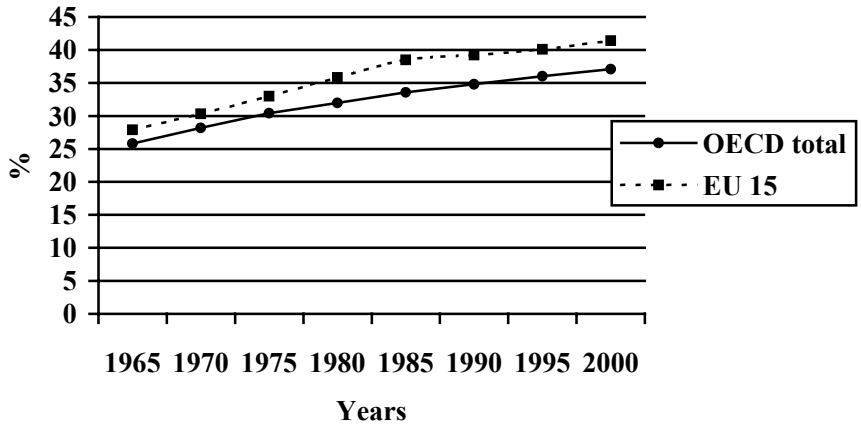
Comparing statutory tax rates over time or internationally does quite often give a wrong impression, since different definitions of the tax base may exert a much bigger influence on the revenue. In fact, there is no general trend of shrinking state income for the group of the most developed countries: instead, quite the opposite is the case. This can be shown using the OECD's Revenue Statistics, the most reliable source for such questions. This statistic has the methodological advantage that the data of many countries are collected under the same principles and therefore comparable.

In Figure 1, trends for the OECD member states and for the European Union are shown. But the picture for singular countries is usually rather similar. The OECD – the Organisation for Economic Cooperation and Development – consists of 30 countries, over half of them members of the European Union (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxemburg, Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, and the United Kingdom). The other countries are Canada, Mexico, United States, Australia, Japan, Korea, New Zealand, Iceland, Norway, Switzerland, and Turkey. To allow long-term comparisons, the OECD calculates figures only for the so-called EU 15, which consists of the above mentioned countries without the new member states of the EU: Czech Republic, Hungary, Poland, and Slovakia.

The graph below shows the trends for the comprehensive definition of public revenues, which includes social security contributions as well. This makes sense,

because the same welfare state services, like old age pensions for example, are in some countries financed by general taxes, in others by a distinct system of contributions. To calibrate the indicator, the expression of revenues as percentage of the GDP is used. The GDP, the Gross Domestic Product, is the amount of all goods and services produced in a certain period.

Figure 1



The picture that here emerges is probably a surprise to most readers: the revenue trends for both the EU 15 and the total of the OECD are definitely increasing over time. Let us have a closer look at the EU 15. In 1965, less than 28% of all income went to the state, in 1975 this figure was 32%, another ten years later, in 1985, it was over 38%, in 1995 then more than 40%, and in the last years it still seems to be slightly increasing, at least it is not going down.

A basically similar picture emerges also for the OECD as a whole, which is always a bit lower than the rates for the European Union alone, due to financially more conservative countries like the United States. Although we have the aforementioned cuts in relevant statutory tax rates since the mid-1980s, what we observe might be a slowing down of the increase in the revenue share of the GDP, but definitely not an absolute downturn.

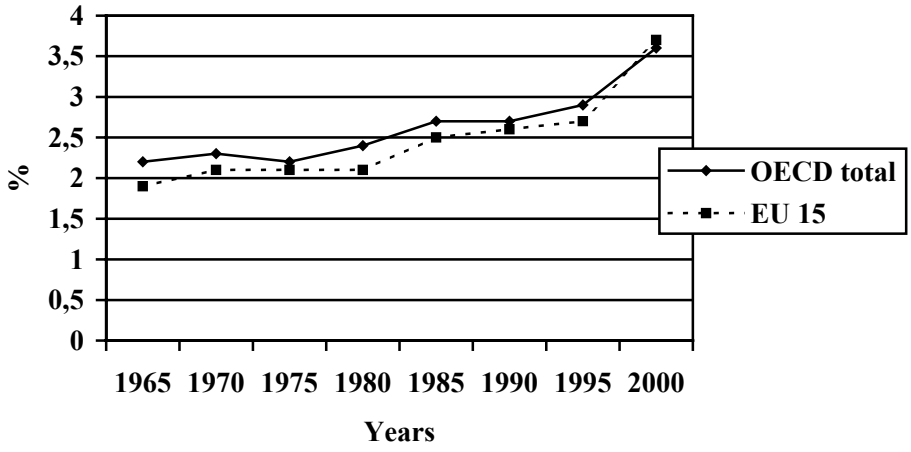
Both the political institutions of the EU and the OECD seem to have accepted this long-term trend as a kind of given. They see two main structural reasons for it, which will not go away in the future. First of all, since their populations are getting older, these countries will have increased expenses in the realm of old age pensions and health care. Both segments are in the OECD widely covered by systems of public procurement. The other reason is the increasing role of education, another segment of state intervention in Europe. It makes quite a costly difference if 10%

or if 50% of a generation goes to college. In addition, in nearly all OECD countries we have higher rates of unemployment now than twenty or thirty years ago, also placing a severe strain on public budgets (European Commission 2003).

It might be objected that total revenue income is not a very good indicator for the pressure felt by countries to lower their tax share. And I basically agree with this objection. Taxes can principally be imposed on capital, but also on labour, on consumption, and on natural resources. Might it not be the case that although the whole tax share has increased over the time, taxes on capital are going down slightly?

The answer is not that simple. Let's have a look at taxes on corporate income, again as percentage of the GDP (in OECD terms, it is the position 1200 of the Revenue Statistics). The restriction to 'corporations' is unavoidable for methodological reasons because for unincorporated companies and self-employed persons no proper distinction can be made between profits and labour income. And the concentration on corporations is also useful for another reason. Corporations are usually the largest economic enterprises, and are the classical case of internationally mobile capital. Therefore, if globalisation is a threat to the taxing of capital, we should find empirical proof of this especially in this category of taxes.

Figure 2



But – another surprise – for the tax revenues from internationally mobile capital also rise over time. The EU 15-situation again taken as quid pro quo: it starts with 1.9% in 1965 and ends with 3.6% in 2000. For the OECD as a whole, the picture is very similar.

Is this the final refutation of the globalisation threat? The answer is no: an increase in this indicator can be explained by more than one cause. There are three possibilities. First, it may indeed be a sign of a real higher tax burden on capital. But it might also be just a reflection of a change in the composition of the GDP. When the share of income for capital is growing at the expense of the share of income for labour, then tax revenues from profits will increase because profits are growing in relative terms. And thirdly, the indicator is restricted to corporations. When the relative share of corporations on the value added increases – compared with the share of non-incorporated companies and the self-employed – then, if all else remains constant, this will also result in more tax revenue from corporate profits. And to make a long story short: in the OECD and the EU there are signs of increasing trends in both the share of profits and the share of corporations.

Nevertheless, after neutralising those influences, an interesting picture emerges (neutralising here is defined as calculating the real tax payment on one unit of value added minus the wages). In some OECD-countries we then see an increasing trend, in some others a decreasing trend, in still others a more or less stagnant development.

In the following the position of the majority of the EU 15 members are given (for Ireland and Luxembourg the data is lacking) after correcting the data for changes in the share of profits and of corporations. In addition, the respective maximum period for a trend calculation is named, since the states provided statistics from a different period than those provided by the OECD.

- Increasing taxes: Austria (1995–2002), Belgium (1985–2002), Denmark (1981–2002), Finland (1995–2003), Greece (1995 – 2002), Italy (1980–2002), Netherlands (1980–2002), Portugal (1995–2001), Spain (1995 –2002), Sweden (1993–2001)
- Stagnant: France (1978–2002), United Kingdom (1987–2002)
- A decreasing trend for taxes on profits: Germany (1991–2002)

The picture is quite impressive: the great majority of the EU members did succeed in increasing their profit tax revenues or keep them at least constant despite the fear of capital flight. Only one real counterexample exists: Germany.

However, due to the enlargement of the EU some new players have entered the field. And those members, where data are given, show a distinctive different pattern of behaviour. None exhibit a really increasing tax share.

- The situation can be considered stagnant in Hungary (1995–2002).
- The trend is decreasing in the Czech Republic (1993–2002), Poland (1995–2002), Slovakia (1998–2001).

The new member states – all former communist countries turned capitalist, with often radically market-oriented administrations – are quite openly and aggressively

competing for foreign direct investment. And this situation is being closely monitored by the other EU member states.

Tax coordination in the EU

The EU has undergone several waves of enlargement. It is no wonder then that nearly from the beginning there was a certain awareness that a higher degree of economic integration may lead to unwelcome tax competition. For reasons of space the following is again restricted to income taxes, especially taxes on profits.

The EU has a long history of thinking about some coordination in this area. It commissioned many reports, usually chaired by very renowned financial economists (Grözinger 1999).

- 1962 Neumark-Report. Recommendation: harmonisation
- 1969 Van den Temple-Report. Recommendation: harmonisation
- 1975 EU-Commission-Report. Recommendation: harmonisation
- 1990 Ruding Report. Recommendation: 30–40% profit taxation

In short, the expert panels usually recommended strict harmonisation policies or, in the end already exhausted by the political resistance, at least a narrow band of tax rates. But none of these proposals were implemented, and this is the situation still today.

However, with the recent enlargement of the European Union to the East and the South, and more countries still waiting in line, something will have to be done in future. The policies of some newer member states, which offer real discount rates for capital, are marking the older member states quite nervous, bringing about a renewed harmonisation debate.

But one can be very sceptical about a harmonisation of tax rates as the best way to stop tax competition: for other factors may be much more influential. Especially the definition of the tax base is the bigger challenge. Let's take Germany again as an example. For many years my country did have the highest statutory tax rates for profits of corporations in the EU. But at the same time it had the lowest revenues from that source. This was not, because the profit share in Germany was so low, nor was the share of corporations insignificant. It was because our definition of the tax base has so many loopholes that paying taxes could be minimised.

But a harmonisation of tax rates and tax bases is a rather cumbersome endeavour for a political union. There are so many national peculiarities that one can spend decades debating whether those are justified or not, which one to keep, which one to abandon. The question is therefore: is there another way of coordination where national traditions may prevail but harmful tax competition can be avoided?

First proposal: output coordination for profit taxes

Due to the above-mentioned difficulties, I propose an alternative instrument. Why not change from an input coordination - harmonising tax rates and tax bases – to an output coordination? In that case each member country must show a certain 'appropriate minimum amount' of revenues from that category, again calculated as a percentage of the GDP. 'Appropriate' here means that the respective share of profits and corporations would have to be taken into account. And what should happen in the case of non-compliance? Then such a country would have to pay a hefty penalty to the other members, for example the total of the difference missing.

What are the advantages? First, it could be implemented quite quickly. We already have standardised revenue data from the OECD's Revenue Statistics and National Accounts, and we have also standardised data about the share of corporations and their profit position (OECD 2004).

The second advantage is that implementation is done by every national government. It may work with changing general tax rates, or revoking special tax breaks for certain branches, or in the way it deals with income from abroad. Only the outcome counts. And we could make the rule quite flexible. For example, we could take economic cycles into account, and use moving averages over the years as calculation base. Or, as part of a temporary aid-package, we could give poorer countries for some years more leeway to attract foreign capital, helping them to catch up with the other member states. In sum, I think, output coordination would make a far better tool against tax competition than input harmonisation.

Second proposal: citizenship principle for personal income taxes

What about personal income? It is often said that very rich people may avoid the taxation of income just by moving to other countries. And that even corporate headquarters – for example in the financial sector – are sometimes relocated due to the personal interests of their high-paid management.

There is a relatively easy way to put a stop to such behaviour. We could change from a residence system to a citizenship principle in personal taxation. Under the first scheme one is taxable after the rules of the residence country, under the second one, additionally under the rules of the home country. In this case, to avoid double taxation income taxes in the country of residence must be deductible.

At first glance, this seems quite a mad proposition. Does not the whole world adhere to the residence principle? Not quite. We have a very convincing and working model for the citizenship principle: the United States of America. Every US citizen remains taxable in his home country with his world income, independent of his actual place of residence. Two other countries that do the same are the Philippines and Liberia, which traditionally follow the US legal model.

The advantages are obvious. Rich people are simply better taxable than is now the case. This generates more revenues. And it also removes some of the political

pressure to lower top tax rates. Additionally, a citizenship principle can be easily extended to inheritance taxes, another problem where we see some tax migration.

And even if some try to avoid their tax obligations by changing their passports and trying to move to Monaco, the Cayman Islands, or wherever, one is not left powerless. The taxability could be extended over the time of the citizenship. Again, have a look at the USA (Bauen 2004). Since 1996 US-expatriates with a certain income remain taxable another ten years after giving up their citizenship.

Of course, many existing 'double-taxation-treaties' would have to be renogotiated. Even the United States needed a lot of time to do so, and still doesn't have such treaties with all countries (Brazil for example, to my knowledge). And there are other dangers too. What happens if a country turns dictatorial? Are the other states then still obliged to deliver data on the income of their citizens, and thereby help stabilise such a regime? So, we must introduce contingency clauses that in such a case international tax cooperation is suspended, until democracy and the rule of law is re-established.

However, technical obstacles could be overcome and solutions for ethically problematic situations could be found. And in my opinion implementation is a real possibility. If the EU and Mercosur countries would undertake a move in this direction, together with the United States this would form a virtually invincible coalition.

Conclusion

This leads immediately to my overall conclusion. Both an output coordination of taxes on profits and a citizenship principle in personal income taxation would send a strong signal to the world that globalisation is not destiny, but a man-made development that can be steered in the direction of a better, not a worse economic situation for the majority.

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Economic Governance in the European Union: Possibilities and Problems of Supranational Policy Coordination*

Arne Heise

1. Introduction

In a book on globalisation, I found the interesting comment that Sao Paulo is sometimes mentioned as 'Germany's largest industrial city' (see Dicken 1992)! Taking the vast amount of German Foreign Direct Investment (FDI) in the Sao Paulo region and the number of jobs involved into account, this may well be true. However, such a statement does not adequately portray the most important facet of the process of globalisation: Contrary to the suggestion of an increasingly rootless capital spreading without any systematic pattern across the globe, the process of economic globalisation really evolves along the line of regions of intense and ever growing economic integration[1]. From a European perspective, the process of European integration is definitely the most important aspect of globalisation, which has reached a first climax of 'positive' integration in the sense of the creation of union-wide institutions with monetary unification and the establishment of a European Central Bank (ECB) in 1999.

It was particularly this last step, which has sharpened the view for the need of a comprehensive system of economic governance in the European Union (EU).[2] By 'governance' in contrast to 'government' a process of continuing cooperation of national actors and the coordination of national or even sub-national (e.g. regional) economic policies is meant (see e.g. Rosenau/Czempiel 1992, Gilpin 2001: 391ff.).

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1 "As some of the extreme advocates of globalization recognize, the world economy is far from being genuinely 'global'. Rather trade, investment and financial flows are concentrated in the Triad of Europe, Japan and North America and this dominance seems set to continue" (Hirst/Thompson 1999: 2).

2 Reading the European Commission's White Paper on European governance (European Commission 2001) one gets the impression that addressing European governance is merely a question of improving the apprehension of policy making at the EU level by the European people ("The goal is to open up policy-making to make it more inclusive and accountable"). Out of five principles of 'good governance' only one ('Effectiveness') is related to economic policies ends.

Before explaining the system of economic governance in the EU (part 4) and taking a look ahead (part 5), let me start with some clarifying principles of the provision of public goods in general (part 2) and of European public goods in particular (part 3).

2. The principle problems of public good provision in an integrating world

Economic policy can sensibly be analysed in terms of the provision of public goods[3]: social security or infrastructure as well as economic or price stability, fiscal or environmental sustainability, public education, lighthouses or public utilities etc. However, due to the peculiar characteristics of public goods (as opposed to private goods) – i.e. non-rivalness in consumption and non-excludability – the task of maximising social welfare by providing public goods (i.e. the economic principle of efficiency) becomes unmanageable: On the one hand, it is impossible to construct anything like a consistent and uncontroversial social welfare function in heterogeneous societies (Arrow's Impossibility Theorem)[4], one the other hand, financing public goods is prone to free-riding behaviour.[5] Both problems are exactly at the bottom of public instead of private goods provision (which would not occur under these circumstances), yet they include that the provision of public goods – i.e. the amount and specific nature – will always be torn between vested individual, class or other interests. In democratic societies, this 'battle' or choice takes the form of elections, putting the electoral processes – the electoral system as such as well as agenda-building and agenda-setting-processes – at centre stage of economic policy.

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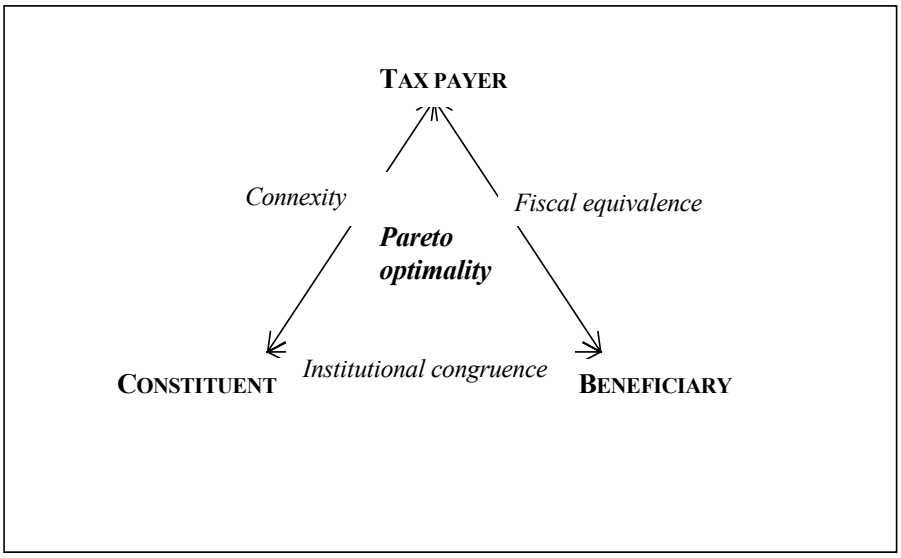
3 see e.g. Reinecke (1998: 85ff.) or Conybeare (1984).

4 Which includes a frustration of individual preferences or, as in fig. 1, the breaking of institutional congruence. As fig. 1 shows, this results in a pareto-inefficient supply of public goods.

5 Which includes, as in fig. 1, a rupture between the individual consumer (of public goods) as constituent and as tax payer (i.e. the connexity) and the non-existence of fiscal equivalence.

Figure 1: Three dimensions of goods provision



Note: Under the assumption of connexity, institutional congruence and fiscal equivalence, the provision of goods will be pareto-optimal. This is the ordinary assumption of private goods provision as beneficiary, payer and constituent are only three dimensions of one individual actor: the consumer.

