



'Deliberative Supranationalism' – A Defence
Christian Joerges
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Abstract
This paper is essentially a translation of a comment in German (Joerges 2000) on a series of articles in which Rainer Schmalz-Bruns (1998, 1999a, 1999b) developed a concept of legitimate governance beyond the constitutional state, which he called "deliberative supra-nationalism" and contrasted with what Jürgen Neyer and the present author had suggested under the same title (Joerges/Neyer 1997). Our <i>querelles allemandes</i> were not specifically Teutonic: while Schmalz-Bruns presented his approach as a systematic elaboration of the theories of deliberative democracy, based, in particular, on recent contributions by Joshua Cohen, Michael Dorf and Charles Sabel (Cohen/Sabel, 1997; Dorf/Sabel 1998), Jürgen Neyer and I had offered an interpretation of institutional innovations and decision-making practices as observed in the European market-building project. This discussion has had precursors and follow-ups in various contexts, among both lawyers and political scientists. This essay should hence be understood as contribution to an ongoing debate.
Kurzfassung
Der Beitrag kontrastiert zwei Ansätze zur Konzeptualisierung legitimen Regierens jenseits des Verfassungsstaates, die beide unter dem Titel "deliberativer Supranationalismus" auftreten. Rainer Schmalz-Bruns hat seine Version, die auf einen nicht-staatlichen, nicht-nationalen Konstitutionalismus und eine reflexive supranationale Institutionenpolitik zielt, als systematische Fortschreibung deliberativer Demokratiekonzepte insbesondere bei Joshua Cohen, Michael Dorf und Charles Sabel entwickelt. Demgegenüber haben der Autor dieses Beitrags und Jürgen Neyer ihre Vorstellungen aus einer Analyse und Rekonstruktion institutioneller Entwicklungen und Entscheidungspraktiken im Prozeß der europäischen Marktintegration gewonnen. Dabei geht es, anders als Schmalz-Bruns dies wahrgenommen und kritisiert hat, nicht um die Abseugung eines technokratischen Paternalismus, sondern um eine Alternative zur Programmatik eines von "non-majoritarian institutions" beherrschten europäischen "Regulierungsstaates", wie sie insbesondere Giandomenico Majone vertritt. Die innovativen und normativen Qualitäten des europäischen Projekts könnten allerdings nur zur Geltung kommen, wenn man es tatsächlich als Experiment behandelt, also von der Notwendigkeit der Entdeckung neuer institutioneller Arrangements ausgeht, die dafür unabdingbare Autonomie gewährt und erst auf der Grundlage (neuer) Erfahrungen korrigierend eingreift.
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1 Introduction [↑]

In three contributions on Europe's democratic legitimacy, Rainer Schmalz-Bruns (1998, 1999a; 1999b) subjected the ideas that Jürgen Neyer and I had developed in connection with a research project on European Comitology (Joerges/Neyer 1997)(1) to criticisms at various levels. The upshot of the criticisms was that our version of "deliberative supranationalism" favours a "traditionally technocratic model of policy consultation" which was precisely what would not suffice to secure European governance to the normative criteria of theories of deliberative democracy. The accusation would seem to have something in it – it has, at any rate, been endorsed by others (Gerstenberg/Sabel, 2000; Somek 2000). This reproach makes us feel uncomfortable because our whole project on the practice of European Comitology started from the assumption that "technocratic" conceptions of the EU as a "regulatory State", as developed by *Giandomenico Majone* (Majone 1994; 1996a; 1996b) notably, are neither attractive on normative grounds nor even ultimately feasible in practice (*cf.* Joerges 1991b; 1999; Neyer 1999a; 1999b).

But the suspicion of technocracy cannot be taken away by simply pointing to different intentions. It may well be that our attempt to describe the actual existing practice in Europe's regulatory policy as an alternative able to overcome the schism between positively technocratic regulatory concepts on the one hand, and negatively deregulatory strategies on the other, has "objectively" become caught in the technocracy trap, or, at any rate, fails to contain any normative concept -- no matter how things may be as regards the plausibility of our observations. This reading may well

be connected with our mode of procedure. While we did not simply go to work without any concepts, and it was beyond question that European regulatory policy did not amount to some "race to the bottom" (Joerges 1990), it also seemed clear that institutionalisations based on American models would not win through in Europe (Joerges 1991a; 1991b). On the internal workings of the committees, something which, at the time, it was hard to find out about, one penetrating study was already available (Roethe 1994). But we had no elaborated "theory" which would have substantiated our preliminary orientations.⁽²⁾ We wanted to treat the integration of Europe's "markets" as a sort of "discovery procedures" in which new types of ("sui generis") answers to new sets of problems have to be found (and are found). Anyone proceeding in this way may easily overestimate the practical importance of his observations, and pronounce them to be normative. And I might add that not everything we actually did consider could be included in our 1997 article. But, I am not concerned with an *ex-post* rationalization. This defence will fMuch can certainly be explicated, and much will, no doubt, have to be corrected. First, however, the explanations. Here, I wish to take up three objections:

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1. Our failure to tie our ideas coherently to the body of thought-deliberative theories of democracy has developed. In my response, I should like to confront such quests for democratisation with the traditional categories, in which pertinent legal disciplines all perceive international relations in general, and Europe in particular. The contrast is such that the establishment or institutionalisation of de-statalized, de-bordered, meta-national society governance structures which may deserve a democratic label remains difficult to imagine.⁽³⁾
2. Assuming that the inherited legal patterns continue to be highly effective, it may be quite reasonable to start from institutional innovations which have actually come about in the course of European market integration, ask whether they can already count as tried and tested, and discuss their normative merits.
3. In all of this, the law is seen as a sort of sensitive seismograph, set close to the conflicts, yielding rich, even if often encoded, messages from "reality". The concluding considerations will, however, also bring up the law's potential to stabilise the deliberative quality of political processes and thus contribute to the legitimacy of transnational governance. It will also emerge that our agreement does not reduce itself solely to the use of an identical label.

