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The Cocoon of Power: Democratic Implications of Interinstitutional Agreements

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The Cocoon of Power: Democratic Implications of Interinstitutional Agreements

Abstract

This article aims at assessing Interinstitutional Agreements (IIAs) in terms of democratic theory. It starts from the premise that democratic rules as developed in the national context may be used as a yardstick for supranational governance as well. Thus, parliamentarisation of the Union is defined as an increase in democracy, although relating problems such as weak European party systems, low turnouts, and remoteness are not to be neglected. The article evaluates several case studies on IIAs in this vein and asks whether they strengthen the European Parliament or not and why. It arrives at conclusions which allow for differentiation: Empowerment of the European Parliament occurs in particular when authorisation to conclude an IIA stems from the Treaty or from the power the parliament has in crucial fields such as the budget and is willing to use for this purpose. Success is, though, not guaranteed in every case and sometimes more symbolic than real. However, a democratic critique must also stress negative consequences of IIAs in terms of responsivity, accountability and transparency.

Introduction

Interinstitutional Agreements (IIAs) between the three main EU organs are an intriguing aspect of European governance. Over the last four decades they have by sheer quantity changed the quality of the Union institutional set-up by spinning new layers around the cocoon of power evolving in the Union. While it is still difficult to imagine what kind of butterfly will eventually emerge from it, IIAs have become a sub-constitutional driving force of European integration though largely neglected by legal and political science and even more so by the European citizenry. Drawing on the empirical research recently concluded by a consortium of lawyers and social scientists this article aims at a first assessment of IIAs in terms of democratic theory. The following questions will be addressed: Are IIAs a means for redressing the distortions the classical model of representative democracy has suffered in the European Union, in particular by putting the European Parliament on equal footing with the Council in the legislative process? Or do they add to the problem by enhancing the intricacies of the European institutional arrangement which thus becomes even more complicated and intransparent in the eyes of the citizens? Are they merely an instrument to smooth the functional interplay of the organs and therefore comparable to other formal or informal interrelations between political institutions? Do they and to what degree alter the EU's institutional balance as constituted by the Treaties? And if so, who is the winner and who the looser of this process of transformation?

Having appeared quite early in the integration process IIAs have become part and parcel of the European constitutional model though not always based on explicit treaty provisions. While Article 218 TEC[1] explicitly refers to this instrument as a means of bilateral and trilateral cooperation between the organs, it may not be interpreted as a general clause authorising any IIA[2]. On the other hand, implicit authorization based on Article 10 TEC stipulating the "duty of sincere cooperation" between the EU institutions and echoed in the *Declaration (No 3) to Article 10 TEC in the Final Act of Nice* appears to be used as a powerful source of legitimation for IIAs.[3]

While scholarly work on European constitutionalism in theoretical and practical terms has manifested an impressive growth throughout the last two decades[4], IIAs have been largely neglected[5]. That these agreements have been concluded to fill the lacunae and ambiguities of the Treaties[6] is one hypothesis guiding the sparse research on IIAs. Another one holds that their growth is due to the initiative of the European Parliament or to the will of either the Council or the Commission to win the Parliament's consent to specific policies. Both have some plausibility, yet only further research will show to what extent. A third hypothesis as well as a counter-hypothesis are proposed here: Interinstitutional Agreements enhance the democratic quality of the European Union in that they empower the European Parliament being the sole directly elected organ of the Union. The counter-hypothesis runs as follows: IIAs add to the democratic deficit of the Union in that the empowerment of the Parliament is far too sporadic and by no means a guaranteed outcome of pertinent negotiation processes, whereas these arrangements tend to further obfuscate the already highly complex institutional setup of the Union.

Obviously, hypothesis and counter-hypothesis are grounded in a specific view of democracy centred on parliamentary representation, responsiveness and transparency. Both are conceived in the vein of the literature on the democratic deficit of the European Union, in particular as recently spelled out by Andreas Follesdal and Simon Hix in a response to Majone and Moravcsik.[7] At the same time the view underlying this article is critical with regard to the dominance of the executive in the European Union be it incarnated by the Commission or by the Council and their administrative "underworld". This stance is concomitant with a sceptical view about the democratic

[1] See also Article III-397 of the Treaty establishing a Constitution for Europe (TCE) whose future however is unclear after failed ratification in France and the Netherlands in May and June 2005.

[2] See W. Hummer in this volume and C. Bobbert, *Interinstitutionelle Vereinbarungen im Europäischen Gemeinschaftsrecht* (Peter Lang 2001), 59.

[3] Ibid.

[4] See e.g. J.H.H. Weiler, 'A Constitution for Europe? Some Hard Choices' (2002), 40 *Journal of Common Market Studies* 563; R. Bellamy and D. Castiglione (eds.), *Constitutionalism in transformation* (Blackwell Publishers 1996); C. Closa and J.E. Fossum (eds.), *Deliberative Constitutional Politics in the EU* (Arena 2004).

[5] Up to now, there is no comprehensive study on IIAs or even an exhaustive list of the accurate number of adopted IIAs, see F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations, in: G. Winter (ed.), *Sources and Categories of European Union Law* (Nomos Verlag: 1996), 454.

[6] M. Westlake, *The Commission and the Parliament: Partners and Rivals in the European Policymaking Process* (Butterworth 1994), 62.