The process of globalisation in general and of European integration in particular aggravates the problems of public goods provision at national levels: firstly, external effects such as competitive aspects of social security systems or spill-over effects of fiscal or monetary stabilisation policies affect adversely the connection between the electorate (or constituency) and the beneficiary or they increase the social costs of economic policies. Secondly, economic actors get a second option: in closed economies, they can use the 'voice-option' in the electoral process, yet have to accept the electoral outcome finally. In a growingly open economy, some actors – those with the least cost of mobility – may also use the 'exit-option' if public goods provision does not conform with their preferences and, in some cases, even the 'dirty' exit-option which combines the possibility of consuming public goods in a country without providing resources for the provision of such public goods. The result of both problems is either a deficient supply of public goods – e.g. the level of social security will be reduced below what a society would like to consume if globalisation or regional integration would not have taken place or stabilisation policies will not be used effectively because every country is waiting for the 'locomotive function' of the other countries – or a 'gap of justice' as the less mobile actors – particularly workers and the less skilled – will be increasingly burdened.

In this context, the sometimes alleged positive effects of the 'competition of economic, social and tax systems' in a growingly global world (the 'Tiebout proposition'[6]) ignores the potential rupture between tax payer and beneficiary – what is called 'fiscal equivalence' – and must therefore be taken very critically.

3. European public goods as a normative concept

To cure the problems of public goods provision at least to the extent caused by European integration, a cooperation of economic policy actors and a harmonization of policies in the areas of fiscal, social, budgetary and probably even wage policies is necessary. In the light of a variety of path-dependent, historically grown institutional systems in the now 25 EU members states, harmonisation cannot be translated as 'standardisation', but rather a benchmark-based establishment of functional equivalence of different systems preventing dumping effects from happening. Taking the almost complete absence of financial resources at the EU-level and the lack of a conscious European public opinion for granted (see Abromeit 1998; Etzioni-Halevy 2002), the provision of European public goods cannot take place in the form a hierarchical cooperation – i.e. government in a 'European Republic' – but must be established as a process of multi-level cooperation with most legal and financial resources and the political legitimacy still at national (or even sub-national) level – i.e. governance in the above-mentioned sense.

Monetary unification with the provision of a single currency and the hierarchical cooperation of national central banks in the European System of Central Banks (ESCB) headed by the ECB must, therefore, rather be seen as the exception to this rule than as a viable blue print for a system of European economic governance. Although hierarchical or hegemonial cooperation is often believed to be more stable than the cooperation among equals (see Keohane 1984), this seems to be no viable option in the European Union where most crucial decisions still have to be made unanimously (and decision making is rooting in national interests).

4. Fragments of a European economic governance system in reality

4.1 The Open Method of Coordination (OMC)

The coordination of economic policy areas among equals keeping financial resources at their disposal is called 'Open Method of Coordination' (OMC) in EU

[6] see Tiebout (1956), Epple/Zelenitz (1981) and, applied to European Integration, Berthold/Neumann (2001).

reality.[7] This method is used for the coordination of economic policies in general and finds its expression in the 'Broad Economic Policy Guidelines' (BEPG) passed each year after a long, reflexive process of discussions among the European Commission (EC), the European Parliament (EP), the European Council, and the Social partners (see tab. 1). After the Amsterdam revision of the Treaty of the European Union has accepted EU-responsibility for employment issues, the OMC has been expanded to employment policies in what is called annual 'Employment Policy Guidelines' (EPG) being also passed after an equally long process of communication and initiating individual 'National Action Plans' for each EU member state.[8] Two more governance processes using the OMC should also be mentioned:

- The 'Cardiff process' coordinates structural reforms and liberalisations on goods, service and financial markets by which so called 'meritoric' public goods[9] are successively being transformed into private goods (e.g. in telecommunications, public utilities such as electricity and water supply, etc.).
- And, finally the 'Cologne process' is supposed to organise a 'macro dialogue' between the ECB (responsible for monetary policy), EU finance ministers (ECOFIN responsible for fiscal and budgetary policies) and the social partners (responsible for wage policies).

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7 Although the OMC has only recently been established by the so called 'Lisbon strategy', the multilateral surveillance procedures of earlier EU programmes (i.e. the employment chapter of the Amsterdam treaty) can be summarised as a variant or predecessor of the OMC (see e.g. Hodson 2004).

8 European employment policy under OMC is coordinating national policies that neither interact nor are interdependent (see tab. 4). Therefore, coordination is not necessary in order the enhance effectiveness of national policies but rather means the harmonisation of preferences, standards or the exchange of tacit knowledge. In this respect, coordination can be regarded as something in its own right but cannot be derived by economic rationality as I tried to expose above.

9 Meritoric public goods are such goods that, for whatever reason, have been supplied exclusively by public authorities although they do not bear the characteristics of pure public goods (see Musgrave 1959).

Table 1: The process of Economic Governance in the European Union

Actor / **Field of action**	**EU Commission**	**Council of Ministers**	**Economic Committee; Employment Committee**	**Social partners**	**ECB**	**European Parliament**	**National Governments**
Employment Policy • Luxemburg process • Cardiff process • Cologne process	*Drafts:* • Economic Policy Guidelines (EPG) • Annual Employment Report • Cardiff reports *partcipates:* • Macro-dialogue	*Decides on:* • Economic Policy Guidelines (EPG) • Annual Employment Reports • Cardiff reports *participates:* • Macro-dialogue	*comments on:* • Economic Policy Guidelines (EPG) • Annual Employment Reports • Cardiff reports *participates:* • Macro-dialogue	*comments on*: • Economic Policy Guidelines (EPG) • Annual Employment Reports *participates:* • Macro-dialogue	*participates:* • Macro-dialogue	*comments on:* • Economic Policy Guidelines (EPG) • Annual Employment Reports	*drafts:* • National Actions Plans (NAP) • Nationale Cardiff reports
Broad Economic Policy • Coordination • Budgetary Policy (ESGP)	*Drafts:* • Broad Economic Policy Guidelines (BEPG) • Annual Economic Reports *surveys:* • Excess Deficit Procedure	*Decides on:* • Broad Economic Policy Guidelines (BEPG) • Annual Economic Reports *decides on:* • Excess Deficit Procedure	*comments on :* • Broad Economic Policy Guidelines (BEPG) • Annual Economic Reports	*comments on:* • Broad Economic Policy Guidelines (BEPG) • Annual Economic Reports		*comments on:* • Broad Economic Policy Guidelines (BEPG) • Annual Economic Reports	*drafts:* • Stability and Convergence programmes

The macro-dialogue of the 'Cologne process' – through all the documents of the EC, EP and council of ministers taken as the prerequisite for an environment favourable for growth and employment – in its present institutional design seems to be no more than a 'chat box' without traceable consequences for policy behaviour (see Heise 2002)[10]. A comparison of fiscal and monetary policy stances – a growth oriented policy mix is the proclaimed aim of the Cologne process – between 2000 and 2004 indicates (see tab. 2), that both policies are set in a more restrictive mode in the Euro-Zone than in the United States. This result, which copies the divergent policy orientations in the United States and Germany at the end of the last decade (see e.g. Lombard 2000; Semmler 2000) and is even more pronounced if the development after the terror shock of 9/11 is portrayed instead of comparing annual averages across slightly divergent business cycles, has not benefited price stability in the Euro-Zone but must be seen as being detrimental to growth and employment in Europe. However, the performance indicators of the non-EMU countries at least suggest that a restrictive policy stance is not the exclusive result of an inefficient economic governance within the Euro-Zone.

Table 2: Macroeconomic performance of the Euro-zone, USA, and the non-EMU countries Sweden, Denmark and the UK in 2000-2004

	Euro-Zone	**USA**	**DK**	**S**	**UK**
GDP[1]	1,6	3,5	1,5	2,2	2,5
GDP-Deflator[1]	2,0	2,2	2,2	1,8	2,6
Structural budgetary balance[2]	-2,4	-3,3	1,4	1,1	-1,2
Total budgetary balance[2]	-1,8	-3,0	2,0	1,8	-0,6
Short term real interest rate[3]	1,3	0,5	0,9	2,0	1,9

Note: [1] = average annual growth rate; [2] = average % of GDP; [3] = average %

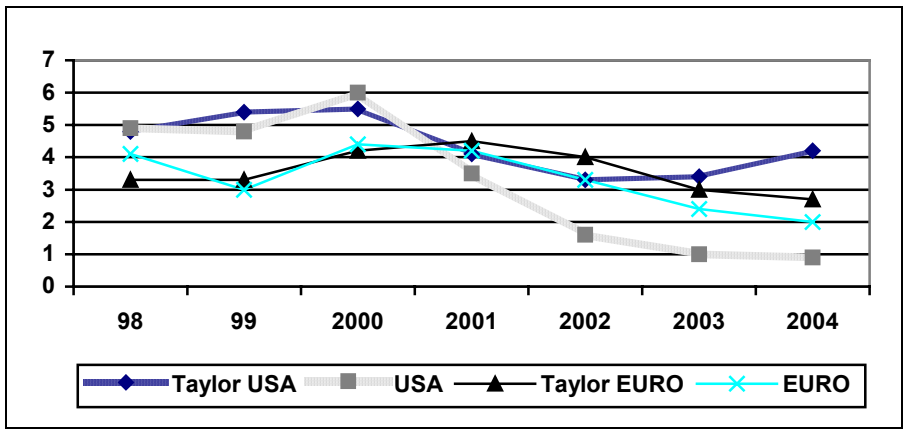
Source: European Economy 2004

Taking monetary policy separately, the restrictive and growth-damaging stance of ECB policy will be evident if it is compared to US monetary policy. In fig. 2 actual (nominal) short-term interest rates are compared to interest rates generated

[10] For a similar, yet more moderate interpretation see Watt/Hallwirth (2003) and Allsopp/Watt (2003).

by a Taylor-rule[11]. Although monetary policy in the Euro-Zone seems to follow the Taylor-rule predictions quite closely, US monetary policy shows how to react appropriately to an external shock. And in fig. 3, where the difference in monetary policy orientation is depicted against the different growth performances, the detrimental effect of restrictive monetary policy within the Euro-Zone (with a time lack of one period) is easy to detect. To be very explicit: this result is not caused by European monetary integration but proves the ineffectiveness of the European governance process with respect to macro-economic coordination.

Figure 2: Monetary Policy in the United States and the Euro-Zone 1998 – 2004

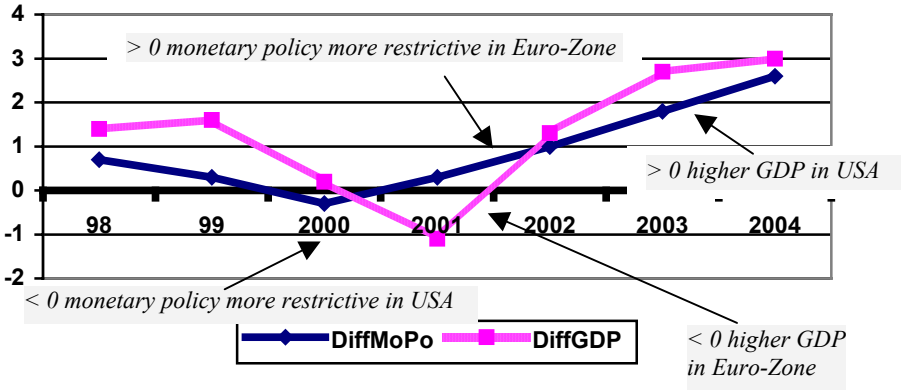


Note: TaylorUSA = Taylor-rule prediction of short-term nominal interest rate for the United Sates; TaylorEURO = Raylor-rule prediction of short-term nominal interest rate for the Euro-Zone; USA = short-term nominal interest rate in the United States; EURO = short-term nominal interest rate in the Euro-Zone

Source: OECD – Economic Outlook No. 75, 2004; IMF – World Economic Outlook 2004; own calculations

[11] John B. Taylor (1993) established a simple rule that was able to explain (ex ante) and predict (ex post) monetary policy. The simple Taylor-rule used here is $iT = i^* + \Delta Pt + 0{,}5\ [(\text{inflation gap}) + (\text{output gab})]$; with i^* as the (real) equilibrium level of short-term interest rate (= 2%) and ΔPt as the tolerated inflation rate.

Figure 3: Monetary Policy and growth performance; United States and the Euro-Zone 1998 - 2004



Note: DiffMoPo = $([i_T^{USA} - i_{Ac}^{USA}] - [i_T^{EURO} - i_{Ac}^{EURO}])$; DiffGDP = GDP^{USA} - GDP^{EURO}; mit i_T = Taylor-rule based interest rate; i_{Ac} = actual nominal interest rate

Source: OECD – Economic Outlook No. 75, 2004; IMF – World Economic Outlook 2004; own calculations

4.2 The European Stability and Growth Pact (ESGP)

Only in one policy area (see tab. 3), namely budgetary policy, a different method of coordination – 'hard coordination' called – has been established: the 'European Stability and Growth Pact' (ESGP) restrictively coordinates national budgetary policies to ensure 'zero deficit budgets' as fiscal policy rule in the European Monetary Union. Principally, the ESGP does not rely on 'moral suasion' but is based on a clear mechanism of material sanctions in order to 'tie the hands of the single nations'. Ironically, it was the German government which believed this kind of 'hard coordination' to be necessary in order to prevent national governments from pursuing an overly expansionary fiscal policy – and to sweeten the farewell of the Deutsch-Mark to the Germans. The irony is that it was Germany which was the first[12] to breach the rules of the ESGP in 2002 and has done so ever since. In consequence, the ESPG has been 'softened' only recently[13]. The basic problem with ESGP is that it is based on a very limited understanding of the working of economies in general and budgetary policies in particular and, more important, that

[12] In company with Portugal and France. Only now, ex post, it becomes evident that Greece – a late-comer to EMU in 2001 – has deceived the European Union by conveying incorrect deficit figures since 2000.

[13] Not only deep recessions but also longer periods of economic stagnation are now regarded as situation which may go without sanction, see European Commission, 2004.

this understanding clashes with the understanding underlying the macro-dialogue of the 'Cologne process'[14]; i.e. the architecture of the European economic governance is still self-contradictory and needs further amendment.

Table 3: Policy coordination in the European Union

		Rules or Guidelines	
		Yes	**No**
Sanctions	**Yes**	ESGP	*
	No (OMC)	BEPG EPG NAP Cardiff reports	Macro-dialogue

* sanctions for governance procedures without rules or guidelines seem senseless

5. The way ahead

Although it is too early to draw final conclusions on the process of European economic governance, it seems uncontroversial to state that we have seen only the beginning. Large areas of policies have not yet even been integrated into a proper process of economic governance, but it becomes ever more obvious that they need to be integrated: social policies or tax policies for example and wage policies, which are all prone to large negative external effects (see e.g. Scharpf 1997, Genschel 2002, Busch 1998). And even if the sometimes painted picture of gruesome wage and social dumping[15] is not the most likely scenario to happen[16], a deficient supply of social public goods and a growing shift of the financial burden seems – as argued above – to be unavoidable.

But it is not only the missing policy areas which must be mentioned, but also the governance process itself which needs a second thought: those critics that see a need for coordination but believe a process of 'coordination among equals' to be too unstable or fragile, argue in favour of government at EU-level – a veritable 'European Republic' (see Collignon 2003a, 2003b). The ongoing discussion about

[14] While the ESGP is based on the explicit assumption of non-coordination of monetary and fiscal policies, the macro-dialogue's goal is exactly to coordinate these policy areas.

[15] For a critical discussion see Sinn (1999), Boeri (2000), Krueger (2000).

[16] Different scenarios may evolve, see Heise (2000: 30ff.) or Genschel (2002).

a European Constitution which would strengthen the EU level and EU institutions such as the EP and the EC sheds a sceptical light on the viability of this way ahead – at least for the time being. Those critics that also see a need for coordination but do not believe in a 'European Republic' in the nearer future, argue in favour of a different institutional framework in order to strengthen the incentives for cooperation in a political environment where the national perspective is still far more important than the common interests of the EU: the ESGP and the macro-dialogue of the Cologne process need to be revised, the Broad Economic Policy Guidelines and Employment Policy Guidelines must be set into a mode of favouring employment growth and income stability and must be 'hardened' in terms of commitment and credibility.

Table 4: Policy coordination issues in the European Union

		Policy Interdependency	
		Yes	**No**
Common goals	**Yes**	Macro-dialogue	EPG NAP Cardiff reports
	No	ESGP Fiscal (tax) policy Welfare policies Wage policy (monetary policy*)	National policies according to national preferences

* has been supranationalised in the EU

Both positions, relying on strengthened institutions to more effectively coordinate national policies in a European Economic Governance process on the one hand and stressing the need for supranational, hierarchical forms of coordination in terms of a European (Economic) Government on the other hand, are not mutually exclusive, but rather point out that different coordination issues may need different procedures (see tab. 4): wherever coordination is based on a zero-sum game – such as curing externalities of tax and social systems - , the process of concession bargaining in order to establish an efficient governance system may be unpredictable and unviable.[17] Hence, some kind of supranational

[17] In most cases, zero-sum games occur in direct interactions of economic actors and a market-led coordination (prices as coordination devices) is optimal, if control- and enforcement costs (based on contracts) are low (Dixit has only recently pointed out that

coordinator would be needed.[18] But wherever coordination starts a positive sum game – as in establishing a truly working macro-dialogue -, a governance process among equals may be both sufficient and efficient.[19]

One thing seems obvious: If the European governance process is not going to work effectively, political (neo-)liberalism intending to cut public goods provision and tax rates in general will prevail and ever more national systems of distribution and social welfare will come under pressure (see e.g. Scharpf 1996). However, this would be no good prospect for further European integration and the establishment of something which is more than a pure 'free trade zone'. Therefore, the process of European economic governance is condemned to work and some kind of supranational European (economic) government must eventually evolve. However, that is still a long way to go.

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this assumption only holds for a few advanced countries and only in recent times. However, economic activity outside theses countries and at other time show that rule- or relation-based modes of self-governance may evolve and remain stable over time; see Dixit 2001). Yet, in our setting, zero-sum games rather take the form of interdependencies which cannot be based on enforceable contracts but would involve complex 'concession bargaining' (see e.g. Reinecke 1998: 73ff.). Such concession bargaining procedures may also end in agreements but are much more dependent on 'systematic incentives' (a hegemon) or complementary pay-off matrices of the actors involved than are self-governed direct interactions.

[18] Therefore, the hopes of the political left bestowed on the OMC as a procedure to safeguard the ‚European social model' if extended to social policy areas, seem to be premature if my analysis is correct (see Rodrigues 2002 and Vandenbroucke 2003, for a more critical view: Radaelli 2003).

[19] However, as the macro-dialogue shows, the governance process needs an appropriate institutional setting (polity) (see Heise 2002 or Watt/Hallwirth 2003).

