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**The Trilemma of
Legitimacy
- Multilevel Governance
in the EU and the
Problem of Democracy**

Discussion Paper

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The Trilemma of Legitimacy

Multilevel Governance in the EU and the Problem of Democracy

I. Introduction

„Hence a form of government has been found which is neither precisely national nor federal; (...) and the new word to express this new thing does not yet exist“ (de Tocqueville)

As the European Communities have unquestionably been exercising governmental power for many years, there is a need for democratic legitimation of this specific „Governance without Statehood“¹. To a far greater extent than ordinary international organizations, the European Union has crossed the boundary from horizontal interstate cooperation to vertical policy-making in a dynamic multi-level system, in which the member states are but one level of the polity². The European Union has developed

¹ Wallace, William: Governance without Statehood. The Unstable Equilibrium, in: Wallace, Helen/Wallace, William (ed.): Policy-Making in the European Union, 3rd edition, Oxford 1996, pp. 439-460.

² Jachtenfuchs, Markus: Democracy and Governance in the European Union, in: Follesdal, Andreas/Koslowski, Peter (ed.): Democracy and the European Union, Berlin - Heidelberg 1998, pp. 37-64.

into a new type of political system which lacks many of the features we associate with democratic governance. Whereas in the past the EC relied on indirect legitimacy based on its member states and their complete control of European policy-making, the „uneven denationalization“³ evoked by the European integration indicates that the sovereign state cannot remain the sole focus of normative reflection. Since the Single European Act (SEA) and the Treaty on European Union (TEU) the forced transfer of political decisions and allocations from the national to the European level has weakened democratic influence and control at the national level without having been compensated by equally strong democratic institutions and processes at the European level. Therefore, the European Union is a new subject for theories of legitimacy which poses fundamental questions to the established principles and concepts of democratic theory. In this discussion paper I try to develop an argument why neither politicians nor academics still have not found any satisfactory solutions concerning the legitimacy problem of European Governance.

First, I will give an overview of the main sources of legitimacy in the Euro-Polity (II.). It will be shown that the strict observation of formal rules of democracy at the European level is not the sole method in which multi-level governance in the EU might gain legitimacy. Regardless of this assumption, it is obvious that European policy-making suffers from a democratic deficit which must be taken seriously from a normative point of view. The academic debate about this democratic deficit is centered on the two dimensions of the problem, which will be presented in chapter III. On the one hand, the institutional arrangement of the EU often is interpreted as non-democratic. On the other hand, it is argued that the EU is unable to be a ‘real’ democracy in principle because the structural and social prerequisites on which democratic rule depends are missing at the European level. These are the main challenges for European constitutional

³ Zürn, Michael: Jenseits der Staatlichkeit. Über die Folgen der ungleichzeitigen Denationalisierung, in: Leviathan 4 (1992), pp. 490-513.

engineering. The final part (IV.) consists of a discussion of varying reform options dealing with the multidimensional legitimacy problem.

II. Sources of Legitimacy in the European Multi-Level-System

One of the key questions for many political theorists is how the will of the European 'Demos' can be implemented better in the decision-making process of the European Union⁴. Therefore, the debate about the legitimate order in Europe is still mainly focused on the European Parliament, which is the only directly elected and therefore publicly accountable EU-institution. Although the Parliament plays only a subordinate role in European policy-making, it seems to be predestined to be the main bearer of legitimacy in the Union. Indeed, the European Parliament is the only body at the European level which is able to claim legitimacy through the democratic participation of the electorate due to the holding of direct European-wide elections. Following a simple logic, the enhancing of the legislative powers of the European Parliament is the most convincing recommendation for resolving the European Union's legitimacy problem.

But sometimes problems are much more complicated than they appear to be at first sight. When calling for a more adequate legitimation of the European „Multi-Level Governance“⁵, we must bear in mind that democratic mechanisms at the European level are only one of several ways in which the EU might gain legitimacy. The current academic debate, therefore, „is deficient since it focuses exclusively on the weakness of the *in-*

⁴ See only Pogge, Thomas W.: How to Create Supra-National Institutions Democratically. Some Reflections on the European Union's 'Democratic Deficit', in: Follesdal/Koslowski, Democracy and the European Union, *ibid.*, pp. 160-185.

⁵ Marks, Gary: Structural Policy and Multilevel Governance in the EC, in: Cafruny, Alan W./Rosenthal, Glenda G. (ed.): The State of the European Community, vol. 2, Boulder 1993, pp. 391-411; Bulmer, Simon: The Governance of the European Union. A New Institutional Approach, in: Journal of Public Policy 4 (1994), pp. 351-380.

put structures at the level of the European Union“⁶. It is not simply a matter of the EU having a so-called ‘democratic deficit’, which must be corrected by giving greater powers to the European Parliament. There are two other important sources of legitimacy in the multi-layered European system which have to be taken into account when considering the legitimacy problems of multi-level governance in Europe:

- Firstly, its general efficiency and effectiveness in dealing with political problems - the technocratic and utilitarian justification⁷ for European Governance („output“-legitimacy). The underlying assumption here is that the legitimacy of a political system depends on its capacity to achieve the citizens’ goals and to solve their problems. Multi-Level-Governance in the European Union could be seen as ‘government for the people’ - it is legitimate and even democratic insofar as the output of the political system corresponds „fully to the collective preferences of its citizens“⁸. This legitimizing factor has a long tradition in the history of European integration. The Union enjoys utilitarian support through the appeal to the economic welfare which it may provide. Surely it cannot be supposed that all human behaviour can be explained by economic motives, but experience in European integration has shown that peoples can be won over by favourable economic conditions. Following the neofunctionalist theory of European integration⁹, the pursuit of different shared sectional benefits promote a patchwork quilt of support. Indeed, more and more economic and political elites transferred their loyalties and expectations to the new ‘central’ institutions of the European Union as the increase of EU-

⁶ Scharpf, Fritz W.: Economic Integration, Democracy and the Welfare State, in: Journal of European Public Policy 4 (1997), pp. 18-36, p. 19.

