Book Review – Charlotte Gaitanides / Stefan Kadelbach / Cil Carlos Rodriguez Iglesias (Eds.) *Europa und seine Verfassung (Europe and its Constitution) Festschrift für Manfred Zuleeg* (2005)

By Daniel Saam[*]

A. Introduction

After the Second World War (WW II), the widely destroyed European Continent stood entirely still. When the dust had thoroughly cleared up and the dimension of the human destruction became visible, nobody, especially not from a German point of view, would have expected, anticipated or not even dreamed of Europe's up-coming common development heading towards the creation of "an ever closing Union" (Art. 1 (2) EU).

In order to be able to assess what today's achieved European integration and, now, the draft Constitution represent about sixty years after the war, one – in particular from a legal perspective – would be better off reminding her- or himself about where this eventual Europe of today started from.[1] The peoples of Europe were entirely exhausted by what would later be called the *climate of new nationalism*. Hence, they longed for a new model of supranational cooperation, which would be able to found an era of peace and prevention from war. It was mainly due to the deep societal hollow between the European peoples that the first step was taken by pooling the countries markets for coal and steel in order to prevent another arms race initiated by Germany.

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[1] HALTERN, EUROPARECHT.DOGMATIK IM KONTEXT (2005), 7–8: Haltern rightly points out that the legal perspective cannot be reduced to focus merely on doctrine; it is as important to see the European Integration in its contexts, especially its history.

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Once again: one constantly must keep in mind that the eventual European project– that besides other factors was started by Churchill's famous speech at the University of Zurich on September 19, 1946 - had a political goal, namely to prevent the nation states and their peoples, who had been rivals for a very long time, from destroying each other through international conflicts and wars. The power of industrialization, of course, strengthened the disastrous cruelty of wars[2] and made the possibility that this fear would come true much more likely.

Seeing the importance of Europe's common awakening against the background of a war that had probably caused more than 50 million casualties, Churchill's call for a "*blessed act of oblivion*" and the demand to build a "*United Nations of Europe*" had a very special and significant meaning. This is emphasized by the fact that the speech was held little more than just one year after the WW II had ended.

Since then, what we roughly use to call the European integration has emerged more and more by establishing the three Communities – the European Coal and Steel Community (*ECSC)*, European Atomic Energy Community *(EURATOM)* and European Economic Community *(EEC – later renamed – EC)* – and, due to the Treaty of Maastricht of 1992 which eventually came into force in November 1993, the European Union *(EU)*. In order not to underestimate the importance of the main treaty amendments for the European development, the Single European Act (1986), the Treaty of Amsterdam (1999) and the Treaty of Nice (2000) need to be mentioned. Besides other legal alterations, nearly every one of those treaty provisions had been altered to deal with upcoming topics of the politics in Europe: the strengthening of the role of the democratically elected European Parliament, the allocation of the competences between the Communities and the Member States and the enhancement of a majority-voting requirement of the Council in areas that had required unanimity before.

Of course, the history of the European integration has not been proceeding without any severe setbacks that might have even weakened the progress to establish a "*common European conscious*".[3] To underline this statement, merely the rejection of the European Political Community (1954) by the French National Assembly, France's empty chair policy (early 1960s) and the first rejection of the Treaty of Maastricht (1992) by the Danish people need to be highlighted.

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[2] Loth, *Nationale Interessen, Supranationalität und europäische Identität in historischer Perspektive in* FS MANFRED ZULEEG, 61.

[3] Loth, *supra* note 2, at 66.

In 2003, the Constitutional Convention on the Future of Europe – which the Member States had installed after the EU Council of Laeken in 2001 – drafted a Constitution Treaty for the EU. During the following two years, the Member States of the EU considered, negotiated and undertook certain amendments and alterations to the draft. Finally, on October 29, 2004 the Treaty was signed by the governments of the then 25 Member States. However, as it needed to be confirmed according to the procedures, as stated in the constitutions of the Member States, it did not came into force promptly.

B. A Testimony to European Integration

The above describes the historical context of Europe's integration in which the *Festschrift für Manfred Zuleeg – Europa und seine Verfassung (Europe and its Constitution)* was issued in March 2005. The developments that followed, in particular the rejection of the draft Constitution Treaty by the people of France and (although not legally but politically binding[4]) the people of the Netherlands in May 2005, are well-known and since then provided broad incentives for numerous discussions all around the common European place, whose very existence is either strongly questioned[5] or claimed to be real[6].

The *Festschrift*, which is the subject of this review, was issued to honour the 70th birthday of Professor Zuleeg. Zuleeg has been passionately and intensively following and accompanying the European integration since the late 1960s[7]. In his professional career he became Professor for public and European law at the Universities of Bonn and, later on, Frankfurt am Main. After having represented Germany in several proceedings before the European Court of Justice [ECJ], he became judge to the ECJ in 1988. During the following six consecutive years, until 1994, he authored some famous and path breaking decisions, which invented legal directives that are still applicable today[8], for instance the principle of harmonious interpretation of

[4] The referendum was not required by the Dutch Constitution. But the Dutch parties declared in advance to follow the people's decision, although they would legally be able to decide differently.

[5] Bryde, *Demokratisches Europa und Europäische Demokratie in* FS MANFRED ZULEEG, 141.

[6] Loth, *supra* note 2, at 60.