2 Democracy as yardstick and democratisation as process

Were the EU to apply to itself for membership, it might fare worse than, say, Turkey. This *bon mot* has made a nice career. But, with respect for its rhetorical merits, are the requirements that the EU imposes on its Member States really transferable to the European *Verbund* for these States? Does our *bon mot*, at least implicitly, – amount to projecting a European mega-state? Should the distinction between the "democratisation of the European Union" and the "Europeanization of [Nation State] Democracies" (Schmalz-Bruns 1999b) be taken seriously and detach the notion of legitimate democratic governance from its statal heritage? The fact that this idea is easier for theoreticians than for lawyers, especially when brought up in the German tradition (*cf.* Möllers 2000; but see the successor to Kirchhof in the German Constitutional Court: Di Fabio 2001), is only to be expected. Lawyers brought up in the disciplines of private or public international law will be inclined to distinguish between supra-national rules and principals requiring the opening up of constitutional states on the one hand, and the emergence of transnational governance structures that now have to be "constitutionalised" outside the state systems on the other. And even anti-statist and anti-nationalist minded lawyers may find only the first step obvious, while

they are horrified at the second (Weiler 1999).

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The national rooting of transnational law and governance is part of the classical core of all international-law subjects: *ius gentium*, international administrative law, private international law, and also European law. But, at the same time, all these disciplines are in the process of shaking off this heritage. Brief references to two of them (the ones I am most familiar with) will have to suffice:

(1) By contrast with traditional international law confined to *interstate* relations, and equally with international administrative or public law that merely developed "one-sided" provisions which defined the international sphere of application of domestic legal norms but did not envisage any "obedience" to foreign public law or any co-operative regulatory arrangement (*cf.* Vogel 1965: 176-239),⁽⁴⁾ private international law was, in the von Savigny and Story tradition, conceived in more co-operative and universalistic terms. Admittedly, it presupposed that private law had to do with pre-state, apolitical matters, so that, in principle, all private-law systems could be regarded as of equal value, and that, accordingly, through "universal" choice-of-law rules, one should be able to reach, if not universal legal equality, at least an international uniformity of decision.

It is not hard to recognize the dominant traditions in the theory of international relations in the various legal positions (for more detail, see Joerges 1979: 6 ff.). This is true, for instance, of the argument common to all positivist traditions in all of the international legal sub-disciplines: that there cannot be any super-law competent to pronounce that this or that norm is "better", and/or supranationally binding. For this very reason, private international law contented itself with ideals of "spatial" justice. And for this very reason, the so-called international economic conflict of laws (*Wirtschaftskollisionsrecht*) is restricted to determining the international sphere of application of regulatory law; it may weigh and balance interests, but it must refrain from designing transnational (co-)regulation (among many, see Kegel 1979; Schnyder 1990).

This positivist scepticism against validity claims that are not accredited through a state has far-reaching legal, practical, and institutional consequences. In a once quite prominent American variant: where courts are asked to decide upon conflicting validity claims of municipal laws, they can only, for lack of legal criteria of decision, orient themselves to interests, or "flip the coin" -- or they will turn into political *fora* (Currie 1963). Accordingly, they should remain faithful to the "governmental interests" of their home state and apply the *lex fori* in all cases of "true conflict".

(2) Anyone aware of this heritage will realise why so many principles, rules and institutions of European law look downright revolutionary: this law is supposed to have emancipated itself from its intergovernmental origins and set itself up as an autonomous system. It is supposed to confer rights on the citizens of the Member States and guarantee them freedoms of action that they, as European citizens, can bring to bear against domestic, constitutionally accredited law.

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All this has now, presumably, penetrated into the public awareness. But how stable is the social acceptance of European-law orthodoxy really? In legal debates on the need for a European constitution, the normative and conceptual positions from the traditional baggage of the international-law disciplines sometimes merely operate in the background, but sometimes step out of their graves.⁽⁵⁾ Yet, however diligently the kowtowings to the supranational validity claims of

European law are rephrased, one should not take such hidden resistance lightly. Hence, one should be ready to search for normative justifications of supranationalism that are better than the pronouncements in the ECJ's historic judgments (ECJ 1963; 1964), even though this jurisprudence was so successful at freeing the EEC Treaty from international law traditions. That this acceptance is not all that stable and not argumentatively adequate has been a widespread perception since the German Constitutional Court's Maastricht judgment (1994). But the uneasiness of this highly controversial judgment with the European legal orthodoxy is more deeply rooted. All of the relevant German legal theories of integration have struggled seriously with the idea that a legal system which gets its legislative "input" from inter-governmental bargaining could be supreme even over the constitutional law of a democratic state. One need not subscribe to *Hans Peter Ipsen's* work in the sixties (Ipsen 1966) and his later depiction of the European Community as a *Zweckverband* (Ipsen 1972; 1973) or to the *ordoliberal* theory of a European "economic constitution" (for an instructive summary, see Mussler 1998) but should, at least, acknowledge their concerns.

To express this in an other way: it seems simply logical that European law's claim of supremacy over national constitutional law needs to be democratically legitimised. However, it seems equally "logical" that this "logic" has not been respected; legal science was drawn into a search for non-democratic legitimation of the integration project. This search has not provided definite answers so far. Jürgen Neyer and I are far from suggesting that we have the key. What we have suggested is to distinguish two steps and to consider them separately.

"Deliberative *Supranationalism*" conceptualises European law as a species of conflict of laws, a law which responds to "true conflicts" by resorting to principles and rules which are acceptable to all concerned polities (cf. also Joerges 1997: 388-391): The "democratic" basis for this function are "nation-state" failures visible, first and foremost, in the constant production, even by democracies, of extra-territorial effects (similarly, Zürn 1998: 6 ff.). The openness of the German Constitutional State rooted in Article 23 of the Basic Law can be claimed as a national basis for this supranationalism (this is, at any rate, the way in which I interpret Kirchhof 1998: 940 f.; Kaufmann 1999: 404 ff.). Indeed, the two examples just mentioned (6) have exemplary importance. European law has repeatedly managed to civilize national idiosyncrasies on normatively good grounds and with *de facto* considerable success (Maduro, 1998: 150-220; Weiler 1994).

