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WHAT SHALL BECOME OF THE EUROPEAN UNION?[1]

I. Starting Point

After the Second World War, the future of Europe was a burning question. Although the original verve of setting out has, in the meantime, given way to bureaucratic practice and national state power, the pressing question remains: What shall become of Europe?

The reasons for this question are the following:

- objectives of the European Union and Community include an increasingly close integration – that is a challenge for the national states;
- globalization of the common foreign and security policy calls for powers of decision – a challenge for the ability of politics and policy;
- increasing integration and the expansion[2] of the Union become problems of the structure of union, administration, and decision-making – a challenge for the European constitutional authority.

The foundation of the European Union is generally known to be but "a new stage in the process of creating an ever closer union among the peoples of Europe" – Art. 1 section 2 of the Treaty on European Union. The "integration" of the Union is supposed to be caused by a "process", but the objective of the integration is not yet to be seen. Art. 2 of the Treaty on European Union claims an "identity" of the Union as far as foreign and security policy are concerned, which actually requires an internal identity. But the contours of this identity are blurred, although Art. 3 sec-

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* Na życzenie Autora przypisy zostały zamieszczone w języku niemieckim.

[1] The article was submitted before any approval of the text of the European Constitution.

[2] Cf. Europäische Kommission, Strategiepapier zur Erweiterung. Bericht über die Fortschritte jedes Bewerberlandes auf dem Weg zum Beitritt – KOM (2000) 700, in: Bulletin der Europäischen Union, Beilage 3/2000.

tion 1 of the Treaty on European Union declares a "single institutional framework". No wonder that there is speculation about the "finality of Europe".

Up to now, the European Union is an association of European states under international law, organized as a community of values, justice, and objectives: The closeness of their integration reflects a success story:

- foundation of the European communities,
- establishment of the Common Market and of the economic and monetary union,
- introduction of a "political Union" through the implementation of a common foreign and security policy, defence policy, and justice policy,
- development of the citizenship of the Union as a basis of a "Europe of the citizens" in an "area of freedom, security, and justice".

The common possession, the "acquis communautaire", which these events have produced, is rich and constitutes a major obstacle for the joining candidates. It reflects the existing closeness of the integration, but not its future, because, according to Art. 2 of the Treaty on European Union, the objective of the Union is not only the "full maintenance" but moreover the "development" of this possession. That also includes the extension of the "institutional framework".

Because of the Treaty of Nice[3] and the Declaration of Laeken[4], the "future of Europe" has, in the meantime, been brought on a constitutional way: In Brussels, the "Convent for the future of the European Union" under the presidency of Giscard d'Estaing[5] has continued to meet since February 28, 2002 to draw up a draft of the Constitution of the Union. All eyes are now turned towards the convention of the European Council in the year 2004, when the decision on the basic reform of the Union, which had been postponed in Amsterdam and Nice, is to be made. By that time, a broad public discussion is planned in which the applying states will be included[6].

II. Horizons of Development

Which fields of discussion will be opened to the public until then? To what horizons of development of the Union do we have to adjust?

1. The basis of the Union

The text of the Treaty on European Union does not make final statements about the future of the Union, but at the same time holds on to the fundamental "principles"

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[3] 26.02.2001, ABl. C 80/01, Anhang: Erklärung 23 Ziff. 3 ff. – C 80/85, Bulletin der Europäischen Union 1/2-2001 Ziff. 1.1.1. Zum Stand des Ratifikationsverfahrens vgl. http://europa.eu.int/comm/niee_treaty (Stand: 17.07.2002); in Deutschland haben der Bundestag am 18.10.2001, der Bundesrat am 09.11.2001 zugestimmt und der Bundespräsident am 21.12.2001 unterzeichnet; die Hinterlegung ist am 11.02.2002 erfolgt.

[4] Erklärung des Europäischen Rats vom Dezember 2001: Bulletin der Europäischen Union 12/2001, Ziff. 1.27.

[5] Vgl. zur Zusammensetzung u. Arbeitsweise Bulletin der Europäischen Union 1/2-2002, S. 9, zum Beratungsablauf: Bulletin 12/2001, S. 25: das „Abschlussdokument" des Konventes soll „Ausgangspunkt" für die „Arbeit der künftigen Regierungskonferenz" sein, die „endgültige Beschlüsse" fasst.

[6] Erklärung 23 Ziff. 3 zum Vertrag von Nizza (Vgl. Fn. 2).

on which the Union is founded – Art. 6 of the Treaty on European Union – and the observance of which is required from the Member States: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Those principles define the constitutional homogeneous state of the community of states. The Treaty does not speak of a pre-contractual homogeneous state similar to the one assumed of the German people by the Federal Constitutional Court[7]. The question whether Turkey is lacking the "European" quality not only geographically but also *socio*-culturally, as is now under discussion because of the increased pressure to admittance, can only be answered politically, maybe geo-strategically, but not legally. At the same time, it is an advantage of the Union that it is a politically open community of states dedicated to peace and progress. One could recommend to the Union the "unkempt thoughts" of Stanislaw Jerzy Lec: "Some backgrounds [in the Polish language synonymous to 'reasons'] tolerate no foregrounds".

2. The Question of Structure

Nevertheless – or possibly: thanks to this – the legal nature of the Union is still controversial[8] so that the constitutional process is accompanied by institutional problems of structure.