[7] MANFRED ZULEEG, DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN IM INNERSTAATLICHEN BEREICH, 1969; *ibid.*, *Die Auslegung des Europäischen Gemeinschaftsrechts,* EuR 1969, 97.

[8] For an initial overview *see*: v. Bogdandy, *Manfred Zuleeg zum 70.Geburtstag,* NEUE JURISTISCHE WOCHENSCHRIFT 2005, 808.

domestic law in the "lights of directives".[9] Hence, it seems perfectly natural that the only appropriate way to honour Professor Zuleeg's birthday and his work so far would be to dedicate a *Festschrift* about "Europe and its Constitution" to him.

The contributions to the *Festschrift* comprise a nearly comprehensive overview of legal events that have been and still are relevant in EU law today. The *Festschrift* is divided into five sections that contain 43 pieces which deal with the Basics (p. 15 – 130), the Institutions (p. 131 – 218), the relationship between the Union and its Member States (p. 219 – 308), the Basic and Human Rights (p. 309 – 396) and last but not least the Common Market and the public interest (p. 397 – 682).

The book's title *Europa und seine Verfassung*, nevertheless, might inevitably lead to the reader's initial assumption that the book merely deals with the Constitutional Treaty or at least with either ongoing or classic matters of EU law seen against the background of the newly drafted Constitution Treaty. However, the "contributions offer a manifold, fundamental and controversial perspective on Europe and, besides, on its Constitution".[10] This is actually not surprising at all as this *Festschrift* is supposed to honour Professor Zuleeg whose very own notion is that the existence of a European Constitution already has come to reality long before the Constitution Treaty had even been subject to political discussions.[11] This opinion of Professor Zuleeg is accurately cited in the editor's preface (p. 7) and supported by *Kadelbach*[12] who is one of the editors of the *Festschrift*.

C. A Celebration of Life and Work

Before a review of the substantial content of the *Festschrift* becomes possible, one has to consider whether it is reasonable at all to review an entire *Festschrift* consisting of various independent contributions. Even though these contributions are pooled under the main topic *Europa- und seine Verfassung*, as mentioned above, the scope of the topics dealt with is enormous. This evident as well as inevitable perception leads to a major problem, one that anyone who wants to review a Festschrift has to deal with. Even though, because of the contributions' quality, it might

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[9] ECJ, case 14/83, *von Colson and Kamann,* [1984], ECR I-1891.

[10] Kadelbach/Rodriguez Iglesias/Gaitanides (EDS.), *PREFACE IN* FS MANFRED ZULEEG (2005), 7-8.

[11] Manfred Zuleeg, *Comment to Prof. Dr. Dr. Di Fabio's Speech "A European Consitutional Treaty: The Blueprint for the European Union* in: 2 GERMAN LAW JOURNAL No. 14 (2001), section [2].

[12] Kadelbach, *Vorrang und Verfassung: Das Recht der Europäischen Union im innerstaatlichen Bereich in* FS MANFRED ZULEEG, 221.

be worthwhile, it is, in turn, quite obvious that such a review cannot deal with all the contributions in particular. Otherwise the review would either grow to the same extent as the reviewed book and would miss its own aim or it would not be able to see beneath the surface of probably highly interesting pieces.

Hence, this review will try to discuss the Festschrift against some of the topics that are currently regarded as very important for the European integration. Some of these topics have been put on the agenda of the German government, which will overtake the Council's presidency in the first half of 2007. This agenda will primarily gather its political efforts to undertake another attempt to enact the Constitution Treaty.

D. The Challenges of the European Constitutional Treaty

The search for today's relevant topics of the EU and legal discussions about them inevitably lead to the question why the Draft Constitution was rejected by the people of France and the Netherlands.

Highly remarkable, at this initial point of the review, is that just one article of the entire *Festschrift* contains particular doubts that the Treaty could not be enacted by every Member State.[13] That the rejections happened in two of the Union's founder states weighs even heavier and caused an initial shock.

Perhaps these rejections expressed one of the major differences in the peoples' minds on the one hand and those of European and domestic politicians and some legal scholars, who blindly believe in the force of law as ground of Europe's unification, on the other. The politicians apparently seem to have forgotten (one might name that a 'great act of historical oblivion', again) that the EU is not a mere technocratic entity to build and preserve a common market but at primarily a political union whose strongest vehicle, of course, was and still is the economic method. This so-called *Monnet-method*[14] might have led to a total *Entpolitisierung* (depoliticization) of the Union that – as we will see later – does not resemble the reality of the Union. At this point, to give an initial hint, one should compare Art. 2 and 3 EEC-Treaty (1957) with either Art. 17 and 18 EU-Treaty or the, however still inva-

[13] Gatianides, *Die Verfassung für Europa und das Europäische System der Zentralbanken in* FS MANFRED ZULEEG, 550.

[14] HALTERN,*supra* note 1, at 36.

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lid, European Charter of Fundamental Rights.[15] It then becomes obvious that the method never was and is still not a mere economic union.

Seen against this background, nobody would have wondered about the sudden stop of Europe's constitutional development and why it has taken quite some time to rebuild a common will to start again.

