

Comment on Niels Petersen - A Democratic Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?

*By Robert Grzeszczak**

First, it should be noted that there is a clear tension between democratic principles and strengthening the process of European integration. We should also bear in mind that until recently the notion of democracy was not solely associated with the functioning of international institutions, even though many of them include parliamentary bodies. Instead, it was only in the last decades of the 20th century that the democratic way of thinking entered into international relations. Despite this development, many international law experts either deny the possibility of introducing democracy in international institutions or simply pass over the issue.¹

In principle, democracy is state-based. Thus the fundamental issue for further consideration is how we understand the principle of democracy in the case of the European Union (EU), as compared to its position in the member states. Neither the founding treaties, nor the Constitutional Treaty, give a final answer to this question. These treaties illustrate however, that there is some interdependence between democracy and citizenship, freedom and the rule of law. They also point out that these concepts constitute the contents of democracy on the one hand and the limits of democracy on the other. The concept of democracy in EU structures was not emphasized until the 1990s, maybe because of the EU's exclusively economic character at the beginning of the integration process. Taking into consideration the discussion above, the following issue should be considered: what kind of solutions for European democracy does the Constitutional Treaty propose?

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¹ CEZARY MIK, EUROPEJSKIE PRAWO WSPÓLNOTOWE 416 (2002); Roman Kuźniar, *Demokracja w państwie a demokratyczność porządku międzynarodowego*, in DEMOKRACJA W STOSUNKACH MIĘDZYNARODOWYCH 42 (Edward Halizak & Dariusz Poplawski eds., 1997); Janusz Simonides, *Ocena demokratyczności systemu politycznego państw w prawie międzynarodowym i praktyce międzynarodowej*, in DEMOKRACJA W STOSUNKACH MIĘDZYNARODOWYCH 25 (Edward Halizak & Dariusz Poplawski eds., 1997).

The problem seems to require an unequivocal answer to the following question: can democracy be related to international institutions and realized by international organizations such as the EU?

Taking into account the features of EU law, the importance of the principle of sovereignty for the member states, and ever more intense competition in the economic sphere it is apparent that reaching a consensus and sharing common interests on the EU level will be exceptionally difficult. That is why the practical achievement and implementation of classical democratic values in the EU structure is not an easy task.

Big and modern states as well as international organizations that are characterized by well-developed structures of power such as the EU (especially in its constitutional shape), can realize only an indirect form of democracy, representative democracy.² In this form of democracy the governmental bodies are elected by citizens to govern on their behalf, while at the same time guaranteeing the rights of citizens.³ Examining contemporary organizations, it is apparent that each of them is based on a principle of democracy, which is based in turn on the idea of self-determination and sovereignty of the nation.⁴ Broadly speaking, decisions of public authorities require legitimisation deriving from the nation, and decision-making processes that are verified through elections.

The European Union does not correspond (neither at present, nor in the shape proposed by the Constitutional Treaty) to the principles of democracy accepted in the internal systems of the member states. However, the heterogeneity of solutions and structures in different member states is not the cause of the democratic deficit. I do not necessarily agree with the view that it would be advisable to introduce the well known legal procedures applied in member states or even those that are convergent in their solutions in all of the member states on the EU level. Because the EU is not a state, I believe that it should not be looked at or estimated

² Compare Treaty Establishing the European Constitution Title VI, Dec. 16, 2004, 2004 O.J. (C 310) 1 [hereinafter CT] (The Democratic Life of the Union); and Constitutional Treaty art. I-46 (the Principle of Representative Democracy).

³ LEXIKON DES RECHTS, I/57 and I/58 (A. Reifferscheid, E. Bockel & F. Benseler eds., 1968).

⁴ PHILIPPE WEBER-PANARIELLO, NATIONALE PARLAMENTE IN DER EUROPÄISCHEN UNION: EINE RECHTSVERGLEICHENDE STUDIE ZUR BETEILIGUNG NATIONALER PARLAMENTE AN DER INNERSTAATLICHEN WILLENSBILDUNG IN ANGELEGENHEITEN DER EUROPÄISCHEN UNION IM VEREINIGTEN KÖNIGREICH, FRANKREICH UND DER BUNDEREPUBLIK DEUTCHLAND 194 (1995).

exclusively (or ever) according to the assumptions created for the purpose of state structures.⁵

Thus I am of the opinion that EU structures do not correspond to Charles Louis de Secondat de Montesquieu's doctrine of division of powers and I do not see any reason why the division of powers principle should be fully implemented in an international organization such as the EU.

