STUDY GROUP
ON THE
EUROPEAN CONSTITUTIONAL PROCESS

Working Group 04
STRENGTHENING DEMOCRATIC REPRESENTATION, PARTICIPATION AND OUTCOMES IN THE EUROPEAN UNION

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I. **A ROAD MAP – 12 CONCRETE PROPOSALS**

The following proposals for change are not drawn from a theoretical model of democracy or a definition of its meaning for the particular form of multilevel governance which is the European Union.

They endeavour answering the question how the concept of democratic representation enshrined in the European Treaties could pragmatically and step by step be strengthened, taking into account the political context and the history of 21st century Europe.

For more details and background considerations see the explanatory considerations in chapters II.-IV.

I.A. **CHANGES WHOSE IMPLEMENTATION CAN BEGIN UNDER CURRENT TREATIES**

I.A.1. **Any legal or political discretionary capability of a single Member State to veto the use of powers conferred to the European Union should be gradually phased out.**

In a first step, the political imperative of incorporating the Ukraine and the Western Balkans into the EU opens the political window of opportunity for successfully insisting that all bridging clauses of the European Treaties must be used prior to the signing of any enlargement Treaty. If insurmountable political obstacles stand in the way of a transition to qualified majority voting in the near future, for areas such as foreign or tax policy the acceptance of temporary interim solutions should be explored, which would combine the qualified majority requirement with political safeguards and practically require super-qualified majorities.

In a second step, at the occasion of a coming substantial revision of the European Treaties, the remaining veto powers regarding the use of conferred powers will have to be phased out under a general rule of fair compromise.

In a final step, once political conditions for European unity have matured, Member State veto rights in constitutional matters could be replaced by other mechanisms to safeguard legitimate national concerns.

I.A.2. Citizens need to perceive that their vote in the European elections matters

European Parliament political groups should be seriously committed not to agree with and not to vote for a candidate for the office of President of the Commission who in the European elections has not run as one of the European Political Parties' 'lead candidates'.

The modification of Act for the Elections to the European Parliament as proposed by the latter should be agreed by the Council and ratified by the Member States without delay so as to set up for the subsequent European elections an additional EU-wide constituency, being understood that it would be most appropriate for the European Political Parties' 'lead candidates' to run for a mandate and campaign in such an EU-wide constituency.

At the occasion of the next substantial revision of the European Treaties, the European Political Parties should be given the power to propose on equal terms with the Member States persons for appointment as Members of the Commission, leaving to the President-elect the responsibility of the choice, subject to the approval of the Council and the final election by Parliament.

I.A.3. The political actors in the EU should develop a "culture of democracy", including a culture of values, a culture of knowledge, a culture of compromise and a culture of transparency and communication that reflects material problems and not national or partisan self-interest.

I.A.4. In accordance with the existing procedures and instruments the Commission and the Council should regularly block financial transfers from the EU to a Member State when the Court of Justice has found that this State persistently fails to comply with EU values. The political burden of accusing and sanctioning infringements should not be the responsibility of the EU Commission alone, but should be shared in solidarity by the other Member State, instead of showing 'diplomatic complicity' by the Council.

I.A.5. The EU policies should be careful not to increase, but should instead reduce economic and other inequalities that are detrimental to the equal exercise of democratic rights.

I.A.6. Building on the experience of the Conference on the Future of Europe the direct involvement of citizens with EU politics should be developed further. In particular, prior to finalising proposals for EU legislation, the Commission could explore the citizenry's reactions to envisaged new measures by explaining and discussing them in randomly selected assemblies of possibly concerned citizens in a wide range of Member States. The Commission's current practice of public consultation does not leave room for a genuine dialogue. Another option would be to use the E-Gov tools (E-voting, E-petitioning), boosting the Digital Europe programme. The participatory instrument of the European Citizens' Initiative should be strengthened making use of the experience gathered with its implementation.

I.B. **INSTITUTIONAL CHANGES TO BE VONSIDERED AT A COMING INTERGOVERNMENTAL CONFERENCE**

I.B.7. The key for the representation of Citizens and of States in the Council and in the European Parliament should be reviewed making use of advanced mathematical methods with the aim that their respective influence on decision making in EU institutions better reflects their respective size.

