

The European Social Contract and the European Public Sphere

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Abstract: *The possible existence of a European democracy does not depend on the prerequisite of a homogeneous public sphere but on the understanding of the relationship between the normative basis of a European democracy—here a social contract—the structure of the European public sphere and the corresponding institutions. The normative concept of democracy as expressed in social contract theory is neither bound to the city-state nor the nation-state, but can be transferred to the European level. To realise the normative aims of the social contract the democratic institutions have to be—and were in the city—and the nation state—adapted to the structure of the respective public sphere. Two institutional characteristics of the democratic European polity could correspond to the heterogeneous European public sphere: (1) a cooperation of institutions with clearly separated and limited competences—contrary to the ideal-type sovereign institutions with broad competences in the nation-state, and (2) the policy field-oriented structure—contrary to the more uniform and functional structure of democratic institutions in the nation states.*

I Introduction

A Public Spheres and a European Democracy

Is a homogeneous public sphere a prerequisite for democracy? Could a European democracy be based on 25 different and interacting national public spheres and languages? These and similar questions are frequently asked in the debate over the creation of a European democracy.¹ They lead to the questions: what kind of institutions needs the EU with its multitude of public spheres to correspond to democratic standards? And: what is the European democratic standard?

To answer these questions, two closely related arguments will be developed here. The first argument is that the possible existence and polity of a democracy can only be understood by the relation between its normative basis, the structure of its public sphere and decision making process and its institutions. The second argument is that most of

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¹ D. Grimm, 'Braucht Europa eine Verfassung?', (1995) *Juristenzeitung*, 588 ff.; J. Habermas, 'Remarks on Dieter Grimm's "Does Europe need a constitution?"', (1995) *ELJ*, 303 ff.

the critique of a seeming deficiency of a European democracy—concerning its missing homogeneous public sphere—is based on a wrong theoretical understanding of democracy as a homogeneous unit of undivided sovereignty in the nation state. Democracy does not require one of the above mentioned elements in a specific form independently of their context. Democracy is realised by the ways of interaction of its different constituting elements. Therefore it cannot be said that democracy cannot exist without a homogeneous public sphere.

After a definition of the notion of public sphere and sociocultural elements of democracy the first step will distinguish between theoretical elements of democratic theory that originate from the idea of the nation state and elements that are essential parts of the contract model of democracy. It will be demonstrated that the normative concept of democracy as a social contract has already been successfully transferred once from the city state to representative democracy and why a further development on the European level meets the resistance of the nation-state theory of democracy. The role of the public sphere in the different conceptions of social contract theory will be analysed. In a second step a European understanding of democracy will be developed on the basis of the contractarian approach. It will be shown that the requirements for democratic institutions on the European level are different from those in consociational societies. It will be examined whether a European democracy can really be considered as a merely output-oriented concept of democracy as done by *Fritz Scharpf*.² To finish, the contract model of democracy in shape of the deliberative approach will be compared to the other contractarian approaches used before.

II Definition of Public Sphere and Other Sociocultural Elements of Democracy

A Public Sphere and Identity as Prerequisites of Democracy

A more or less homogeneous public sphere, cultural or ethnic identity are widely seen as conditions of a working democracy. This article is focused on the problem of heterogeneous public spheres and democracy because this seems to be the crucial point in the debate on the possibility to constitute a European democracy. It is clear that democracy is linked to what *Dahl* calls the problem of inclusion.³ *Dahl* argues that we cannot derive the criteria for the identity of a political system from within democratic theory. Within democratic theory we have to take the existence and boundedness of political entities as given through contingent historical circumstances.⁴ In other words, democracy requires the willingness of the people to transfer competences to a certain political unit. This is a problem that is at the heart of any federal design, since all federal systems presuppose the boundedness of the units that are to make up the federation. This condition must also be recognised by theories that see the legitimating force of democratic law making not in a pre-existing substantive ethical consensus of a political community but rather in the democratic procedure for the production of law

² F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999) 13 ff.

³ R. Dahl, *Democracy and its Critics* (Yale University Press, 1989), chapter 9.

⁴ Similar A. Weale, 'Democratic Legitimacy and the Constitution of Europe', in: R. Bellamy, V. Bufacchi and D. Castiglione (eds), *Democracy and Constitutional Culture in the EU* (Lothian Foundation Press, 1995), p. 88.

itself.⁵ Therefore, a certain willingness to transfer and inclusion are necessary for the constitution of a political entity—but they do not answer to the more specific question whether this entity can be democratic. Democracy requires further conditions. The question to be examined is whether a homogeneous public sphere is a condition for a democratic organisation of competences on the European level.

B Definition of Public Sphere

The definition of 'public sphere' comprises the public expression of opinions of all actors of the 'civil society', which includes interest groups such as trade unions or public interest groups,⁶ political associations and political parties.

Not included in the definition of the public sphere is the expression of opinions of political actors within the institutionalised decision-making process, e.g. within the European Commission or within the European Parliament.⁷ However, if arguments from within this institutionalised decision-making process become part of the debate of the civil society in newspapers and on television, they may also be considered part of the public sphere. This perspective differs from the conception that understands the decision-making process in the institutional system (e.g. comitology or parliament) as an emergent European public sphere. This latter understanding of the notion of a public sphere is not used in this article as it does not show the speciality of the European public sphere that is divided in numerous national sub-spheres clearly enough.

The European public sphere is understood as consisting of several national subsystems. These, however, may have a European element, when certain topics are being discussed in several states along similar criteria and an idea of common European interest. It is accepted today in communication theory that it is the communication space and discourse over common subjects which may be conducted in diverse languages⁸ that is indispensable for a democracy,⁹ not the identical language. Besides the national subsystems, the existence of sectoral transnational European public spheres constituted by actors of a transnational civil society¹⁰ is recognised. It is evident that such sectoral publics differ from a broad or popular conception of the public sphere.¹¹

⁵ For this approach to democratic theory by Habermas see O. Gerstenberg and Ch. Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?', in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002), p. 311 ff.

⁶ EU Commission, *European Governance—a White Book* (European Commission, 2001) 19.

