

Kei Ishii (kish@cs.tu-berlin.de)

Bernd Lutterbeck (narwal@cs.tu-berlin.de)

Technical University Berlin

31st March 1998

**PERMANENT STUDY GROUP FOR THE EUROPEAN
CONSTITUTION**

in association with

THE EUROPEAN INSTITUTE, SOUTH BANK UNIVERSITY LONDON

Governance and Subsidiarity in the European Union

Towards a institutional framework for an European constitution

Draft Version

Aims of this Paper

The Decline of Nation States and the Challenge of Democracy

The Need for a New Architecture of European Policies and Politics

Overview of Existing Provisions

Shortcomings in the Existing Provisions

- * Principles of subsidiarity and proportionality
- * Regionalism, federalism and the problem of civic society
- * Information society
- * The global economy with its institutions and the European citizen
- * The process—structure relation

Open Questions

- * Principles of subsidiarity and proportionality
- * Regionalism, federalism and the problem of civic society
- * Information society
- * The global economy with its institutions and the European citizen
- * The process—structure relation

The Basic Structure of the Institutional Framework of *ius publicum europaeum* [*Gemeineuropäisches Verfassungsrecht*]

Bibliography

Aims of this Paper

In this paper we will only concentrate on some institutional aspects which nevertheless could become a core part of a future European Constitution. The underlying question here will be how to develop a *civic society* within Europe?

These institutional aspects will have to be closely related to

- the concept of human rights

on one hand, and

- the external relations of the Union and its citizens

on the other.

We will identify some questions which we hope can serve as a starting point for further investigations in this direction.

The Decline of Nation States and the Emergence of Democracy

The collective power of people to shape the future is greater now than ever before, and the need to exercise it is more compelling. Mobilising that power to make life in the twenty-first century more democratic, more secure, and more sustainable is the foremost challenge of this generation. The world needs a new vision that can galvanise people everywhere to achieve higher levels of Co-operation in areas of common concern and shared destiny.

[Commission on Global Governance 1995, Chapter one]

The world and with it Europe are in the midst of a rapid change on a global scale. Among the main factors which seem to drive these changes are:

- * the deregulation of markets, financial liberalization and the emergence of an integrated global market with new international actors (e.g. World Trade Organization (WTO)),
- * the emergence of new poles of dynamism in the world,
- * the explosive growth of telecommunications, computers and the Internet.

There is a broad consensus—at least in academic circles—that one of the most urgent problems to be addressed is that of how to govern this ever-changing world.

But it is more difficult to name these problems, and therefore to understand

them. This holds true for both politicians and scientists. Especially there are serious doubts that terms like 'capitalism', 'globalization', 'global village', among others, do lead to a better understanding of what is happening. There is a need for more distinctive terms.

To quote one example, we know quite well that different ways exist to organize market economies. Even the not at all controversial understanding of the decline of nation states does not explain why some nations seem to be successful and others not

In 1991, a group of eminent persons of the world—most of them politicians—formed an initiative within the United Nations' organizational system in order to grasp these changes. Their report on "Our Global Neighbourhood" was published in 1995. We believe that some of their findings could help us to define and structure some of the ongoing problems in Europe.

The frame of reference of the report is their understanding of the term *Governance*:

Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.

The key points of the definition are:

- i. A new definition of sovereignty
Transfer of competences to local, regional and global organizations.
- ii. The compression of international relations through compulsory rules.
- iii. The civic society as a source for efficiency in international co-operation.
Besides setting up a normative postulate it is a matter of practical reason to establish democracy in order to solve the relationships between democracy and civil society, social balance and the

ability to solve problems through political organizations.

This understanding could be helpful in the process of building a European Constitution.

The Need for a new architecture of European politics and policies

Overview of Existing Provisions

In the following chart we give an overview on the main provisions and rulings in the treaties and some other European documents dealing with the structure of European democracy:

A more comprehensive list would of course have to include many more decisions of the ECJ and ECHR.

SUBJECT	CONTENT	SOURCE
Charter of Regionalism		of 11/18/1988 C 326/296
Herman-Report	Proposal for a European Constitution, named after the then rapporteur F. Herman	Draft of the International Committee of the EP of 1/27/1944 EP documents A3-0031/94 and A3-0064/94
Principles of liberty & democracy; social rights	The Union is "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms.."	Preamble of the Amsterdam Treaty; Article 6 (ex Art. F) Amsterdam Treaty
Principle of Subsidiarity	The principle with its two meanings, the * Sufficient-Formula * Better-Formula	Article 5 lit. 2 (ex Art.3b) Protocol (No 30) on the application of the principles of subsidiarity and proportionality

Committee of the Regions		Article 263 (ex Art. 198a) Treaty e. the E. Community
Common commercial policy	Provisions concerning the relations EU-WTO	Article 131 (ex Art. 110) Treaty E. Community; ECJ 1994 I, 5267
Freedom of information; Data protection	Provisions only for the institutions of the Union, not for the member states	Article 255 (ex Art. 191a) Treaty E. Community; Article 286 (ex Art. 213b) Treaty E. Community

Shortcomings in the Existing Provisions

Even this small overview shows that the European treaties already contain many elements necessary for a modern type of constitution. What is lacking is the interdependencies and interworkings of these elements: Of what kind, for example, are the interdependencies between the principle of subsidiarity and the new freedom of information provisions introduced by the Amsterdam Treaty?