In the European Convention, all debate on the implementation of democratic principles within the European Union, as well as on incorporation of procedures and mechanisms from the spheres reserved for the member states, was focused on the institutional aspects. Such an approach is reflected by the provisions of the Constitutional Treaty which point out the need for reform of Community institutions, changes in legislative procedures and a stronger position of the national parliaments in EU decision-making procedures.

The main task for the framers of the Constitutional Treaty was to change the undemocratic image of the EU. However, I do not share the view that the scope of changes proposed in the Constitutional Treaty will in any way influence the existence of the EU's democratic deficit, which dates back to the very origins of the Communities and the Union.

Looking across European literature on the subject, it appears that the primary catalyst of the democratic deficit is the relationship between the European Parliament (EP) on one hand, and the Council of Ministers and the European Commission on the other.⁶ That is why some authors stress the need for a change in this relationship, particularly between the EP and the Council of Ministers by

⁵ Compare MONTESQUIEU, O DUCHU PRAW 239 (1957), with Heinrich Oberreuter, *Demokratiedefizite in der EU*, 54 POLITISCHE STUDIEN 50 (1999) (“[...] Die EU ist kein Staat. Sie ist eine Gebilde sui generis, was der Begriff Staatenverbund zutreffend umschreibt. Institutionen und Verfahrensweisen in diesem Verbund waren immer schon nach Maß zu schneiden, nie nach einzelstaatlichem Vorbild”).

⁶ DAVID COOMBES, SEVEN THEOREMS IN THE EUROPEAN PARLIAMENT. FUTURE OF EUROPEAN PARLIAMENTARY DEMOCRACY (1999); Albert Bleckmann, *Das europäische Demokratieprinzip – Zum Demokratieprinzip in der EG* 301, 7 JURISTEN ZEITUNG 30 (1990); WINFRIED KLUTH, DIE DEMOKRATISCHE LEGITIMATION DER EUROPÄISCHEN UNION 87 (1995); Albert Bleckmann, *Chancen und Gefahren der europäischen Integration. Zum Demokratieprinzip in der EG* 301, 7 JURISTEN ZEITUNG (1990); Klaus Pöhle, *Das Demokratiedefizit der Europäischen Union und die nationalen Parlament*, 1 ZEITSCHRIFT FÜR PARLAMENTSFragen 77 (1998); Dieter Grimm, *Mit einer Aufwertung des Europa-Parlaments ist es nicht getan. Das Demokratiedefizit der EG hat strukturelle Ursachen*, 6 JAHRBUCH ZUR STAATS- UND VERWALTUNGSWISSENSCHAFT (1992-1993); Frank Decker, *Demokratie und Demokratisierung jenseits des Nationalstaates: Das Beispiel der Europäischen Union*, 2 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 177 (2000); FRANK EMMERT, MATEUSZ MORAWIECKI, PRAWO EUROPEJSKIE 170 (2004).

making the Parliament a fully competent body that can approve every single act coming from the Council.⁷

The Constitutional Treaty increases the competence of the EP, but it is not enough to make the EP a fully independent legislator. Consequently the European Union, as shaped by the Constitutional Treaty, still does not have an appropriate institutional structure to ensure a democratic form of governance for the citizens.

Moreover, the extent to which the Constitutional Treaty takes into account the New Millennium's changing social conditions and the expansion of the EU, has been overemphasized. Often, what for politicians is simply a step in achieving further objectives (for instance political integration) is for many societies an absolute maximum of acceptable change. Activities of international institutions (Council, Commission or EP) should be broadly reflected in the support from the societies, in their opinions and expectations.⁸ This aspect, although often raised and discussed in European circles, is not implemented strongly enough.