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Governance, Democracy, and Judicial Control in the EU - The European Court of Justice and the EU Committees

Rainer Nickel

The state of the European Union is that the Union is not a state in the traditional sense of political philosophy, constitutional law, or international law, and it will not be one in the foreseeable future.[1] Its parliament is not a parliament in the traditional sense of nation-state democracies, and its first attempt to establish a Constitution for Europe dramatically failed in 2005.[2] Notwithstanding its constitutional crisis, however, the EU has evolved into a singular and highly successful supranational entity. Its problem-solving capacity and its evolution into a legal community, a *Rechtsgemeinschaft*, is cited frequently as incentives to take it as a positive role model for the development of other regional integration projects. Mercosur is obviously a possible candidate for such a supranational integration in South America; in contrast, for example, to NAFTA, which is clearly designated only to remain an intergovernmental trade agreement.[3]

The success story of the EU, especially with regard to the establishment of an internal market, rests to a significant degree on its peculiar institutional structure. There are, however, two faces of the EU: the visible, "official" institutions, like the Council, the Commission, and the European Court of Justice, on the one hand, and a less visible structure where European market governance occurs, where bureaucrats, national and Community officials, and scientific experts convene and

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1 This unclear position can even be traced back to the founding document and its different language versions: while the official English title of the TEU is "Treaty on European Union", the Spanish "Tratado de *la* Unión Europea" and the German "Vertrag über *die* Europäische Union" translate into "Treaty on *the* European Union". For consolidated versions of the Treaty in the community languages, see http://eur-lex.europa.eu/en/treaties/index.htm.

2 The "Treaty on a Constitution for Europe" fell through in the 2005 French and Dutch referenda. For a discussion about possible scenarios in case of a ratification crisis, see Bruno De Witte, The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective, *EUI Working Paper LAW No. 2004/16*, http://www.iue.it/LAW/Publications.shtml.

3 Admittedly, Mercosur and NAFTA share an important common feature: they consist of one large country and a number of smaller partners, economically as well as politically, with the corresponding risk of hegemony and domination. In contrast to these entities, the EU/EC is an endeavour of medium-size (Germany, France, the UK, for example) and small countries (Austria, the Netherlands, for example). Respective institutional arrangements can contain the risk of domination by one country or a group of countries.

continuously make decisions, develop routines, and shape the contents of European law, on the other hand. This less visible structure, sometimes coined the "underworld" of the Commission, is best represented in the EU committee system, also called "Comitology".[4] Its decisive influence on the material contents of European law is inversely proportional to its transparency and accessibility[5], thus provoking sharp criticism about its opacity and inaccessibility. In other words, European Governance, and especially Comitology, may be held as one of the major culprit for the EU's lack of democratic accountability. Should Mercosur really follow?

This contribution will approach this question in three steps: firstly, it will address some functional commonalities of and structural differences between the EU and Mercosur; in a second step, it will analyze the new governance mechanisms that silently but successfully dominate the EU lawmaking processes; and thirdly it will address the judicial reaction to this transformation from government to governance.

1. The benefits of mutual observation: EU Governance and Mercosur development

1.1 Mercosur: A clone of the EU?

Mercosur is an intergovernmental organization with an integration agenda and community objectives. Its zeal to establish a common market resembles in many respects the integration process of the EU. During the last four years and especially with the elections of Luis Inacio Lula da Silva and Nestor Kirchner as presidents of Brazil and Argentina respectively, the integration process has gained new political momentum. At a special summit in October 2003, the Mercosur heads of state decided to deepen integration in the framework of Mercosur and discussed future steps and projects that ensure that the integration within Mercosur is both strengthened and accelerated.[6] A year before, in 2002, the heads of state had

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4 For detailed analyses of the EU committee system, see the contributions in the volume by Christian Joerges & Ellen Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford & Portland/Ore., Hart Publishing, 1999).

5 See Rainer Nickel, "Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order", in: Erik O. Eriksen, Christian Joerges & Florian Roedl (eds.), *Law and Democracy in the Post-National Union* (Oslo: ARENA Reports, 2006), for a more detailed account on the development towards an integrating European administration and the role of EU committees.

6 For a detailed description and analysis of the development of Mercosur until 2004, see John AE Vervaele, "Mercosur and Regional Integration in South America", 54 *International and Comparative Law Quarterly* (2005), 387-410, esp. pp. 387-391 with further references.

already agreed upon the Protocol of Olivos, which contains a number of new provisions on conflict resolution proceedings and legal actions against Mercosur measures. One of the first results of these efforts is the installation of a permanent appellate tribunal of Mercosur, which has already delivered its first judgements.[7] In a parallel move, Mercosur also widened its reach, with visible results: after a longer period of negotiations, on 4 July 2006 the heads of state of Argentina, Brazil, Uruguay, Paraguay and Venezuela signed a treaty on the accession of Venezuela to Mercosur as the fifth full member state.[8]

Like the EU, Mercosur has as its primal objective the creation of a 'Mercado Común', and the necessary integration steps are shaped by regulatory activity of the Council (Consejo del Mercado Común) whose composition resembles a combination of the European Council and the Council of Ministers in the EU. These obvious similarities between the institutional structure and the integration agenda of Mercosur and the structure and integration steps of the EU/EC may induce observers to conclude that Mercosur is copying the EU/EC and its path to integration. This conclusion, however, would be premature. On a closer look it becomes apparent that Mercosur has still a much stronger intergovernmental character than the EC ever had: while the EC, with its Commission and its Court of Justice, had supranational elements built in its institutional structure from the beginning, Mercosur was created by classical means of international law, with the power of legislative proposals resting with the Member States and a dispute settlement system instead of a court.[9] Therefore, comparisons, as always, can only be made very cautiously, if they are not impossible altogether.[10]

1.2 Integration, thick and thin

This caution towards a transfer of legal concepts and designs is justified not only with regard to comparisons of the institutional structure of Mercosur and the EU, but also with regard to the term 'integration' itself, and the underlying processes that characterise it. 'Integration' in the present European context conveys a peculiar meaning, especially in view of the fact that the EU treaty has established an "ever closer Union" (Art. 1 TEU) with a constitutional project. The integration

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7 The 'Tribunal Permanente de Revisión del Mercosur' has only recently been established. It is a forum for appellate proceedings against rulings of the ad hoc arbitration tribunals. In a preliminary assessment of its first decision, Daniel P. Piscitello and Jan P. Schmidt hold that the tribunal takes the European Court of Justice as a role model: „Der EuGH als Vorbild: Erste Entscheidung des ständigen Mercosur-Gerichts", in 17 *Europäische Zeitschrift für Wirtschaftsrecht* (2006), pp. 301-303.

8 See http://www.mercosur.int/msweb/principal/contenido.asp (July 2006).

9 See the founding Treaty of Asuncion, establishing Mercosur, and the four amending protocols at http://www.mercosur.int/msweb/principal/contenido.asp.

10 See Günter Frankenberg, "Critical Comparisons: Rethinking Comparative Law", 26 *Harvard International Law Review* (1985), 411.

agenda of the EU has moved away from mere market integration towards political, legal and social integration.[11]

Even the term 'market integration' is too broad and has to be conceptually specified as it can stand for very different modes of integration. For example, in retrospect it is frequently argued that European integration can roughly be divided into two different phases, a phase of 'negative integration' and a phase of 'positive integration'.[12] The former phase can be identified with the establishment of the Common Market; it was characterized by *legislative* activity aiming at the removal of non-tariff barriers to trade, while the latter phase is dominated by vast and far-reaching activities aiming at a re-regulation of the Internal Market through *administrative* regulatory networks and agencies.

Positive integration is even defined as a legal duty of the EU: title VI chapter 3 TEC (Articles 93-97) precisely describes the possible ways for a harmonization of the Member State legal orders. Article 95.3 TEC in particular induced the European Commission to find creative ways for this re-regulation activity. This article obliges the Commission to ensure "a high level of protection" in the fields of health, safety, environmental and consumer protection when drafting proposals for legislative acts needed "to complete the internal market". Instead of only removing barriers to trade in goods and services the Commission has to create a positive vision of qualitatively 'good' market governance.

1.3 The way forward: Positive Integration of Mercosur?

Such a quantum leap from negative to positive integration, even if not as neatly distinguishable in practice as often described in theory in the style of a regulatory model, may be the subject of future Mercosur integration activities as envisioned by the 2003 special summit.[13] As future developments of Mercosur highly depend

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[11] The Treaty of Maastricht has brought the Union citizenship (Art. 17 TEC), the Treaties of Amsterdam and Nice have widened competences in the areas of social protection (Title XI TEC) and police and judicial co-operation (Title IV TEC, Title VI TEU).

[12] In this sense, for example, Fritz W. Scharpf, "Negative and Positive Integration in the Political Economy of European Welfare States", in Gary Marks et al., *Governance in the European Union* (London: Sage, 1996). For a critique of the over-simplification implied in this division, see Christian Joerges, "Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance", in Christian Joerges & Ellen Vos (eds.), *supra* note 5, pp. 3-17, esp. at pp. 4-5.

[13] Regulatory activity in Mercosur shows some remarkable patterns. Although Article 1 of the Treaty of Asunción clearly states that the installation of a common market demands a harmonization of the legal orders of the Mercosur member states, a survey of the regulatory fields of Mercosur reveals some interesting gaps. There are, for example, no common market regulations in the agricultural sector. In contrast to this rather sluggish development in some areas there is a heightened activity especially in the field of judicial cooperation, police cooperation and intelligence, although judicial and police

upon political preferences as well as upon the political economic cycles within the Member States,[14] however, speculations about the way forward may prove rather fruitless. Instead of describing and analyzing in detail the current differences between and the commonalities of the superstructures of Mercosur and the EU/EC, therefore, it is more useful to focus on specific patterns of European integration, patterns that characterize the peculiar path of EU integration better than methodologically questionable comparisons. A mutual observation of Mercosur and EU developments may provide for interesting exterior perspectives, no more, but also no less. Particularly for Mercosur, which is also struggling with the political, legal and legitimatory consequences of further integration, the European experience with internal market governance and its constitutionalization can serve as a yardstick –or a daunting example.

2. The Emergence of EU Governance: A case study

What is EU Governance – bureaucratic nightmare, technocratic regime, or good transnational governance?[15] Whatever the final verdict may be, one of the most remarkable developments in the integration mechanisms of the EU in the last two decades is the emergence of a new form of supranational legislative and administrative activity that amounts to New Forms of Governance[16] – a development that started in 1985/86 (with the White Paper of the Commission in 1985[17] and with the Single European Act 1986[18]), long before the word

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cooperation are not even mentioned in the Treaty of Asunción as objectives or instruments, see Vervaele, *supra* note 7, p. 401-407 with further references.

14 For an account on the major steps to Mercosur integration, see Vervaele, *supra* note 7.

15 See the title of Christian Joerges' contribution, *supra* note 13.

16 These 'New Governance' structures are best represented by the EU committee system ('Comitology'), by the Open Method of Coordination (OMC), and by the so-called Lamfalussy method of regulation. For more detailed accounts on new forms of EU governance, see Joanne Scott & David Trubek, "Mind the Gap: Law and New Approaches to Governance in Europe", 8 *European Law Journal* (2002), pp. 1-18; Erika Szyszczak, "Experimental Governance: The Open Method of Coordination, 12 *European Law Journal* 4 (2006), pp. 486-502; see also the contributions in the volume by Herwig C.H. Hofmann & Alexander Türk (eds.), *EU Administrative Governance* (Elgar Publishing, London 2006; forthcoming).

17 In 1985 the Commission, under the impetus of its new President, Jacques Delors, published a "White Paper on the Internal Market" which identified the 279 legislative measures needed to complete the internal market. It put forward a schedule and proposed a deadline of 31 December 1992.

18 The Single European Act (SEA), signed in Luxembourg and The Hague in 1986, and entered into force on 1 July 1987, provided for the adaptations required for the achievement of the Internal Market. It can be found in the Official Journal (OJ) L 169 of 29 June 1987.

'governance' became a popular catchword,[19] and it gained momentum in the 1990's when majoritarian voting mechanisms were introduced in more and more policy fields of the EU.[20]

In the following I will sketch this institutional and legal development of the EU/EC towards what can be called an *Integrating European Administration*. I attempt to show that the EU/EC has silently evolved into a supranational administrative system *in the shadow of the law,* where horizontal and vertical administrative actions are intertwined in a unique way. This system functions largely without a coherent and comprehensive legal basis, but not outside the law. Its paradoxical position as being situated between lawmaking and political engineering is best illustrated by the frictions and irritations New Governance structures create within the legal system, and especially in the judgements of the European Court of Justice (ECJ). One of the most important cases highlighting the problems and pitfalls of European Governance mechanisms was the Rothmans case:[21]

2.1 A Kafkaesque story

By letter of 23 January 1997, the Rothmans company, a famous cigarette manufacturer, had requested access to a number of documents which included the minutes of the Customs Code Committee from 4 April 1995 onwards.[22] Rothmans probably had heard that the Commission planned to take actions against illegal imports of cigarettes through third countries such as Romania or Bulgaria into the European Union. Many indicators pointed to the active involvement of cigarette manufacturers in these illegal activities. The reasons why Rothmans had

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[19] The emergence of the term 'governance' outside of the narrow field of corporate governance can be traced back in particular to the United Nations Commission on Global Governance. In a policy paper from 1995 it defined that "Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs", United Nations Commission on Global Governance, *Our Global Neighbourhood*, (Oxford: Oxford University Press, 1995), Chapter 1, also available at: http://web.archive.org/web/20011222021819/www.cgg.ch/chap1.html.

[20] Milestones towards majority voting were the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997) and the Treaty of Nice (2001).

[21] Court of First Instance, judgment of 19 July 1999, Case T-188/97, *Rothmans International BV* vs. *Commission*, available at http://www.curia.europa.eu/en/index.htm (under 'case-law'). The Court of First Instance can be characterised as an independent sub-division of the European Court of Justice.

[22] The request was based on Decision 94/90 granting access to certain documents of the Commission under certain conditions. This Decision has been replaced by the already mentioned Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The new regulation provides for a much higher degree of transparency and easier access to documents of the Council, the Commission, and the Parliament.

approached the Commission (and not the Customs Code Committee directly) were simple: like all committees assisting and counselling the Commission, this one did not have its own administration, budget, archive or premises, nor an address of its own.

The Commission's Directorate-General for Customs and Indirect Taxation forwarded a number of Commission documents, but refused to hand over the minutes of the Committee on the ground that the Commission was not their author.[23] It pointed out that, while the minutes are drawn up by the Commission in its secretarial capacity, they "are adopted by the Committee, which is therefore their author". The Commission also refused to hand over the Committee's internal regulation on the ground that the Commission was not the author of that document, either. Finally, it stated that, under that regulation, the Committee's proceedings are confidential.

As a last resort, Rothmans approached the EU Member States. By letters of 30 May 1997, the company requested access to the minutes in question from the customs authorities of each Member State. Seven of them answered, two merely acknowledging receipt of the application and the other five declining access by reference, in the majority of cases, to the confidential nature of the work carried out by the Committee.

In June 1997 Rothmans brought an action against the Commission before the Court of First Instance and requested the annulment of the Commission´s decisions denying access to the minutes and the internal regulation of the Committee – successfully, as it turned out.

This case was a landmark case in three respects: firstly, it challenged the practice of the Commission to retreat behind some form of intergovernmental confidentiality; secondly, it brought up the question of what the real mechanisms behind the Commission's regulatory actions are: how does the EU bureaucracy actually work, and what is the role of the committees?; and finally, the case demanded a clarification of the openness, transparency, and accessibility of the EU bureaucracy: are citizens entitled to control the administrative process, and to what extent?

The Rothmans decision, in line with a general policy of the ECJ, did not take up all these questions and answer them in a fundamental manner. It highlighted, however, that the fact that the committees formally do not possess decision-making powers of their own tends to complicate judicial review of committees´ work. Additionally, as Renaud Dehousse aptly observes, the "indirect character of the review process, compounded by the more general difficulty experienced by private parties seeking annulment of community decisions, reduces incentives to rely on litigation to ensure the proper functioning of committees."[24] Indeed, the structure of judicial review as laid out in Articles 220-245 TEC strongly supports this

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23 Decision 94/90 provided that applications must be sent "directly to the author".

24 Renaud Dehousse, "Misfits: EU Law and the Transformation of European Governance", in: Christian Joerges & Renaud Dehousse (eds.), *Good Governance in Europe´s Integrated Market* (Oxford: Oxford University Press, 2002), 207-229, at 215.

observation: while the reference procedure of Article 234 TEC represents the "normal" procedure where a national court refers a case to the ECJ in case of doubts about the interpretation and implementation of the TEC, individual access to the Court of First Instance (CFI)[25] is granted only under strict conditions.[26] In our case, because Rothmans was denied access to the minutes individually, the conditions for individual access to the Court of First Instance were met.[27]

As to the material question concerning Rothmans´ right to access to the minutes, the position of the Commission amounted to a paradoxical – and embarrassing – situation: committees are supposed to be an emanation of the Council, they inform and control the measures of the Commission. But the Council does not hold copies of committee documents. Thus, the argument of the Commission that it held the pen for the committee but was not the author of the documents amounted to an exclusion of committees from the scope of rules granting access to Community documents.

In its judgement the Court of First Instance resolved the case in favour of the right to access and stressed the importance of the principle of transparency. It held that "for the purposes of the Community rules on access to documents, "'comitology' committees come under the Commission itself,…which is responsible for rulings on applications for access to documents of those committees".[28] With its decision the ECJ paid tribute to the new governance amalgam of Commission and committees that is called "Comitology", but it did not go further and explore the status and constitutional position of the committee system.

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25 The CFI was created in 1988 in order to ease the caseload of the ECJ. Originally, the CFI was only responsible for the rising number of cases related to employment matters of EC personnel; after the Treaties of Nizza and Amsterdam the CFI was entrusted with more and more tasks and functions presently as the first instance in all cases where the ECJ can be addressed directly (cf. Article 230 TEC).

26 While Articles 230.2 and 230.3 TEC grant privileged access of the EU institutions and the Member States to the Court, Article 230.4 TEC allows for an individual motion of annulment of decisions by other plaintiffs such as private persons only if this decision addresses the plaintiff in person, or if a general regulation affects the plaintiff directly and individually. The interpretation of theses provisions is highly contested; from the beginning, the ECJ has taken up a strict position and interprets Article 230.4 TEC extremely narrow. A recent attempt of the CFI to loosen the conditions under which individual access to the court is granted has failed; in a parallel case, the ECJ immediately rejected the considerations the CFI had favoured. See case T-177/01, *Jégo-Quéré et Cie SA vs. Commission*, CFI judgement of 3 May 2003 (loosening the conditions), and case C-50/00, *Unión de Pequeños Agricultores vs. Council*, ECJ judgement of 25 July 2003 (re-establishing the strict conditions), available at http://curia.europa.eu.

