Constitutionalism and Democratic Representation in the European Union

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A constitution is the organisation of offices in a state, and determines what is to be the governing body, and what is the end of each community.
Aristotle, Pol. 1289a

I. Introduction

The modern state is transformed by two challenges calling for a new understanding and practice of governance: globalisation (Zürn 1995, 1998; Hirst 1996; Beck 1997; Saskia-Sassen 1999) and functional differentiation (Mayntz et al. 1988; Mayntz/Scharpf 1995; Schimank 1996). These long-term trends put the nation-state under pressure thus demanding an adaptation of traditional political institutional arrangements. The process of European integration has highlighted the inadequacies of certain key concepts of constitutional and democratic thought outside the context of relatively homogeneous nation states, such as the sovereignty of the people and questions of adequate representation in a multilevel system (Bellamy/Castiglione 1996).

The European Union can be viewed as an attempt to cope with this pressure in western Europe. Started as a project to prevent war, the E(E)C was later seen as the remedy against the expected incapability of national political systems to guarantee economic growth and political stability. Since the beginning of the European integration the member states have continuously shifted more and more competences towards the European level creating thereby a complex multi-level system of governance that has brought about a new legal and political order among states (MacCormick 1996). While decision making in the course of European integration shifted from unanimity to majority rules in ever more important fields, modes of contestation remained weak (Marks/Wilson 1999).[1]

This new order raises questions about democratic representation, which has been traditionally bound to the nation-state. In the wake of the recent and forthcoming accessions of new member states to the European Union the demand for a (new) constitution for Europe has

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[1] This undermines the argument that the democratic legitimacy of the EU partly derives from the elected members of the national governments acting in the Council of Ministers because they simply can be outvoted by (qualified) majorities.

again become highly topical but also controversial.[2] In this debate we identify three groups of interest:

1. For some a European constitution should be adopted as a basis for the establishment of the *United States of Europe.*

2. A second group considers constitutional progress as necessary and/or desirable in order to give more legitimacy to the European Union, but without defining the ultimate outcome.

3. A third group of actors strongly opposes any further deepening of the current state of the integration.

4. Additionally, recent trends of flexible integration using notions like "Kern-Europa", two-tiered Europe, multiple velocities, a European avant-garde etc. raise the question about whether the constitution should apply to all member states or only to some of them.

The common ground of the above named positions is the acknowledgement of the fact that the process of European integration has severe consequences for the citizens and the institutional arrangements of the member states. One remedy to strengthen the position of the individual is seen in the adoption of a Charter of Fundamental Rights,[3] which however per definitionem does not tackle the question of adequate representation. Representation being the focus of this project proposal the Charter of Fundamental Right will not be at the very center of our considerations.

A prominent feature of the established complex multi-level system of governance is the fusion of national and supranational institutions, especially executives (Wessels 1997), which are at best legitimated only indirectly. A basic democratic principle says that the citizens as subjects of rule should also be the authors of the rules.[4] State power derives from the people and is exercised on their behalf by special agencies who are accountable to the people for that exercise. In European constitutional thinking a predominant consensus has emerged that political representation refers to the process by which the parliament represents the entire

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[2] The debate about a European constitution is at least twenty years old (comp. Schwarze/Bieber 1984). The roots can be traced back even further: As early as 1955 the Treaty on the European Steel and Coal Community was called a "Charter" (Schwarze 2000:1) by Advocate General Lagrange. See Case 8/55, Slg. 1955-1956, 266f.. See also the proposals for a European constitution advocated by the European Parliament (Spinelli, Herman).
[3] Besides its contribution to improve the *Rechtsklarheit* and a certain symbolic value its real benefit can be questioned, in particular when not legally binding. See Schwarze 2000: 20ff.
[4] In A. Lincolns famous Gettysburg address of 1863: *"Government of the people, by the people, for the people".*

nation (Lehmbruch 1997).[5] While the ideal democratic principle (by and large) applies in the member states, their decisional powers are dwindling with the constant shift of competences towards the European level. The resulting system of European multi-level governance has severe consequences for the relationship between principal (i.e. the represented) and agent (i.e. the representative). The agent is split into three seperate powers, which should check and balance each other. In this system parliaments have to check governments and maintain the link with the principal. However, the balance of power is constantly shifting towards the executive depriving the citizens of these links. This trend exists in the nation-state, but it is exacerbated by European integration. This might pose serious problems for the legitimacy and hence the continuity of the integration process. The project is based on the following general thesis: A (new) European constitution, setting clear limits for the executive and attributing competences to the national and suprantional organs, is expected to reduce the democratic deficit of the European Union and generate loyalty.

It is not the aim of the project to devise an ideal constitutional model but to analyse the conditions and the background of the current debate using the results for scenario-building in order to evaluate the chances of realisation of the different proposals presented. The project will not only contribute to a theoretical debate but also wants to submit suggestions for the further integration processs. Therefore several scenarios will be devised.

First we have to identify certain modes of political organisation, namely the concept of federation and its varied realisation. The following elements will be analysed:

- The relation of the constituent units among each other (horizontal) and to the federal level (vertical).
- The allocation of competences (legislative and executive powers) between the federal level and its constituent units.
- The link between the different state levels and the citizen, i.e. the question of representation and legitimation.

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[5] However, this is only one point of view. E. Burke and e.g. J. H. Kaiser (1978) and W.A. Patzelt as well as liberal pluralists use representation as a feature of mass-elite relations (Parry 1995; Scigliano 1995).

The named elements are realised in different models of federalism.[6] For instance: the German model of federalism known as *cooperative federalism* which is based on the principal of equality between the *Länder*. But this principle is weakened by the asymmetric representation of the Länder in the second chamber (*Bundesrat*). To give another example, the US practising a *dual sovereignty* strictly distinguishes federal and state competences (*concurrent government*) including independent stages of appeal. Whereas in Austria federal competences are to a great extent implemented by organs of the *Bundesländer* (*mittelbare Bundesverwaltung*).