⁷ von Bogdandy, Armin: Supranationale Union als neuer Herrschaftstypus: Enstaatlichung und Vergemeinschaftung aus staatsrechtlicher Perspektive, in: integration 16 (1993), pp. 210-224, p. 220.

⁸ Dahl, Robert A./Tuftes, Edward R.: Size and Democracy, Stanford 1973, p. 20.

⁹ Haas, Ernst B.: The Uniting of Europe, Stanford 1958, p. 16.

Lobbying¹⁰ and the public demands for European solutions show. The success of the European enterprise, and therefore its justification, depends on its utility in providing substantive results for the participating countries and their populations. As long as the efficiency and effectiveness of European policy-making leads to more noticeable benefits than costs the utilitarian support of large parts of the European population and hence the membership in the Community is less likely to be questioned.

- Secondly, the democratic and formal legitimacy of the European Union is still founded indirectly by member states as signatories to the treaties, and by their parliaments. The constitutionalization of Europe was approved by all national parliaments of the member states. It is argued that the „formal legitimacy“ of this system could be taken for granted because in the creation of the European institutions all requirements of the law are observed¹¹. Indeed, in this formal sense, the existing structures and processes of multi-level governance rest on a formal approval by the democratically elected parliaments of the member states. At the same time, governance at the European level suffers from a clear democratic deficit. Therefore, as far as European Governance is the result of interstate bargaining, it is indispensable that national governments acting in the European arena are democratically controlled by, and held accountable to, their national constituencies and parliaments. As the German Constitutional Court points out, it is first and foremost the national peoples of the member states who have to provide the democratic legitimation for Union Governance. In the „Staatenverbund“ formed by the EU, democratic legitimation necessarily comes about through the feedback of the actions of the Euro-

¹⁰ Andersen, Svein S./Eliassen, Kjell A.: EU-Lobbying. Between Representativity and Effectiveness, in: Andersen, Svein S./Eliassen Kjell A. (ed.): The European Union: How Democratic Is It?, London 1996, pp. 41-55.

¹¹ Weiler, Joseph H. H.: After Maastricht: Community Legitimacy in Post-1992 Europe, in: Adams, William James (ed.): Singular Europe. Economy and Polity of the European Community after 1992, Michigan 1993, pp. 11-41, p. 19.

pean institutions into the parliaments of the member-states¹². The „Rule of law“¹³ is another legitimizing factor which guarantees that the Union has no direct means of enforcing its authority - it has neither a police nor an army - but only a small administrative machine which must rely to a large extent on the member states.

The different sources of legitimacy stem from the hermaphrodite „nature of the beast“¹⁴ called ‘European Union’. The current state of the European integration is often described as a complex „mixed polity“¹⁵ which has classical intergovernmental elements as well as increasing supranational components. Therefore, the Euro-Polity divides political authority among several levels of governance and includes a multitude of different sources of legitimacy. Usually a twofold policy legitimacy of the Union is noticed. On the one hand, national, indirect legitimacy is conferred to the Council via governments enjoying the trust of their parliaments. On the other hand, legitimacy arises from direct democratic foundation expressed by the European Parliament. These sources of legitimacy are described as the two pillars on which the Community’s institutional system rest¹⁶.

This constellation is a new one. Until middle of the eighties, the European Community was not more than a „funktionaler Zweckverband“¹⁷ which could be sufficiently legitimised only by the member states and their par-

¹² Bundesverfassungsgericht: Urteil zum Maastricht-Vertrag, in: Entscheidungen des Bundesverfassungsgerichts 89 (1994), pp. 155-213, p. 155.

¹³ Hallstein, Walter: Europe in the Making, London 1972, p. 30.

¹⁴ Risse-Kappen, Thomas: Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union, in: Journal of Common Market Studies 34 (1996), pp. 55-80.

¹⁵ Wessels, Wolfgang: The Modern West European State and the European Union: Democratic Erosion or a New Kind of Polity?, in: Andersen/Eliassen, The European Union, ibid., pp. 57-69, p. 59.

¹⁶ Dehousse, Renaud: Institutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?, European University Institute Working Paper RSC 95/4, Florence 1995, p. 23.

¹⁷ Ipsen, Hans Peter: Europäisches Gemeinschaftsrecht, Tübingen 1972.

liaments, while the weakness of the European Parliament could be neglected at that time. In addition, the principle „rule of law“ has secured that the Community was unable to act autonomously against the interests of their member states and their populations. The question of legitimacy did not arise because the EC was the ‘right’ reaction against the communist threat and based „on the democratic traditions and practices of its members“¹⁸. As long as the Community was successful in solving the limited problems of a few policy sectors which required European solutions, the integration process was not open to question. Consensual cooperation at the European level was widely held to leave the democratic legitimacy at the national level intact¹⁹.

After the great leap forward through the SEA and TEU, several new policy sectors have been „Europeanized“. Policies which are supposed to belong to the core of state sovereignty have been put on the European agenda. In the near future, currency will come under supranational authority. Since the European Union could be defined as a partial polity which tends to redefine political boundaries²⁰ and which developed into a form of direct governance in its own right, the questions concerning the political identity, loyalty and affiliation attached to the Union level of governance have become crucial²¹. Under these circumstances it was increasingly obvious that the Europeanization of policy-making could no longer be based mainly on indirect legitimacy: „The more power over issues of core state sovereignty and redistribution was transferred to the European level, the more the Community was in need of its own sources

¹⁸ Wallace, Helen: Deepening and Widening: Problems of Legitimacy for the EC, in: Garcia, Soledad (ed.): European Identity and the Search for Legitimacy, London 1993, pp. 95-105, p. 96.