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"Deliberative Supranationalism", as an alternative to hierarchical legal structures, addresses a greater challenge: the very policies that aimed at the breaking down of barriers to trade and at the Europeanization of markets, and, in the wake of the very controls that push back individual state interests and approaches, integration was always, despite all the so-wrongly favoured distinctions between "negative" and "positive" integration, a process of re-regulation as well. In it, transnational governance structures which started to have effect and develop a logic of their own, in which social actors adjusted to a transnational reality that could no longer be domesticated nationally, emerged. Their structures burst open the forms of inter-governmental action and supra-national decision-making institutionally provided for by European law. And it is along this second dimension that the European "democratic deficits" become so striking and seem so hard to remove, because the emergent legal structures do not fit any of the institutionalised national or supra-national models (cf. the analytical distinctions between "Deliberative Supranationalism I" and "Deliberative Supranationalism II" in Joerges/Sand 2001).

To come back once more to international economic law: so far, no one has, as far as I know, thought of presenting the *lex mercatoria* of international trade, the complex international private

governance configurations in the world economy or even state-supported international regimes as "democratic" institutions.⁽⁷⁾ Here, the EU seems to be a much simpler case. Not only is the mutual limitation of unilaterally sovereign positions measured by supra-national rules and principles — and very much in basic agreement with the constitutional *leitmotifs* of open statehood; in the second dimension of European transnational governance structures, juridification processes can also be observed: rules and principles did, in fact, take shape; "institutions" emerged in the shadow of formal law; decision making procedures, even though often rudimentary, were developed and applied; transparency, participation rights, make their way; possibilities of redress are considered; established political actors and institutions -- the governments of Member States, the European Parliament, the European Commission -- observe these transnational governance formations. And there is a public that calls for such activities.

3 Europe a "Market without a State?" – The "Masters of the Treaties" as "States without Markets?" – the "Non-statal Polity" ↑

If democracy-theory criteria remain far too indefinite for a reconstruction and assessment of the transformation processes specifically taking place in the EU, it may be appropriate to look more directly at these very transformation processes. These sub-state, silent, extra-legal, long and almost invisible, transformation processes that are being discussed here are not even mentioned in many of the systematic presentations of European law. Yet, they exist and operate, notwithstanding their neglect by textbook wisdom.

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To summarize in three theses what will subsequently be briefly explained: Europe has not become a "market without a state" ; nor have the Member States of the Union become degraded into "states without markets" (Joerges 1991a; 1996); instead, in the European multi-level system, processes of politicisation and institutionalisation, in which the truly transnational governance structures which are forming have institutionally taken the shape of the European committee system ("comitology"), have got under way. The legitimacy of this governance is to be measured by the deliberative quality of the decision processes organized in it; with the help of law, these qualities are to be guaranteed, and additionally to have their connections to both the institutions of the nation states and the EU ensured.

3.1 Europe as a "Market without State"? ↑

When the EC started on its internal market project (Commission 1985), observers in Germany committed to the ordo-liberal and neo-liberal theories saw it as what they had, in any case, deemed to be necessary and had previously conceptualised (among many, Wissenschaftlicher Beirat 1986, 1994): at long last, the famous four freedoms were to be taken seriously and the Community's market citizens enabled to exercise their economic freedoms effectively in full; the legal precept of mutual recognition would replace the hopelessly complex international-law principles of conflict of laws in private and economic law, and usher in an era of regulatory and institutional competition in economic and social policy; European competition law would not just handle its tasks of monitoring private restrictions on competition but additionally become a criterion and instrument in deregulating the nation states. This was a vision of Europe as a "private-law society", completing its integration in a supranational "economic constitution" (Mestmäcker 1991, 1994).

3.2 Europe as "Regulatory State"? ↑

This was, to be sure, a vision that not only came up against practical policy obstacles but also underestimated the complexity of the social, political, and institutional functioning conditions of "markets". The internal market programme, as *Giandomenico Majone* (1990, 1996, 1996, 1998; cf. Grande 1998), in particular, has shown, turned into a re-regulation and modernization project. Here, Majone defended the message of economic efficiency, a concept of the "common weal" as common prosperity. He emphatically advocated abandoning redistributive policies and restricting regulatory activities to the correction of market failures, which presented themselves as cognitive, technocratic, and technical tasks which could, therefore, be best coped with by being entrusted to non-majority institutions. Europe as a "regulatory state"-- this vision was not just more realistic than the programme of the German liberal theoreticians: with its concern for the interests of "social regulation" in particular, it pushed into policy areas of indubitable explosiveness. At the same time, it offered a constitutional perspective that was consistent, theoretically thought out in many dimensions, empirically rich and politically topical. Yet, the non-majority institutions which, according to Majone, should be entrusted with regulating Europe have not been established – at least, not at European level, or, anyway, not in the way envisaged by Majone. In fact, there are, now, a whole range of so-called agencies (for a survey, see Chiti 2000; Vos 2000). Each of the so-called agencies is different; none has the independence or regulatory power that Majone saw exemplified (even if only in trend) in the US (cf. Majone 1994). The reasons are manifold. But the (partial) failure of Majone's ideas will be regretted only by those who see the delegation of risk policy (despite its politically normative dimensions) as practically possible and normatively defensible, and additionally think that the analytical distinctions between regulatory policy (concerned only with efficiency) on the one hand, and politically redistributive policy on the other, can be institutionally translated into allocations of these policies to both the EU and the nation states (for a criticism, see Joerges 1999).

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3.3 "The Europeanised Economy as Polity" ↑

The most significant institutionalisation of the internal market, however, is not the new agencies, but the long-established comitology. Committees do not just have the so-called "implementation" of Community framework provisions to deal with ("Comitology" proper), they also operate much more comprehensively as *fora* for political processes and as co-ordinating bodies between supranational and national, and governmental and social actors (Joerges/Neyer 1998; Joerges/Vos 1999). And both, agencies and committees, are surrounded by – or surround themselves with – semi-public and private policy networks.