Despite some voices that believe the rejections were due to domestic inconveniences there are many complaints in the public spheres of the Member States that perhaps built the rejections' grounds, e.g. that the people cannot keep up with the (legal) integration. This is what the History Professor Loth marks with his conclusion, that the frontiers or frontiers of communication, that *einseitig von oben nach unten verläuft* (runs from the top to the bottom in one direction) become visible.[16] The domestic political elites try to progress the development of a supranational EU without considering the nationals sentiments.[17] This is the very contrary of two notions stated at the integration's very beginning:

Firstly, the above-mentioned *Monnet-method* was the prevailing method to start European integration out of consideration for the peoples' *sozialpsychologische Befindlichkeiten* (social-psychological sentiments).[18] Otherwise, the European progress never would have happened in the known way, as the rejection of the European Defence Community and the European Political Community in 1954 by the French National Assembly witnessed.[19]

Secondly, *Denis de Rougemont's* initially imagined Europe as a *Graswurzel-Demokratie* (grass-roots-democracy), which should have been built bottom-up and not the other way around.[20]

A top-down-integration might have worked while it was focusing or even restricting on economic matters and policies, though these acts were taken in order to reach a political goal, namely peace and prosperity in the Communities. But the EU

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[15] HALTERN, *supra* note 1, at 37 and 38.

[16] Loth, *supra* note 2, at 68.

[17] *Id.* at 70.

[18] HALTERN, *supra* note 1, at 35.

[19] STREINZ, EUROPARECHT (6TH ED., *2003)*, at 9.

[20] *See* HALTERN, *supra* note 1, at 30.

has not stuck merely in economic terms and aims. This change in policies became strongly visible in certain developments (initiated by the re-politicization through the Maastricht-Treaty) that are dealt with in the *Festschrift*: e.g. the ECJ jurisdiction regarding European Citizenship (acc. Art. 17 EC) – which is subject to the piece by *v.Bogdandy/Bitter*[21]; or the Court's decisions about the *Grundfreiheiten* (general freedoms) that affected the Member States' sovereignty to decide whether or not and in what capacity taxes should be raised.[22]

In turn, the jurisdiction concerning the equality of women and men[23] shows that these developments do not (yet) necessarily affect every area of common law – *König* deals with a similar topic, the prohibition to discriminate elder people.[24]

The *Festschrift* offers various articles and arguments in relation to recent European developments. In the following, some of the public attitudes that have caused broader and deeper inconveniences with Europe and its development should be discussed with reference to appropriate pieces of the *Festschrift*. The topics will be the ECJ as motor of integration and its functionality (I.), the development from an economic to a broader community (II.) and the complaints regarding an alleged democratic deficit within Europe's institutions (III.). The end of the review marks the discussion about the difficult determination of EU's frontiers (IV.).

I. Functionality of the ECJ as Motor of Integration

All these above described developments of the Union that have been initiated and formed by the *Motor of Integration*.

The ECJ is titled in that way since its famous sentences in the cases *vanGend en Loos*[25] and *Costa v E.N.E.L.*[26] The well known and since then essential principles of

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[21] v.Bogdandy/Bitter, *Unionsbürgerschaft und Diskriminierungsverbot. Zur wechselseitigen Beschleunigung der Schwungräder unionaler Grundrechtsjudikatur in* FS MANFRED ZULEEG, 309-322.

[22] Wieland, *Der Europäische Gerichtshof als Steuergesetzgeber? in* FS MANFRED ZULEEG, 492-504.

[23] *See* Sachsofsky, *Die Gleichberechtigung von Mann und Frau – besser aufgehoben beim Europäischen Gerichtshof oder beim Bundesverfassungsgericht? in* FS MANFRED ZULEEG, p. 323-340.

[24] König, *Das Verbot der Altersdiskriminierung – ein Diskriminierungsverbot zweiter Klasse? in* FS MANFRED ZULEEG, 341-361.

[25] ECJ, case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen,* [1963], ECR 1.

[26] ECJ, case 6/64, *Costa v. E.N.E.L.*, [1964], ECR 585.

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the Communities have been that the Treaties creation of *a* new legal order that prevails (only in terms of application not validity) contrary domestic laws and their establishment of not only mutual obligations between the Member States also refers to their nationals.

Kadelbach contributes a piece about the precedence of EU-law[27] and immediately points to the highly problematic relation between the ECJ and the German *Bundesverfassungsgericht* (Federal Constitutional Court)[28], whereas the latter still reserves itself the power to proof whether the ECJ acts within the competences transferred to the EU. *Kadelbach* identifies the purpose of this problem in the different view of the participants on the relationship of the EU and domestic legal orders.[29] The EU-law should see the relationship as a partnership not – like the Member States – as a competition.

This recent notion leads to a highly important topic, namely the preservation of the ECJ's functionality:

An initial step to a more complementary relationship between domestic courts, the ECJ and the Court of First Instance can perhaps be made through the establishment of the so-called "green light" system. The preliminary reference procedure is very important to ensure the uniform application and interpretation of Community law throughout the Union.[30] The latter is, however, vulnerable to delays. And these are increasingly caused by several reasons, e.g. the number of procedures, the size and sophistication of the ECJ. The "green light" system, therefore, is the idea to "to preserve the efficient operation of the preliminary reference procedure"[31] and aims to implement the following procedure: The domestic court that holds itself responsible to start a preliminary procedure (Art. 234 EC) has to provide its own draft of a decision. If the ECJ does not reject that by writing its own decision, the domestic court can act according to its own proposal. The author believes there are many advantages to this system.[32] Nevertheless, it is highly questionable whether it would reduce the ECJ's work and, thus, reduce judicial delays.