¹⁹ Scharpf, Fritz W.: Legitimationsprobleme der Globalisierung. Regieren in Verhandlungssystemen, in: Böhret, Carl/Wewer, Göttrik (ed.): Regieren im 21. Jahrhundert. Zwischen Globalisierung und Regionalisierung, Opladen 1993, pp. 165-185, p. 180.

²⁰ Weiler, After Maastricht, *ibid.*, p. 18.

²¹ Wallace, Deepening and Widening, *ibid.*, p. 100.

of direct popular support“²². But the long assumed „permissive consensus“ of the European population towards integration and the postulated pure „utilitarian support“ has eroded and turned into widespread mistrust since „Maastricht“. The dissatisfaction and disagreement with some policy outputs resulted in citizens’ withdrawing their support from the EU as a whole²³. The nature of the Union as ‘Community of Law’ was no longer suitable for legitimizing Euro-politics because „(...) appeals to the law can never provide more than a primary, and therefore provisional, ground for legitimacy. Rules cannot justify themselves simply by being rules, but require justification by reference to considerations beyond themselves“²⁴. This new scepticism by both public opinion and the scientific community entailed a great debate about the legitimate order of the European Union which has been continued until today. The decided enlargement of the EU will intensify the problem of legitimate rule in the multi-level system. During the ongoing post-Maastricht controversy, the so-called „democratic deficit“ has been identified as the main challenge for legitimate European Governance.

III. Dimensions of the Democratic Deficit

1. The non-democratic Character of the Institutional Arrangement

In the existing stage of European Integration the statal structures, processes and institutions cannot provide adequate democratic quality for the European Union. One of the most important principles of democracy - the

²² Schimmelfennig, Frank: Legitimate Rule in the European Union. The Academic Debate, Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung, No. 27, Tübingen 1996, p. 2.

²³ Reif, Karl-Heinz: Ein Ende des ‘permissive consensus’? Zum Wandel europapolitischer Einstellungen in der öffentlichen Meinung der EG-Mitgliedstaaten, in: Hrbek, Rudolf (ed.): Der Vertrag von Maastricht in der wissenschaftlichen Kontroverse, Baden-Baden 1993, pp. 23-40.

²⁴ Obradovic, Daniela: Policy Legitimacy and the European Union, in: Journal of Common Market Studies 34 (1996), pp. 191-221, p. 197.

„inclusiveness of citizenship“²⁵ - is hardly fulfilled. When considering the institutional dimension of the democratic deficit the following problems usually are addressed:

- Even after Maastricht and Amsterdam, the powers of the European Parliament in the legislative process leave a huge gap in democratic control for European policy-making. Although the IGC in Amsterdam has brought some progress in strengthening the role of the European Parliament, the really important decisions do not occur there. The voice of the European Parliament remains limited and its power to shape Union's legislation indirect. „Even though the European Parliament's power over the Commission has been considerably enhanced by the Maastricht Treaty, it largely remains an outsider in comitology networks“²⁶. At the same time, the European Parliament has not emerged as a forum in which political debate on important issues can be developed. In such circumstances, the Parliament is also not the adequate 'counterweight' to the Council of Ministers, representing the executive branch in the member states, which continues to enjoy primacy in the Community legislative process. For this reason, governance in the Union is still predominantly the result of net empowerment of the executives of the member states without meaningful parliamentary control at the European level. In addition to the Parliament's weakness in the process of policy formation and democratic control, it is not constituted as a real representative body of the European citizen, because the democratic principle „parity of votes“ („one man - one

²⁵ Boyce, Brigitte: The Democratic Deficit of the European Community, in: Parliamentary Affairs 46 (1993), pp. 458-478, p. 459.

²⁶ Dehousse, Renaud: European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?, RSC Working Paper, No. 98/11, European University Institute Florence 1998, p. 10.

vote“) is not even nearly fulfilled²⁷. In sum, it simply does not possess the functions of a ‘true’ parliament.

- The critics of the institutional arrangement of the EU often emphasize the bureaucratic and technocratic character of the Commission. De Gaule’s famous dictum of the Commission as „aréopague apatrie, technocratique, et irresponsable“ has many advocates even today. Indeed, the Commission is the body which fits least easily with traditional democratic theory. The very control of the legislative agenda gives the Commission the power to set priorities for the Community²⁸. This undemocratic body is exercising powers of a kind normally reserved to elected institutions. Although it has many functions comparable to a ‘real’ government it is not democratically legitimate in the same way. The Commission depends more on the approval of the member states²⁹ and less on the European Parliament whereas national governments depend exclusively on their parliaments. The intrinsic set-up of multilevel administrative interpenetration coordinated by the Commission is responsible for the often criticized bureaucratization of ‘Brüssels’³⁰. For this reason the Commissioners are sometimes called modern ‘Platonic guardians’, which, of course, is unsuitable for justifying their powers.
- The role of the Council of Ministers in providing indirect legitimacy for the European Union is weakening for two reasons. Firstly, supra-

²⁷ Steffani, Winfried: Das Demokratie-Dilemma der Europäischen Union. Die Rolle der Parlamente nach dem Urteil des Bundesverfassungsgerichts, in: Steffani, Winfried/Thaysen, Uwe (ed.): Demokratie in Europa. Zur Rolle der Parlamente, Opladen 1995, pp. 33-49.

²⁸ Craig, P.P.: Democracy and Rule-Making Within the EC: An Empirical and Normative Assessment, in: European Law Journal 3 (1997), pp. 105-130, p. 117.

²⁹ Matlár, Janne Haaland: Democratic Legitimacy and the Role of the Commission, in: Follesdal/Koslowski, Democracy and the European Union, *ibid.*, pp. 65-80.