The functional and formal difference between agencies and committees is important, but in a different way than these terms suggest. The new European agencies do not decide independently about market access for firms or the licensing of their products; instead, they are to gather information that can inform policy – they act as technocratic supply undertakings to policy. Their semi-official status opens them up to manifestly private and social interests, and strengthens a technocratically apolitical self-perception. The attachment to Commission departments and the representation of national actors in the agency bodies does not seem to change anything here.

On the other hand, the Committees are supposed to operate as controllers and agents not just of technocratic requirements but also of the political and normative dimensions of the completion and administration of the internal market. This explains why they are called "mini-Councils", *fora*

where the logic of market integration has to be made compatible with the social regulatory concerns and interests in Member States.

Less visible, but by no means less important than the schism between agencies and committees, are the differences in the way and the intensity with which European institutions interact with the public, gather professional expertise and explore the interest definitions of private actors. This no longer has much in common with the way traditional bureaucracies defined their relationship with the public. It is the agencies, in particular, that do not have formal decision-making power (and, therefore, appear so weak legally) which prove to be extremely active organizers of Europe-wide opinion-forming processes.

Agencies, committees, and public and private networks -- all these are institutional products that were not planned "so", and yet prove "necessary". They represent what Joseph Weiler has branded as the "underworld" of the internal market,(8) an "infra-national" undergrowth of the formerly national and supranational institutions of Europe: "...a new sub-atomic particle, a neutrino or a quark, affecting the entirety of molecular physics" (Weiler 1999: 340).

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But how dreadful are things really in this underworld? Should it be possible or even requisite here to take account of a counter-intuitive, but constructive, opposite perspective? Could the internal market project, possibly, in a "discovery procedure of practice", have unravelled and replaced the Gordian knot that linked the regulation of the economy to the nation state, which seemed only to allow either a neo-functionalist output or an intergovernmental, strategic reason? Have these "multi-tiered, geographically overlapping structures of governmental and non-governmental élites" (Eriksen/Fossum 1999: 17) possibly created a sphere of autonomous economic action that enters into social and political ties with the help of the new institutions? If the national economies were still domesticated according to the model of requirements filtered by the political system, cast into binding regulations and then administered, we would now be dealing with an openly political, administrative regulatory process producing a forum through which competing private and public, political and social, national and supranational values and interests could be expressed. And, in fact, all this can be seen in the committees, in the representation of "national interests", in the activities of the Commission and the networks of interest representatives, as policy and expert communities (*cf.* for a thoughtful exploration of the representation problem Smismans 2000).

4 Constitutionalization

What, then, about the accusation that Jürgen Neyer and I, in our version of deliberative supranationalism, have robbed democracy of its constitutive reference to the public, replaced the idea of the people's self-government by a paternalistic rule over the people, which no longer has any relationship to the concept of citizenship and political participation, and discredited the programme of legally and constitutionally domesticating this rule by "expertocratic alienation of the legal medium" (Schmalz-Bruns 1999a: 213)? This is the most important objection. I do not even try to "refute" it. But I would like to point to some difficulties which require a resolution by Schmalz-Bruns in order to get beyond his critique.

4.1 Technocracy and Deliberation

Once again, we conceived our project as a challenge to Majone's visions of a European "regulatory state" primarily governed by using "non-majoritarian institutions". The comitology

interested us as an alternative to European agencies; it interested us because of its links not just with the bureaucracies but also with the polities of the Member States, because of its complex internal structure in which government representatives, the representatives of social interests and "the" economy all interact. Risk regulation in the internal market seemed to us to document the weaknesses of expertocratic models adequately, because the normative, political and ethical dimensions of risk assessments resist a merely technocratic treatment. Admittedly, in the debates about the tensions between the ideals of democracy and the constraints of the "knowledge society", Columbus' egg has not been sighted so far. My mere status as a citizen does not qualify me for a qualitatively convincing (to me at least) technical decision, nor can it be seen how "all" the citizens affected by such decisions are really to participate in them. What is true of risk policy is present as a problem in practically every corner of modern law. And what is true of risk policy in an EU Member State in which (relatively) dense communicative processes guarantee the ongoing political debate is true *a fortiori* for such a polymorphic entity as the EU.

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The much-maligned comitology has the advantage over agencies of the American pattern in that it structures risk policy pluralistically, that national bureaucracies have to face up to the positions of their neighbour states, and that interests and concerns in Member States cannot be filtered out. Committees can be observed closely by the wider public and such politicisation has proved to be effective (Joerges 2001a). This seems to be the situation: any conceivable argument can be brought to bear in the committee system. It tends to offer *fora* for pluralistic discussions. Its links with the broader public do, however, remain dependent on the attention that an issue attracts and on the insistence of the actors concerned on public debate.

4.2 Transparency and publicity

As a matter of fact, anyone who makes the necessary effort can get a daily picture of what is going on in the "underworld of the committees" may turn to sanco-news@cec.eu.int (and will be over-informed) or click on the appropriate pages for questions of standardization on www.NewApproach.org. This is not just helpful for experts and interest groups. On the one hand, risk issues in the internal market can scarcely complain of a lack of public attention. Klaus Eder (1999; 2000) has drawn attention to a typical dynamic for regulatory policy in Europe: along with expertise, counter-expertise is institutionalised; not only do experts and counter-experts observe each other, they, in turn, are observed by those affected in European society, who, in this way, become attentive to each other. The outcome of the communication is the *demos*, which "produces itself in the process of European communication". This is a new type of political public, not that of national constitutional states. It lives in decentralized communicative contexts, to which the actors in the committee system are committed, and it is increasingly taking on dimensions which, if certainly not stable, are pan-European. Instead of complaining about this or praising it, one ought, perhaps, to ask what opportunities lie hidden within the coming together of still nationally oriented publics – and how these opportunities can be institutionally stabilised.