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[27] Kadelbach, *supra* note 12, at 219-233.

[28] *Id.* at 220.

[29] *Id.* at 221.

[30] Jacobs, *Further reform of the preliminary ruling procedure – towards a green light system? in* FS MANFRED ZULEEG, 204.

[31] *Id.* at 205.

[32] *Id.* at 214.

Back to *Kadelbach*: the fact that the Member States see the relation in a competitive way, in turn, is owed to a more abstract notion or theory prevailing in the domestic notions about how the EU should be shaped: the so-called *völkerrechtliche Theorie* (international law theory). The author then challenges that notion by placing it within the context of Art. I-6 of the draft Constitutional Treaty (whose only aim was to lay down the ECJ's jurisdiction and, thus, has no further content[33]) and by emphasising structural reservations of the Member States' Constitutions[34]. Inevitably, he comes to the conclusion that to overcome the *völkerrechtliche Theorie* autonomy of the EU the rule of law needs to be achieved, which is only possible when ascribed by the domestic constitutions. This will not happen through the Constitutional Treaty, because it does not replace the Member States as *Masters of the Treaties*[35].[36] But the most important question is not resolved: how can this happen at all?

II. From a mere economic to a broader concerned Union

Another significant aspect is the development from a mere economic undertaking to a much broader entity. The economical goal of the Communities was first and figuratively reached by the establishment of the Common Market in 1992.

But the European Union is more than that, which, at least becomes visible by one brief glance at the 3-pillar model. One might wrongly but reasonably claim that the Communities (first pillar) deal with mere economical entities. But even though this would be right, the Union (acc. Art. 1 (3) EU-Treaty) as well builds the umbrella for the Common Foreign and Security Policy (second pillar) and the Cooperation in Justice and Home Affairs (third pillar). These two policies have evidently more than just an economic purpose.

One major mark of this development is represented by the ECJ's jurisdiction regarding the Union Citizenship's. The later renumbered provisions that deal with the Citizenship are Art. 17 – 22 EC and were established by the Maastricht-Treaty. *v.Bogdandy/Bitter* describe the Court's decisions that increasingly linked Art. 17, 18 EC with the *Diskriminierungsverbot* as stated in Art. 12 EC.[37] The latter prohibits any

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[33] Kadelbach, *supra* note 12, at 225-228.

[34] *Id.* at 228-231.

[35] BVerfGE 89, 155 – *Maastricht.*

[36] Kadelbach, *supra* note 12, at 232-233.

[37] v.Bogdandy/Bitter, *supra* note 21, at 311.

discrimination by nationality within the *Anwendungsbereich* (scope of application) of the Treaty.

Because of that, Art. 12 EC is always applicable when a national of one Member State lives in another and wants to receive a public benefit from the latter, whose provisions usually grant these benefits only to their own citizens.[38] Those domestic laws do not comply with the EU-law and are not applicable in such cases. The judges dealt with this issue first in 1998[39] and subsequently in 2001[40]. *v.Bogdandy/Bitter* highlight what they call *eigentümliches Wechselverhältnis* (distinct reciprocal relationship) between Art. 12 and Art. 17, 18 EC: because Art. 17 (2) EC grants the rights that are provided by this treaty, i.e. also the rights derived from Art. 12 EC. Art. 12 EC, in turn, presupposes that the relevant measure falls into the treaty's scope again. Freedom of movement (guaranteed by Art. 18 EC and part of the Citizenship itself) falls within the scope of Art. 12 EC and, thus, causes its application.[41] Art. 12 EC, then, even applies to *Inländer* (nationals) because they have exercised their rights to freedom of movement in a negative sense, by deciding not to move.

Hence, the use of one of the economic freedoms is not necessary any more. The citizenship is therefore described *als Schwungrad zur unionalen Sozialgemeinschaft* (spinning wheel towards a social community).[42] By linking Art. 12 and 18 EC, broad spheres of national laws (such as Criminal Law and Family Law) will be affected.[43] The scholars predict that there will not be many fields of domestic law that are not subject to Art. 12 EC. Thus, a presumption that the shelter of rights of Art. 12 EC is applicable should be valid.[44] The authors suppose that this jurisdiction linked with the protection of Basic Rights by the ECJ would deliver more convincing decisions. Basic Rights can then be derived from the person itself and not from the exertion of an economic freedom.[45] On the one hand, this makes the argument for a closer Union more than just reasonable. But, on the other hand, this does not answer the

[38] *Id.* at 311.

[39] ECJ, case 85/96, *Martinez Sala*, [1998], ECR I-2691; *see* v.Bogdandy/Bitter, *supra* note 21, at 311-312.

[40] ECJ, case 184/99, *Grzelczyk*, [2002], ICR 566; see v.Bogdandy/Bitter, *supra* note 21, at 312-315.

[41] v.Bogdandy/Bitter, *supra* note 21, at 312-313.

[42] *Id.* at 314.

[43] *Id.* at 316.

[44] *Id.* at 317.

[45] *Id.* at 320.

question of whether the ECJ itself is convinced by its own jurisdiction that was expressed by the Court's decision in the *Baldinger*-case.[46] The ECJ thereby stopped the wide interpretation of Art. 12's scope as a reaction to many critiques, that were voiced from within the Member States.