³⁰ Wessels, Wolfgang: An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes, in: Journal of Common Market Studies 35 (1997), pp. 267-299, p. 281.

national institutions obtained more power and independence in order to complete the single market project which led to the decline of the member state's ability to control every step in European decision-making. For that reason alone, the state is a declining source of political legitimation in the European multi-level system³¹. Secondly, decision-making processes at the European level lead to manifold „scapegoating“ and „credit claiming“ in European policy-making³². In the course of enlarging the competencies of the Union, the member states comfort themselves with the conviction that they would still be able to control actual decisions in the Council. A paradox is noticeable: On the one hand, the national executives want to give the impression that they are playing the very active and determinant part in formulating and controlling European policy-making. But the 'package deals', which are usually concluded by the Council, often water down the original negotiating position of the member state executives which is mandated by the national constituencies and parliaments. On the other hand, the member state executives seem to play only a passive role in the two-level game when calling for unrealistic European solutions. It could be said that member state governments often hide behind „Brussels“ while they are not willing or able to do their homework in domestic politics. The result of this scapegoating - but this is also the case with 'credit claiming' - is a benevolent diffusion of responsibility and accountability in the multi-level system, because the public no longer knows who is the right addressee for political demands. This is also a reason why the indirect legitimation of Euro-politics granted by the council is an eroding source of legitimacy. It should be mentioned that this development has negative implications for the national democra-

³¹ Matlány, Janne Haaland: *New Forms of Governance in Europe? The Decline of the State as the Source of Political Legitimation*, in: *Cooperation and Conflict* 30 (1995), pp. 99-123.

³² Moravcsik, Andrew: *Why the European Community Strengthens the State: Domestic Politics and International Cooperation*, Harvard University Working Paper Series, No. 52, Cambridge, Mass. 1994.

cies, too: „There is no longer any question that European democracies discredit themselves when, for an evergrowing number of urgent problems, national political leaders admit their importance by calling for ‘European solutions’, while in Brussels interminable negotiations will, at best, lead to compromises that are declared unsatisfactory by all concerned, and for which nobody is willing to assume political responsibility“³³.

2. The Missing Structural Prerequisites for a European Democracy

There are many deep-rooted arguments which speak against the European Union’s general ability to be a real ‘textbook-friendly’ democracy. The current debate concerning the structural and social prerequisites for a European-wide democracy is predominantly focused on four broader issues:

- One of the most discussed obstacles to a forced democratization, especially in the German literature³⁴, is the non-existence of a european-wide people. Indeed, the crucial question is if there can be „ (...) a democratization at the European level without there being a transcendent notion of a European people? Is there a European demos around which, by which, a democracy can be established? How should or could it be defined? How could or should it fit into political theory?“³⁵. A ‘Demos’ of course need not be an ‘Ethnos’ as well. But the members of a ‘Demos’ must be identical in the sense of recognizing each other as members of the same political community. Only under these circumstances, is the use of the majority principle for all mem-

³³ Scharpf, Fritz W.: Community and Autonomy: Multi-level Policy-Making in the European Union, in: *Journal of European Public Policy* 1 (1994), pp. 219-242, p. 220.

³⁴ See only von Simson, Werner: Was heißt in einer europäischen Verfassung „Das Volk“?, in: *Europarecht* 1991, pp. 1-15.

³⁵ Weiler, Joseph H.H.: European Democracy and Its Critique, in: *West European Politics* 2 (1995), pp. 4-40, p. 5.

bers in a democracy acceptable. Kielmansegg³⁶ has shown that the acceptance of the majority principle presupposes the existence of a community of communication, of memory, and of experience. The member states of the Union do not constitute such a community of communication³⁷. To a very limited extent only they form a community of experience and shared history. But again this common European history is differently interpreted alongside national categories of identity. Joseph Weiler has demonstrated the strength of this ‘no-demos’ argument by constructing an interesting intellectual experiment. He suggests the entry of the Kingdom of Denmark into the Federal Republic of Germany as a seventeenth „Bundesland“: „Try and tell the Danes that they should not worry since they will have full representation in the Bundestag. Their screams of grief will be shrill not simply because they will be condemned, as Danes, to permanent minorityship (that may be true for the German Greens too), but because the way nationality, in this way of thinking, enmeshes with democracy is that even majority rule is only legitimate within a demos, when Danes rule Danes“³⁸. The rigorous implication of this view is simply that in the absence of a European demos there cannot be a democracy at the European level.

- It is often argued that the extent of cultural and social heterogeneity in Europe prevents majority-rule at the European level, within the European Council as well as in the European Parliament. This argument is closely related to the ‘no-demos’-thesis. In this view, democratic governance requires more homogeneity in ethnic, linguistic, cultural and institutional spheres. But this argument is not entirely convincing, in-

³⁶ Kielmansegg, Peter Graf: *Integration und Demokratie*, in: Jachtenfuchs, Markus/Kohler-Koch, Beate (ed.): *Europäische Integration*, Opladen 1996, pp. 47-71, p. 57.

³⁷ Risse, Thomas: *Who are We? A Europeanization of National Identities?* Unpublished Paper, European University Institute, Florence 1997.

³⁸ Weiler, Joseph H.H.: *The Reformation of European Constitutionalism*, in: *Journal of Common Market Studies* 35 (1997), pp. 97-131, p. 116.

deed it is rather dubious: „Whereas different writers throw a different mix of elements into the pot, an insistence on a relatively high degree of homogeneity, measured by these ethno-cultural criteria, is typically an important, indeed critical, element of the discourse. Here rests, of course, the most delicate aspect of the theory since the insistence on homogeneity is what conditions in its statal operationalisation the rules for inclusion and exclusion“³⁹.