4.3 Law

If deliberative qualities can be shown in the consultative and decision-making processes of the European committee system, and if it is true that the consultancy and decision-making actors are observed by national publics that are also looking at each other, then the need is to stabilise these advantages and act to counter visible deficits – then, anyone pursuing such intentions ought not to do without the medium of law. Our considerations to date on the "constitutionalisation" of the "comitology" (Joerges/Neyer 1998: 224-230) are undoubtedly still far too vague (*cf.* the

criticisms in Hofmann/Töller 1998; Lindseth 1999). Yet, some of the already well-established control mechanisms should be taken seriously. First, reference should be made to Directive 83/189,⁽⁹⁾ according to which domestic regulatory projects have to be notified to the Commission and are then subject to a "standstill" if objections are raised at European level, and a separate procedure is then started. Second, European directives regularly contain so-called safeguard clauses that allow objections to be made in order to established positions and may lead to their amendment. Finally, there are rights to derogate from Community standards, which recognize that risk assessments are simply not "objective" decisions and that European bodies cannot lay claim to any unconditional supremacy here. And then there is also the European Parliament, which, by setting up committees of enquiry, can assuredly bring effective means of publicly to bear, by calling on those involved in regulatory policy to reason (for an example, *cf.* European Parliament/European Commission 1999).

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Epilogue

Why stop here? This restatement and defence of "deliberative supranationalism" is somewhat evasive. It fails to address directly the *Gretchen*-question that Schmalz-Bruns and others have raised: the critique of deliberative supranationalism as just another facet of technocracy may have been refuted nicely, but what about democracy? And indeed, the argument of governance by committees in the EU has again been presented with ambiguous reservations.

This epilogue cannot accomplish what the article failed to do. But it might be useful to spell out some implications of the defended positions more explicitly and indicate the research priorities following therefrom.

I..

One implication is methodological: *Infranationalism* needs to be treated as a new reality which cannot be negated by law. This is not to take Weiler's (1999) philippic against *infranationalism* in general, and against 'comitology' in particular, lightly. In Weiler's account, *infranationalism* occupies a 'middle-level' between (inherently political) intergovernmentalism and (truly legal) supranationalism. It is one thing to list deficits of the committee system as it is presently institutionalized, it is quite another, to refute as an *Unding* the very idea of 'juridifying', let alone of 'constitutionalizing' infranational phenomena.

Weiler's preoccupations are probably best understood in light of his own paradigms. His diagnosis of a dual structure of the Community system portrays normative (legal) supranationalism and decisional intergovernmentalism in a functioning, albeit precarious, equilibrium (*cf.* the path breaking, Weiler 1981). *Infranationalism* moves beyond this dual structure by its disregard of the law/politics dichotomy and of the Member State/Community dichotomy. The Committee System is the institutionalised embodiment of these heresies. And yes, indeed, comitology blurs the law/politics distinction through a 'political administration' that operates in the zones between normative/legal supranationalism and decisional/political intergovernmentalism.

What is so bad about all this? Very similar developments have long been observed within constitutional states. They cannot be confined territorially. Why, then, should the substitution of legal-hierarchical constitutionalism by a 'deliberative' supranationalism be nothing but a 'semantic *faux pas*' indicative of its proponents' failure to 'grasp the real implications' of their

suggestions? (Weiler 1999: 347). What these proponents advocate is that the validity of democracies' legally binding restrictions be based on the exigencies of co-operation and on deliberative processes. And equally important: if the rise of *infranationalism* is really as inexorable as Weiler suggests, an erosion of the Community's dual structure seems unavoidable. The messenger who transmits this report is not to be condemned. What is at stake is a comparative evaluation of doctrinal rejections, an affirmative equation of facticity and validity, and the design of regulative ideas that guide the assessment of real-world developments.

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II.

A second implication concerns the tensions between expertise and democracy. The practices of European market governance in general, and of risk regulation in particular, are characterised by the presence of experts of all kinds and the resort to expertise as a source of 'sound' practice. The authority of expertise threatens the realm of practical reasoning, the claim by all concerned to equal participation in decision-making, and the accountability to their constituencies of elected political representatives. There is a real dilemma. Laymen and experts might have comparable intelligence and virtue, but they boast different types of knowledge (van den Daele 1996). The expert's knowledge cannot be substituted or 'overruled' by the problem perceptions and preferences of the layman. It can, and should, be exposed to critical observation through a quest for counter-expertise. Such 'politicisation' would not replace cognition; nor is cognition invalidated by a reference to other scientific disciplines or the mere fact that other experts hold other opinions. The interaction of experts and non-experts can, and should, pursue other objectives. Such a perspective suggests that resort to expertise does not have to abolish democratic ideals; it can merely approve the inequalities by recognizing the existence of experts' deliberative privileges over the opinions of ordinary citizens (*cf.* Bohman 1996, 165 ff., 172 ff.).

III.

The most important flaw of comitology *telle quelle* remains its problematic relation with public opinion (Eriksen/Fossum 2001). The problem has been addressed at the end of the defence (*cf.* also Joerges 2001a; Joerges/Sand 2001). Institutionalised deliberation and public debate must indeed interact. But this must not become the Achilles heel of 'deliberative supranationalism'; such interactions take place, tend to get stronger and can be institutionally supported. Rather than restating this argument, I would defer further deliberations until the findings of new pertinent projects become available. Comitology has become quite popular not only in legal quarters (to cite some books: Azoulay 2000; Andenas/Türk 2000; Christiansen/Kirchner 2000; Dehousse/Joerges 2002). It also has attracted much attention among political scientists – I happen to be aware of project in Hamburg (Töller 2000), Maastricht (EIPA 2000), Oslo (ARENA). Comitology is discussed by one of the working groups established in the context of the preparation of the Commission's White Paper on Governance in the European Union which will be published either at the end of July or in September 2001 (Commission 2000). So let us wait and see.