[7] A. Follesdal and S. Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik', EUROGOV Papers No. C-05-02.

quality of the Council in two respects: First, it qualifies the Council as a "halved" representative as it represents states and not citizens, a virtual aggregate, not individuals[8]; second, it is critical with regard to the Council's melting of executive and legislative functions. Thus, a shift in power towards the Parliament is valued as an increase in democracy. However, up to now it remains unclear to which extent this shift really occurs or, to put it differently, whether it occurs in any case of an IIA and how persistent it is. A second caveat is about transparency. Given the fact that the Union has concluded for one reason or another well over 100 such Interinstitutional Agreements in different fields and with different scopes and objectives their effect for the democratic quality is all but obvious. Moreover, it is far from obvious how to assess these agreements in terms of responsiveness. In Hanna Pitkin's terms a scrutiny of how political representatives respond to the needs of the represented has to start from the question what representatives actually do rather than who they are[9]. While it seems certain that IIAs respond to the European institutions' needs for better cooperation and compromise-building, it is less clear whether they serve the concept of responsiveness with regard to the electorate. Yet this approach takes us to further complications as definitions of the people's will are a crucial if unresolved issue of democratic theory and practice since its inception, Rousseau's construction of *volonté générale* and *volonté de tous* being an important case in point.

While I argue that parliamentary representation is one cornerstone of modern democracy and that this must hold true for the Union as well[10], the deficiencies of European parliamentarism cannot be neglected nor can they simply be set aside by the facile argument that the European Parliament like all other supranational institutions is in a process of incremental transformation which will eventually and somehow teleologically bring about the full-fledged classic. It is common wisdom that the European Parliament despite its continuous growth in power since its first direct election in 1979 is still a non-saturated institution suffering from exclusion in a variety of very important policy fields, from the lack of a functioning transnational party system, from despairingly low turnouts in the elections, from election campaigns generally focused on national rather than supranational issues, from a dangerous remoteness from its citizens. These flaws have a structural dimension and will not be easily cured as long as the Union remains a hybrid of supranationalism and intergovernmentalism. As a matter of fact, we currently witness a peculiar, i.e. contradictory development: The growing powers of the European Parliament still do not provoke a more pronounced interest in its doings. It has neither become a major concern for the citizens ignoring the EP's influence nor is it a central strategic target of the political parties whose transnational organisations remain weak compared to their national constituents. Seemingly, citizens as well as

[8] Heads of states and governments though have repeatedly proposed themselves also as representatives of the people and indirectly they do so, but their representation function is not primarily, at least not in theory, dedicated to specific individuals but to state interests however defined.

[9] H. Pitkin, *The concept of representation* (University of California Press 1967).

[10] See D. Beetham and C. Lord, *Legitimacy and the European Union*, (Longman 1998).

parties remain encapsulated in their national political world. Only lobbyists representing specific interests seem to have acknowledged the importance of the EP as an arena for advocacy.[11]

It goes without saying, that these problems will not be solved by any existing or additional number of IIAs, however far-flung their scope might be. On the contrary, if known they might even endorse the popular vision of the Union as being an intricate and opaque web of institutions and agreements, a black hole, in which the people's will is subdued by potent stakeholders having access to them. Yet, popular perspectives on a specific institutional setup are only one, if important, part of democratic theory. Another perspective is inherent in a longstanding theoretical work on democracies and their institutions defined as norms, habits and behaviour. However, as suggested above the two perspectives are communicating vessels. No democratic theory could and ever has ignored its very *raison d'être* which is to advocate the people as the ultimate source of legitimate power. By defining the people as nation modern democratic theory seemed to have reached a general solution to the perennial problem posed by the question about who the people is. Thus, the theoretical state of the art became and still is imbued with notions and concepts of democracy tightly linked to the national state. Our topic though is supranational democracy or, more precisely, it is about democratisation of a supranational polity which has come about as a result of international treaties between now 25 member states who have agreed upon a set of institutions with legislative, executive and judicial powers over their citizens. To complicate things even further: We are dealing with a polity in the making whose *telos* remains contested and thus open, while confronted with the need for democratisation due to the citizens' disaffection with the whole enterprise.

Today, theorising European integration as well as supranational democracy has to start with the political and legal achievements enshrined in the *acquis communautaire*.[12] The *acquis* includes primary and secondary law as well as an expanding corpus of soft law as for instance in guidelines and recommendations. From the outset, primary law has mirrored the will of the founding fathers to go beyond a simple international organisation deemed unable to bring real and sustained stability to Europe after two devastating world wars. Thus, the institutional setup foresaw two organs which were novel in international organisations: the High Authority in the Treaty of ECSC, which in the

[11] See J. Greenwood, *Interest representation in the European Union* (Palgrave Macmillan 2003).