27 Case T-188/97, *Rothmans vs. Commission*, CFI judgement of 19 July 1999, para. 30-32.

28 Case T-188/97, *supra* note 28, para. 61

2.2 The EU Committees: European Social Regulation between Governance and Government

In order to grasp the somehow twisted character of the decision making process within the EU – "twisted" if compared to the traditional picture of parliamentary decision-making in the traditional democratic nation state – it is necessary to stress once more that the EU has a unique institutional fabric that resists comparisons with the structures we are familiar with from our nation state design: neither can the European Parliament be characterised as *the* law-making organ of the EU (especially because the Council is the primal legislative organ), nor does the European Commission fit the description of a government in the traditional sense (particularly because it is solely responsible for legislative proposals), and also the Council resists a clear characterisation in terms that are familiar from political science or legal text books (it is a non-parliamentarian law-making organ consisting of government ministers). At a different level, this unique constellation finds its counterpart in the committee system, another unique construction that was characterised above as 'the Council in the Commission'. In order to illuminate this substructure of EU committees another prominent case, the so-called BSE case, is extremely useful. It has put the institutional framework of the EU to a crucial test, and it has revealed the reality of a supranational entity that is neither a democratic state nor an international institution.

a. The BSE case

In 1996, the BSE crisis shook the European Union institutions, and especially the European Commission. It finally resulted in the establishment of a Special Inquiry Committee of the European Parliament that scrutinized the European Commission´s decision making process in the BSE case.[29]

What had happened? Bovine Spongiform Encephalopathy (BSE) had spread in the 1980´s and 1990´s into a major epidemic. This epidemic affected cattle and sheep, finally leading to their death because the disease literally caused the animals' brain to dissolve. In Europe it had its origin undoubtedly in Great Britain, where cases of BSE had emerged first and had spread all over the country. BSE, however, was treated as one of the regular epidemic problems in the meat industry, similar to those diseases affecting pigs or poultry. During a long period, the general view in the UK was that there was nothing special or threatening about this disease, only that this time the crown jewel of the British food industry, "the roast

[29] For a detailed account on the BSE crisis, see Graham R. Chambers, "The BSE crisis and the European Parliament", in: Christian Joerges & Ellen Vos (eds.), *supra* note 5, pp. 95-104, especially pp. 96-102, also to the following. - As Principal Research Administrator for the European Parliament, Chambers was involved in the writing of a report of the "European Parliament's Special Inquiry Committee into BSE" on the BSE crisis.

beef of Old England", was falling victim to it. But the real trouble began when a statement in the House of Commons in March 1996 about a possible link between BSE and a "new variant" form of Creutzfeld-Jacob disease (CJD) turned a veterinary problem into a public health problem. Young people, the statement said, seemed to be falling victim to a deadly disease which has historically only affected people five decades older.

The BSE crisis turned into a scandal when more and more press reports emphasized the possible link between the new form of CJD and BSE, and consumer protection groups questioned the inaction of the EU with regard to the internal market: Although there were indicators of a serious health risk the Commission hesitated to impose a ban on British beef. The 1997 report of the EP Special Inquiry Committee finally revealed that the Standing Veterinary Committee counselling the Commission had been divided more or less along the national lines on the question which measures had to be taken, a result that was not surprising given the structure of this Committee. But what was more troubling was the fact that the Scientific Committee, where no votes are taken but a deliberating process is held, usually until a common solution is found, had been divided, too: In the case of the Scientific Veterinary Committee, a (critical) minority view was registered by a German government toxicologist with observer status in that Committee.

When a closer look at the Scientific Committee revealed that the BSE case had been transferred to a BSE sub-committee, which consisted entirely of veterinarians, and almost exclusively of one nationality (of course: British), it became apparent why the official position of the Scientific Committee and the European Commission had reflected the mind-set, attitude, and policy of the UK Ministry of Agriculture rather than the warnings of critical voices that had been raised within the scientific community, or the worries expressed by a deeply concerned public: The Scientific Committee had obviously been captured by national economic interests.

b. Governing the Single Market: The Committee system

The BSE crisis shed public light for the first time on the mechanisms of rule-making in the EU below the level of legislative acts in a narrow sense (directives or regulations). It revealed the fact (little known to legal scholars, almost unknown to the public at that time) that the Commission, in its decision making, operates through the particular system of "Comitology". Comitology is "Eurospeak" for the variety of committees and procedures used in the implementation of EU legislative acts, and often it is also used to describe the "arcane science" of understanding the way in which the whole system works.[30]

The Comitology process was created when the Council began delegating executive powers to the Commission in 1962 to implement a series of Council

[30] Graham R. Chambers, *supra* note 30, at 99.

regulations organising the market in agricultural products in the then still comparably small EC of six Member States. After the considerable extensions of the EC in the 1970s and 1980s[31] the Single European Act of 1986 added a third indent to the former Article 145 EEC (now Article 202 third indent TEC), which reads:

> *"the Council shall (...) confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself".*

The new feature of Comitology committees was not that they represent a new form of delegation of powers, but that they mix the powers of the Commission, the Council and the Member States in a unique way. In 1962, when the system was first established, the Council resisted the attempts of the Commission to present itself as the sole executive branch of the EC. The Council kept the right to have the last word on decisions delegated to the Commission, and the Member States kept their influence by ensuring that they were represented in each Comitology committee.

In July 1987 the Council used its power as the basis for adopting what is known as the Comitology Decision, laying down the procedures for the exercise of the implementting powers conferred on the Commission. This Decision was replaced by the 1999 Comitology Decision[32] that further specified the procedures and conditions concerning the implementation process.

In essence, "Comitology" was invented especially because the Council was simply not able or willing to take decisions on a day-to-day basis on a plethora of technical matters. Devolving such decisions entirely to the Commission, on the other hand, would have given the Commission far too much power in the eyes of the Member States, and it would have conflicted with the institutional balance as laid down in the treaties. The solution was to construct a system of committees of experts and national representatives around this given structure. The Comitology system gives the Council the possibility of controlling the procedure at arm´s length and, in certain cases, of taking the issues back to the Council itself. Comitology was thus intended to be, in a constitutional sense, something like "the Council in the Commission".[33]

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31 Denmark, Ireland and the United Kingdom joined in 1973, followed by Greece in 1981, Spain and Portugal in 1986.

32 Council Decision 1999/468 of 28 June 1999, OJ 1999 L 184/23.

33 See Graham R. Chambers, *supra* note 30, at 100.

c. A silent revolution

The Committee system has, since 1962, evolved into a fascinating amalgam of supra-national decision making that has dramatically altered the decision-making and rule-making process in a number of important fields of European social regulation. Although the European Union´s institutional architecture is *officially* well defined in the EU and the EC treaties, the two fundamental documents that make up for the constitution of the EU, Comitology emerged as an almost invisible, but very powerful and essentially unique system that was not expressly foreseen in the treaties.

The committees gather expertise and discuss solutions; for that purpose, thousands of representatives of the EU Member States, usually, but not necessary members of national administrations, congregate on a regular basis in the more than 400 committees that have been counted.[34] Chaired by a Commission representative, the committees formulate and adopt measures of various kinds[35], whereas "adoption" is meant here in a material sense: the committees do not possess decision-making powers of their own. Only the Commission and the Council are formally entitled to adopt a measure, but in practice the Commission holds the pen for the committees.

A number of developments in the last decades have fuelled the growing importance of the regulative committees: the awareness of risks in modern societies, the aim of consumer protection and the widening of the competences of the European Union after the establishment of the Single Market, to name a few, have raised the demands for sophisticated EU decision-making processes. Especially the paradigmatic change from the Common Market concept to the Single Market demanded a qualitatively and quantitatively different know-how and expertise in the field of social regulation[36], a demand the Commission was structurally unable to meet: the Commission is in many respects far from being the all-powerful and almighty institution as it is often portrayed in the press. Its staff of

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[34] The precise number of committees is not known; according to reports, not even the Commission has an overview over the whole system, or at least does it not keep track of the Committee system as a whole. The number of Comitology committees is rising constantly. While in 1962, when the Comitology committee system was established, there were only 10 committees, Annette E. Töller, *Komitologie* (Opladen: Leske + Budrich, 2002) claims that in 1998 there were 418 Comitology committees, see Töller, at p. 315.

[35] For further details, see the contributions in the volume by Christian Joerges & Ellen Vos (eds.), *supra* note 5; Christian Joerges & Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology", 3 *European Law Journal* (1997), pp. 273-299.

[36] The term „social regulation" is used here in a broad sense. It denotes the complex task of creating legal norms for our modern industrial risk societies, norms that are structurally linked to distributive effects, without necessarily addressing those effects in a direct manner. "Social regulation", in other words, is not reduced to welfare state provisions in a narrow sense, such as unemployment subsidies or health insurance regulations.

about 25.000 public officials is smaller than the staff of many European cities of medium size, and its budget is comparably limited. In sum, the Commission had neither the manpower nor the expertise and knowledge to fulfil the tasks conferred upon it in the course of the establishment of the Single Market. Thus, Comitology is also a complex answer to complex regulatory task within a multi-level governance system.

d. From Hierarchy to Heterarchy

According to the law in the books, the Council - as the only organ involved in Comitology that is at least indirectly under democratic control (because the Member State ministers in the Council can be held accountably by their respective parliaments) - is supervising and controlling the Comitology procedures. In reality, however, there is effectively no traditional top-down control. For example, in the period between 1993 and 1995 thousands of opinions were submitted by committees, but only six cases were referred back to the Council.[37] This shows that Comitology committees have nothing in common with a hierarchical, Weberian-style model of administration. Instead, they represent hundreds of networks consisting of experts and public officials who act quite independent from their home ministry as well as from public or democratic control. In their amassment the committees form a paradoxical *decentralized center of power*.

While Comitology is viewed by many with suspicion, mainly due to the character of the system as "technocratic structures behind closed doors"[38], Christian Joerges and Jürgen Neyer, in a famous 1997 contribution in the European Law Journal, have suggested a radical new vision of comitology as a forum for deliberative supranationalism in which all participants engage in the search for the common good.[39] Viewed from this angle, comitology is a borderline case[40] that seems to resists a clear characterization as governance or government – but nonetheless raises serious legitimacy questions: The rule-making process is quite intransparent, its actors are hard to define and even harder to make accountable for their actions, and the rules of participation effectively exclude the wider public and civil society in general. Although national administrations are not forced to send only one representative and only public official into the committees, a comprehensive representation of national or EU civil society actors is neither mandatory by law, nor practice. The BSE scandal revealed this structure, and its

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37 Renaud Dehousse, "Misfits: EU Law and the Transformation of European Governance", in: Christian Joerges & Renaud Dehousse (eds.), *Good Governance in Europe´s Integrated Market* (Oxford: Oxford University Press, 2002), 207-229, at 213.

38 Renaud Dehousse, *supra* note 38, at 214.

39 Christian Joerges & Jürgen Neyer, *supra* note 36, at 273.

40 Christian Joerges, "Constitutionalism and Transnational Governance: Exploring a Magic Triangle", in Christian Joerges, Inger-Johanne Sand & Gunter Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford; Portland/Ore.: Hart Publishing, 2004), pp. 339-375, at 358.

flaws and shortcomings. The case produced a deep legitimacy crisis of the EU regulatory system as a whole.

As the *Rothmans* case had shown, Comitology is a key component of EU Governance.[41] The important role of Comitology in the law-making process of the EU – as briefly outlined above – underlines that the Commission and "its" committees have left the originally intended function of the committees as intergovernmental control mechanism far behind. They have turned into a unique, "freewheeling transnational structure"[42], with its own merits as deliberative forums, but also without a clear *legal* structure and form. Especially the poor transparency of the committee procedures "makes it difficult to discern the part played by the committees in the formulation and eventual adoption of measures".[43] Is EU Governance an untameable bureaucratic nightmare after all?

3. The ECJ and the Emergence of an Integrating EU Administration

3.1 From Executive Federalism to an Integrating Administrative Network

Traditionally the EU administrative system is viewed and described as a two-level system: a small portion of administrative functions are directly executed on a central level (with the European Commission as executive), while most European legislative acts are executed indirectly by the Member States. An implementation through direct administration is the exception to the rule of indirect implementation by the Member States. This system is often referred to as 'executive federalism'.[44]

New Governance mechanisms such as Comitology do not fit into this description. Administrative actions in the European realm are increasingly 'decentred' in the sense that they are neither rooted in a single legal source or structure, nor are they formed or implemented by a single administrative entity, be it the European Commission, or the administrations of the Member States, respectively. They represent the transformed reality of an "integration décentralisée" (Eduardo Chiti) and "décentralisation integrée" (Loic Azoulay).[45] A

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41 It *still* is, one may add, whereas more and more fields of regulation are dominated by regulative agencies; see most recently the establishment of the European Food Safety Authority in Parma/Italy, http://www.efsa.europa.eu/en.html. At a closer look, however, it becomes apparent that most regulative agencies are structured similar to the Comitology committees. This issue cannot be broadened here.

42 Renaud Dehousse, *supra* note 38, p. 214.

43 Grainne De Búrca, in: Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (1999), 55, at 77.

44 See especially Koen Lenaerts, "Some Reflections on the Separation of Powers in the European Community", 28 *Common Market Law Review* (1991), pp. 11-35, at 11 et seq.

45 Loic Azoulay, "Extension et élévation du champ du droit administratif européen", in: Jacques Ziller (ed.), *What's New in European Administrative Law?*, EUI Law working

new administrative space has emerged in which the traditional Community methods and structures of hierarchy and delegation, in the framework of an executive federalism, are supplemented by new forms of procedural, communicative, and conflictual techniques.[46] A special characteristic of this new space of regulatory and administrative activity is the fact that its institutional structures have emerged outside the traditional Community method, with its legislative triangle of Council, Commission, and European Parliament

This new European public legal order is still in search of its legal form. The fusion of classical government functions (regulation and administration) with new institutional modes and forms, combined with the absence of a classical parliamentary legislator, blurs the distinction between legislation and administration to an up to now unknown degree. A crucial question, then, is whether this development should be described in and measured on constitutional terms and norms (with regard to doctrines of separation of powers, of popular sovereignty, or of constitutional rights, for example), or whether it should be described in terms of administrative law and administrative accountability, with its own distinctive set of normative expectations (following the doctrines of rule of law/*Rechtsstaat*, for example).[47]

3.2 Democracy and Participation in the EU

A second – and more pressing – aspect is, of course, the democratic question. On paper the EU is well suited for a democratic process; Article 6 TEU states that the EU is founded on the principle of democracy. The institution of the European Parliament is proof enough that there is a certain degree of legitimacy from below in the law-making process.[48] The EU, however, found itself for reasons which were well apparent in the late 1990's, in the focus of criticism because of its lack of

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paper 2005/10, http://cadmus.iue.it/dspace/handle/1814/3330, at 44 with further reference to Edouardo Chiti, "Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies", 10 *European Law Journal* (2004), at 402.

46 Loic Azoulay, *supra* note 46, at 44.

47 For a more thorough discussion on this topic, see Rainer Nickel, "Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order", in Erik O. Eriksen, Christian Joerges & Florian Roedl (eds.), *Law and Democracy in the Post-National Union* (Oslo: ARENA Reports, 2006).

48 Low voter turnouts and other circumstances additionally weaken the – already limited - legitimising force of EU elections: The outcome of the 2004 elections for the European Parliament – as with the elections before – clearly demonstrated that the EU citizens still orientate themselves not only according to their nation-state preferences, but also on domestic issues, instead of on European issues. Election analysts unanimously stated that, throughout the EU, there was a trend to punish the ruling parties and the governments they formed, for domestic policies. This outcome stresses the importance of alternative ways of participation in the European law-making processes.

democratic legitimacy[49]: not only were the lack of full (or half-full) parliamentary sovereignty and the lack of an overarching European public sphere seen as symptoms of a regulatory structure that had reached its limits, but so were the regulatory structures themselves with their opaqueness and lack of transparency. In particular, the prospect of ten or more new Member States and the fact that the regulatory activity of the EU had not only increased quantitatively but also qualitatively, with major fields of rule-making shifting into the core Community sphere following the Amsterdam and Nice Treaties, had caused a widely stated sense of uneasiness with the regulatory mechanisms as a whole. Article 257 EC, which foresees a certain form of functional participation of the Economic and Social Committee in some areas, only provides for a corporatist top-down approach to civil society, with rather limited potentials for the production of a significant legitimacy surplus.[50]

a. The White Paper on Governance

The European Commission reacted to this crisis with its (in)famous White Paper on European Governance.[51] Instead of taking up the popular slogan of a strengthening of the European Parliament, the Commission mainly focused on its own position within the institutional framework of the EU. It identified five principles of "good governance", three of which were directly related to the legitimacy issue: 1) *openness*: "The Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes.(…)"; 2) *participation*, with the need to ensure wide participation of interested actors "throughout the policy chain – from conception to implementation", because "improved participation is likely [to] create more confidence in the end result and in the Institutions which deliver policies"; and 3) *accountability*: "Roles in the legislative and executive processes need to be clearer. Each of the EU Institutions must explain and take responsibility for what it does in Europe."[52]

By stressing the issues of participation, openness and accountability, the Commission reacted to popular criticism about its own performance as a non-

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[49] For a critique from the perspective of democratic theory, see Hauke Brunkhorst, „A Polity Without a State? European constitutionalism between evolution and revolution", in: Erik O. Eriksen, John E. Fossum & Agustín J. Menéndez (eds.), *Developing a Constitution for Europe* (London: Routledge 2004.

[50] See Stijn Smismans, *Law, Legitimacy and European Governance: Functional Participation in Social Regulation* (Oxford: OUP, 2004).

[51] COM (2001) 428, July 2001. For a critical review of the White Paper, see Ch. Joerges, Y. Mény & J. Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (2001), http://www.jeanmonnetprogram.org/papers/01/010601.html.

[52] COM (2001) 428, at 10. The other two principles – effectiveness and coherence – are related to functional aspects of output-oriented legitimacy; for lack of space they cannot be dealt with here in more detail.

transparent regulatory machine that seemingly runs on itself. In this regard, it was an intelligent move to use the concept of "governance" instead of "government" as a reference point; this shift in the nomenclature lowers the expectations to a significant degree:

> *"Governance is not political rule through responsible institutions, such as parliament and democracy – which amounts to government – but innovative practices of networks, or horizontal forms of interaction. It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other."*[53]

In order to prove that the commitment to participation, transparency, and openness is not merely lip service, the Commission later published a code of conduct for its interaction with civil society actors. This document contained the promise that civil society would be included in deliberations on legislative acts as soon as possible and as comprehensively as possible.[54] Additionally, in 2001, a new regulation on access to EU documents came into effect, significantly raising the level of effectiveness of transparency rights.[55]

b. Theory and Practice of Citizen's Participation

While the White Paper issues of openness and transparency were dealt with in a more thorough way through the introduction of a clearer legal basis for the access to documents, it's commitment to participation did not bring about any satisfactory results in the following years. The Council and its Secretariat, which had, in the course of five decades, evolved into a second major administrative-legislative institution parallel to the Commission, was left completely out of the discussions about enhanced public participation. The above-mentioned code of conduct of the Commission, laid out in December 2002 in a "Communication of the Commission", does not have any legally-binding force and cannot be used by third parties in court: the mere self-binding force of an internal Commission regulation does not entitle citizens to gain access to committees or other *fora*, nor does it contain other possible participatory rights such as the right to be consulted, or the

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53 Erik O. Eriksen & John E. Fossum, "Europe at crossroads: Government or Transnational Governance?", in: Christian Joerges, Inger-Johanne Sand & Gunter Teubner, *supra* note 41, at 120.

54 For further details, see the "Communication from the Commission: towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation on interested parties by the Commission" from 11 December 2002, COM(2002) 704 final.

