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The ratification of European Treaties: Legal and constitutional basis of a European Referendum

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Martin Seidel

**The ratification of European
Treaties - legal and
constitutional basis of a
European Referendum.**

Working Paper

**B 01
2007**

„The ratification of European Treaties – legal and constitutional basis of a European Referendum”♦

Professor Dr. Martin Seidel*

I. Referenda – hurdles to the process of European Integration?

1. Lessons from the recent national referenda

The referenda which took place within some Member States of the European Union on the occasion of the ratification of European Treaties are not seldomly regarded as hurdles or troublemakers or obstacles to the process of European Integration. The Treaty of Maastricht from 1993, by which the European Union was founded and its first pillar, the European Community, has been restructured to an Economic and Monetary Union was threatened to nearly failing during the process of its ratification within the 15 Member States because of the result of the referenda in France and in Ireland and above all because of the result of the referendum in Denmark. As far as France and Ireland were concerned, in both countries only a very short majority of the people approved the Treaty, in Denmark the people had to be asked for its consent a second time after a negative result of the first referendum. The Treaty of Nice has only been adopted in Ireland after a second referendum which had contrary to the first one a positive result. The Treaty “establishing a Constitution for Europe” which had been adopted nearly unanimously by the European Convention and, in accordance with this has been approved by governments of all Member States did not get the consent of the French and the Dutch people. Both people were

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involved in the ratification process by referenda which were arranged in these two countries in accordance with their constitutional procedures governing the inclusion of European Treaties. As far as the United Kingdom of Great Britain and Ireland, Sweden, Denmark, Poland and Tschechia are concerned, even European-minded optimists in these countries and in the European Union reckon on disapprovals by the people of each of these countries in the case that referenda on the said Constitution Treaty during the ratification processes should take place.

This being so, the course of the European Integration process during the last decades very strongly gives advice to academic scholars as well as to politicians to reflect on the role and function and, above all, on a possible new constitutional placing of national referenda within the ratification procedure of European Treaties. Especially such reflexions seem to be necessary in the context of the highly urgent need to negotiate among the meanwhile counting 27 Member States - as envisaged and discussed - a minimised new European Treaty by which the said monstrous Treaty on an Constitution for Europe could and should be substituted. Without a new Treaty, as envisaged, minimised and properly dressed, which as heir of worthy work of the European Convention would have to be a getting out of the constitutional dilemmata and a breakthrough at any case, the failed Constitution Treaty could probably not be saved from totally being condemned and unpolitely being buried.ⁱ

Some people occasionally classify or even blame national referenda which take place within Member States in accordance with their constitutional law as “hurdles” or as “troublemakers” or even as “obstacles” to the process of European Integration, especially in the case that they have negative results. These people not seldomly are of the opinion that national referenda have to be contained or even to be completely eliminated. All these people do not do enough justice to the referenda as institutions of public life being legitimated not only under national constitutional law but also under the constitutional law philosophy of the European Union.ⁱⁱ

Using such phraseology and blaming the referenda in the described way reveals ignorance of those people or even their disregard if not even disrespect vis-à-vis a basic democratic institution. The basic understanding of democracy is that public power emanates from the people and that the people as sovereign do not exclusively have to exercise its sovereignty by a group of elected delegates constituting the representative institution, called Parliament or National Assembly. The sovereign is not blocked by delegating its powers to its representation to exercise the sovereignty “on its own”. Directly acting in the sense that political issues are decided by simple acclamation or by the taking place of referenda is not a lower ranking principle of democracy, i.e. of the “governing of the people”. Therefore, as far as debates and discussions on the

role of referenda in the ratification processes of European Treaties are concerned, the decisive question is not whether the existing national referenda could and should be eliminated or at least restricted. Legitimated only is the asking for the feet on which referenda should be installed in the ratification processes and, above all, in which way they should reasonably be arranged and properly be placed. Should they be reasonably and more adequately restructured and still be placed within the constitutional framework of the Member States or instead of this within the constitutional framework of the European Union and be arranged by the Member States under the supervision of the European Union's organs. If politicians, for escaping out of the dilemma, should argue as they have done that one could and should go to the people and repeat the referenda as many times as necessary until the "right" answers are given they would not pay respect to the sovereign. Furthermore, "treatising" the people in such a unworthy way of handling the "affaire" - by no means spleeny but an actual idea - would simply ignore that arranging further referenda which are not completely redressed and restructured, i. e. consisting of the same questions and objects, arranged to the purpose of overruling "unwished" results of the "failing" of a former referendum are regarded as unconstitutional according either by expressively written or, at least by unwritten national constitutional law.

2.The monstrous dressing of the referenda as hurdles to their proper functioning

Instead of criticising referenda as hurdles, troublemakers or even as obstacles to the process of European Integration the eyes should be strictly put on the volume, the object, the content, and the dressing of all national referenda which up to now took place in the past during the various processes of the ratification of European Treaties. It simply seems necessary to ask whether not the way referenda are traditionally arranged and dressed as far as their volume, content and object are concerned should be approached as the "villain", i.e. the hurdle or the troublemaker or the outstanding obstacle to European integration. The number of problematic questions which the European Treaty on the constitution for Europe raises is far from being few and even more far from simply be solved. The complexity and the legislative implications of a Treaty like the Treaty establishing a Constitution for Europe can hardly be understood and decided by the people without broadly commenting article by article. The complexity of the Constitution Treaty surmounts the complexity and implications of nearly every normal legislative undertaking. The Treaty contains nearly 200 pages written text and consists of more than 400 hundred articles, it is, as its text is concerned, hardly readable and probably non understandable although it is, for the people more important than any other proposal for legislation. The Treaty, using the description of its content as a Constitution for Europe,

description which normally refers to the fundamental law of a state, does not clarify that the European Union will not be established as a “European Superstate”. A Treaty like the European Constitution Treaty simply is not suited for asking millions of men and women, living within 27 countries, speaking different languages and being embedded within different political cultures for their opinion. Under the given circumstances a clear and cut workable decision on whether this Treaty should be adopted as fundamental law of the European Union cannot be considered and taken by the people, at least not under the conditions as they exist that there are not enough facilities for an effective, i.e. an integrated political dispute shaped by an integrated European public opinion, especially no facilities enough for the offsetting of opinions across the borders within the European Union which would have to be administered by an integrated media and news paper systems as well as other institutions capable for shaping public opinion. Even experts who are trained in constitutional law and in European law are likely not generally capable to the complete understanding and to a correctly assessing of the implications of such a voluminous and complicated set of rules and norms which the Treaty on the Constitution for Europe consists of.

Arranging referenda within the Member States in a way as described, has to take into account that not only Europe’s appropriate constitutional structure but its development as such, and above all the fate of Europe is at stake. Therefore, an uncountable number of questions, which are interlocked one with the other in different ways, simply cannot reasonably and responsibly be presented to the people for giving decisive answers. National or European referenda which are dressed in this way are sampling to games the outcome of which are always uncertain, they are anything else than a reasonable contribution to the process of European integration. If for example, the question would have been presented to the French and the Dutch people for their approval of the proposed new prescription that the President of the European Commission should be elected in the future under the condition that European Parliament be more involved in than in the past such a reduced referendum would have probably had a positive result in both countries. The specific prescription has been incidently rejected in France and in the Netherlands by the total disapproval of the Treaty. It is worth to ask how many Frenchmen and Dutchmen at all have been aware of this special provision of the Treaty. The said prescription which has been incidently rejected does not only improve the procedure for the election of the President of the Commission but strengthens the democratic legitimation for the European Commission as such.

