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**Counteracting Democratic Deficit in the European Union through a New
Multilevel “Trial” Model of Democracy**

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Abstract

Due to the progressive integration of the European Union, national parliaments continued to lose legislative powers; this, however, had not been transferred to the same extent to the European Parliament, but to the Council or the Commission. This transfer of power from national legislative organ to the European executive organs is identified as democratic deficit or a lack of legitimacy. To countervail the phenomenon of the democratic deficit the Treaty of Maastricht of 1992 introduced the national parliaments as a new actor into play.

Today, the legitimacy of the Union is attributed to a large extent to the national parliaments. The Article 12 TEU intensifies even further the legitimizing function of the national parliaments in the government system of the European Union.

The present study should examine, the cross parliamentarisation of the European Union through the European Parliament – and in particular by recourse to the national parliaments. It tries to answer the question, by which alternative models the democratic legitimacy of the European Union can be ensured in the long period.

The focus of the paper will be on the dual Democracy. It will especially be analysed, whether the new role of national parliaments in the legislative process at the European level should be understood as an expansion of the rights of national parliaments, and consequently form a new third pillar of a “trial democracy”.

Keywords

Democracy and democratic deficit in the European Union, European Parliament und member states parliament, parliamentarianism, dual Democracy, trial Democracy.

I. Multilevel Democracy in the European Union

A. Introduction

The term “democracy” comes from the Greek. Democracy in Greek is: Δημοκρατία and is derived from δῆμος [*dēmos*], the Greek word for “people”, “masses” or “full citizenship”, and κρατία [*kratía*], what “rule”, “reign”, or “exercise power” means;¹ “*kratía*“ literally means rule by the people. In simple terms “democracy”, means “rule of the (simple) people.”²

Modern democratic polities do not use a definition of democracy and regularly operate at several political levels. In the case of the European Union multilevel democracy operates at the level of the member states and the European Union itself, and in addition at federal, regional, and municipal levels.³

B. Preconditions for Democracy

What is the *democracy*?⁴ If we answer this question to the effect that democracy is a direct, semi-direct or indirect representation of the demos, the next logical question will be, namely, what presupposes the democracy as a form of state and government. As a *representative form of government*,⁵ democracy requires legitimacy, the legitimacy itself participation.

Who creates the *legitimacy* of the government?⁶ If the majority of the voters in a society create the legitimacy of a democratic form of government, it has logically to be asked, what are the main objectives, the preconditions for such participation.

If this is the best possible representation of the people, it requires the political *participation* of as many as possible over much as possible.⁷

The question, whether a majority decision is legitimate, depends on in which procedure it was taken.⁸ The procedures presuppose institutions, which guarantee the expiration of these procedures. In this respect, democracy can be seen as a cycle: Democracy as a form of government presupposes a legitimacy that requires on the one hand participation of citizens entitled to vote and on the other hand the participation of the institutions, which enable such a participation at all.

C. Democracy model of the EU Treaties

The requirement of democratic legitimacy played until the 1990's not a big role in European treaty law. The term “*democracy*” is not found in the text of the treaties. The case law of European Court of Justice (ECJ) recognizes one meaning to the principle of democracy only, when it comes to the involvement of the European Parliament in the legislative process.⁹ Democracy is first mentioned in the preamble and Article F paragraph 1 TEU (Treaty on European Union) as amended by the Treaty of Maastricht. For the first time Article 6 paragraph 1 of the Treaty on European Union as amended by the Treaty of Amsterdam – which was unchanged took over from the Nice Treaty – formulated that the Union was founded on the principles of democracy.¹⁰ The Constitution of the European Union (Const. EU) included for the first time a separate Title VI concerning the democratic ruling in the Union under the title “The democratic life of the Union” (Article I-45 to Article I-52 Const. EU).¹¹

D. Democracy model of the Treaty of Lisbon

The provisions on democratic principles of the Union are listed in Articles 9 to 12 TEU – under the title II.¹² Article 9 TEU regulates citizenship.