I.B.8. There are mixed feelings about the idea of conferring to the European Parliament the right of legislative initiative. On the one hand, as most Parliaments have the prerogative of initiating a legislative procedure, a European Parliament without the right of initiative risks not to be considered a fully-fledged Parliament. On the other hand, the reason of being for the Commission's (quasi) monopoly on initiative, namely the need to protect the integration process from nationalist setbacks caused by the contingencies of the democratic process, has by no means been overcome. Safeguards of that kind are contained in many constitutional systems, e.g. in the form of presidential veto rights. A conferral of the right of legislative initiative to the European Parliament should therefore be balanced by conferring to the European Commission a right of veto against draft legislation on the grounds

that it contradicts the European Treaties and the integration goals laid down therein.

I.B.9. The content of EU policies should be de-constitutionalised in order to broaden the leeway for shaping them through political dynamics.

I.B.10. The Treaty provisions on participatory democracy should be reviewed with a view to develop a framework for more systematic direct involvement of randomly constituted citizens' assemblies in the debates on EU policies. Appropriate procedural rules could make sure that the outcome of such deliberations is duly taken into account by the three political institutions of the EU. It was further proposed to make the involvement of relevant non-governmental organisations and organisations of the civil society (both acting on supranational and national level) mandatory.

I.B.11. EU procedures and mechanisms for defending and enforcin EU values (notably democracy and the rule of law) within the EU should be reviewed and made more effective so as to credibly ensure continued compliance by all Member States. In particular, when a non-compliance procedure is opened against a Member State, the latter should no longer be allowed to participate in the deliberations on a non-compliance procedure against another Member State. Moreover, the creation of an ultimate safeguard such as existing under the Council of Europe Treaty should be considered.

I.B.12. A general rule should ensure that decisions on matters that may affect citizens living in more than one Member State will no longer be taken at a national level but at a level where all affected citizens are duly represented.

II. **DEVELOP CONCEPTS AND AVENUES OF DEMOCRACY ACCEPTED BY THE EU AND ITS MEMBER STATES**

II.1. **Values**

Liberal democracy is a form of governance that has evolved in history. It does not only mean that the people as the new sovereign are replacing the monarch and the aristocracy. It neither means that the new sovereign may do whatever the majority decides. The rule of the majority is legitimate and acceptable only under the condition and to the extent that it respects values (such as human dignity, solidarity and tolerance), individual human rights and lawful

procedures which are recognized as inalienable. In that regard there is still a two-fold deficit in the European Union insofar as part of the citizenry is not or not fully committed to such values and the European institutions do not dispose of appropriate instruments for raising the necessary awareness in the citizenry and effectively guiding the compliance of all public authority with the recognized values.

Moreover it is questionable whether the action taken at the level of the European Union is always in compliance with the values set out in the European Treaties, notably with regard to the respect of human dignity and human rights. For example the manner in which migrants and refugees seeking shelter in the EU are treated at the Union's external borders shows the complexity of a problem that up to now the EU has not been able to address satisfactorily. As a result of the war waged on Ukraine the EU's double standards on its approach to refugees became apparent. Undoubtedly there is a point in reviewing the Union's internal judicial and extrajudicial procedures with a view to ensure best compliance of the EU action with the proclaimed values. Such procedures may, however, prove to have only limited effects where democratically elected governments of Member States are deliberately taking positions that are in conflict with Union values, be it that they agree on measures that are difficult to justify in light of the declared values or that some of them simply block EU-decision making on value-conforming measures.

II.2.   Develop a "culture of values"

Therefore, attention needs to be given to the understanding of democracy itself and the values that it stands for. The recognised values of the EU appear to be put in question if not challenged in some of its Member States, especially with regard to the rights of LGBTQ groups. The EU would need better capacities to check/ prevent democratic backsliding in EU member states. The EU cannot be regarded as a democratic entity if its parts are not fully committed to freedom and democracy. There is a need for a sustained public debate in the Member States all across the EU on the meaning of democracy. That debate should stress and reiterate the values of inclusion, equity and justice, thus promoting a culture of values amongst the citizenry.

It could be held in national capitals, bigger cities, and smaller towns, especially involving local communities, universities and schools.