Among the shortcomings we think the following to be of certain importance:

Principles of subsidiarity and proportionality

While these principles define procedural rules it does not in itself provide the values necessary to decide whether the principle can be applied. What these principles call for are values from outside the principles.

Regionalism, federalism and the problem of civic society

Regionalism leads a shadowy existence in the treaties. The attempt to constitute a right of action for the Committee of the Regions in the

Amsterdam Treaty has failed. It is unclear whether this committee has more than a bureaucratic existence.

Modern constitutions (e.g. of Spain, Portugal, Italy, Peru, Guatemala, Saxonia) are examples for the view that regionalism is "the little brother" of federalism: "Federalism and regionalism are equivalent alternatives in the modern constitutional state." (Haeberle)

Information society

The Amsterdam Treaty provided new provisions on data protection and freedom of information. Strong arguments not only among academics state that at least the freedom of information principle is one—some say the one—eminent democratic principle of a modern type of society called Information Society.

Much can be said in favour of the view that this type of societies requires a new type of co-ordination, too: Horizontal rather than hierarchical governance.

The treaty didn't touch this kind of problems at all.

The global economy and the European citizen

After the heavy defeat in the "Banana-case" (cf. United States ea. v. European Union) it is clear at the latest that the common commercial policy of the Union is wrongly structured. It needs to be understood what happens if a body of the World Trade Organization can overrule European decisions and provisions.

These are probably problems of a new type of competition as well as problems of the democratic legitimation of such bodies.

Serious questions—but not even an attempt in the treaties to answer them.

The process-structure relation

Among others a democratic constitution needs rules for the fundamental freedoms and human rights as well as principles for the governance of the state and the markets which today are global markets. These freedoms and rights and the governance principles can only function if they are strongly related. We call this the process-structure relation.

Open Questions

For each of the aforementioned deficiencies we identify some questions which might be helpful in order to address them. During this stage of the work of the Permanent Study Group we think it necessary to gather as much as possible expert knowledge and opinions from the academic disciplines best suited to explain and analyse the particular problem.

The Principles of Subsidiarity and proportionality

How did the principle develop after the last war in Europe? (Tindemann-Report etc)	Social History
Are the religious roots of the subsidiarity principle (e.g. Enzyclica Quadragesimo anno) still alive? If so, do they explain different habits of European citizens to either hierarchy or federalism?	Theology, esp. specialists of the Old Testament Social History and Sociology
How does the European Court of Justice deal with the principle?	Jurisprudence, esp. specialists in Comparative J.

Regionalism, Federalism and the problem of civic society

What can be learned from the privosions of regionalism in various constitutions?	Comparative Jurisprudence (public law) Political Science
What are the old and new figurations of (the core of) Europe and what does that mean for the spatial order of Europe?	Geography Sociology
Are there special space boundaries in Europe which behave invariant towards political changes? (e.g. so called EU-Banana: the belt from Greater London to Lombardy in Italy)	Social History Sociology Economy

What can we learn from the various "Euregios" like Euregio Egrensis and Regio Basilensis under the aspect of civil society?

Political Science
Economy

Is there a need to alter the traditional theories of federalism in the view of the new theories of developing capitalism (S. Sassen) and Internet Governance (Johnson, Post)?

Social Science
Regional and Urban Planning
Political Science (Governance theory)
Computer Science

Is a constitutional theory of regionalism in the sense of "Regionalist Papers" desirable? (P. Haeberle)

Political Philosophy

Information Society

While it can be argued that this particular topic is not of utmost importance in the context of an European Constitution, we nevertheless propose to keep it on the agenda of our group. We think that the new theories of Internet Governance pose an interesting and thought provoking challenge for the 'normal' sciences.

A draft for the constitution of the *Land* Schleswig-Holstein (Northern Germany) proposes under the heading *Participation in the Information Society*:

Politicians

no special academic disciplines

"Every person shall participate in commonly available information and the use of information technology, the *Land* shall support the acquisition of the necessary knowledge and the right infrastructure."

Could one imagine such kind of provisions in European Constitutional documents?

The global economy and the European citizen

The treaties and almost every constitution have a concept of the outside

entities. The common approach to this concept is to construct a relation between governments on the basis of *ius gentium*. To see it as a matter of citizens governing the one world together with national, supranational and international institutions, therefore, calls for a fundamental change of view regarding this concept.

How should "domestic" politics of the World look like—with fundamentals in law, not just in moral principles?

Jurisprudence, best is international law
Political Philosophy and Political Science

Could the ancient *lex mercatoria* serve as a model?

Is a new conception needed for the relations between GASP and the Common Commercial Policy?

Shall the democratic interests of European Citizens be institutionalized on the global level of the world economy?

Economy
Political Science

The Process-Structure-Relation

In order to understand this relation profound intellectual abilities need to be combined with a deep empirical knowledge about what is going on in the world. Have some vision, too, and nothing can go wrong... To have some vision won't ____, either...