The support of the EU citizens for the Union is decreasing. The referenda show that in the old member states (Denmark, Ireland) support in favour of European integration is becoming weaker and weaker, and in the new ones it is surprisingly low (Slovakia). The framers of the Amsterdam Treaty realized this and tried to change this situation by introducing a new principle into Community law: transparency through the enhanced access of EU citizens to documents of the Community institutions (Art. 255 TEC). The entry into force of the Amsterdam Treaty (1999) and its provisions providing for the democratic principles in the functioning of the EU were supposed to put an end to debate on the EU as an enterprise of executive power.⁹ However, those provisions were not followed by any further legal changes. So far, the principle of democratic legitimisation has not yet been implemented.

That is why this issue, a subject of discussion in many European bodies, has been added to the agenda of the European Convention. Moreover, this way of thinking is reflected in the Constitutional Treaty and laid down as a principle of participatory democracy (Art. I-47).

⁷Albert Bleckmann, *Das europäische Demokratieprinzip*, 2 JURISTEN ZEITUNG 53 (2001).

⁸ Grażyna Michałowska, *Spoleczne przesłanki demokracji w stosunkach międzynarodowych*, in PAŃSTWO, DEMOKRACJA, SAMORZĄD 449 (Tadeusz Mołdawa ed., 1999).

⁹ *Id.* at 358.

The question remains, however, whether the Constitutional Treaty's entry into force will really strengthen the democratic image of the European Union. Its future practical application will answer this question. Nevertheless, the solutions proposed by the Constitutional Treaty seem quite superficial in this field and do not seem to propose any revolutionary changes in the integration process.

In a broader political context, the democratic deficit of the EU is linked with the European citizens weakening support for the deepening of the integration process. The Community institutions adopt laws without consulting with the citizens, thus the intention expressed in the Constitutional Treaty to implement the rules of transparency in the functioning of the EU institutions remains wishful thinking.¹⁰ That is why it is not at all surprising that the European Community, and then the European Union, have not succeeded in creating a truly international community and that its citizens do not form one politically integrated society. The EU citizens are still far from being a European nation (*demos*) and in turn this makes it even more difficult to find a common European identity (*ethnos*).

Most of the treaty revisions have their roots in the underlying reform tendencies of the member states. That should be emphasized when observing how democracy is being introduced on the EU level. An example of this phenomenon is the above mentioned principle of granting EU citizens access to information (Art. 255 TEC). The principle was originally developed by the member states in their internal legal orders and was then incorporated into the Community's legal order. The principle has been reflected in the law of almost all member states but it has been regulated in a more or less detailed way depending on the individual member state.¹¹

The right of access to the information and documents of the EU administration should be perceived as an attempt at incorporating the democratic principles that originated in member states on the Community level.¹² Until now, the right of access to information on the EU level has been interpreted in a limited way. Under Art. 255 of the EC Treaty, as well as under the provisions of the European Parliament, the relevant Council Regulation and the case-law of the ECJ this right

¹⁰ Monika Szwarc, *Zasady wglądu do dokumentów instytucji Wspólnot Europejskich*, in PAŃSTWO I PRAWO 34 (2001).

¹¹ They have been most broadly considered in the legal orders of the Scandinavian states.

¹² However, the EU solutions must have reached a consensus on different member states traditions and create a model incorporating on the one hand exceptionally transparent solutions of the Scandinavian states.

should be understood as the right of every single citizen to access the documents of each of the Community institutions.¹³

We should only support the provisions of the Constitutional Treaty (Art. I-47) which give citizens and representative associations the opportunity to publicly exchange their views in all areas of Union action. A common Europe cannot be achieved without the support of its citizens; alternatively, if such popular support cannot be mustered, a common Europe must be attained in compliance with the underlying, foundational values of the various member states.¹⁴

The mere fact that the Constitutional Treaty lays down provisions on representative democracy (Art. I-46) and introduces a general principle of participatory democracy (Art. I-47) does not ensure its true democratic character. These are envisaged provisions, which may lead to a more democratic character of the Union.¹⁵ These democratic principles have been introduced in the Constitutional Treaty directly (*inter alia* by the Preamble and Art. I-2, I-45 and I-47), and indirectly from the rules and principles included throughout the Treaty. One of the avenues guaranteeing more democratic procedures for a democratic Union is amended by the Constitutional Treaty – the double-majority requirement in the weighting of Council voting, as introduced by the Nice Treaty.

