Revise the European Constitution to Protect National Parliamentary Democracy

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Without doubt, the European Union has come to a crossroads. Following the failure of the proposed Constitution in the referendums in France and The Netherlands, it is now vital to take stock of the situation in order to develop an overall concept for how European integration can and should progress from this point. Germany's EU Council Presidency provides an opportunity to hold this discussion. However, the fair-weather talk about Europe, currently being heard from all political sides, is no help at all. People are ill-at-ease and increasingly reserved and sceptical about the European Union, because they can no longer make sense of the integration process. They cannot shake off the feeling of an ever stronger, increasingly inappropriate centralization of competencies without understanding who is responsible for which policies. These concerns must be taken very seriously, particularly because they are not simply imaginary.

It is European policy and in part also German policy to want the proposed Constitution for the European Union to come into force in spite of its failure in France and The Netherlands. In particular, they want to save those aspects, which reorganize the competencies of the EU's bodies and its legislative procedures. However, it is precisely these aspects which reveal crucial problems and weaknesses. In the end, the proposed Constitution is a continuation of those contradictory, intransparent structures of the European Union, which were material in bringing about the very problems which confront us today.

Problems have resulted from the existence of two mutually exclusive concepts for the final structure of the European Union. On the one side, there are the intergovernmentalists aiming for an association of permanently sovereign states, a 'Europe of the mother countries'. They are greatly concerned about the increasing centralization of policy on the EU level, which at the same time dilutes the au-

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thority of the individual member states. The intergovernmentalists see the cause of this development as the aims of the Commission and the European Parliament together with the European Court of Justice – like all institutions acting in the political field – to obtain ever greater powers. The intergovernmentalists believe that the way to counter this is to give the Council of Ministers a greater role: this is made up of representatives from the governments of the individual member states, and has to approve of every piece of EU legislation. The idea behind this is that the governments of the member states will prevent any excessive, inappropriate centralization in the interests of preserving their own power.

On the other side there are the federalists who are aiming for a federal European state. They complain about massive institutional deficits in the bodies and decision-making processes on the EU level arguing that these are ineffective, intransparent and undemocratic, and that these deficits are growing progressively with the on-going development of the European Union. They demand full state structures for the European Union along the lines of the classic separation of powers, in particular, a parliament as sovereign legislature and a government as sovereign executive; without the governments of the member states being able to throw a 'spanner' in the works through the Council.

The institutional structure of the European Union is a compromise between these two idealist concepts. The Commission is a kind of government, but it must maintain good relations with the governments of the member states because of their co-determination position in the Council. The legislature consists of two bodies: the Council and the European Parliament, whereby the Parliament shares with the Council the decision-making process in many but by no means all matters; the Council clearly has greater influence.

Without doubt, both the intergovernmentalists and federalists are correct in their diagnosis of the problems.

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Let us look first at what the intergovernmentalists say. It is true that we are experiencing an ever greater, inappropriate centralization of powers towards the European Union and away from the member states. The German Ministry of Justice has compared the legal acts adopted by the Federal Republic of Germany between 1998 and 2004 with those adopted by the European Union in the same period. Results: 84% came from Brussels, with only 16% coming originally from Berlin. It is not relevant to counteract this by claiming that the 'more important' laws are made in Germany. Single market legislation, the 'fauna flora habitat' environmental directive and anti-discrimination legislation, to name but a few examples,

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are European legal acts that have brought about a fundamental, sustainable change in Germany's legal and social structure. Where does the centralizing tendency come from?

One initial cause is the fact that EU politicians are politicians, and EU civil servants are civil servants. No matter whether they are working in a national ministry or in an EU Directorate General, if they are given the task of protecting the environment or potential victims of discrimination, they will do so as extensively as possible, thus creating corresponding rules. In these efforts – sometimes well-meant attempts to solve problems, sometimes simply striving for influence and power – it is frequently only a marginal point of consideration as to whether the European Union has the necessary competency and whether a pan-EU solution is really necessary.

This explains why when pursuing, what are in the end, politically dictated objectives, time and again the European Union regulates matters which certainly do not have to be harmonized throughout the European Union or for which the Union does not even really have any competence at all. This is repeatedly justified with the argument that the member states have not brought about any comparable rules so that the problem can only be solved by the European Union. One example of this is the massive impact on substantive labor law by EU anti-discrimination legislation, although the structural content of labor law falls under the responsibility of the member states.

A second cause of inappropriate centralization is the fact that member states frequently use Brussels as a backdoor for introducing legislation. If a national ministry, for example the German Ministry for the Environment, cannot assert a certain regulation project on the national level – for instance because the German Minister of Labor puts up resistance or because it would not obtain a majority in the German Parliament, it discreetly 'encourages' the corresponding Directorate General in the European Commission to implement the project on the EU level. In Brussels, this will usually fall on open ears for the reasons stated above. The EU project then runs through the normal legislative process and, in the end, the Council of Ministers takes the final decision. As a rule, it will be staffed by exactly that German Ministry which had prompted the suggestion in the first place, together with the corresponding ministries of the other member states, in our example by 27 environment ministries.