The primary concern to deal with is not the referendum as such but are the manner and the bulk the questions which are presented to the people to be decided by them. It is necessary that the object, i.e. the questions of the referendum, have to be not too numerous and have to be absolutely

understandable to the common man. For properly fulfilling its function the referendum has to be dressed and structured in the way that the questions could serve as basis for reflections and discussions.

The Governments and not the people are primarily responsible for constitutionalising Europe. The dressing of referenda in a way that the referenda fulfill their functions, is an important task of the governments in the context of properly constitutionalising Europe. Governments could be approached for any failure of managing their task. They should be approached in the future if they do not correctly assess the decision capacity of their people and, especially, should be approached if their referenda are not structured in a way that the people could properly and responseably exercise their role in the process of ratification of European Treaties. The Constitution Treaty, meanwhile set aside is an example of a rarely readable and rarely understandable volume of articles, legal norms and rules, declarations and protocols and is not an example of a reasonably structured object for a referendum. example, neither for a national referendum nor for an European Referendum. It should not have been presented to the people as such, at least not without primarily putting concrete and understandable single questions.ⁱⁱⁱ

II. Replacing the referenda as institution of democracy within the processes of ratification of European Treaties

Apart of the necessity to redress the referenda as described above it seems to be worthwhile to examine whether the existing national referendum as a democratic institution could be replaced or substituted within the processes of ratification of European Treaties.

1. Repealing national referenda

It is not questionable that Member States could abstain from referenda by autonomous decisions if they want to facilitate the processes of ratification of European Treaties or if they want to prevent the eventual failing of European Treaties following from disapproval by their people. But the question is whether they can be obligated to do so by a legal act of the European Union.

Member States whose constitutional law does not strictly prescribe a referendum in cases of European Treaties but gives discretionary power to the President like in France or to the government or to Parliament to arrange a referendum do not have the same difficulties to abstain from a referendum than those countries the constitutional law or a established custom of which, strictly provides for referenda. But, even in cases where referenda are not strictly prescribed public opinion and the political circumstances can constitute stringent guidelines and

instructions which might set boarders to the government, to the head of the state or to the government for an envisaged abstaining from a referendum.

The abstention from referenda creates nearly unsurmountable difficulties in those countries in which the referenda are prescribed by constitutional law. In these states abstaining from referenda requires a formal change of the constitution which presupposes a long during and complicated political and legislative process. In these Member States any changing of the constitution for the said purpose would hardly be taken into consideration if among the people the rate of consent to the process of European integration is traditionally low or, as in Germany, has considerably decreased in the recent past. Critical situations are more or less the case in nearly all Member States.

Abstainig from national referenda on the basis of an obliging legal act of the European Union seems to be no solution. As far as the existing law of the European Union or, respectivly of the European Community is concerned none of the organs of the European Union is authoriesed and, further more, not legitimated to adopt a legal act which obligates the Member States to abstain from referenda, if necassery by changing their constitutional law. The existing law of the European Union does not even include an authorisation and sufficient legitimation of the European Parliament, of the European Council or of the Commission to recommend the Member States the changing of their referenda legislation and practice. The national constitutional law which way it might be shaped forms part of the national identity of the Member State which according to the law of the European Union has to be strictly respected by the European Union (article 6 EU-Treaty). National referenda reflect the principle of democracy which according to the law of the Euroepean Union has also to be strictly respected by the European Union. Respecting the principle of democracy is a condition for membership within the European Union for the countries admission and their further staying within the European Union. To make it clear, all special authorisations and competences to harmonise national law and legislation which actually are provided for by the constituional system of the European Union and its legal order, the prescriptions of the Treaty on a constitution for Europe included, do not authorise to harmonise national constutational law, even not in the case that the authorisations would be broadly and extensively interpreted. The articles 94 and 95 of the EC-Treaty which entitle the European legislator to harmonise national law for the purpose of creating and the proper fonctionning of the Common Market and article 308 EC-Treaty (former article 235 EC-Treaty) which authorises the European Union to harmonise national legislation under special conditions cannot be applied.

If the European Union should like to obligate the Member States to abstain from referenda in the ratification process on European Treaties a new authorisation for the adoption of such an appropriate legal act of harmonisation in this field of

national constitutional law would have to be created by altering the Treaty of Maastricht by a new Treaty to be concluded by the Member States. Such a Treaty the content of which would have been the creation of a special authorisation to harmonise national constitutional law for the purpose of abstaining from referenda had to be adopted by the national Parliaments and, respectively, by their second Chambers and had to be presented to the people for approval within those Member States in which referenda are provided for. Within these countries the people would probably not give their approval to a European Treaty changing the national constitution and depriving them from their right to approve or to disapprove European Treaties.

2. Arranging national referenda at the same date

Arranging national referenda within the Member States concerned at the same date does not seem to be in discussion. But it is worthwhile not to abstain from reflecting on this idea. Here too, adopting a legal act by the European Union which would oblige the Member States concerned to arrange the agenda this way that they take place on the same day would touch national constitutional law and presuppose an authorisation of the European Union's legislator. The authorisation would have to be created before and this could only be done by altering the Treaty of Maastricht as prescribed before.

The question is whether, at least, the European Union, could adopt a recommendation asking for national referenda at the same date under the existing European law. The prevailing theory of European Law says that the European Union can only adopt recommendations in fields in which it is authorised by a special prescription to act either by policy measures or as legislator. A recommendation of the European Union that a referendum should take place on a special date, and this together with the taking place of referenda in other Member States would evidently touch the right of the national governments based on the national constitution to freely choose the appropriate date. But Member States are obliged to refrain from any action which are running against the interests of the European Union^{iv} or as the Treaty on the Constitution for Europe more precisely states they are even obliged "to facilitate the achievements of the European Union's tasks and to refrain from any measure which could jeopardise the attainment of the objectives"^v of the European law.

Since the result of a national referendum, especially if it is a negative one, could influence in whatever way and in whatever direction the people in other countries where the referenda take place at later dates, arranging national referenda at the same dates clearly lies within the interests of the European Union. Elections or referenda within Member States which do not take place simultaneously in all parts of their territory are regarded as hardly being in accordance with the principle of democracy and are not usual. The European

Union should be regarded as authorised by an unwritten authorisation of European law to recommend the Member State that in the European Union's and their own interests their referenda have to take place at the same date.

But one has to be aware that the election to the European Parliament do not take place at the same date in all Member States, nonetheless the possible "catastrophe and domino effect" of this proceedings.

3. The European Referendum

The arrangement of a so-called European Referendum would comply with the principle of democracy and would make national referenda as superfluous. Due to the possible abandonment of national referenda the European Referendum is the most discussed idea and proposal in the context of replacing and restructuring the national referenda in a way that the process of European integration is not harmed more than necessary.