In fact, and as many authors observe, there is no convincing starting point at all in the EC-treaty for the Court's jurisdiction.[47] However, the authors do not point out where this should come or be derived from. This might have been a really interesting question and perhaps, have led the authors to the necessity to reveal their views on Europe. This is the strong will to develop a Union in which every national has the same social rights everywhere: Europe as an (at least factual) Federal State. While reading this interesting piece, one could get the feeling that the authors want to compel the European peoples to their fortune and do not want to be stopped by the provisions of the Treaties and their possible interpretation, which needs to recognize the Member States' and the peoples' opinions. Another question is whether or not to impose a social Union from the top (the Institutions, particularly the ECJ) to the bottom (the peoples) could be a worthwhile one. The question whether this wish needs certain achievements to be accomplished and what these are remains open.

That this development, nevertheless, has not yet been undertaken in every field of European law is shown by *Sacksofsky*[48] as well as some other pieces. *Sacksofsky* questions whether one would be better off arguing for equality before the ECJ or before the *Bundesverfassungsgericht*. She argues that both have contributed much to accelerate the development of gender equality.[49] At the beginning of her piece she outlines the main decisions of the two courts by setting those against three fields: the general scope of the provisions guarding equality[50] and the direct[51] as well as indirect discriminations[52]. One difference that was relevant for filing the piece in this section of the review already becomes clear while the author unfolds the general scope: in the Community-Treaties the equality-rights are merely linked to labour

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[46] *Id.* at 314-315.

[47] *Id.* at 321.

[48] Sacksofsky, *supra* note 23.

[49] *Id.* at 340.

[50] *Id.* at 324.

[51] *Id.* at 329.

[52] *Id.* at 334.

and matters concerning social security, e.g. Art. 141 EC-Treaty. Although the treaty comprises a *Querschnittsklausel* (cross-section clause) in Art. 3 (2) EC, the jurisdiction of the ECJ is limited to those matters.[53] Thus, the equality rights and the ECJ's jurisdiction have not yet been subject to changes from economic to other concerns. That is why the author concludes by ascertaining that the merit of ECJ's jurisdiction lies in decisions concerning labour law.[54] In turn, jurisdiction concerning areas such as equality in family law are limited to the *Bundesverfassungsgericht* (Federal Constitutional Court).[55]

The EU's development from strict economic matters to other ones can be perceived by the pieces that emphasize the EU policies regarding matters of environmental law – such as *Rodríguez Iglesias/Riechenberg*[56] – who describe the ECJ's role concerning protection of the environment, *Epiney*[57] – who deals with the question whether the common environmental principles bind the Member States – and *Rehbinder*[58] who covers the union's duties derived from the so-called Aarhus-Convention.[59] *Bothe*[60] describes the role of the Union within international environmental treaties.

III. The Democratic Deficit

The third topic that is highly relevant in today's discussions concerning the EU is the question whether the EU, its institutions and its decisions suffer from a Democratic Deficit. On the one hand, this is subject to various complaints by the people of the Member States when (by every treaty amendment and by the Constitutional Treaty too) further powers should be transferred to the Union. On the other hand,

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[53] *Id.* at 326.

[54] *Id.* at 340.

[55] *Id.* at 326.

[56] Rodriguez Iglesias/Riechenberg, *Der Beitrag des Europäischen Gerichtshofs zum Schutz der Umwelt in* FS MANFRED ZULEEG, 624-632.

[57] Epiney, *Zur Bindungswirkung der gemeinschaftsrechtlichen „Umweltprinzipien" für die Mitgliedstaaten in* FS MANFRED ZULEEG, 633-649.

[58] Rehbinder, *Rechtsschutz gegen Handlungen und Unterlassungen der Organe und Einrichtungen der Europäischen Gemeinschaft im Lichte der Aarhus-Konvention in* FS MANFRED ZULEEG, 650-667.

[59] The Aarhus-Convention is the first international law treaty that grants certain rights concerning the environment to single persons. It is named after the city of Aarhus (Denmark), where it was signed in 1998.

[60] Bothe, *Die EU in internationalen Umweltabkommen in* FS MANFRED ZULEEG, 668-682.

this topic marks the source of many legal discourses, e.g. the question of whether Europe needs to create a common public sphere first before being able to create more institutional democratic elements. This motivates legal scholars to clamor for a strengthened role of the European Parliament. Whether this mere demand would heal the alleged deficit is more than just contested, as will be shown later. The democracy question on EU's level leads to an initial question of whether a democracy can only be properly founded upon any kind of previous existing prerequisites and how those must look like.

The contributions of *Bryde*[61], *Hermes*[62], *Pernice*[63], *Loth*[64] and *Häberle*[65] are to varying degrees concerned with this topic.

In particular, *Bryde's* contribution *Demokratisches Europa und Europäische Demokratie* (Democratic Europe and European Democracy) deals precisely with the questions of whether there is a democratic deficit in the Union at all and whether or not it is reasonable to use the term democracy in the very same sense as in domestic discussions.

In the first part of the piece, *Bryde* challenges the arguments of those scholars who try to identify a democratic deficit on the European level by using the democratic term(s) derived from national discussions and democratic theories. This, in particular, is cited as a very strong argument especially in the German legal scholars' minds. Therefore, *Bryde* notes that the thesis of incompetence of democracy in Europe is heavily ethnocentrically premised.[66] The perception that the starting point of the Europeans idea of democracy would be shaped by the national opinion would contribute to the problem that the prerequisites of the national democracy can not be found past the national state; therefore a transnational democracy could not be realized at all through similar forms and institutions as in the national state. *Bryde* calls this *Reduktion von Demokratie auf die Herrschaft eines Staatsvolkes* (reduc-

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[61] Bryde, *supra* note 5.