Furthermore, an integrated part of the scenario-building are ways of generating a possible constitutional process. So far the ideas range from a Europe-wide public referendum after an extensive discussion of a European constitution to a European constitutional convention. What needs to be analysed with respect to these suggestions is the question *Who* is going to play which role in drawing up a constitution? and *What* could be viable procedures in adopting the text? The aim of the scenario-building is to challenge normative models with its actual chances of realisation.[7]

Additionally the project aims at generating further concrete hypotheses along the following questions:

- Can a dynamic, evolutionary system such as the EU and given the domination of the executive therein be constitutionalized according to the classical principles of democracy?
- Who is able and interested in such a constitutionalization?
- How can a European constitution provide the necessary institutional requirements for an effective political role of the national parliaments and the European Parliament?
- Is the adoption of the "Charter of Fundamental Rights" a proper means to enhance the legitimacy of the Union?
- Are traditional intermediary powers still in the position to fulfill their traditional tasks or is the multi-level system of European governance demanding new forms of interest representation?

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[6] Cooperative (or asymmetric) federalism in Germany, dual federalism in the US, unitarian federal state (*unitarischer Bundesstaat*) in Austria, unitarian state in France and the UK.
[7] Any realisation of a European constitution will heavily depend on the constitutional traditions of the member states.

- What will be the differences between the formal procedures of adopting such a constitution and a change of the Treaties?
- If it comes to a Europe-wide referendum which majority will be binding (a majority in each member state, a double majority of member states and EU-citizens etc.)?
- What will be the relation between a European constitution and the national constitutions?[8]

II. Theoretical and Empirical Research Design

The stages of the project are divided in theoretical reflections and empirical analyses:

- *Identifying the "Prince"* – Who will be the object of constitutionalization?
- Critical evaluation of the key concepts constitution, representation, confederation and federation and their relationship. Consequently, a theory of representation in multi-level systems should be developed.
- Drawing on the experience of the institutional structure of USA, France, Germany, United Kingdom and Austria we will identify and compare certain constitutional elements mentioned above in order to assess their representational features.
- In order to assess the citizen´s representation we also have to focus on electoral laws, especially at the supranational level, given the existing imbalance of representation in the European Parliament (e.g. Føllesdal 1998: 234).[9]
- After comparing the constitutional characteristics of the selected countries we will evaluate their relevance with regard to the current institutional arrangement of the EU. This will enable us to identify federal and confederal characteristics of the current multi-level system of governance.
- In a next step we will compare these findings with proposals raised in the current political debate about the *finalité* of the EU in the selected member states and evaluate them in the view of the relationship principal/agent.
- The different ideas about targets and final states of consitutional development in the EU will then be enriched with correlative scenarios of constitution-making and proposals for securing legitimacy and public consent thus analysing the genesis of a constitutional

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[8] According to most scholars a European consitution must not substitute national ones. See Schwarze (2000: 19).
[9] According to Art. 190 (4) TEC the European Parliament is working on a draft to standardize the electoral law to the EP.

process.[10] In doing so we also want to develop models of representation in multi-level systems.

- In a concluding section we will analyse whether Austria's position in the European Union and Austrian constitutional traditions suggest specific national interests and perspectives with regard to the goals and processes of constitutionalizing the Union.

One major task of this research project will be the crossing of disciplinary borders. Whereas the political discourse on constitutional issues is partly marked by misunderstandings of key terms the academic dispute is rather bound to disciplinary borders: European legal scholars analyse the constitutional quality of the European Treaties or the chances and necessity for a European constitution in legal terms (Piris 2000; Grimm 1995; Koenig 1996, 1998; Dorau 2000; Bieber 1995). Political scientists hardly notice the findings of constitutional lawyers. They address normative and political implications of a European constitutional process, sometimes using the historical vocabulary of their discipline that developed in the period of nation-state building (Ellwein 1992; Wagner 1990). Our approach will make use of both disciplines trying to chart both the limits and advantages of a combined analysis.[11]

2.1. Who is the Prince?

Our premise is that the domination of the executive over parliaments on both, the national and the European level (Rommetsch/Wessels 1996) may lead to an erosion of legitimacy. Adhering to the principle of effectiveness and bureaucratic neutrality which alone is supposed to guarantee optimal solutions, the supranational and national executive elites are confronted with a reluctant public who increasingly shows signs of disaffection if not utter disapproval of European politics (Wolton 1993; Andersen/Eliassen 1996; Scharpf 1996, 1999; Lodge 1997; Puntscher Riekmann 1998; Bach 1999; Gusy 2000). Public sentiment is enhanced by the fact that there is no clear-cut border line between `national´ and `European´ institutions and no clear allocation of competences as in classical state models.[12] Thus, one can hardly locate the areas of responsiblities and public accountability of national and European institutions since both are affected by, and involved in, the EU decision-making process. The combination of

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[10] One remedy for increasing legitimacy and transparency of European politics is seen in the simplification and consolidation of the Treaties (see the study carried out by the EUI. Text available at http://europa.eu.int/comm/igc2000/offdoc/repoflo_en.pdf; von Bogdandy/Ehlermann 1998). We do not regard this sufficient for reducing the "democratic deficit" of the Union.

[11] The focus on representation, which is inextricably bound to questions of legitimacy serves as an interface between legal and political sciences Joerges (1995: 7)

these features forms the core of the democratic deficit of the current European institutional arrangement (Andersen/Burns 1996).