Theoretically, two different structures of organising the European Referendum are thinkable. The referendum could be structured this way that the votes of the European citizens are counted separately in each Member State and that the result of the national voting within each Member State is decisive which means that a majority of the people in all Member States would have to approve the European Treaty (national counting system). This structure of the referendum would extend the referenda which are taken place in some Member States to all the other Member States. Whether the "national counting system" would facilitate European integration even if the referenda would take place at the same date is highly questionable. But the idea "Europe for the Citizens" would certainly be honoured and be strengthened. Secondly, the referendum could be organised this way that regardless the voting by the people in the Member States the votes of the European citizens are counted within the European Union across the national borders and the union wide counted voting alone would be decisive for the approval of the European Treaty (unified union wide counting system).

In the first case the voting procedure on the level of the people and the voting procedure on the Parliamentary level do not raise questions. Since the people of all Member States would have to agree the normal and usual procedure of the voting via referenda could and should be applied, namely that the majority of the votes are decisive (simple majority). On the Parliamentary level the question whether unanimity or a two third majority should be decisive does not arise. Since the electorates of all Member States would have to give their approval the national Parliaments would also have to give their approval by unanimity. Since Parliaments respect the vote of their electorates the voting results by their people

whether they are approving or disapproving the European Treaty need not to be binding to Parliaments.

The second type of a European Referendum, i.e. the referendum which is institutionalised the way that the votes of the European Citizens are counted across the national borders raises questions and creates implications which are crucial. An answer has firstly to be given to the question whether the - simple - majority of the votes of the European Citizens or a qualified majority, i.e. a two third majority of the votes should govern the voting procedure. Then the by far most crucial question necessitates an answer whether on the Parliamentary level unanimity should be required for the adoption of the European Treaty or whether two thirds of the national Parliaments – the second chambers included – would be sufficient for its adoption.

The voting procedure on the level of the citizens evidently creates a problem because of the different growth of the population of the Member States. Even the “qualified majority solution”, but more the “ simple majority solution” would not exclude the feeling of the people of the less larger and smaller Member States, that they might be “governed” by the people of the larger Member States. Since the new 12 Member States mostly are less larger and smaller Member States the vote of the people of the older Member States would be decisive in most of the cases.

Probably all Member States would have a preference for the qualified majority voting solution. This solution would be absolute necessity in the case that on the Parliamentary level not unanimity but a two third majority decision would be sufficient for the setting into force of the European Treaties. In deed, the decisive question which this type of a European Referendum raises is whether on the Parliamentary level unanimity as the actual rule of procedure should persist or whether already a two third majority vote - a simple majority vote is absolutely out of question – should be sufficient for the approval of an European Treaty.

Traditionally, majority ruling is far from governing the process of setting European Treaties into force. According to European law European Treaties have to be approved and ratified by the Parliaments - in addition by existing second chambers - of all Member States. The requirement of unanimity might not correspond to the national procedure as provided for in the case of changing national constitutions but it would be in accordance with the constitutional law as it exists within the European Union. The requirement of unanimity on the parliamentary level would certainly not facilitate the process of integration. Parliaments which would not be backed by the votes of their population would feel bound by the opinion of its electorates and would probably hesitate to give their approval to an European Treaty even more than they did in the past. If the people in Germany where for the time being referenda do not take place

would not approve an European Treaty the Bundestag and the Bundesrat would probably pay full respect to the opinion of the people and would not overrule its disapproval. All those, politicians and scholars, who are favouring European referenda argue that a European referendum would not make any real sense if the existing ruling procedure on the Parliamentary level would not be changed and the requirement of unanimity would not be abandoned in favour of a two third majority solution. Instead of facilitating the process of European integration one should not put further burden it.

But transgressing to the two third majority solution, as charming and wishfull it may be, a clear answer has to be given to the question whether those Member States which were overruled should be bound to the decision possibly and are probably suffering from the feeling that they are now “forced Members” of the European Union or whether they should have the right to withdraw from their membership or even be forced to leave the European Union. For the time being European law does provide neither for the withdrawal from Membership nor for a forced expulsion in cases where Member States are overruled in normal legislative processes of the European Union. All deliberations going into the direction of an exemption for the process of constitutionalising Europe do not sufficiently take into account the basic aims and the philosophy which underlines the process of European integration. This process guaranteeing freedom, security and growing wealth, aims at the irrevocational inclusion of all European national states and the further staying of them within the European Union. The European Union is not constitutionalised comparable to classical international organisations the statutes of which provide for free withdrawal at any time. From a material point of view unanimity is the basic ruling procedure within the European Union. The majority ruling has to step back in cases in which its so-called external costs overclimb the inner costs and benefits of a decision. The expulsion of a Member State who has been overruled or the withdrawal from membership are regarded as external costs and would exceed the benefit of a legislative measure or of a European Treaty being a more or less substantial step towards European integration. The European Union would collapse if the overruling of Member States and their voluntary or forced withdrawal from membership would become normalcy. Therefore, the two third voting procedure does not seem to be the preferable solution.^{vi vii}

a. The necessary authorisation for arranging European Referenda

A European Referendum which should be arranged by the European Union requires that the European Parliament and the Council as common legislator of the European Union are authorised to adopt a legal act which obligates the Member States to organise referenda. The necessary authorisation of the European Parliament and the Council cannot be deduced from the present legal and constitutional order of the European Union. It would have to be introduced

into the legal and constitutional order of the European Union by changing the Treaty of Maastricht in its version of the Treaties of Amsterdam and Nice. The necessary amendment to the Treaty of Maastricht would have to be arranged before the start of any legislative activity of the European Commission, of the European Parliament and of the Council.

This being so, the European Referendum presupposes that the Member States have to initiate a European Treaty which simply has as its content the recreation of the needed authorisation of the European legislator to arrange European referenda and the obligation of the Member States to abstain from their traditional national referenda. Since unanimity among the Member States is a requirement for negotiating and adopting European Treaties it would be a requirement in the case of the "Authorisation Treaty", too. If the Member States should reach unanimity on a "Authorisation Treaty" which probably would not be an easy undertaking all national Parliaments - and the second chambers - would have to give their consent to the authorisation in question as well as to the elimination of national referenda. In those Member States in which the ratification of European Treaties require a referendum the creation of an authorisation of the European Parliament and the Council to arrange a European Referendum and to oblige Member States to abstain from their traditional national referenda the people have to be asked for their approval of the Treaty. People would have to consent that the traditional national referendum will disappear and that they will be deprived of an existing right without having the absolute assurance that the European Union would compensate their loss by granting equal possibilities of taking part in the process of constitutionalising Europe.

During the negotiations on the "Authorisation Treaty" probably all basic questions which have been elaborated, the necessary "dressing" of the referenda included, would have to be discussed and would have to be solved by the governments of the Member States by unanimity. Without giving detailed instructions and guidelines to the European legislator for the dressing of a European Referendum the national governments, especially those in the countries of which like in France, in the Netherlands, in the UK and in some other countries referenda in the context of European Treaties take place, would hardly be willing to give the envisaged authorisation to the European legislator.