Whether Europe will finally find the structure of a federal state[9], a state-alliance[10], any kind of federation of "mother countries" following the model of the compromise of Luxembourg of 1966[11] or whether it will continue as a personally-territorially concentrated "constitutional alliance"[12] or only as a legal community *sui generis* consisting of multiple states, does not depend on theories but on the constellations of Europe's forming powers and on the progress of the integration itself, because Art. 1 section 2 of the Treaty on the European Union took back etatistic visions on an open development process, the course of which has essentially produced an independent functional corporation of the Member States.

Art. 281 of the Treaty establishing the European Community therefore attributes to the Community a legal personality of its own while the European Union so far does not have such a qualification. Now the European Parliament as well as the committee speak for the granting (not: the acknowledgement) of a legal personality to the Union[13] so that the Union can come out of the shadow of its Member States and the Communities, and can, even under international law, unfold as the

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[7] BVerfGE 89, S. 155, 186.

[8] Cf. Bieber in: Beutler/Bieber/Pipkorn/Streil, Die Europäische Union, 5. Aufl. 2001, S. 59 f.; zur Entwicklungsgeschichte Oppermann, Europarecht, 2. Aufl. 1999, S. 13 ff.

[9] Hallstein, Der unvollendete Bundesstaat, 1969.

[10] BVerfGE 89, S. 155, 185; von Bodandy, Supranationaler Förderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform, 1999, S. 11 ff.

[11] Vom 28.01.1966, Text in: Europarecht (EuR) 1966, S. 79, auszugsweise in: Beutler/Bieber/Pipkorn/Streil (Fn. 7), S. 162; zu de Gaulles' föderatives „Europa der Vaterländer" vgl. das Zitat von 1960 in: Oppermann (Fn. 7), S. 14.

[12] Von Bogdandy (Fn. 9), S. 13, 29 ff.

[13] „Vergabe" laut Kommission: Bulletin der Europäischen Union 5/2002, S. 7 f.; Entschließung des Europäischen Parlaments vom 14.03.2002, Bulletin der Europäischen Union 3/2002, S. 41 f.

policy maker that it is supposed to become according to the Treaty of Nice[14], without questioning the sovereignty of the Member States by its own sovereignty. According to Community law, the Union and its constitutional system could then precede the Communities.

3. The Constitutional Question

This calls for a qualified answer to the constitutional question which so far has been postponed.

The question refers to the ideas of the modern constitutional state and just therefore gives rise to worries about etatism with the Euro-federalists. The European Court of Justice, however, has not been afraid of calling the foundation treaties of the Union a "constitutional document"[15]. Persons with a background in constitutional history who know the legal nature of the Peace of Westphalia of 1648[16] are not astonished at the fact that transformed treaties have this meaning. In the meantime, the European discussion about the concept of a summarizing constitutional treaty for the Union, that is a codification treaty to which the Member States have to give their approval, has progressed.

In comparison to a state-constitution a Union-constitution cannot naturally provide a codification which covers the political system and the civic society and is complete and compulsory for all because the Union is still in the progress of becoming something and has neither omnipotence nor sovereignty. A constitutional treaty therefore cannot fulfil all constitutional functions required for a state[17].

Because the fundamental decisions for democracy and the rule of law have already been put into place[18], the constitutional convent must now provide them with a shape. As far as legal techniques are concerned, the first thing to do is the simplification of the now relatively intricate community treaties[19]; this simplification could at least lead to a constitutional "system" whose following interpretation will lead to the "finding out of the reasonable"[20] and thus to a systematic unity. The constitutional order goes further. The convent is supposed to establish regulations of competence corresponding to the principle of subsidiarity, to consider the "role of the national parliaments within the architecture of Europe"[21] and to settle the

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[14] Vgl. Erklärungen 1 und 2, Anhang zum Vertrag (Fn. 2).Skeptisch Piris, Hat die Europäische Union eine Verfassung? Braucht sie eine? In: EuR 2000, S. 311, 335ff.

[15] EuGH, Gutachten 1/91 (Europäischer Wirtschaftsraum), Slg. 1991, S. 1-60, 79; zur Entwicklung und Begründung dieser Rechtsprechung vgl. Piris (Fn. 23), EuR 2002, S. 311, 314 ff.

[16] Cf. Grawert, Gesetz, in: Brunner/Conze/Koselleck (Hrsg.), Geschichtliche Grundbegriffe, Bd. 2, 1975, S. 863, 877 ff.

[17] Cf. Grawert, Funktionen der Landesverfassung NRW im gesamtstaatlichen Gefüge der Bundesrepublik Deutschland, in: Verfassungsgerichtsbarkeit in Nordrhein-Westfalen. Festschrift zum 50-jährigen Bestehen des Verfassungsgerichtshofs für das Land Nordrhein-Westfalen, 2002, S. 153, 155 ff.

[18] Zum Begriff der Verfassung als Grundentscheidung vgl. C. Schmitt, Verfassungslehre, 3. Aufl. 1928/1957, S. 23.

[19] Vertrag von Nizza (Fn. 2), Anhang: Erklärung 23 Ziff. 5 (Abl. C 80/85 f.).

[20] Hegel, Grundlinien des Philosophie des Rechts, Vorrede XIX, hrsg. Hoffmeister, 4. Aufl. 1955, S. 14.