This backdoor approach typically means that the whole project will not be adequately deliberated on a national scale and, frequently, not on an EU scale either, for example with regard to its effects on the labor market. This deprives other ministries and, in particular, the national parliaments of the individual member states, of any kind of effective participation in the decision-making process, as would be a matter of course for a legal instrument of this kind on a national level,

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and as is actually stipulated in the constitutions of the member states. Much legislation which cannot be put through the national parliament is thus implemented through Brussels' back door – now even on a European scale. The consequence is progressive centralization, triggered by specific national interests.

A third cause consists of the so-called 'package deals' in the Council of Ministers. In order to make up majorities for adopting resolutions, the representatives of the member states forge alliances, frequently bundling together projects which are related in no way whatsoever, and agreeing on compensation deals. In accordance with the logic of political negotiations, as a rule, such alliances will result in more rather than less regulation.

The fourth cause for inappropriate centralization exists in the legal practice of the European Court of Justice. The Court's decisions on competence issues reveal the systematic tendency to decide in favor of EU competency, as long as it can find any justification at all for doing so. To use the words of the German Constitutional Court, it interprets EU law along the lines of making the most exhaustive possible use of the Community powers. This is no great surprise. After all, Article 1 and Article 5 of the EU Treaty also place an obligation on the European Court of Justice to make a contribution to 'bringing about an ever closer union'.

One example is the decision of November 2005 (Case C-144/04), in which the European Court of Justice declared the unconditional possibility of concluding temporary employment contracts with older employees contained in the Hartz-I package – a core element of Chancellor Schröder's labor market reforms – to be incompatible with Community law. Its aim was to reduce long-term unemployment in this particular group of the population. In the face of the amazed experts, the European Court of Justice conjured up the justification that the 'prohibition of discrimination on account of age' is a 'general principle of Community law'. Another example is the decision of January 2006 (Case C-2/05) on the so-called E-101 certificates. These documents stipulate that an employee temporarily delegated to another European Union country remains insured in the social security system of his home country, so that he is exempt from the obligation to pay social security contributions in the country to which he has been sent by his employer. Social security fraudsters claim incorrect facts to obtain E-101 certificates by fraud abroad, in order to escape from having to pay social security contributions at home. The European Court of Justice has now categorically refused national courts any judicially viable means of checking whether E-101 certificates could have been obtained by fraud. This prohibition means that German social security fraudsters, who have falsely claimed to have sent employees abroad, have to be acquitted in Germany. With this decision, the European Court of Justice has created the need to establish European rules in an area which actually belongs to the core competencies of the member states.

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Therefore, the analysis of the problem as seen by the intergovernmentalists, that the EU keeps on acquiring ever greater competencies, is correct.

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Nevertheless, the federalists are also correct with their diagnosis of the problem that the political decision-making structures of the European Union are inadequate, intransparent and above all, not very democratic, given the extent of their influence over practically all aspects of social life. Why is this?

The Council of Ministers plays a central role here. On the one hand, it is made up of the corresponding ministers from the member states, i.e., representatives of the executive; on the other hand, it makes up part of the European legislative, formally alongside but in fact with priority over the European Parliament. In other words, the Council is hybrid by nature: against the fundamental principle of the separation of powers, the essential European legislative functions lie with the members of the executive. While this may have been acceptable during the initial phase of European integration when dismantling trade restrictions was the primary aim, today Brussels is in possession of very extensive positive regulation and, above all, regulating competencies: 84%. In this context, the hybrid nature of the Council of Ministers is definitely problematic.

On the one hand, this applies directly on the European level, even if the Union has a European Parliament, which is gaining increasing influence. On the other hand, this problem is even more pertinent on a national level: the constitutional competencies of the state bodies in the member states, in particular the national parliaments like the *Bundestag*, are substantially being undermined, especially in view of the way the national executives use the backdoor in Brussels, as explained above.

The figures stated by the German Ministry of Justice make it quite clear: by far, the large majority of legislation valid in Germany is adopted by the German Government in the Council of Ministers, and not by the German Parliament. Moreover, every directive adopted by the German Government in the Council of Ministers has to be implemented in national law by the German Parliament. The German Basic Law, however, gives parliament the central role in shaping the political community. And so the question arises whether Germany can still be referred to unconditionally as a parliamentary democracy, because the separation of powers as a fundamental constituting principle of the constitutional order in Germany has been cancelled out for large sections of the legislation applying to this country.