Taming the "Prince" (Mansfield 1993), i.e. setting clear limits for political power within a fixed set of positive and negative rights, usually written down in a constitution, has been the primary aim of constitutional struggles since the French Revolution at the latest.[13] Questions of political power mainly concern the relationship of decision and partcipation. Modern democracies are based on constitutional arrangements which clearly state the formal division and relation of the three branches of power: the legislative, the executive and the judiciary. That the executive generally dominates the legislative power is glaring in most democratic nation states. For most policy-makers (i.e. the executive), decision, latently or overtly, appears to be more important than direct participation of the citizens, but also more important than their indirect particpation through parliamentary representation. However, also public demands for efficiency and effectiveness tend to favour the executive against the legislative, whereas the independence of the judiciary remains largely unchallenged. Analyses of the European integration process show that this tendency has been widely enhanced by the emerging supranational order. Indeed, political scientists speak of a *deparliamentarisation* of European politics (Rommetsch/Wessels 1996) posing a serious threat for democratic representation which cannot be replaced by national governments in the Council of Ministers.

However, if the basic democratic principle[14] were to be transferred onto the European level as well it becomes important to define who this *prince* really is. This is all but easy given the multi-layered decision-making process in the European Union where national executives merge with supranational organs and where the supranational parliament although directly elected has co-decision powers in a limited but growing field of policies only. In spite of the difficulty to disentangle the maze of European politics it is argued here that the modern prince is to be found in the Council of Ministers as well as in the European Council, the Commission being considered mainly as an instrument for integration.[15] Taming the European *Prince* is tantamount to creating a system of checks and balances between the Council (as well as the European Council) and the European Parliament on the one hand and between the

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[12] The allocation of competence is, of course, very different in different federal states, e.g. dual federalism in US vs. cooperative federalism in Germany.

[13] This struggle may be traced back to the Magna Carta.

[14] See fn 4.

[15] This argument does not aim at minimising the role of the Commission whose power has been considerable in certain periods of integration. But repreated cut-backs of power by governments demonstrate the Commission´s instrumental character.

supranational and national institutions on the other thereby increasing the public accountability of the political decision making.

2.1.1. Who is the Sovereign or who should tame the Prince?

A further difficulty in analysing the relationship between the political powers at the European level results from the absence of a European sovereign. In the context of most European constitutions the sovereign is the people.[16] It is a matter of fact that a European demos, hence a European sovereign, is hard to discern. By holding this we do not favour the so-called *"No-demos"* thesis of the German Federal Supreme Court[17] with all its ethno-cultural connotations. Neither do we argue that the lack of a *European people* means that the EU does not need a constitution (Grimm 1995).[18] We define the collectivity of European citizens as the potential European demos, although an individual consciousness of the belonging to this collectivity is still to be developed.

If one were to consider the European elections as a moment in which such a demos might emerge, he or she would be utterly disillusioned: Turnouts are very low particularly when compared to national results, campaigns are almost exclusively fought about national issues, most of the citizens being highly convinced of the irrelevance of the European Parliament. At the same time citizens fancy the Commission as being the most powerful organ of the Union, whereas the importance of national actors in the supranational decision-making process remains largely unrecognised. The member states´ executives have successfully sold their citizens on the idea that the real political power is located in "Brussels". Thus the Commission as the proto-executive is forced to assume the role of a veil behind which the real executive (e.g. in the comitology; see *inter alia* Joerges/Vos 1999) can hide.

Today, after fifty years of integration, opinion polls show a general downward trend in levels of support for the EU in most member states, the average rate of support reaching 49% (Germany, Austria, Finland, Sweden and UK showing rates lower than average). This rather low figure may partly be due to the special characteristics (highly dynamic, polycentric character, osmotic relationship between supranational and national policy-making) of the

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[16] The big exception is – of course – UK with its parliamentary sovereignty.
[17] BVerfGE 89, 155 (Maastricht-decision) and the harsh criticism by Weiler (1995).
[18] The question whether the Union is a state or not, a debate usually led by German legal scholars (e.g. Kirchhof 1994), is misleading, because its main premises is still routed in the conceptual framework of the sovereign

European system of governance. However, a simple transfer of national polity-building methods is neither possible nor desirable. New forms of governance and representation (including participation and contestation) are needed to facilitate and structure supranational government and to hold it accountable to the citizens whom it affects. In order to discern viable elements of a democratic European governance some key concepts of classical constitutionalism have to be discussed.

2.2. Key Concepts

A constitution for the European Union is widely debated - its central terms and concepts being sometimes rather ambiguous and often highly controversial. In his speech at Berlin´s Humboldt University on 12 May 2000 the German Foreign Minister Joschka Fischer outlined a "finalité" of the integration process: a European federation that will create a government from either the Council or the Commission and will resolve the democratic deficit through a bicameral European parliament with real legislative power.[19] This federation is to be brought to life by a "constituent treaty".[20] The international reactions ranged from cautious acceptance to disapproval (comp. Hrbek 2000; Börzel/Risse 2000; Müller-Graff 2000). Nevertheless, all commentators agreed about the importance of Fischer´s speech in initializing a public debate about the future European political order.

Unfortunately the debate itself is blurred by the different meanings and understandings of its key terms: constitution and federalism and their relation to representation. The terms used in the debate show an impressive variety: *constitution* (as already used by some European law scholars), *Constitutional Charter* (as used by the European Court of Justice), *Constitutional Pact* (as proposed by the European Movement) or *Constitutional Treaty* (as proposed by Schäuble/Lamers 1999) contribute to misunderstandings. While many scholars do not hesitate to regard the founding treaties of the Union as a constitution (Thun-Hohenstein 1999: 70; Simson/Schwarze 1992; Rodríguez Iglesis 1996; Steinberg 1999) as does the ECJ[21], others

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territorial nation-state. Therefore the debate on the necessity of a European constitution must not be blocked by the controversy on its statehood.