According to Article 10 paragraph 1 TEU the functioning of the Union shall be founded on “*representative democracy*”. The representative democracy is complemented by the elements of participatory, associative and direct democracy, in particular through a citizens’ initiative (Article 11 TEU).¹³ Thus, the Union is constituted as supranational democratic governance, which is constituted and limited on the principle of democracy.¹⁴

“*Dual Democracy*“ is codified in Article 10 paragraph 2 TEU. Article 12 TEU codifies the involvement of national parliaments in the legislative process of the EU, covering the national parliaments as well as the participation of national parliaments in the European Union.¹⁵

II. Democratic deficit in the EU

Democracy deficit is described by the striking sentence: Because of not fulfilment of the criterion of “democracy”, the candidature of the Union would be rejected, would it want to join to itself.

The subject matter of “democratic deficit of the European Union” describes the fact, that the European Union – as a supranational organization – is not sufficiently democratic legitimated in its political activities. It has to be made a distinction between structural and institutional¹⁶ democratic deficit.¹⁷

For supporters of the theory of “*structural democratic deficit*”, the deficit is deeply rooted, and can not be eliminated in the medium term, because it is significantly interrelated to the lack of a European demos.¹⁸

The thesis of “*institutional democracy deficit*” on the other hand refers to the shortcomings of the political system of the European Union.¹⁹ According to this thesis, the deficit is based on in principle revisable decisions, especially on shortcomings of representation and participation in the Union.²⁰ Accordingly, the representation and participation deficiencies have exacerbated by the transition of European integration from a purely intergovernmental organization with unanimity to a mixture of intergovernmentalism, qualified majority voting, and hierarchical control by the European Union law.²¹

III. Dual (two pillar) Democracy

In the European Union, the principle of dual Democracy is based on two complementary pillars of legitimacy; the European Parliament on the one hand and the national parliaments on the other.

“*Dual Democracy*“ is codified in Article 10 paragraph 2 TEU. Thereafter, “citizens are directly represented at Union level in the European Parliament“. Thus, the first sentence of Article 10 paragraph 2 of the TEU codifies the first pillar of dual legitimacy of the EU.

The *first pillar* of the principle of dual legitimation consists of the European Parliament, which is composed originally by the directly elected representatives of European citizens.²² This provides a “direct” representation of citizens, a direct legitimacy of the Union by the own citizens. In this capacity, the Union is also called as “Union of citizens”.

The *second pillar of dual legitimacy* is formulated in the second sentence of Article 10 paragraph 2 TEU as follows:

„Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.“²³

The second pillar of the principle of dual legitimacy consists of the national parliaments, which are composed by the directly elected representatives of citizens of member states of the EU.²⁴ Because

of the control they exercise over their Heads of State or Government in the European Council and their governments in the Council, national parliaments convey an indirect legitimacy to the Union.²⁵ This however provides an “indirect” representation of citizens of the EU, an indirect legitimacy of the Union by the citizens of the member states. Because of the – over national parliaments – indirectly mediated legitimacy, the Union is also called as “Union of the member states”.

IV. Trial (three pillar) Democracy

According to *Article 12 TEU* “national Parliaments contribute actively to the good functioning of the Union“. After this concrete regulation of the role of national parliaments in Article 12 TEU,²⁶ the question arises, whether the new role of national parliaments in the legislative process at the European level is just another reinforcement or extension of the second pillar of legitimacy of the principle of dual legitimacy. Or, whether, because of its directness, independence and intensity, this new role of national parliaments should be understood as an expansion of the rights of national parliaments, and consequently form a new third pillar of the hereinafter called “principle of trial democracy”.

The *trial Democracy* model consists of three pillars of legitimacy. The first and second pillars of legitimacy remain the same as those for the dual legitimacy model. The *third pillar* of legitimacy consists of the national parliaments.

National Parliaments contribute actively to the good functioning of the Union by carrying out tasks that are enumerated in Article 12 letters a to f TEU. The performance of the duties of Article 12 TEU requires more direct involvement of national parliaments in the European legislative process than it is provided for dual democracy in Article 10 paragraph 2 sentence 2 TEU, since the rights to participate of the national parliaments in Article 12 TEU go beyond previous rights to information and include further independent rights to participate, rights to control and right to evaluation. This new, direct legitimacy of European governance through national parliaments forms a new pillar of a new three pillar Democracy.