Given the overriding power of the national executive in drawing up EU policy, many members of the German Parliament today see themselves faced with a consid-

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erable loss of influence. One expression of this wide-spread feeling is the 'agreement' which the German Parliament reached with the German government in September 2006 in order to protect its rights. While the German government undertakes to inform Parliament early on about developments in Brussels, giving Parliament an opportunity to react and taking account of Parliament's opinion in its negotiations in the Council of Ministers, the agreement still entails a delicate aspect which explicitly grants the German government the right to reach deviating decisions for important reasons of foreign policy or integration policy, while being aware of the votes given by the German Parliament. In other words, the German government can and may act even contrary to the resolutions adopted expressly by the German Parliament.

And so the federalists' analysis of the problem is also correct: the institutional structures of the EU are suffering to a worrying extent from a lack of democracy and from a factual breakdown in the separation of powers.

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What can be done to come to terms with the two key problems: the lack of democracy and separation of powers, together with inappropriate centralization? Does the proposed Constitution offer a solution? What kind of a European solution could address the worries of both the federalists and the intergovernmentalists?

European integration has progressed to such an extent that a solution has to be found for the lack of democracy and the breakdown in the separation of powers, in view of all its negative consequences. This demands a fully empowered European Parliament as legislator. Therefore, it must be welcomed that the Constitutional Treaty intends to grant the European Parliament far more extensive rights of co-determination than in the past. On the other hand, what it fails to do is to close Brussels' backdoor, which is used extensively by national ministries through the Council of Ministers. Here, in particular, the Constitution fails to offer transparency and clear allocation of responsibility for good or bad policy.

In this context, or at least where the legislative process is concerned, the Council of Ministers should have undergone further development to become a second parliamentary chamber as in a classical two-chamber system: a second chamber which would prevent inappropriate centralization on the one hand, while at the same time not acting as a driving force behind inappropriate centralization on the other hand by implementing specific interests through the European Union which cannot be asserted on the national level. Further, the Constitution does not defuse the problem in the relationship between national executives and national parliaments. While the national parliaments would have the right to censure what

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they see as infringements in EU draft legislation against the subsidiarity principle, such censure from a national parliament does not have any binding effect on the EU bodies, so that there are no mandatory consequences.

Moreover, the so-called *passerelle* clause in the proposed Constitution gives the heads of state and government of the EU member states – i.e., the national executive, not the national parliaments – the right to convert EU competencies subject to unanimous decisions into competencies with majority decisions. In other words, the executive is empowered to modify an agreement under international law, which is of fundamental significance to the individual member state, without requiring the consent of the national parliament. The six-month right of objection of the national parliaments does not offer adequate compensation, because it constitutes a far greater hurdle to topple a decision already taken by the heads of state and government than to deny the consent needed for a planned agreement in the first place.

And so, the proposed Constitution does not remedy the lack of democracy and breakdown in the separation of powers.

The second issue, of how to prevent the trend to inappropriate centralization, is also significant. The solution to this issue is made up of four elements.

Firstly, it is necessary to draw up a conclusive list of competencies stipulating the scope and limits of EU competencies. The proposed Constitution does not contain such a list, although this was, in some cases, a specific demand in the constitutional negotiations during the European Convention. In particular, this is not provided by the non-conclusive order of competencies in the first part of the Constitution. When it comes to the scope of EU competencies, reference is made to the corresponding regulations for the concrete Community policies in the third section, which hardly include any changes to the current situation. On the contrary, the introduction of the 'mixed competencies' in the first part threatens to open up new floodgates for an even more dynamic assumption of competencies.

Moreover, the proposed Constitution entails a changeover from unanimous to majority decision-making for many policy areas when adopting resolutions in the Council of Ministers. And so, implementation of the proposed Constitution would even reinforce the process of inappropriate gradual centralization because of the simpler resolution adopting process, instead of stopping or at least slowing down this development.

The European Convention, above all, rejected the introduction of a conclusive list of competencies with a clear separation of the competencies for the European Union and the member states, above all on the grounds that this would impair the 'dynamic ability of the EU to develop'. However, that is exactly the point arguing

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in favor of this kind of list. And anyway, a list of this kind can be amended at any time if it should prove appropriate to expand certain EU competencies.

Secondly, the so-called discontinuity principle must be introduced on the EU level. This entails the automatic expiry of prospective legislation if it has not been adopted within a legislative period, so that the procedure has to begin again from the start in the new legislative period. This is a matter of course in Germany but not so in the European Union. Here the EU bodies repeatedly have to deal with legislative initiatives, which are ten years old and more. The proposed Constitution has abstained from introducing the discontinuity principle into EU legislation.