II.3.   Develop a "culture of knowledge for democracy" including bureaucracy, academia, and professionals

It is often said that contemporary mankind is living in knowledge-based societies. Thus, it is astonishing how little attention is given to the knowledge-factor in the discourse on democratic governance. On the one hand, democratic principles command equality of political rights of all citizens without any regard to the education or knowledge they may have. Moreover, education or knowledge is not a condition for being elected. On the other hand, any democratic government would fail if it confined itself to acting only in accordance with the prevailing opinions in the citizenry, without taking into account the knowledge accumulated in the society. Therefore, the question merits attention, how knowledge accumulated in the society can be legitimately fed into the democratic decision-making process. There are basically three reservoirs of knowledge in contemporary societies: state bureaucracy, academic research and teaching, professional practice. It is necessary for decision-makers, i.e. the democratically elected representatives, to develop a culture of understanding and making use of available knowledge. Conversely, the reservoirs of knowledge must also develop a culture of well-founded knowledge production instead of partisan, reassuring or comfortable opinions. The challenges for enhancing the culture of knowledge may be different for each of the knowledge reservoirs. Improvements could be made for example:

- with regard to bureaucracies through fair cooperation between decision-makers and experts, based on a clear distinction between political opinion and expert advice, as well as through a rethinking of plethoric hierarchies that stifle knowledge alternatives;

- with regard to academic research and teaching through a sharp separation between presenting scientific opinions and well-founded knowledge, as well as through the renunciation of show-hearings with academics hand-picked along partisan lines;

- with regard to professional practice through the transparency of business contacts and a culture of lobbying that distinguishes between information and pursuit of interests.

The need of developing a "culture of knowledge for democracy" is obvious for any form of representative governance. But it is no less indispensable for any form of direct democracy, in particular at the design stage of the questions to be put to the citizenry.

II.5. Develop a "culture of compromise"

A culture of knowledge may provide certainty about unavoidable benchmarks for democratic decision making. The final decisions are regularly based on opinions or assumptions that may or may not be correct. Political opinions are often held in the belief that they are right and that the opposite opinion is wrong. But very likely they are neither right nor wrong but only possible opinions. Disputes about conflicting opinions are decided in democratic procedures by the majorities resulting from a vote. That does not mean that the opinion of the winning side is right. The vote – and the recognition of its outcome – merely constitutes a democratic dispute settlement. Against this background it is appropriate to reflect on the "public good" that any democratically elected representative has in one way or another pledged to pursue.

This reflection also implies a certain distancing from one's own position, i.e. an acknowledgment that it is an opinion which can be right or wrong, just like the opinion of the political opponent. Under such circumstances – that often occur in real political life – the "public good", i.e. the interests of a broad majority of the citizenry, may be pursued much more effectively through a compromise solution that only partially accommodates the wishes of both opponents. For these reasons the emergence of a genuine culture of compromise has been seen as typical for a well-functioning democracy, while failing democracies are often characterised by sharp antagonism and an inability to compromise. As far as the political processes at the level of the European Union are concerned, they may be regarded as exemplary for the emergence of a "culture of compromise", both in the European Parliament and in the Council. Conversely, criticism of a lack of straight-forward decision-

making seems to belong to a rather archaic understanding of democracy. This also demonstrates the questionable legitimacy of putting a matter to a referendum when a compromise is conceivable. Since a citizen regularly has no choice to compromise when voting in a referendum, this mode of democratic decision places full pursuit of the interests of the majority ahead of best possible pursuit of the interests of all.

II.6.   Difference between procedural and substantive democracy

Substantive democratic choices should be made possible by reducing the "over-constitutionalizing" of EU-policies in the EU-Treaties. Democratic constitutions define an area of freedom within which different political conceptions compete for majority support allowing to put ideas into acts. Therefore, a democratic deficit arises, where margins of manoeuvre for political conceptions and decision making are unduly limited by ideological constraints or legal obstacles. In the European Union the basic principles of the sectorial policies are fixed in the constitutional order, reflecting the agreement amongst the majorities governing the Member States at the time of the conclusion of the Treaties. Thus, the basic rules of the EU policies have become binding not only for any EU office-holder but also for any political majority that would come into power in a Member State. If despite its politicised investiture the European Commission is sometimes still qualified as "bureaucratic", the reason for this is partly that the Treaties seem to limit its political margin of manoeuvre, whatever its political composition may be. One may perhaps consider such limits as already overthrown by the European Council's "impetus", finding a way forward in the successive European crisis. Still, removing the constitutionalised contents of EU policies would give more leeway for openly debating their contents and shaping the decisions, thus improving their democratic legitimacy.

II.7.   Democratic key elements, according to Dahl

would be the effective and equal participation of citizens with the vote, informed understanding of public issues, control of the political agenda and inclusiveness.