[21] Vgl. zur Differenzierung dieses Problems den Fragenkatalog des Präsidiums des Konvents vom 31.05.2002: Europäischer Konvent / Sekretariat, CONV 68/02 (http://register.consilium.eu.int/pdf/de/02/cv00/00068d2.).

status of the Charter of Fundamental Rights of the European Union because this work, which has also been made by a convent, is not yet legally binding[22] but, in the case of its being put into force, it will compete with the fundamental freedoms of community law, with the jurisdiction of the basic human rights of the European Court of Justice and with the European Convention on Human Rights[23]. Moreover, the institutional structure[24] and the decision-making process[25] have to be reformed.

4. The Question of Government

Now comes the question of government. It aims at the efficiency of the "functioning of the institutions", declared desirable in the Preamble of the Treaty on European Union.

Now and in the foreseeable future, this question focuses the question of structure and of constitution because the answer to it will determine the structure of power within Europe and therefore the mechanism of integration. Whether the Member States, and for them their governments For Them, or the "peoples", and their parliaments for them including the political parties, or whether the European common institutions as supra-national institutions will move to the centre of the European relations of power, this decision will be the most important one since Europe's future is determined by procedures and methods, not by visions.

Thus, we have come to the ideas about the Corporate Governance of the Union in the future.

III. Corporate Governance of Europe

Corporate Governance is a business term that denotes, in a general sense, exercising power within a corporation[26]. In this sense, the economic and social committee made the relationship of administration and citizens within the Union a subject as far as legitimization, participation, consultation and subsidiarity are concerned[27].

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[22] Vgl. dazu Suerbaum, Die Schutzpflichtdimension der Gemeinschaftsgrundrechte, EuR 2003 (erscheint demnächst); Pache, Die Europäische Grundrechtscharta – ein Rückschritt für den Grundrechtsschutz in Europa? In: EuR 2001, S.475 ff.

[23] Seitens des Europarats ist der Verfassungskonvent dringlich auf die Kompetenz des Europarats und des Europäischen Gerichtshofs für Menschenrechte für Fragen der Menschenrechte und Demokratie hingewiesen worden: vgl. Resolution Parliamentary Assembly des Europarats 1290 (2002) in: Europäischer Konvent/Sekretariat, Übermittlungsvermerk vom 17.07.2002, CONV 193/02.

[24] Vgl. Europäische Kommission, Institutionelle Reform für eine erfolgreiche Erweiterung. Stellungnahme der Kommission nach Artikel 48 des Vertrages über die Europäische Union zur Einberufung einer Konferenz der Vertreter der Regierungen der Mitgliedstaaten im Hinblick auf die Änderung der Verträge, in: Bulletin der Europäischen Union, Beilage 2/2000.

[25] Cf. Antrag Di Rupo u.a. an das Präsidium des Konvents: Europäischer Konvent/Sekretariat, Übermittlungsvermerk vom 10.07.2002, CONV 181/02.

[26] Cf. Rebérioux, European Style of Corporate Governance at the Crossroads: The Role of Worker Involvement, in: Journal of Common Market Studies (JCMS) 2002, S. 111.

[27] Initiativstellungnahme des Wirtschafts- und Sozialausschusses vom 25.04.2001: „Die organisierte Zivilgesellschaft und europäische Governance" (http://europa.eu.int/comm/nice_treaty/index:de.htm).

Naturally, the committee took the existing order of competence and the institutional order for granted as well.

1. The Order of Competence

The pressure which the coming expansion of the Union will cause for the efficiency of its institutions and for their ability to govern has led to stronger efforts to outline the principle of closeness to the citizens and the principle of subsidiarity more clearly – Art. 1 section 2, Art. 2 phrase 2 of the Treaty on European Union. Even until now the principle of special authorization could not do enough to slow down the standardizing urge for perfection of the supra-national legislation. As a consequence, the national parliaments had to fulfil this hopeless duty which only brought about routine of transformation but no increase of participation and legitimation. Now all hopes are for the strict marking off of competences between the Union and the Member States which, in Germany, is in vain expected by the federal states from the legislation of the Grundgesetz. In addition, the committee of the regions demands that the principle of subsidiarity resulting from Art. 5 of the Treaty establishing the European Community is extended to the regions and communities[28]. We will see which shall prevail: the vital tendency towards equality of living conditions or the rational standard.

This problem, however, will not only occupy the constitutional convent which is in session but moreover the future interpretation of the treaty, and it will thus pose the question of the authorization for the interpretation. If the marking off of competence is acknowledged as a legal question, it must obviously be handed over to the European Court of Justice; if the marking off is rated as a political question, the European Council comes into question as judging instance, following the model of the Bundestag/Lower House of German Parliament of 1815 and of the Bundesrat/Upper House of German Parliament of 1817: This way, the Member States could practice a remnant of "control" over the treaties[29].

If the marking off and the relief of the Union turn out well, the institutions of the Union whose ability to decide has come, through the expansion, across a critical limit, could draw profit from that. Therefore, the order of competence does not only logically take precedence over the institutional order, but it is also closely connected with the institutional order.

2. Experiences with Integration and Maxims of Organization

What requests must the political system of the Union be adequate in the future? The answer is not easy because there are historically-based theories of the state but there is no consistent theory of Union and because the Member States have an understanding of their selves that does not allow a homogeneous concept.