55 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145/43.

duty to take contributions of participants into account when delivering the grounds for a decision. Additionally, the document expressly exempts crucial areas of decision-making processes from the consultation process, especially "Decisions taken in a formal process of consulting Member States ('comitology' procedure)".[56]

In this respect, the Commission remains firmly within the 'Community method' of practising consultation *according to its preferences and under its conditions*. Under this classical method of decision-making, wide consultation is not a completely new phenomenon, on the contrary: as its Communication on Consultations correctly points out, the Commission has a long tradition of consulting interested parties from outside when formulating its policies. It incorporates external consultation into the development of almost all its policy areas.[57] The underlying philosophy of this consultation policy – that consultation processes are initiated by the institution, participation is limited to non-decision, and only directed towards selected actors – did not change after the publication of the White Paper. Calling the White Paper approach to public participation and the subsequent policy as laid out in the Commission's "Communication" a substantively new approach would, thus, be a misnomer.[58]

In summary, in the light of the principle of participatory democracy, notwithstanding the first steps of the Commission towards a more inclusive legal structure, the current level of public participation in the norm-generating processes of the EU is still not satisfying: the basic assumption that all those affected by legal norms should have the chance to participate in the deliberation and decision making process regarding the said norms has clearly not been met by the current institutional and legal design of the EU. The 2001 Laeken Declaration of the IGC also underlined the fact that the legitimacy gap is still a serious issue, and the seemingly failed attempt to establish a formal European Constitution, with the referenda in France and the Netherlands turning out a vote against the Draft Constitution, has deepened the legitimacy crisis of the EU even more.

3.3 The ECJ: The Guardian of "Good Governance" in the EU?

If a new concept of participatory governance in the EU is only emerging and still underdeveloped[59], then the ECJ may appear as the last resort of more effective

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[56] "Communication from the Commission: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation on interested parties by the Commission" from 11 December 2002, COM (2002) 704 final, at 16.

[57] *Ibid*, at 3.

[58] For an evaluation of the White Paper approach *before* the publication of the Communication, see P. Magnette, "European Governance and Civic Participation: Beyond Elitist Citizenship?", (2003) 51 *Political Studies* 144-160, especially at 148-150.

[59] For an assessment see Rainer Nickel, "Participatory Transnational Governance", in Christian Joerges & Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, forthcoming 2006).

control and supervision over the EU's integrating administration. In the field of Comitology the ECJ has indeed delivered a number of important decisions on various issues. Only a small number of these decisions, however, focus not only on the outcomes of the deliberations, that is on the material committee decisions, but also on the *process* of committee decision-making itself.

a. The right to be heard

An important milestone in this regard was the 1991 decision in the case *Technische Universität München vs. Hauptzollamt München*.[60] The case concerned the import of an electronic microscope from Japan by the applicant, a University. Its application for exemption from customs duties had been transferred to the Commission which, having consulted a committee of experts, rejected it on the ground that an 'apparatus of equivalent scientific value' was manufactured and available in the EC. The University questioned this quasi-scientific finding, but it was never heard in this matter by the Commission, the committee, or the competent national authorities who had transferred the case to the Commission. The court was confronted with the task to define the extent of a right to be heard by the authorities; in earlier case law, the court had minimised the extent to which procedural protections could be granted in the face of the exercise of broad administrative discretion. The opposite approach was taken here: the Court held that "the right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution."[61]

This 'right to be heard', however, is neither codified in the Treaties nor in a general EU procedural law; it belongs to a number of unwritten 'principles' and 'rights' that have been acknowledged in the jurisprudence of the Community courts over the years.[62] One consequence of this only vaguely defined status is that the extent and the limits of rights and principles are defined and redefined over and over again in the jurisprudence of the courts, and not by a democratically legitimised legislator.

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60 ECJ, Case C-269/90, *Technische Universität München vs. Hauptzollamt München-Mitte*, (1991) ECR I-5469; for a detailed analysis of the case, see Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti & Adam Tomkins, *European Union Law* (Cambridge: Cambridge University Press, 2006), pp. 444-445, also to the following.

61 *Ibid*., paragraph 25.

62 For an account of the development of these principles until 1999, see Hans Peter Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999).

b. Proceduralisation of committee deliberations?

Punctual interventions of the courts have brought some light into the Comitology 'underworld', but they do not add up to a system of administrative law. This holds true also for the issue of transparency in Comitology. While the ECJ´s decision in the *Rothmans* case can be seen as a major step towards a more transparent comitology procedure, transparency itself is not sufficient for an effective control of Comitology from outside of the governance network. It may grant access to information, but it does not lend a more active role to individuals or the civil society sector in the decision-making process.

An additional starting point for a procedural approach to social regulation in the committee framework can be found in another decision of the European Court of Justice related to comitology. In the case *Germany vs. Commission* the ECJ declared void a regulation on construction products on the grounds that procedural rules had been violated – allegedly the draft for a decision had not been sent within a certain time frame to the Member State, and not in the right language.[63] If civil society actors were entitled to such a procedural position as the Member States possess, and the Commission were responsible for the dissemination of draft regulations (and accountable for infringements of those procedural rights) the comitology system would loose a good part of its secretive character. This may lessen the effectiveness of the rule-making governmental network EU to a certain degree, but it may strengthen the system on the long run, and it will certainly enhance the legitimacy of EU law. The emerging concept of participatory governance in the EU[64] points into this direction, but it must also be accompanied by an administrative law that explicitly defines the scope of civil society participation; it is not the task of the ECJ to invent such a procedural framework.

A more comprehensive concept of participatory governance could be an additional means to gradually balance the democratic deficit of the EU. The correlation between the loss of democratic power in the national arenas and the growing material regulation in the supranational sphere has to be reflected and confronted within the existing legal structures of the EU. As the supranational processes of rule-making are dominated by public or private administrators, the law of supranational regulation coordinating these processes has to integrate possible functional equivalents to national legitimatory processes. One element of such a "constitution" of supranational regulation could consist of a procedural right of affected interest groups and civil society actors to comprehensively participate in regulatory processes. A reference point for this framework can be found in existing concepts of interest representation and participation that already form an integral part of many administrative law regimes throughout the world.[65] This may

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63 ECJ, Case C-263/95, *Germany vs. Commission*, decision of 10 February 1998.

64 For a more detailed account, see Rainer Nickel, *supra* note 59.

65 One prominent example is the US Administrative Procedures Act (APA). For a comprehensive overview over its development, see Richard Stewart, "Administrative Law in the Twenty-First Century", 78 *N.Y.U.L.Rev.* (2003), pp. 437-460, esp. at pp.

not solve all problems of democratic legitimacy, but it will certainly lead to a more inclusive European legal community.

4. Conclusion: A bureaucratic nightmare – the inevitable future of Mercosur?

„The general rule is that there is no rule."[66] This statement of Giuseppe Azzi, Director in the Secretariat-General of the European Commission, involuntarily characterizes the major problem with EU governance, its lack of a coherent and comprehensive legal structure. The fusion of legislative and executive functions, combined with a well-established, but widely invisible network of administrations, has led to a unique form of European governance that functions in the shadow of the law. Fragmented legislation on access to documents or on formal structures of Comitology committees misses the crucial point of civil society inclusion into the law-making processes of EU governance. The jurisprudence of the ECJ cannot compensate for this failure: it is a matter of 'normative choice' for the Community courts to decide, for example, that the right to be heard in relation to individual determinations is fundamental, while a similar right to participation or consultation in the context of regulatory activity depends on a clear legal basis in the Treaties or secondary legislation.[67] European administrative law, and the concept of 'good governance', it seems, do not contain sufficient legal substance to determine the choices of the Community courts.

If Mercosur decides to take the next steps towards an integrating administration – and there are signs that this is actually happening in some policy areas - it will certainly raise the efficiency of its institutions and instruments. The example of the EU shows, however, that there are high risks and costs[68] attached to this model of functional supranationalism, especially if it emerges in the shadow of the law instead of on a sound legal or constitutional basis. The actual EU model of regulation and governance has incrementally grown over the past two decades, and with it its influence on important fields of social regulation. Its decisions affect

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441ff on the evolution of the interest representation model within the institutional framework of administrative agencies. Of course there are a number of problems attached to this model (e.g. the risks of agency capture, or neo-corporativism), an issue that cannot be broadened here.

66 Giuseppe Ciavarini Azzi, "Comitology and the European Commission", in Christian Joerges & Ellen Vos (eds.), *supra* note 5, pp. 51-57, at 52. Azzi's sentence refers to participation in the 'consultative committees' set up by the Commission outside of Comitology, but with regard to civil society participation it holds true for all committees.

67 Paul Craig, in: Jacques Ziller (ed.), *supra* note 46, at 27.

68 See also the analysis of Deisy Ventura, "La gouvernance démocratique et l'intégration économique. Regards croisés entre le Mercosur et l'Union européenne", in: 59 *Droit et société* (2005), pp. 93-106.

more than 450 million people, but the mechanisms behind this regulatory machine and its fundamental legal basis remain widely obscure and unknown to the people. In the end the dramatic failure of the Draft Constitutional Treaty in 2005 made clear that Europe is still in search of its constitutional basis, and especially its social model.

For Mercosur the alternative path is not to stop the integration process and to remain an intergovernmental organisation, but to decide upon the ways and means to build a 'market without a state' beforehand. Building an integrating administration after the EU model may prove to be the most effective way, but without a sound legal and constitutional basis Mercosur may also end up like the EU now: caught in a struggle between the efficiency of a class of 'experts' and bureaucrats, with their own preferences and interests, and its legitimacy; and finally risking that an expertocracy replaces the preferences of the wider public and what was once called "the general will".

From the ‚Nomos der Erde' to a Unified European Defense System[1]

Rüdiger Voigt

> *"For humanity and especially for the peoples of Europe no other single event has been as important as the discovery of the new world […]. It started a full change in trade, national power, customs, trade and the government of all people"*[2]

This is the beginning of „Histoire des Deux Indes" by *Guillaume Raynal.* Published in 1770 for the first time and reprinted – several prohibitions nonwithstanding – several times and in several languages. This made it one of the greatest successes on the pre-Revolutionary book market of Europe. Almost two centuries later *Carl Schmitt* re-examined the subject in his book "Der Nomos der Erde"[3]. He is one of the most controversial, but at the same time undoubtedly among the most inspiring constitutional law experts of the 20th century"[4]. Of course he had his own point of view: "For four hundred years, from the 16th to the 20th century, the general structure of the European International Law has been dominated by a single, fundamental happening, the discovery of the new world." This quote speaks of a „European" international law. Isn't that a contradiction of terms? Shouldn't he talk about a world-spanning, global international law? You have to consider the world view of Europeans in that time. The "old world" considered itself near the very centre of the world: 'Jerusalem'. Everything European was seen as normal. This made everything outside Europe unnormal, sometimes frightening and monstrous. The pictures on world maps showing cannibals, monsters and antipodes give an indication for this thinking.

The Christian nations of Europe, most notably Spain and Portugal, saw themselves as creators and keepers of an order for the whole world.

> *"The division between the eras around the turns of the 15th to the 16th century marks the origin of international law that became the legal framework for the 'discovery' or rather the colonisation of the new world. Until the 20th century, when the imperialistic division of the*

1 I am grateful to Karsten Voigt and Martin Seybold for giving me the benefit of their comments and helping me with the English proofreading.

2 Raynal 1988, p. 9.

3 Schmitt 1997, p. 69.

4 Dreier 1999, p. 75.

world came to an end, it stayed in force and influenced the postcolonial international law by handing down its most basic concepts."[5]

1. Partition of *the* World

The discovery of the new world in the 15th and 16th century certainly caused the most important break in thinking about world and space. For the first time the world was seen as spherical and at least considering the surface, a as a whole. The surface was – more or less exactly – mapped and divided among the European superpowers. On May 4th, 1493 Pope Alexander VI, born in Spain, drew the line of demarcation in his edict „inter cetera" between the Spanish and the Portuguese part of the world. In the treaty of Tordesillas of June, 7th 1494 the partition of the world was confirmed. A line, correlating with the 49th degree western longitude, divided the world. Spain obtained all territories westward of this line and Portugal all territories situated east of this line. This applied mainly to the land and only in part to the sea.

The treaty between two equal kings, the Catholic Majesties of Spain and Portugal agreed upon the acquisition of territories of non-Christian princes and peoples. Within the scope of the medieval res publica Christiana this treaty was backed by the arbitral authority of the pope. Officially, the pope granted concessions for missionary purposes and nothing else. Later, in 1513, the Spanish crown substituted the papal mandate for a so called „Proclamation of the Indians". The Indians were prompted to recognize „the church as master and ruler of the whole world". Refusal or silence, even if based on the lack of understanding the Spanish language, meant war. This proclamation was requirement for the legitimate taking of the land.

2. Jus Publicum Europaeum

The new division of the world in a 'old' and a 'new' world opened not only combat zones for the European powers. It also led to a amazing relaxing of inter-European tensions. Not every disagreement in the 'New World' had to heighten tension in the 'Old World'. In the corpus of the European public law, the *Jus Publicum Europaeum*, could be retained as a sphere of peace and order, even while combats on other theatres of war endured. Relating to public international law this exclusion finally served to foster the European-style war, that is its rationalisation, humanisation and – last but not least – legalization[6].

The process was furthered by the Thirty Year's War (1618-1648). This allowed to build a equilibrium between the territorial states on the European continent. The

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5 Paech, Stuby 1994, p. 16.

6 Schmitt 1997, p. 68 f.

order created by the treaty of Westphalia cleared the relations between the sovereign and recognized states of continental Europe. As powers with central government and administration were they the adequate subjects of a public international law. It first only applied to the nations on the continent but soon extended its influence on the maritime British Empire. With the appearance of the modern "territorial states" the whole European life got secularised and referred to the spatial order "state". The public international law changed from a *jus gentium* to a *jus inter gentes Europaeas*. Hence, the "spatial core" of the new European regime was the "state", the very achievement of occidental rationality.

3. Occupation of the New World

From the 16th century till far into the 19th century the territories of the New World were considered to be free to occupy. Oceans, islands and continents outside Europe, if unknown to the Christian sovereigns, could be taken. The position of the discoverers was esteemed to be superior, spiritually and historically. This placed the discoverer above the natives thus found. On the one hand the territory was symbolically taken into possession by flying a flag. On the other hand they tried to fix their "owned" territory as accurately as possible in maps. These maps were kept back in Europe to document the 'right' on the land.

3.1 Two different approaches

In the 17. and 18. century two different schools of thought characterize the different perceptions in public international law. *Immanuel Kant* (1724-1804) represented the philosophic approach based on the law of nature (jus naturale). In his book "Allgemeiner Menschenstaat" ("Common State of Mankind") he sees – in regard to the human beings – three levels of law[7]:

- jus civitas, the law of the citizens;
- jus gentium, the public international law, defined as law applicable to the relations in between the states;
- jus cosmopoliticum, law applicable to human beings and states if seen in their position as members of the common state of mankind.

The famous and probably most influential expert of public international law in the 17. century, *Hugo Grotius* (1583-1645) as well as *Samuel Pufendorf* (1632-1694) represents the positivistic-practical approach. For Hugo Grotius the treaty in between sovereign states plays the central role in the creation of a just world order. This view was based on the principles of the "Treaty of Westphalia".

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7 Kant 1795, p. 16.

3.2 The Right to Occupy?

Francisco de Vitoria questioned in 1538, whether the non-European and non-Christian peoples and countries could be considered as abandoned. This was no longer doubted by the legal theorists of the 17. and 18. century. They merely discussed the relationship between the European conquerors. As authorized and military organized powers the European sovereigns could measure their strengths in form of a war between the states, ruled by the European martial law[8]. The international law recognized each European ruler – independent on the size and strength of his state – as formally equal. The equity of he sovereigns made them to opponents of war with equal rights and duties under the international public law. Indeed, this did not apply for colonial wars against 'wild' or "uncivilized" peoples.

3.3 Thinking in global lines

Since the Spanish-French treaty of *Chateau Cambrésis* in 1559, there was a new kind of agreements, the so called "amity lines". These lines defined the border between Europe and the "New World". Their impact can be determined by examining a edict of the French king Louis XIII from 1634. It prohibited the French seamen to attack Portuguese and Spanish ships on the European side of the tropic of cancer. Beyond the line the attack was expressly permitted, unless the Spanish and Portuguese would admit the French free access to their Indian and American territories and oceans. "No peace beyond the lines" characterized *Sir Francis Drake* this thinking in global lines (*Carl Schmitt*). Not until the peace of Madrid between England and Spain in 1630, the European peace regime got extended on the overseas territories beyond the lines. This was confirmed in the peace of Westphalia in 1648.

4. A spatial regime centered on Europe

The era after the Thirty Years' War was coined by a fundamental restructuring and transformation of the European states and a special legal view on war. "War is a steady companion and the deciding political instrument of the multipolar balance of power"[9]. The transformation of the European states was based on three fundamentals:

- the modern *territorial state* was the organizational frame;
- the *absolutism* was the type and form of government;

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8 Schmitt 1997, p. 114.
9 Nye 2003, p. 36.

- the *mercantilism* was the economic method[10].

As soon as 1582 three criteria emerged for the war between sovereign states ("Staatenkriege"):

- From a legal point of view only a war fought between sovereigns, the carriers of the *summa potestas*, was a war;
- Each war fought between lawful enemies was a just war (Carl Schmitt defines this as a non-discriminating term of war[11])
- The decision, whether or not a "justa causa" (just reason) is given is made exclusively by the sovereign.

The theological criteria for a just war developed by *Thomas von Aquin* (1225-1274) no longer carried weight.

4.1 Balance between Land and Ocean

The result of the restructuring process in Europe and the "New World" were summarized by *Carl Schmitt*: "From the point of view of the Jus publicum Europaeum, all land of the earth is either territory of European or coequal states, or not yet occupied and therefore a potential territory of the state or a potential colony" [12]. This was only true for the continents, while the oceans stayed outside of every specific "spatial regime". "For the first time in the history of mankind the contrast between land and ocean got the all-embracing fundament of a global public international law. [13]"

The often talked about "Freedom of the Sea" was neither obvious nor undisputed. It depended on the interests of a state. They differed greatly between a dominating sea power that wished to exclude everybody else from over sea trade and a state with a small navy that still was interested in trade with non-European countries. The scientific dispute about the freedom of the oceans was carried out between *Hugo Grotius* and *John Selden*. Holland was greatly interested in a free trade. It was no surprise that the Dutch scholar Grotius published its "mare liberum" (free ocean) in 1609[14]. 26 years later the English scholar Seldon[15] published his counter-opinion "Mare clausum" (closed ocean). England was interested in keeping Holland and other competitors out of the over sea trade. This controversy was not decided by arguing, but by further shifts of power between the European states[16]. In the peace treaty of Muenster in 1648 the Netherlands gained the

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10 Wallerstein 1974, p. 122 ff.; Paech, Stuby 1994, p. 33.
11 Schmitt 1997, p. 125.
12 Schmitt 1997, p. 143.
13 Schmitt 1997, p. 144.
14 Grotius 1609.
15 Seldon 1635.
16 Paech, Stuby 1994, p. 38.

guarantee for trade and navigation for both (East and West) Indias. The wars over dominance of the seas finally ended with the undisputed maritime hegemony of the United Kingdom in the second half of the 17th century.