References

Andenas, Mads/Türk, Alexander (eds.) 2000: Delegated Legislation and the Role of Committees in the EC, The Hague-London-Boston: Kluwer.

Azoulay, Loïc 2000: Les garanties procédurales en droit communautaire. Recherches sur la

procédure et le bon gouvernement, PhD Thesis EUI Florence.

Bohman, James 1996: Public Deliberation. Pluralism, Complexity, and Democracy, Cambridge, MA: MIT Press.

BVerfG (1994): Urteil zum Maastricht-Vertrag. In: Entscheidungen des Bundesverfassungsgerichts 89, 155-213.

Chiti, Edoardo 2000: The Emergence of Community Administration: The Case of European Agencies, 37 *CML Rev.* 309-334.

Christiansen, Thomas/Kirchner, Emil 2000: Committee governance in the European Union, Manchester-New York: Manchester UP.

Cohen, Joshua/Sabel, Charles 1997: Directly-Deliberative Polyarchy. In: *European Law Journal* 3, 313-342.

Commission of the EC 2000: Enhancing Democracy in the European Union. Work Programme, SEC (2000)1547/7 final, 11.10.2000.

Currie, Brainerd 1963: The Constitution and the Choice of Law: Governmental Interests and the Judicial Function. In: Brainerd Currie, Selected Essays on the Conflict of Laws, Durham, N.C.: Duke UP. 188-282.

van den Daele, Wolfgang 1996: 'Objektives Wissen als politische Ressource: Experten und Gegenexperten im Diskurs', in: Wolfgang van den Daele/Wolfgang Neidhardt (eds.), *Kommuniktion und Entscheidung: politoische Funktionen öffentlicher Meinungsbildung und diskursiver Verfahren*, 297-326.

Di Fabio, Udo 2001: A European Charter: Towards a Constitution for the Union, 7 *Columbia Journal of European Law* (forthcoming).

Dorf, Michael C./Sabel Charles F. 1998: A Constitution of Democratic Experimentalism, 98 *Columbia L. Rev.*, 270-465.

Eder, Klaus 1999: Herrschaftskritik und die Suche nach ihrem Träger. Zu einigen Vermutungen über den europäischen Demos. Oder: Wie ist eine heterodoxer sozialwissenschaftlicher Diskurs möglich?, Ms. Berlin 1999 (Vorlage zur Tagung Bremen 30.9./1.10 "Macht und Herrschaft in der Europäischen Union", Bremen 30.9./1.10.).

Eder, Klaus 2000: Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issuespezifischen Kommunikationsgemeinschaft, *Berliner Journal für Soziologie*, 167-184.

ECJ 1963: Case 26/62, Judgment of 5.2.1963, ECR [1963] 1 – van Gend en Loos.

ECJ 1964: Case 6/64, Judgment of 15.7.1964, ECR 1964, 585 – Costa v. ENEL.

ECJ 1979: Case 120/78, Judgment of 20.2.1979, ECR 1979, 649 – Cassis de Dijon

ECJ 1999: Case C-212/97, Judgment of 9.3.1999, ECR 1999 I-1459 – Centros.

EIPA (European Institute for Public Administration) 2000: Committees in the EU system, http://eipa-nl.com/public/public_publications/current-books/WorkingPapers/ResearchPapers/chap_5.pdf.

Europäisches Parlament/ Europäische Kommission 1999: Die Europäische Union und die Sicherheit von Lebensmitteln, Luxemburg: Amt für amtliche Veröffentlichungen.

Eriksen, Erik O./Fossum, Johan E. 1999: The European Union and Post-national Integration, ARENA Working Paper No. 9/99, Oslo. <http://www.sv.uio.no/arena/publications/wp99_9.htm>

Eriksen, Erik O./Fossum, Johan E, Democracy through strong publics in the European Union? (accessible at: <http://www.iue.it/LAW/joerges/transnationalism/>)-

Falke, Josef/Joerges, Christian (eds.) 2000: Das Ausschußwesen der Europäischen Union. Die Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung, Baden-Baden: Nomos.

Gerstenberg, Oliver 1997b: Law's Polyarchy: A Comment on Cohen and Sabel. In: European Law Journal 3: 4, 343-358.

Gerstenberg, Oliver/Sabel, Charles F. 2000: Directly-Deliberative Polyarchy: An Institutional Ideal for Europe? (<http://www.law.columbia.edu/faculty/csabel.html>).

Grande, Edgar 1998: Regulierungsstaat und Infrastruktur in Europa – Eine international und intersektoral vergleichende Untersuchung. Projekt-Antrag im Rahmen des DFG-Forschungsschwerpunkts "Regieren in Europa".

Hofmann, Herwig C./Töller, Annette Elisabeth 1998: Zur Reform der Komitologie – Regeln und Grundsätze für die Verwaltungskooperation im Ausschußsystem der Europäischen Gemeinschaft. In: Staatswissenschaft und Staatspraxis 9, 209-239.

Ipsen, Hans Peter 1966: Als Bundesstaat in der Gemeinschaft. In: Festschrift für Walter Hallstein, Frankfurt a.M.: Klostermann, 248-265.

Ipsen, Hans Peter 1972: Europäisches Gemeinschaftsrecht, Tübingen: Mohr/Siebeck.

Ipsen, Hans Peter 1973: Über Supranationalität. In: Hans Peter Ipsen, Europäisches Gemeinschaftsrecht in Einzelstudien, Baden-Baden: Nomos 1984, 87-112.

Joerges, Christian 1979, Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts. In: Rabels Zeitschrift für ausländisches und internationales Privatrecht 43, 6-79.