- Some authors point out that there is a European-wide lack of intermediary structures which are necessary preconditions in order to integrate different political, economic and social interests into the political process of a democracy⁴⁰. In the member states political parties and the media-based public are the most important factors to mediate between decision-makers and citizens. It is obvious that there is no European public and no European party-system. Political events in the EU monitored by the media are mostly perceived from a pure national perspective. The media as mediator between government and population sets the agenda for the European integration matters which are decisive in national elections. It is nearly impossible to organize wide, general discussions on European issues at the European level, because a majority of people cannot participate in or follow public debates in a foreign language. Expectations of the development of a European party system on the occasion of the first direct elections to the European Parliament were dissapointed⁴¹. Even parties with a great international tradition like the Social Democrats have great difficulties in agreeing to minimal common programmatic European guidelines. The parties

³⁹ Weiler, *European Democracy and Its Critique*, *ibid.*, p. 11.

⁴⁰ See only Merkel, Wolfgang: *Integration and Democracy in the European Community. The Contours of a Dilemma*, Instituto Juan March de estudios e investigaciones, Estudio 42/1993, Madrid 1993.; Merkel, Wolfgang: *Das Demokratie-Effizienz-Dilemma. Die Europäische Union gerät in eine Legitimitätsfalle*, in: FAZ, 24 April 1996, p. 12.

⁴¹ Hix, S.: *Parties at the European Level and the Legitimacy of EU Socio-economic Policy*, in: *Journal of Common Market Studies* 33 (1995), pp. 527-554.

follow only the imperatives of the national political game because their organizational and electoral basis remain within the member states. It is not easy for party federations to play the multilevel game because it is nearly impossible to link both arenas effectively. In sum there are no institutions at the European level which are able to transform even complicated issues into distinguishable alternatives for decision along clearly defined conflict lines⁴². This leads to a situation in which no one who votes in the European elections has the persuasion that his voice affects critical policy choices at the European level or has an influence in confirming or rejecting European governance. It is simply not possible for the electorate to replace one set of governors by another in „throwing the scoundrals out“, which is one of the most important principles in democratic theory. The lack of transparency of the European „Politikverflechtung“⁴³ increases the impossibility of sanctioning any single person or party for a positive or negative performance. As a result, the European elections are only second-order elections, in which the outcomes are determined more by domestic political allegiances and less by attitudes towards European matters. Moreover, interest groups and social movements predominantly are organized in the national context and are not easily to be europeanized. European umbrella associations have a very limited capacity for action because the decision-making processes at the European level are very complicated and the heterogeneity of the different actors playing in the European arena is much stronger than it is in the national context⁴⁴. Whereas large enterprises and the political executives are able to act effectively on the European level this is not the case for social move-

⁴² Jachtenfuchs, *Democracy and Governance in the European Union*, *ibid.*, p. 48.

⁴³ The thesis of the „joint decision trap“ was first developed by Fritz Scharpf: *Die Politikverflechtungsfälle. Europäische Integration und deutscher Föderalismus im Vergleich*, in: *Politische Vierteljahresschrift* 26 (1985), pp. 323-356.

⁴⁴ Jachtenfuchs, *Democracy and Governance in the European Union*, *ibid.*, p. 44.

ments, trade unions and for many interest groups (especially with 'diffuse' interests).

- The most clear argument against the democratic capability of the EU is perhaps the most decisive: it is the size of a supposed European democracy. Even if governance in the European Union is organized by the same institutional arrangement which can be found in the member states, there would be a decrease in the political weight and in the level of control of each individual within this new political boundaries. As Joseph Weiler points out: „That is (...) an inevitable result of enlarging the membership of the functional polity (...) and from adding a tier of government thereby distancing it further from its ultimate subjects in whose name and for whom democratic government is supposed to operate“⁴⁵.

IV. Constitutional Choices and Reform Options

„The piecemeal engineer will adopt the method of searching for, and fighting against, the greatest and most urgent evils of society, rather than searching for, and fighting for, its greatest ultimate good“ (Karl Popper)

Against the background of the multidimensional democracy problem we begin to perceive the contours of a legitimacy trilemma: Proposals for institutional reform in the EU which target any of the three sources of legitimacy tend to weaken another. Institutional changes operated on one source of legitimacy can hardly avoid becoming a factor of stress on one of the other sources. The quest for reforms to bestow greater legitimacy for governance in the EU thus appears to be a zero-sum game: the multidimensional problem of legitimacy may be reshuffled to a degree, but it cannot be reduced in total. The constitutional choices can be described in an idealtypical manner in the following three options to reform the institutional arrangement of the EU:

⁴⁵ Weiler, *European Democracy and Its Critiques*, *ibid.*, p. 6.

1. „Input“-Legitimacy

A fully-fledged democratization of the European Governance System is perhaps the most popular constitutional choice in order to gain more input-legitimacy for European policy-making. The basic argument is very simple: The more the citizens are involved in the decision-making process and its control the more likely it is that they accept the resulting political outcomes.

- According to the national blueprint, a European Union organized as a (strongly decentralized) federal state with a two-chamber system representing the European people and the member states is most desirable⁴⁶. It is also ‘textbook-friendly’ because it requires a democratization of suprastatism including a strong role for the European Parliament in decision-making: „The very important function of the European Parliament to establish links with the citizens will only develop substantially when it gets more powers and when it becomes a major decision-maker of the European Union“⁴⁷. As the main bearer of legitimacy in the Union the Parliament’s increased powers in legislative functions and democratic control of the executive activity of the Union would be the most appropriate instrument for ensuring the legitimacy of the European governance system as a whole. One of the most important arguments for this reform option is that the principle of accountability should be fully respected in the process of Union policy formation. The Commission as the future European government depends politically upon the will of the electorate channelled through the European Parliament. According to this federal vision the EU should be a real

⁴⁶ See for the Federal State option only Herman, F.: Second Report of the Institutional Committee on the Constitution of the European Union, 2 February 1994, EP-Doc. A 3-0064/94; Weidenfeld, Werner: Europa ‘96 - Unterwegs wohin? Die Europäische Union vor der Regierungskonferenz, in: *Aus Politik und Zeitgeschichte*, B 1-2/96, pp. 3-10; Wistrich, Ernest: *The United States of Europe*, London - New York 1994.