⁷ For different conceptions and functions of the public sphere see V. A. Schmidt, 'Democracy and Discourse', (2000) *ELJ*, p. 277 ff.; A. Beierwaltes, *Demokratie und Medien. Der Begriff der Öffentlichkeit und seine Bedeutung für die Demokratie in Europa* (Nomos, 2000) p. 56 ff.; K. Eder, 'Öffentlichkeit und Demokratie', in: Markus Jachtenfuchs and Beate Kohler-Koch (eds), *Europäische Integration* (Leske+Budrich, 2003) p. 85 ff.; D. Chalmers, 'The Reconstitution of European Public Spheres', (2003) *ELJ*, p. 145: there is little evidence that these institutions mobilise public opinion or have the resources to do so.

⁸ I. Pernice, 'Maastricht, Staat und Demokratie', (1993) *Die Verwaltung* 479–481.

⁹ J. Habermas, 'Drei normative Modelle der Demokratie', in J. Habermas (ed.), *die Einbeziehung des Anderen* (Suhrkamp, 1996) 284–292; see A. Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, 2001), 706 ff.

¹⁰ K. Eder, *op. cit.* note 7 *supra*, at 93.

¹¹ For such élite public spheres, see Eder, *op. cit.* note 7 *supra*, at 97 ff.

III The Public Sphere between Democratic Theory and the Idea of the Nation State

A The Public Sphere in the Classic Literature of Social Contract Theory

Rousseau's theory of democracy is chosen here as an example of the classical democratic theory because it has deeply influenced democratic theory of the eighteenth and partly the nineteenth centuries, and contains a first complete theoretical concept of public decision-making and its normative basis. Rousseau's democratic theory is characterised by a relation between a normative basis (social contract), decision-making process via the *volonté générale* (including the problem of expression of interests in a public sphere) and the corresponding institutions¹² that emphasise strongly the role of common deliberation and decision-making. Thereby the public sphere is not mentioned explicitly because the classical authors¹³ were instead focusing on the idea and effects of a direct democracy, and less on the problems of a public sphere as it has evolved in modern societies with representative parliaments and governments.¹⁴

Rousseau's social contract as normative foundation of democracy is based on the individual interests of the citizens to find a way to act collectively¹⁵ and—at the same time—to preserve as much individual freedom as possible.¹⁶ Rousseau's doctrine of the *volonté générale* describes the normative aim of the operationalised collective action: if collective action corresponds to the enlightened interests of all citizens, it would give maximal freedom to all individuals since they would not be forced to any action they would not take individually anyway. Rousseau recognised the perils of democratic decision-making if interest group activism were to prevail over an equal consideration of interests of all citizens.¹⁷ From this understanding of public decision-making processes Rousseau concluded that for the institutional level, democracy could only be realised in small political units with direct democracy, establishing direct communication between all citizens. This institutional concept is rooted in the ancient Greek understanding of democracy as a direct democracy in small city states. His institutional conclusions are also based on his normative concept of the *volonté générale*, which was supposed to be applicable only to the undivided sovereign. In this understanding a transfer of the sovereignty and the general will to representatives was not possible¹⁸

¹² See J-J. Rousseau, *Du Contrat Social ou Du Droit Politique*, 1762, Book 1, chapter 6 (reprint Gesellschaftsvertrag, Reclam 1977); for a discussion of Rousseau's contract theory see Th. Petersen, *Individuelle Freiheit und Allgemeiner Wille; Buchanans politische Ökonomie und die politische Philosophie* (Mohr-Siebeck, 1996) 175 ff.

¹³ Only once with a minor role by J-J. Rousseau, *Contrat Social*, 1762: 2nd Book, chapter 6; no explicit mentioning in J. Locke, *Two Treatises of Government* 1690 (reprint: *Zwei Abhandlungen über die Regierung*, Suhrkamp 1977); for the role of the public sphere to be found in the works of Kant, Hegel, Marx and Mill, see Eder, *op. cit.* note 7 *supra*, at 87.

¹⁴ For the differences of the contract theories of Hobbes, Locke and Rousseau see A. Peters, *op. cit.* note 9 *supra*, at 224 ff.

¹⁵ A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International, 2003), at 24 ff. with a detailed explication of Rousseau's social contract and its possible transfer to the European level.

¹⁶ J-J. Rousseau, *Contrat Social*, 1762: Book 1, chapter 6.

¹⁷ This concept was taken to an extreme with the prohibition of all trade association through the *Loi Le Chapelier* of 1791 which was carried out in the name of liberty and the superiority of the general interest. See J. Jennings, *The French Constitutional Tradition*, in: R. Bellamy, V. Bufacchi and D. Castiglione, *Democracy and Constitutional Culture in the European Union* (Lothian Foundation Press, 1995) 23.

¹⁸ J-J. Rousseau, *Contrat Social*, 1762: 2nd book, chapter 1.

because the sovereignty of the people was indivisible and so was the normative concept of the general will.¹⁹

B The Transfer of the Contract Model from the City State to Representative Democracy

The understanding of democracy, however, has then developed differently. With the creation of representative democracy, the three constitutive elements of democracy—normative basis, institutions and required public sphere—were understood in a new relation to each other that should guarantee the normative goals of the social contract.

On a normative level, the justification of all collective action by the social contract and the general will remained, but they were now applied to the new institutional concept of representation. The normative idea of indivisible sovereignty and general will that had contradicted representation was transformed in a way that the representative institutions now expressed the sovereignty and would help realising the normative concept of the general will in large nation states.²⁰ The idea of a homogeneous public sphere as prerequisite of democracy remained. However, the public sphere was now understood in a wider sense than in Rousseau's democratic theory where the realisation of the general will was closely linked to the much more narrow concept of a public sphere of a city state. The role of the public sphere as factual basis of the expression of interests and its relation to the normative basis and the institutions were not changed.

C The Transformation of Democratic Theory under the Influence of the Nation State

In the nineteenth century the contract model of the state and democracy continued to exist,²¹ but an idea of sovereignty that was focused on the unity of the state and the nation prevailed.²² The three constitutive elements of democratic theory were modified and, moreover, it was commonly understood now that only in the specific shape of the nation state—national parliament, sovereignty, and homogeneous public sphere—a democracy could exist.

The normative concept of the general will that originally explained how free men could act collectively and remain at the same time as free as possible, was transformed to a concept of the general will that symbolised the sovereignty and unity of a nation.²³ Early critics argued that the symbolic unity of the general will was supposed to over-

¹⁹ J.-J. Rousseau, *Contrat Social*, 1762: 2nd book, chapter 2; This concept of indivisibility of power is rooted in the theory of the sovereignty of the monarch, which was 'one and indivisible', see Jennings, *op. cit.* note 17 *supra*, at 25.