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[28] Cf. Antrag vom 13.03.2002: Bulletin der Europäischen Union 3/2002, S. 41.

[29] BVerfGE 89, S. 155, 190.

The existing Community Treaties at least provide for the fundamental "principles", the principle of integration and the criterion of efficiency. Moreover, the Treaty of Nice requires – in a form typical for the treaty of authorization and of reservation of sovereignty – a broader capacity for policy as far as questions of foreign affairs and questions of security are concerned[30].

On the other hand, the existing deficits of organization are evident. Because the Union is committed to the principle of democracy and because the national constitutions such as the German Grundgesetz demand structural homogenity[31], the problem of the democratic legitimation increases while the Union coalesces into a community. As long as the Commission played its role as "motor" of the integration, the Commission was the first object of criticism. In the meantime, the criticism must also be held against the Council of the Community and the European Council of the Union because these institutions decide not only on essential political matters but also decide on objective issues supra-nationally.

Compared to this, the participation of citizens has developed only marginally as far as individual law is concerned. At least the parliamentization of those institutions has progressed considerably. It appears in the rights of the European Parliament of advising, hearing, deciding, approving and controlling, the participation in the legislation – Art. 251, Art. 161 of the Treaty establishing the European Community – and in the adoption of the budget – Art. 272 of the Treaty establishing the European Community – as well as in the filling of the positions of the commissioners – Art. 214[32], Art. 201 of the Treaty establishing the European Community.

Nevertheless, we cannot speak of a parliamentary-democratic governmental system. The European Parliament has not assumed the position of the leading representative institution, legitimizing institution, decision-making institution, and controlling institution yet. Followed from direct elections differentiated within the several national states without lists of candidates for the whole of Europe[33], its 626 members of parliament – after the expansion: up to 732 members of parliament[34] – do not represent a unified European people but the variety of the peoples of Europe. And this representation is not actually proportional but follows the principle of the so-called degressive proportionality which mixes up the number of state-peoples and the number of citizens in the Member states[35]. Neither the Parliament nor the European unions of parties organized within the Parliament have so far been able to produce a Europe-wide Union-consciousness.

Apart from that, the power of legitimization of the European Parliament does not reach that of the committees of the heads of the states and the representa-

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[30] Cf. Art. 17, 23 bis 27e EUV neuer Fassung (Fn. 2).

[31] Cf. Art. 23 I 1 GG und BVerfGE 89, S. 155, 183 ff; Pernice in: Dreier (HRSG.),Grundgesetz. Kommentar, Bd. II, 1998, Art. 23 Rn. 51 ff.

[32] Änderung durch den Vertrag von Nizza (Fn. 2).

[33] Solche Listen werden von der Kommission vorgeschlagen: vgl. deren Stellungnahme „Institutionelle Reform für eine erfolgreiche Erweiterung" (Fn. 23), S. 9.

[34] Cf. Europäische Kommission, Institutionelle Reform für eine erfolgreiche Erweiterung (Fn. 23), S. 7 ff. Höchstzahl von 700 Abgeordneten.

[35] Zur Neubestimmung vgl. den Vertrag von Nizza, Anlage (Fn. 2), Tabelle zur Erklärung 20.

tives of the governments. Therefore, the democratic legitimization[36] of the institutions of the Union and the work of the Union are in a position of imbalance.

The correction of this imbalance, on the other hand, requires guiding ideas about "good government". According to which concept?

Those who believe in a homogeneous Europe complain chiefly about the lack of the summarization of the "peoples" into one people of the citizens of the Union. So far, citizens occupy only individual-legal positions – Art. 19, 21, 194 of the Treaty establishing the European Community: the right to vote and petition within the limits of the Community, but do not constitute a voting people[37]. Seen this way, the European Parliament appears only as a stage of integration on its way to a future group of representation resulting from a Europe-wide common proportional representation which does not consider the differences between the national states.

On the other hand, whoever considers the relations of power of the Member States and of their own interests will reject this idea as illusory. The German Federal Constitutional Court even regards that idea as unacceptable because of constitutional reasons[38]. It is also worried by France's insistence on the unity and indivisibility of the Republic[39] and by the sovereignty of the British Parliament[40]. Seen this way, the European Parliament and the Council receive legitimation from the allied "peoples", since their mediated members elect the citizens of the Union to the European Parliament. However, this construction must be satisfied in cases of decisions of the majority with a decentralized virtual responsibility.

For that reason, there is, on the one hand, the proposal to involve the national parliaments more strongly in the existing process of integration. To this, the President of the Convention, Giscard d'Estaing, has contributed the idea to let the members of the European Parliament and of the state parliaments hold a meeting as "congress" once a year, but it is not clear what this crowd should effect. On the other hand, the Union-internal parliamentarization of the Commission[41] and of the Council are to be improved, meaning: more effective competence of participation and control for the European Parliament.

The resulting view of the parliamentary governmental system which exists within the Union is not explained in any definite state-constitution or constitutional doctrine, but only by a rating comparison of the national constitutional systems with the help of the union-legal requirements, as was done while developing union-

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[36] Zur Notwendigkeit effektiver demokratischer Legitimation für alle Ausübung der Staatsgewalt vgl. E.-W. Böckenförde, Demokratie als Verfassungsprinzip, in: Isensee/Kirchhof, Handbuch des Staatsrechts, Bd. I, 2. Auifl. 1995, S. 887, 894 f. (Rn. 11 ff.).