⁴⁷ Neunreither, Karl-Heinz: *The Democratic Deficit of the European Union*, in: *Government and Opposition* 29 (1994), pp. 299-314, p. 302.

political community, within which central political issues are to be the stuff of a Europe-wide discourse and will-formation, and the composed European Parliament is to be the decisive factor in resolving conflicts between the member states and the suprapstate⁴⁸. Europe as a Federation seems to be a very attractive constitutional choice. But formal measures to close the democracy gap at the European level with the intention of strengthening the „input“-legitimacy of European governance might soon impair the Union's efficiency and capacity for action⁴⁹. There is a „general trade-off“⁵⁰ between efficiency and effectiveness on the one hand and democratic participation and control on the other: „(...) Expanding the legislative and budgetary powers of the European Parliament could render European decision processes, already too complicated and time-consuming, even more cumbersome“⁵¹. It is also doubtful - as we have seen above - whether the EU is capable of being a democracy at all, not even a federal one, for want of the structural preconditions, on which democratic governance depends. „In the absence of European media, European political parties, and genuinely European processes of public-opinion formation, constitutional reforms could not, by themselves, overcome the present democratic deficit at the European level“⁵². Democracy cannot simply be installed by a constitutional act. It has to be linked to particular social preconditions which are only partially existent in the EU and which cannot be created by political intervention⁵³. However, models of federal democracy developed in the national context cannot be eas-

⁴⁸ Gustavsson, Sverker: Double Assymetrie as Normative Challenge, in: Follesdal/Koslowski, Democracy and the European Union, *ibid.*, pp. 108-131, p. 121.

⁴⁹ Dahl, Robert A.: A Democratic Dilemma: System Effectiveness versus Citizen Partizipation, in: *Political Science Quarterly* 109 (1994), pp. 23-34.

⁵⁰ Wessels, The Modern West European State and the European Union, *ibid.*, p. 58.

⁵¹ Scharpf, Community and Autonomy: Multi-level Policy-Making in the European Union, in: *Journal of European Public Policy* 1 (1994), pp. 219-242, p. 220.

⁵² Scharpf, Community and Autonomy, *ibid.*, p. 220.

⁵³ See only Kielmansegg, Integration und Demokratie, *ibid.*, p. 58.

ily transferred to the European Union. It is useless - as most of the federalists do - to apply standard doctrines of parliamentary democracy developed for nation-states to institutions of the EU in an unreflected way⁵⁴. Such a political strategy would probably not lead to a more democratic and legitimate EU because a European identity including a certain 'we-feeling' is lacking⁵⁵. On the contrary, it could have counterproductive effects with regard to output legitimacy and the indirect democratic legitimation of European policy-making through the member states and their parliaments. The latter could occur to the extent that the strengthening of the European Parliament weakens the Council of Ministers as the voice of the member states. As a result the public would have to accept the continued loss of centres of power which provide national identification and emotional links for some kind of a „flickering gleam of a transnational community“⁵⁶. Therefore a too strong parliamentary input-orientation could exacerbate the multidimensional legitimacy problem of the Union.

⁵⁴ Wessels, *An Ever Closer Fusion*, *ibid.*, p. 268.

⁵⁵ Hrbek, Rudolf: *Federal Balance and the Problem of Democratic Legitimacy in the European Union*, in: *Aussenwirtschaft* 50 (1995), pp. 43-66, p. 64.

⁵⁶ Laffan, Brigid: *The Politics of Identity and Political Order in Europe*, in: *Journal of Common Market Studies* 34 (1996), pp. 81-102, p. 95.

MODES OF GOVERNANCE (Example 1)

PREFERRED LONG-TERM INTEGRATION TREND

(Constitutional Choice)

Europe as a Federation

REFORM OPTION

Abolishing the democratic deficit by democratizing suprastatism

Two-Chamber-System

Commission as real government legitimised by European Parliament

SOURCE OF LEGITIMACY

Input: participation, political accountability, democratic control

Type of representation at the European level: more individual

BASIC UNDERSTANDING OF LEGITIMATE RULE

Cosmopolitan: Government *by* the People, Demos-Cracy

2. „Output“-Legitimacy

According to this concept, everything has to be done to strengthen the efficiency and effectiveness of European policy-making. It is postulated that the greater the capacity of the EU-Governance-System to achieve the citizens' goals and to solve their problems the more legitimate the system will be. But institutional arrangements designed for greater efficiency tend to encroach upon the standards of democracy that are common within the Member States. This thesis can be demonstrated in two proposals.

It is often argued that the expansion of majoritarian decision-making in the Council of Ministers would strengthen the output-legitimacy of Euro-

pean Governance, because it is more efficient than the current, predominantly consensual mode. But paradoxically the increase of majority-rule at the European level would accentuate the democratic deficit in the multi-level system. This is especially the case at the national level, because the member state governments' answerability to their national parliaments loses some of its meaningfulness and efficacy. The parliaments of the member state executives, which were in a minority position, are not able to hold the representatives of other countries accountable for their voting behavior in the Council. From a theoretical point of view it is not evident that the boundaries within which a minority will accept as democratically legitimate a majority decision could be European instead of national: „(...) It can be argued plausibly that the electorate in most member states accepts only grudgingly the notion that crucial areas of public life should be governed by a decision process in which their national voice becomes a minority that may be overridden by a majority of representatives from other European countries“⁵⁷.