[12] There is, however, no inflation of theories on supranational democracy. This is perhaps all too natural, for theoretical work if geared towards practical relevance cannot abstract from the reality of the existing Union. As a matter of fact, for the time being a theory of supranational democracy has to be focused on the European Union as no other transnational organisation has reached such a degree of integration operating on the basis of supremacy of law and direct effect, just to name the most conspicuous differentia specifica between the EU and other organisations. It is no exaggeration to hold that until now the very term "supranational" is appropriate to the EU alone. Hence, theorising supranational democracy is theorising democracy in the context of this emerging polity based on existing treaties and institutions. The development of the polity is a process driven by these very treaties and institutions, by organs using, (re-)interpreting and perhaps (over-)stretching the provisions accorded. It is not theorising on a tabula rasa. Creating integration and democracy at the same time is a dramatic challenge for the European Union in particular as it remains a contested polity. Theory building has to take these aspects into account.

following treaties became the Commission, and the European Court of Justice. These two organs were deliberately built to create and promote a common interest leading to common regulations and to supervise their implementation in the member states. In spite of problems in the past and today, it is my thesis that without this "commissarial management"[13] based on real supranational powers the Union would hardly have reached the form we witness today. Hand in hand with this embryonic supranational element, the original primary law offered also a democratic one: the Assembly of national members of parliaments which eventually evolved into the European Parliament, directly elected and with astonishingly growing powers since the early eighties of the last century[14].

As treaty revisions are the privilege of the member states through Intergovernmental Conferences the expansion of the powers of the EP must also have been in the governments' interests.[15] Although this assessment might not be shared by all EU scholars, the dialectics between growing integration and the advancement of EP powers is striking. Whether it occurred due to the institutional self-interest of the EP or due to the needs for greater legitimacy of the Council's decisions or the Commission's initiatives or to both is an interesting question the answer to which will most probably lie in the middle. For my argument here it is more interesting that national political actors engaging in European unification did resort to parlamentarisation as one important solution to the problem of legitimacy. Moreover, the European concept is moulded on the national model organising its members along party lines and not along national lines. However, in terms of representation the European Parliament rivals the Council and to a degree the Commission. The Council is not simply a second chamber nor is the Commission simply the executive branch depending on majorities in the Parliament. Last but not least, it is not self-evident that the institutional evolution will inevitably follow the classical course.[16]

How then do we qualify this peculiar institutional development of growing parliamentarisation and how do we explain the role of IIAs as an important part of its functioning? A tentative general answer to these questions goes as follows: Given Europe's anti-democratic and in parts totalitarian history in the 20th century parliamentarisation remains the hegemonic instance of democracy.

[13] See S. Puntscher Riekmann, *Die kommissarische Neuordnung Europas. Das Dispositiv der Integration*, (Springer 1998) where I hold that real progress in integration has not only been achieved by Treaty change but also or perhaps even more so by the work of a „commissarial management" incarnated in the Commission and the governance by committees on the one hand and by the rulings of the ECJ on the other. It is my thesis that this fabric of governance is to a degree comparable to the practices of "commissioners" installed with varying denominations and authorized by the rulers of the *Ancien Régime* to engage in modern state building from the sixteenth century onwards. I did not though maintain that the outcome will inevitably be the same.

[14] M. Westlake, *A Modern Guide to the European Parliament* (Pinter Publishers 1994); R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* (John Harper Publishing 2003),

[15] See Bull. EC 10-1972, Part I, Chapter I, where the Heads of States and Government in their final declaration at the Summit in October 1972 requested the Commission "to increase the supervisory powers of the European Parliament and to do so regardless of the date on which it would be elected through direct suffrage according to Article 138 of the Treaty of Rome"; see also Bull. EC 6-1973, p.8 regarding the increase of the EP's budgetary powers.

[16] However, the future of the TCE notwithstanding, the empowerment of the EP becoming the true co-legislator of the Council (albeit not in all policy fields) as one salient outcome of the Convention drafting the Constitutional Treaty in 2003 has been confirmed by the IGC in 2004. See also S. Puntscher Riekmann and W.Wessels (eds.), *The Constitutionalisation of the EU - From Nice to Rome The European Convention and Discourses in the Member States* (Verlag für Sozialwissenschaften, forthcoming).

Denying the EP more rights is a dangerous discourse which can only be justified in the name of defending the national parliaments' rights. Yet, the more decisions are taken at the European level the more the EP must be upgraded as national parliaments are for various reasons handicapped in controlling their executives acting in the Council or the European Council let alone in the plethora of committees and working groups populating the European Union. Hence, parliamentarisation is one solution to the problem of supranational democracy, but it is embedded in a system of colliding forms of representation. Current constitutional discourses though do not envisage the termination of this collision by introducing a clear cut model of separation of powers but rather by inventing new forms of interinstitutional cooperation. The emergence and development of IIAs endorsing the role of the EP even in policy fields where primary law remains silent appears consistent with a constitutional thinking oriented towards parliamentarisation, yet within a polyarchic cooperative legislative model.

Obviously, according to this reasoning IIAs may be an important feature of European democracy. Yet, this standpoint might be challenged by the equally reasonable argument about the informal, if not unconstitutional or sub-constitutional nature of IIAs[17]. However, what practical implications they really have, remains to be assessed by detailed research in the relevant policy fields. Until now this research uncovers rather different realities. IIAs enhancing the EP's clout in budget negotiations are perhaps the most valuable contribution to supranational democracy, while involving the European Parliament in the comitology procedures might get mixed qualifications at least from a theoretical standpoint. Comitology being a device to involve national bureaucracies in the process of implementing European law has gradually become an instrument in the cycle of law preparation. This expanded considerably the power of supranational and national executives in the legislative process, thus blurring the boundaries between executive and legislative even further and giving rise to criticism against bureaucratic power in the Union[18]. Hence we have to ask, what exactly is the role of the EP in comitology? Finally, one interesting case study on the IIA on Democracy, Transparency and Subsidiarity showed the EP as political entrepreneur in the name of democracy. However, a first assessment comes to a sceptical conclusion about the effect of this IIA.