[19] For the full text of the speech see http://www.auswaertiges-amt.de/6_archiv/index.htm.

[20] The English translation of Fischer´s speech is sometimes misleading, e.g. *Verfassungsvertrag* is translated "constituent treaty" rather than "constitutional treaty".

[21] Case 294/83, *Les Verts*, 1986 ECR, 1339, para. 23. This judgment is by no means a revolutionary rupture with the past but more a corrolary from other judgments dating back to the early 1960ies. It rests on four pillars: the

strongly reject this view (Hilf 1994). Therefore the starting point for our project will be a thorough analysis and clarification of the key concepts and their inter-relation used in the debate: constitution, representation, and federation/confederation.

Constitution

Historically, the concept of the constitution has been tightly linked with the development of the nation-state. The basic purpose of every modern constitution was to limit the power of the state (Montesquieu 1973: 125) in order to secure the rule of law and basic civil and political rights (comp. Creveldt 1999, Finer 1997, Reinhard 1999, Wesel 1997).

In a first approach a constitution can be conceived as "the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principle to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers. A charter of government deriving its whole authority from the governed." (Black's Law Dictionary). From this definition we deduce the following three guarantees which every constitution has to meet (Castiglione: 1996):

- *A principled guarantee as to the political form of the state and individual rights*: Influenced by the theory of social contract and natural rights the individual rights where firstly enshrined in the great liberal manifestos of the American Declaration of Independence and Bill of Rights and the French Declaration of the Rights of Man and Citizen.
- *An organizational guarantee referring to the institutional organisation and separation of powers*: constitutional government requires a division of power among several organs of the body politic. Only this principle ensures the presence of restraints and *checks and balances* in the political system.
- *A representational guarantee that secures the equal participation for citizens in the political body concerned*: To represent means to be present on behalf of someone else who is absent. Historically, the empirical realisation of this concept varies heavily. Since

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doctrine of direct effect, the supremacy of EC law, and the case law on the Community competences and "fundamental rights".

the end of the 18th century the normative point of reference changed. Government was more and more considered to represent the citizens and not metaphysical entities.

Representation

One of the key points of every constitution is the relation between the principal and the agent, i.e. the concept of representation. The direct participation of the citizen in the process of policy-making in day-to-day politics is no longer possible since ancient times where the voice of the herald reached all people in the agora or in the *forum romanum*.[22] Thus, the organization of the relationship between represented and representatives marks a fundamental principle of modern democracy. This poses also a theoretical problem, since an dequate modern theory of political representation is largely missing this projects also intends to contribute to the development of an understanding of representation in multi-level systems.

The principal-agent relationship is determined by formal and substantive aspects of representation (Pitkin 1967). Formal aspects refer to the actors and the process of representation. The represented or principal transfers authority to the representative or agent to act on his or her behalf and subsequently may hold the agent accountable for the action. Thus, formal aspects encompass two fundamental activities: authorization of acting on behalf and, holding accountable. Substantive aspects deal with the problem of what content and/or whose interests are represented as well as on the degree of dependence/independence of a representative from the represented. It thus entails issues of how interests can get representation and how the principal may control the agents (comp. Tuschhoff 1999). Pitkin´s treatment of representation is a rather narrow one. For our understanding of representation and its variation across political systems we need to include questions about the organisational consequences for representation that different political systems generate.

Kincaid (1999: 35) enriched the concept of representation by suggesting four elements[23]: 1) authoritative representation refers first to the authority of citizens to elect the persons who make authoritative decisions through their government institutions; second in a separation-of-powers system it refers to the ability to hold to account the elected officials who appoint persons to authoritative governing institutions; 2) consultative representation refers to the

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[22] Such direct participation in decision-making is always in danger to mutate into totalitarian democracy. See Schmitt (1993^8: 243).
[23] Two of them clearly related to E. Voegelin´s (1991) concept of existential and descriptive types of representation who draws himself on M. Hariou (1929).

right of persons to make their voice heard in government in an advisory manner through petitions, lobbying, and the like. 3) In a confederal order <u>descriptive representation</u> is based on territorial nationality in which elected heads of member states and governments and their ministers act as trustees to represent their citizens, not because they were elected to those federal institutions but because they have the same nationality characteristics as their constituents. On a more abstract level this means that representation is bound to a common identity and that the quantitative composition of the trustees or agents has to correspond with this identity. In a federal mode direct <u>4) substantive representation</u> means that elites act as delegates to represent citizens´ functional and symbolic interests. Out of this a four-field matrix can be developed one dimension being consultative/authoritative representation, the other being decriptive/substantive representation.

This pattern allows to describe the formal aspects of representation currently applied in the European multi-level system of governance. Building on the description of the EU´s representative system by Kincaid (1999) we can differentiate between the following: the main authoritative institutions of the EU accommodate the interests articulated by the heads of states and governments of the member states. The interests of the individuals and other groups (e.g. regions) are accommodated in a consultative fashion. Individuals achieve authoritative representation primarily, but indirectly, through their nation-state government; they achieve consultative representation mainly through direct and indirect interest-group pressure on EU institutions. Due to the strong position of the nation-state in terms of identity formal representation in the EU is descriptive, i.e. based on national identities. In the absence of direct electoral representation of citizens in the EU´s most authoritative institutions (European Council, Council of Ministers)[24] substantive representation is filtered through the descriptive preferences of voters, thereby giving nationality interests priority over European Union interests. Or to put it in another way: The focus on national interests favoured by this form of representation hampers the emergence of genuine Union interests and the emergence of a transnational Europeanized public sphere. Thus, the concept of representation varies according to the organisational frame of rule. Confederal and federal systems generate different sets of options from which principals and agents must choose when they engage in representation. From a principal´s point of view these choices concern accountability, loyalty,

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[24] We do not share positions holding that legitimacy of the members of the Council and European Council is given through national elections. This position is even more eroded by the introduction of majority voting in substantial policy fields since the Single European Act. See fn 1.

and confidence linkages. From an agent´s point of view choices are about effectiveness that the literature on representation has largely ignored (Tuschhoff 1999: 29).