²⁰ See e.g. J. St. Mill, *Considerations on Representative Government*, ed. C. Shields (Indianapolis, 1861) at 55.

²¹ Peters, *op. cit.* note 9 *supra*, at 528 ff.

²² N. MacCormick, 'Sovereignty, Democracy and Subsidiarity', in: R. Bellamy, V. Bufacchi and D. Castiglione (eds), *Democracy and Constitutional Culture in the EU* (Lothian Foundation Press, 1995), 99; G. F. Hegel, *Grundlinien der Philosophie des Rechts* (Suhrkamp, 1985), § 278, 279.

²³ See e.g. Raymond Carré de Malberg, *La Loi, Expression de la Volonté Générale* (Recueil Sirey 1931, reprint Economica, 1984); a less symbolic understanding of democracy prevails in the Articles of the Federalist Papers, written and edited by A. Hamilton, J. Madison and J. Jay in 1787–1788 (Phoenix Press, 2000).

come the fact that in the reality of the representative system there was no single and uniform will of the nation.²⁴ This opinion, however, was shared only by a minority.

Similarly in German democratic theory, the contract model of democracy was given up²⁵ in favour of a more monolithic constitutional theory that centred around the nation as its uniform collective foundation.²⁶ The concept of ‘*Volkssouveränität*’ and ‘*Volkswille*’ became a correspondent of this transformed understanding of sovereignty and *volonté générale* and symbolised the unity of the nation.²⁷ The united ‘*Volk*’ was the condition for the existence of the national and homogeneous public sphere.²⁸

The idea of the unity of a nation’s will and therefore of the public communication continued to exist also with the rise and expansion of newspapers, radio and television in the twentieth century. Only with a single and homogeneous public sphere ‘that shapes the political will would it be possible to create a democracy’.²⁹ In this view, the pre-constitutional conditions of a democracy, so called sociocultural elements, such as a homogeneous European public sphere, do not exist on a European level yet.³⁰

D The Role of the Public Sphere in Modern Social Contract Theory

a) The New Contractarians

It was only in the 1960s and 1970s that the contract-based theory of democracy was renewed again by J. Rawls (1971),³¹ R. Nozick (1974)³² and J. M. Buchanan and G. Tullock (1962)³³ and that an original understanding of democratic theory emerged, different from the nation-state influenced approach presented above. The new contractarians can be classified in three groups: the economic contractarianism or constitutionalism, the political and the hypothetical contractarianism.³⁴ It will be shown that in their concepts the relation between normative basis, institutions and public sphere and not just one element such as the public sphere, constitutes the basic understanding of democracy. This article focuses on the economic and the political contract theories, as they are more process oriented than the hypothetical

²⁴ H. Kelsen, *Vom Wesen und Wert der Demokratie* (1929) (reprint Scientia Verlag, 1981) p. 30ff.

²⁵ The contract model until today has not much influence in German democratic theory, see Peters, *op. cit.* note 9 *supra*, at 528, 365. P. Häberle, *Verfassungsinterpretation und Verfassungsgebung*, in: P. Häberle (ed.), *Verfassung als öffentlicher Prozeß: Materialien zu einer Verfassungstheorie der offenen Gesellschaft* (Duncker & Humblot, 1978) 182–224 and G. Haverkate, *Verfassungslehre: Verfassung als Gegenseitigkeitsordnung* (Beck, 1992) are working with the contractarian approach.

²⁶ G. W. F. Hegel, *op. cit.* note 22 *supra*, at, § 75; Peters, *op. cit.* note 9 *supra* at 528.

²⁷ C. Schmitt, *Verfassungslehre* (1928), (Reprint 9. ed. Duncker & Humblot, 2003), p. 206ff., 209: ‘Repräsentant der politischen Einheit des Volkes’.

²⁸ Schmitt, *op. cit.* note 27 *supra*, at 208: ‘weil es . . . keine Öffentlichkeit ohne Volk gibt’; p. 243ss.

²⁹ Decision of the German Constitutional Court, BVerfGE 89, p. 155, 185: ‘Demokratie . . . ist vom Vorhandensein bestimmter vorrechtlicher Voraussetzungen abhängig . . . und aus der heraus eine öffentliche Meinung den politischen Willen verformt’.

³⁰ Decision of the German Constitutional Court, BVerfGE 89, p. 155, 185; D. Grimm, ‘Braucht Europa eine Verfassung?’, (1995) 50 *Juristenzeitung*, p. 581 ff., P. G. Kielmannsegg, ‘Integration und Demokratie’, in: M. Jachtenfuchs and B. Kohler Koch (eds), *Europäische Integration* (Leske+ Budrich, 1996), 47ss.

³¹ J. Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press, 1971).

³² R. Nozick, *Anarchy, State and Utopia* (Blackwell, 1974).

³³ J. M. Buchanan and G. Tullock, *The Calculus of Consent* (University of Michigan Press, 1962, reprint Liberty Fund 1999).

³⁴ D. Castiglione, ‘Contracts and Constitutions’, in R. Bellamy, V. Bufacchi and D. Castiglione (eds), *Democracy and Constitutional Culture in the EU* (Lothian Foundation Press, 1995), at 65ff.

approach and therefore are more important to the debate on the public sphere and democracy.

b) The Economic Constitutionalism

James Buchanan's constitutionalist theory elaborates a new kind of relation between the constitutional (social) contract, the public sphere, post-constitutional decision-making and the necessary democratic institutions, which stresses the importance of rules and institutions for collective decision making.³⁵ In Buchanan's theory the basic social contract is concluded on a constitutional level by a hypothetical consensus between the individuals because of their interests in collective action.³⁶ Unrestricted post-constitutional collective action is seen as a threat to democracy. One important result from this perspective is that it can be favourable to agree on certain policies on the constitutional level and withdraw these topics from the post-constitutional political process, because the latter can produce results that are in fact not intended by anyone, e.g. the high-tax trap or the ever-increasing state debt³⁷ or are ineffective.³⁸ Even an active public sphere would not be able to correct such outcomes,³⁹ because it is part of the interest-driven post-constitutional political decision-making process in general. In this respect the role of the public sphere of economic model resembles the pluralist and elitist model of democracy⁴⁰ as developed by Max Weber and Schumpeter.⁴¹ In their view the public sphere plays a minor role compared to the influence of interests groups, the interests of the political élite and the importance of the election process.

c) Deliberative Theory

Deliberative theory legitimises collective action ultimately by the consent of all citizens like the other social contract theories but emphasises more the role of the public sphere and public debate than rules and institutions. It is different from the other social contract theories in that it stresses the (formal) conditions of the creation of the contract, which had been widely neglected by the contractarians mentioned earlier.⁴² Thus, this model does not focus on a separate contract as a basis of democracy, but rather, the role of deliberation and communication⁴³ as a condition of democracy itself.⁴⁴

³⁵ Buchanan and Tullock *op. cit.* note 33 *supra*.