[62] Hermes, *Gemeinschaftsrecht, „neutrale" Entscheidungsträger und Demokratieprinzip in* FS MANFRED ZULEEG, 410-428.

[63] Pernice, *Diskontinuität und Europäisches Recht. Legitimitätsprobleme im Europäischen Verfassungsverbund in* FS MANFRED ZULEEG, 145-157.

[64] Loth, *supra* note 2, at 59-71.

[65] Häberle, *Nationales Verfassungsrecht, regionale „Staatenverbünde" und das Völkerrecht als universales Menschheitsrecht: Konvergenzen und Divergenzen in* FS MANFRED ZULEEG, 80-91.

[66] Bryde, *supra* note 5, at 131.

tion of democracy onto the rule by the people of a state)[67], and argues that it would permanently prevent the strengthening of democracy in the EU. As he already did in articles before[68], he again points out that the concept of democracy itself is not reduced to this interpretation.[69] In turn, he focuses on the *Prinzipiencharakter der Demokratie* (principle character of democracy), which merely contained the precept to preserve the highest level of self-determination of the governed which is possible.[70] He then explains that the next major point of critique, the alleged abuse of the principle "one man, one vote" by the way of allocation of the seats in the European Parliament, fails. If carefully analyzed, this principle did not apply in any federal state.[71] Due to that, the allocation of Members of the Parliament between the Member States should not per se be anti-democratic at all.[72] Unfortunately the argument that leads to that conclusion remains unclear because a general reference to other possible democratic forms does not back it up.

A third main critique is identified as *Unvollkommene Parlamentisierung* (imperfect parliamentarization), which comes from the comparison of the powers and functions of the European Parliament with domestic parliaments. *Bryde* even doubts the correctness of the analysis that leads to this opinion. He thinks that, especially due to the *Meinungsbildung ohne Fraktionszwang* (opinion-making without compulsion by the congressional party), the European Parliament is even more applicable to what *Bryde* calls nostalgic theories of democracy as the regular domestic parliamentary system.[73] He comes back to this analysis when accusing the European media of failing to deliver sufficient information, which the European institutions, especially the European Parliament, should do.[74] Regardless, a domestic parliament should not even have a real possibility to control the government, because the latter is elected by the parliament's majority. This is as doubtful as the notion that the most

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[67] *Id.* at 132.

[68] *See e.g.* Bryde, *Die bundesrepublikanische Volksdemokratie als Irrweg der Demokratietheorie* StWStPr 305 (1994).

[69] Bryde, *supra* note 5, at 132-133.

[70] *Id.* at 133.

[71] *Id.* at 133.

[72] *Id.* at 134.

[73] *Id.* at 135.

[74] *Id.* at 142.

important fact is that the Parliament showed its real but only theoretical strength by preventing the so-called Santer- and first Barroso-Commission.[75]

Bryde then points to one of the perhaps major questions of the European integration today: Is a further parliamentary development of the Union *de constitutione ferenda* progressive, in particular in light of the highly diversified political systems?[76] Unfortunately, *Bryde's* own conception appears to be too close to one of a *Volksdemokratie* (people-democracy).[77] Because he assumes that a homogenous people is an inevitable premise of a parliamentary democracy and that in a trans- and multinational political system the purity of the democratic theory cannot be maintained.[78] The only reasonable form of democracy on the European level should be developed by orientation to the transnational *Konkordanzdemokratie* (concordance democracy), not on domestic parliamentary systems. In the following, *Bryde* discusses various institutional problems and derived necessary changes that need to take place within the EU and its institutional systems in order to enable a more democratic Union, e.g. the relevance of the subsidiary clause, a better parliamentary control of the Council and the (still missing) parliament's right to start a legislative procedure.[79] *Bryde* then demands that the people should be involved in political decisions on the smallest possible level, because this leads to the best *Betroffeneninklusion* (inclusion of the affected).

Hermes affirms *Bryde's* first (the second part of his piece will be discussed later) notion of a democratic theory, but by approaching from a very different starting point. He namely outlines the necessity to find independent authorities to regulate the use of privatized networks, such as the rail network.[80] The EU legislation enables the Member States to keep the decision-monopoly on the network.[81] In that case, the state would be entitled to grant or to deny access to the network to private companies. The state, of course, might be at least the dominant shareholder of one of the competing (private) companies. In order to secure a non-discriminatory decision-making process, independent agencies should be established that are able to decide instead of and surely without restrictions by the states (authorities).

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[75] *Id.* at 135.

[76] *Id.* at 136.

[77] *Id.* at 132.

[78] *Id.* at 136.

[79] *Id.* at 137-139.

[80] Hermes, *supra* note 62, at 410-416.

[81] *Id.* at 412.