Endnotes

- 1 Schmidt, p. 17.
- 2 Schmidt, p. 17; see also Wolf-Dieter, Karl: Demokratiebegriff und politischer Prozess, Bonn 1976.
- 3 Möllers Christoph, Multi.Level Democracy (September 2011). Ratio Juris, Vol. 24, Issue 3, pp. 247-266, 2011.
- 4 Habermas Jürgen, Die Postnationale Konstellation. Politische Essays, Frankfurt a.M. 1998; Habermas Jürgen, Drei normative Modelle der Demokratie, in: Jürgen Habermas, Die Einbeziehung des Anderen. Studien zur politischen Theorie, Frankfurt a.M. 1999; Habermas Jürgen, Toward a cosmopolitan Europe, in: JoD 14, Nr. 4, p. 86-100.
- 5 Kaufmann, in: Biaggini/Gächter/Kiener (Eds.), Staatsrecht, § 3 N 39.
- 6 See Habermas Jürgen, Legitimationsprobleme im Spätkapitalismus, Frankfurt a. M. 1973; Habermas Jürgen, Theorie des Kommunikativen Handelns, 2 Bdn., Frankfurt a.M. 1981; Habermas Jürgen, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Frankfurt a. M. 1992; Habermas Jürgen, Die Einbeziehung des Anderen. Studien zur politischen Theorie, Frankfurt a.M. 1999; Habermas Jürgen, Concluding Comments on Empirical Approaches of Deliberative Politics, in Acta Politica 40, p. 387-392; Habermas Jürgen, Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik, in: Niesen/Herborth (Eds.) 2007, p. 406-459.
- 7 Schmidt, p. 236. See also Habermas Jürgen, Über den Begriff der politischen Beteiligung, in: Jürgen Habermas/Ludwig von Friedeburg/Christoph Oehler/Friedrich Weltz, Student und Politik. Eine soziologische Untersuchung zum politischen Bewusstsein Frankfurter Studenten, Neuwied 1969, p. 11-55.
- 8 Kaufmann, in: Biaggini/Gächter/Kiener (Eds.), Staatsrecht, § 2 N 61.
- 9 Ruffert, in: Calliess/Ruffert, EUV/AEUV, Art. 9 EUV Rn. 17.
- 10 Ruffert, in: Calliess/Ruffert, EUV/AEUV, Art. 9 EUV Rn. 18.
- 11 Ruffert, in: Calliess/Ruffert, EUV/AEUV, Art. 9 EUV Rn. 19.
- 12 For literature over the Democracy model of the EU see Calliess, Die neue EU, p. 163 ff., 170 ff., 182 ff.; Calliess, in: Calliess/Ruffert (Eds.), EUV/AEUV, 4. Ed., 2011, Art. 2 EUV Rn. 20 ff.; Ruffert, in: Calliess/Ruffert (Eds.), EUV/AEUV, 4. Ed., 2011, Art. 9 EUV Rn. 1 ff., 22 ff.; Ruffert, in: Calliess/Ruffert (Eds.), EUV/AEUV, 4. Ed., 2011, Art. 10 EUV Rn. 1 ff.; Geiger, in: Geiger/Khan/Kotzur, EUV/AEUV, 5. Ed., 2010, Art. 10 EUV Rn. 1 ff.; Nettesheim, in: Grabitz/Hilf/Nettesheim (Eds.), Das Recht der Europäischen Union, Bd. 1, 41. EL, Juli 2010, Art. 10 EUV Rn. 1 ff., 12 ff.; Kaufmann-Bühler, in: Lenz/Borchardt (Eds.), EU-Verträge, 5. Ed., 2010, Art. 10 EUV Rn. 1 ff.; Siehe dazu auch Ruffert, in: Calliess/Ruffert (Eds.), VerfEU, Art. I-46 Rn. 6; Ruffert, EuR 2009, Beih. 1, 31 (34 f.); Calliess, ZG 2010, 1 (5); Kamann, S. 257 f.; Peters, S. 556 ff.
- 13 Article 11 TEU codifies the citizens' initiative, as an element of participative, direct Democracy. This article corresponds to Art. I-47 of Const. EU.
- 14 Ruffert, in: Calliess/Ruffert, EUV/AEUV, Art. 9 EUV Rn. 21.
- 15 For the Constitution of EU see Ruffert, in: Calliess/Ruffert, EUV/AEUV, Art. 9 EUV Rn. 19.
- 16 Schmidt uses the term of „konjunkturelles Demokratiedefizit“ instead of institutional, cf. Schmidt, p. 400.