This article rests on a more comprehensive work on the constitutional affairs of the Union[19], whereas the analysis offered here draws on a broader research project on the role of IIAs as a special fabric of European governance. It will *first* give a theoretical account of the specificities of European democratic thinking as a basis for theorising supranational democracy; it will, *second*, try to assess some empirical findings of studies on IIAs in the light of the theory; and it will, *third*, formulate some questions to be answered by further research.

[17] See I. Eiselt and P. Slominski, 'Sub-Constitutional Engineering: Negotiation, Content and Legal Value of Interinstitutional Agreements in the EU' (2006), 12 *European Law Journal* 2, 209-225.

[18] See J.H.H. Weiler, 'Epilogue: „Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy', in: C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999), 339-350.

[19] See S. Puntscher Riekmann and W. Wessels (eds.), *op.cit.*, note 18 *supra.*

Transformation of Democracy into Supranational Democracy: A Blend of Old and New

It is common wisdom that European integration poses a new challenge to democratic rule.[20] The "ever closer union" of states and peoples has given birth to a new polity exerting legislative, executive and judicial power. The supremacy and direct effect of European law makes the Union no longer comparable to other international organisations if it ever had been. The treaties have shifted a considerable portion of national sovereignty onto the supranational level without constructing as yet a new European demos legitimating the political outcomes. Political actors have always been aware of this imbalance and have tried to redress it by different means, sometimes by copying national models of representation, sometimes by inventing new forms. The blend of old and new is the material basis to start from when conceiving supranational democracy.

If democracy is a form of rule of the people, by the people and for the people, the European fabric of governance should be assessed in those terms.[21] Yet Lincoln has stated his famous formula in the context of the nation state, whereas the practices it engendered may vary considerably from state to state. In particular different constitutional models may offer quite different solutions to the innate tension between the two notions of government for the people and government by the people.[22] For decades the European Union has stressed the former and neglected the latter. Legitimacy through output trumped legitimacy through input.[23] It is, however, interesting to observe that the Convention drawing up the Treaty establishing a Constitution of Europe (TCE) invented the popular initiative (Article I-47 (4)) and thus marked a turning point in European constitutional thinking. Such initiatives are even unknown to many national constitutions. It appears as an attempt to combining representative with direct democracy under the conditions of a multinational polity in the making.

The European Union can only come about by transcending the nation state without engaging in the creation of a new nation: Multi-nationalism is its very precondition as is polycentrism. Until now the creation of central organs with supranational powers did not go hand in hand with the disempowerment of national centres subduing the latter to a new hierarchy. Multi-level governance with its dialectics of top-down and bottom-up policy-making is the central feature of any discussion

[20] However, what we are witnessing lately is a controversy about whether the Union has at all a democratic deficit: While Majone and Moravcsik are critical about the reality of such deficit, Follesdal and Hix have again and forcefully endorsed the analysis pointing to the constitutional deficits pervading the Union's institutional set-up. See Follesdal and Hix, *op.cit.* note 9 *supra*; G. Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998), 4 *European Law Journal* 5; G.Majone, 'The European Commission: The Limits of Centralization and the Perils of Parliamentarization' (2002), 15 *Governance* 375; A. Moravcsik, 'In Defense of the 'Democratic Deficit': Reassessing the Legitimacy of the European Union' (2002), 40 *Journal of Common Market Studies* 603.

[21] See D. Beetham and C. Lord, *op.cit.*, note 12 *supra*.

[22] See J.H.H. Weiler, 'Epilogue', *op.cit.*, note 20 *supra*.

[23] See F. W. Scharpf, *Regieren in Europa. Effektiv und demokratisch?* (Campus Verlag 1999).

on European democracy. It is this construct which has been so fruitful in terms of integration, yet rather detrimental to democracy. The political system based on the incremental "fusion" of national and supranational administrations[24] has brought about common standards, harmonisation as well as mutual recognition; it has brought down national trade barriers and removed national boundaries; it has created the single market, the single currency and last but not least the European citizen. For decades, the latter behaved as a permissive onlooker trusting his or her government as well as his or her parliament. He or she had no doubts about the national parties they voted for as being their appropriate representatives on the European level as well. Moreover, the new polity was not perceived as a polity but rather as a place where nationals would meet to cooperate. Yet, only in the mid-eighties of the last century it became rather clear that integration had generated a union exposing state-like features.[25] Certainly, Maastricht marked a turning point and the onlooker started to look on the Union more carefully. The rise of Eurosceptic parties reframed public discourses on Europe, while the citizens discovered that monetary policy and single market provisions had started to influence, if not to determine national policies to an ever growing extent. In particular, the stability and growth pact as a cornerstone of monetary union affected national regulations in the name of market liberalisation impinging upon social policy.

It is my thesis that the imbalance between monetary, economic and social policy inherent in the treaty of Maastricht has been the real midwife for a broader discussion about the democratic deficit, albeit this term had been used before. In post-war Europe the construction of democracy was deeply linked to the construction of the welfare state. The ever closer union of nation states on the basis of a single and liberalised market although conceived as a new opportunity for competitive socio-economic actors was and is perceived as a threat by many.[26] The specific challenge for democracy though results from the fact that national representative systems, in particular national parliaments, are no longer seen as able to respond to welfare demands, whereas supranational organs are unable or unwilling to deliver in this respect. Thus, European citizens are stripped of channels into which they can feed their interests. The argument about the European Parliament as being their representative at the supranational level is so little convincing not only because it seems so remote and its entanglement with other organs so complex, but because its power to promote social issues is nil.[27] At the same time other organs are as powerless due to the fact the EU has no or little competences in this field. They cannot respond to their citizens' demands because they are the wrong addressees. Only national governments could change this by amending the treaties and empowering European institutions to act in policy fields dear to their citizens. Yet, for the time being consensus among heads of state and government is thin. If at all, changes may be expected within the Eurozone only.