These elements are useful indicators and ideally seem to be unassailable. However, they can be misleading when they are used as criteria to determine

whether a given polity is democratic or not. Only with regard to the first of these elements it can be reliably measured to which extent they are fulfilled. Election monitoring and manifold forms of supervision, including by judicial authorities, ascertain that citizens' voting rights are equal and (within a constitutionally determined bandwidth) have equal effects. In contrast, the elements of informed understanding of public issues, control of the political agenda and inclusiveness cannot be evaluated but approximately on the basis of statistical data and with regard to a fictitious collectivity.

II.8.   Balance of power

We also need to focus on how EU can develop better capacities to check/ prevent democratic backsliding in EU member states. EU as a democratic entity cannot exist if the parts are not committed to liberal democracy

II.9.   Legitimacy

A distinction should be made between the legitimate self-governance from illegitimate governance on others. In the history of modern times, democratic governance is the achievement of people who desired to govern themselves. The will to reject foreign rule, be it by a monarch, be it by another external power, was strong enough to motivate people to fight for their freedom at the cost of their lives. In this struggle of life and death there was no room for theoretical subtleties. Convinced of their right, the people claimed the place of sovereign. Who gave a thought to the fact that the former sovereign oppressed not only his own people but others as well? By simply taking the sovereign's place, the people governed not only themselves, but also, by virtue of the "sovereignty" they assumed unthinkingly, they determined over matters that would have better been left to the self-government of other peoples. Contemporary democracies are operating in an interconnected and interdependent world. In a region that is as closely intertwined as the European Union, quite a few of the decisions made at national level in accordance with democratic procedures affect the population of other Member States in such a way that they not only appear as self-government but also as foreign determination. If national measures of a European Union Member State affect a large part of the population of the European Union, the decision-making about them, even if democratic procedures are observed, is not only

legitimate self-determination but involves foreign determination. Measures of this kind can only be democratically legitimised at the supranational level, where all those affected are represented. Irrespective of any obligations arising from the European Treaties, every far-reaching measure at national level would have to be carefully scrutinised to see whether its effects would not illegitimately interfere with the right of self-determination of others.

II.10. Openness, transparency, competitiveness

Creation of a pan-European political space, including:

- a common political language,
- a pan-European civic identity,
- a unified communication infrastructure

II.11. Citizens' expectations of EU democracy – link to outcomes

III. INSTITUTIONAL CHANGES

III.1. Eliminate single-state veto power in some areas

In the initial phase of the European Communities major political decisions were generally taken by unanimous agreement of the representatives of the six Member States in the Council. When subsequently to the adhesion of Spain and Portugal the Council for the first time proceeded to qualified majority voting the conditions of bargaining between the Member States changed. While previously a representative could defend the interests of a government by simply opposing a proposal, the threat of possibly being outvoted in the Council would induce a rationally acting representative to seek support by others, if necessary, by entering into compromises. The areas of possible majority voting were widened in the reform treaties preceding the successive enlargements. The bigger the number of Member States became the more increased the risk, that a single state for political reasons abuses an unanimity requirement to hold the majority hostage by a veto. Veto powers of a single State in fields such as taxation and fiscal policy, environment and social policy, justice and home affairs, foreign affairs and security policy are going beyond reasonable protection of minorities in democratic decision making. The European Union should urgently overcome them, notably making use of the various bridging-clauses agreed in the Lisbon Treaty.

III.2. Reviving the Lead Candidates (synchronization of the terms of office of the EP and Commission

The EU-system should function in accordance with the general democratic rule that the will of citizens expressed in elections should determine whether following an election there is or not a peaceful change of the executive power. Over time the European elections have resulted in changing majorities in the European Parliament. But such changes had no tangible repercussions on the investiture and the composition of the EU executive branch. Some improvement could be achieved under constant primary law, if the "Lead Candidates"-procedure were generally followed. To this end, the major European political parties would probably need, prior to appointing their "Lead Candidate", to informally explore her/his acceptability to acting Heads of Government and State. For a major improvement the investiture of the EU-executive branch would need to become a parliamentary procedure subject to the final consent by the EU-Council.