*Joerges, Christian 1990: Paradoxes of deregulatory strategies at Community level: The example of Product Safety Policy. In: Giandomenico Majone (ed.), *Deregulation or reregulation?: Regulatory reform in Europe and in the United States*, London: Pinter/ New York: St. Martin's Press, 1990, 176-197.*

*Joerges, Christian 1991a: Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik, in: R. Wildenmann (Ed.), *Staatswerdung Europas? Optionen einer Europäischen Union*, Baden-Baden: Nomos, 225-268 = *The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics*, European Integration online Papers (EIoP) Vol. 1 (1997) N· 19, <http://eiop.or.at/eiop/texte/1997-019a.htm>.*

Joerges, Christian 1991b: Die Europäisierung des Rechts und die rechtliche Kontrolle von Risiken. In: Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 3-4, 416-434; English version in: Francis Snyder (ed.), *European Community Law. Vol. II*, Aldershot-Dartmouth: Hong Kong-Singapore-Sydney, 297-320.

Joerges, Christian 1994: Economic Law, the Nation-State and the Maastricht Treaty, in: Renaud Dehousse (ed.), *Europe after Maastricht: an Ever Closer Union?*, München: C.H. Beck 1994, 29-62.

Joerges, Christian 1995: Die Beurteilung der Sicherheit technischer Konsumgüter und der Gesundheitsrisiken von Lebensmitteln in der Praxis des europäischen Ausschußwesens ("Komitologie"), ZERP-Diskussionspapier 1/95.

Joerges, Christian 1996: Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration, *European Law Journal* 3, 105-135.

Joerges, Christian 1997: The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective, *European Law Journal* 3, 378-406.

Joerges, Christian 1999: Der Philosoph als wahrer Rechtslehrer. Review Essay on G. Majone, "Regulating Europe" (1996). In: *European Law Journal* 5, 147-153.

Joerges, Christian 2000: Transnationale "deliberative Demokratie" oder "deliberativer Supranationalismus"? Anmerkungen zur Konzeptualisierung legitimen Regierens jenseits des Nationalstaats bei Rainer Schmalz-Bruns, *7 Zeitschrift für Internationale Beziehungen* 145-161.

Joerges, Christian 2001: Law, Science and the Management of Risks to Health at the National, European and International Level – Stories on Baby Dummies, Mad Cows and Hormones in Beef, *Columbia Journal of European Law* 7, 1-19.

Joerges, Christian 2002: The Law's Problems with the Governance of the European Market, in: Renaud Dehousse/ Christian Joerges (eds.), *Good Governance and Administration in Europe's 'Integrated' Market*, Oxford: OUP (forthcoming).

Joerges, Christian/Neyer, Jürgen 1997: From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology, *European Law Journal* 3, 273-299.

Joerges, Christian/Sand, Inger-Johanne 2001: Constitutionalism and Transnational Governance (accessible at <http://www.iue.it/LAW/joerges/transnationalism/>).

Joerges, Christian/Vos, Ellen (Eds.) 1999: *EU Committees: Social Regulation, Law and Politics*, Oxford-Portland: Hart Publishing 1999.

Joerges, Christian/Falke Josef (Eds.) 2000: *Das Ausschußwesen der Europäischen Union. Die Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, Baden-Baden: Nomos.

Kaufmann, Marcel 1999: Integrierte Staatlichkeit als Staatsstrukturprinzip. In: *Juristen Zeitung*, 814-822.

Kegel, Gerhard 1979: Vaterhaus und Traumhaus – Herkömmliches internationales Privatrecht

und Hauptthesen der amerikanischen Reformer. In: Otto Sandrock (Ed.) Festschrift für Günther Beitzke, Berlin: deGruyter, 551-573.

Kegel, Gerhard 1995: Internationales Privatrecht, 7th ed., München: C.H. Beck.

Kegel, Gerhard 1999: Editorial: "Es ist was faul im Staate Dänemark...". In: Europäisches Wirtschafts- und Steuerrecht, H. 8.

Kirchhof, Paul 1998: Die Gewaltenbalance zwischen staatlichen und europäischen Organen, Juristen Zeitung 53, 965-974..

Kohler-Koch, Beate (Ed.) 1998: Regieren in entgrenzten Räumen (= PVS Sonderheft 29). Opladen: Westdeutscher Verlag.

Kommission der EG 1985: Weißbuch der Kommission an den Europäischen Rat zur Vollendung des Binnenmarktes, KOM (85) 310 v.14.6.1985.

Lindseth, Peter 1999: Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community. In: Columbia Law Review 99, 628-738.

Maduro, Miguel Poiares 1998: We the Court, Oxford: Hart Publishing.

Majone, Giandomenico (ed.) 1990: Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States, London: Pinter.

Majone, Giandomenico 1994: The European Community. An "Independent Fourth Branch of Government"? In: Brüggemeier, Gert (ed.): Verfassungen für ein ziviles Europa, Baden-Baden: Nomos, 23-44.

Majone, Giandomenico 1996a: The European Community as a Regulatory State, 1994-VII Collected Courses of the Academy of European Law, The Hague/Boston/London: Kluwer,.

Majone, Giandomenico 1996b: Regulating Europe, London/New York: Routledge.

Majone, Giandomenico 1998: Europe's 'Democratic Deficit': The Question of Standards. In: European Law Journal 4, 5-28.

Mestmäcker Ernst-Joachim 1991: Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts. In: 10 Rechtshistorisches Journal, 177-192.

Möllers, Christoph 2000: Staat als Argument, München: C.H. Beck.

Mestmäcker Ernst-Joachim 1994: On the Legitimacy of European Law. In: 58 Rabels Zeitschrift für ausländisches und internationales Privatrecht, 615 -635.

Mussler, Werner 1998: Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel. Von Rom nach Maastricht, Baden-Baden: Nomos.

Neyer, Jürgen 1999a: Weder subversiv noch demokratisch? Bedingungen und Möglichkeiten gleichzeitig effektiven und legitimen Regierens in der Europäischen Gemeinschaft. In: Michael Th. Greven/Rainer Schmalz-Bruns (Eds.), Politische Theorie – heute. Ansätze und Perspektiven.

Baden-Baden: Nomos, 363-383.

Neyer, Jürgen 1999b: Legitimes Recht oberhalb des demokratischen Rechtsstaats? Supranationalität als Herausforderung für die Politikwissenschaft. In: Politische Vierteljahresschrift 40, 390-414.