Federation vs Confederation

Federation and confederation have in common that they are conceived as a union of two or more constituent states. The constituent units or member states enjoy a substantial degree of autonomy and exert certain political and legal rights. Riker defines federalism as a "political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions." (Riker 1975: 101).

A confederation is an association of two or more sovereign states, which means that a confederation cannot legislate for individuals.[25] An individual is the subject or citizen only of the member state and not of the association. This has fundamental implications for representation, because a confederation is only a congregation of states while in a federation both states and citizens are represented in the federal institutions. In a confederation, only states or governments are represented in the common political institution, whereas in federations citizens are directly represented both in constitutive units (the provinces, regions or states) and at the federal level.

In federal democracies both levels of government (constituent and federal) represent individual citizens and are directly accountable to them. A federal state has a dual citizenship where each citizen is a member of one constituent polity as well as of the common federal polity. Moreover, a federal government usually has broader powers than decision-making institutions of a confederation. Elements of both concepts are as follows:

Thus, a democratic federation is not only a multilevel government but also a multilevel community of citizens towards whom all governments are accountable. Direct election of EP members since 1979 and the formal introduction of EU citizenship in the Maastricht Treaty of 1992 were the first steps towards a federation; a Charter of Fundamental Rights will be a much larger one. However, in order to establish the crucial direct relation between citizens

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[25] The exception of this general principle are international treaties which are self-executing (Neuhold/Hummer/Schreuer 1997: 67).

and the federation, a modernized catalogue of basic human rights will not suffice. What ties individual citizens to a democratic community are not only the rights and liberties that they enjoy, but the relation of representation that makes political authorities directly accountable to them.

Confederation	Federation
Unanimity	Majority voting
Non-direct effect	Direct effect
Easy to secede	Difficult to secede
No use of force against MS	Possibility to use force against MS
No direct taxation	Direct taxation
No confederal citizenship	Federal citizenship
States	Citizens and States

Nonetheless the two concepts are not mutually exclusive.[26] The term confederation was not only applied to classify international organisations, traditionally conceived as intergovernmental institutions by public international law.[27] An in-depth analysis shows the inter-relation of both concepts, some elements are listed below:

- In confederations qualified majority or simple majority is not excluded; unanimity is rather exceptional (Kunz 1929: 472).

- The ratification of confederal decisions (*Bundesbeschlüsse*) including those adopted by simple majority are not usual (Kunz 1929: 473).

- The direct effect of legal acts of a confederation is rare but not excluded (Kunz 1929: 472).

- Even confederal constitutions guarantee fundamental rights for the citizens of the constituent states but there is no fully developed confederal citizenship (Kunz 1929: 476f).

- Contrary to conventional wisdom confederations existed in which the organs of the confederal level had the exclusive right of diplomatic missions.

- Concerning the basic revenue order (*Finanzverfassung*) of confederations not only financial contributions of the constituent units are customary but direct taxation is possible (Kunz 1929: 480).

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[26] See the the 1848 adoption of "The federal Constitution of the Swiss Confederation".
[27] The French member of the Council of Europe L. Bolifraud pleaded for the creation of a "Confédération européenne" including extensive supranational features. Even C. de Gaulles argued that a European confederation is in need of a powerful central institution to which parts of the sovereignty of the member states should be conferred (comp. Schneider 1998: 32).

A federation does not necessarily mean that its constituent units are politically weak or irrelevant. A confederation of sovereign states usually is heavily dependent on its member states. Therefore we have to bear in mind that the actual balance of power outside the formal institutional arrangement (Schneider 2000:176).

This enables us to categorize and evaluate concrete political entities beyond their merely formal denomination. In the case of the European Union one can easily see the combination of both conceptual features. As Kincaid (1999) has convincingly argued the European Union operates in different modi: it is a confederal order of government that operates in a significantly federal mode within its spheres of competence.

In every (con)federal entity the question w*hat* should be done politically is inextricably linked with *who* should do it.[28] But this vertical separation of power is only one aspect of a con-/federation. The other aspect is that in a federation the individuals have to develop multiple identities (local, regional, national). Consequently, a federal union needs a more complex mode of representation than a confederation (Tuschhoff 1999). One could argue at this point that it is indeed the transition towards a federation that makes the need for a written constitution more urgent. All federal states have written constitutions and most have powerful federal constitutional courts (comp. Elazar 1987). The reason for this is the need to secure the autonomy of constitutive units against any possible encroachment of a federal majority of such units as well as the inividual rights of federal citizens against the constitutent state's legislative and administrative powers.

2.3. Countries

The project will draw on the experience of constitution-building in the following countries: France, United Kingdom, Germany and Austria. France was selected because of its enduring constitutional history and its unitarian structure of political order. Germany builds the major counter part to France and the UK adhering to the constitutional tradition of federalism. The UK builds an exceptional case in point standing outside the continental European constitutional tradition: the UK serves as an important case for a long and accepted history of constitutionalism without having a written constitution. Besides that France, the UK and

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[28] The president of the European Commission Romano Prodi stressed this point in a recent speech held before the European Parliament: "I therefore agree that the time has come to open the debate on the distribution of powers between the Union and the Member States" (AGENCE EUROPE, 4.10.2000).

Germany, although in different ways, appear to have the most influence in the current debate about a European constitution (see the recent statements by J. Fischer, J. Chirac, H. Védrine, T. Blair, G. Schröder, J. Rau). Austria was chosen because it combines federal and unitarian elements and provides an example for small staes in the EU.