[24] See W. Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes' 35 *Journal of Common Market Studies* 267.

[25] See S. Puntscher Riekmann, M. Mokre, M. Latzer, *The Transformation of Statehood* (Campus 2004).

[26] See also the debates in France in the course of the referendum of the TCE where in particular left parties stressed the notion of globalisation through Europeanisation and the dangers for national welfare resulting thereof. See Flash Eurobarometer June 2005.

[27] It is this fact that inspires Moravcsik in pointing to the lack of salience in European politics which as a consequence causes the lack of interest of European citizens also in constitutional matters, see A. Moravcsik, *op.cit.*, note 22 *supra*.

From the outset in the eighteenth century, European constitutional discourses have not only been about freedoms and rights, institutions and rules, but also about (re)distribution of national wealth. To put it differently: In Europe democratic freedoms and rights were always discussed together with the "social question". Hannah Arendt has spotted therein one important difference between American and European constitutionalism.[28] Joseph Weiler qualified the hard question about social security as one determinant of the current constitutional debate.[29] Thus, in European nation-states institutions and rules seem to be conceived as devices to bring about social stability through social policy. To ignore this fact is to court trouble also with regard to European integration. Yet, demanding a further transfer of social and economic policy issues onto the European level is all but easy. (Re)distribution is an important facet of national vote- and office-seeking. Shifting the question to supranational organs implies not only further shifts of power and eventually money, but also putting national social security systems in jeopardy as seeking common standards might imply lowering standards at least in some member states. After the 2004 enlargement towards eight new members coming out of a communist past and showing quite different socio-economic levels of development, the vision of a European social policy seems ever more illusionary. Hence, the focus on new modes of governance as e.g. the Open Method of Coordination in policy fields such as pensions, poverty and employment. Moreover, distribution raises the question about inner-European solidarity and equality. The recurrent controversies between net-payers and net-receivers shed a light on the implications of the topic.[30]

It is, thus, not the least astounding if there is a rather solid consensus between member states' governments to avoid or dilute the issue as much as possible and to focus on rules and regulations, thus confirming again Majone's thesis about the Union as regulatory state[31]. Moreover, Europeanising distributive policy would foster the ambitions of the Commission in designing and supervising such policies as much as those of MEPs to sell them as their achievements to their electorate. Not much fantasy is needed to see the limits of linking democracy and welfare at the supranational level. A striking evidence for this argument was given by the European Convention which only reluctantly gave way to the instalment of a working group on social issues whose results were as meagre as those of the working group on EMU. The debate on creating a powerful instrument for economic governance balancing monetary union never gained momentum and withered in the consensus about the status quo as best solution. Thus Europeans are called to trust a political system regulating rather than shaping their socio-economic reality in a tangible way through (re)distribution.

[28] H. Arendt, *On Revolution* (Faber and Faber 1963).

[29] J.H.H. Weiler, 'A Constitution for Europe', *op.cit.*, note 6 *supra*.

[30] See European Council, Brussels 15-16 December 2005.

[31] G. Majone, *Regulating Europe* (Routledge 1996).

What the implications of this split will be for democracy is difficult to predict. However, throughout Europe populist parties on the far right as well as far left try to re-constitute the nexus by combining it with nationalism and consequently with anti-europeanism deemed by many as a version of globalism. The success of these parties in national elections may be fluctuant, but if taken as an instance for latent or open social conflicts it is a matter of concern in terms of democracy as well as European integration. In the vein of these protest movements and parties European politics is considered as being non-responsive and intransparent, favouring capital over people, free market and competitiveness over social security for everybody. Whether and to what extent there is truth in this criticism, must be assessed by careful analysis. However, a recent study on poverty in Germany shows that "the poor get poorer" (Financial Times, March 3, 2005, p.1). Unemployment rates are high in Germany, France, Spain and Italy as well as on the rise even in countries like Austria and the Netherlands. The Lisbon Strategy heralding the EU as the most competitive regional economy of the world by 2010 appears more and more as a mirage. Thus, the result is a popular impression of the EU as system that cannot deliver. Eurobarometer surveys endorse this finding.

It is, therefore, understandable that the European Parliament whose members are directly accountable to the public and may be sanctioned by their electorate has tried time and again to open new channels of access to the citizens. The 1993 package of IIAs on Democracy, Transparency and Subsidiarity could be qualified in this vein, although its real impact may be questioned. The same could be said of the 1988 IIA giving the EP a voice in the distribution of structural and cohesion funds. The EP's position will be further consolidated by a new IIA proposal put forward by the Commission in 2004.