> *"The classical regime that was generally accepted for the governance of oceans space and resources since the mid-nineteenth century can be loosely termed freedom of the sea. The high seas were treated as non-appropriable res nullus, and coastal state jurisdictional claims were narrowly restricted"*[17].

From now on it was the rule that the coastal shore belonged to the states bordering the sea, "as far as a cannon can fire". In those times that meant three sea miles. This rule endured even as modern arms reached quite farther distances.

The peace treaty of Utrecht in 1713 restored the peace and calmness of Christianity by creating a just balance of power. The Spanish inheritance was subdivided; among other things England got the lucrative monopoly for the slave trade between Africa and America. *Carl Schmitt* deducted from this[18]:

> *"Thus, the great balance between land and ocean emerged, on which the "Nomos of the Earth" could rely on for more than two centuries."*

4.2 Revolution and Restoration

The order created by the Treaty of Westphalia lasted at least until the French Revolution in 1789. This revolution changed the world in many ways. The great usurper *Napoleon Bonaparte* shook the old order with his military successes. But concerning public international law, the French Revolution of 1789 was merely an episode. After Napoleon was banned to Elba, later St. Helena the Congress of Vienna restored the old order in 1815[19]. In Vienna the five superpowers: Austria, Prussia, Russia and England and finally France created under the direction of *Prince Metternich* a regime of public international law based on the balance of powers and finally endured until the breakout of the First World war in 1914. Each state felt compelled to sign the Treaty of Vienna on June 9, 1815 to secure his own position.

Since the "New World" had been divided already, the occupation of foreign territory was almost complete. But meanwhile new territories had been discovered: Almost every European nation created colonies of greatly varying size in the Pacific, Asia and especially in Africa. It was in the interest of the colonial lords to avoid conflicts. The last pan-European taking of land took place in Africa. Under the presidency of Chancellor *Prince Bismarck* the former colonial powers claimed

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17 Keohane, Nye 1977, p. 90.
18 Schmitt 1997, p. 153.
19 See Kissinger 1994, pp 78-102.

their interests in Africa in the Conference of Congo (1884-1885) in Berlin. They legitimated their action with the necessity of a "crusade for the civilisation"[20]. This "crusade" never was more than a cover for the interest in power and profit.

By means of mechanisation of war and the replacement of mercenaries by conscripted armies increased the destructive power of war[21]. The international humanitarian law was meant to limit at least the most brutal excesses.

4.3 End of the European era

Almost visionary seems the quotation of *Prince Metternich* about the relevance of America which he stated in autumn 1854 during the Crimean War (1854-1856):

> *"...while the opposing powers fight a senseless, avoidable war, the United States of America grow in power and appetite to conquer, and are already today the Masters of the Pacific Ocean…"*

Largely unnoticed by the Europeans the US were the ascending power, getting ready to change the world order to further its own causes. In 1823 the US declared – without consulting the European powers – the famous Monroe Doctrine. The American president declared in this doctrine that every further creation of a colony in the new world by a European power, or every attempt to establish the European system in the new World would be considered as a unfriendly act. In return the US declared to stay out of European affairs.

When the US took part in the First World War in 1917, this phase ended. The United States helped the side to win the war that furthered their causes most. Yet, they neither signed the peace Treaty of Versailles nor did they become part of the League of Nations. However, neither the Conference of Paris, which led to the Treaty of Versailles, nor the League of Nations were a European conference anymore; in fact states of several continents participated, namely the US and Japan. The Soviet Union did not participate in the conference because of the civil war in its own country. As opposed to the Conference of Vienna, on which the aggressor France took part as an equal partner, the losers of the First World War had to accept a dictated peace. Germany was not accepted in the League of Nations. Together with the Soviet Union it became the "Pariah" of Europe[22].

Art. 10 of the Covenant of the League of Nations[23] outlawed the war of aggression, but the right to self-defence was acknowledged. Not until August 27th 1928 war as an instrument to solve international disputes was outlawed in the Treaty of Paris[24]. Since the nations victorious in the First World War were not ready to dis-

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20 King Leopold of Belgium, September, 12th 1876 to the Geographic Society in Brussels.
21 Münkler 2002.
22 A term coined by Lloyd George.
23 Compare http://fletcher.tufts.edu/multi/www/league-covenant.html
24 Also known as the Briand-Kellog-Pact.

arm, both the Covenant of the League of Nations and the Treaty of Paris were not able to prevent the wars between WWI and WWII. But why? *Carl Schmitt* is able to answer this question: without a "clear vision of a spherical Nomos" can be no comprehensive international order be build[25].

> *"The peace conference of Paris in the Winter 1918/1919 was supposed to end a World War and create a World Peace"* [26]

The League of Nations had no vision of the spatial regime which had to be created. Europe could no longer serve as a reference point – it was not longer important enough. The whole world was (still) too big. Thus, a universal world order could not be constituted by the League of Geneva, because the two modern continental powers, the Soviet Union and the United States of America, were absent[27]. With the end of the First World War finally ended the "European era" [28].

5. The American Century

But not until the entry of the US in the Second World War in the year 1941 the "American Century" began. The US signalled powerfully that they were back on the European stage as a major player. The end of the war showed that the United States was the only country that became wealthier during the war. The US produced more than half of all industrial goods of the world and delivered one third of the world's production of the goods. In contrast, the European countries were impoverished.

It was no coincidence, that the Conference of the United Nations in June 1945 took place in San Francisco on American ground. The victors of the Second World War agreed easily on one point; they all desired to safeguard what they achieved during the war. The Security Council of the United Nations included the superpowers US and Soviet Union, as well as the other victors of the Second World War, Great Britain, France and China, as permanent members with the power to veto. Non-permanent members were not admitted to the power to veto. Japan and Germany were not even allowed to become members of the UN. From now on the Security Council ought to carry the main responsibility for the safeguarding of the world peace and the international security. Even those UN-members who had virtually no influence recognized the right of the Security Council, to act on behalf of their names and bind them with resolutions.

The UN placed restrictions on the abilities of its members of to act as they saw fit. They were acceptable to the US as long as they could assume that the other members with a right to veto shared similar goals. Goals that were made program

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25 Schmitt 1997, p. 216.
26 Schmidt 1997, p. 213.
27 Schmitt 1997, p. 21.
28 Paech, Stuby 1994, p. 194.

of the UN in Art. 1 of the UN-Charter. The US seemed to be surrounded by "friends". But now, that the enemies Germany and Japan were no longer a threat, the conflicts of interest surfaced. The Soviet Union contested the power of the US in every part of the world. France now followed its own interests instead of being thankful for the help of the US during and after World War II. Soon, the power to veto became a nuisance in the eyes of the United States.

The centre of the global order was no longer the "Old World". On the other hand, neither was it the "New World". In fact the US and the Soviet Union became the poles of a new, bipolar, order. On one side of the "Iron Curtain" the American forces were stationed in Europe. The NATO was an instrument to both defend and dominate Western Europe. But on the other side of the demarcation line the highly armed forces of the Soviet Union along with satellite states, organised in the Warsaw Pact were equally powerful.

The fact that both sides had so many nuclear warheads that they could kill the enemies several times (the so called "overkill-capacity") led not only to a balance of fright, but literally to a division of the world. Both competing powers were like magnets. They forced almost all states to decide for one of them. Since a hot war had become too dangerous for both superpowers, the "cold war" began. This phase lasted until the collapse of the Soviet Union in 1989/90. Since then, the US is the only superpower left, the French are even talking about a "hyper power". The United States have become the center of the global order.

6. The European Integration

Due to the support of the US, known as Marshall-Plan, Western Europe recovered economically. In the shelter of the US-American dominance very soon after WWII a movement for European unification emerged. It led to the creation of the Council of Europe in 1949, first of all concerned with the enforcement of the human rights. The first step that led to the European Union was the European Coal and Steel Community (Montan-Union). It consisted of France, Germany, Italy and the Benelux-Countries (Belgium, Luxemburg and the Netherlands). Founded in 1951 it was suggested by the French foreign minister *Robert Schuman*. Its main reason was the French security interests. France wanted to control the strategically important steel industries of Germany.

After the outbreak of the Korean War a plan for a European defence community was created in 1951. It was meant to solve three problems[29]:

1. Counter the Soviet threat,
2. Solution of the German status (Unification, Eastern Parts of Germany now under Polish administration),
3. Creation of a new European constitution.

[29] Gasteyger 1990, p. 114.

In the end the French were not ready to join this community. The European Defence Community failed. Instead, its task was given to the Western European Union by the treaty of Brussels. Its goal, however, was not the defence of a free Europe, but arms limitation and control. The military defence continued to be the task of the NATO, founded in 1949. Western Germany joined the NATO on May 9th 1955. Thus, the link between Northern America (USA and Canada) and Western Europe was institutionalised. The US from now had a say in the process of the European integration. The former world power Great Britain was both a member of the NATO and the WEU, but did not desire to take part in the European integration. Yet, the UK played an important part in the European integration. It had still stationed troops in Germany ("Rhine army"). It was also founder and member of the EFTA, the European Free Trade Association.

6.1 Economic Community

The British position changed as the European Economic Community was founded in 1958 as a customs union and the "Europe of the six" prospered. Meanwhile, the influence of the UK in the world decreased. It took only four years for the gross national product of the EEC (European Economic Community) to increase by 21,5 % (UK: 11 %) while the industrial production increased by 37 % (UK: 14%). The French president *Charles de Gaulle* prevented a joining of the UK to the European Economic Community in 1963. He had good reasons for this. The “special relations” between the United Kingdom and the United States were prone to lead to a collision of interests. Great Britain saw itself still as a transatlantic sea power, not (yet) as a European middle power. It took until 1973, five years after *De Gaulle* retired from politics, for the UK and other members of the EFTA to join the European Community. Great Britain still did not consider it to be in its own interest to be tightly integrated into continental Europe.

While the core of Europe grew together and the Community expanded into more countries, Europe as a whole stayed divided – just as the rest of the world – into East and West. A clear vision (from a spatial point of view) was limited to a few statesmen like *Charles de Gaulle*, who has as early as 1960 declared that Europe did not end at the “Iron Curtain”. The integration of Eastern Europe would be a long term goal for the European integration. For the time being the CSCE[30], the Conference for Security and Cooperation in Europe, was used as the vehicle to overcome the East-West- Division.

[30] Conference on Security and Co-Operation in Europe, since 1995: Organization for Security and Co-operation in Europe (OSCE).

6.2 Monetary Union

The collapse of the Soviet empire and the cutback of the frontiers meant a new challenge for Europe. *De Gaulle's* vision of a unified Europe from the Atlantic to the Ural suddenly seemed to be very close. At the same time Germany has become bigger and more powerful because of its reunification, and therefore disturbed the old European balance. Until then the "big four": France, Western Germany, Great Britain and Italy, had been more or less equal in political power. Germany was already an economic giant, but – because of certain rights of the allies to declare reservations – politically a "dwarf".

To prevent Germany becoming great power in politics, too, the approval of the "Two Plus Four Treaty", with which the allied regime was brought to an end, was bound to certain conditions[31]. Germany committed itself to abandon its currency, the D-Mark and join a European monetary union. The Central Bank of Germany (Bundesbank), controlling most of the European currencies because of Germanys economic might, was substituted by the European Central Bank, also seated in Frankfurt/Main.

6.3 Defence Community

At the same time, the German government under *Chancellor Kohl* forced a further level of integration on the European Community. The Economic Community ought to be complemented by a political community. In the *Treaty of the European Union*[32] of February 7, 1992, the member states agreed upon a common foreign and security policy (Art. 17[33]). The purpose of this policies is to ensure Europe's capacity to act in case of civil and military crisis. It was the Western European Union, which (in 1997) is declared to be a "decisive element for the development of a European security and defence identity within the Atlantic alliance (NATO)", had been charged with its elaboration and enforcement[34]. The common defence policy is to be supported by a cooperation in armament. This has resulted in the Eurocorps, consisting of German, French, Spanish, Belgian and Luxemburgian soldiers. It took over the command of the western troops in Afghanistan in Summer 2004 as its first deployment outside Europe.

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31 See Voigt 1996, pp. 163.

32 http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.000501.html

33 Compare the protocol on article 17 of the Treaty Establishing the European Union, Läufer 2000, p. 182.

34 Compare the declarations given after the conference of Amsterdam in 1997 (BGBl. 1998 II, p. 440 ff.).

7. Europe and the USA: Strategic Partnership or Open Rivalry?

The US vision of a world order is based on an universalism that includes the absolute American hegemony in every aspect. This view includes the whole world, including outer space, as can be seen in the attempt to create a space based anti-missile system. The goals of the US are not only defensive (like the war on international terrorism), but also securing commodities, especially oil. Every attempt to create a new, area-based, system of order are to be prevented by the US. In some areas the Europeans and the US have similar goals, in other parts of the world they differ. The latter is the case in the Caribbean Region. The US is particularly interested in securing their dominance in their "backyard" or, in the case of Cuba, restoring it. The Europeans on the other hand see Cuba as an interesting partner in trade. Even the threat of US-sanctions has not been able to prevent them doing trade with Cuba. In the Near East the Europeans strive for a balance between Israel and Palestine, while the US seem to favour Israeli interests. The war on Iraq shows that the Europeans – with the significant exception of Great Britain – were not interested is a war as a solution. The US on the other hand viewed the Iraq as a model state for their plans to change the Middle East.

The relationship between the European Defence Policy and the NATO is a difficult one. The USA view every effort of the Europeans to create their own ability to defend themselves with suspicion. The Europeans need the abilities of the NATO to manage their own missions. So far the EU is unable to launch their own missions without the support of the NATO. Especially the ability to plan missions is lacking. March 2003 saw a treaty between the NATO and the EU ("Berlin Plus") that allows the EU to use the planning capabilities of the NATO without a consenting resolution of the NATO Council. The "European Capability Action Plan" coordinates the national efforts in the future. A European Agency for the development of defensive abilities, research, procurement and armament was founded.

The year 2003 saw four missions falling under the European Defence Policy:

- The policing mission Bosnia-Herzegovina (EUPM), since January 2003;
- Operation Concordia, a military mission in Macedonia, March till December 2003;
- Operation Artemis, a military mission in Congo, June till September 2003;
- Police-mission Proxima in Macedonia (EUPOL), Decembar 2003.

When the European Union launched its operation Concordia, 350 troops, as a "autonomous" military mission, it needed NATO capabilities for planning and transport. The operation was commanded by the German Admiral Feist, vice-commander of all NATO troops. For emergencies NATO troops stood by to evacuate Concordia personnel. The first military mission without NATO participation was operation Artemis, based on the UN-resolution 1484 in Congo. During the

height of the Iraq war France, Germany, Belgium and Luxemburg suggested during a meeting in Tervuren, a suburb of Brussels the establishment of a headquarter for autonomous military operations of the Europeans. This suggestion was harshly criticised not only by the US, but also Great Britain.

Prime Minister Tony Blair would not accept a European Defence project that would endanger the NATO[35]. A compromise was found that allowed the EU to act more independently without reducing NATOs capabilities and responsibilities. Thus were

- a workgroup of Europeans in the NATO headquarter SHAPE was build. SHAPE liaison officers were installed in the EU military leadership,
- a workgroup consisting of military and civilian personnel was created within the EU military leadership to plan and lead EU missions.

The plans of the Europeans were hindered by the US suggested creation of a NATO response force, decided upon on the NATO Meeting in Prague. The NATO response force was to be ready in October 2004 and is supposed to reach its full strength in October 2006 with 21.000 elite troops. Its made of highly modern, flexible and easily transferable units who have to be able to cooperate and sustain. Obviously the Europeans are neither able nor ready to increase military spending without risking social tensions. In other words: The money spent on the NATO troops hinders the creation of the European response force.

The Europeans are oriented on an extension of public international law and its international institutions, e.g. the International Criminal Court. Furthermore they are also interested in a UN-Security Council serving as the beginning of a world government. The US, on the other hand, is less likely to accept restrictions of their sovereignty by international rules. They only choose this way, if it provides them with advantages like military or financial release or a higher legitimacy.

The last war on Iraq (2003) shows clearly, that the European nations could not find a coordinated policy, even though the US started the war without a UN-Mandate. The US saw in the Iraq a good place to start their plans on the change of the Middle East. The establishment of democracy was meant to influence the neighbouring countries, this would also secure the oil shippings of the US. The United Kingdom, Italy, Spain, the Netherlands, Poland and other nations were ready to unconditionally support the US. Germany, France and Belgium, the "Old Europe", opposed the war. Russia and even China followed that policy. The members of the Security Council with the right to veto saw their influence threatened. Above that, both Russia and France had still their very own interests in the Iraq.

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35 German newspaper „*Die Welt*", Oktober, 17th 2003.

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The Future of Latin America: Can the EU Help?[1]

Agustín Gordillo

Abstract: This paper: (i) assumes that a) corruption, patronage and clienteles imbedded for centuries in Latin America's culture are at the root of Latin America's economic, social and political problems, together with b) systematic failure to grasp reality. (ii) On those assumptions it discusses the creation of a supranational Inter-American State comprising those Latin American countries willing or in need to participate, with the added minority vote and participation of representatives of both the European Union and the United States. It is suggested that the two superpowers join forces in helping us to achieve good governance. (iii) It would further be a step to a different world order in the distant future.

1. The Ever Changing World Order

POWER has been shifting away from the Nation State, in two opposite directions: first inwards towards local regions[2] and second outwards, originally towards inter-

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[1] The essence of this paper has already been delivered at the European Public Law Center on the occasion of their conference on Civilizations and Public Law, Athens, 2003, in press at the European Review of Public Law, who have kindly given me permission for this publication. The original title was "Civilizations and Public Law: a View from Latin America" and it was accompanied by a small book entitled precisely as this paper and its presentation in Sao Paulo. We believe the current title better to represent its contents.

[2] The United Kingdom with devolution to Scotland, Wales, Northern Ireland, is a clear example. There are more, these are just some of the clearest. See ANTHONY, G. (2002): Public Law Litigation and the Belfast Agreement. In: European Public Law, 8(3): 401-422; MORISON, J. (1999), Constitutionalism and Change: Representation, Governance, and Participation in the New Northern Ireland. In: Fordham International Law Journal, New York, 22(4): 1608-1627. "Globally there has been a trend for state governments to lose power also through devolution to substate, regional, provincial, and local political entities. In many states, including those in the developed world, regional movements exist promoting substantial autonomy or secession": HUNTINGTON, S. (1997): The Clash of Civilizations and the Remaking of the World Order. New York, Touchstone: 35. BREWER CARÍAS, A. R. (2001): Regionalization in Economic Matters in Comparative Law. In: Études de Droit Public Comparé, Brussels, Bruylant: 139-159, esp. 140-1, 154-9, concludes that economic regionalization is frequently linked to administrative or political regionalization.

national institutions,[3] then to the supranational state and beyond; towards greater international law[4] (even applied by local courts[5]) and jurisdiction.[6] In the meantime, there is greater national or bi-national[7] foreign jurisdiction[8] as part of a process towards more international jurisdiction.[9]

The world seems to be moving towards a new federalism,[10] where the former Nation States will act as local intermediate entities.[11] Most Nation States inevitably suffer, in this process, "losses in sovereignty, functions, and power". This

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3 "International institutions now assert the right to judge and to constrain what states do in their own territory": HUNTINGTON (1997): *op. loc. cit*. Some authors point out that there is also "cross conditioning", when international lenders, both public and private, agree on conditions that the receiving country is to meet; even technical country missions sometimes are composed by member of different international lenders, such as the WB and the IMF. JIMÉNEZ CASTRO, W. (2000): Préstamos y programas de ajuste estructural, San José de Costa Rica: EUNED: XIX, tells of such "cross conditioning" by the IMF, WB, IDB, AID, "the Club of Paris" and other international private commercial banks.