The most crucial aspect of constitutionalising Europe the way, that a European referendum takes place, namely the different weight of the population of the larger Member States in relation to the weight of the less larger or even smaller Member States would probably be the main issue of dispute if not even cause for the failing of the conference. The less larger and the smaller Member States would probably not accept that the results of the voting within the larger Member States, under certain constellations, could be decisive or at least of

relativ greater importance for the adoption or the rejection of European Treaties than the voices of their people. The less larger Member States and the smaller Member States would certainly stress the solution that all national Parliaments would have to approve the European Treaty if they would not even make their consent dependent on this solution or even torpedo the whole undertaking.

b. The partially changing of the present basically confederal structure of the European Union into a partially more federal structure - “nation building aspect” - by a European Referendum organised according to the principle of unified counting of the votes of the European Citizens and the principle of counting the Member States`parlamentary voting on the basis of qualified majority (system of double or duplicate majority)

The European Referendum, if it is organised according to the principle of union-wide counting of the votes of the people, raises a further aspect and a constitutional problem which until now does not seem to be sufficiently seen, at least not enough discussed. The said aspect being primarily of academic interest could work as powder pleg when the European Referendum of the described type should become the issue of a controversial political discussion among the Member States.

Despite of its complexity, this aspect can be shortly described: A European Referendum, structured by union wide counting of the voting, simply implies that the 27 nations of the European Union are bound together in a way that they are regarded as an integrated European people or an integrated European citizenry. As such the 27 national citizenry or nations, unlike as in all other cases, are functioning like an integrated European Nation or an integrated European Citizenry, i.e. as an institution which is not provided for by the constitutional system of the European Union. The fictitiously setting up of a “European Nation” or of a “European Citizenry” or a “European Electorate” can hardly be brought in compliance with the prevailing philosophy of constitutionalising Europe and the status of actual deliberations on progressing towards the end of Europe’s unification process. The European Referendum of the type in question has a “nation building aspect” since it implies that a simple or qualified majority of the citizens of all Member States, artificially being bound together and constitutionalised as an integrated European Citizenry has to approve or disapprove a European Treaty i.e. has to make a binding decision as one of several partners of the process of constitutionalising the European Union. The fictitious European Citizenry is not only authorised to take part on the process of constitutionalising Europe but makes its decisions which decisively

contribute to the constitutionalisation of Europe, regardless of the nationality of their members, on the basis of equal voting rights,

Restructuring the people of the Member States of the European Union in the way that they build up an integrated “European Nation” or a “European Citizenry” or at least, like the Swiss people, build up a “community of common will and fate” might be a theoretical vision but means subordination of the actual 27 national citizenries being the sovereigns of the European Union to an supranationally structured European institution. Besides this, equal rights of voting cannot be deduced from the constitutional law and from the prevailing philosophy of constitutionalising Europe. The two idealistic structural elements are deduced from the constitution and structure of a federal typed central state and do not fit into the constitutional system and theory of the European Union. In times they have been in discussions these two structural elements have been regarded as an utopian vision and have always been proved as unacceptable to the Member States.

Under the constitutional system national citizens as “European citizens” do not have equal voting rights. About this, a European Citizenry based on the principle of equal voting rights and artificially created – a European Nation is out of question – would properly not function as “supreme sovereign” if not before the political and the societal system of the European Union would have been basically reversed and properly restructured.

In the case of elections for the European Parliament the deputies of which are directly elected since 1979 equal voting rights of the European Citizens are not provided for. Equal voting rights does not mean that the election take place in all Member States according to the same procedure of voting but means that the Members of European Parliament are elected according to the principle “one man - one vote”. As well known, the seats in the European Parliament are apportioned to the Member States and this in a way that although the larger Member States have more Parliamentarians than the smaller Member States the latter are over represented of the size of their electorates. The consequence of this is that the basic democratic principle of equal right of voting in the sense that every men’s vote has equal value in counting is not guaranteed in the European Union – at least not as far the election to European Parliament is concerned. Equal rights of voting cannot be granted by the European constitutional legislator to the people as long as the existing system of proportioning the number of seats has not been abandoned. Even under the Treaty on the Constitution for Europe the votes of electors in the larger Member States would count for considerably less than those of electors in the smaller Member States. Depending on where Union citizens choose to reside, they could increase the weight of their vote by two, three or maybe even eleven times

The Members of the European Parliament are according to the special distribution of their seats elected by the national people, not by a single European people in the sense that the national people are brought and bound together within the European Union. The on the basis of national elections elected Members of the European Parliament are representatives of the national people.^{viii} They are not representatives of a - non existing and non thinkable - “European Nation” or of an “European Citizenry” or of a “community of men and women having a common will and destiny”. The European Parliament may appear to represent a genuine authority but in terms of its structure, the European Parliament more or less reflects the confederal nature of the European Union and, respectively of the European Community as an association of states. The European Parliament as the European Union as such does not exercise rights and competences the authorisation of which derives from a single electorate as the sovereign. Its authority derives from the Member States and their various electorates in terms of both its origin and its legitimation. The legal entities bearing responsibility for the European Union’s and the European Community's competences and authority are the Member States. The citizens of the European Union do not enjoy protection from the European Union nor do they owe it substantial obedience. The Member States are ultimately accountable to the people for all decisions and acts that emanate from the European Union.

If the European Union should derive its authority from the European citizenry, the European Union itself would have to be restructured from a confederation to a federation and as a first step before, the European Parliament staying within the center of the constitutional system and representing the citizenry would have to be reorganised and restructured as a representation of the European Citizenry on the basis of equal voting rights.

The lack of voting equality is due to the fact that the European Parliament, in origin, has been an assembly of representatives of - equal - Member States. Like the constitution of the European Union itself the structure of the European Parliament is still - to a less extent - based on the principle in international law that each state in an association or confederation has an equal right to share in the exercise of their common sovereignty. The “Parliament” of such an association does not have to abide by the principle that each citizen should share equally in the exercise of that sovereignty. The constitutional principle that all citizens should take an equal part in the exercise of state authority is the essential foundation of a federal union, but not necessarily of a confederal union of states.

There are no signs and indications that in the future, at least in the near future, the European Union would be restructured from an confederation to a real federation, from “United Nations of Europe” to “United Europe”. Member States are evidently not willing to transfer more sovereignty to the European Union than they did in the past. Among other reasons they have the feeling that

a federalised Europe as a federally structured central state would degrade and considerably subordinate them as Member States to subordinated organisations. And there are no indications and signs to assume that the European Parliament might take up the flag for a constitutional breakthrough, as far as its part is concerned.^{ix}

There are other substantial reasons that the creation of a federally typed European State within which decisions are taken by a Parliament elected by an European Citizenry on the basis of equal voting rights is not a realistic vision. The parliamentary system of a European Union restructured as described would probably not function as well as expected and in way the national parliamentary systems do. The European Union itself would likely not be governable under a parliamentary system. Its failing would partly be due to the fact that despite of the existence of a newly created "European Citizenry" a federalised European Union will continue to consist of separate nations even if they were theoretically and legally "subordinated" to the "European Citizenry" for a long time to come. A properly functioning parliamentary system requires much more than just the formal restructuration of the European Parliament into a representation of the European Citizenry as the new sovereign, especially requires much more than the introduction of voting equality. For the well and adequately functioning of a parliamentary system at the level of the European Union some kind of centralised political filtering system to serve as an infrastructure of the parliamentary system would have to be in existence as a precondition. With regard to the size of the European Union, this political filtering system would have to be highly centralised. For the effectively operating of this system, beneath the European Parliament, an institutional framework would have to be established on the level of the society, centrally structured, to weigh up and balance all communications relevant to policy in a proper and efficient manner. This new framework would have to replace the existing national communications frameworks which are encrusted in national attitudes, and for the time being probably would have different influences on the European development. The key players in shaping public opinion, in particular the mass media, would have to be organised and, above all, would have to operate along central lines. All these preconditions would generate a centralised political culture oriented towards the European Parliament. A properly functioning parliamentary system therefore implies to some extent a rejection of the call for multiculturalism and regionalism in the European Union. The European Union would have to reconsider the demand for multiculturalism and regionalism in the context of extending the role of the European Parliament to that of a genuine representation of the citizens of the European Union.