The United States provide a paradigmatic model of federalism based on relatively strong constituent units with distinctive histories and characteristics**.**

IV. Method

In order to assess the chances for a European constitution a comparative approach has been choosen. The project is based on a literature and document analysis regarding the ongoing debate on a European constitution. Additionally, we will not only focus on the academic discussion, i.e. comparing constitutional traditions, allocation of competences, institutional arrangements etc. but also on the discussion among political elites perceived by mass media in order to better grasp the dimensions of European constitional discourses. Besides theoretical reflection, the project combines qualitative and quantitative methods. In doing so we will carry out intensive research on selected nation-wide published daily and weekly periodicals in France, Germany, United Kingdom and Austria. More specifically, the research team will

- analyse the post May 1999 debates on a EU related Constitution according to a structured questionnaire, which focuses on the key concept.
- establish four country-by-country reports and synopsis and one cross-country synopsis on the basis of the answers to the questionnaire,
- analyse the written fall-out of key speeches, papers and debates by focusing on a content-analysis of print media in the three countries under consideration.

The general research design (Holsti 1968) of the content analysis contains the following steps as points of departure for the analysis:

Key concepts and terms, positive or negative connotations, etc. will be selected by using CD-ROMS and other databases of different newspapers, so that it will be possible to catch the relevant articles and identify the inference of policy cycle and media reports in the publicized opinion. By using the computerized program *QSR NUD*IST 5* (Non numerical Unstructured Data Indexing Searching and Theorizing) the research method will be to search key words,

phrases etc. in the selected press reports and to automatically index the results by using a self-created index system for the data. Key terms will be linked and their links will be explored with the data using a flexible optional tree structure for the indexing connections and non-hierarchical index structures (Groeben/Rustemeyer 1994: 313). On-line text will be searched with a pattern-based text search facility, so that text search can be done context-sensitively, to restrict it to documents or passages with any chosen characteristics. Measures of association, including a concordance which shows the relative position of words to each other in a document, cross-tabulations and correlations between individual words or word groups, sequential plots which show the use of words and word groups over time will complete the analysis. The identified key terms will be used for the analysis of the relevant categories of the monetary and employment policy cycles and the publicized discourses in the different countries. Additionally positive and negative connotation can be identified and described.

For this analysis *QSR NUD*IST 5* will be used to construct and modify the tree-structured "Index System". With this option of being tree-structured, the index system will as a taxonomic organizer of the data indexing. The index trees can be rearranged as the understanding of the research project changes. Because of their tree-structuring, index categories can be used to handle structured questions, and cases, such as interviews and press reports.

To ensure comparability in the selected countries the analysis will be enriched by interviews with national parties, federal ministries, transnational party organisations, the constitutional committee of the European Parliament based on a semi-standardized questionnaire. To guarantee optimal co-operation between the partners (*Austrian Academy of Sciences* and the *Trans European Policy Studies Association*) a kick-off meeting will take place in Vienna as soon as possible. In the wake of the project two workshops will be held which will draw in experts from a wide range of fields. Moreover co-operation links have been established on a national level with Univ.Prof. S. Griller, *University of Economics and Business Administration, Research Institute for European Affairs* (Vienna). Within this co-operation a joint workshop on the relevant topics is planned.

V. Expected Benefits and Dissemination

The project will provide analytical support for the national and supra-national policy-makers by offering a comprehensive analysis of one of the most ambitious political goals in European integration history. The comparative approach guarantees not only a clarification of the key concepts used in this debate but also contributes to a mutual understanding of constitutional history thereby increasing the chances for its realisation. Furthermore it will help to clarify the Austrian position in the ongoing debate by drawing up different scenarios and policy-options. After the kick-off meeting two workshops are planned drawing in a wide range of academics and politicians in order to intensify the exchange of knowledge between theory and praxis. A concluding conference will be held in Vienna to stimulate further debate with hindsight to the Conference 2004 proposed by the German Chancellor G. Schröder and the Italian Prime Minister G. Amato. Furthermore a monograph with a renowned academic publisher is planned. Additionally articles in peer-reviewed journals are envisaged.

References

Andersen S.S./Burns T.R. (1996), "The European Union and the Erosion of Democracy: A Study of Post-Parliamentary Governance", in: *Contemporary Development Analysis*, Vol.1, No.2, pp.33-65

Andersen S.S./Eliassen K.A. (1996), *The European Union: How Democratic is it?,* London

Bach M. (1999), *Die Bürokratisierung Europas. Verwaltungseliten, Experten und politische Legitimation in Europa*, Frankfurt a.M., New York: Campus

Bauböck R. (2000), *European Integration and the Politics of Identity*. Lecture at the Austrian Permanent Representation at the European Union, Draft, Brussels

Beck U. (1997), *Was ist Globalisierung*?, Frankfurt aM.: Suhrkamp

Bellamy R./Castiglione D. (eds.) (1996), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford: Blackwell Publishers

Bieber R. (1995), "Steigerungsform der Europäischen Union: Eine Europäische Verfassung", in: Ipsen J. et al. (Hg.), *Verfassungsrecht im Wandel*, Köln, pp.291ff.