Interinstitutional Agreements in the European Institutional Design: The Growing Cocoon

The preceding very general theoretical remarks on democracy should serve as a basis for the evaluation of of a series of case studies on IIAs. Obviously, the first on CFSP and the second on Democracy, Transparency and Subsidiarity diverge in several respects as to approach and to outcome. However and counter-intuitively, the first comes to quite positive conclusions with regard to parliamentarisiation of the European Union, while the latter ends on a rather sceptical tone in spite of the democratic goals set by the IIA. Yet, both insist on the fact that regardless of the EP's gains in the negotiation leading to an IIA the outcome depends on convergence of perspectives pursued by all three organs involved. If convergence is lacking, the bargaining will fail. This is perhaps not surprising as all three organs when engaging in the negotiation of an IIA start on equal footing: Even if there is always one organ driven by greater interest than another, when it comes to the bargain about a specific IIA it is largely a matter of *do ut des*.

Notwithstanding this finding emerging from both studies, they divert with respect to the discussion on supranational democracy defined as a process of growing parliamentarisation. Despite several

caveats, Maurer et al. argue that the IIA on CFSP has been a means of enhancing the EP's role in this policy field. Interestingly, this process has even resulted in greater powers than national parliaments would ever have dreamed of. Thus challenging one sacred cow of intergovernmentalist integration theory, the authors maintain that IIAs are "instruments to beat paths for parliamenarisation in the valleys up to ICG summits" in that they sew the seeds of future Treaty amendments by creating facts. While the main agenda-setter in this respect is the European Parliament, Maurer et al. argue that "since the EP has no decision-making power at IGCs, it has deliberately used IIAs – and not just in the field of CFSP – to create irreversible facts. The EP constantly links the conclusion of IIAs to the unfinished process of constitutionalisation." From a normative perspective on democracy this might be deemed as problematic. Ideally, democratic institutions are bound to the rules set by a given constitution that might be changed according to the rules spelled out in the same text. There is though an important hiatus between the classic role of parliaments as known from the national context and the reality of the European Parliament to be considered in this case: While the European organ bears the same denomination it is still far from having the same rights. As it lies in the nature of institutions to expand powers, the EP is driven by the ambition to eventually become equal. There might be an interesting parallel between the European Parliament and national parliaments in the 19th century, when the latter fought against the monarch in order to gain more rights. It is intriguing to observe the European Parliament acting as a single subject against the other organs (or sometimes building alliances with one of them to the disadvantage of the other) without being torn apart by party conflicts.

However, the history of the IIA on CFSP is a series of uphill battles fought by the EP during the nineties of the last century unleashed by the negotiations of the Treaty of Maastricht. To underline the legitimacy of its cause the EP repeated time and again that according to "the principles of parliamentary democracy, which are amongst the most fundamental values of the EU", only the EP's participation supplies European foreign policy with sufficient democratic legitimisation. Yet, the result of the IIA finally concluded in 1997 gets a mixed qualification. Conclusively, the battle had been fought on budgetary and information issues offering the most promising lever. In the end the IIA "represents a compromise between the EP's interest not to see the classification of expenditure in the field of CFSP revised at the IGC and the member states' interest to keep the responsibility for the substance of CFSP and budgetary powers of the EP separated". Given the traditions in this special policy field, it could hardly have been otherwise.

What are the theoretical lessons to be drawn from this study? First, the EP has self-asserted itself as an autonomous supranational actor pursuing its own reform agenda in the name of democracy. This finding most certainly endorses an institutionalist approach to European integration. As a matter of fact, the EP has very aptly used the IIA to change, albeit in a limited way, the institutional setup of the Union in the "valley" between Maastricht and Amsterdam. In doing so, it has even managed to go beyond Treaty provisions by introducing the *fiche financière* and the conciliation procedure. It is appropriate to conclude that the EP's strategy to exploit the Council's interest in quick

implementation of CFSP related decisions has served the cause of representative democracy rather well.

However, two critical points have to be raised: *First*, the role of informal agreements to overstretch the formal ones is problematic with regard to constitutional principles. While rule-specification may be all the more necessary in the context of European Treaties showing the member states' penchant for ambiguities when compromise is difficult, it cannot just be set aside in the Machiavellian vein that "the end justifies the means". If this were to be the general rule, no formalisation let alone a constitution with its specific rules for amendment were ever needed. However, as time and again the content of IIAs has led up to Treaty reform formalisation does eventually occur. Due to the evolutionary character of the Union, special relations between the formal and the informal are perhaps inevitable. *Second*, IIAs might represent not only a special means to bring integration about in the dialectics of the formal and the informal, but they also might stay as a new form of interinstitutional cooperation. If the latter holds true it has to be theorised in terms of democracy. Doubts must be raised with regard to IIAs a contribution to democracy, if conceived as a more general substitute to formal constitutionalisation through treaty provisions. They do not open new channels of representation of the popular will, but they are prone to serve a highly self-referential discourse among organs which might be important for the functioning of the EU. In the political system deriving thereof representatives are hardly compelled to tell the represented what they actually do. Thus, responsiveness as one keystone of representative democracy is eroded, whereas the authority of the EP may be jeopardised at the same time.