³⁶ On the constitutional level they define rights, property and agree on procedures and institutions to secure these rights and to produce 'public goods' for the benefit of everyone.

³⁷ See G. Brennan and J. M. Buchanan, *The Reason of Rules* (Cambridge University Press, 1985, reprint Liberty Fund 2000) at 92 ff.

³⁸ G. Engel, 'Die Grenzen der politischen Öffentlichkeit', in I. Pies and M. Leschke (eds), *James Buchanans konstitutionelle Ökonomik* (Mohr-Siebeck, 1996) at 49, demonstrates with sinking of the 'Brent Spar' in 1995 that an active political public sphere can create ineffective political and economic outcomes. In 1995 Greenpeace and ultimately a transnational public had prevented the company Shell from sinking the drilling rig 'Brent Spar' in the Atlantic ocean. However this would have been ecologically and economically the best solution.

³⁹ Brennan and Buchanan, *op. cit.* note 37 *supra*, at 94 ff.

⁴⁰ For public sphere and the pluralist model of democracy see Beierwaltes, *op. cit.* note 7 *supra*, at 123.

⁴¹ For the elitist model of democracy and the public sphere see Beierwaltes, *op. cit.* note 7 *supra* at 63 ff.

⁴² Th. Petersen, *op. cit.* note 12 *supra*, at 184.

⁴³ B. Barber, *Strong Democracy, Participatory Politics for a New Age* (University of California Press, 1984).

⁴⁴ J. Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Suhrkamp, 1993).

Deliberative theory draws partly from discourse theory and partly from civic republicanism,⁴⁵ which both stress the importance of communication and civil society. Therefore, in contrast to the pluralist and constitutionalist model described above, the deliberative theory considers the public sphere as the ultimate source of democratic legitimacy.⁴⁶ Communications between citizens and journalistic influences emerge from civil society and the political public sphere, and are transformed into communicative power by the democratic process. Democracy rests basically on the interaction of informal and formal communication processes, on the cooperation of representative decision-making, societal political debate and citizen participation in the political process.

IV The European Public Sphere and the European Democracy

A *The Foundations of a European Democracy*

On the European level all three constitutive elements of democracy and their relation to each other must be considered in a new way. In particular, the structure of the public sphere and the institutional basis of a European democracy (cooperation with 25 Member States) are completely different from the situation in nation state democracies. Accordingly, the search for a specific institutional design of EU institutions corresponding to the specialities of the European political process and the European Public Sphere has been identified as a main question of the democratic capacity of the European Union.⁴⁷

In a first step, whether the social contract model can serve as a normative basis of a European democracy will be examined. In a second step, it will be argued that the existence of various public spheres⁴⁸ and integration of civil society in the decision-making process, as well as the multi-level character of the EU lead to the necessity of an adaptation of democratic European institutions⁴⁹ that is characterised by an emphasis on the role of rules and institutions with limited competences as well as a policy field-oriented polity that builds on the existing sectoral publics.

B *Social Contract, European Public Sphere and European Institutions*

a) *The Normative Basis: the Social Contract on the European Level*

On the European level a social contract represents an adequate basis for legitimacy.⁵⁰ A European social contract can provide the necessary legitimacy for supranational

⁴⁵ D. Chalmers, 'The Reconstitution of European Public Spheres', (2003) ELJ 142.

⁴⁶ Engel, *op. cit.* note 38 *supra* at 19 ff. with a comparison of the role of the public sphere in economic constitutionalism and deliberative theory.

⁴⁷ D. Wincott, 'Does the European Union Pervert Democracy? Questions of Democracy in New Constitutional Thought on the Future of Europe', (1998) ELJ 417.

⁴⁸ P. Häberle, *Gibt es eine europäische Öffentlichkeit?* (De Gruyter, 2000), 24 ff. with examples of sectoral European publics.

⁴⁹ S. Voigt, 'What Constitution for Europe? The Constitutional Question from the Point of View of (Positive) Constitutional Economics', in Th. Bruha, J. J. Hesse and C. Nowak (eds), *Welche Verfassung für Europa?* (Nomos, 2001), p. 48: 'To derive the economic rationale for institutions beyond the nation-state, it might be useful to recall the economic rationale for the existence of the state'.

⁵⁰ For the transfer of Rousseau's construction to the European level see Verhoeven, *op. cit.* note 15 *supra* at 24 ff.; J. H. H. Weiler, 'The Reformation of European Constitutionalism', (1997) *Journal of Common Market Studies*, 121; I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam', (1999) *CMLR*,

governance if it can be shown that the (hypothetical) conclusion of such a social contract can be constructed. Therefore a European social contract has to be based on the individual citizens.⁵¹

The theoretical conclusion of a European social contract as a normative basis of a European democracy can be described by Rousseau's and Buchanan's interpretation of the social contract. It can be argued that a social contract is in the interest of European citizens who have learned that their national and state-oriented governments are not able to provide them with lasting peace, prosperity and the realisation of satisfying individual and collective transnational action.⁵² Political and economic theories show how the creation of border-crossing public goods is better provided by strengthening supranational governance and individual freedom than by mere intergovernmental negotiation.⁵³ Accordingly, the normative principle of equal consideration of interests can be transferred to the European level. It can be argued that it is clear that a European integration process and transfer of competences to supranational institutions must rely on a fair consideration of the interests of the participants.⁵⁴

b) Multi-level Democracy and Heterogeneous Public Sphere

A comparison of the European and national polities shows the importance of rules and institutions in cooperative decision-making at the European level. More so than in the case of the national model of sovereignty and unity of governmental functions, the European polity finds its expression in a rule-based cooperation of numerous institutions with clearly separated and limited competences within at European, but also at the national, level,⁵⁵ e.g. the cooperation of European Council, Commission, Parliament and Central Bank and further institutions amongst themselves, but also with the integration of the national level via the council, comitology committees, or agencies.