Bogdandy von A./Ehlermann C. D. (Hrsg.) (1998), "Kosolidierung und Kohärenz des Primärrechts nach Amsterdam", in *Europarecht*, Beiheft 2, Baden Baden: Nomos

Börzel T./Risse T., Who is Afraid of a European Federation? How to Constitutionalize a multi-Level Governance System, prepared for Christian Joerges, Yves Meny and Joseph H. H. Weiler, Responses to Joschka Fischer, 17 July 2000. Draft; paper available at: http://www.iue.it/Personal/Risse/Rissedoc/Welcome.html

Castiglione D. (1996), The Political Theory of the Constitution, in: Bellamy R./Castiglione D. (ed.), *Constitutionalism in Transition: European and Theoretical Perspectives*, Oxford: Blackwell Publishers, pp. 6-23

Creveldt M. (1999), *The Rise and Decline of the State*, Cambridge: Cambridge University Press

Dehousse R. (1998), The European Court of Justice. The Politics of Judicial Integration Basingstoke: Macmillan Press

Dorau Ch. (2000), "Bedarf und Inhalt einer Verfassung für die EU", in: Ronge F. (Hg.), *In welcher Verfassung ist Europa – Welche Verfassung für Europa?*, Baden-Baden: Nomos

Elazar, D. J. (1987), Exploring Federalism, University of Alabama, Tuscaloosa

Ellwein Th. (1992), "Staatlichkeit im Wandel. Das Staatsmodell des 19. Jahrhunderts als Verständnisbarriere", in: Kohler-Koch B. (Hg.), *Staat und Demokratie in Europa.* 18. Wissenschaftlicher Kongreß der Deutschen Vereinigung für Politische Wissenschaft, Opladen: Leske + Budrich, pp.73-82

Finer S.E. (1997). *The History of Government from the Earliest Times*, III. Vols., Oxford: Oxford University Press

Føllesdal A. (1998), `Democracy and Federalism in the European Union´, in: Koslowski P./Føllesdal A. (eds.), *Democracy and the European Union*, Berlin, Heidelberg: Springer, pp.231-253

Friedrich, C. J. (1968), Trends of Federalism in Theory and Practice (New York: Frederick A. Praeger)

Grimm D. (1995), Does Europe need a Constitution?, in: *European Law Journal*. Special Issue on Sovereignty, Citizenship, and the European Constitution, 1/3, pp.282-302

Groeben N./ Rustemeyer R. (1994): "On the Integration of Quantitative and Qualitative Methodological Paradigms (Based on the Example of Content Analysis)", in: Borg I./ Mohler P. Ph (Eds.), *Trends and Perspectives in Empirical Social Reearch*, New York, pp.308-326, p.313

Gusy C. (2000), "Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der Europäischen Uion", in: Brunkhorst H./Kettner M. (Hg.), *Globalisierung und Demokratie*, Frankfurt a.M.: Suhrkamp, pp.131-150

Haas E.B. (1958), *The Uniting of Europe. Political, Social and Economical Forces 1950-1957*, London: Stevens & Sons Ltd.

Hauriou M. (1929), *Précis de droit constitutionnel*, 2nd ed., Paris

Hilf M. (1994), "Eine Verfassung für die EU: Zum Entwurf des Institutionellen Ausschusses des Europäischen Parlaments", in: *Integration* 17/2/, pp.68-78

Hirst P./Thompson G. (1996), *Globalization in Question*, Cambridge, Oxford: Polity Press

Hogan W.N. (1970), "Political representation and European Integration", in: *Integration* No.4

Holsti O.R.(1968), *Content Analysis for the Social Sciences and Humanities*, London, pp. 24-41

Hrbek R. (2000), "Europäische Föderation durch Verfassungsvertrag. Joschka Fischers Leitbild und der Beginn einer neuen europapolitischen Orientierungsdebatte, in: Hierzinger R./Pollak J. (Hg.), *Europäische Leitbilder. Festschrift für Heinrich Schneider*, Baden-Baden: Nomos: 2000 forthcoming

Joerges Ch. (1995), *Das Recht im Prozeß der europäischen Integration – ein Plädoyer für die Beachtung des Rechts durch die Politikwissenschaft*, EUI Working Paper, Law, 95/1

Joerges Ch./Vos E. (eds.), *EU Committees: Social Regulations, Law and Politics*, Oxford, Portland: Hart Publishing

Kaiser J.H. (1978), *Die Repräsentation organisierter Interessen*, 2nd ed., Berlin: Duncker & Humblot

Kincaid J. (1999), "Confederal Federalism and Citizen Representation in the European Union", in: *West European Politics*, Vol. 22, No.2, pp.34-58

Kirchhof P. (1994), "Kompetenzaufteilung zwischen den Mitgliedstaaten und der EU, in: *Europäisches Forum: Die künftige Verfassungsordnung der Europäischen Union* (Europäische Gespräche 2/94, hrsg. v. d. Vertretung der Europäischen Kommission in der Bundesrepublik Deutschland, Bonn, pp.57ff.

Koenig Ch. (1998), "Ist die europäische Union verfassungsfähig?", in: *Die Öffentliche Verwaltung*, pp.268ff.

Koenig Ch. (1996), "Anmerkungen zur Grundordnung der EU und ihrem fehlenden `Verfassungsbedarf´", in: *Neue Zeitschrift für Verwaltungsrecht*, pp.549ff.

Kunz J. (1929), Handbuch des Völkerrechts, 2. Bd.: Lehre von den Staatenverbindungen, Stuttgart: Kohlhammer

Lehmbruch G. (1997), *Interest Intermediation in West European Federal systems*, 3rd Workshop of the Federalism and Compounded Representation in Western Europe Project, 9-11 Oct. 1997, Emory University, Atlanta, GA

Lijphart A. (1984), *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven: Yale University Press

MacCormick N. (1996), "Liberalism, Nationalism and the Post-Sovereign State", in: Bellamy R./Castiglione D. (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford: Blackwell, pp.141-155

Mansfield H. C. (1993), *Taming the Prince. The Ambivalence of Modern Executive Power*, Baltimore, London: Johns Hopkins University Press

Marks G./Wilson C. (1999), "National Parties and the Contestation of Europe", in: Banchoff T./Smith M.P. (eds.), *Legitimacy and the European Union*, London, New York: Routledge