Thirdly, the member states must be given the right through the European Council to withdraw competency for an area of policy from the European level and restore it to the national level again. This clearly reduces the risk of structural contents of EU competencies developing contrary to the preferences of the majority of the member states and, in particular, the risk of measures, which in the end are not covered by the competencies granted to the European Union. For, if this possibility exists, then it will be in the interests of the Commission and the European Parliament to exercise the competencies granted to them with reservation and without excess, in order to prevent the risk of these powers being withdrawn completely. For this threat to be real, the right to restore competency to the national level must be based on a majority vote and not a unanimous vote. The proposed draft Constitution does not contain the possibility of restoring individual competencies to the national level as a centralization brake. Instead, it counts on the same one-way street as before, heading towards ever greater centralization.

Fourthly, the progressing centralization through European legal practice by the European Court of Justice must be stopped. This entails setting up an independent 'Court for Competency Issues' parallel to the European Court of Justice, to deal solely with questions of distinguishing between competencies on a European level and on the level of the member states. In order to remain independent, such a Court for Competency Issues would have to be made up of members from the constitutional courts of the member states. This court should be able to judge not only the legal instruments and political measures of the Commission and the European Parliament but also the decisions of the European Court of Justice, where distinguishing between competencies is material to the verdict.

Not only the bodies of the European Union and the governments of the member states should have the right to sue but also the national parliaments and, important for federal countries such as the Federal Republic of Germany, the individual states as well. While the proposed Constitution includes the possibility of national Parliaments and the Committee of the Regions taking action follow-

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ing violation of the subsidiarity principle, this right will vanish into thin air because, in addressing such action to the European Court of Justice as an EU institution, any corresponding decision will interpret the competency regulations in favor of the European Union as far as possible. This is why there is a real need for an independent court in the form of a Court for Competency Issues. However, the proposed Constitution does not make any provisions for this.

A combination of the four institutional measures described above – the conclusive list of competencies, the discontinuity principle, the possibility of restoring competencies to the member states and the Court for Competency Issues – could successfully counteract the trend to inappropriate centralization. As far as day-to-day policy is concerned, they would assume the function of the subsidiarity controller, which up to now was the task of the Council, a role which it was not capable of performing effectively enough, as has become evident in developments over the last 15 years. These precautions to prevent inappropriate centralization do not contradict the necessary elimination of another more serious deficit in the current proposed constitutional text: this Constitution would make it practically impossible to introduce greater co-operation between willing member states, particularly in foreign and security policy, because this requires the consent of all EU member states. The proposed Constitution is, therefore, detrimental to the global political interests of Europe and must be rejected for this reason as well.

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The reforms suggested here could tackle both the problems in Europe as diagnosed by the federalists – intransparency, a lack of democracy and the breakdown in the separation of powers – and the weakness identified by the intergovernmentalists – progressive unreasonable centralization. Nevertheless, European, and some German politicians, want to forge ahead with a second attempt to introduce the proposed European Constitution, in spite of its rejection in France and the Netherlands, and in the face of a clearly sceptical population in other member states as well. They refuse a constructive discussion of the issue whether this Constitution is really the best solution for Europe, because they are afraid they will not have the strength to achieve success once again. However, this discussion has to be held, because the proposed Constitution would only consolidate the described deficits, which threaten the very foundations of the European Union. There is therefore a risk that the policy of 'muddling on' in the European integration process will result in exactly the opposite of what it really wants – further erosion instead of greater stabilization.

Without doubt, a reorientation towards an EU organization along the lines described above would entail overcoming structures, which have become estab-

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lished to an extensive degree, and in particular overcoming the political interests of the member state governments, which are geared above all to the preservation of their power. But, that is exactly what we will have to expect and demand from politics if, as can be seen today, the path taken in recent decades and continued in the proposed Constitution threatens to lead to a dead end, because the European Union overextends itself when it fails to concentrate on the really essential European problems and because people are no longer willing to go along this path. The argument that such a constitutional order could not be implemented politically is, therefore, simply not valid.

In unpublished comments, German politicians on a national and state level repeatedly express their criticisms and concerns at the developments in European politics. Nevertheless, few of them are prepared to express these fears and concerns in public – for fear that this could harm the on-going unification process. However, exactly the opposite would happen: the German population has progressed further than some politicians think. Most people have a fundamentally positive attitude towards European integration. But at the same time, they have an ever increasing feeling that something is going wrong, that an intransparent, complex, intricate mammoth institution has evolved, distant from the factual problems and national traditions, grabbing ever greater competencies and areas of power; and that the democratic control mechanisms are failing: in brief, that it cannot go on like this.

People expect politicians in particular to show a differentiated attitude to Europe: a fundamental YES to European integration must be followed by a constructive discussion as to HOW this can be implemented. This is a great challenge. We should use Germany's EU Council Presidency to launch just this kind of discussion process – for the sake of Europe.

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