Roethe, Thomas 1994: EG-Ausschußwesen und Risikoregulierung: Ein Problem von Handlungsstruktur und Rationalität (EUI Working Paper Law 94/7), Florence.

Schmalz-Bruns, Rainer 1995: Reflexive Demokratie. Die demokratische Transformation moderner Politik. Baden-Baden: Nomos.

Schmalz-Bruns, Rainer 1998: Grenzerfahrungen und Grenzüberschreitungen: Demokratie im integrierten Europa? In: Beate Kohler-Koch (ed.) 1998, 369-380.

Schmalz-Bruns, Rainer 1999a: Deliberativer Supranationalismus, ZIB 6, 185–242

Schmalz-Bruns, Rainer 1999b: Demokratisierung der Europäischen Union – oder: Europäisierung der Demokratie? Das Projekt Europa in herrschaftskritischer Perspektive, paper presented at the conference of the “DVPW-Arbeitskreis “Europäische Integration” über “Macht und Herrschaft in der EU” on September 30-October 1, 1999 in Bremen.

Schnyder, Anton K. 1990: Wirtschaftskollisionsrecht, Zürich: Schulthess.

Slaughter, Anne-Marie 2001: International Law and International Relations. The Hague Academy of international Law (forthcoming).

Smismans, Stijn 2000: The European Economic and Social Committee: towards deliberative democracy via a functional assembly, European Integration online Papers (EIoP) Vol. 4 (2000) N-12, <http://eiop.or.at/eiop/texte/2000-012a.htm>.

Somek, Alexander 2000: On Supranationality, European Integration online Papers (EIoP) Vol. 5 (2001) N- 3, <http://eiop.or.at/eiop/texte/2001-003a.htm>.

Teubner, Gunther 1996: Global Bukowina: Legal Pluralism in the World Society. In: Gunther Teubner (ed.), Global Law Without A State. Aldershot: Dartmouth Gower, 3-28.

Teubner, Gunther 1998: Vertragswelten: Das Recht der Fragmentierung von Private Governance Regimes, Rechtshistorisches Journal 17, 234-265.

Töller, Annette Elisabeth 2000: Der Beitrag der Komitologie zur politischen Steuerung in der europäischen Umweltpolitik, in: Grande, Edgar/ Jachtenfuchs, Markus (eds.): Wie problemlösungsfähig ist die EU? Regieren im europäischen Mehrebenensystem, Baden-Baden: Nomos, 313-342.

Vogel, Klaus 1965: Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm, Frankfurt a.M./Berlin: Metzner.

Vos, Ellen 2000: Reforming the European Commission: What Role to Play for European Agencies, Common Market Law Review 37 (2000) 1113.

Weiler, Joseph H.H. 1981: ‘The Community system: the dual character of supranationalism’, 1

Yearbook of European Law, 267-306.

Weiler, Joseph H.H. 1991: The Transformation of Europe. In: *Yale Law Journal* 100, 2403-2483.

Weiler, Joseph H.H. 1994: Fin-de-siècle Europe. In: Dehousse, Renaud (ed.), *Europe After Maastricht: An Ever Closer Union?*, München: Beck, 203-216.

Weiler, Joseph H.H. 1999: Epilogue: 'Comitology' as Revolution – Infranationalism, Constitutionalism and Democracy, in Joerges, Christian/Vos, Ellen (Eds.), 339-350.

Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft 1986: Stellungnahme zum Weißbuch der EG-Kommission über den Binnenmarkt (Schriften-Reihe 51), Bonn.

Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft 1994: Ordnungspolitische Orientierung für die Europäische Union. Gutachten (Schriftenreihe 356).

Zürn, Michael 1998: Democratic Governance Beyond the Nation State?, InIIS-Arbeitspapier Nr. 12/98, Bremen.

Endnotes

(*) Translated by Iain L. Fraser

(1) On the design of this project, cf. Joerges (1995); on its findings, Joerges/Falke (2000).

(2) Roethe (1994) had based his inquiries on a method of "objective hermeneutics and interpreted his findings in the light of theories of professionalisation. He did not engage in the debate on European regulatory policy.

(3) There was, however, much more useful literature available than we were aware of, as I learned from reading Slaughter (2001, esp. ch. IV).

(4) In a more recent version of Germany's maître penseur of private international law: "Every State is an association of the people (citizens) in its country... Every State promotes its own common weal in its own country; it is free (master in its own house), accepts no orders from outside, and tolerates no judge over it." (Kegel 1995: 848).

(5) This can be shown on a thousand individual issues, of which let us mention at least one: when the ECJ, in a recent judgment (ECJ 1999 – Centros) which, if not in importance then, at least, in persuasiveness, surpasses by far, in my view, the legendary Cassis de Dijon decision (ECJ 1979), gave Danish citizens the right to avoid provisions of company law that were binding in Denmark (which were unreasonable in both their objectives and their means) and to invoke instead English company law which was more favourable to their needs, our *doyen* of private international law thus commented: "... No favouring of rogues that cock a snook at the law! There is something rotten in the State of Denmark – and elsewhere! (Kegel 1999). Our *maître penseur*, though always having defended the autonomy of the parties in conflict of laws, can get nothing out of the autonomy of citizens rooted in European law."

(6) "Cassis de Dijon" (ECJ 1979) and "Centros" (ECJ 1999).

(7) Schmalz-Bruns refers (p. 189 and p. 233) to Teubner's perspective of a constitutional model of

”heterarchical self-co-ordination inspired by private law”, though, in order immediately to distance himself from it; it would, in fact, be inappropriate, since Teubner’s concept of a private-law constitution cannot (irrespective of a reference to Cohen/Sabel 1997) be claimed for Schmalz-Bruns’ democratic-theory intentions.

(8) In an interview in : Die Zeit Nr. 44, for 22.10.1998.

(9) EC OJ L 109/1983, 8 (much amended, most recently by Directive 98/34, EC OJ L 217/1998, 18).

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