In the nation-state democracy the legitimacy of the central governmental institutions was linked to the existence of one homogeneous public sphere in which all interests were expressed. At the European level the expression of interests does not take place within one homogeneous public sphere but within different national and transnational

709, 710, 717; G. Frankenberg, *The return of the Contract: Problems and Pitfalls of European Constitutionalism*, (2000) ELJ, pp. 257–276; I. Pernice, F. Mayer and S. Wernicke, *Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism*, WHI-Paper 11/2001, <<http://www.whi-berlin.de/socialcontract.htm>>, 2001, p. 10ss.

⁵¹ In reality, an individually rooted social contract can be seen in the existing treaty basis of the European Union. The European integration process began with the conclusion of treaties between the member states of the new community. However, the conclusion of these international contracts is ultimately legitimised by individual citizens of the member states, the *pouvoir constituant* of their governments and parliaments. See Verhoeven, *op. cit.* note 15 *supra* at 48ss.

⁵² A. Weale, 'Democratic Legitimacy and the Constitution of Europe', in R. Bellamy, V. Bufacchi and D. Castiglione (eds), *Democracy and Constitutional Culture in the EU* (Lothian Foundation Press, 1995), at 87.

⁵³ K. Nicolaidis, 'Conclusion: The Federal Vision beyond the Federal State', in: K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States* (Oxford University Press, 2002).

⁵⁴ J. M. Buchanan, 'Europe's Constitutional Opportunity', in *Europe's Constitutional Future* (Institute of Economic Affairs, 1990) suggests a right of secession for states or smaller entities in case that their interests are being violated by the European institutions. Critical Weale, *op. cit.* note 52 *supra* at 89.

⁵⁵ D. Chalmers, 'The Reconstitution of European Public Spheres', (2003) ELJ, p. 128 ff., 142 ff. is focusing on the institution-building capacity of a deliberative process; MacCormick, *op. cit.* note 22 *supra* at 99 points out the difference to the nineteenth-century doctrine of sovereignty.

sectoral publics. These national and transnational sectoral publics need institutional counterparts on the national and the European level to be taken into account adequately during the decision-making process. Therefore at the European level, no acceptance of a shift of competences to one central political institution deciding by majority exists (yet?).⁵⁶ It is clear that the development of the present European institutions has other reasons than the structure of the European public sphere.⁵⁷ However, the above-mentioned characteristics of the European polity correspond to the structure of the European public sphere because they help in realising the normative aims of a European social contract.

c) *The Policy Field Oriented Structure of EU-Institutions*

Institutional cooperation in the European multi-level system⁵⁸ is thereby more and more characterized by a policy-field oriented structure on the constitutional and the administrative level.⁵⁹ At the constitutional level, the European System of Central Banks,⁶⁰ the organisation of the control of competition and of member states subsidies⁶¹ and the coordination and control of Member States financial policy⁶² by the Commission constitute special forms of cooperation between European and Member State institutions in diverse policy fields. On the administrative level, between 1993 and 2005, fourteen European Agencies were created,⁶³ covering areas such as environment, health and safety at work, racism and xenophobia, or food safety.⁶⁴ Most of the agencies have been created as responses to the growing need for administrative assistance in the preparation of EU policies and their implementation.⁶⁵ In most agencies, Member States are

⁵⁶ R. Dehousse, 'Beyond representative democracy: constitutionalism in a polycentric polity', in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), at 138 ff.; F. Scharpf, *Interdependence and Democratic Legitimation*, Cologne, Max Planck Institute for the studies of societies, <<http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp98-2/wp98-2.html>>.

⁵⁷ Voigt, *op. cit.* note 49 *supra* at 55.

⁵⁸ A. Benz, 'Mehrebenenverflechtung in der Europäischen Union', in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (Leske+Budrich, 2003), at 317 ff. with an overview on the literature on multi-level governance in the EU.

⁵⁹ E. Chiti, 'The Emergence of a Community Administration: The Case of European Agencies', (2000) 37 *Common Market Law Review* 309, describes the decentralised and policy-field oriented European Agencies as model of decentralised integration. R. Dehousse, 'Misfits: EU Law and the Transformation of European Governance', in Chr. Joerges and R. Dehousse, *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002), p. 216 points to the 'mushrooming of specialized European agencies' as one of the most interesting developments in the functioning of EU bureaucracy in the post-Maastricht years; Th. Groß, 'Die Kooperation zwischen europäischen Agenturen und nationalen Behörden', in: *Europarecht 2005*, p. 55.

⁶⁰ Art 105 EC.

⁶¹ Arts 81, 87 EC.

⁶² Art 104 EC; For a discussion on the effectiveness and political costs of the cooperative structure of the European stability- and growth pact see S. Bredt, 'Der Stabilitäts- und Wachstumspakt benötigt mitgliedstaatliche Verankerung', *Europarecht 2005*, p. 104 ff.

⁶³ A total of 17 agencies exist altogether, see <http://europa.eu.int/agencies/index_de.htm>.

⁶⁴ In the United States agencies play a major role in the administrative process, see G. Majone, *Regulating Europe* (Routledge, 1996). For a comparison of EU- and US agencies see D. Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (Duncker & Humblot, 1999).

⁶⁵ R. Dehousse, 'Misfits: EU Law and the Transformation of EU Governance', in Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002) at 217. Another argument presented by Majone, *op. cit.* note 64 *supra*, is that the creation of agencies can improve the effectiveness and the credibility of European regulatory policies.

represented by own national representatives.⁶⁶ The European agencies do not dispose of relevant decision-making power, but work within a limited degree of autonomy with fairly strictly defined competences.⁶⁷

The European policy field-oriented polity corresponds in two respects to the nature of the European public sphere. The first aspect is that it can take into account the interests expressed in existing policy-field related European specialised publics, constituted by transnational interest groups in policy fields like agriculture or environment⁶⁸ and therefore helps in realising the normative aims of equal representation of interests. In addition, this institutional structure creates and strengthens the already-existing specific public spheres by integrating civil society actors in the decision-making process.⁶⁹ The polycentric organisation corresponds in this sense with the traditional understanding that democratic legitimacy exists where a public sphere exists.