Some authors argue that multi-level governance in Europe could gain more legitimacy when the EU develops into a kind of „regulatory state“⁵⁸. The example which is frequently given is the 'fourth branch of government' in the USA. The model of the US regulatory state allows the correction of market failures in areas of social regulation. Corresponding to this model, the European Union should concentrate on activities in which it can hope to achieve greater efficiency than can the member states, „whether that be because of the transborder character of the issues to be dealt with or because states acting alone are likely to generate negative externalities for their partners“⁵⁹. This purpose allegedly is best

⁵⁷ Weiler, *After Maastricht*, *ibid.*, p. 23.

⁵⁸ The most active theorist of the regulatory model at European level is Giandomenico Majone: *Independence versus Accountability? Non-Majoritarian Institutions and Democratic Government in Europe*, European University Institute Working Paper SPS No. 93/4, Florence 1994; Majone, Giandomenico: *Regulating Europe*, London - New York 1996.

⁵⁹ Dehousse, *Parliamentary System or Regulatory Structure*, *ibid.*, p. 3.

achieved by efficiency-oriented independent regulatory agencies which are dominated by sectoral technical experts and functional organizations and which have no political accountability in a traditional sense of democratic thinking. It is argued that the problem-solving style of decision-making of independent regulatory bodies and other specialized agencies would be in a better position than elected governors to satisfy the new regulatory demands of the electorate⁶⁰. Evidently, delegating substantive powers to independent agencies tend to weaken the influence of parliaments - at both the European and the national level. But this concept of legitimacy goes in a different direction. It is emphasized that efficiency-oriented policy based on expertise has no redistributive effects and also need not be democratically legitimated. The argument runs as follows: (...) the delegation of important policy-making powers to independent institutions is democratically justified only in the sphere of efficiency issues, where reliance on expertise and on a problem-solving style of decision-making is more important than reliance on direct political accountability. Where redistributive concerns prevail, legitimacy can be ensured only by majoritarian means⁶¹. In this view democratic control of European policy-making on policy sectors which should be handled in an efficiency-oriented manner could often even have counterproductive effects. Therefore also politically motivated interference must be avoided.

The premises of this concept are very dubious. It is almost impossible to de-politicise policy-making in a multinational setting through this static differentiation into regulatory and redistributive issues because the former could also have redistributive effects⁶² which would provoke political conflicts, i. e. among „haves“ (richer nations) and „have-nots“ (poorer nations). It is simply inconceivable that these conflicts should be solved

⁶⁰ Majone, *Regulating Europe*, *ibid.*, p. 299.

⁶¹ Majone, *Regulating Europe*, *ibid.*, p. 296.

⁶² Scharpf, Fritz W.: *Föderalismus und Demokratie in der transnationalen Ökonomie*, in: von Beyme/Offe, Claus (ed.): *Politische Theorien in der Ära der Transformation*, Westdeutscher Verlag 1996, pp. 211-235, p. 220.

The Trilemma of Legitimacy

by independent regulatory authorities which lack political accountability and democratic control. Another negative implication of a pure efficiency-oriented constitutional engineering can also be mentioned: Insisting exclusively on the principle of efficiency and the exclusive institutionalization of this idea of rationality „could turn out to be a threat to the integration process. The neglect of other criteria of rationality such as ‘autonomy’ or ‘democracy’ could lead to the formation of political movements against integration which are stronger and more persistent than the one that appeared during the referenda on the Maastricht Treaty“⁶³.

MODES OF GOVERNANCE (Example 2)

PREFERRED LONG-TERM INTEGRATION TREND

(Constitutional Choice)

Europe as a ‘regulatory state’ (technocracy)

REFORM OPTION

Abolishing the democratic deficit by depoliticising Euro-Politics

Institutionalization of independent regulatory agencies

SOURCE OF LEGITIMACY

Output: Efficiency and Effectiveness

Type of representation at the European level: more functional

BASIC UNDERSTANDING OF LEGITIMATE RULE

Technocratic-utilitarian: Government *for* the people

⁶³ Jachtenfuchs, Democracy and Governance, *ibid.*, p. 58.

3. „Social“ Legitimacy

According to this communitarian concept⁶⁴, the legitimacy of a political system depends on the degree of social homogeneity and the existence of a collective identity among citizens. The only communities which fulfil these conditions are nation-states. It follows from the communitarian principle of social legitimacy that the political order at the European level must protect the communities to which the collective identities of the individuals are oriented and which possess the best social prerequisites for stable democracy. Therefore the member states as the „Masters of the Treaties“ („Herren der Verträge“) should play the most important role in the multi-level game of European policy-making. This reform option seems to be a step back because it tends to abandon suprastatism.

In order to protect the national autonomy of member states the Union requires consensual interstate decision-making and/or a greater role for the national parliaments in controlling European policy-making. At first sight, a European Confederation based on intergovernmental co-operation would have many advantages. The citizens in the member states have no problems in accepting the majority principle in their own community, and their power to force governments and legislative majorities from office for political reasons is not threatened. Therefore, national parliaments should be the primary source of legitimacy in the EU. Instead of compensating the lack of democratic empowerment and control of the national executives by strengthening the European Parliament, it is favoured to strengthen the role of national parliaments vis-à-vis national governments in European politics⁶⁵. Common decisions in a confederation-like govern-

⁶⁴ This „communitarian“ argument has been demonstrated very excellent by Weiler, *European Democracy and Its Critique*, *ibid.*; See also Bellamy, Richard/Castiglione, Dario: *The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticised and Combined*, in: Follesdal/Koslowski, *Democracy and the European Union*, *ibid.*, pp. 254-284.