III.3. How Lead Candidates contribut to democratization of EU-level politics

- Linking the EU's highest executive office, that of Commission President, to the strongest political force resulting from the EP elections

- Such a linkage could make EP elections more meaningful, thereby increasing electoral turnout

- Given prior failures, the most realistic way to revive the *Spitzenkandidaten* is to have negotiations prior to the elections and a pre-commitment from the Council

III.4. Creation of a transnational constituency

In a representative democratic system citizens' acceptance is regularly measured in elections. For this measurement to be effective, a developed political party system is needed for presenting clear political alternatives on which citizens express their preferences. The emergence of genuine European political parties is not a matter of political voluntarism but depends on a relevant role to fulfil in the institutional power game. Thus, European political parties would largely benefit from the creation of a transnational constituency as proposed by the European Parliament. This in turn would

improve the information gained from European election results on citizens' acceptance of EU outputs.

III.5. **Review proportionality of the composition of the EP and of the Member States' voting power in the Council**

To ensure democratic representativity the Institutions of the European Union have to concomitantly meet two seemingly contradictory requirements flowing from the basic principle of unity in diversity. On the one hand, equality of rights of all members of the citizenry commands that every vote cast be given equal impact on the governance of the polity. On the other hand, respect of diversity commands that smaller communities be protected against being systematically outvoted by larger ones. The contradiction can only be settled by a fair balance between representation of individuals and representation of communities. In the institutional setup of the European Union individuals are represented in the European Parliament whereas (national) communities are represented in the Council. The peculiarity is that neither individuals nor communities are represented proportionally, but depending on the size of the community they are belonging to. Individuals belonging to a less populous nation are over-represented in the European Parliament while that nation as a whole is under-represented in the Council. Inversely individuals belonging to more populous nations are under-represented in the European Parliament and over-represented in the Council. Since the current balance was established by a consensus following a political bargain between the European Parliament and the European Council, an overall assessment may conclude that Parliament and Council together are fairly representing the European citizenry. Still, that outcome of the political bargain should not be taken as perfect and set in stone. There is room for improvements in the democratic representativity of the EU institutions in the full respect of the described duality. On the one hand, further steps enhancing proportionality in the electoral procedure(s) for the European Parliament would strengthen its representativity. On the other hand, mathematical game theory provides for a convincing method for better adapting the influence of government representatives in the Council in proportion to the size of the population they represent.

III.6.   **Fairer balance between representation of individuals and representation of communities**

The EU constitutional design as a representative democracy with participatory elements should not be generally put in question. There is only very little, if any room for elements of direct democracy. Binary choices such as proposed in referenda will in most of the cases not adequately address the complexity of the issues dealt with at EU level. There is, however, room for reconnecting citizens to the EU system through the convening of advisory bodies such as citizens' councils or broadening the scope of citizens' initiatives, e.g not restricting them to powers already attributed to the EU and allowing them to also be addressed to the EU Member States via the EU-Council.

III.7.   **Enhance notoriety of European Citizens' Initiative and increase its effectiveness**

- Reduce excessive data requirements

- Reimburse organizational costs for those initiatives that meet the minimum threshold

- Allow successful initiatives to be submitted directly to the EP and Council

- Reduce the minimum age from 18 to 16

- Simplify the process of signature collection as much as possible without   significantly increasing the risk of fraud

- Clarify the guidelines governing the the follow up to be given by the European Commission to a successful citizen initiative

- Regularly evaluate the whole process and gather from participants any feedback in order to identify areas for improvement

- Consider the question whether lowering the threshold of required signatures would be appropriate

III.8.   **Creation of advisory bodies such as citizens' councils or citizens' initiatives**

IV.   OUTCOMES

IV.1.   Address economic and other inequalities

Democratic governance is based on the principled assumption of equality amongst all citizens. But in real life every individual is different. Inequalities are intrinsic of a society respecting everyone's freedom of choice. Still, some individuals succeed in accumulating (economic) power to a degree that they act in a world different from that of the ordinary citizen and even intimidate the elected representatives of the latter. The described distortion of democracy is frequently addressed by the claim that the political sphere needs to reassert its priority. But such demands will remain castles in the air until the most disruptive economic inequalities are ironed out by decisive policy action.

IV.2.   Human rights, including minority rights

Human rights and the rights of minorities are a necessary corrective of democratic power. They are a safeguard preventing democracy from becoming a dictatorship of the majority. Thus, respect of these rights is the most noble duty of any form of democratic governance. Still, human society has only step by step perceived the full meaning of human rights. In the century following the first declaration of human rights slavery was considered not to be in contradiction with them. For another fifty years it was not thought that human rights would require women's right to vote. It is only two hundred years later that human society is beginning to perceive that the behavior of powerful economic actors, too, must respect the fundamental rights of human beings and that democratic powers are under an obligation to ensure such respect.

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