- 17 For representatives of the strong version of the theory of democracy in the EU see Bundesverfassungsgericht, BVerGE 89, 17, 155-213; Di Fabio Udo, Das Recht offener Staaten. Grundlinien einer Staats- und Rechtstheorie, Tübingen 1998; Di Fabio Udo, Was der Staatenbund leisten kann. Europa ist auf dem Weg in die Mehrebenen-Demokratie, in: FAZ Nr. 79, 6.4.1999, p. 11; Majone Giandomenico, Europe's ‚Democratic Deficit‘: The Question of Standards, in: European Law Journal 4 (1998), Nr. 1, p. 5-28; Moravcsik Andrew, In Defence of ‚Democratic Deficit‘: Reassessing Legitimacy in the European Union, in: Journal of Common Market Studies 40 (2002), p. 603-624. For representatives of the weak version of the theory of democracy in the EU see Gustavsson Sverker, Defending the Democratic Deficit, in: Weale/Nentwich (Eds.), 1998, p. 63-80; Nass Klaus Otto, Ein beliebtes Phantom: Das Demokratiedefizit der EU, in: FAZ Nr. 74, 29.3.1999, p. 15; Landfried Chritine, Das politische Europa. Differenz als Potenzial der Europäischen Union, Frankfurt a.M./New York 2005; von Bogdandy Armin, Die Europäische Demokratie – Skizzen ihrer rechtlichen Konsolidierung, in: Kaiser/Leidhold (Eds.), 2005, p. 177-201; See, for further information Schmidt, p. 399.
- 18 See, for further information about structural Democratic deficit Schmidt, p. 402.
- 19 See for an overview of the theory to the institutional democratic deficit Bauer Hartmut, Demokratie in Europa – Einführende Problemskizze, in: Bauer/Huber/Sommermann (Eds.), 2005, p. 1-17; Dahl Robert A., On Democracy, New Haven/London 1998, p. 115; Dahrendorf Ralf, Der Wiederbeginn der Geschichte. Vom Fall der Mauer zum Krieg im Irak, München 2004; Dreier Horst, Demokratie, in: Horst Dreier (Eds.), Grundgesetz-Kommentar, Bd. 2, Tübingen 2006, p. 26-105; Hofmann Wilhelm/Dose Nicolai/Wolf Dieter (Eds.), Politikwissenschaft, Konstanz 2007, p. 297; Hooghe Liesbet/Marks Gary (Eds.), Special Issue. Understanding Euroscepticism, in: Acta Politica 42, Nr. 2-3, London 2007; Kaina Viktoria/Karolewski Ireneusz P., Why We Should not Believe Evers Lesson Andrew Moravcsik Teaches Us: A Response, in: PVS 48, p. 740-757; Lord Christopher, A Democratic Audit of the European Union, Basingstoke/London 2004; Neunreither Karlheinz, Governance without Opposition: The Case of the European Union, in: Government and Opposition 33, p. 419-441; Schäfer Armin, Nach dem permissiven Konsens. Das Demokratiedefizit der Europäischen Union, in: Leviathan 34 (2006), p. 350-376; Scharpf Fritz W., Demokratieprobleme in der europäischen Mehrebenenpolitik, in: Merkel/Busch (Eds.), 1999, p. 672-694; Steffani Winfried, Das Demokratie-Dilemma der Europäischen Union. Die Rolle der Parlamente nach dem Urteil des Bundesverfassungsgerichtes vom 12. Oktober 1993, in: ZParl Sonderheft 1/1995, p. 33-49.
- 20 For further information see Schmidt, p. 402.

21 Schmidt, p. 402 f.

22 Partially disagree BVerfGE 123, 267 (283) (Lisbon).

23 Article 10 paragraph 3 sentence 2 TEU.

24 BVerfGE 123, 267, Rn. 36 ff.

25 BVerfGE 123, 267 (283) (Lisbon).

26 Protocol (No. 1) on the Role of national Parliaments in the European Union, Official Journal of the European Union, C-83/203, 30.3.2010; Protocol (No. 2) on the Application of the principles of subsidiarity and proportionality, Official Journal of the European Union, C-83/206, 30.3.2010.

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