[37] Deshalb sind Europalisten für die Wahlen zum Europäischen Parlament problematisch.

[38] BVerfGE 89, S. 155, 184 ff.

[39] Seit der Proklamation vom 24.09.1792, jetzt Art. 1 der Verfassung der Republik Frankreich von 1958; dazu Pactet, Institutions politiques. Droit constitutionnel, 14. éd. 1995, S. 346 ff.; ferner Chantebout, Droit Constitutionnel et Schience Politique, 11. ed. 1994, S. 65f.,78.

[40] Cf. Bogdanor in:Jowell/Oliver (Hrsg.), The Changing Constitution, 3. ed.1994, S. 3, 5 ff.; dagegen die Frage von Bradley, The Sovereignty of Parliament – in Perpetuity? In: Jowell / Oliver, a.a.O., S.79, 90 ff.

[41] Ministerpräsident des Landes Nordrhein-Westfalen Clement, Eine neue Architektur für das Haus Europa, in: Frankfurter Allgemeine Zeitung Nr. 267 vom 16.11.2001, S. 10.

legal standards of basic human rights. This work still has to be done[42]. The result will be a mixture of the parliamentary, presidial, chancellor and collegial systems already existing in Europe, within which the participation of the Parliament in the governing of the Union can concentrate on certain important but not necessarily all decisions[43]. In any case the union-legal principle of democracy necessitates the establishment of the Parliament not only as a participant in debates but as a leading decision-making institution for essential matters. This position does not exclude the decision-making competence of other (and perhaps otherwise authorized) institutions of the Union.

However, the plans to move the Parliament into the center of the European decision-making processes are still met with the objection that the structure of the parties of the Union and of the European Parliament and the attitudes of the members of the Parliament at this time are not ready for a leading role in Europe. Compared with national experiences, the European Parliament can thus acquire the image of a Europe-wide body of representatives which is situated close to the citizens only within the limits of a European media community whose development, however, because of structural and language-reasons, is still distant.

More important is the objection that the Union must, for reasons of national constitutional law, at least partly and continually, be based on the legitimization of the founding and Member States if this legitimization is not to escape from under their "control". Not only does the political good sense call for respect for this objection[44]; it is rather the belief in the openness of the integration process that excludes its aiming at a union. Thus, the European Council and the Council of the Community remain players on an equal footing with the Parliament. For reasons of legitimization and efficiency, the idea to unite both Councils is obvious.

3. The Evaluation of the Governmental Structure

This having been said, attention should now be directed to the to the structure of the European government in the future: government in its narrower sense seen as a composite of the institutions and competences for leadership of the current political decision-making processes including the leadership of the executive administration. Essentially, the questions are whether and where the political leadership is to be situated, how the politics of the Union can be stabilized and how European politics and bureaucracy can be brought to a balance of powers according to the rule of law.

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[42] Eine gute Grundlage bieten Grewe / Fabri, Droits constitutionnels européens, 1995; ergänzend, allerdings eher faktenreich als dogmatisch angelegt, die Sammlung von Staatenstudien in: Ismayr (Hrsg.), Die politischen Systeme Osteuropas, 2002.

[43] Cf. Grawert, Demokratische Regierungssysteme. Qualitätsanforderungen an die Regierungssysteme der Mitgliedstaaten der Europäischen Union, in: Murswiek/Storost/Wolff (Hrsg.), Staat – Souveränität – Verfassung. Festschrift für Helmut Quaritsch zum 70.Geburtstag, 2000, S. 95 ff.; ders., Parlamentarismus in Europa – Entwicklungslinien und Systemstrukturen, in: Institut für Verfassungsforschung Bd. 12: Internationale Wissenschaftliche Konferenz 150 Jahre griechischen parlamentarischen Lebens 1844-1994, hrsg. Das Griechische Parlament (Übersetzung des Titels aus dem Griechischen), Athen 2000, S. 391 ff.

[44] Der Präsident der Republik Polen hat noch kürzlich auf der Fortsetzung des intergouvernementalen Interessenausgleichs bestanden: vgl. Frankfurter Allgemeine Zeitung Nr. 281 vom 02.12.2002.

Whoever is orientated on a party-political comparison of the governmental camp and the opposition regards the government as an action-committee of the majority of the Parliament and organizes cooperation and control according to the pattern of this relationship. This pattern, however, does not fit the Union. In the foreseeable future one must remember the already established, organized powers which on the one hand consist of the parties and governments of the Member States and on the other hand of the already integrated institutions of the Union, the Council and the Commission including their bureaucracy as the collection of specialized knowledge. This constellation must be formed in the more distant future so that a legitimate and effective governmental leadership within and outside the Union is guaranteed.

So far, the Commission considers itself "protector of the Treaties"[45] and "motor" of the integration. Within this conception it can rely upon its supranational composition – Art. 213, 214 of the Treaty establishing the European Community, now being included in the new version of the Treaty of Nice – as well as upon its right of control and of taking legal action – Art. 211, Art. 226 of the Treaty establishing the European Community – and upon its monopoly of taking the legislative initiative – Art. 250, 251 of the Treaty establishing the European Community.