⁶⁵ See only Lepsius, Rainer M.: *Nationalstaat oder Nationalitätenstaat als Modell für die Weiterentwicklung der Europäischen Gemeinschaft*, in: Wildenmann, Rudolf

ance system are only binding when they are completely ratified by each member state in accordance with its own constitutional provisions, especially the approval of their parliaments⁶⁶. But the disadvantages outweigh these benefits. Greater involvement of member state parliaments in European decision-making and control, or even a return to an intergovernmental state-system based on the principle of unanimity, would doubtless be gained at the expense of efficiency in decision processes and hence of problem solving ability. The deficits in achieving, implementing and controlling common decisions would reduce the effectiveness of common or co-ordinated instruments⁶⁷. High degrees of national autonomy and European consociationalism can only be honored at the expense of system capacity and effective political decision-making⁶⁸. After the creation of a European market the remaining of competencies at the European level is essential. Majority voting in the Council and strong supranational institutions like the Commission and the Court increase the efficiency and the effectiveness of the EU in the enlightened self-interest of the member states⁶⁹. „Insisting on the virtues of national democracy (...) risks to defend an increasingly empty set of formal participation rules while the impact of the European market dictates political choices“⁷⁰. Wessels rightly points out that the return to a more intergovernmental mode of governance would even reinforce the de facto erosion of national constitutions and institutions⁷¹. In sum, renationalization cannot be the right answer to

(ed.): *Staatswerdung Europas? Optionen für eine Europäische Union*, Baden-Baden 1991, pp. 19-40, p. 40.

⁶⁶ Gustavsson, *Double Assymetrie as Normative Challenge*, *ibid.*, p. 120.

⁶⁷ Wessels, *An Ever Closer Fusion*, *ibid.*, p. 286.

⁶⁸ Schimmelfennig, *Legitimate Rule in the European Union*, *ibid.*, p. 13.

⁶⁹ Moravcsik, Andrew: *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, in *Journal of Common Market Studies* 31 (1993), pp. 471-524, p. 507.

⁷⁰ Jachtenfuchs, *Democracy and Governance*, *ibid.*, p. 49.

⁷¹ Wessels, *An Ever Closer Fusion*, *ibid.*, p. 286.

the challenges which the EU faces now and in future. To solve common problems more effectively - and solving common problems is after all the motivating force behind integration - majority decisions and supranational authority at the European level must be given dependable recognition.

MODES OF GOVERNANCE (Example 3)

PREFERRED LONG-TERM INTEGRATION TREND (Constitutional Choice)

Europe as a Confederation

REFORM OPTIONS

Abolishing the democratic deficit by abandoning suprastatism
Return to interstate cooperation based on consensual decision-making
Protection of national autonomy
Withdrawal from supranational authority

SOURCE OF LEGITIMACY

Social legitimacy:
Emphasizing the necessity of social underpinnings for governance
The nation-state as the only possible framework for democracy
Type of representation at the European level: more executive

BASIC UNDERSTANDING OF LEGITIMATE RULE

Communitarian: ethnos-cracy, government of the *people*

V. Conclusions

So what can be done? In view of this legitimacy trilemma, academics and politicians should dispense with utopian („Europe as a Federation“), monistic („Europe as a Technocracy“) and ‘old-fashioned’ („Europe as a Confederation“) constitutional choices in their search for solutions of the EU’s multidimensional legitimacy problem. Despite several attempts for far-reaching institutional reforms, the EU-governance system is arguably likely to persist in its present structures for a foreseeable future, and is unlikely to develop into a federal state or to disintegrate into a classic international organization⁷². It is, therefore, better to search for a „down-to-earth“ and „non-metaphysical“ piecemeal approach in the tradition of Karl Popper⁷³. Reform policies should be formulated in small, clearly stated stages so that their premises can be tested and their implications are easy to grasp. This approach could show that it might be better to preserve the existing democratic deficit instead of abolishing it either by abandoning suprastatism or by democratizing suprastatism. Against this background, the concept of „autonomy compatible co-ordination“⁷⁴ is a useful „preservationist“⁷⁵ option. In this idea the European multi-level system as a whole is to be rendered compatible *both* with the demands for autonomy put by the member states *and* with practical advantages arising from transnational problem-solving at the European level: „On the one hand, the limited policy-making capacities of the EU ought to be used sparingly, and only for issues that need to be settled on the European level. On the other hand, an effort should be made to restrict as much as possible the negative repercussions of European integration on the problem-solving capacities of national politics“⁷⁶. To avoid the situation that

⁷² Jachtenfuchs, *Democracy and Governance*, *ibid.*, p. 38.

⁷³ Popper, Karl R.: *The Open Society and its Enemies*, London 1945.

⁷⁴ Scharpf, *Community and Autonomy*, *ibid.*; p. 221 f.

⁷⁵ Gustavsson, *Double Assymetrie as Normative Challenge*, *ibid.*, p. 115.

⁷⁶ Scharpf, *Community and Autonomy*, *ibid.*, p. 222.

politics at the European level cannot act while politics at the national level has lost its effectiveness, the primary maxim for constitutional engineering must be employing „the limited possibilities of action at both levels, national and European, in such a way that the existing but limited opportunities for effective policy at both levels are exploited and predictable frustrations sidestepped“⁷⁷. The question is, of course, how this piecemeal idea of combining respect for the autonomy of member states with a sense of the need for European-level regulation can be institutionalized. Nevertheless it may be taken for granted, that current and future research concerning the legitimation of the European multi-level system should concentrate on relatively modest questions like this one - otherwise scholars will develop only utopian, monistic or old-fashioned blueprints, which do not fit the multidimensional legitimacy problem of European governance at all.

⁷⁷ Scharpf, Fritz W.: Democratic Policy in Europe, in: *European Law Journal* 2 (1996), pp. 136-155, p. 150.

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