The Basic Structure of the Institutional Framework of *ius publicum europeum* [*Gemeineuropäisches Verfassungsrecht*]

As we look for the basic structure of the institutional framework, we should not aim for *the* grand monolithic theory which will explain everything in the (European) universe. Instead I suggest that a "Lego"-like approach—building blocks which can be put together into many different forms—will work best, at least at the beginning.

As we look for the basic structure of the institutional framework, I suggest that in the beginning a *patchwork approach*—to combine elements of different origins into one more or less coherent thing—or "*Lego*"-like approach—building

blocks which can be put together into many different forms—will work best.

This theory has to connect distinct problem eras in the triad of *nation state* — *global economy* — *civil society*:

Our work would have to connect distinct problem areas within the triad of *nation state* — *global economy* — *civil society*:

- the fundamental freedoms
- procedures and other institutional arrangements
- relations to international institutions of the global economy and the institutional system of the United Nations

Maybe the *Permanent Study Group* will be able to construct the "logical engine" that brings the *Triad* into function — well that is, of course, after our work is done, not at the beginning!

Bibliography

Brzezinski, Zbigniew (1997): A Geostrategy for Eurasia. In: Foreign Affairs Vol. 76 Iss. 5 (Sept./Oct. 1997), p. 50

Commission on Global Governance (1995): Our Global Neighbourhood. Report of the Commission on Global Governance. Geneva 1995. <http://www.cgg.ch/contents.htm> [visited 11/27/1997].

Corporate Europe Observatory (ed.) (1998): MAIGALOMANIA! Citizens and the Environment scarified to Corporate Investment Agenda. A Briefing by Corporate Europe Observatory. Part 1 to 5. Amsterdam 1998
<sent by E-Mail 2/10/1998 from <mailto:ceo@xs4all.nl>.

Davies, Norman (1996): Europe. A History. Oxford, New York: Oxford University Press 1996.

Gould, Mark (1997): Governance of the Internet - a UK perspective. In:

Kahin, Brian, Keller, James H. (ed.), Co-ordinating the Internet. Cambridge: MIT-Press 1997. <http://arena.law.bris.ac.uk/Harvard/HarvardFinal.html> [visited 1/3/1998].

Häberle, Peter (1994): Europäische Rechtskultur. Baden-Baden: Nomos 1994.

Herman Report (1994): Report of the Committee on Institutional Affairs on the Constitution of the European Union of 1/27/1994. EP documents A3-0031/94 and A3-0064/94.

Hoesli, Eric (1993): Das protestantische gegen das katholische Europa. Die EG ist von katholischen Werten geprägt. Das könnte sich ändern, denn das Subsidiaritätsprinzip ist ein protestantischer Wert. In: Süddeutsche Zeitung v. 11.1.1993, p. XII.

Jachtenfuchs, Markus, Kohler-Koch, Beate (1996): Einleitung: Regieren in dynamischen Mehrebenensystemen. In: Europäische Integration. Opladen: Leske und Budrich 1996, S. 15 ff.

Johnson, David, Post, David G. (1998): The new 'civic virtue' of the Internet. [Lessons from Models of Complex Systems for the Governance of Cyberspace]. In: Firstmonday Vol. 3 (1998) Iss.1 http://www.firstmonday.dk/issues/issue3_1/johnson/index.html [visited 1/22/1998].

Kant, Immanuel (1795): Zum ewigen Frieden. In: Gesammelte Werke. Bd. 6. Köln: Könnemann Verlagsgesellschaft 1995.

Kilian, Wolfgang (1996): Europäisches Wirtschaftsrecht. München: Beck 1996.

Post, David G., Johnson, David R. (1997): "Chaos prevailing on every continent": A new theory of decentralized decision-making in complex systems. Draft, Temple University Law School 1997. <Paper sent by the authors, to order by E-Mail from Dpost@vm.temple.edu or <mailto:David.johnson@counsel.com>.

Renan, Ernest (1882): Was ist eine Nation? Vortrag in der Sorbonne am 11.3.1882. In: Frankfurter Allgemeine Zeitung v. 27.3.1993.

Rosenau, James N., Czempiel, Ernst- Otto (1992): Governance without Government. Order and Change in World Politics. Cambridge 1992.

Sassen, Saskia (1994): Cities in World Economy. Thousand Oaks: Pine Forge Press 1994 (German: Metropolen des Weltmarktes. Die neue Rolle der Global Cities. Frankfurt, New York 1996).

Spinner, Helmut F. (1998): Die Architektur der Informationsgesellschaft. Bodenheim: Philo Verlagsgesellschaft 1998 [The architecture of the Information Society].

Therborn, Göran (1995): European Modernity and Beyond. The Trajectory of European Societies 1945-2000. London ea.: Sage 1995.

World Trade Organization (1997): Decision of the WTO Appelative Body in the case United States ea. v. European Union of 9/8/1997 (WT/DS27/AB/R, Import of bananas). In: Europäische Zeitung für Wirtschaftsrecht 1997, p. 722. (document in english).