The functional prerequisites for a European parliamentary system of government cannot be imposed by a fiat of the European Union. They can only develop of their own accord as the result of a process of social and political integration. The

task of the European Union, however, would be to remove the obstacles and barriers to their emergence, in particular to the growth of an integrated filtering system in the shape of political parties and social groupings.

Under the existing constitutional law of the European Union, i.e. the Treaties of Rome and Maastricht in the version of the Treaties of Amsterdam and Nice, the basic political aim of the European Union is the creation of an “ever closer Union” of its Member States and of their people, but not to unify the Member States and their people. The European constitutional law, and so does the Treaty on the Constitution for Europe, very clearly abstains from a more far reaching aim, i.e. the setting up of a federalised central European State.^x

Unifying the citizens of the Member States to an “European Citizenry” as the European Referendum of the discussed type does and endowing this fictitious “European Citizenry” with the power to make binding decisions is not only not in compliance with the constitutional system of the European Union but even overreaches the aim of the integration process as far as its aims are consented among all Member States.^{xi}

The assessment might be another one in the case of an European Referendum which is organised on the principle that the votes of the European Citizen are not counted union-wide but on the national basis. A European Referendum which is structured this way respects the structure of the constitutional and the societal situation as they are existing and could be brought in compliance with the aim of the European Union.

III. Final remarks

As far as foreseeable European Referenda on European Treaties, typed in the way that the votes of the citizens are counted within the national frameworks might be consistent with the aims of the European Union and its constitutional system but would only extend the national referenda practised in some countries to all of them, it would by no means facilitate neither the process of ratification of European Treaties nor of the European integration process as such.

As far as the federal type of a European Referendum is concerned, considerable doubts are justified whether their setting up would be accepted by the Member States, not because of their constitutional implications, but simply by political reasons. This type of an European Referendum would surely not be acceptable to all Member States if it should provide for the double vote in that way, that the approval on the national parliamentary level does not require unanimity but a two third majority might be sufficient for approval.

Those who would be involved in the process of negotiating as politicians or their advisors would be very soon aware of a “substantial disparity” which would rule the elections if the referendum would be introduced within the voting systems in the case of a European Treaty. They could convincingly argue that in the process of approving the European Treaties people participate by voting according to the principle of equal voting rights whereas in the forgoing process of shaping the European Treaty, which are much more important than the latter and which indirectly implies the participation of the people, the said principle be not applied. A qualified majority of the people can approve a European Treaty which when being shaped has been indirectly disapproved by their majority. For the time being the European Parliament is only involved in the process of shaping a European Treaty this way that it is consulted, but probably in the future as proposed and foreseen within the Treaty of a Constitution for Europe by its consent. Its members are not elected on the basis of equal rights the consequence of which means different participation of the European Citizens in this process. As far as the negotiating and adopting of the Treaty by the national governments is concerned, the status of indirect participation of the people is strongly different, too. The picture of non coherency and of a schizophrenic participation system might become the basic argument not to accept the federal typed European Referendum and by doing so to reject a new possible breakthrough of the European integration process.

The requirement of unanimity on the parliamentary level instead of the crucial requirement of a two third majority does not facilitate the process neither of the ratification of European Treaties nor of the European integration process as such. This type of a European Referendum would probably not be acceptable to those Member States and their people who are more in favour of the strengthening of European integration and are favouring steps towards “United Europe” whenever such steps are possible.

In the near future, not European Referenda will govern the scene but the national referenda will prevail. But the national referendum, as far as its structuring and the putting of questions is concerned has to be redressed in a way that it functions in accordance with its philosophy. Clear and cut formulated questions which are understandably at least for a big majority of the people have to be presented, they should not be interlocked in a confusing way and their number has to be limited. This new dressing of the national referendum should be regarded as a stringent obligation of the Member States’ governments. If the process of intergration of Europe, as it has been the case in the past, should not even become more burdened and suffering from a decreasing rate of consent of the people within nearly all Member States and the referenda should not be restructured as proposed not only the European Treaty as the basic instrument of the gradual progression of Europe’s integration but Europe’s integration as such would be at stake, if not even be jeopardised. The national governments, the

organs of the European Union and all the other institutions like the conventions and like the media participating in the process of Europe's building up are faced with the described task resulting from the dilemmata which the national referenda have created in their traditional dressing. If they would not assume responsibility and succeed in solving the dilemmata they would be responsible for and could be blamed for a further stagnation of the process of European integration if not even of its slowing down. Correctly organised, referenda are not hurdles, troublemakers or obstacles to the process of European integration but are contributing to its legitimation and acceptance among the European Citizenry.

Footnotes:

ⁱ During the processes of ratification of all the former European Treaties (Paris, Rome and Luxembourg) national referenda did not take place and obviously needed not taking place in the Member States. European Treaties at that time were evidently regarded as normal International Treaties without direct implications for the people. Therefore, governments, more or less could “dictate” the Treaties to their people and did so.

ⁱⁱ The European Union, as created by the Treaty of Maastricht, is not a legal entity. It consists of three „pillars“ or bases, the first pillar being the former three meanwhile two European Communities - i.e. the European Community (former European Economic Community), Community and the European Community on Atomic Energy and – in the past – the European Community on Coal and Steel, the second pillar described as the cooperation among Member States in foreign and security policy and, the third pillar named as the cooperation among Member States in domestic and judicial affairs.

Among the three pillars the European Community is a legal entity. It has its own constitutional order but does not share its legal and constitutional order with the two other “pillars”. As far as the second and the third mainstays are concerned the European Union, as such and a whole, basically being an association of states or a confederation, even is no more than an intergovernmental procedure for cooperation among Member States, and for cooperation between the Member States. Member States have not transferred as they did within the sphere of the Common Market and the Economic and Monetary Union and within further fields, their foreign and security policy to the European Union, but only agreed to co-operate in this field within the framework of the European Union.

Any transfer of competences in the future to the European Union in the field of foreign and security policy, or in the field of justice and home affairs, requires a new agreement to be adopted by the Member States and its ratification according to national constitutional law. This has partially happened at the conference of Amsterdam in 1997. According to the Treaty of Maastricht the European Union has a "single institutional framework“, but as far as the second and the third pillars are concerned the European Union being no more than an intergovernmental procedure for cooperation among Member States, and for cooperation between the Member States, does not equally function as within the European Community, especially not as far as its competences to give impulses is concerned.