In this respect it is interesting to study the IIA package on Democracy, Transparency and Subsidiarity as a complement to the IIA on CFSP. The package negotiated in 1993 is important for two reasons: *first*, with regard to question whether IIAs do enhance supranational democracy by empowering the EP, and, *second*, with regard to the real content of the IIA package as this explicitly aims at democratising the European decision-making. As for the first question Eiselt/Slominski[32] arrive at a sceptical conclusion. According to their analysis of the package, "the EP is by no means necessarily the only institution which benefits from IIAs". Logically, so they elaborate, the success of institutions depends on their bargaining power. However, the relevance of the outcome also depends on the embeddedness of the IIA in Treaty provisions. Without specific authorisation by the Treaty IIA negotiations will with high probability result in rather vague if not irrelevant conclusions. While this assertion has to be corroborated by careful analysis of further IIAs, it is challenging the generalising findings produced in the study of the IIA on CFSP. Moreover, if the link of an IIA to specific authorisations by primary law is to be confirmed by other empirical material we might conclude that the Treaty does indeed limit IIA negotiations which cannot transcend the constitutional frame. This allows for another important finding: While in the light of our reasoning about democracy through parliamentarisation we might welcome any gain in

[32] See I. Eiselt and P. Slominski, *op.cit.*, note 17 *supra.*

power achieved by the EP, we should also welcome the fact that IIAs do not induce unconstitutional behaviour.

However, the issue is more complicated indeed. The IIA package on Democracy, Transparency and Subsidiarity includes a variety of issues which have been interrelated by the EP, while the Council had wanted to limit the discussion on subsidiarity alone. The EP threatened the partners with its dissent on subsidiarity if no steps were taken to promote the other two issues as well. However, with regard to the Ombudsman for which the Treaty had provided an explicit authorisation to conclude an IIA (Article 195 EC) the EP was rather ambivalent in the first place as it feared a new rival in the control of the EU administration. Moreover, despite the EP's entitlement to lay down the regulations and general conditions governing the performance of the Ombudsman's duties, it could not win the Council's consent to its demands about time limits for a file of complaint. While the EP had tried to negotiate no limitation at all, it finally yielded to the Council's compromise of two years. The same holds true for the important question about confidentiality and secrecy as it lies within the Councils room of discretion to refuse the communication of a given document.

As to subsidiarity we have to recall that the relevant Article 3 EC was an attempt of member states' governments to assuage national electorates' criticism of ever growing supranational power. However, the provision was utterly vague and thus implementation difficult. Moreover, the EP and the Commission were less convinced about the democratic implications of subsidiarity which they qualified as an "intergovernmentalist turn". Two rivalling discourses on democracy surfaced here: While the EP and the Commission as clearly supranational organs were geared towards supranational democracy and at the same time towards more power for themselves, the Council's Members due to their ambivalent role between representation of the member states and supranational functions played the card of "coming closer to the citizens" via subsidiarity. The outcome of the negotiations though falls short of expectations. It hardly did go beyond the commitment of all three organs to take the principle of subsidiarity into account and to regularly check compliance with it. The EP finally succeeded in a rather symbolic battle about the denomination of the institutional forum designed to settle further disputes and entitled to amend the IIA: It finally was called "interinstitutional conference" rather than meeting.

These results lead to two assessments: The first is that an IIA cannot specify Treaty provisions which were deliberately kept vague due to fundamental differences. Hence, IIAs are no substitutes to ICG negotiations. While this might be true to an extent – the study on CFSP and the legislative process have come to somewhat different conclusions -, another point must be raised in terms of democracy: The principle of subsidiarity is perhaps doomed to remain vague not only due to the eminent difficulties to precisely assess what then is best done on which level of the EU. Yet, while this principle can always be rhetorically invoked if need be, national political elites actually may not want to implement it at all. Having discovered the EU as an ideal room for taking unpopular

policy decisions they may escape unpleasant national debates and shift the blame onto anonymous Brussels.

If this holds true as confirmed by the literature about blame-shifting in the EU the vague results of the negotiations about the IIA on transparency and democracy are less astounding. It has to be mentioned first, that this IIA could not rely on any authorization clause of the Treaty nor did it serve any need for specification of Treaty rules unless we invoke the Treaty's general commitment to the principle of democracy. Yet the demand for publishing the Council's voting results had been raised several times in particular by the media[33]. The Council finally agreed to open "some of its debates to the public" as well as policy debates in the six-monthly work-programme if the Council Presidency and the Commission's annual work programme and on other "important issues" depending on unanimity vote of the Council. As a matter of course, publicity of Council's meeting was deemed as detrimental to the efficiency of its negotiation process. And one could add that publicity would necessarily lead to new forms of stealth in that real important issues would be withdrawn to further remote fora. Yet, this can and does occur in the national political system as well. Most political decisions presuppose rooms for negotiation which are not and in every moment open to public scrutiny. However, secrecy had been the dominant principle of the workings in the Council since the inception of European integration. The crucial difference between the European and the national political systems lies exactly in the differences relating to the forms of democratic representation: While at the national level it remains relatively clear who is to be sanctioned at the end of day, the multitude of representational layers create diffusion of power and confusion in citizens' minds. It is no wonder that it eventually led to the citizens' growing disaffection with the EU. Interestingly though, citizens do not manifest anger against their governments but against the EU as a novel polity or the Commission as preferred scapegoat or the EP by abstaining in European elections.

The second important demand raised by the EP in the frame of the IIA on Democracy, Transparency and Subsidarity, i.e. the Council's commitment not to adopt a legislative proposal previously rejected by the EP, led to a complete failure in the first place. The study imputes it to the fact that the EP certainly had gone beyond the Treaties undermining its chances from the beginning. Yet the case study emphasises the EP's success in this cause during the negotiations of the Amsterdam Treaty as to the accomplishment of its demands raised within this IIA. This can be taken as an instance for the EP's political clout which however should not be overstated as it was much less successful in the negotiations of the Treaty of Nice. [34]

In this context the IIAs relating to Comitology appear to be a slow, yet sustainable success story for the EP. Maurer/Kietz[35] have consistently demonstrated that starting from the Plumb-Delors-

[33] F. Heyes-Renshaw and H. Wallace, *The Council of Ministers* (Palgrave Macmillan, forthcoming).