Second, the policy-field oriented structure fills the gap that the missing 'pan-European' homogeneous public sphere creates on the European level. Contrary to the nation state, there is no homogeneous European public sphere to control and correct the European administrative stages of decision-making. The representation of interests in the European executive decision-making process including European and Member States authorities is therefore of major importance.⁷⁰ As will be shown in the next paragraph, it may become necessary to create institutions and rules in diverse policy fields that assume the role of a strong homogeneous public sphere and support the provision of special public goods e.g. like consumer security.

d) The Example of Consumer Security

The BSE⁷¹ crisis demonstrated, that if the requirements developed above—rules for a clear separation and limitation of competences and cooperation as well as a policy field oriented polity—are not met, an equal consideration of interests, here consumer security, will not be reached, although a policy-field related special public exists in this field.⁷²

The example of consumer security proved that a policy field-oriented structure is particularly necessary on the administrative level.⁷³ In the European Union new administrative decision-making processes, e.g. so-called comitology, have evolved, that cannot be understood by the national categories of law making and

⁶⁶ See Th. Groß, 'Die Kooperation zwischen europäischen Agenturen und nationalen Behörden', in *Euro-
parecht* 2005, at 59s.

⁶⁷ For detailed studies see O. De Schutter, N. Lebessis and J. Paterson (eds), *Governance in the European
Union* (European Commission, 2001) and V. H. Helfritz, *Verselbständigte Verwaltungseinheiten in der
Europäischen Union* (Weißensee Verlag, 2000).

⁶⁸ Eder, *op. cit.* note 7 *supra* at 92, 98.

⁶⁹ Eder, *op. cit.* note 7 *supra* at 98s.

⁷⁰ Weiler, *op. cit.* note 50 *supra* at 283 ff.; Chr. Joerges and J. Neyer, 'From intergovernmental bargaining to
deliberative political processes: the constitutionalisation of comitology', (1997) *ELJ* 273–299 describe the
decision-making process within comitology as deliberative and as oriented to the search for the solution
of problems rather than as a bargaining for pure interests.

⁷¹ Bovine Spongiform Encephalopathy.

⁷² See J. Falke, 'Komitologie—Entwicklungen, Rechtsgrundlagen und erste empirische Annäherung', in
Joerges and J. Falke (eds), *Das Ausschusswesen der Europäischen Union* (Nomos, 2000), 120 ff.

⁷³ S. Krapohl, 'Risk Regulation in the EU between interests and expertise: the case of BSE', (2003) *Journal
of European Public Policy* 189–207 with a detailed study of the crisis.

implementation.⁷⁴ Decision-making within comitology can be described as regulatory policy-making⁷⁵ and is driven by the interests of the Member States, and by other interest groups, but also by scientific advisory boards. This is a new element to the administrative process compared to the national level, where policy making still takes place mainly in the political institutions and not as much in the administrative process.

Before 1997 there were insufficient procedural rules and institutions to guarantee an equal consideration of interests in the comitology procedure concerning food safety.⁷⁶ The EC had started fighting BSE in 1988, but it was not until 1996 that the Commission prohibited the export of meat products that could be infected by BSE.⁷⁷ In 1997 the European Parliament was critical of the fact that since 1990 the responsible committees had not worked in a transparent and impartial manner.⁷⁸ Consequently, in 1997 the Commission presented several proposals to reorganise the procedures and institutions in the field of consumer security.⁷⁹ Regulatory (political), scientific and controlling activities were more clearly separated and the aspect of consumer security strengthened by the creation of a Scientific Steering Committee.⁸⁰ There is evidence that the clear separation of procedures, institutions, and interests after 1997 improved the quality of the decision-making process.⁸¹ Scientific committees could then work insulated from political influence and integrate civil society actors more efficiently in the decision-making process.⁸² On the other hand, national representatives could articulate the interests that evolved from the national publics in the Standing Veterinary Committee.⁸³ As a consequence from 2000 onwards, when BSE was perceived as an internal threat by all Member States and not only for Great Britain, which should be regulated on the European level, the EU was able to react adequately.⁸⁴

Additionally, in 2002 an independent food authority was established.⁸⁵ Although this new authority does not dispose of regulatory powers, its creation shows a growing understanding for the necessity to adapt the European institutional framework to the specialities of the European decision-making process. Such an agency creates an own institutionalised representation of interests within the institutional framework by its work and decisions.⁸⁶ It can be concluded that it is not enough to rely on sectoral publics or a deliberative process of an active civil society to guarantee democratic normative

⁷⁴ R. Dehousse, *op. cit.* note 55 *supra* at 227ss; P. Lindseth, Delegation is Dead, Long live Delegation: Managing the Democratic Disconnect in the European Market Polity, in: C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market*, p. 140.

⁷⁵ See Lindseth, *op. cit.* note 74 *supra* at 140.

⁷⁶ J. Falke, *Komitologie-Entwicklungen, Rechtsgrundlagen und erste empirische Annäherung*, in: C. Joerges and J. Falke (eds), *Das Ausschusswesen der Europäischen Union* (Nomos, 2000) 120ss. Presenting the critique of the European Parliament from 1997.

⁷⁷ Even then the British Government insisted successfully on a limitation of this prohibition, see Falke, *op. cit.* note 76 *supra* at 121.

⁷⁸ For details see Falke, *op. cit.* note 76 *supra* at 120s.

⁷⁹ See Agence Europe Nr. 6913, 13.2.1997, p. 8.

⁸⁰ Commission Decision 97/404/EC.

⁸¹ Krapohl, *op. cit.* note 73 *supra* at 204f.

⁸² Krapohl, *op. cit.* note 73 *supra* 202, 204.

⁸³ Council Decision 68/361/EEC.

⁸⁴ See Krapohl, *op. cit.* note 73 *supra* at 198 with an explanation of the taken measures.

⁸⁵ Regulation (EC) No 178/2002, OJ L 31, 1/2/2002.