In the meantime, the arrangement of policies within the Union has to a high degree passed on to the heads of states and to other committees of representatives of the governments. Since Europe-politics have become domestic politics of the Member States – one only has to consider the fact that economic law and social law are to a high degree Community law, the intra-governmental communication dominates the area of decisions. According to Union-law, the competences of the Council to participate in the decision-making progress have been extended. It is also for the benefit of the Council that the Treaty of Nice has intensified the cooperation in foreign and security questions – Art. 17, 25, 27a to 27e of the Treaty on European Union. Of these circumstances results the office of a General Secretariat – Art. 207 section 2 of the Treaty establishing the European Community, which is under the control of "Secretary-General and High Representative for the common foreign and security policy"; the Treaty of Nice provides for the appointment of the Secretary General and his deputy by the Council with a qualified majority. Thus the Council is, in comparison with the Commission, a center of its own which will outlast introduction of changes concerning the representatives of the government.

It was, however, predictable that the Council will lose its ability to make decisions in the course of the expansion once there are 27 Members with 237 votes instead of the current 15 Members with 87 votes. The Treaty of Nice tries to pre-

[45] Europäische Kommission, Institutionelle Reform für eine erfolgreiche Erweiterung (Fn. 23), 10. – Der Begriff nimmt wohl auf dessen Einführung durch C. Schmitt Bezug: C. Schmitt, Das Reichsgericht als Hüter der Verfassung (1929), jetzt in: ders., Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954, 2. Aufl. 1973, S. 63 ff. – Für das Rechtsstaatsverständnis interessant ist der Umstand, dass die Kommission sich und nicht den Europäischen Gerichtshof als „Hüter" anerkennt.

vent this danger by providing a new distribution of seats, different weight of votes[46] and a new arrangement of the procedures. The new arrangement of the procedures had to show consideration for the relation between smaller and bigger Member States and in many cases for the way they see themselves – sometimes overestimating their importance. In the future, at least 169 votes shall be needed for the acceptance of a proposal and 69 votes shall be sufficient to prevent the acceptance of a decision. Thus, decisions will be the results of complex calculations. Besides, the procedure is so complicated that its progress must be doubted[47].

As far as we can see, there have been no proposals to reduce the Committee or divide it into sub-committees. The critical topic of the ability to make decisions can only be improved by its tighter regulation and by the concentration of the heads of the states on things essential for the Union. From the procedural and legal point of view, it is important to put the principle of majority in force. There is no doubt about that, except for the fact that there are different opinions about the question as to which topics might be decided upon by a majority without substantially restricting the sovereignty of the national states. It is doubtful whether the Council might be prevented from discussing detailed problems since in principle almost every topic can include a domestic political dimension as well as a party-political dimension[48].

Therefore, the Council does not compete only with the Commission but also – and mostly – with the Parliament because the Council acts towards the Parliament with regard to its different structure of interests and legitimization. Dogmatically and historically educated observers therefore foresee the European Parliament as the unitarian division and the Council as the federative division of a collective leadership duo. In Germany, one naturally thinks of the cooperation of the Bundestag/Upper House of the German Parliament and Bundesrat/Upper House of the German Parliament. Implementation of such a construction into the Union would result in an integration-friendly balance of powers.

But this construction touches the essential questions of power: externally, it is questionable whether the Member States will take the position of the German federal states; internally, the distribution of the legislative and control competences are questionable.

Some reform-ideas seek to stabilize the Council as the actual government, having the competence to produce political guiding rules, and to empower the Commission only with lesser administrative functions because there are more and more doubts concerning the continuation of the Commission's monopoly to initiate legislation[49]. Even now, the Council may demand the Commission to make investigations and proposals, as stated in Art. 208 of the Treaty establishing the European Community. If a parliamentary right to the initiative is established, the Commis-

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[46] Cf. Vertrag von Nizza (Fn. 2), Anhang: Erklärungen 20 samt Tabellen (Verteilung), 21 (Verfahren, Mehrheitsprinzip) und 22 (Tagungsort).

[47] Europäisches Parlament, Entschließung vom 31.05.2002, in: Bulletin der Europäischen Union 5/2002, S. 1.

[48] These von C. Schmitt, Der Begriff des Politischen, 1932/1963, S. 38 f., dessen Freund-Feind-Abgrenzung hier allerdings nicht hilfreich ist.

[49] Cf. u.a. Bünder/Friedrich in: Frankfurter Allgemeine Zeitung Nr. 204 vom 03.09.2002.

sion will lack essential parts of its competences necessary for it to be the "motor" of integration. If the Commission is only a part of a governmental system which is ruled by the Parliament and the Council, it will lose the power to shape a supranational common spirit.

Perhaps the reforms introduced by the Treaty of Nice give the Commission a new weight. From January 1, 2005 on, every state will only be able to propose one member of the Commission. After the expansion of the Union to 27 Members, the Council will be supposed to set the number of members of the Commission lower than the number of members of the Union[50]. Art. 214 section 2 (new version) of the Treaty establishing the European Community regulates that the President of the Commission is nominated by the Council with a qualified majority[51]; until now, the governments of the Member States nominated the President by mutual agreement. Moreover, the qualified majority is sufficient for the nomination of the other members of the Commission and for the final appointment of the entire Commission, having been given the approval of the European Parliament. This measure itself could reinforce the independence of the Commission towards national interests if this independence does not result in an inclusion of the division of offices as far as the General Directors are concerned. Regardless of this scepticism, the reforms promote the development of the Commission towards a managing government which exists beside and beneath that of the Council.