4 See ALTER, K. J. (2001): Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe. Oxford: Oxford University Press, OX2 6DP. In another vein, some anthropologists ask "Does the proliferation of global agreements initiate a spatial order that represents an important shift form the territorial claims of colonialism and nationalism –a «postcolonial» space?": GUPTA, A. (1998): Postcolonial Developments. Durham: Duke University Press: 299.

5 Both phenomena are well examined in VOLPI, M. (1997): Le forme di Stato. In: MORBIDELLI, G./ PEGORARO, L./ REPOSO, A./ VOLPI, A. (Eds.): Diritto costituzionale italiano e comparato. Bologna: Monduzzi: 413-27. Sometimes the tendency favors indigenous people: see ANAYA, S. J. (1996): Indigenous Peoples in International Law. New York: Oxford University Press, 3: 75 et seq.

6 The most interesting example of supranational jurisdiction is discussed in BROWN, N. L./ KENNEDY, T. (2000): The Court of Justice of the European Communities, 5th ed. London: Sweet & Maxwell.

7 As in the case of the NAFTA panels: see LEMIEUX, D./ STUHEC, A. (1999): Review of Administrative Action Under NAFTA. Ontario: Carswell.

8 One example is that of the American FCPA. See CRUVER, D. R. (1999): Complying With the Foreign Corrupt Practices Act. A guide or U.S. Firms Doing Business in the International Marketplace, 2nd ed.. Chicago: American Bar Association.

9 See CRAIG, P. (2001): The Jurisdiction of the Community Courts Reconsidered. In: DE BÚRCA/ GRÁINNE/ WEILER, J. H. H. (Eds.), The European Court of Justice. New York: Oxford University Press: 6: 179.

10 Or, in another perspective, "a new regime of discipline in which governmentality is unhitched from the nation-state to be instituted anew on a global scale": GUPTA, A (1998) *op. cit.*: 321.

11 In any case, the phenomenon is not new; "…global communities act across borders as more than citizens of their home status and identify to varying degrees with inherently universalizable norms": BRYSK, A. (2000): From Tribal Village to Global Village. Indian Rights and International Relations in Latin America. Standford: Standford University Press: 5: 188 et seq.

"weakening of states" and the perception that there are "failed states"[12] is a fact that cannot really be denied.

This affects the whole of Latin America in a peculiar way. It stands in a world with many different kind of states, first resulting from the original clash of Europe vs. indigenous populations,[13] but fundamentally in the very dissimilar development of the colonies respectively under British and Spanish empires.[14] Such distinction is alive today.[15] The trend to globalization requires good governance,[16] yet that is not available in Latin America. Patronage and *caudillismo*[17] are hereditary[18] and thriving:[19] "Accostumed to a patron-client relationship, they seem to have been

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12 HUNTINGTON (1997) *op. loc. cit.*.; "Argentina is widely perceived as a national failure": SHUMWAY, N. (1993): The Invention of Argentina. Berkeley: University of California Press: X.

13 An interesting reference is provided by DIAMOND, J. (1999): Guns, Germs, and Steel. The Fates of Human Societies. New York: Norton: 18: esp. 354-370. His data proves that confrontation could have had only one result. However, interpretations vary as to the meaning of each lifestyle. The traditional view "was that hunter-gatherers had to toil from dawn to dusk in the quest for food in order to eke out a life that was nasty, brutish, and short"; to which others confronted cases of where people "whose wants and needs were limited, like many hunter-gatherers, could achieve a comfortable life with little time and effort. Instead of working all day every day, these people spent much of their time simply lounging around": BURCH, E. S., JR./ ELLANNA, L. J. (Eds.) (1996): Key Issues in Hunter-Gatherer Research. Oxford: Berg: 147, Hunter Affluence?, Editorial.

14 SERVICE, E. R. (1968): Indian-European Relations in Colonial Latin America. In: MANNERS, R. A./ KAPLAN, D. (Eds), Theory in Anthropology. Chicago: Aldine: 285.

15 NEILSON, J. (2002): Clash of civilizations. In: Buenos Aires Herald, November 28: 16.

16 "Globalization depends on effective governance, now as in the past. Effective governance is not inevitable. If it occurs, it is more likely to take place through interstate cooperation and transnational networks than through a world state. But even if national states retain many of their present functions, effective governance of a partially –and increasingly- globalized world will require more extensive international institutions": KEOHANE, R. O. (2002): Governance in a Partially Globalized World. In: HELD. D /MCGREW, A., (Eds.), Governing Globalization. Padstow, Cornwall: Polity Press: 16: 325.

17 The Spanish word has gained general acceptance. See LEWELLEN, T.. C. (1983): Political Anthropology. An Introduction. New York: Bergin & Garvey: 79-81.

18 In fact, it has always been the case, from the earlier times of colonial history: LUNA, F. (2000): A Short History of the Argentinians. Buenos Aires: Planeta: 19 and 25.

19 NEILSON (2002) *op. loc. cit*. ROSENSOHN, N. /SCHNEIDER, B. (1993): THE CLUB OF ROME, Latin America, facing contradictions and hopes. Bilbao: BBV: 73: "the stratified system put in place by the colonizers –and essentially denied full citizenship to the indigenous peoples of the region—has continued up to the present." Ideologically different versions of history come to the same conclusion, on a different basis. The peripheral countries are "condemned to underdevelopment" or worse, to "the development of underdevelopment": FRANK, A. G. (1969): Capitalism and Underdevelopment in Latin America. Historical Studies of Chile and Brazil. New York: Monthly Review Press: 55-57. Both versions have in common the belief that nothing has changed in 500 years. Cu-

specially willing, even eager to follow the new caudillo;"[20] that is "the kind of leadership most […] seem to prefer", "a bland mixture of nationalism, populism, and social democracy."[21] "The system was self-perpetuating."[22] This shows the way to the inference that "All ethnography is part philosophy, and a good deal of the rest is confession". [23]

The original descendants of the European colonizers in Latin America were not much diverse than what *they* thought the indigenous population was. One chronicler said of the *gaucho*: "that man lost in the middle of Nowhere or Nothingness, who does not either do anything to change his destiny: a kind of natural indolence that completely dominates time and space;" [24] determined to live without needs;

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riously enough, there are descriptions from far away countries that also fit the description: In 2003 we may rightly say, in Argentina, that we see agreements between local governors and the nation's president that "Rather than an agreement between two, three, or a half dozen regional […] (governors), these alliances involved an encounter or whole collection of separate, semi-independent, intensely rivalrous political figures joined at best in unstable blocks by ties of […] clientship": GEERTZ, C.(1980): Negara. The Theathre State in Nineteenth-Century Bali. Princeton, New Jersey: Princeton University Press: 43.

20 SNOW, P. G. /MANZETTI, L. (1995): Political Forces in Argentina. Westport, Connecticut: Praeger: 3rd. edition: 13. The salient characteristic is that in almost all cases, the chief, even if he is *primus inter pares* in a council, "controls the whole apparatus of government and is usually himself supreme judge, military commander, economic director, and archpriest of his community." "This form of comprehensive personal rule, in which there is no «separation of powers,» is one of the reasons […] why conquered groups can easily be absorbed by allowing their own leaders to continue directing internal affairs": SCHAPERA, I. (1967): Government and Politics in Tribal Societies. New York: Schoken Books: 208-9. GASTON GORDILLO notes that "the most important leaders have also become well-paid members of the apparatus of the provincial government, a situation not free from internal tensions among the Toba": (1999) The Toba of the Argentine Chaco. In: LEE, R. B. /DALY, R. (Eds.), The Cambridge Encyclopedia of Hunters and Gatherers. Cambridge: Cambridge University Press: 110-3. Different versions are given of different cultures. See for instance GLUCKMAN, M. (1984): Politics, Law and Ritual in Tribal Society. Oxford, UK: Blackwell: IUV: 123-168; LEACH, E.R. (1986): Political Systems of Highland Burma. London: The Athlone Press: 182-195.

21 SNOW /MANZETTI (1995) *op. cit.*: 41. The citation is slightly out of context, but not enough that the reader should beware.

22 Snow /Manzetti (1995) *op.cit.*: 13.

23 GEERTZ, C. (1968): The cerebral Savage: On the Work of Claude Lévi-Strauss. In: MANNERS, R: A. /KAPLAN, D. (Eds), Theory in Anthropology. Chicago: Aldine: 551.

24 KUPCHIK, C. (1999): La ruta argentina. El país contado por viajeros y escritores. Buenos Aires: Planeta: 66-7. As CALDCLEUGH, A. (1825) put it around 1821 (Travels in South America During the Years 1819-20-21. Containing an Account of the Present States of Brazil, Buenos Ayers and Chile. London. Later translated into German and Spanish), acording to KUPCHIK, *op. cit.*: 62, "I have observed something very general in all of America: people do not have any idea of time or space." Or, rather, the notion of time as circular or cyclic, in which archaic societies express fear of change and the new. The

content with his luck and in no need of money; surrounded by cattle, but with no milk; in a nice climate, without vegetables or fruits; seemingly always standing in front of his ranch, which is full of holes that he does not mend; women's lives were similarly "indolent and inactive."[25] Similar observations are conjured by *other* foreigners in the *next* century. [26]

Fact accompanies perception. Just as poverty and indigent conditions are fast *diminishing* in developing Asia, they are *increasing* in Africa and Latin America.[27] In Africa, one element of the predicament is *physical*; in Latin America there is more *subjectivity*. Most of us view the world in our own way.[28] And that seems to be getting worse, not better: in 2001-2003 we had three consecutive years where growth in Latin America has been lower than in Africa.[29]

The tendency towards inwards regionalization is always weak in Latin America, where the tradition has been of continuous centralization.The first, inward shifting of power away from the Nation State is clear in Europe[30] and the United States.[31] Yet Latin America is only a part of that phenomenon, with emphasis on a premature loss of power of the Nation State, towards international organizations and other supranational bodies,[32] but also towards other more powerful Nation States. This is not really new in History, just different.[33] The attempts at supranational organization have also been historically weak; its loss of power at foreign or international hands is obvious.

The case of growing foreign national jurisdiction as a step towards a not yet fully developed international jurisdiction is also present in certain international crimes that have not yet been fully ascribed to the ICC at The Hague: organized

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same happens with empty spaces: "enormous empty spaces", "the enormity of the desert", as PAUL THÉROUX said. (Cited by KUPCHIK, *op. cit*.: 295.)

25 FRANCIS BOND HEAD, as cited by KUPCHIK, *op. cit.*: 67.

26 GOMBROWICZ says "They do not feel repugnance…, they do no get indignant…, they do not condemn… nor are they ashamed…as much as we are." (cited by KUPCHIK, *op. cit.*: 230).

27 GUADAGNI, A. A. (2003): Una nueva geografía de la pobreza. In: La Nación, February 5: 15.

28 We should beware of that, because "The inverted ethnocentrism has to end in an anti-anthropology:" SAHLINS, M. (1995): How «Natives» Think About Captain Cook, For Example. Chicago: The Chicago University Press: 151.

29 FRAGA, R. (2003): La africanización de la Argentina. In: El Cronista, February 18: 8.

30 Where all nations are different: WILSON, J. Q. (1994): National Differences. In: SCHUCK, P. H., Foundations of Administrative Law. New Cork: Foundation Press: 323-338, esp. 329.

31 Some would debate this. I think Iraq clearly demonstrated that not even the United States can act without international formal backing.

32 See ATKINS, G. P. (1999): Latin America and the Caribbean in the International System, 4th ed. Colorado: Westview Press: 220 et seq.

33 It is easy to prove that the international order was not established between equals, even at its genesis. See ALLOT, P. (1992): Mare Nostrum: A New International Law of the Sea. In: American Journal of International Law, October, 86: 764. I mention this fact in (2003) An Introduction to Law. London: Esperia Publications Ltd.: X.

crime and terrorism, money laundering, past cases of genocide and torture, etc. The tendency the world is now following is the grouping of states, with the direction shown by the ever-growing European Union. It would be fallacious, to point out how the apparently insoluble problems of Latin America, also appeared a couple of centuries ago in what today are developed societies. First, they did not all have our own troubles.[34] Second, if some of them arose out of their own troubles without resorting to external integration, that was in the past.

Today we cannot simply watch how continents go asunder, and wait for some miraculous internal change to happen; least of all, when those problems have been rampant throughout all of their history, [35] as is the case of universal and eternal rampant corruption,[36] patronage, clienteles, and their consequences in bad public governance.[37] Our assets[38] do not play much of a role in such a local cultural envi-

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[34] NORTH, D. C. /SUMMERHILL, W. /WEINGAST, B. R.: Order, disorder and economic change: Latin America vs. North America. Translated into Spanish by *Joan Oriol Prats*, IIG, Instituto Internacional de Gobernabilidad, as Orden, desorden y cambio económico: Latinoamérica vs. Norte América. In: Revista Institutiones y Desarrollo, 12/13: 17-12-2002, available in www.iigov.org/revista

[35] "in 1883 […it] was still plagued by corruption, personalism, and a general disregard for institutional rule": SHUMWAY, N. (1993): The Invention of Argentina. Berkeley: University of California Press: 140.

[36] Corruption has always been eternal and will always be universal. What matters is how strongly and effectively we fight it, or how much we let it flourish. See JOHNSTON, D. /ZIMERMANN, R. (Eds) (2002): Unjustified Enrichment. Key Issues in Comparative perspective. Cambridge, United Kingdom: Cambridge University Press. It has been said that "the social system of many of these countries also contributed to swell the debt: some of the loans benefited only the middle and upper classes, the money merely passing through Latin America before being placed in Europe or the United States", *op. cit.*: 31. See ROMERO PÉREZ, J. E. (1999): Derecho administrativo general. San José: EUNED: IX-X, who denounces at the same time corruption, "globalization" and "neo liberalism": he considers all three to be interconnected affairs. He also denounces bad government and patronage in all emerging countries: X: 293-306; he is against everything that the WB, the IMF and the IDB stand for: 299. In a different vein but from the same country, see also JIMÉNEZ CASTRO, *op. loc. cit.*.

[37] Many writers have tackled the problem of our tradition of non-compliance with the law. I first dealt with it in (1982) La administración paralela. El parasistema jurídico administrativo. Madrid, Civitas: 4th printing 2001; NINO, C. (1992) also dealt with it later, in the nineties, in his Un país al margen de la ley. Buenos Aires: EMECE; many books have since been written on the subject, among them DE SOTO, H. (1987): El otro sendero. Buenos Aires: Sudamericana, 1st ed.; PORTES, A. (Ed.) (1989): The Informal Economy. John Hopkins University Press. As for the relation between public reason and democracy, see RAWLS, J. (1996): Political Liberalism. New York: Columbia University Press: 216 et seq.

[38] We should instead say, *potentially* rich, for all foreigners always posit the same observation: nobody does seem to work on it. SAINT EXUPÉRY said in 1929 that all he could see from the plane were infinite land, with no trees, only a barrack in the middle of the camps and a windmill. "For hundreds of kilometres you see nothing but that." Cited by KUPCHIK, *op. cit.*: 22-3. LAWRENCE DURRELL, who visited us in 1947-8, observed the

ronment:[39]caudillismo, too strong executive powers,[40] extraordinary indebtedness,[41] etc. Change in corrupt practices has not happened from the inside of our countries. In my view, simply waiting for something new to happen in the future, all by itself, is rather suicidal.

2. "Democracy" vs. "Sovereignty"

Throughout history mankind has developed these two concepts as if they were compatible. They sometimes are not. One pull of the forces of gravity is towards the local autonomous region: many people in the world feel that if their region has more power, at the expense of the national sovereign state, then their kind of "democracy" will be better, because stronger, at the local level.

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spectacle of "unexploited richness" being savagely disputed by local chieftains: KUPCHIK, *op. cit.*: 23. No matter what century or which foreigner you pick, the observations are always the same. In 1837 DARWIN notes that when travelling, only from time to time a single ranch could be seen, lonesome, each with a single tree (Cited by KUPCHIK, *op. cit.*: 90-1.) That detail of the "single tree" for a lonesome solitary ranch has always struck me as pathetic. It did impress DARWIN.

39 It is useless to remind us how many natural assets we have (as in THE CLUB OF ROME, *op. cit.*: 119), when we lack the capabilities that are needed to use them; the reverse happens with Japan, devoid of natural assets but with a culture that manages to overcome those difficulties.

40 This problem has been getting worse of late. Even in recent democratic times, the tendency to obscure the role of Congress and enhance that of the administration is clear for all to see: FERREIRA RUBIO, D. /GORETTI, M. (1998): When the President Governs Alone: The *decretazo* in Argentina, 1989-93. In: CAREY, J. M. /SHUGART, M. S (Eds.), Executive Decree Authority. Cambridge, U.K.: Cambridge University Press: 33-61. That seems to be the case in all Latin American countries: SCHMIDT, G. (1998): Presidential Usurpation on Congressional Preference? The Evolution of Executive Decree Authority in Peru. In CAREY /SHUGART, *op. cit.*: 104-141; CRISP, B. F. (1998): Presidential Decree Authority in Venezuela. In CAREY /SHUGART, *op. cit.*: 142-171; POWER, T. J. (1998): The Pen is Mightier that the Congress: Presidential Decree Power in Brazil. In CAREY /SHUGART, *op. cit.*: 197-230.

41 A former president said more than a century ago that we were "the great debtor of the South": LUNA, *op. cit.*: 215, who adds: our country "has almost constantly been in debt. It has almost become a way of life." It is a long tradition: "For reasons that have never been clear [… the country…] has always been capital-dependent and thereby beholding to loaner nations in ways that seriously compromise the country's ability to run its own affairs." (SHUMWAY, *op. cit.*: 156, footnote 3). That problem is not ours alone: "Of course, the external debt was not the only problem facing Latin American economies at the beginning of the 1980s, but it was the most acute and brought with it the most unfortunate consequences." (THE CLUB OF ROME, *op. loc. cit.*) In the nineties, various countries had external debts bigger than their GNPs, so it is only with a rather ingenuous look that the 1991 World Economic Survey could say that "Highly indebted countries may carry their debt burden for another decade."(As cited by THE CLUB OF ROME, *op. cit.*: 35.) Just *one* decade?

On the other hand, the pull of gravity towards a supranational state does not necessarily function on the basis of equality. Of course, words can be played with, and one would be able to say that international democracy means an equal vote for each state no matter how big (territory and economy) and populated or small and unpopulated it is. That is the way it works in the UN's General Assembly, but it is not the way it functions in the Security Council and in the real world order.