⁸⁶ Helfritz, *op. cit.* note 67 *supra* at 2 however states that the creation and existence of the agencies does not lead to greater publicity in the general public.

standards, but that a European democracy must be based on both clearly defined rules and institutions for decision-making and a policy-field oriented polity, as well as an inclusion of existing sectoral publics and civil society.

C EU and Consociational Democracies

Consociational democracies have similarities with the EU concerning their heterogeneous public sphere and their segmented society. However, their essential characteristic is not so much any particular institutional arrangement—compared to other nation-state democracies or the EU—as informal mechanisms and a common political culture of the élites to render the political system functional and stable.⁸⁷ The reason for this difference is that they are not characterised by the institutional circumstances that create the European multi-level system (integration of 25 nation-state governments) and that there are differences in the quality of their public spheres compared to the EU.

The phenomenon of a missing homogeneous public sphere in the EU can to a certain extent be compared to the situation in so-called consociational democracies such as Switzerland, Belgium, the USA, or India,⁸⁸ which are being described as segmented or consociational because of their social structure.⁸⁹ Each of these democracies consists of several sub-societies that occupy their own kind of public sphere and form ‘social pillars’ that are represented in the political decision-making process by their civil society and political representatives. The situation in Europe is similar to that in these countries, e.g. the bargaining decision-making process, decisions based on consensus and package deals by the élites.⁹⁰ There are, however, problems in simply comparing these democracies to the European situation. With regard to the structure of the public sphere, larger democracies such as the USA or India benefit from a common language, understood by the larger part of the population⁹¹ and—more important—a common discourse on political subjects. Therefore there is not such a strong necessity to create a polity that guarantees the consideration of all interests as expressed in the different public spheres with its multi-polarity. Hence, there is also less need for a policy-oriented polity.

Moreover, the consociational democracies are not characterized by the requirement for a multi-level polity like the EU. Consociational states such as Switzerland, USA or India are federal states, but are much more institutionally centralised than the EU. Therefore there is not the same need as on the European level to find policy-field related forms of cooperation between the different levels in order to secure an equal consideration of interests.

It is not possible to compare the social pillars that constitute consociational democracies with the European Member-State governments. The representation of sub-

⁸⁷ Weiler, *op. cit.* note 50 *supra* 280.

⁸⁸ A. Lijphart, ‘Patterns of Democracy—Government forms in 36 countries’, 1999; I. Pernice, ‘Maastricht, Staat und Demokratie’, 26 (1993) *Die Verwaltung* 449–488.

⁸⁹ G. Lehmbruch ‘discovered’ the so-called consociational democracies (konsozietae Demokratien) in 1967 in a study on democracies in Austria and Switzerland, see G. Lehmbruch, *Proporzdemokratie* (Mohr Siebeck, 1967).

⁹⁰ Weiler, *op. cit.* note 50 *supra* 279ss. compares in this respect the mode of international governance and the consociational model.

⁹¹ For the knowledge of EU-citizens of member state languages see Beierwaltes, *op. cit.* note 7 *supra*, at 222.

societies by social groups in consociational democracies is something different than the cooperation of 25 Member States in one Union.⁹² The governments of Member States are institutions with their own specific interests and preferences because of their democratic structure, and can influence the decision-making process much more intensely than any societal group because of their extensive administrative resources.

D Does a Heterogeneous Public Sphere Lead to an 'Output'—Democratic Legitimacy?

Fritz Scharpf describes a future European democracy as merely 'output'-oriented,⁹³ legitimised by effective outcomes rather than by a feeling of solidarity and a common public sphere.⁹⁴ Consequently, the European democracy provides less legitimacy than the input (process) oriented democracies in the nation states.⁹⁵ However, his conception of democracy is influenced by the nation-state perspective on democratic theory and does not take into account the understanding of democracy as a relation between normative basis, institutions and public sphere.

On the normative level, the input–output distinction cannot grasp the originality of the contract approach, as the social contract includes input elements (free consent of the citizens to the social contract) and output elements (consent depends on results, especially the protection of the individual liberty) at the same time. Therefore the normative basis of a European social contract is not more output oriented than a national social contract.

Rousseau's conclusions for direct democracy⁹⁶ and the later representative democracy are qualified as more input-oriented than a European democracy. However, as seen above, the conclusions for democratic institutions have to be based on a specific relation between normative basis, an institutional concept and the idea of public decision-making, and not on the (non-)existence of one element, e.g. public sphere or feeling of solidarity. Therefore, a European democracy, understood as a specific relation between its normative basis, its institutions and the public sphere, is not more output-oriented than the national democracies, but establishes a similar political process (input) between these elements. It is important, however, to remember that the European institutions dispose of democratic legitimacy in as far as they correspond to the needs of the European citizens (social contract). In these fields however, they are legitimised like the nation-state institutions.

E The European Public Sphere in the Deliberative Conception of the Social Contract

In response to the nation-centred view Habermas offered 'a communications-theoretical understanding of democracy' that 'can no longer rest upon such a con-

⁹² D. Wincott, 'New Constitutional Thought and Europe's Future', (1998) ELJ, 426.

⁹³ Scharpf, *op. cit.* note 2 *supra* at 13ss.

⁹⁴ F. Scharpf, 'Föderalismus und Demokratie in der transnationalen Ökonomie', in Klaus von Beyme (ed.) *Politische Theorie in der Ära der Transformation* (Sonderheft 26 der Politische Vierteljahresschrift), 1996, 225.

⁹⁵ This understanding of European democracy is shared by Grimm and by Kielmannsegg, see above; critical Eder, *op. cit.* note 7 *supra* at 95.