[34] See I. Eiselt and P. Slominski, *op.cit.*, note 17 *supra*.

[35] See A. Maurer, D. Kietz, 'The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements',

Agreement (1988) to the Modus vivendi (1994) to the TCE the powers of the EP in terms of rights of scrutiny has continuously increased. Agreements built on the preceeding ones, consolidated and expanded the powers in a strategy of pressure stemming from its co-decision and budgetary rights or of delaying legislation in lengthy conciliation procedure or of utter rejection of legislation. However important the progress in parliamentarisation may be, its assessment in terms of democracy must be careful: First, it is difficult to sell this story onto the electorates as for them it might indeed lack in salience; second, the EP might also be valuated as an obstructor in the process of legislation rather than a powerful player representing the citizens' interests.

In line with the reasoning on the links between democracy and social issues IIAs on budgetary questions are of utmost importance. Obviously, this topic constitutes a classical battleground in terms of democracy by parliamentarisation. The Commission Working Document for renewal of the IIA on budgetary discipline and improvement of budgetary procedure (COM (2004) 498 final) proposes among other issues also the incorporation of an IIA concluded in 2002 on the creation of the European Union Solidarity Fund in order to develop it into a European Solidarity and Rapid Reaction instrument. However, as Eiselt/Pollak/Slominski have shown[36], numerous IIAs relating to budgetary issues adopted over the last two decades have not succeeded to provide a sustainable solution to the long-lasting conflicts between the EP and the Council. Moreover, the leading role of the European Council in this field frames and limits the room of manoeuvre for the EP as for the Council. In particular, the seven years' Financial Frameworks negotiated by the European Council in dramatic setups as was the case in 2005 makes it almost impossible for the EP to use its veto power in case of dissent. Thus, the EP is utterly hampered in exercising one of the fundamental rights of any parliament in the world which is to define and distribute the financial resources of the polity.

Concluding Remarks

By way of conclusion it must be said that in depth studies of single IIAs seem to allow for rather mixed assessments in terms of democracy. In particular, it is rather difficult to come to sound generalisations. If democracy is defined as parliamentarisation the IIA on CFSP shows the EP as winner of the game even if it transcended the constitutional boundaries, while the IIAs package on Democracy, Transparancy and Subsidiarity obliges to re-evaluate this finding in different terms. The EP might win, but only under certain conditions, i.e. when their endeavours are grounded in the Treaties, and do not do so necessarily at their first attempt but with some delays. However, more research is still needed on IIAs in other policy fields and especially on failed IIAs in order to find out under what circumstances IIAs are expected to be concluded and why the EP potentially succeeds in IIA negotiations. Other variables, such as the political constellation of the parties involved and their bargaining power, are also crucial in this regard.

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in: *European Law Journal* (forthcoming).

[36] See I. Eiselt, J. Pollak, P. Slominski, 'Codifying Temporary Stability? The Role of Interinstitutional Agreements in Budgetary Politics', in: *European Law Journal* (forthcoming).

Moreover, the findings about these "sub-constitutional" changes as part of a self-referential interinstitutional game do not per se endorse the democratic quality of the EU. They rather seem to enhance integration by stealth as Joseph S. Nye has written about the EU already in the seventies of the last century.[37] Or to put it differently, while the cocoon of power is ever growing through the formalisation of informal practices by creating legal instruments as sources of legitimacy, it does not resolve the problem of responsiveness and accountability vis-à-vis European citizens. At last the formal legitimacy of the EU may thus become impeccable, it will however not suffice to convince citizens.[38]

Yet, independently of the debate about the impact of IIAs on the EP's institutional role we have to conclude with two critical points. First, the role of informal agreements to overstretch the formal ones is problematic with regard to constitutional principles. Second, IIAs might represent not only a special means to bring integration about in the dialectics of the informal and the formal, but they also might stay as a new form of interinstitutional cooperation. Doubts must be raised with regard to IIAs as a contribution to democracy, if conceived as a more general substitute to formal constitutionalisation through treaty provisions. In this respect also the question about the impact of IIAs on the institutional balance has to be tackled in greater depth. While Hummer is critical about the consequences for the balance as established by the Treaties[39], in particular with regard to the cumulative effect of IIAs, he does not take into account that the institutional balance or better imbalance is one important reason for IIAs: As far as the studies quoted in this paper have demonstrated, the EP is the main driving force behind many IIAs. This is only the case, because the EP is a non-saturated institution. The EP is trying to live up to the standards of parliamentary rule by continuously challenging the existing balance of power among institutions by means of IIAs. If the EP will eventually be a parliament proper, perhaps the need for IIAs will vanish.

[37] Joseph S. Nye, *Peace in Parts. Integration and Conflict in Regional Organization* (Little, Brown 1971)

[38] A. Arnull, 'Introduction: The European Union's Accountability and Legitimacy Deficit', in: A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002), 4.

[39] See W. Hummer, From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices', in: *European Law Journal* (forthcoming).