By its very structure, even the European (Economic) Community is an association of states, i.e. a confederation, and this regardless of its conversion into an Economic and Monetary Union, which is associated with a surrender by the Member States of their monetary policy sovereignty to the Community. Insofar as the European Community exercises authority on the basis of the sovereign rights transferred to it, this authority is derived from the Member States in terms of both its origin and its legitimation. The legal entities bearing responsibility for the Community's authority are the Member States; the citizens of the European Community do not enjoy any substantial protection from the European Community nor do they owe it substantial obedience. It is to them that the Member States are ultimately accountable for all decisions and acts that emanate from the European Union.

This structure of the European Community is mainly reflected in the fact that the power to legislate in the Community remains in the hands of the Council of Ministers, where the Member States are represented by members of their governments. The European Parliament's part in the legislative and political decision-making process is confined to the right to co-decide with the Council (Article 251 of the EC Treaty) although, in specific fields of action, the European Parliament has a right of approval.

The Community's character as a confederation is also evidenced by the fact that the limiting effects of the basic rights and freedoms under Community law, as recognised in the jurisprudence of the European Court of Justice, are confined to Community sovereignty alone. These basic rights and freedoms are binding on the Member States only where they act to apply or implement Community law. Where the Member States exercise their own residual sovereignty to act, those basic rights and freedoms have no limiting effect. Firms and private individuals who are affected by a national measure falling outside Community sovereignty can only rely on the protection afforded by the Member State in question. Where such protected basic rights and interests are affected by national measures, such as expropriation, they cannot take their case to a Community authority such as the Court of Justice. The limited scope of the fundamental rights afforded by the Community legal order are, then, a clear indication of the confederal rather than federal nature of the Community constitutional order. The European Community does, in fact, possess some supranational features. Decision-making by qualified majority in the Council, the jurisdiction of the Court of Justice, the authority given to the Commission to monitor and control

Member States' aids and enforce competition law as well as the precedence of Community law over national law are all evidence of a pre-eminence of the Community over its Member States. Article 48 EU Treaty, however, gives constitution-making power solely to the Member States. The Commission has no right of proposal under the procedure for amending the Treaty, nor does amendment of the Treaty require the approval of the European Parliament. Exercise of the powers assigned to the Community requires the participation of the Member States in two ways. Firstly, it is through the Member States, or more precisely via their Parliaments, that the exercise of Community competence is given democratic legitimacy. Secondly, the Community depends on the Member States for the political and legal implementation of the policies entrusted to it.

In the European Parliament the European Union seems to possess an institution which represents a genuine Community authority. In terms of its organisation, however, the European Parliament, too, reflects the confederal structure of the Community as an association of states. Unlike a national parliament, the European Parliament is not representative of a European "nation", of a "European Citizenship", or of a community of common will and destiny, i. e. of the national peoples taken as a single electorate or of all European citizens. By its basic structure and in the terms of the legal definition (Article 189 of the EC Treaty), the European Parliament represents the peoples of States brought together in the Community, despite of the direct election of its Members.

Transforming the European Union from a union of states to a federally structured state was not one of the aims of the Maastricht conference. Under the Treaty of Maastricht the constitution and institutional structure of the European Community, as laid down in the Treaty of Rome, remain unchanged. The European Parliament has neither gained a new position nor has the protection afforded to fundamental rights in the European Union been recast accordingly. There was a consensus among those taking part in the conference that the fundamental structure of the European Community should remain unchanged, notwithstanding the new powers assigned to it, in particular the transfer to the Community of powers in the monetary field. This consensus was reflected above all in the fact that the extension of the powers of the European Parliament was not a major priority aim for the conference. The thinking of the Member States went no further than to allow the European Parliament an increased role in the legislative process. The new "co-decision procedure", which applies in several areas, does not affect the decision-making powers of the Council as the real authority exercising Community legislative power. To counterbalance the reduction in the powers of the national parliaments through the transfer of new powers to the Community, the Member States - in a joint declaration, adopted as part of the Final Act of the Treaty of Maastricht - called on the European Parliament and the national parliaments to meet jointly in a "Conference of Parliaments" (Assizes) for the purpose of consultation and reporting. This declaration clearly shows that the Member States regard the legitimisation for Community legislation and policy-making as stemming primarily from the national parliaments rather than from the European Parliament.

As a "community of states", the European Union can only take over new tasks and functions to a limited extent. Some tasks and functions of the state necessarily require the organisational structure of a federally structured state for their effective exercise and formulation. Political debate in the European Union is shaped by the fact that some extensive tasks of the state are due to be transferred to the European Union, while there is no intention that it should abandon its basic structure as a community of states; so far, a "United Europe" is not a generally acceptable goal; the concept of a "United Nations of Europe" reflects the present structure of the European Union. If the European Union is to be given powers that can only be exercised on the basis of a genuine state structure, the European Union must first be transformed into a federal-style state. The Treaty "establishing a constitution for Europe", if carefully read and analysed pays full respect to these constitutional reflexions and philosophy.

iii This hard judgement is the more justified as the innovative content of the Treaty on the Constitution for Europe is rather limited in relation to the already existing European constitutional law. An approval by the people probably could have been reached in the case that only the small but important bulk of new innovative constitutional norms would have been the content of the referendum i.e. would have been fixed together, properly commented and dressed in an understandable way and presented to the people. Of course, this set of few norms and rules could not have been named and called as "constitution". But, the Treaty in question does not contain a "constitution", at least not a constitution for a European State, even not for a federal type one. It only contains similar to the present "constitutional" outfit of the European Union, a statute or a charter for the European Union as a confederation of states, of course endowed with some supranational features. From a material point of view, the Treaty has no further intention than to simply modify and alter some features of the existing organisational structure of the European Union. Admitted, the existing European Union is not a legal entity but would become one under the governance of the Constitution Treaty. Admitted, the European Union consists of three independent "pillars" or "columns" and would lose its famous three-temple-structure under

the governance of the proposed Constitution, in deed. The basic norms Union as contained in the Treaties of Rome, Luxembourg, Maastricht, Amsterdam and Nice, which are constitutionalising the European Union - from a legal point of view being already the "statute" of the European Union if not even the best and most efficient one - according to the opinion of the European Court of Justice they even perform a "constitution" of the European Union. As far as the concept of the constitution as proposed by the Constitution Treaty is concerned, it is anything else than a complete new one, the concept has as its guidelines and orientation the existing statute and the existing constitutional structure of the European Union of Maastricht. It does not at all restructure the European Union from a confederation of states into a federation which its wrong description as "constitution" might indicate for the people. The intention of the Treaty could have been conceived this way that it restricts itself to a limited number of new articles deemed necessary for improving the existing statute or "constitution" of the European Union. Corresponding to its basic content being a simple amendment to the existing statute of the European Union it could not have been called "constitution" in this case. By founding the European Union as a complete new entity and by intending to establish a complete new constitution the Treaty could not have simply be restricted to the new norms and prescriptions and referred to the main part of already existing constitutional prescriptions, it had to pick up the complete unchanged main bulk of unchanged primary law consisting of hundreds of articles - the protocols which are annexed to the Treaty of Rome, Maastricht, Amsterdam and Nice being part of primary law, included. The including was necessary according to the special idea of the convention as well as of the conference of the national governments, that the European Union should newly be founded and should not be identical with the European Union of Maastricht. For an idea which might be responsible for the outcome of the referenda in France and in the Netherlands the total bulk of the unchanged European constitutional has been presented to the European people as law of the European Union for approval although it already existed. Since the biggest part of the European people are laymen or laywomen, by conceiving and implementing this "idealistic" plan, a potential wrong understanding of the real situation could not have been excluded, and the understanding of the people that all parts of the "constitution" are absolutely new ones and have to be approved has been foreseeable, more or less.