⁹⁶ F. Scharpf, *Demokratiethorie zwischen Utopie und Anpassung* (Universitätsverlag Konstanz, 1971) at 3f describing Rousseau's theory as input-oriented.

cretistic understanding of “the people”⁹⁷ or social preconditions for democracy,⁹⁸ but on a communicative process and the corresponding institutions. The absence of a common European language is thereby not a central impediment for the creation of a European public sphere.⁹⁹ A European democracy is not an expanded national public sphere but evolves out of the communication processes of the national public spheres that remain the basis of the European debate and public sphere.¹⁰⁰ A European democracy does exist if transnational communication in a common culture with a civil society and a European party system transcends the existing national public spheres¹⁰¹ by the articulation of transnational interests.¹⁰² A European political discourse may evolve over the time. Thereby the EU-institutions have an inducing effect on the development of the European public sphere.¹⁰³

The main critique on the deliberative theory is that the deliberative approach already considers the process of communication as the basis of democratic legitimacy, whereas it is not the communication *per se* that provides legitimacy, but it is the correlation with the other constitutive elements of democracy, the normative basis and the institutional framework, that enables the communication to contribute to democratic ideals.¹⁰⁴ To unfold deliberative discourse and rationality all participants should enjoy equal liberty, respect and opportunity to participate during the deliberation. However, deliberative theory does not develop further which institutional arrangement might satisfy these conditions. Deliberative theory has been used to explain comitology and the Economic and Social Committee,¹⁰⁵ but has failed so far in presenting suggestions as to how deliberation as a process can realise its normative goals. As seen above, the choice of specific rules and institutions is decisive for the inclusion of civil society actors, sectoral publics and finally an equal consideration of interests.

In order to overcome the nation-state centred views of democracy, the deliberative approach is focusing on the element of public debate as an instrument to develop a European democracy independently of societal prerequisites. However, it is precisely this element of democratic theory that is weakened at the European level, because only a few transnational publics and a greater number of strong national public spheres exist. The nation-state centred argument of missing societal prerequisites can be overcome more convincingly with a stronger emphasis on an adequate relationship between existing structures of public sphere, normative basis (social contract) and on rules and institutions. This way of understanding European democracy strengthens those parts

⁹⁷ J. Habermas, ‘Remarks on Dieter Grimm’s, Does Europe need a Constitution?’, (1995) ELJ, p. 303, 305ss.

⁹⁸ J. Habermas, ‘Braucht Europa eine Verfassung? Bemerkungen zu Dieter Grimm’, in *Die Einbeziehung des Anderen. Studien zur politischen Theorie* (Suhrkamp, 1996) at 191.

⁹⁹ D. Grimm, ‘Braucht Europa eine Verfassung?’, (1995) 50 *Juristenzeitung*, 581–591; Habermas, *op. cit.* note 98 *supra* at 190 ff.

¹⁰⁰ J. Habermas, ‘Braucht Europa eine Verfassung?’, in J. Habermas, *Die Einbeziehung des Anderen*, 1996, 185ss.; J. Habermas, ‘Warum braucht Europa eine Verfassung?’, *Die Zeit*, 28 June 2001, p. 7, available at <http://www.zeit.de/2001/27/Politik/200127_verfassung_lang.html>.

¹⁰¹ J. Habermas, *Die Einbeziehung des Anderen*, 1996, 190; J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, in: J. Habermas, *Die postnationale Konstellation. Politische Essays* (Suhrkamp, 1998), 154f.

¹⁰² Habermas, *op. cit.* note 101 *supra* at 154s.

¹⁰³ Habermas, *op. cit.* note 101 *supra* at 191.

¹⁰⁴ D. Chalmers, ‘The Reconstitution of European Public Spheres’, (2003) ELJ 127 ff.

¹⁰⁵ C. Joerges and J. Neyer, ‘From intergovernmental Bargaining to Deliberative Political Processes: The Case of Comitology’, (1997) ELJ 273.

of democratic theory that are not weakened by a relatively under-developed European public sphere.

The problem of the deliberative concept with the focus on the public debate as the main basis of a European democracy becomes evident in the transformed notion of public sphere in the European context when compared to the origins of deliberative theory. In earlier definitions of the public sphere¹⁰⁶ Habermas had understood public sphere as an open forum in the periphery, which was contrasted with the centre of political power where decisions are taken,¹⁰⁷ and presupposed conditions of neutrality and ideal speech that can only be conceived as the product of an established political community¹⁰⁸ and is already hardly realised in the nation-state.¹⁰⁹ This contrasts with the understanding of public sphere in the European context as the debate of specialised transnational actors and civil society that are not bound to a general and open public, but are close to the centre of political power.

Moreover, the deliberative approach focuses on the growing of a more homogeneous European public sphere via an active civil society,¹¹⁰ which then strengthens democracy and thereby still privileges the nation-state centred idea and necessity of a homogeneous public sphere.¹¹¹ The missing homogeneous public sphere is in the deliberative concept naturally seen as an obstacle that can and must be overcome if a European democracy develops in the future and less as a part of a new relation between the constitutive elements of democracy.

Conclusions

This article has shown that a homogeneous public sphere is not a sociocultural prerequisite of democracy, but that the structure of the public sphere is one of the elements that constitute the shape of the polity of a democracy. Other constitutive elements of democracy are its normative basis and its institutions. The possible existence of, and conditions for, a European democracy can only be understood by the relation between its normative basis, here the social contract, the characteristics of its heterogeneous public sphere and the institutions to guarantee the realisation of the normative aims of the social contract. Therefore the possible existence of a European democracy cannot be answered just with the (non-)existence of a homogeneous public sphere. The possibility for a European democracy is denied only by the state-centred interpretations of democratic theory that follow the idea of undivided sovereignty and demand a state-like homogeneous public sphere as a prerequisite of democracy. These interpretations of democratic theory are strongly influenced by theories of sovereignty that are not central to democratic theory.

At the European level, the heterogeneous structure of the European public sphere requires new institutional forms of governance. It is more convincing to see the

¹⁰⁶ Beierwaltes, *op. cit.* note 7 *supra*, at 170, with a presentation of Habermas earlier understanding of Public sphere.

¹⁰⁷ J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1992) 430.

¹⁰⁸ Castiglione, *op. cit.* note 34 *supra* at 67.

¹⁰⁹ J. Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Suhrkamp, 1993) 337.

¹¹⁰ Eder, *op. cit.* note 7 *supra* at 93 ff.

¹¹¹ Eder, *op. cit.* note 7 *supra* at 116ss; C. Frenzius, 'Europäische Öffentlichkeit und europäische Verfassung', in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 2003, p. 326.

characteristics of a European democracy in institutions and rules of decision-making that correspond to the shape of the heterogeneous public sphere than to see such characteristics defining existing transnational special publics as the basis of a European democracy as done by the deliberative approach. Two characteristics of a European democratic institutional structure are then its policy-field orientated institutions and procedures, as well as the cooperation of institutions with clearly separated and limited competences that correspond to existing national and transnational public spheres.

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