Montesquieu (1973), *De l'esprit des lois*. Vol I. Paris: Garnier

Müller-Graff P.C. (2000), "Europäische Föderation als Revolutionskonzept im europäischen Verfassungsraum?", in: *Integration* 23/3, pp.157-170

Mayntz R./Rosewitz B./Stichweh R. (1988), *Differenzierung und Verselbstständigung. Zur Entwicklung gesellschaftlicher Teilsysteme*, Frankfurt/M., New York: Campus

Mayntz R./Scharpf F. (Hg.) (1995), *Gesellschaftliche Selbstregulierung und politische Steuerung*, Frankfurt aM., New York: Campus

Neuhold H./Hummer W./Schreuer Ch. (Hg.) (1997), *Österreichisches Handbuch des Völkerrechts*, Bd.1: Textteil, Wien: Manz

Parry G. (1995), "Types of Democracy", in: Lipset S.M. (ed.), *The Encyclopedia of Democracy*, Washington DC: Congressional Quarterly, pp.1277-84

Patzelt W.A. (1993), *Abgeordnete und Repräsentation*, Passau: Wissenschaftsverlag Rothe

Piris J. (2000) *Does the European Union have a Constitution? Does it need one?*, Harvard Jean Monnet Working Paper 5

Pitkin H.F. (1967), *The Concept of Representation*, Berkeley, CA: University of California Press

Puntscher-Riekmann S. (1998), *Die kommissarische Neuordnung Europas*, Wien/New York

Reinhard W. (1999), *Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur gegenwart*, München: Beck

Riker W.H. (1975), "Federalism", in F.I.Greenstein/N.W.Polsby (ed), *Handbook of Political Science*. Vol 5. Governmental Institutions and Processes

Rodríguez Iglesias G.C. (1996), 'Zur "Verfassung" der Europäischen Gemeinschaft', in *Europäische Grundrechtszeitschrift*, pp.125ff.

Rommetsch D./Wessels W. (eds.) (1996), *The European Union and member states. Towards institutional fusion?*, Manchester: Manchester University Press

Sassen S., (1996), *Losing Control? Sovereignty in an Age of Globalization*, New York: Columbia University Press

Scharpf F.W. (1996), "Democratic Policy in Europe". In: *European Law Journal*, Vol.2, No.2, pp.136-155

Scharpf F.W. (1999), *Regieren in Europa. Effektiv und demokratisch?*, Frankfurt/New York

Schäuble W./Lamers K. (1999), "Réflexions sur la politique européenne II - la suite du processus d'unification européenne"

Schimank U. (1996), *Theorien gesellschaftlicher Differenzierung*, Opladen: Leske + Budrich

Schmitt C., *Verfassungslehre*, 8.Aufl., Berlin: Duncker & Humblot

Schneider H. (1998), *Grundbegriffe in der Europäischen Verfassungsdebatte*. Unpublished paper presented at the Conference "Europa zwischen Integration und Ausschluss", Vienna

Schneider H. (2000), "Alternativen der Verfassungsfinalität: Föderation, Konföderation - oder was sonst?", in: *Integration* 23/3, pp.171-184

Schwarze J./Bieber R. (Hg.) (1984), *Eine Verfassung für Europa*, Baden-Baden: Nomos

Schwarze J. (2000), "Auf dem Wege zu einer europäischen Verfassung – Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht", in: Schwarze J./Müller-Graff P. (Hg.), *Europäische Verfassungsentwicklung*, Europarecht Beiheft 1, Baden-Baden: Nomos, pp.7-30

Scigliano R. (1995), "Representation", in: Lipset S.M. (ed.), *The Encyclopedia of Democracy*, Washington DC: Congressional Quarterly

Simson von W./Schwarze J. (1992), *Europäische Integration und Grundgesetz*, Berlin: de Gruyter

Steinberg R. (1999), 'Grundgesetz und Europäische Verfassung', in: *ZRP*, pp.365ff.

Thun-Hohenstein C./Cede F. (1999), *Europarecht. Das Recht der europäischen Union unter besonderer Berücksichtigung der EU-Mitgliedschaft Österreichs*, Wien: Manz Verlag

Tuschhoff Ch. (1999), "The Compounding Effect: The Impact of Federalism on the Concept of Representation", in: *West European Politics*, Vol.22, Nr.2, pp.16-33

Voegelin E. (1991), *Die Neue Wissenschaft der Politik. Eine Einführung*, 4th ed., München

Wagner P. (1990), *Sozialwissenschaften und Staat. Frankreich, Italien, Deutschland 1870-1980*, Frankfurt aM., New York: Campus

Weiler J.H.H (1991), "The Transformation of Europe", in: *Yale Law Journal* (1991), pp.2403-2483

Weiler J.H.H (1995), The State "über alles": Demos, Telos and the German Maastricht Decision, in: Due O. et al. (eds.), *Festschrift für Ulrich Everling*, Baden-Baden: Nomos

Weiler J.H.H. (1999), "*Fin-de-siècle* Europe: do the new clothes have an emperor?", in: Weiler J.H.H., *The Constitution of Europe. `Do the new clothes have an emperor?´ and other essays on European Integration*, Cambridge: Cambridge University Press

Wesel U., (1997) *Geschichte des Rechts. Von den Frühformen bis zum Vertrag von Maastricht*, München: Beck

Wessels W. (1997), An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes, in: *Journal of Common Market Studies*, Vol.35, No.2, 267-299

Wolton D. (1993), *La Dernière Utopie. Naissance de l´Europe démocratique*, Paris

Zürn M. (1995), "The Challenge of Globalization and Individualization. A View from Europe", in: Holm H./Sorensen G. (eds.), *Whose World Order? Uneven Globalization and the End of the Cold War*, Boulder: Westview, pp.137-163

Zürn M. (1998), *Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance*, Frankfurt aM.: Suhrkamp