The question which inevitably arises is whether these agencies can be introduced in accordance with the democracy principle.[82] *Hermes* then discusses alternate input-orientated democratic concepts as well as output-orientated concepts.[83] He affirms *Bryde's* notion and generally denies the theoretical correctness of the *volksdemokratische* conception. He thinks the only realistic notion on democratic legitimacy is to link traditional input- and new output-theories. The latter are accompanied by the entitlement of so-called experts to make decisions. Thereby the self-determined single person, besides the people as a whole, becomes more and more subject to democracy.[84] The German *Bundesverfassungsgericht* should already have paved the legal way to change the formerly prevailing democratic perception by opening the principle to new concepts. However, this change needs general approval by the sovereign people[85], because the line between decentralized democracy and undemocratic corporatism cannot be drawn with a ruler but with the people's power to decide within traditional (representative) democratic procedures.[86]

Due to this, it becomes questionable whether this is a real change of democratic concepts or just a mere shifting of old problems onto a different level? Can the latter itself already cause severe changes? The only difference would probably arise from the following: the peoples' (traditional) democratic decision should be a general one concerning a certain common area. This field, in case of approval, should then be opened to output-concepts in general as well. But the problem of where to draw the line is not resolved at all. The democratic power traditionally seems to remain in the people's hands.

The fact that both authors fall back onto the input-orientated dogmatic can hardly surprise. It is more than tempting to argue from the starting point of a certain theory while deducing a concrete concept from the democracy principle. The input-orientated dogmatic, though, is owed to a democratic theory which, in turn, is owed to certain (especially) historical developments. In order to overcome a certain dogmatic it would be necessary to challenge the theory that lies behind. What lies behind output-dogmatism?

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[82] *Id.* at 418.

[83] *Id.* at 419-422.

[84] *Id.* at 425.

[85] *Id.* at 423.

[86] *Id.* at 426.

In the end the functionality and thus the merits of the proposed output-orientated concept remain highly questionable.

Back to *Bryde's* piece: In its second part, *Bryde* states that the real problem of the European democratic progress lies in the missing engagement of the European citizens, who, as he says, cannot be compelled to be interested in Europe.[87] The latter should be quite evident (and probably is).

At first, he ascertains that the people are not serious about the European elections and that the parties merely consider these as test for national political public opinions. Therefore, nobody tries to emphasize the importance of European elections for e.g. environmental and consumer protection matters, which have been pursued mainly by the Parliament.

The second major democratic problem was identified as the failure of the European media, especially to establish a common European public.[88] *Loth*, in turn, did already recognize the existence of a common public.[89] While *Bryde* is discussing the inevitable relationship of democracy and media, *he* comes to the problematic conclusion that the media driven developments which are bound to endanger democracy on the domestic level are impossible in the Union as a whole.[90] Where this conviction comes from remains not clear.

In the last paragraph, *Bryde* tries to convince his readers that the *Kampf um die Europäische Verfassung* (fight for the European Constitution)[91] should be taken as a chance to progress. In his opinion, the EU should not stay merely an economic entity but should be considered as what he means the EU is. In particular he means the *Überwindung des Nationalismus* (overcoming of nationalism); the demons of the latter should only be sleeping. This quote cannot be overestimated.

Although *Bryde* speaks of the finality of Europe and that the EU should not be a mere supranational substitute of nationalism[92], it remains fairly unclear what, in his

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[87] Bryde, *supra* note 5, at 140-141.

[88] *Id.* at 141.

[89] Loth, *supra* note 2, at 59-60.

[90] Bryde, *supra* note 5, at 143.

[91] *Id.* at 144.

[92] *Id.*

opinion, should be the final aim of European integration and whether this is realistically achievable at all.

Pernice deals with another democratic problem that evolves from the divergence of European and domestic legal order within the legislative process of secondary European law, namely directives (Art. 249 (3) EC). The problem can be described as a time-problem: A government of today can bind the (perhaps different-thinking) government of tomorrow by giving its approval to a directive that needs to be transferred into domestic law in the following legislature-period.[93] There would only be a formal legitimacy. This result is owed to the absence of a so-called *Grundsatz der Diskontinuität* (principle of discontinuity).[94] *Pernice* again, as well as *Bryde* and *Hermes*, refers to the self-determination of the individual as the core of democratic legitimacy.[95] Once again, one must ask themselves, where does this notion come from? The legitimacy that a directive (which was imposed under contribution of the old parliament) needs to be transferred by the new parliament should be derived from the will of the European citizens. He thinks that greater transparency of political processes on the European level could contribute to the strengthening of the directives' legitimacy.[96]

This notion, at least for the time being, is strongly challenged by the legal scholars who do not presuppose the very existence of a (then necessary) common European public.

IV. Frontiers of the EU

The last (but not least) topic taken from today's discussions concerning the EU is marked by the question where the frontiers of the Union should be drawn.

Some of the *Festschrift's* pieces try to determine the frontiers of the European Union. The scholars therefore use geographical, economical and political arguments and try to describe the outline of the Union by external as well as internal reasons.

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[93] Pernice, *supra* note 63, at 153.

[94] *Id.* at 146.

[95] *Id.* at 155.

[96] *Id.* at 156-157.

For instance, *Oppermann* discusses the eventual "*Grenzen der Europäischen Union" (frontiers of the EU)*.[97] He asks whether the external criteria to determine these frontiers are perhaps the so-called *Kopenhagener Beitrittskriterien* (*joining-criteria* established at the Copenhagen summit on June 22, 1993), geographical or economic reasons or the need to respect common values.[98] The latter is supported by *Loth* who concludes that the European peoples should focus on their common values, namely the principle of representative democracy, the rule of law, social justice, Human Rights and the goal of a prospering economy.[99] In *Oppermann's* opinion, very significant and important in order to determine the union's frontiers is the internal criterion of the *Aufnahmefähigkeit der Union* (Union's capacity to integrate more member states), which internally restricts the enlargement of the Union in order to preserve the *Stoßkraft* (power to push) of European integration.[100] While *Oppermann* tries to reduce the European integration to that what he uncritically calls a common *Gründerphilosophie of the Union* (Union's founding philosophy)[101], it becomes not even partly visible what the author has in mind of how the Union should be shaped. One could only guess.