Yet, the future equality of all Member States has raised speculation about a tighter circle of leaders. The President of the Commission, Prodi[52], says that a "management" of the big Member states as far as the number of votes is concerned (Germany, France, Great Britain and Italy – the countries which have the highest number of votes in the Council, i.e. 10, later 29 votes) is not planned. Moreover, the Commission proposed a committee of vice presidents at the summit of Sevilla[53]. By instituting such a committee, the Commission would receive a hierarchie structure unknown in the past. More importantly, this would elevate the President up above the *primus inter pares* level. This would be a step towards the top of the Union, which is not occupied at present.

4. The Creation of a Presidency

Some concepts for the future of the Union call for a President of Europe. The intentions behind these can be summarized by the following terms: unity, representation and concentration of competences.

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[50] Cf. Vertrag von Nizza (Fn. 2), Protokoll über die Erweiterung der Europäischen Union, Art. 4. Auf eine ähnliche Regelung zielte bereits der Vorschlag der Kommission: vgl. Bulletin der Europäischen Union, Beilage 2/2000, S. 11; zu den Ergebnissen Hatje, Die institutionelle Reform der Europäischen Union – der Vertrag von Nizza auf dem Prüfstand, in: EuR 2001, S.143, 148ff.

[51] Der frühere irische Ministerpräsident und der frühere dänische Ministerpräsident sollen dagegen vorgeschlagen haben, den Präsidenten Europas als Präsidenten der Kommission in allgemeinen, unmittelbaren Wahlen bestimmen zu lassen: vgl. Schuller in: Frankfurter Allgemeine Zeitung Nr. 160 vom 13.07.2002.

[52] Cf. Frankfurter Allgemeine Zeitung Nr. 139 vom 19.06.2002.

[53] Cf. Europäische Kommission, Institutionelle Reform für eine erfolgreiche Erweiterung (Fn. 23): Bulletin der Europäischen Union, Beilage 2/2000, S. 12 f.

The idea of unity stems from the Europe-wide conviction that a hierarchic organization culminates in one point and that a corporation has one head. Hobbes' Leviathan is known as a super-man who consists of many human beings. Following rules of legal pragmatics, the Community as a legal person under international law, needs in any case a homogeneous outward representation, and the Union would gain legal subjectivity by having a President.

Again and again, people criticise Europe for speaking with too many voices and not with a single one that could prevail within the concert of global politics ruled by hegemonies. The Iraq conflict currently illustrates this statement. As far as legal competence is concerned, the heads of the Member States set an example for a President of Europe. This leaves the question of power which makes the problem urgent which structure to give Europe in the future.

In the beginning of the European Economic Community, the first President of the Commission, Hallstein, saw himself in such a position. Also, Delors' and Prodi's power-conscious leadership points to greater presidial plans. Since the implementation of the European Council, though, the President of the Commission acts within the Union together with the heads of the states under changing presidencies and within the Community only in the representative shadow of the chairman of the Council who changes from term to term. This reflects the changed relationship between the Council and the Commission, between national states and the Community. Even within the Commission, the President only has the "political leadership", while in all other matters the principle of majority is effective. To be *the* President of Europe, the President of the Commission most importantly needs the competence to represent the Union in its relations to the other international states and in this connection the competence for the foreign and security policy. This competence lies with the Council who for that reason included the office of a High Representative into its General Secretariat – Art. 207 section 2 of the Treaty establishing the European Community in the version of the Treaty of Nice.

France, Great Britain and Spain, on the other hand, propose a special Head of Europe who is to be nominated by the Council and who will essentially be responsible to the Council. Blair mentioned this concept fairly recently[54] when he announced a proposal of his own concerning the constitution of the Union. This concept marks a national-state integrated solution of the problem which can be extended in parliamentary respect by the participation of the European Parliament.

Germany and the big European party-associations, namely the European Party of the People, on the other hand, prefer a President with a stronger democratic legitimatization[55]. The German proposal, to begin with, leans towards the President of the Commission. His/Her appointment by the heads of the states should be the result of him/her first being elected by the European Parliament, and he/she should be responsible to the Parliament. The German Minister of Foreign Affairs, Fischer, even thinks

[54] Cf. Frankfurter Allgemeine Zeitung Nr. 171 vom 26.07.2002.

[55] Cf. die Mitteilungen von Lohse in: Frankfurter Allgemeine Zeitung Nr. 166 vom 20.07.2002, und von Busse in: Frankfurter Allgemeine Zeitung Nr. 204 vom 03.09.2002

about a constructive vote of no confidence. This concept is apparently modelled after the procedure of appointing the German Chancellor.

The former Irish Prime Minister Bruton added his idea to institute, instead of the European Parliament, a committee similar to the German Bundesversammlung/Federal Assembly, consisting of the representatives of the European Parliament plus the same number of members of the national Parliaments. This proposal comes close to Giscard d'Estaing's idea of a special congress.

A remarkable feature of the German proposal are the competences provided for the European President. He/She is not only to receive the competences usually connected with the outward representation but also the competences of the High Representative for the foreign and security policy – at present the Spanish Solana – and the competences of the member of the Commission responsible for foreign policy – now the British Patten, in order to achieve a concentration of the foreign policy. This model is called "double-hat" and wants the overcoming of the "method Metternich" by the "method Monnet"[56], without aiming for a European Federal State.