As far as the fate of the envisaged following up Treaty is concerned it should be primarily kept in mind that the failing Constitution Treaty alters the existing organisational structure of the European Union desirably by only some but very important new norms, rules and prescriptions. All norms, rules and prescriptions which outreach these relative little bulk of necessary changes of the existing constitutional statute of the European Union would remain valid law and would not need a second approval by the people under the condition that the "heroic" concept of newly refounding the European Union would be abandoned. As a consequence of the abandoning of this concept, for the people totally non understandable, the inclusion of the huge bulk of unchanged European law would be abandonable. The concept of refounding the European Union as a new one seems to be questionable and not convincing, since, nonetheless of the refounding of the European Union, according to the Constitution Treaty, the whole bulk of secondary European law, especially the secondary law of the European Community and the whole bulk of jurisdiction of the European Court of Justice and of the Court of first Instance had to remain valid as law and jurisdiction of the newly founded European Union.

Although being new ones some of the new prescriptions of the Constitution Treaty need not necessarily be ratified by the Member States. They could be set into force by simply exercising internal authorisations provided for by the established law or even by making not binding decisions on behalf of the European Union. There exclusion from the ratification process within the Member States would have as consequence that these prescriptions would not have to be renegotiated among Member States on the incoming new intergovernmental conference and that 27 national Parliaments and even in some countries the people would not have to be asked for their approval. For example, the Euro is already the legal tender and the currency of the European Union and need not be introduced again into the law system of the European Union by an European Treaty. Ludwig van Beethoven's "Ode to the Joy" from the Ninth Symphony seems to be completely accepted as the anthem of the European Union and need not be prescribed as anthem to the European people by a European Treaty as the Constitution Treaty does. The same is due to May 9th as celebration and Europe Day the prescription of which could be effectively anchored within the constitutional system of the European Union by a common resolution of European Parliament and the European Council on a proposal from the European Commission instead of putting them into the new Treaty with the consequence that it has to be ratified by 27 national parliaments and in some countries the people would have to give their formal consent.

^{iv} See Article 11 EU Treaty

^v See Article I-5 Constitution Treaty

^{vi} Even in other cases, the highly beseeched principle of majority voting has to be given up in favour of the principle of voting by unanimity. Basically, the European Union is a system of consensus. See Martin Seidel. „Die Einstimmigkeit im EU-Rat – eine leidige, aber nicht dispensable Regel“ in EuZW, Europäische Zeitschrift für Wirtschaftsrecht 3/2000, p. 1 also Martin Seidel „Between Unanimity and Majority: Towards New Rules of Decision-Making“ in Norbert Siebert (ed.) „Quo vadis Europe?, Tübingen, 1997, p. 47 ff.:

“In the fields of the common foreign and security policy and of cooperation in legal and domestic policy matters the Member States are required to take decisions in the form of common measures and actions by way of unanimity, as a matter of principle. Unanimity has been replaced by qualified majority only in respect of implementing measures, which - like decisions in principle - do not have any legally binding effect. It has been fully guaranteed that the consensus principle would apply without restriction should tasks falling into these two fields be assigned to the European Community or should agreements binding under international law be concluded.

In light of such a broadly based applicability of the principle of unanimity, the cases in which the council adopts decisions by qualified majority - although big in number - are rather modest. It would be fair to say that, in general, such cases rather are of minor importance insofar as Member-State "vital" interests are concerned. Foreign trade and agriculture represent major exceptions from this rule; an even more important exception is budgetary law.

Decision-making by qualified majority is a principle generally practised by associations of people and within states. Applicable to the community of nations and in international law is decision-making not by qualified majority, but by consensus and by cooperation. Organisations set up under international law, which set legally binding rules and, in doing so, replace the consensus principle by other decision-making procedures exempt outvoted or dissenting countries from the effects of the decisions so made, as a rule.

The European Communities have been established by treaties binding under international law, although these treaties are so-called integration treaties. These Communities are, by their nature, either associations of states or confederations; their authority is constituted and legitimised by the Member States acting together, but not by any independent sovereign, e.g. a European people or the European electorate. Irrespective of certain supranational elements, the democratic legitimacy of the Communities' authority is – at least for the time being - rooted exclusively in the peoples of the Member States. The structure of the European Communities and the way in which their exercise of powers is legitimised therefore sets conceptual and material limits to qualified-majority decision-making by the council.

Decision-making by qualified majority either by associations of private individuals or by states is subject to limits as well, i. e. limits set by the people or by the parliament as the sovereign representation of the people. Majority decision-making derives its internal justification, acceptability and legitimacy from the principle that the interests reflecting the will of a majority of people may be changed at least in the future, as a matter of principle. Majority decision implies the possibility to influence the majority will so that decisions, once made, can be modified again. Where interest structures stand to be unchanged, the necessary consensus that the sovereign powers assigned to the state or association can be exercised by majority is, as a rule, not obtainable. In such cases, democratic decision-making is by concordance rather than competition.

Democracy means government by the people and the exercise of sovereign powers by the people legitimised through periodically held elections and through voting; the legitimacy of decision-making by concordance within a democratically organised body is not less democratic than decision-making by simple or qualified majority.

It may be doubted whether decision-making by majority as the general rule, which the Intergovernmental Conference 1996 has been invited to agree upon, would ultimately represent an important step towards consolidating the integration process. What is hitherto known about the academic theory of the „optimum majority rule“ does not allow this assumption, but rather confirms the view that decision-making by unanimity ought to be retained. According to the theory developed presumably in the USA, the „optimum decision-making rule“ must be deemed to represent a procedure that minimises the total costs of decision-making. The

so-called total costs are composed of the costs due to the inability to reach decisions and the external costs of „easier“ decision-making procedures disregarding minority interests. Such external costs are zero where decisions are reached by unanimity, they rise the closer the decision-making rule gets to 50 %. Where decision-making is by unanimity, there is an incentive to show a strategic behaviour in an attempt to obtain additional advantages by threatening to veto a decision. However, it should not be overlooked that, to a certain extent, every decision-making rule is exposed to the threat of „blackmail“ by individuals or to the threat of opposition by a number of participants which leads to extra negotiating costs.