Later, *Oppermann* asks if this currently fragile and complex *Staatenverbund* (state association) that we call the EU is applicable to any sort of enlargements *ohne ihr Wesen zu verändern* (without changing its nature).[102] But, again, the author does not tell us what in his view constitutes this nature of the EU?

He then hints of dinosaurs that died because of being too big. He states that the Union would even be aware of its (alleged) own *Erosionsprozess* (process of erosion), which inevitably resulted from enlargements. On the other hand, *Oppermann* refers to three other scholars (*Böckenförde*, *Winkler* and *Wehler*) who have allegedly pointed out legal-institutional reasons why Turkey – that he calls the *Schicksalsstaat* (state if fate) for the EU – could not join the EU. Unfortunately the author does not himself deliver an explanation as to which aims the Union should develop. Concerning Turkey, it even seems as though he tries to convince the readers by merely emphasizing that the scholars who affirm the addition of Turkey do not think about it

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[97] Oppermann, *Die Grenzen der Europäischen Union oder das Vierte Kopenhagener Kriterium in* FS MANFRED ZULEEG, 72-79.

[98] *Id.* at 74-76.

[99] Loth, *supra* note 2, at 69-70.

[100] Oppermann, *supra* note 97, at 77.

[101] *Id.* at 73.

[102] *Id.* at 77.

properly or pursue other goals with the European institutions, such as prevention of terrorism in the aftermath of 9/11.[103]

One might perceive that his final concept of the EU resembles something like a federal state. Seen in this context it becomes apparent why the author tries to keep the Union as homogenous as possible (this notion only seems to be contrary to those of *Bryde, Hermes* and *Pernice*). Thus, the common values of European people should deliver the ground. But then it is unfortunate (for the reader) that the author does not deliver more critical information if the aim of the Union's founders was to create any kind of a federal state (which would have led to one of the major topics regarding the integration) or if the Union's aims are only to build a federal state that resembles, for instance, German federalism.

The European integration is in fact not focused on that. It actually comprises – as *Müller-Graf*[104] discusses – criticized by *Oppermann,* a *Raum der Freiheit, der Sicherheit und des Rechts* (Art. 3 Draft Constitution Treaty). This is part of the contribution by *Sieveking*, too.[105] The latter highlights the new power of the EU in Art. 61 – 69 EC and describes the history as well as perspectives of citizenship and aliens. Art. 61 EC enables the Council to impose propositions in order to establish this *Raum* (area).[106]

Therefore the notions that the European integration (towards a federal state) on the one hand and politics to protect Europe from terror, which *Oppermann* confronts[107], on the other do not necessarily contradict each other.

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[103] *Id.* at 78-79.

[104] Müller-Graf, *Der „Raum der Freiheit, der Sicherheit und des Rechts" im neuen Verfassungsvertrag für Europa-Neuerungen und Notwendigkeit seiner Rekonstruktion in* FS MANFRED ZULEEG, 605-623.

[105] Sieveking, *Europäisierung des Ausländerrechts – rechtshistorische, grundrechtlichen und gemeinschaftsrechtliche Tendenzen in* FS MANFRED ZULEEG, 362-384.

[106] *Id.* at 372.

[107] Oppermann, *supra* note 97, at 79.

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E. Conclusions

The *Festschrift* itself does not answer the question of whether or not Europe should already be seen as having a constitution. But after reading its various, interesting pieces, one must conclude (at least challenge contrary notions) that the EU can no longer be seen as a mere top-down common legal system (*Rechtsgemeinschaft*). At least some initial movements on the way to further integration have happened. One, then, might ask three questions:

The first is what it is exactly that creates an ever-closer union. The second might be whether there is or should be a final goal of integration and if so, what should it look like. Third, is the European process likely to be on its way to change itself into (or to stay) a mere intellectual idea of scholars (again), but not a process of the people. Remember: the demons of nationalism are only sleeping.

The book itself gives no single answer. But one notion that is shared by the honoured professor seems to play an enormous role (especially for the third question): the European citizen (*Gemeinschaftsbürger)* is *der eigentliche Träger des europäischen Integrationsverbandes* (actually carries the European integrative federation).[108] *Loth* supports this notion when he states that in the end it will not be the states that create Europe, it will be the human beings.[109] Until this perception is accepted by politicians and scholars throughout all of Europe (again) as well as (and even more important) by the peoples themselves, the open process of European integration will probably stutter more and more. The transformation of the society of individuals into the society of organizations – *Carl Schmitt's* thesis of the end of classical-European states[110] – has to be questioned. On the other hand it is highly contested that a 'Europe of the people' can ever acquiesce to a homogenous policy.

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[108] v.Bogdandy/Bitter, *supra* note 21, at 309.

[109] Loth, *supra* note 2, at 71.

[110] *See* Staff, *Der Nomos Europas. Anmerkungen zu Carl Schmitts Konzept einer Weltpolitik in* FS MANFRED ZULEEG, 39.