One answer to the quest for more democratic rules in EU structures might be in the increasingly popular doctrine of deliberative democracy.¹⁶ In the heart of the theory of deliberative democracy lies the assumption that a decision must result from a vote in order to be legitimate. This legitimisation may be acquired if a decision results from an argumentation process free from any pressure. The source of the legitimisation lies not only in the possibility for everybody to participate, but also in broad access to the deliberative process. Under these conditions, a mistake is not excluded from majority voting. Voting closes a debate because of the above mentioned external pressure. Argumentation free from any external pressure is the best solution, allowing separation of a specific interest from the common interest as

¹³ Commission Regulation 1049/2001, 2001 O.J. (L 145) 43.

¹⁴ M. Fragde, *Sovranità diffuse e diritti umani nella prospettiva comunitaria*, in RIVISTA DI DIRITTO EUROPEO 19 (1999).

¹⁵ Meinhard Hilf, *Amsterdam – Ein Vertrag für die Bürger?*, in EUROPARECHT 357, 358 (G. Nicolaysen & H.J. Rabe eds., 1997).

¹⁶ The father of the theory of deliberative democracy is Jürgen Habermas. See JÜRGEN HABERMAS, STRUKTURWANDEL DER ÖFFENTLICHKEIT (1961).

well as the crafting of norms based on consensus. In consequence, the addressees should consider themselves co-authors of those norms.¹⁷

In light of this model, democracy is no longer understood as solving conflicts or weighing interests. The parties do not advocate strategic interests. Any interest can be generalised and this leads to a consensus without majority voting being necessary. Jürgen Habermas's model, following Klaus Bachmann's, emphasizes debate, the art of persuasion and the exchange of arguments (supranational deliberation). Many supporters of this theory see it as a way to add more legitimacy to EU actions.¹⁸

With a dose of criticism it should be noted that the provisions on democracy on the EU level do not teach anything new in substance. The guarantee of respect for the values enumerated in Art. I-2 of the Constitutional Treaty are already in place by virtue of EU law, *inter alia* the preamble to the Single European Act or Art. 6 of the Treaty on the European Union (TEU). The fact that Art. 6 TEU has been introduced in the Constitutional Treaty is of formal nature. It merely reconfirms the observance of those rights on the community law level.

I agree with the view that an elite is necessary for efficient governance in a state or within an international organization's structures. It is linked with the functioning of *invisible authority*, namely experts whose role is becoming ever more important as a result of the increasing complexity of the structures.¹⁹ Such phenomena can be seen in the European structures and this shift is justified by the European Community's need for an effective executive. But if recognizing an authority as efficient is a fact, recognizing it as democratic refers to the evaluation of this fact.²⁰

To conclude, I will invoke the well-known *Maastricht* judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court). In this decision concerning the compatibility of the Maastricht Treaty of 1993 with the German *Grundgesetz* (Basic Law), the Court referring to the issue of realizing democracy on the supranational level, stated that the EU Treaty considers nations from the ethnic and national perspective or cultural and ethnic perspective.²¹ (Incidentally, the

¹⁷ KLAUS BACHMANN, KONWENT O PRZYSZŁOŚCI EUROPY. DEMOKRACJA DELIBERATYWNA JAKO METODA LEGITYMIZACJI WŁADZY W WIELOPLASZCZYNOWYM SYSTEMIE POLITYCZNYM 51 (2004).

¹⁸ *Id.* at 52.

¹⁹ ANDRZEJ REDELBACH, SŁAWOMIRA WRONKOWSKA & ZENON ZIEMBIŃSKI, ZARYS TEORII PAŃSTWA I PRAWA 56 (2003); N. BIBLIO, THE FUTURE OF DEMOCRACY 42 (1987).

²⁰ ANDRZEJ WASILKOWSKI, SUWERENNOŚĆ W PRAWIE MIĘDZYNARODOWYM I W PRAWIE EUROPEJSKIM (2003).

²¹ BVerfGE 89, 155 (F.R.G) (the judgment known as *Maastricht – Urteil*).

Constitutional Treaty takes this viewpoint, as well.) The Court explained that this is why the creation of any form of European statehood is impossible without the existence of one European nation, having a common heritage, language, culture and ethnic history. Such a view leads to the conclusion that on the *pan-European* level the full implementation of democratic principles, common to the member states, is not possible at least as long as the Union remains merely an international organization.