Sometimes[57] the German Bundespräsident/Federal President, whose office is marked by the functions of representation and integration, but who participates only marginally in the management of the state is taken as a model. Within the Union, such a President is to symbolize the European integration and to practice certain tasks of mediation and judgement. His/Her being elected by the European Parliament would at the same time move the European Parliament forward towards integration. Certainly, this model has, in comparison with the alternative model of the French President of State, the advantage that the holder of the office does not interfere with the balance of powers between the Council and the Commission, between politics and bureaucracy and therefore can have the ability of reaching a consensus. But this model does not add anything to the solution of the problem of an effective, powerful outward representation of the Union, and the competition for leadership between the Council and the Commission would not be eliminated.

IV. Unitarization and Federalization of the Union

Whoever compares the organizational structures of the Union and the reform concepts comes to the disillusioning conclusion that for now the way to a united Europe is also the strategic objective. As holders of an established sovereignty and as "masters" of the Treaties, the national states decide on the further development

[56] Lohse und Busse (Fn. 54). Der deutsche Vorschlag kommt dem der Kommission nahe, die Aufgaben des Hohen Vertreters und des Kommissars für Außenbeziehungen zusammenzulegen: vgl. Bulletin der Europäischen Union, Beilage 5/2002, S. 7; allerdings verbindet die Kommission diesen Vorschlag nicht mit dem Amt eines Europapräsidenten; sie zöge aus der Zusammenlegung den regierungsspezifischen Vorteil, die Fäden der gemeinsamen Außen- und Sicherheitspolitik in der Hand zu halten.

[57] Holzinger/Knill, Eine Verfassung für die Europäische Union, in: Frankfurter Allgemeine Zeitung Nr. 278 vom 29.11.2000, S. 11.

of the Union according to their internal interests, which are chiefly the interests of their domestic politics. With, in the future, 27 Members of the Union, the opinions about what is practical and desirable will vary more than they have done so far. The Union's future will therefore remain in a position of imbalance between unitarization and federalization.

Since the expansion will decrease the supply of common topics and interests and increase the variety of interests, one can assume that the groups of states will come to agreements about their interests in informal, more direct ways outside the European order of institutions, as long as the law of the Community does not force them to follow its regulations.

The "Europe of two speeds" is an absolutely attractive concept. That even the monetary union and the legal framework of the Union's social order are executed in a differentiated way is a well-known fact. Chirac advertised the "Avantgarde-group"[58] in his Berlin speech, and a short time ago, the Slovakian Minister of Foreign Affairs, Kukan, announced that the cooperation between Hungary, Poland, the Czech Republic and Slovakia within the Visegrad-Group will be continued by these states even after the joining of the Union[59]. Experts in the history of the Holy Roman Empire of the German Nation have nightmares thinking about this plan. At least, Art. 17 section 4 of the Treaty on European Union in the version of the Treaty of Nice stresses the fact that a "closer cooperation" between two or more Member States and in the framework of the West-European Union (WEU) and the Atlantic Alliance shall not run counter or impede the cooperation provided for in the Treaty on European Union. The Peace of Westphalia contained a similar regulation of alliance.

Even today, in spite of all the technical and political problems the main objective of the Union should come more clearly into focus: and it is the maintenance of peace in Europe by stabilizing democracy[60].

Co może czekać Unię Europejską?
streszczenie

Pytanie to zadawano sobie już po II wojnie światowej, zwracając uwagę, iż coraz ściślejsza integracja będzie stanowić wyzwanie dla państw narodowych, globalizacja wspólnej polityki bezpieczeństwa i zagranicznej – dla ich polityki i polityków, a wzrost integracji i ekspansji Unii stanie się problemem na płaszczyźnie strukturalnej, administracyjnej oraz decyzyjnej dla władz konstytucjonalnych krajów Europy.

Omawiając horyzonty rozwoju Unii, Rolf Grawert skupia się następnie na podstawach Unii: jej strukturze, zagadnieniach konstytucyjnych – będących podstawą demokracji i sprawie zarządzania. Osobny obszerny rozdział autor poświęca

[58] In deutscher Übersetzung abgedruckt in: Frankfurter Allgemeine Zeitung Nr. 147 vom 28.06.2000.
[59] Laut Frankfurter Allgemeine Zeitung Nr. 208 vom 07.09.2002.
[60] Europäische Kommission: vgl. Bulletin der Europäischen Union, Beilage 3/2000, S. 5.

kwestii sprawowania władzy (*corporate governance* – termin ten zostaje wyjaśniony jako „sprawowanie władzy korporacyjnej w sensie ogólnym pojęcia") i jej ocenie. Tutaj też pojawia się koncepcja ustanowienia Prezydentury Europejskiej wraz z opisami potencjalnego zakresu władzy Prezydenta Europy płynącej z poszczególnych propozycji i modeli, związanych również z opisanymi w ostatnim rozdziale trendami unitaryzacyjnymi oraz federalistycznymi obecnymi w Europie.

Pracę podsumowuje konkluzja, iż dziś –pomimo nawet wszelkich technicznych i politycznych problemów – głównym celem, ku któremu winna zmierzać Unia powinno być utrzymanie pokoju w Europie poprzez stabilizację demokracji.