The European Union is a more interesting case. When you join small states (in geography, population and economy), with larger states (again in geography, population and economy), the rules have been adapted. Varying sizes (territory, population and economy) of countries change the scales of "equality" towards some new equilibrium of (implicitly different) "international democracy," where not each state's vote counts the same if it has very different population, economy and territory. In a sense, a new — still implied — concept of "international democracy" commences to be a counterweight to the absolute notion of "sovereignty." Perhaps the notion of reciprocity will have to be reconsidered, as well.

How do the EU and the US relate to Latin America today? The EU spends large amounts of money on trying to cope with some of the consequences of bad governments in Latin America: natural or man-made disasters, that national government cannot manage them on their own: famine, poverty and indigence, inequality, fiscal irresponsibility, over spending, over indebtedness, etc. It seems more expensive and less efficient for the US and the EU to try to alleviate such problems rather than addressing their mismanagement in bad public governance. Also, attacking the consequences is not of much use when you do not enter into the causes. The EU countries tried colonization in the past, and it did not work. [42] The US experimented with direct intervention, support for local coups d'État by military regimes, and they did not work either.

Both the US and the EU now try to help solve the consequences of maladministration by going to the very governments that practice it and try to convince them to do it differently this time, when they are being helped from abroad. They also try to implicate civil society in these efforts, to avoid some of the problems of bad public governance, corruption, patronage, and so on. Does it work? I am afraid not.

3. A Time for Nation Building? [43]

The case of Afghanistan is useful to look at the problem from the other side, that of the US and possibly Europe. In 1945 the US thought they could transform societies. They tried that in Japan and Germany, which trend fell later into disbelief. Afghanistan has brought the problem to the forefront of discussions: How do you

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[42] Except, notably, for the British colonies.

[43] We take the lead from DAO, J. (2002): Nation-building: back in style?. In: New York Times, republished in the Buenos Aires Herald, November 28: 17.

rebuild a nation that has not been functioning for years? Or do you try not to rebuild, but to build something new?

Unless someone can help Afghanistan to put in place a government that can be a provider of public goods, "people will look for help to those who do provide those things – which is the warlords." [44]

4. What, a New Imperialism?

It would be naïve to think that the great powers do not always exert their influence over emerging countries, even today. Countries exert influence over others in numerous non transparent ways. [45] Small countries try to defend their interests in foreign countries, too. Their leverage may be smaller, but it is real nonetheless.

In the case of the US and the EU and other big international organizations, too many individuals and institutions exercise some kind of influence in foreign countries, without the benefit of internal legal and social controls in their own native society. What I propose here is to make those influences transparent and overt, subject to public scrutiny both at home and abroad; to channel them through a single main course instead of the myriad ways in which it is now exercised by too many countries and international organizations.

Many foreigners go to Latin America and do *pro bono* work, being commissioned either by non governmental organizations from their own countries or by their own countries themselves, and most try to be fair, balanced and reasonable in their management suggestions; they believe what they say with all their heart. Other times, though, the politics are, often, nefarious. And there's also the aptly named "policy du jour."

But if everything is cloaked in secrecy and there is no public control either in our countries or in their own foreign countries, then it cannot objectively produce good results. Control is more essential to public life when it operates under the veil of diplomatic secrecy than when it is done in the open. Now it's a cloak and dagger business.

I suggest bringing it into the open in the whole world, both the developing and the developed one.

That cannot either be done by direct intervention in the affairs of *each* nation, as has already been suggested in some cases. Yet, even if that thought might be a logical implication of the premises on a country by country basis, it is really not feasible. Public resentment would be too strong. On the other hand, an indirect influence such as is exercised in the EU towards its composing countries may prove feasible. It is not going to happen by itself.

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[44] Alexander T., British Department of International Development, cited by DAO, *op. loc.cit*.

[45] An Introduction to Law: *op. cit.*: IX.

Historians might want to point out that all this talk is reminiscent of the Empire-Colonies relations of the past. That is an attempt to recreate the colonial past, without even the empires wanting it: which of course they don't.

The present situation allows them to exert whatever influence they desire, without facing the critiques of mal administration or malpractice in foreign public governance. As things now stand, they lobby their position and obtain their results without paying for the consequences of having to really participate in the administration of a failing or failed state.

They also exert such influence in so many different ways and by so many different means that the results are often contradictory or at least inefficient. The criticism at the IMF for its role in giving excess credit to countries which were obviously under corrupt governments and prone to make inefficient use of the borrowed money, therefore ending by being unable to pay back the credits, is not really a criticism to its bureaucracy,[46] for it in turn depends of the major contributors' directions.

So it is the bigger countries themselves that are not making an efficient usage of the money they give to the IMF to be lent to smaller countries. It is not that the money is given without caveats and conditions: it is that the caveats and conditions are not really working, not because the IMF' bureaucracy is sometimes wrong, but rather because the international system itself is not sufficiently coherent.

Such a situation is comfortable primarily for those responsible for government in the former colonies; it is doubtful to which extent it is also comfortable to bigger countries too. Those in the local power in Latin America can enjoy the comforts of power and the State and are not accountable because they can always blame the empire; as for public opinion or the common people in these former colonies, they either do not care to see reality, do not know about it, or know about it but prefer to keep silent.

Those inclined to consider this but one modern version of the old "white man's burden" might say they recognize that European or American control of the emerging countries is nothing new in history. It is now less evident to see, but no less powerful.

5. The Resistance to Assume Further Responsibilities

A pertinent question is whether the current governments of the US and the EU would care to take a more candid responsibility for the affairs of countries which are so obviously problematic.

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[46] Such as MUSSA, M. (2002): Argentina and the Fund: from Triumph to Tragedy. Washington, D.C.: Institute for International Economics; Spanish edition, Argentina y el FMI: del triunfo a la tragedia. Buenos Aires: Planeta. MUSSA's book, faithful to his own formation, is that of macroeconomics: no place there for corruption, clienteles, patronage, or anything but numbers.

Egoism would naturally indicate them to just let things stand as they are now. If that is the answer, then it should come as no surprise that sometimes things get out of hand. And to then intervene in self defence is a late reaction, therefore more expensive in lives and money, in universal good will and cultural influence.

The same thing that can be said of extreme inequalities within a single country can be said of extreme inequalities in the world order. I cannot live in peace *and* in luxury in my own country, yet surrounded by poverty and injustice. I then have to employ part of my resources in self defence. If I then suffer damage, in spite of my mechanisms of self defence, it is too late already. How do I change the system within my own country? I simply cannot, and I do not really want to lose democratic elections and representative governments, even if those that govern do not make a good job of it. Yet, I know too that sovereignty does not exist as it was thought it was going to be when the newer smaller states came into being. I just want to have a fairer world organization, where my own problems are better dealt with, where better public governance than ours is not a privilege of the EU and the US that Latin America cannot share.

Some countries in the EU voice the opinion that the US has brought its current troubles upon itself. The same people would say that if I am living in almost luxury in my own country, but surrounded with peril, I am assuming a risk of unknown dimensions. But the same can be said of the EU as the EU says of the US; both individuals and countries are sometimes living in luxury yet surrounded by poverty. The parallel is too obvious to miss, yet we get the criticism without the example.

We Latin Americans get progressively unhappy with our reality, and see a better world in Europe or the US. It is almost unavoidable that a sizable part of our population is therefore tempted to go there, legally or illegally. It is just the reverse flow of when Europeans abandoned their continent, ravaged by wars or famine, in search of a better life in Latin America or other countries. That is also the point DERSHOWITZ makes, when he accuses Europe of being soft on terrorism.[47]

Naturally, you have the option of deciding not to try to help those surrounding you in the world to overcome their problems (real managerial help, not just humanitarian aid). Just as naturally, then the problems will inevitably come to you. I do not think that either the EU or the US can shut their eyes to world problems that they can help to be solved, and live happily and safely forever.

Now and then the European Union or its member States, and also the US, like to extend their cultural influence on Latin America, be it by teaching the language, making cooperative relations between European Universities and Latin American Universities, launching special cultural projects, etc.

I am not going to suggest that such money is misspent, on the contrary. Nevertheless, the fact that those countries or continents spend money to extend their cultural influence in Latin America proves precisely my point. You cannot have a

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[47] DERSHOWITZ, A. M. (2002): Why Terrorism Works. Understanding the threat, responding to the challenge. New Haven: Yale University Press.

lasting influence in that culture if you do not help it to get into is own feet in terms of reasonably good public governance.

Of course, we might tempt the wrong people for the wrong reasons. That is why I suggest minority participation only. Too frequently foreign countries acting elsewhere do so in their own economic self interest, with utter disregard for the interest of the client country. That was clearly shown by European participation in Latin American privatizations. That is currently being shown by internal subsidies that go against the international opening of the markets that the same countries preach.

Notwithstanding all that, I have enough faith in more developed societies so as to think that they will somehow manage to send their best and not their worst people. I also have enough faith in Latin American countries to loudly complain if those foreign actions are addressed merely to enrich themselves or their countries further, again at our expense.

I have faith in the developed countries to have people who will listen to these cries of complaint, it their country representatives are just lining their own pockets or just helping their own countries get richer and us poorer.

I have faith in their enlightened understanding that in the end, it is also in their own interest that they should try to send good people with serious intentions. Otherwise they will be like they are today, scared or furious at each new bully that decides to part ways with the civilized world. The copy-cat pattern is obvious to see and dangerous to ignore.

6. Am I Idealizing the EU?

It has been pointed out to me that there is scope to be slightly more critical of the EU,[48] as they too have experienced difficulties.[49] However, the gap between EU's problems and Latin America's problems is always widening.

It would seem doubtful that the EU would ever accept taking up the responsibility of having a minority vote in a new supranational state and thereby increasing its moral responsibility for the development of this continent. There is quite a difference whether you limit yourself to traditional forms of aid while at least in part maintaining the opportunity to blame local paternalism if the effects fall short of expectations, or whether you accept to directly participate in the decision-making

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[48] For instance, while corruption is rampant in our countries, it is not at all an unknown phenomenon in Europe. See for instance NIETO GARCÍA, A (1997): La corrupción en la España democrática. Madrid: Ariel; (1996): La "nueva" organización del desgobierno. Madrid: Ariel.

[49] ADAM T. (1999-2000): Transparency and the Emergence of a European Administrative Law. In: 19 *Yearbook of European Law* 217; HARLOW, C. (1999): European Administrative Law and the Global Challenge. In: CRAIG, P. /DE BÚRCA, G. (Eds), The Evolution of EU Law. Oxford University Press: 261, etc.

in such an obvious way as is here proposed. That is a question only the EU can answer.

One of the first problems also is, the EU seems to lack a clear focus on its policies towards Latin America.[50] But the interest is undoubtedly there, as the budget allocations would indicate: between € 400 and 500 million/year 0,415 by the UE, plus € 1.900 from the Member States' aid. The money goes primarily to humanitarian aid: uprooted people or refugees, migrants, demobilized former soldiers, reproductive health; those discriminated against or suffering from poverty or disadvantage, children, minorities, prisoners, victims of torture, indigenous peoples; rehabilitation and reconstruction; also for developments in democracy, rule of law, human rights, justice, etc.

This aid is channeled through regional international agreements with Central America, the Andean Community, and Mercosur, or bilateral agreements (Mexico, Chile), but there does not seem to be a continental scope in the efforts and aid. Also, since the budgets are made annually, there may be changes either in the amounts of in the operations that are approved each year.

Spain and Italy are having the most important number of returnees in search of employment or a better life, much as their ancestors did centuries ago in the other direction; but the problem is no just theirs. Except for immigration these problems in the EU are considered on a common basis for Europe but individually for the countries of Latin America, precisely because these countries are not united in a supranational state or an economic union.

The difficulty is common to all countries of Latin America, but since it appears with varying degrees of intensity according to the particular time and country being considered, it is considered as diverse or unique in each country.[51] Moreover, some documents and resolutions stress the need for innovative immigration policies founded on the "sovereignty" of the countries concerned.[52] That, coming from a European Union whose main starting point was precisely some abdication of sovereignty for the common good, is not a good signal, even though possibly another message can read between the lines.[53]

Instead of giving primary attention and money to single problems in individual countries, no matter how pressing and distinct they may appear to be on each occasion, the EU should mostly try to devise a continental government of sorts in Latin

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50 Some reports say it is a "thicket of regulations, resolutions, declarations and communications for which there is no road map," OECD's Development Assistance Committee, OJ L 287, 31/10/2001: 3

51 Regulation (EC) number 550/97 of 24 March 1997 on HIV/AIDS related operations in developing countries, OJ L 550, 27/3/1997: 1

52 See the European Parliament resolution on a global partnership and a common strategy for relations between the European Union and Latin America, 200/2249 (INI), minutes of 15/11/2001.

53 The same resolution of 2001 suggest than an immigration "observatory" be established up with the responsibility for ongoing and thorough "monitoring" of all issues related to migratory flows between Europe and Latin America.

America to be the recipient of those efforts and the primary object of help (indeed, not to give it money, but to try to improve public governance in the continent).

It is curious that EU programs under these regulations may include the establishment of democratic structures and the promotion of human rights. Of course this is not bad at all in itself; it just misses the central point, which is the traditional culture of politics in the area. If this is not understood, then the trappings of democracy will be installed and the most blatant human rights violations will be addressed, but the same tradition of inefficiency and patronage will remain under the guise of elected governments. Democracy is necessary, but it is not enough to produce good public governance.

Much the same can be said about EU Regulation 2258/96 concerning humanitarian aid for rehabilitation and reconstruction operations in developing countries. Article 1 declares that the final aim must be not just to permit refugees, displaced persons and demobilized troops to return home, but to help the entire population *to resume normal civilian life in their countries and regions of origin*. To "resume normal civilian life" in an underdeveloped society is to continue being subject to patronage, corruption, inefficiency, clienteles, and so on. To do things properly, something has to be done about that too.

In turn, EU Resolution 1257/96 concerning also humanitarian aid, has covered around € 500 million/year, administered by ECHO, the Commission' s European Community Humanitarian Office. The objective in this case is slightly broader, for art. 3 establishes that the objective is to cope with the consequences of population movements (refugees, displaced peoples and returnees) caused by natural and man-made disasters and carry out schemes to assists repatriation to the country of origin and resettlement there, when the conditions laid down in current international agreements are in place. That includes institution building.

A broader approach is also present in some agreements. In one of them[54] it is established that Community support shall be focused on the preparation of cooperation activities with the recipient countries and with the International Conference on Central American Refugees (CIREFCA), as well as the implementation of projects with specializes partners such as UNHCR, government bodies and NGOs.[55] The same approach can be observed in a more recent agreement with Mexico[56], which provides that the parties shall endeavor to *preserve* the benefits of the aid already granted to Central America refugees in Mexico, and shall cooperate *in the search for lasting solutions*.[57]

While all these efforts are oriented towards preventing illegal immigration and resettling immigrants back in their countries of origin as a lasting solution, at least it is understood that *the solution cannot be found in Europe, it has to be found in Latin America and other developing countries.* Transnational crime, such as traf-

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54 The 1999 Framework Cooperation Agreement between the EEC and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, OJ L 63, 12/3/99: 39.

55 Article 26.

56 OJ L 276, 28/10/2000: 45

57 Article 38.

ficking of migrants, women and children, has been added to the scope of these efforts,[58] but the point remains, all this has to be done on a regional scale and with the express purpose of improving public governance in the area, in order to have really "lasting" solutions.

My contention is, then, that the EU should channel its aid efforts first into improving public governance for the continent and its components, because that is the real root of the problems which they try to alleviate with so much budgetary effort.

Badly governed countries, because governed with a traditional culture of corruption, patronage and inefficiency, will always lead to inequality, poverty and crisis. The different crises do sometimes have natural disasters as its causes, but even then, they worsen when there is not reasonably able public governance to deal with them. If the first objective of having reasonable public governance were achieved, much better results would be obtained with whatever singular help were decided for specific needs in the poorest countries.

7. Exports and Subsidies [59]

Fifty and more years ago we used to profitably export grain and beef, but then international prices went down and even more, developed countries chose to protect their own grain and beef from imports (farmers are quite powerful in most developed countries); we started to produce steel but now the United States is imposing tariff barriers on that too. (Some industrial lobbyists are also powerful there.) If we cannot profitably export our products, then some supernatural force drives us to export ourselves. It is nothing to be much surprised about, for Europeans have in the past been very busy immigrants to both North and South America. It is now people in South America, of European ancestry, that are making the reverse trip.

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[58] However, not all forms of transnational crime are the object of European preoccupation. The crimes of bribery committed by many European countries and enterprises in the process of privatization in Latin America have not yet been dealt with appropriately by the European Union or its pertinent member states. The moral obligation is here at odds with the interests of the very governments and groups that are an integral part of the EU. It is a contradiction comparable to that of preaching liberalization abroad and maintaining internal subsidies against imports from the countries that have been told to open their economies. Or to say that the European Development Bank has been established to provide loans to non EU-Countries, while in fact its loans are given in support of subsidiaries or joint ventures of European companies and banks.

[59] See RESNICK BRENNER, M.: Globalize subsidies to pay foreign debt. In: Herald World Trade, January 13: 2: "Countries that preach the eminent virtues of free trade and free markets for resource distribution, are the first to heavily subsidize their own agricultural sectror"; according to an editorial of The New York Times, December 1, 2002, "The Hypocrisy of Farm Subsidies," "the developed world pays out more than U$S 300 billion a year in farm subsidies," which is "seven times what it gives in development aid."

8. The Merits of EU Participation in Regional and World Public Governance

We already have an international "web of multilateral agreements, global and regional institutions and regimes, transgovernmental policy networks and summits"; that is "much more than a system of limited intergovernmental cooperation", it is an "emerging global governance complex."[60]

My suggestion is to change the national States so willing into a new, supranational one with minority US and UE participation. Since we *elect* candidates that abuse power[61] and heavily use patronage and corruption to govern, we have to devise a way by which our elected officials are more restrained.

- Internal laws and institutions are notoriously unable to do that, even with foreign pressures to establish the rule of law, human rights compliance, judicial control, good governance, etc.
- The conditional ties of foreign aid have been unsuccessful to surmount the problems of good public governance in my country.
- The change does not seem to be achieved either by means of international treaties against corruption, and even international or foreign jurisdiction, for it has been tried that without success either.
- What we need is a different kind of power structure where to put our elected leaders.
- It might even be an early exercise in public governance foreign aid, instead of humanitarian aid, which is really not everlasting.

What I propose is simpler than EU expansion: It does not imply much of a budgetary commitment, there is no immigration resulting from it, and it does not change the balance of your cultures. It proposes instead a strengthening of supranational bonds were the commitments I am asking for are EU participation, first in helping it to be born, and then in decision making at one new supranational state of underdeveloped or emerging Latin American countries. You can make a difference. You can regain some of the power and prestige you are losing in confrontation with the US in other arenas.

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60 HELD, D. /MCGREW, A. (Eds) (2002): Governing Globalization. Cornwall: Polity: XI.

61 FERREIRA RUBIO, D. /GORETTI, M. (1998): *op. cit.*: 33-61. SCHMIDT, G. (1998): *op. cit.*: 104-141; CRISP, B. F. (1998): *op. cit.*: 142-171; POWER, T. J. (1998): *op. cit.*: 197-230.

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