The theoretical knowledge about the optimum decision-making rule, which consists, *inter alia*, of the number of winning and losing coalitions and which suggests the largest number of winning coalitions to exist with just over 50 % and the lowest costs of the inability to reach decisions at 51 %, are based on the basic assumption that all conceivable coalitions are of the same possibility and that consequently, the existence of stable coalitions of participants cannot be *proved*. It is further assumed that all participants are willing to share in the decision-making efforts. However, these two basic assumptions have not been met insofar as the European Union is concerned:

Within the European Community, the Member-State interests are unchangeable, by and large. Besides the prosperous Member States there are less prosperous ones whose interests in the transfer of resources are different, of necessity. There are Member States which, because of their better economic performance and greater competitiveness, pursue, when it comes to integrating their economy into a global free-trade system, interests that are different from those of the Member States that are less well off. Any dominant economy like the German neatly integrated into a world-spanning system of free trade is, since it is one of several members of a community of nations, bound to have interests that are different from those Member States whose economies show a different orientation. Germany's European policy is aimed to an open trade policy of the European Community; since trade-policy decision-making requires a qualified majority, it is the aim of German European policy to ensure the existence of a blocking minority, no matter what the price may be, to fend off protectionist trends in the European Community's trade policy. Member States, instead of vetoing a decision by reference to vital national interests, make attempts at forming minority or blocking coalitions to ensure that their interests are duly taken account of within the framework of the overall squaring of interests under a majority decision-making regime. The disintegrative effects of decisions reached by qualified majority have been demonstrated by the loss of acceptability in connection with the banana market regulation.

As a result of unchangeable Member-State interest structures, it would be fair to assume that firm coalitions exist in all those areas in which the principle of unanimity is still applicable - the less prosperous Member States' continuing interest in transfers of financial and other resources at the expense of the more prosperous Member States, and they are less free-trade-minded so that they wish the European Union to be less free-trade minded as well, which would be to the detriment of the more strongly in the benefit of intervention in opposition to the credo of the free marketers. Firm coalitions have emerged in environmental protection among the Member States with a less strongly developed awareness for environmental needs. Their attitude is opposed to the interests of those convinced that the acceptability of market economy and its liberal constitution is at stake in the absence of national and/or Community policies for protecting the environment. Lasting coalitions of countries exist where the interests of certain countries in a stronger orientation of the European Union to the Mediterranean countries must be offset against the interests of certain other countries that want the European Union to show a greater understanding for certain countries in central and eastern Europe, in the field of economic and monetary union, Member-State coalitions must be deemed to exist insofar as the interests of countries with less stable money must be opposed to the interests of the countries with greater monetary stability. There is, no least, an interest of certain Member States wishing their national languages classified as languages used by the European Union as a matter of priority. On the other hand, there is the interest of an unchanged group of Member States insisting on their national languages to be classified as official Community languages that are of no less importance.

The view that the coalition of France and Germany and the coalition of the Mediterranean countries has hitherto not had a determining influence on the decision-making processes within the European Community has not been substantiated by research. Broader empirical studies which would have to include the submission of proposals by the Commission and, most important of all, the voting behaviour in the committees - which are not free from being influenced by the Member States - may be anticipated to lead to opposite results. It is no coincidence that

Member States visibly strive for a common denominator and ultimately a consensus even in areas in which majority-decision-making is possible.

It is not possible to estimate the costs of the European Union's instability to reach decisions, they can, at best, be deplored. The „external“ costs of decision-making in the course of which the interests of outvoted Member States are not taken account of are likely to be of indefinite dimensions in many fields, this applies to those cases in which a „withdrawal“ or „non-participation“ is demanded or discussed because interests have not been taken into account.

In its 12 October 1993 ruling, Germany's Federal Constitutional Court indicated constitutional-law limits to decision-making by qualified majority. In areas in which Germany's „vital interests are affected it is not possible in the Court's opinion to legitimise decisions of the Council that have been adopted against the will of Germany by a qualified majority in a sufficiently democratic way. The question has remained open whether this interpretation of Germany's Basic Law - the German Constitution - means a limitation of majority decisions thought out or whether this limitation is of relevance only where Germany has been outvoted in the Council and where Germany's vital interests are at stake. For the 1996 Intergovernmental Conference the ruling of the Federal Constitutional Court means in any event that decision-making by unanimity which is necessary if the Protocol on the convergence criteria is to be modified cannot be replaced by decision-making by qualified majority. The Federal Constitutional Court has justified the acceptability of the rules and regulations of an European Economic and Monetary Union essentially by the view that according to Article 6 of the "Protocol on the Convergence Criteria" the „Council shall adopt appropriate provisions to lay down the details of the convergence criteria referred to in Article 109 j" by unanimity. Likewise, the ruling bans the transition to decision-making by qualified majority in respect of all those decisions and legal acts the Council takes pursuant to paragraph 4 of Article 109 1 of the EC Treaty after the entry to the final stage of Economic and Monetary Union. This applies to the irrevocable fixation of the exchange rates which may be associated with monetary losses and/or gains for Member States. It holds true also for all those legal acts that are needed in connection with the introduction of the European currency.

It has not yet been decided whether the constitutional law limits the Federal Constitutional Court has derived from the Basic Law are applicable to all those areas in which decision-making by consensus is still valid for the time being. If appropriate, Germany would only be in a position to agree to decision-making by qualified majority if the reservations concerning applicability pursuant to the German constitution continue to be applicable in case Germany is outvoted."

^{viii} See Article 189 EC Treaty

^{ix} Any such transformation of the European Union would have to start with the European Parliament. A prerequisite for the transfer of more extensive powers to the European Community is not solely their assignment to the European Parliament, but first its restructuring into a genuine representation of the Community electorate. There is, of course, no European "nation" from which "Community sovereignty" could be held to derive, as with the nation within a state. Even the substantial integrating impact of the Community in social-political terms will not lead to the emergence of a "European nation" for a long time yet. The peoples of the European Community have lived within the constitutional framework of nation states for too long and developed traditions that differ too widely. Their systems of communications and education are still too steeped in national attitudes. Equality in terms of voting may result in smaller countries being denied any influence on the political decision-making process. A parliament, however, is not so much concerned with the influence of smaller or larger states but with the influence of social trends and movements. If a Member State was too small and its citizens therefore found themselves completely excluded from playing a part in the exercise of common sovereignty, the principle of protecting minorities would justify giving them some special position. The only option to ensure that every country has a fair chance to influence Community legislation and policy would be to establish a second legislative chamber. In the European Union this could be the Council, with appropriate arrangements made to ensure that the smaller Member States could properly defend their interests. The parliament representing the "community of citizens" must not be burdened with the additional function of ensuring that each individual Member State has a fair share of influence on its decisions.

^x See Martin Seidel, „Das Kompetenz- und Entscheidungssystem des Vertrages von Rom im Wandel

seiner Funktion und Verfassung“ in Jürgen Bröhmer, Roland Bieber, Christian Callies, Christine Langenfeld, Stefan Weber und Joachim Wolf (Hrsg) „Internationale Gemeinschaft und Menschenrechte“, Festschrift für Georg Ress zum 70. Geburtstag, Berlin, 2005, S. 805 ff

^{xi} The societal and political preconditions and the basic readiness of the Member States who had to surrender national sovereignty even for a partial conversion of the European Union from a confederation into a federation by means of European Referenda of the discussed federal type may not be granted. Nonetheless the idealistic planning of European Referenda should not be totally set aside or even banned by constitutional scepticism or experiences with the difficult process of European Integration during the past decade. If the European Union would try to introduce it at least succeed in making the necessary constitutional structure for a federal type of “United Europe” more visible more familiar and less dangerous as it seems to be regarded, a substantial breakthrough of the process of European Integration would have happened.

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